Dominion Law Reports

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ANNOTATED

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EDITED BY

C. E. T. FITZGERALD

C. B. LABATT

RUSSEL S. SMART

ASSOCIATE EDITOR OF PATENT AND TRADE MARK CASES

and

A. P. GRIGG

ASSOCIATE EDITOR FOR QUEBEC

CONSULTING EDITOR

E. DOUGLAS ARMOUR, K.C.

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ONTARIO.

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DOMINION LAW REPORTS

ANNOTATION.

Corroborative Evidence Required by Statute in Ontario.

By Frank Hartley Curran.

INTRODUCTION.

In speaking of the subject matter of corroborative evidence, Phipson's Law of Evidence, 5th ed., 1911, ch. 41, pp. 481 *et seq.*, says:

"Under the Roman and Canon Law, testimony was governed strictly by the numerical system. Witnesses were counted, not weighed, one oath being in no case sufficient. So, in Anglo-Saxon and Norman times, proof was, according to the importance of the case, made six-handed, twelve-handed, etc.; he who had the greater number of witnesses prevailing. Attempts were not lacking to import this system into the common law; but although various statutes were passed requiring two or more witnesses in particular cases, the attempts failed, and from about the middle of the sixteenth century onward the present rule began to be more or less effectively recognised. (1551), *Ringer* v. *Fogossa*, Plowd. 1, 8, 12; (1605), Articuli Cleri, 2 How. St. Tr. 131, 143-4; (1662), *R.* v. *Tong*, 6 id. 225; (1800), *R.* v. *Rusby*, 2 Peake N.P.C. p. 193 [Wigmore s. 2032; Thayer, Pr. Tr. Ev. 179; and Cas. Ev., 2nd ed. 1067-8; Best, ss. 66-69.]

In his reference to the "present rule" he has in mind the present-day system in which the number of witnesses, as such, does not necessarily affect the matter in question to any great extent, except in some very special cases such as, for example, trials for treason, in 7-8 Wm. III. 1695 (Imp.) ch. 3, following 1 Ed. VI. 1547, (Imp.) ch. 12 which was in this respect impliedly repealed by 1-2 P. & M. 1554, (Imp.) ch. 10, which in Canada is superseded by R.S.C. 1906, ch. 146, sec. 1002*a*.

ANNOTATION In all cases corroborative evidence, in the strict sense of the term, is valuable and much desired, whether it be presented by the testimony of additional witnesses testifying to the main question at issue, or by facts adduced from the conduct of the parties, which may corroborate general or particular testimony. As Phipson further (at p. 483), says:

"Facts which tend to render more probable the truth of a witness's testimony on any material point are admissible in corroboration thereof, although otherwise irrelevant to the issue, and although happening before the date of the fact to be corroborated." Phipson's Law of Evidence 5th ed. 1911, ch. 11, pp. 480 et seq.; *Wilcox* v. *Gotfrey* (1872), 26 L.T. 481; *Cole* v. *Manning* (1877), 2 Q.B.D. 611, 46 L.J. (M.C.) 175.

However, in the Province of Ontario there are in force statutory enactments providing for the necessity for corroborative evidence in certain cases—such evidence being offered, as aforesaid, by additional witnesses testifying directly to the main question at issue or by additional material facts adduced from the testimony at hand. The instances fall into two main divisions—those occurring under R.S.O. 1914, ch. 76, secs. 11, 12 and 13, and those occurring under R.S.C. 1906, ch. 146 (the Criminal Code), secs. 1002 and 1003.

R.S.O. 1914, CH. 76—

11. The plaintiff in an action for breach of promise of marriage shall not recover unless his or her testimony is corroborated by some other material evidence in support of the promise. 9 Edw. VII. c. 43, s. 11.

12. In an action by or against the heirs, next of kin, executors, administrators or assigns of a deceased person, an opposite or interested party shall not obtain a verdict, judgment, or decision, on his own evidence, in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence. 9 Edw. VII. c. 43, s 12.

13. In an action by or against a lunatic so found or an inmate of a lunatic asylum, or a person who from unsoundness of mind is incapable of giving evidence, an opposite or interested party shall not obtain a verdict, judgment, or decision on his own evidence unless such evidence is corroborated by some other material evidence. 9 Edw. VII. c. 43, s. 13.

R.S.C. 1906, CH. 146— ANNOTATION

Cases in which evidence of one witness must be corroborated.

1002. No person accused of any offence under any of the hereunder mentioned sections shall be convicted upon the evidence of one witness, unless such witness is corroborated in some material particular by evidence implicating the accused:—

74. *(A) TREASON. PART II., SECTION SEVENTY-FOUR—*

Treason is:—

(*a*) the act of killing His Majesty, or doing him any bodily harm tending to death or destruction, maim or wounding, and the act of imprisoning or restraining him; or

(*b*) the forming and manifesting by any overt act an intention to kill His Majesty, or to do him any bodily harm tending to death or destruction, maim or wounding, or to imprison, or to restrain him; or

(*c*) the act of killing the eldest son and heir apparent of His Majesty or the Queen consort of any King of the United Kingdom of Great Britain and Ireland; or

(*d*) the forming and manifesting, by an overt act, an intention to kill the eldest son and heir apparent of His Majesty, or the Queen consort of any King of the United Kingdom of Great Britain and Ireland; or

(*e*) conspiring with any person to kill His Majesty, or to do him any bodily harm tending to death or destruction, maim or wounding, or conspiring with any person to imprison or restrain him; or

(*f*) levying war against His Majesty either

(*i*) with intent to depose His Majesty from the style, honor and royal name of the Imperial Crown of the United Kingdom of Great Britain and Ireland, or of any other of His Majesty's dominions or countries, or

(*ii*) in order by force or constraint, to compel His Majesty to change his measures or counsels, or in order to intimidate or overawe both Houses or either House of Parliament of the United Kingdom or of Canada, or

(*g*) conspiring to levy war against His Majesty with any such intent or for any such purpose as aforesaid; or

(*h*) instigating any foreigner with force to invade the

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said United Kingdom or Canada or any other of the dominions of His Majesty; or

(*i*) assisting any public enemy at war with His Majesty in such war or by any means whatsoever; or

(*j*) violating, whether with her consent or not, a Queen consort, or the wife of the eldest son and heir apparent, for the time being, or the King or Queen regnant.

2. Every one who commits treason is guilty of an indictable offence and liable to suffer death. 55-56 V., c. 29, s. 65; 57-58 V., c. 57, s. 1.

(B) PERJURY. PART IV., SECTION ONE HUNDRED AND SEVENTY-FOUR.

174. Punishment of Perjury or subornation of perjury. Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who commits perjury or subornation of perjury.

2. If the crime is committed in order to procure the conviction of a person for any crime punishable by death, or imprisonment for seven years or more, the punishment may be imprisonment for life. 55-56 V., c. 29, s. 146.

(C) OFFENCES UNDER PART V., SECTIONS TWO HUNDRED AND ELEVEN TO TWO HUNDRED AND TWENTY INCLUSIVE—

211. Seduction of girls between fourteen and sixteen. Every one over the age of eighteen years is guilty of an indictable offence and liable to two years' imprisonment who seduces any girl of previously chaste character of or above the age of sixteen years and under the age of eighteen years. Proof that a girl has on previous occasions had illicit connection with the accused shall not be deemed to be evidence that she was not of previously chaste character. 10-11 Geo. V. c. 43, s. 4, replacing the following former section 211:

Every one is guilty of an indictable offence and liable to two years' imprisonment who seduces or has illicit connection with any girl of previously chaste character, of or above the age of fourteen years and under the age of sixteen years of age. 56 V., c. 32, s. 1.

212. Seduction under promise of marriage—

Every one above the age of twenty-one years is guilty of an indictable offence and liable to two years' imprisonment who, under promise of marriage, sedues and has

illicit connection with any unmarried female of previously chaste character and under twenty-one years of age. 55-56 V., c. 29, s. 182. ANNOTATION

213. Seduction of ward or of female employee—

Every one is guilty of an indictable offence and liable to two years imprisonment,—

(*a*) who, being a step-parent, or foster-parent, or guardian, seduces, or has illicit connection with his step-child or foster-child or ward (as amended 7-8 Geo. V., c. 14, s. 2); or

(*b*) who seduces or has illicit connection with any girl previously chaste and under the age of twenty-one years who is in his employment, or who, being in a common, but not necessarily similar, employment with him is, in respect of her employment or work, under or in any way subject to his control or direction, or receives her wages or salary directly or indirectly from him. Proof that a girl has on previous occasions had illicit connection with the accused shall not be deemed to be evidence that she was not previously chaste. 10-11 Geo. V., c. 43, s. 5, replacing the following former section 213 (*b*):

Who seduces or has illicit connection with any woman or girl previously chaste and under the age of twenty-one years who is in his employment in a factory, mill, workshop, shop or store, or who, being in a common, but not necessarily similar employment with him in such factory, mill, workshop, shop or store is in respect of her employment or work in such factory, mill, workshop, shop or store under or in any way subject to his control or direction, or receives her wages or salary directly or indirectly from him. 63-64 V., c. 46, s. 3.

214. Seduction of female passengers on vessels.—

Every one is guilty of an indictable offence and liable to a fine of four hundred dollars, or to one year's imprisonment, who, being the master or other officer or seaman or other person employed on board of any vessel, while such vessel is in any water within the jurisdiction of the Parliament of Canada, under promise of marriage, or by threats, or by the exercise of his authority, or by solicitation, or the making of gifts or presents, seduces and has illicit connection with any female passenger.

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2. The subsequent intermarriage of the seducer and the seduced is, if pleaded, a good defence to any indictment for any offence against this or either of the two last preceding sections, except in the case of a guardian seducing his ward. 55-56 V., c. 29, s. 184.

215. Parent or guardian procuring defilement of girl or woman.

Every one who, being the parent or guardian of any girl or woman,—

(*a*) Procures such girl or woman to have carnal connection with any man other than the procurer; or

(*b*) orders, is party to, permits or knowingly receives the avails of defilement, seduction or prostitution of such girl or woman;

is guilty of an indictable offence, and liable to fourteen years' imprisonment, if such girl or woman is under the age of fourteen years, and if such girl or woman is of or above the age of fourteen years, to five years' imprisonment. 55-56 V., c. 29, s. 186.

216. Procuring defilement of women or girls.—

Every one is guilty of an indictable offence and shall be liable to ten years' imprisonment and on any second or subsequent conviction shall also be liable to be whipped in addition to such imprisonment who— fil

(*a*) Procures, or attempts to procure or solicits any girl or woman to have unlawful carnal connection, either within or without Canada, with any other person or persons; or

(*b*) inveigles or entices any woman or girl not being a common prostitute or of known immoral character to a common bawdy or assignation house for the purpose of illicit intercourse or prostitution; or

(*c*) knowingly conceals any woman or girl in any common bawdy or assignation house; or

(*d*) procures or attempts to procure any woman or girl to become, either within or without Canada, a common prostitute, or

(*e*) procures or attempts to procure any woman or girl to leave her usual place of abode in Canada, such place not being a common bawdy house, with intent that she may become an inmate or frequenter of a common bawdy house within or without Canada; or

(*f*) on the arrival of any woman or girl in Canada directs or causes her to be directed, takes or causes her

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to be taken, to any common bawdy house or house of assignation; or

(*g*) procures any woman or girl to come to Canada, or to leave Canada, for the purpose of prostitution; or

(*h*) by threats or intimidation procures or attempts to procure any woman or girl to have any unlawful carnal connection either within or without Canada; or

(*i*) for the purposes of gain, exercises control, direction or influence over the movements of any woman or girl in such a manner as to show that he is aiding, abetting or compelling her prostitution with any person or generally; or

(*j*) by false pretences or false representations procures any woman or girl to have any unlawful carnal connection, either within or without Canada; or

(*k*) applies, administers to, or causes to be taken by any woman or girl any drug, intoxicating liquor, matter or thing with intent to stupefy or overpower so as thereby to enable any person to have unlawful carnal connection with such woman or girl; or

(*l*) being a male person, lives wholly or in part on the earnings of prostitution.

2. Where a male person is proved to live with or to be habitually in the company of a prostitute or prostitutes, and has no visible means of support, or to live in a house of prostitution, he shall, unless he can satisfy the court to the contrary, be deemed to be living on the earnings of prostitution. (As enacted by 3-4 Geo. V., c. 13, s. 9.)

217. Householders permitting defilement of girls on their premises.

Every one who, being the owner or occupier of any premises, or having, or acting or assisting in, the management or control thereof, induces or knowingly suffers any girl under the age of eighteen years to resort to or be in or upon such premises for the purpose of being unlawfully and carnally known by any man, whether such carnal knowledge is intended to be with any particular man, or generally, is guilty of an indictable offence, and is liable,—

(*a*) to ten years' imprisonment if such girl is under the age of fourteen years;

(*b*) to two years' imprisonment if such girl is of or above the age of fourteen years. 63-64 V., c. 46, s. 3.

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218. Conspiracy to defile.
Every one is guilty of an indictable offence and liable to two years' imprisonment who conspires with any other person by false pretences, or false representations or other fraudulent means, to induce any woman to commit adultery or fornication. 55-56 V., c. 29, s. 188.

219. Carnally knowing idiots, etc.
Every one is guilty of an indictable offence and liable to four years' imprisonment who unlawfully and carnally knows ,or attempts to have unlawful carnal knowledge of, any female idiot or imbecile, insane or deaf or dumb woman or girl, under circumstances which do not amount to rape, but where the offender knew or had good reason to believe, at the time of the offence, that the woman or girl was an idiot, or imbecile, or insane or deaf and dumb. 63-64 V., c. 46, s. 3.

220. Prostitution of Indian women.
Every one is guilty of an indictable offence and liable to a penalty not exceeding one hundred dollars and not less than ten dollars, or six months' imprisonment,—

(*a*) who, being the keeper of any house, tent or wigwam, allows or suffers an unenfranchised Indian woman to be or remain in such house, tent or wigwam, knowing or having probable cause for believing that such Indian woman is in or remains in such house, tent or wigwam with the intention of prostituting herself therein; or

(*b*) who, being an Indian woman, prostitutes herself therein; or

(*c*) who, being an unenfranchised Indian woman keeps, frequents or is found in a disorderly house, tent or wigwam used for any such purpose.

2. Every person who appears, acts or behaves as master or mistress, or as the person who has the care or management, of any house, tent or wigwam in which any such Indian woman is or remains for the purpose of prostituting herself therein, is deemed to be the keeper thereof, notwithstanding he or she is not in fact the real keeper thereof. 55-56 V., c. 29, s. 190.

(D) *PROCURING FEIGNED MARRIAGE. PART IV., SECTION THREE HUNDRED AND NINE.*

309. Feigned marriage.
Every one is guilty of an indictable offence and liable

to seven years' imprisonment who procures a feigned or pretended marriage between himself and any woman, or who knowingly aids and assists in procuring such feigned or pretended marriage. 55-56 V., c. 29, s. 277.

(E) FORGERY. PART VII., SECTIONS FOUR HUNDRED AND SIXTY-EIGHT TO FOUR HUNDRED AND SEVENTY INCLUSIVE.

468. Punishment of forgery.

Every one who commits forgery of,—

(*a*) any document having impressed thereon or affixed thereto any public seal of the United Kingdom or any part thereof, or of Canada or any part thereof, or of any dominion, possession or colony of His Majesty; or

(*b*) any document bearing the signature of the Governor General or of any administrator, or of any deputy of the Governor, or of any lieutenant-governor or any one at any time administering the government of any province of Canada; or

(*c*) any document containing evidence of or forming the title or any part of the title to, any land or hereditament, or to any interest in or to any charge upon any land or hereditament, or evidence of the creation, transfer or extinction of any such interest or charge; or

(*d*) any entry in any register or book, or any memorial or other document made, issued, kept or lodged under any Act for or relating to the registering of deeds or other instruments respecting or concerning the title to or any claim upon any land or the recording or declaring of titles to land; or

(*e*) any document required for the purpose of procuring the registering of any such deed or instrument or the recording or declaring of any such title; or

(*f*) any document which is made, under any Act, evidence of the registering or recording or declaring of any such deed, instrument or title; or

(*g*) any document which is made by any Act evidence affecting the title to land; or

(*h*) any notarial act or document or authenticated copy, or any proces-verbal of a surveyor, or authenticated copy thereof; or

(*i*) any register of births, baptisms, marriages, deaths or burials authorized or required by law to be kept, or any certified copy of any entry in or extract from any such register; or

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(*j*) any copy of any such register required by law to be transmitted by or to any registrar or other officer; or

(*k*) any will, codicil or other testamentary document, either of a dead or living person, or any probate or letters of administration, whether with or without the will annexed; or

(*l*) any transfer or assignment of any share or interest in any stock, annuity or public fund of the United Kingdom or any part thereof, or of Canada or any part thereof, or of any dominion, possession or colony of His Majesty or of any foreign state or country, or receipt or certificate for interest accruing thereon; or

(*m*) any transfer or assignment of any share or interest in the debt of any public body, company or society, British, Canadian or foreign, or of any share or interest in the capital stock of any such company or society, or receipt or certificate for interest accruing due thereon; or

(*n*) any transfer or assignment of any share or interest in any claim to a grant of land from the Crown, or to any script or other payment or allowance in lieu of any such grant of land; or

(*o*) any power of attorney or other authority to transfer any interest or share hereinbefore mentioned, or to receive any dividend or money payable in respect of any such share or interest; or

(*p*) any entry in any book or register, or any certificate, coupon, share, warrant or other document which by any law or any recognised practice is evidence of the title of any person to any such stock, interest or share, or to any dividend or interest payable in respect thereof; or

(*q*) any exchequer bill or endorsement thereof or receipt or certificate for interest accruing thereon; or

(*r*) any bank note or bill of exchange, promissory note or cheque, or any acceptance, endorsement or assignment thereof; or

(*s*) any scrip in lieu of land; or

(*t*) any document which is evidence of title to any portion of the debt of any dominion, colony or possession of His Majesty, or of any foreign state, or any transfer or assignment thereof; or

(*u*) any deed, bond, debenture, or writing obligatory, or any warrant, order or other security for money or

payment of money, whether negotiable or not, or endorsement or assignment thereof; or ANNOTATION

(*v*) any accountable receipt or acknowledgment of the deposit, receipt, or delivery of money or goods, or endorsement or assignment thereof; or

(*w*) any bill of lading, charter-party, policy of insurance, or any shipping document accompanying a bill of lading, or any endorsement or assignment thereof; or

(*x*) any warehouse receipt, dock warrant, deck-keeper's certificate, delivery order, or warrant for delivery of goods, or of any valuable thing, or any endorsement or assignment thereof; or

(*y*) any other document used in the ordinary course of business as proof of the possession or control of goods, or as authorizing, either on endorsement or delivery, the possessor of such document to transfer or receive any goods;

is guilty of an indictable offence and liable to imprisonment for life if the document forged purports to be, or was intended by the offender to be understood to be or be used as genuine. 55-56 V., c. 29, s. 423.

469. Punishment of forgery.

Every one who commits forgery of,—

(*a*) any entry or document made, issued, kept or lodged under any Act for or relating to the registry of any instrument respecting or concerning the title to, or any claim upon, any personal property; or

(*b*) any public register or book not hereinbefore mentioned appointed by law to be made or kept, or any entry therein;

is guilty of an indictable offence and liable to fourteen years' imprisonment if the document forged purports to be, or was intended by the offender to be understood to be, or to be used as genuine. 55-56 V., c. 29, s. 423.

470. Punishment of forgery.

Every one who commits forgery of,—

(*a*) any record of any court of justice, or any document whatever belonging to or issuing from any court of justice, or being or forming part of any proceeding therein; or

(*b*) any certificate, office copy, or certified copy or other document which, by any statute in force for the time being, is admissible in evidence; or

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(*e*) any document made or issued by any judge, officer or clerk of any court of justice, or any document upon which, by the law or usage at the time in force, any court of justice or any officer might act; or

(*d*) any document which any magistrate is authorised or required by law to make or issue; or

(*e*) any entry in any register or book kept, under the provisions of any law, in or under the authority of any court of justice or magistrate acting as such; or

(*f*) any copy of any letters patent, or of the enrolment or enregistration of letters patent, or of any certificates thereof; or

(*g*) any license or certificate for or of marriage; or

(*h*) any contract or document which, either by itself or with others, amounts to a contract, or is evidence of a contract; or

(*i*) any power or letter of attorney or mandate; or

(*j*) any authority or request for the payment of money, or for the delivery of goods, or of any note, bill or valuable security; or

(*k*) any acquittance or discharge, or any voucher of having received any goods, money, note, bill or valuable security, or any instrument which is evidence of any such receipt; or

(*l*) any document to be given in evidence as a genuine document in any judicial proceedings; or

(*m*) any ticket or order for a free or paid passage on any carriage, tramway or railway, or any steam or other vessel; or

(*n*) any document not mentioned in this or the two last preceding sections;

is guilty of an indictable offence and liable to seven years' imprisonment if the document forged purports to be, or was intended by the offender to be understood to be, or to be used as genuine. 55-56 V., c. 29, s. 423.

Evidence of child not under oath may be received in certain cases, but must be corroborated.

1003. Where, upon the hearing or trial of any charge for carnally knowing or attempting to carnally know a girl under fourteen or any charge under section two hundred and ninety-two for indecent assault, the girl in respect of whom the offence is charged to have been committed, or any other child of tender years who is tendered as a

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witness, does not, in the opinion of the court or justices, understand the nature of an oath, the evidence of such girl or other child of tender years may be received though not given upon oath, if in the opinion of the court or justices, as the case may be, such girl or other child of tender years is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth.

2. But no person shall be liable to be convicted of the offence, unless the testimony admitted by virtue of this section and given on behalf of the prosecution, is corroborated by some other material evidence in support thereof implicating the accused.

3. Any witness whose evidence is admitted under this section is liable to indictment and punishment for perjury in all respects as if he or she had been sworn. 55—56 V., c. 29, s. 685.

292. Indecent assault on female:—

"Every one is guilty of an indictable offence and liable to two years' imprisonment, and to be whipped, who,—

(*a*) indecently assaults any female; or

(*b*) does anything to any female by her consent which but for such consent would be an indecent assault, if such consent is obtained by false and fraudulent representations as to the nature and quality of the act. 55—56 V., c. 29, s. 259."

(*c*) assaults and beats his wife or any other female and thereby occasions her actual bodily harm." (Added by the Criminal Code Amendment Act, 1909, 8—9 Edw. VII., c. 9, s. 2).

The subject of this treatise, accordingly, will be considered under these two main divisions and their respective subdivisions. It is well to note that the requirement, in the main, is for corroboration by some other material evidence. The corroborative evidence must be proved otherwise than by the testimony of the witness to be corroborated, as was pointed out in *Owen* v. *Moberly* (1900), 64 J.P. 88.

INSTANCES UNDER THE ONTARIO EVIDENCE ACT, R.S.O. CH. 76, SECS. 11, 12, 13.—

11. The plaintiff in an action for breach of promise of marriage shall not recover unless his or her testimony is corroborated by some other material evidence in support of the promise.

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Instances of corroboration under this subject-matter which have come before the Courts have been many and various: what may amount to corroboration in some cases falls short of it in others.

There is, however, a general rule regarding the necessity that the evidence in corroboration come from some other source than the plaintiff's own testimony, as seen in the case of *Owen* v. *Moberley, supra,* to which reference has been made already. In this case, the plaintiff produced letters in the defendant's handwriting to the effect of a promise by him to marry her. The letters were rejected as corroborative evidence because there was no proof of it other than the testimony of the plaintiff herself.

Regarding silence and its relationship to corroboration it has been laid down in the leading case of *Wiedemann* v. *Walpole*, [1891] 2 Q.B. 534, 60 L.J. (Q.B.) 762, 40 W.R. 114, that, in an action of this nature ,the mere fact that the defendant did not answer letters written to him by the plaintiff, in which she stated that he had promised to marry her, was not evidence corroborating the plaintiff's testimony in support of the promise. The doctrine found expression in the statements of the members of the Court.

Lord Esher M.R. said: "I have, therefore, no doubt that the mere fact of not answering a letter stating that the person to whom it is written has made a promise of marriage, is no evidence whatever of an admission that he did make the promise, and therefore, no evidence in corroboration of the promise. I do not say there may not be circumstances, occurring in a correspondence between a man and a woman, which would or might make the omission to answer one letter in the correspondence some evidence of an admission of the truth of the statements contained in that letter."

In the words of Bowen, L.J., "There must be some limitation placed upon the doctrine that silence when a charge is made amounts to evidence of an admission of the truth of the charge. The limitation is I think, this: Silence is not evidence of an admission, unless there are circumstances which render it more reasonably probable that a man would answer the charge made against him than that he would not."

With regard to the latter part of these remarks of Bowen L.J., it is interesting to note the words of Bramwell, L.J. in the oftencited case of *Bessela* v. *Stern* (1877), 2 C.P.D. 265 at p. 272, 46 L.J. (C.P.) 467, 25 W.R. 561.

"If two persons have a conversation, in which one of them makes a statement to the disadvantage of the other, and the

latter does not deny it, there is no evidence of an admission that the statement is correct."

Of course, in *Wiedemann* v. *Walpole*, Bowen, L.J., was dealing with written correspondence, while, in *Bessela* v. *Stern*, Bramwell L.J. had reference to an oral conversation. The general trend of these statements of high authority appears to be that the extent to which silence may be corroboration is, very largely, a question to be determined in every action in which it appears in evidence, having due regard to all the circumstances of the case including those of the making of the unanswered charge.

To what length must the evidence given in corroboration go? The answer to this question may be obtained from the section itself, which calls for "some other material evidence in support of the promise." As Cockburn, L.J., pointed out in *Bessela* v. *Stern*, such evidence need not go to the length of establishing the contract to marry, as such, it being sufficient if it support the promise. In the same case, Brett, L.J., indicated that it is not necessary that the evidence in corroboration show a mutual promise to marry ; it need not prove a promise; corroborative evidence of the promise being all that is required, although a mutual promise is necessary to establish the contract of which breach can occur.

The presentation of the salient facts of some of the more important reported cases will be of some assistance in determining the relationship of the evidence in corroboration to the rest of the evidence offered in the respective cases.

In *Bessela* v. *Stern*, X. sued Y. for breach of promise of marriage, and one Z. testified to two important facts, firstly, that Y. had told Z. that he would marry X. but that Z. must not expose him, and secondly, that Z. overheard X. say to Y. (see 2 C.P.D. p. 272), "You have always promised to marry me, and now you don't keep your word" — to which Y. did not reply, but promised her money to go away. This latter or second fact was what Bramwell, L.J., had in mind when he spoke of unanswered allegations made in the course of conversations, *ante*. The evidence of Z. was held to be in corroboration of X.'s testimony of the promise.

In *Hickey* v. *Campion* (1872), 20 W.R. 752, the corroboration was supplied in this manner: Y. said to X., who was attending him during an illness, in the presence of Z., a third party, "Who has a better right to take care of me than my wife?"— and this was given in evidence by Z. In *Hansen* v. *Dixon* (1906), 96 L.T. 32, 23 Times L.R. 56, it was adduced from a

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statement in a letter from the defendant to the plaintiff, reading at p. 33 (96 L.T.); "If I were well, you would marry me?"

Cases in which the evidence offered has fallen short of corroborating the promise are very numerous, but some idea of the attitude of the Courts may be gained from consideration of a few of them.

In *Wiedemann* v. *Walpole*, the plaintiff was the defendant's former mistress, and she and the clergyman of the defendant's parish wrote letters to him claiming that he had promised to marry her, and, this being offered in evidence it was held not to be in corroboration of the plaintiff's testimony as to the existence of the promise, merely because the defendant had not answered the allegation in the letters. It is considered that if the remarks had been part of a series passing backward and forward, or if they had been made orally in the defendant's presence, they might have been in corroboration. The fact that the defendant did not go into the witness box to deny the promise was held not to be evidence in corroboration of the promise ....In the same case it was held that the plaintiff's having possession of the defendant's signet-ring—which, she insisted, he had given to her, and which he, with equal emphasis, insisted, she had found—was not in corroboration of the promise because it was not any more consistent with a promise to marry than it was with a continuance of their previous illicit relationship. However, if there be proof of a prior relationship, the presumption is in favour of the moral and against the immoral relationship, as was laid down in *Yarwood* v. *Hart* (1887), 16 O.R. 23 where the defendant set up the defence of what he said was an immoral relationship, and where such defence was held not to render the evidence less material in support of the promise.

Expressions of admiration, affection, or endearment are not necessarily evidence in corroboration, as long as they contain no reference to marriage. This was seen in the cases of *Kempshall* v. *Holland* (1895), 14 R. 336 and *May* v. *Kelly* (1897), 31 Ir. L.T. (Jo.) 67 where it was held that such were equally consistent with the defendant's having no intention to marry the plaintiff, (See *Costello* v. *Hunter* (1886), 12 O.R. 333, in this connection).

Some cases are rather extreme, one of such being *Cleeland* v. *M'Cune* (1908), 42 Ir. L. T. R. 201. In this case the defendant had "kept company" with the plaintiff, had told her that she "would make a good wife for some man," and did not deny to a third party that he had given her reason to believe that he was

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going to marry her. There was held to be no corroboration of the promise.

The Ontario case of *Costello* v. *Hunter*, 12 O.R. 333, is an interesting one, and was an action brought under these circumstances. The plaintiff alleged that the defendant had promised to marry her in the Fall of 1873, but that when the time arrived he excused his so doing on the ground of not having his house built, and he agreed not to marry until he had a suitable house; despite the fact that she told him of her willingness to live in a shanty, to which he replied that he would not marry until he could keep her. The house in question was completed in the summer of 1878. Although no definite promise was proved after the Fall of 1873, friendly relations continued until 1884 when the defendant married another woman. The defendant denied the promise, but admitting visiting the plaintiff when she was alone, talking to her of marriage—which according to him, did not refer to their marriage—and kissing her. A witness called in corroboration of the plaintiff's testimony told of a conversation with the defendant in the Fall of 1882, in which the latter referred to some girls who visited the house saying that they wanted it but that he wanted the girl who wanted him; and upon the witness's saying that he supposed the plaintiff to be the one, the defendant replied in the affirmative. The witness further testified that in the Spring of either 1883 or 1884, in the course of another conversation with the defendant, the latter said that he would rent or sell the house or get married and made no reply when the witness expressed himself as supposing that the match would be with the plaintiff soon. The trial Judge overruled objections that the action was barred by the Statute of Limitations and that there was no evidence in corroboration of the promise. On appeal the action was held to be barred by the Statute of Limitations but the opinions of the respective Appeal Judges are interesting. Cameron, C. J., considered that there was evidence to go to the jury corroborative of the promise stated by the plaintiff, but, with Rose J., considered that the action was barred by the Statute of Limitations. The latter Judge expressed no opinion as to the corroboration; while Galt, J., considered that there was not sufficient corroboration, although he did not dissent from the ruling that the action was barred by the Statute of Limitations, the action not having been brought within the time limit in the Statute. In *Grant* v. *Cornock* (1888), 16 O.R. 406; 16 A.R. (Ont.) 532, it was held that the mere lapse of time previously fixed for the marriage does not necessarily constitute breach when the

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In *Fisher* v. *Graham* (1880), 31 U.C.C.P. 286, when the father of the plaintiff, after having been told by the latter that the defendant had promised to marry her, informed the defendant that she was in the family way, the defendant said that he would marry her if the child were really his but that he could not until he received some land from his father. It was shewn that the land had already been received. The Court held that there was sufficient evidence of a mutual promise. Other instances regarding corroboration; *Cole* v. *Manning* (1877), 2 Q.B.D. 611, 46 L.J. (M.C.) 175, *Morrison* v. *Shaw* (1877), U.C.Q.B. 403. *Parker* v. *Parker* (1881), 32 U.C.C.P. 113, *Lowry* v. *Robins* (1919), 45 O.L.R. 84.

> 12—In an action by or against the heirs, next of kin, executors, administrators or assigns of a deceased person, an opposite or interested party shall not obtain a verdict, judgment, or decision, on his own evidence, in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence.

As in sec. 11, the corroboration is to be "by some other material evidence." The party is "opposite or interested," and the matter must have occurred before the death of the deceased. *McClenaghan* v. *Perkins* (1902), 5 O.L.R. 129. In considering some of the older cases reported and English cases it must be remembered that the rule is not one exercisable merely in judicial discretion but one definitely stated by statute, according to the law of Ontario at present.

A leading case is that of *Finch* v. *Finch* (1883), 23 Ch. D. 267, 31 W.R. 526 (Stephen's Law of Evidence, 6th ed. (1904), art. 121A), in which it was stated that the rule also applied to cases of alleged gift as well as to cases of alleged debt. The circumstances were, briefly, these: An English widow, who resided in a Parisian house belonging to her for her separate use, married an Englishman, and by the marriage settlement certain of her first husband's plate was settled to her separate use. Following the marriage, the second husband sent his own plate to his wife's home in Paris, and she sent the other plate to her son by her first marriage; and upon his death his family plate, together with a marble bust of himself, was in his wife's home. In an action for administration the widow claimed the plate as having been given in exchange for her

own, and the bust as a gift from the deceased. It was held on the final hearing that the surrounding circumstances did not furnish corroborative evidence in support of her claim to the plate and the bust, and that as the claim rested upon her unsupported testimony it could not be allowed.

A peculiar case was *Lovesy* v. *Smith* (1880), 15 Ch. D. 655, 49 L.J. (Ch.) 809, 28 W.R. 979, in which rectification of a marriage settlement was decreed at the instance of the wife after the death of her husband upon her parol testimony uncorroborated except for the following fact: "the settlement on the face of it was not such as the Court would have sanctioned in the absence of agreement after due explanation,"—which put the burden of proof on the representative of the husband, the widow having a *primâ facie* case.

There are many Ontario cases on the subject, some of the more prominent among them now following.

Parker v. *Parker* (1881), 32 U.C.C.P. 113, is authority for the ruling that "if there be any evidence adduced corroborating the evidence of the interested party in support of his claim or defence in any material particular it must be submitted to the jury as sufficient corroboration in point of law, the weight to be attached to it in point of fact being a matter for their consideration."—Armour, J. See also; *Orr* v. *Orr* (1874), 21 Gr. 397; *McDonald* v. *McKinnon* (1878), 26 Gr. 12; *Wilcox* v. *Gotfrey*, 26 L.T., 481; *Hickey* v. *Campion*, (1872), 20 W.R. 752; *Hodges* v. *Bennett* (1860), 5 H. & N. 625, 157 E.R. 1329; *Cole v. Manning* (1877), 2 Q.B.D. 611, 46 L.J. (M.C.) 175; *Regina* v. *Giles* (1865), L. & C. 502, 13 W.R. 327; *Regina* v. *Bannerman* (1878), 43 U.C.Q.B. 547.

Particular attention should be paid to the case of *Re Curry, Curry* v. *Curry* (1900), 32 O.R. 150, which ruled that the required evidence in corroboration may be found in those facts adduced in the case, which although not in themselves main facts as such raise "a material and reasonable inference in support of the evidence whereof corroboration is required." The opinion also was expressed that the corroborative evidence within the meaning of the statutory requirement may be given by an interested party as long as he is not the party obtaining the decision.

Batzold v. *Upper* (1902), 4 O.L.R. 116, laid down that a person interested as *cestui que trust* in a claim by or against the executors of a deceased is not debarred by reason of that interest from giving material corroborative evidence as required by R.S.O. 1897, ch. 73, s. 10, the predecessor of our present

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In *Wilson* v. *Howe* (1902), 5 O.L.R. 323, the plaintiff claimed from his father-in-law's executors payment of a running account for work done and goods supplied to the testator for a period of some 7 years prior to the death in 1895. No demand of payment was made of the deceased, no account was rendered until one was sent to the defendants May 16, 1895, and the action was commenced May 4, 1901. The plaintiff and the plaintiff's wife testified to an agreement with the deceased whereby the plaintiff should keep the account in question separate from his other accounts and should try to get along without payment in the meantime, leaving the funds in the hands of the deceased who declared that he would save the money for the plaintiff and "put it in a house" for him or his wife. The account was so kept and the separate books and the general books were produced by the plaintiff. A witness, A., gave evidence that the deceased, some year and a half before his death told him, A., that he had ordered the plaintiff to keep the account in a little separate book at home so that it would not come to the attention of the wholesale men, and that he intended to buy a house for the plaintiff's wife. Similar, but less clear evidence was presented on the point by another witness, B. It was held that there was sufficient corroboration of the plaintiff's statement afforded by the production of the books and the testimony of the witness, A. Held, also, that the plaintiff was not obliged to prove a definite term of credit extending till demand which was made on May 16, 1895.

Some of the cases have had connection with business relation between landlord and tenant, two of these being *Re Jelly, Union Trust Co.* v. *Gamon* (1903), 6 O.L.R. 481, and *Cowley* v. *Simpson* (1914), 19 D.L.R. 463, 31 O.L.R. 200. In the former case the claim was in an administration action by a tenant against the estate of the deceased landlord for a balance due in respect of advances and goods supplied. The plaintiff produced his books in which the transactions were set out, and also the cheques made by him in favour of and endorsed by the landlord. These productions were held to be a sufficient corroboration of his testimony although the cheques did not show on their face what the consideration was to indicate whether they had been given for rent or as advances.

The case of *Cowley* v. *Simpson*, was more or less complicated. The defendant's predecessor in title "squatted" in 1858 on

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certain property projecting into the Ottawa River, made two small clearings, built a small house and a stable on one of these, attended to the lighting of a lamp on the shore for the purposes of navigation and traded desultorily in liquor and fishermen's poles. It appeared as if he had built a rough house at the base of the point from water to water. The "squatter" lived there, except for one winter, till he died in 1891, after which his adopted daughter and her devisee occupied the house until one of the defendants bought the property. One of the plaintiffs and the other's predecessor bought the property from the registered owner in 1873 during the winter when the "squatter" was not there resident. The surviving purchaser testified that (1) it was the "squatter" who told him that the land was for sale and that he did not intend to go back, and that (2) subsequently he did, at the request of the purchaser, agree to go back as caretaker. Another witness, in corroboration of the agreement, gave evidence that the "squatter" had told him subsequently of being on the land as caretaker. Under these circumstances it was held at p. 200 (31 O.L.R.) that "the evidence of the purchaser as to this agreement was sufficiently corroborated, the well-settled rule now being that as against the deceased person complete duplication of the evidence of the adverse party is not essential, but merely that there be other material evidence sufficient to lead to the conclusion that the evidence of that adverse party is true or probably true."

The other phase of the section, *i.e.*, action by executors and the like, is illustrated by the case of *Thompson* v. *Coulter* (1903), 34 Can. S.C.R. 261, which was an action by executors to recover money due from one C. to the testator. Evidence was given that the last-named, while ill in a hospital, had sold a farm to the defendant, and $1,000 on account of the purchase-price was deposited in a bank to the vendor's credit, which amount was withdrawn by the defendant on the testator's order. The testator died some weeks afterwards, when none of the money was found on or about his person, and there was no record of his having received it. The defendant admitted the withdrawal, but stated that he had paid it to the testator. There was no corroborative evidence of such payment, and it was held, therefore, reversing the judgment of the Court of Appeal for Ontario, that the executors were entitled to judgment, a *prima facie* case having been made out against C., his admission of the withdrawal being in corroboration of the plaintiff's claim.

In these actions such corroboration of witnesses who are

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The particularity of the corroboration required is discussed to an extent in *Little* v. *Hyslop* (1912), 7 D.L.R. 478. In this case the following statement appears in the judgment of Lennox, J.: "When the alleged payments are wholly unconnected, corroboration of an item here and there is not corroboration of the whole account." Semble, then, that in such circumstances as the occurrence of certain items in a claim, the particularity depends, largely, upon the connection among the various items. See also *Cook* v. *Grant* (1882), 32 U.C.C.P. 511, *Re Ross* (1881), 29 Gr. 385.

The method of arriving at corroboration in somewhat difficult cases is seen in *Thompson* v. *Thompson* (1902), 4 O.L.R. 442, which was an action on a promissory note, against the personal representatives of the maker, tried by a Judge without a jury. To prove by comparison the signature on the note there was produced a duplicate registered mortgage, purporting to be executed by the deceased, with the registrar's customary certificate attached thereto. On appeal it was held that the Judge, at p. 442 (4 O.L.R.), "was entitled to compare the signatures, and act on his own conclusion as to their identity," and, having found them identical, the corroboration was sufficient to satisfy R.S.O. 1897, ch. 73, sec. 10.

The matter of a *donatio mortis causa* to a person in a fiduciary relationship to the deceased arose in *Davis* v. *Walker* (1902), 5 O.L.R. 173. The alleged gift was from a client to his solicitor when the two were in private. There was no previous intimation of the gift, and there was no other evidence in corroboration to support it; consequently the gift failed.

Other instances regarding corroboration: *Schwent* v. *Roetter* (1910), 21 O.L.R. 112; *Radford* v. *Macdonald* (1891), 18 A.R. (Ont.) 167; *Green* v. *McLeod* (1896), 23 A.R. (Ont.) 676;

McGreggor v. *Curry* (1913), 5 O.W.N. 90, 25 O.W.R. 58; *McEwan* v. *Toronto General Trusts Corp.* (1915), 29 D.L.R. 711, 36 O.L.R. 244; reversed 35 D.L.R. 435, 28 Can. Cr. Cas. 387, 54 Can. S.C.R. 381. ANNOTATION

A peculiar phase of the question is seen in *Toronto Suburban Railway Co.* v. *Beardmore* (1917), 12 O.W.N. 214; reversed at p. 251. In this case it was held, on appeal, that when a deceased as a member of a partnership firm made an agreement for the firm, there was no necessity of corroborative evidence in an action against the firm.

> 13. In an action by or against a lunatic so found or an inmate of an insane asylum, or a person who from unsoundness of mind is incapable of giving evidence, an opposite or interested party shall not obtain a verdict, judgment or decision on his own evidence, unless such evidence is corroborated by some other material evidence.

There appears to be an absence of reported cases bearing directly upon the subject matter of this section. It has been suggested that perhaps one reason for this is the practice in Ontario of dealing with so many matters regarding lunatics or persons of unsound mind in Chambers.

The general principle of the section is clear. The evidence to be corroborated is that of "an opposite or interested party"; the evidence in corroboration must corroborate some material particular of that evidence to be corroborated.

INSTANCES UNDER THE CANADIAN CRIMINAL CODE, R.S.C. (1906), C. 146, SS. 1002, 1003.

In this field there is a large number of reported cases covering most of the various parts of the sections concerned, and selection is more or less difficult; but the state of the law on the subject seems fairly clear. Consequently some idea may be gained from the cases here presented.

1002. Cases in which evidence of one witness must be corroborated:—

> No person accused of an offence under any of the hereunder mentioned sections shall be convicted upon the evidence of one witness, unless such witness is corroborated in some material particular by evidence implicating the accused.

The requirement is some evidence in corroboration of the testimony of the witness mainly considered by the Crown for its case. The corroboration is to be of a material particular, so

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Although the evidence in corroboration usually is gained from the oral testimony of another witness, it may be obtained, generally speaking, in some cases, from documents. For example, it has been held that the jury was entitled to draw corroboration from a non-committal letter of the accused if it took the meaning of it as implicating the writer, having due regard to the surrounding circumstances. *R.* v. *Threfall* (1914), 10 Cr. App. R. 112; *R.* v. *Everest* (1909), 73 J.P. 269, 2 Cr. App. R. 130; *R.* v. *Wilson* (1911), 6 Cr. App. R. 125.

The evidence in corroboration must confirm in some material particular (i) the commission of the crime, and (ii) its commission by the accused. See *R.* v. *Baskerville*, [1916] 2 K.B. 658, 86 L.J. (K.B.) 28, 25 Cox C.C. 524, 12 Cr. App. R. 81; *R.* v. *Grosberger* (1909), 152 Cent. Cr. C.R. 261, 267. It may be gained from evidence which tends to give certainty to the matter which it is supposed to corroborate. *Peterson* v. *The King* (1917), 28 Can. Cr. Cas. 332, 55 Can. S.C.R. 118, affirming *R.* v. *Peterson* (1917), 32 D.L.R. 295, 27 Can. Cr. Cas. 3; *R.* v. *Scheller* (1914), 16 D.L.R. 462, 7 S.L.R. 239, 23 Can. Cr. Cas. 1. Corroboration, therefore, is not required, the corroboration needing to be only with regard to some material particular. *R.* v. *Bannerman* (1878), 43 U.C.Q.B. 547; *The Queen* v. *Harrell* (1888), 1 Terr. L.R. 166; *The King* v. *Daun* (1906), 11 Can. Cr. Cas. 244, 12 O.L.R. 227; *The Queen* v. *Wyse* (1895), 2 Terr. L.R. 103; *R.* v. *Vahey* (1899), 2 Can. Cr. Cas. 258; *The Queen* v. *Boyes* (1861), 1 B. & S. 311 at p. 320, 121 E.R. 730, 9 Cox C.C. 32, 30 L.J. (Q.B.) 301, 9 W.R. 690; *Parker* v. *Parker* (1881), 32 U.C.C.P. 113, is authority for the ruling that where there are several issues the term "corroboration by some material evidence" does not mean, necessarily, corroboration in each issue. If, at the conclusion of the case for the Crown, the trial Judge rules that the corroboration has been made out, and because of that refuses to take the case from the jury, there are two courses

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open to the defence: (i) resting of the case, (ii) giving of evidence in defence. However, if the second alternative be followed and sufficient corroboration be gained from such defence evidence, the defence, by appealing by case reserved, cannot take advantage of the fact that there was a lack of corroboration when the Crown rested its case. See *The King* v. *Wakelyn* (1913), 10 D.L.R. 455, 5 Alta. L.R. 464, 21 Can. Cr. Cas. 111; *R.* v. *Girvin*, 45 Can. S.C.R. 167; *R.* v. *Fraser*, 7 Cr. App. R. 99; *The King* v. *St. Pierre*, 19 Can. Cr. Cas. 82; *R.* v. *Nash*, 17 D.L.R. 725, 7 A.L.R. 449, 23 Can. Cr. Cas. 38; *R.* v. *Fontaine*, 18 D.L.R. 275, 23 Can. Cr. Cas. 159; *R.* v. *Scheller*, 16 D.L.R. 462, 23 Can. Cr. Cas. 1, 7 S.L.R. 239. It may be derived from statements made by the accused person to other persons. *The King* v. *Burr* (1906), 12 Can. Cr. Cas. 103, 13 O.L.R. 485; *The Queen* v. *Wyse*, 1 Can. Cr. Cas. 6; *The King* v. *Daun*, 11 Can. Cr. Cas. 244, 12 O.L.R. 227. In any case it must show more than a mere probability that the accused is guilty. *Reg.* v. *Vahey*, 2 Can. Cr. Cas. 258; *Dawson* v. *M'Kenzie*, [1908] S.C. 648; *Ridley* v. *Whipp* (1916), 22 Com. L.R. 381 (Australia). The corroboration may be gained from the conduct of the defendant when he is accused of the offence. Held, in *R.* v. *Stevens* (1913), 9 Cr. App. Cas. 132. The provisions of the sections refer to trial and not to preliminary inquiry before a magistrate. Hence, they apply to questions of conviction, not to questions of committal. Held, in *In re Lazier* (1889), 30 O.R. 419. No such corroboration as required in these sections is required in extradition proceedings. Held, in *Re H. L. Lee* (1884), 5 O.R. 583.

It has been said that a case should not be withdrawn from the jury unless the trial Judge be satisfied that it is entirely impossible to find corroboration from the evidence of the Crown. See *R.* v. *Wiltshire* (1910), 152 Cent. Cr. Const. Sess. Papers 543, 546.

(*A*) *TREASON, PART II., SECTION SEVENTY-FOUR*:

A former statute on this subject-matter called specifically for the evidence of two witnesses for the Crown to enable the Court to convict the accused. A trial for treason has been, in recent years, a rather rare thing within the British Empire, so rare, in fact, that in this country there appears to be no reported case bearing directly on this part of the section. The points are that the corroboration must be of a material point in the testimony, and must implicate the accused. Phipson's Law of Evidence, 5th ed., 1911, ch. 41, pp. 481 *et seq.*

ANNOTATION (B) *PERJURY, PART IV., SECTION ONE HUNDRED AND SEVENTY-FOUR:*

Although perjury is expressly included in this section, it has been held that the section does not refer to the offence of making a false statutory declaration. *R.* v. *Phillips* (1908), 14 Can. Cr. Cas. 239, 14 B.C.R. 194, 9 W.L.R. 634.

The falsity of the alleged perjured statement is the material particular required to be corroborated, and it is not necessary that there be two witnesses to swear to the falsity, as long as the corroborative evidence may be gained from the admissions of the accused. *R.* v. *Lee* (1766), 3 Russell on Crimes, 5th ed., p. 72; *R.* v. *Boulter* (1852), 5 Cox Cr. Cas. 543.

The question of the amount of particularity required is seen in *R.* v. *Curry* (1913), 12 D.L.R. 13, 21 Can. Cr. Cas. 273, 47 N.S.R. 176; see *R.* v. *Houle* (1905), 12 Can. Cr. Cas. 56, where it was laid down that the corroboration required is in connection with the perjured fact as a whole, and need not be in corroboration of every constituent part thereof as such. In this case, the accused had sworn that A. and B. had attempted jointly to bribe him for the purpose of obtaining his vote, and at the trial for perjury A. testified denying the fact of bribery as to himself, and B. as to himself. B.'s statement appears to have been considered by the Court as corroborating sufficiently A.'s testimony.

The corroboration is not required to have regard to *more* than the falsity of the deposition in question, as was decided in *R.* v. *Nash* (1914), 17 D.L.R. 725, 23 Can. Cr. Cas. 38, 7 Alta. L.R. 449. This case is also authority for the ruling that the testimony of the accused may be the source of the corroboration, such as material variances from the statement which caused the laying of the charge.

Peterson v. *The King* (1917), 28 Can. Cr. Cas. 332, 55 Can. S.C.R. 118, affirming *R.* v. *Peterson* (1917), 32 D.L.R. 295, 27 Can. Cr. Cas. 3, was a much litigated case, and laid down that if there be given evidence which is equally consistent with two different viewpoints such evidence is not in corroboration of either unless the accused, under oath, has denied the correctness of one of them, in which case the evidence becomes evidence in corroboration of the unimpeached viewpoint. It also points out that the particular which requires the corroboration is the falsity of the statement in question, not the swearing to the statement by the prisoner. The facts were, shortly, these: Peterson swore that he "did not get from Frank Brunner a

cheque for $4,000," and maintained this at the trial. However, Brunner testified that he had given him the cheque. The necessary corroboration was obtained from one Smith, a bank manager, who swore that he had cashed for Peterson Brunner's cheque for $4,000. Other instances regarding corroboration include *R.* v. *Knell* (1822), 5 B. & Ald. 929n, 106 E.R. 1431; Taylor, secs. 959-963, pp. 681-685; Best, secs. 603-610, pp. 585-591. ANNOTATION

(C) OFFENCES, UNDER PART V., SECTIONS TWO HUNDRED AND ELEVEN TO TWO HUNDRED AND TWENTY, INCLUSIVE.

There is a large number of reported cases under this heading, but, as is so often the fact in reported cases, circumstances of various kinds are duplicated in case after case, whereas, of course, the general principle which is being exemplified remains the same.

The King v. *Burr* (1906), 12 Can. Cr. Cas. 103, 13 O.L.R. 485, laid down the rule included in the general rules regarding corroborative evidence, indicating that to adduce such evidence recourse need not be had to the evidence of additional witnesses as such. . . . This case appears to reaffirm the doctrine in *The Queen* v. *Wyse*, 1 Can. Cr. Cas. 6, where W. was charged with the seduction of a girl under the age of sixteen years, and he made certain admissions after she had reached the age in question. The admissions were held to be in corroboration as required. He had made a statement before the charge was made, that someone had told him that he would escape punishment if he could persuade the girl to marry him, and this statement was held to be the necessary corroborative evidence implicating the accused. See also *R.* v. *Fontaine*, 18 D.L.R. 275, 23 Can. Cr. Cas. 150. (These cases were decided prior to the amendment to sec. 211.)

It has been held that there is required more than bare proof that by virtue of the circumstantial relationship existing between the complainant and the accused there is a strong probability that no person other than the accused has had an opportunity to seduce the complainant; for example, there is the case of *The Queen* v. *Vahey*, 2 Can. Cr. Cas. 258. In this case, the complainant was employed as a domestic at the accused's home, and there was offered evidence showing that there was a "marked probability of no opportunity for any man other than the accused to have done the act," but this evidence was held

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There have been many instances of trial for seduction under promise of marriage, a good example of these being the case of *The King* v. *Daun*, 11 Can. Cr. Cas. 244, 12 O.L.R. 227. In it there was laid down the well-known general rule that there need not be corroboration of every fact, it sufficing if there be confirmation of the truth of the prosecutrix's testimony. Apparently there must be corroboration to support the evidence of both the promise and the act itself. See *State* v. *Hill* (Mo. Supr. Ct.) (1887), 4 S.W. Rep. 121, 9 Cr. L. Mag. 594; *State* v. *Ferguson* (N.C.) (1890), 12 S.E. Rep. 574, 13 Cr. L. Mag. 486.

In *The King* v. *Brindley* (1903), 6 Can. Cr. Cas. 196, the defendant was charged with having allowed a girl under the age of eighteen years to be upon certain premises for immoral purposes. The girl proved that she shared with the proprietor the money obtained by prostitution conducted on those premises. The corroboration of her testimony was the evidence of another person, which indicated that the premises were a "bawdy house" under the Code. In *R.* v. *McNamara* (1891), 20 O.R. 489, the prisoner was accused of having attempted to procure a woman to become a common prostitute, and, in corroboration of her evidence that he had taken her to the "bawdy house" in question in that particular case for such purposes, testimony of the general character of the house was held admissible. Other instances: *The Queen* v. *St. Clair* (1900), 27 A.R. (Ont.) 308, 3 Can. Cr. Cas. 551; *R.* v. *Quinn* (1918), 44 D.L.R. 707, 30 Can. Cr. Cas. 372, 43 O.L.R. 385.

(*D*) *PROCURING FEIGNED MARRIAGE, PART IV., SECTION THREE HUNDRED AND NINE*:

There seems to be no reported case directly in point as to this matter, but the general principles are the same as in regard to the other parts of the section—speaking generally—and are indicated in the remarks on 1002-(*a*).

(*E*) *FORGERY, PART VII., SECTIONS FOUR HUNDRED AND SIXTY-EIGHT TO FOUR HUNDRED AND SEVENTY, INCLUSIVE.*

A case which illustrates very aptly the principle that the corroboration in these cases is additional evidence that will tend to verify the evidence of the Crown's main witness, and justify that evidence's being acted upon if believed is that of *R.* v. *Scheller*, 16 D.L.R. 462, 23 Can. Cr. Cas. 1. A man, Jonat by

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name, had given Scheller four promissory notes which the latter had taken to the Yorkton branch of the Union Bank of Canada and discounted. While the bank was in possession of the notes, Scheller agreeing to sell them to one Pachal, got copies of them from the bank, endorsed on these the names of himself and of his brother—with his brother's consent—and handed the "completed" copies over to Pachal, Jonat's name being on them as maker. Jonat swore that he had never signed these, and his evidence was corroborated by the evidence of both the manager and the accountant of the branch, who testified that the three "originals" of the alleged forged notes were, all this time, in the possession and the custody of the bank where they had been placed by Scheller as collateral security for a loan.

In *The King* v. *Houle* (1905), 12 Can. Cr. Cas. 56, the accused was charged with the forgery of the endorsements on three promissory notes. Every one of the three persons whose signatures were forged swore that the respective signature purporting to be his was a forgery. The evidence of these three was held to amount of the corroboration required to support the charge; (of course there would have to be some evidence connecting such a prisoner with the charges in order to warrant a conviction.)

It has been held in *The Queen* v. *McBride* (1895), 2 Can. Cr. Cas. 544, see also *R.* v. *Giles* (1856), 6 U.C.C.P. 84, that the witness whose evidence is to be corroborated cannot corroborate his own evidence by giving evidence on another ground or point. In this case a certificate of death for the purpose of the support of an insurance claim and an endorsement on the insurance company's cheque for the amount of the claim were proved to be forged. A. testified that the forged signatures were written by the defendant by proving other signatures to be in the same handwriting. The only proof of this latter was A.'s evidence and A. had already testified to the handwriting in the forgeries, so the corroboration was held insufficient.

Another case where the attempted corroboration failed is *The King* v. *Henderson* (1911), 18 Can. Cr. Cas. 245. A. testified that the papers in question were not signed when he handed them to the defendant, but that when they were returned to him by the latter very shortly afterwards they were signed, such signatures being discovered, later, to be forgeries. B., an expert, compared the forged signatures with the defendant's handwriting in letters, and testified that the forgeries were in the accused's handwriting. C., an equally credible expert, testified, upon due comparison, that the forgeries were not in the accused's handwriting. B.'s testimony was dia-

ANNOTATION metrically contradicted by C.'s, so there was held not to be the required corroboration. See also *R.* v. *Hagerman* (1888), 15 O.R. 598; *R.* v. *Selby* (1888), 16 O.R. 255; *R.* v. *Bent* (1885), 10 O.R. 557. As to trials see Juvenile Delinquents Act, 1908 (Can.), ch. 40, amd. by 1912, ch. 30, and by 1914, ch. 39, with reference to where Juvenile Courts have been created.

1003. Evidence of child not under oath may be received in certain cases, but must be corroborated.

Where, upon the hearing or trial of any charge for carnally knowing or attempting to carnally know a girl under fourteen or of any charge under section two hundred and ninety-two for indecent assault, the girl in respect of whom the offence is charged to have been committed, or any other child of tender years who is tendered as a witness, does not in the opinion of the court or justices, understand the nature of an oath, the evidence of such girl or other child of tender years may be received though not given upon oath if, in the opinion of the court or justices, as the case may be, such girl or other child of tender years is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth.

2. *But no person shall be liable to be convicted of the offence, unless the testimony admitted by virtue of this section and given on behalf of the prosecution, is corroborated by some other material evidence in support thereof implicating the accused.*

3. Any witness whose evidence is admitted under this section is liable to indictment and punishment for perjury in all respects as if he or she had been sworn.

R.S.C. (1906), C. 145 (CANADA EVIDENCE ACT), S. 16.—Evidence of child:

1. In any legal proceeding where a child of tender years is offered as a witness, and such child does not, in the opinion of the judge, justice or other presiding officer, understand the nature of an oath, the evidence of such child may be received, though not given upon oath, if, in the opinion of the judge, justice or other presiding officer, as the case may be, such child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth.

2. No case shall be decided upon such evidence alone,

and such evidence must be corroborated by some other material evidence. 5-6 V., c. 31, s. 25. ANNOTATION

In *The King* v. *De Wolfe* (1904), 9 Can. Cr. Cas. 38, the distinction between "corroboration by material evidence" and "corroboration by material evidence implicating the accused" was pointed out. Although there was not given in corroboration any material evidence implicating the accused, there was given material evidence, and it was held that, although, under the circumstances, there was not the corroboration required to convict on the charge of attempting to have carnal knowledge, there was sufficient to enable the prisoner properly to be convicted of common assault. Section 10 of the Canadian Evidence Act extends the power of receiving the evidence of a child without oath to all proceedings and the power is, therefore, not restricted to cases arising under sec. 1003 of the Canadian Criminal Code.

The question as to who may give the corroborative evidence required arose in several cases. Despite doubt expressed by some writers, the rule appears to be that the unsworn testimony of a young child who does not understand properly the nature of an oath cannot be corroborated by the similar unsworn testimony of another such child. See *R.* v. *Whistnant* (1912), 8 D.L.R. 468. 20 Can. Cr. Cas. 322, 5 Alta. L.R. 211; *R.* v. *McInulty* (1914), 16 D.L.R. 313, 22 Can. Cr. Cas. 347, 19 B.C.R. 109; *R.* v. *Iman Din* (1910), 18 Can. Cr. Cas. 82, 15 B.C.R. 476.

In *The King* v. *Christie*, [1914] A.C. 545, it was laid down that the fact that the child identified the accused after the offence was committed was able to be shewn by the testimony of other witnesses, although such child had not been asked anything regarding that identification when giving the unsworn testimony in question. In *The King* v. *Bowes* (1909), 15 Can. Cr. Cas. 327, it was held that evidence that the child, who was seven years of age, had made to her mother, voluntarily, within some two hours after the attempted act, a statement implicating the defendant was in corroboration as required by the statute,—evidently as evidence of a verbal fact: it has been held also that the statements of a child to her natural guardian are not involuntary or inadmissible merely because they are in answer to questions put by such natural guardian, even after the lapse of some days from the time of the offence, provided that the questions themselves do not suggest the person to be named. See *The King* v. *Osborne*, [1905] 1 K.B. 551; *The King* v. *Spuzzum* (1906), 12 Can. Cr. Cas. 287, 12 B.C.R.

ANNOTATION 291; *The King* v. *Iman Din* (1910), 18 Can. Cr. Cas. 82; *R.* v. *McGivney* (1914), 15 D.L.R. 550, 22 Can. Cr. Cas. 222, 19 B.C.R. 22.

The general rule regarding hearsay evidence as such is exemplified in *R.* v. *South* (1903), 39 C.L.J. 639, where the child refused to give testimony. The Crown offered the evidence of two witnesses who told what the child had told them, but this was held inadmissible. Of course, there could not be, strictly, corroborative evidence, if there were nothing to be corroborated, and here, as indicated, the child refused to give the evidence required to be corroborated . . . When a witness gives evidence of a statement made to him by another person, the question as to whether such evidence is direct evidence, hearsay evidence, or evidence of a verbal fact which, in its last analysis, is also direct evidence, is a question of fact in every case in which the matter arises. Other instances: Isaacs, L.J., in *R.* v. *Murray* (1913), 30 Times L.R. 196, indicates that the Judge should point out to the jury that, "there must be corroboration" of the child's evidence before it can regard that evidence at all. *R.* v. *Davies* (1915), 85 L.J. (K.B.) 208, 11 Cr App. R. 272, 25 Cox C.C. 225.

ACCOMPLICES.

Before leaving the subject of corroborative evidence as required by statute, something should be said on the subject of the evidence of accomplices. In this field corroboration is not required by statute, but is by natural discretion. Reference to this matter is made because of considerable confusion which, apparently, has arisen on the point.

The jury should be told by the trial Judge that it ought not to convict upon the uncorroborated evidence of an accomplice (see *R.* v. *Frechette*, 51 D.L.R. 246, 32 Can. Cr. Cas. 409, 46 O.L.R. 610) but that it is strictly entitled at law to do so if it sees fit. See *R.* v. *Frechette*, *supra*; see also *R.* v. *McClain* (1915), 23 D.L.R. 312, 23 Can. Cr. Cas. 488, 8 Alta. L.R. 73; *R.* v. *Betchell* (1912), 5 D.L.R. 497, 19 Can. Cr. Cas. 423. In other words, the Judge should warn the jury of the inadvisability of placing too much importance in an accomplice's testimoney, but should point out that it may use its own discretion in accepting or rejecting such evidence without corroboration, when coming to a decision as to conviction. It has been said, though, that such corroboration should, as a matter of discretion, extend to both the circumstances of the crime and the identity of the prisoner as the person committing the criminal

act. *R.* v. *Farler* (1837), 8 Car. & P. 106; *The Queen* v. *Stubbs* (1855), 25 L.J. (M.C.) 16, 4 W.R. 85, 7 Cox C.C. 48; *The King* v. *Ah Jim* (1905), 10 Can. Cr. Cas. 126. In *R.* v. *Neal* (1835), 7 Car. & P. 168; *R.* v. *Jellyman* (1838), 8 Car. & P. 604; *R.* v. *Ampman*, 115 C.C.C. Sess. Pap. 294, evidence by the accomplice's wife was not considered such corroboration because it was held not to be independent,—nor, indeed, has the evidence of another accomplice been held to be sufficient. *R.* v. *Noakes* (1832), 5 Car. & P. 326; *R.* v. *Gay* (1909), 2 Cr. App. R. 327. ANNOTATION

A very recent and most instructive case is *R.* v. *Frechette* (1920), 51 D.L.R. 246, 32 Can. Cr. Cas. 409, 46 O.L.R. 610. In this case the charge was one of the theft of whisky from a railway company. One alleged accomplice gave evidence for the Crown, and two other alleged accomplices gave evidence for the defence. The jury was instructed by the Judge that if the jury considered the three witnesses in question accomplices, it could not accept their evidence in the absence of corroboration. The Crown counsel considered that the evidence of the two testifying for the defence required corroboration. The counsel for the defence submitted that the two called for the defence had not been proved to be accomplices and, at his request the Judge recalled the jury and told it that it might accept the evidence of the "accomplices" if it so desired, without corroboration. A feature was that both of the alleged accomplices who testified for the defence, and the defendant denied that they or he had anything whatsoever to do with the theft. . . On a stated case it was held that the discretionary rule requiring corroboration did not apply to the evidence of accomplices or of alleged accomplices testifying for the defence, such as "the rule of practice and experience" in the case of accomplices testifying for the Crown, which requires the warning of the jury as previously indicated. It was held that the jury was misdirected as to the necessity for corroboration, that there could not be said to have been no substantial wrong resulting from such misdirection (see R.S.C. 1906, ch. 146, sec. 1019), and that there should therefore, be a new trial. (See judgment of Magee, J.A., 51 D.L.R., at 287).

Obviously, if the charge be one of those mentioned under secs. 1002, or 1003—under the latter the cases would be very, very rare—the corroboration of an accomplice testifying for the Crown would be required by the provisions of those sections, if he be the witness whose evidence is that "mainly relied upon by the Crown for a conviction."

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ROTMAN v. PENNETT.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins and Ferguson, JJ.A. January 20, 1921.

DAMAGES (§ IIIP—340)—AGREEMENT FOR LEASE OF STORE—INFIRMITY OF TITLE—LESSOR ACTING IN GOOD FAITH—MEASURE OF DAMAGES—LEGAL EXPENSES.

Breach of an agreement to make a lease of a store and premises being due to infirmity of title, the lessor, defendant, acting in good faith and believing that she had the right to make the lease does not entitle the plaintiff to damages for loss of profits, but only to the amount of the proper and necessary preparatory legal expenses.

[*Bain* v. *Fothergill* (1874), L.R. 7 H.L. 158 followed; *Rotman* v. *Pennett* (1920), 54 D.L.R. 692, 47 O.L.R. 433, affirmed.]

APPEAL by the plaintiffs from the judgment of LENNOX, J., 54 D.L.R. 692, 47 O.L.R. 433, in an action for damages for breach of defendant's agreement to make a lease to the plaintiffs of a store and business. Affirmed.

I. F. Hellmuth, K.C. and *H. A. O'Donnell*, for defendant.

The judgment of the Court was delivered by

MEREDITH, C.J.O.:—We think this case is governed by the rule laid down in *Bain* v. *Fothergill* (1874), L.R. 7. H.L. 158. That, no doubt, was an artificial rule, and was based upon the difficulty of proving titles to real property in England, but it has been adopted in this country and is the law.

Now, in this case fraud is out of the question. What prevented the respondent from implementing her contract to give a lease and possession was a defect in her title. It is not a case where she misunderstood the terms of the lease, but it is a case in which the property came to her from her husband with the defective title, that is, incumbered by the lease to Peter Johnson, and that prevented her from carrying out her contract.

The cases in England go much farther than that, and Lord Chelmsford, in *Bain* v. *Fothergill*, said at p. 207, that, "if a person enters into a contract for the sale of a real estate knowing that he has no title to it, nor any means of acquiring it, the purchaser cannot recover damages beyond the expenses he has incurred by an action for the breach of the contract; he can only obtain other damages by an action for deceit."

That case was followed by Russell, J. in *Grindell* v. *Bass*, [1920] 2 Ch. 487, at p. 494; in which he held that the vendor who knew

he had no title was not liable for any more than the expenses incurred in investigating the title.

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Appeal dismissed.

REX v. BONDY.

Ontario Supreme Court, Orde, J. January 25, 1921.

INTOXICATING LIQUORS (§ IIIA—55)—REPORT BY ACCUSED TO POLICE THAT HE HAD LOST 18 CASES OF LIQUOR—NO LIQUOR FOUND ON PREMISES—EVIDENCE OF POSSESSION—PRIMA FACIE EVIDENCE OF SALE UNDER SEC. 88 OF ONTARIO TEMPERANCE ACT—NO DIRECT EVIDENCE—CONVICTION BY MAGISTRATE UNDER SEC. 40.

Under sec. 88 of the Ontario Temperance Act, 1916, ch. 50, proof of possesion of 18 cases of liquor, which the accused claims to have been stolen, is *prima facie* evidence of selling contrary to the provisions of sec. 40 of the Act, and unless the accused proves that he did not commit the offence he may be properly convicted by a Magistrate on such evidence, although there is no direct evidence of sale. It is not necessary that liquor be found in the possession of the accused at the time the seizure is made.

[*Rex* v. *Moore* (1917), 30 Can. Cr. Cas. 206, 41 O.L.R. 372, followed. See Annotation on the Ontario Temperance Act, 61 D.L.R. 177.]

MOTION to quash the conviction of the defendant, by a Police Magistrate, for an offence against the Ontario Temperance Act, 1916, ch. 50.

H. J. Scott, K.C., for the accused.

F. P. Brennan, for the magistrate.

ORDE, J.:—The accused was convicted, by the Police Magistrate for the Town of Essex, of having, at the Town of Amherstburg, on September 12, 1920, unlawfully sold or otherwise disposed of 18 gallons of liquor contrary to the provisions of sec. 40 of the Ontario Temperance Act.

The evidence upon which the conviction is based is that about 7 a.m. on September 12, the accused called upon the Chief of Police of Amherstburg, and said he had lost 18 cases of liquor, the supposition being, I assume, that he was complaining that the liquor had been stolen. The Chief of Police with the License Inspector investigated the premises of the accused but found no liquor there. They did find certain things and signs about the rear of the premises to indicate that persons had been there with a motor car, and that some heavy articles had been taken across the fence, but there was absolutely nothing to shew that anything had been in fact removed from the house. The marks found by

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the police were equally consistent with the theory that something had been brought into the house, and there was nothing upon which to base a finding that liquor had been removed except the statement of the accused that he had had 18 cases of liquor in his possession, and that it was gone. There was no direct evidence whatever of any sale. It was stated by counsel for the magistrate that it was a common practice, when liquor had been sold, for the vendor to report to the police that his liquor had been stolen. Whether this is the case or not is, of course, immaterial, and no knowledge on the part of the magistrate that any such practice exists can justify a finding of fact upon insufficient evidence, though it may make the magistrate a little more cautious in accepting or believing tales about the theft of liquor.

If the conviction here depended solely upon any evidence that liquor had been sold, or even upon any evidence from which a convincing inference could be drawn that a sale had taken place, then it could not be supported. There was no such evidence. But there was evidence that the accused had had in his possession 18 cases of liquor; he admitted it at the trial. And this liquor is the liquor "in respect of, or concerning which, he is being prosecuted." Under sec. 88 proof of such possession is *primâ facie* evidence of guilt, unless the accused proves that he did not commit the offence. Counsel for the accused argued that the "possession" to which sec. 88 refers means possession at the time that the search is made, that is, that there must be evidence that liquor is *found* in the possession of the accused, and that evidence that the accused has previously had liquor in his possession is not sufficient. There is much force in this argument, but the question is settled, until a higher Court holds otherwise, by the judgment of my brother Middleton in *Rex* v. *Moore* (1917), 30 Can. Cr. Cas. 206, 41 O.L.R. 372. It is true that in that case liquor was also found in the premises of the accused, but the judgment is not based upon the finding of liquor, but upon the fact that the accused had had liquor in his possession which he could not account for. There is no distinction between that case and this, beyond the fact that the failure to find any liquor upon the premises in the present case throws up the real point in question into rather sharper relief. It is to be noted that sec. 88 really makes no reference to the "finding" of liquor in the possession

of the accused at all; it refers merely to proof of possession. I cannot therefore hold that the magistrate had no evidence upon which to convict.

The motion must be dismissed with costs.

Motion dismissed.

QUARTIER v. FARAH.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee and Ferguson, JJ.A. January 31, 1921.

CURRENCY (§ I—1)—FRENCH ADVOCATE—ACTION TO RECOVER FEE FOR SERVICES—CHARGE MADE IN FRENCH CURRENCY—RECOVERY OF JUDGMENT FOR EQUIVALENT IN CANADIAN CURRENCY—VALUE ESTIMATED AT RATE OF EXCHANGE AT THE DATE OF JUDGMENT.

An advocate in France who sues in Ontario to recover the sum of 2000 francs for services upon the taking of evidence under a foreign commission, is entitled only to recover the equivalent of that sum in the currency of Canada according to the rate of exchange which prevailed when the judgment was pronounced in the action.

[*Lebeaupin* v. *Crispin*, [1920] 2 K.B. 714, at p. 724; *Di Ferdinando* v. *Simon Smits & Co.*, [1920] 3 K.B. 409; *Cockerell* v. *Barber* (1810), 16 Ves. 461, 33 E.R. 1059; *Manners* v. *Pearson & Son*, [1898] 1 Ch. 581; *Judson* v. *Griffin* (1863), 13 U.C.C.P. 350; *Crawford* v. *Beard* (1864), 14 U.C.C.P. 87; *Morrell* v. *Ward* (1863), 10 Gr. 231; *White* v. *Baker* (1864), 15 U.C.C.P. 292; *Stephens* v. *Berry* (1865), 15 U.C.C.P. 548, referred to and applied.]

AN appeal by the defendant from the judgment of the County Court of the County of Carleton in favour of the plaintiff for the recovery of $400 for services of the plaintiff as an advocate in France acting upon behalf of the defendant upon the taking of evidence under a foreign commission.

The plaintiff's claim was for "Frs. 2,000 $400."

The questions upon the appeal were whether the plaintiff was entitled to recover $400, or only the equivalent in Canadian currency of 2,000 francs, and, if the latter only, as of what date its value in Canadian currency was to be ascertained.

W. L. Scott, for appellant.

A. Lemieux, K.C., for plaintiff.

MEREDITH, C.J.O.:—This is an appeal by the defendant from the judgment of the County Court of the County of Carleton, dated the 17th February, 1920, which was directed to be entered after the trial, without a jury, on the previous day.

The questions for decision are, whether the respondent is entitled to recover $400, or only the equivalent in Canadian cur-

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rency of 2,000 francs, and, if the latter sum, as of what date its value in Canadian currency is to be ascertained.

The respondent is an advocate residing and practising in Paris, France, and was retained on behalf of the appellant in connection with the taking of evidence under a commission in a proceeding against the appellant in a Court in the Province of Quebec.

The proper conclusion, in my opinion, is that the respondent's fee for the services rendered by him was 2,000 francs, not $400. The services having been rendered in France, it was natural that the fee for them should be stated in the currency of that country. I have no doubt that, had the respondent been asked what his fee was, he would have said 2,000 francs; and, according to the testimony of Mr. Bisaillon, the witness relied on by the respondent to prove his claim, "Mr. Quartier always claimed 2,000 francs for his appearance and attendance before the commission."

It is true that to the question, "How much did Mr. Quartier ask for acting as special counsel for Mr. Farah on the commission?" Mr. Bisaillon answered, "$400." That question was followed by the question, "Do you know that Mr. Quartier is now claiming 2,000 francs from Mr. Farah for that special work?" to which the answer was, "Yes."

Following the detailed statement of the services rendered by the respondent are the words and figures:—

"Frs. 2,000 $400."

It is reasonably clear, I think, that $400 is not mentioned as the fee, but is a statement of the equivalent in dollars of 2,000 francs, and it was so treated by counsel for the respondent, and by Mr. Bisaillon at the trial.

I apprehend that if conditions were such that $400 would not be equivalent, according to the current rate of exchange, to 2,000 francs, the respondent would be much surprised if he were asked to take less than the 2,000 francs.

Assuming then that the respondent's fee was 2,000 francs and not $400, for what sum in dollars should the judgment be entered? This raises a very important question.

If our law permitted the amount recovered to be expressed in the foreign currency, the amount recovered would be 2,000 francs, and the judgment would be satisfied by the payment of the

equivalent of that sum in the currency of Canada, which would be determined on the basis of the prevailing rate of exchange; and I see no reason why the same result should not follow when the amount recovered is to be expressed, as it must be, in the currency of Canada: Currency Act, 1910, (Can.) ch. 14, sec. 15.

There is a conflict of judicial opinion and in the views of text-writers on the question.

The view expressed in Westlake's Private International Law, 5th ed., para. 226, p. 315, is that:—

"A debt payable abroad being recovered in England, the judgment must be for so much English money as, if remitted to the country where the payment ought to have been made at the rate of exchange current at the time the judgment is recovered, will there produce the amount of the debt, with any interest or damages included in the judgment."

The authority cited for that proposition is *Scott* v. *Bevan* (1831), 2 B. & Ad. 78, 109 E.R. 1073, 9 L.J. (K.B.) O.S. 152. In that case the action was brought on a Jamaica judgment, and it was held that the judgment should be for such sum in sterling money as the Jamaica currency would have produced according to the actual rate of exchange between Jamaica and England at the date of the judgment.

In Mayne on Damages, 9th ed., p. 271, *Scott* v. *Bevan* is treated as having decided that judgment should be given for the value in sterling money which the currency of Jamaica would have produced according to the rate of exchange between that country and England at the date of the Jamaica judgment, but at first sight that would seem to be a mistake.

Scott v. *Bevan* was treated by McCardie, J., in *Lebeaupin* v. *Crispin*, [1920] 2 K.B. 714, at p. 724, to which I shall afterwards again refer, as having determined that the governing rate of exchange was that prevailing at the date on which the English judgment was recovered; but in *Di Ferdinando* v. *Simon Smits & Co.*, [1920] 3 K.B. 409, it was stated by Bankes, L.J. (pp. 412, 413), and by Scrutton, L.J. (pp. 415, 416), that McCardie, J., had proceeded upon a misapprehension of the judgment, owing, as the last named Lord Justice said at p. 415, "to the report being expressed in somewhat ambiguous terms," and that what the plaintiff had recovered was the equivalent of Jamaican currency calculated upon

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the rate of exchange prevailing at the date of the Jamaica judgment.

In a subsequent case—*Bertram* v. *Duhamel* (1838), 2 Moore P.C. 212, 12 E.R. 984,—it was decided by the Judicial Committee of the Privy Council on appeal from the Royal Courts of Jersey that "the rate of exchange at which a creditor is entitled to recover on account of money received under a specific authority, to be applied in a particular manner, is according to the rate at the time and place specified, where the default in payment was made, and not at the time the judgment for the recovery of the sum is recorded."

Sir Thomas Erskine, who delivered the judgment, referred (p. 217) to *Cash* v. *Kennion* (1805), 11 Ves. 314, 32 E.R. 1109, in which Lord Eldon said: "I cannot bring myself to doubt, that where a man agrees to pay £100 in London upon the 1st of January, he ought to have that sum there on that day. If he fails in that contract, wherever the creditor sues him, the law of that country ought to give him just as much as he would have had if the contract had been performed;" and said that, according to that opinion, "if any specific time and place had been fixed by the contract of the parties for the repayment, then the rate of exchange at the time and place specified would be the measure of the amount to be recovered."

The case was decided as it was because, upon a consideration of the facts, the conclusion was reached that the debtor had engaged to remit the money which he had received towards the latter end of October, 1828, and the case was, therefore, one falling within the principle of *Cash* v. *Kennion*.

In *Suse* v. *Pompe* (1860), 8 C.B.N.S. 538, 141 E.R. 1276,7 Jur. (N.S.)166, 9 W.R. 15, 30 L.J. (C.P.) 75, the action was on a bill of exchange drawn and endorsed in England, and payable abroad, which had been dishonoured by the acceptor's non-payment, and it was held that the holder was entitled as against the drawer to the amount of the re-exchange, that is, the value, at the rate of exchange on the day of the dishonour, of the sum expressed on the face of the bill in the currency of the place where it was payable, with interest and expenses.

In *Cockerell* v. *Barber* (1810), 16 Ves. 461, 33 E.R. 1059, the question was as to how payment was to be made of a legacy in a foreign country and coin, and it was held by Lord Eldon that it

must be according to current value of the coin in the foreign country at the time when the legacy was to be paid.

All of these cases were referred to in *Manners* v. *Pearson & Son*, [1898] 1 Ch. 581, the facts of which were that the defendants had entered into a contract with Arthur Duff Morison, whose personal representative the plaintiff was, to pay him monthly one cent in Mexican currency per cubic metre of certain excavation works in Mexico, as and when payment should be received by the defendants from the Mexican authorities. Morison died in 1894, and his personal representative was not appointed until 1896. In an action brought in June, 1896, for an account, the Court, on the 4th November, 1897, declared that the plaintiff was entitled to an account of what was due on the contract. On the 13th November of that year the defendants delivered an account shewing that 19,366 Mexican dollars were due to the plaintiff on the 31st August, 1896, and offered to pay that amount in Mexican currency or in English currency at the rate of exchange on the 13th November, 1897. This offer was refused by the plaintiff, who contended that the value of the dollars should be ascertained at the several times the monthly payments became due, or on the 31st August, 1896. It was held by a majority of the Court of Appeal, Vaughan Williams, L.J., dissenting, that the plaintiff was not entitled to have the Mexican dollars turned into English money until the amount due on taking the whole account was ascertained. Vaughan Williams, L.J., was of opinion that the contention of the plaintiff was well-founded. After referring to *Scott* v. *Bevan* and *Suse* v. *Pompe*, he said (p. 592): "It seems plain that this mode of computing the value of foreign currency in English sterling" (i.e., the mode of computing adopted in these cases), "and thus converting the one currency into the other, is based upon damages for the breach of contract to deliver the commodity bargained for at the appointed time and place, and, if this is so, it follows that the date as of which that value must be ascertained is the date of the breach, and not the date of the judgment;" and his view was (pp. 592, 593) that the same mode of computation should be adopted in a case where the form of action is an action for an account.

The later English cases I shall afterwards refer to.

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I have found seven reported cases in the Courts of this Province in which the question was considered.

Judson v. *Griffin* (1863), 13 U.C.C.P. 350, is the first of them. The action was brought to recover the amount of a promissory note made and payable in the State of New York. It was shewn that at the time of the trial exchange was 50 per cent. in favour of Canada, but the Court said (p. 355) that that "was not evidence to shew that such was the case when the note became due."

Crawford v. *Beard* (1864), 14 U.C.C.P. 87, is the next case. The action was for the price of coal which, according to the finding of the Court, was to be delivered in Cleveland and paid for on delivery. The defendants paid into Court the amount owing, calculating it according to the rate of exchange, which was much in favour of Canada; it does not appear as of what date the calculation was made, but it is, I think, to be inferred that it was of the date of the payment into Court. The defendants succeeded; and, delivering the judgment of the Court, Adam Wilson, J., quoted with approval the passage from Story to which I shall afterwards refer. This case was also before the Court on demurrer (1863), 13 U.C.C.P. 35.

The next case is *Morrell* v. *Ward* (1863), 10 Gr. 231, a decision of VanKoughnet, C. The date given in the report is 1863, but it is clear that the decision was pronounced after that in *Crawford* v. *Beard*, because that case is referred to and approved. The action was brought on a mortgage, and the mortgage money was payable in "lawful money of the United States of America," in which country both the mortgagor and mortgagee lived. The decision of the Chancellor (p. 233) was that the mortgagee was entitled at his option "to take his money according to the value of the current or lawful money of the United States at the time of default made, and money payable, or at any time subsequently, when he is paid or tendered his mortgage money."

In the same year, (1864), *White* v. *Baker*, 15 U.C.C.P. 292, was decided. The action was on two promissory notes made in Illinois and payable in six months after date. The defendant tendered before action, and paid into Court, a sum in lawful money of Canada, which it was alleged was "at the time aforesaid," which I understand to have meant at the maturity of the notes, equal to the sum claimed. The plaintiffs demurred, and their demurrer

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was allowed upon a somewhat technical ground, turning upon the language of the plea. Delivering the judgment of the Court, Adam Wilson, J., said that the plea should have been that the sum paid into Court was equal to a certain sum of the currency of the United States. He also criticised the statement of Westlake as to the time when the rate of exchange is to be determined, and expressed the opinion that the calculation should be made according to the rate which prevailed when the notes became due.

The question was again discussed in *Stephens* v. *Berry* (1865), 15 U.C.C.P. 548. The action was upon a bill of exchange payable in New York "with current funds" 60 days after date, and it was held that the plaintiffs were entitled to recover an amount equal to the value of the sum to be paid at the place of payment on the day the payment should have been made, with interest.

White v. *Baker* was followed in *Massachusetts Hospital* v. *Provincial Insurance Co.* (1866), 25 U.C.R. 613, which was an action on a covenant entered into in Toronto to pay a sum of money in New York on a stated day.

Hooker v. *Leslie* (1868), 27 U.C.R. 295, is the last of these cases. It was an action on a promissory note payable at a place in the United States but not "not otherwise or elsewhere." The defendant pleaded that when the note fell due treasury notes of the United States Government were a legal tender in payment of all notes; that $144.53 of lawful money of Canada then equalled in value treasury notes to the amount of the note, and he paid that sum into Court. It was held that the note was, in its legal effect, payable generally, and that the plaintiff was entitled to recover the amount of the note in Canadian money. In stating the opinion of the Court, Hagarty, J., said (p. 300):—

"We may assume that if this contract be, as the defendant insists, performable in the foreign country, he is not bound to pay more than an amount equal to the foreign currency at maturity."

It will be observed that in all these cases the money was payable at a fixed or definite time, and that all of them, except two, were upon promissory notes or bills of exchange, the rule as to which is settled, and is that the rate which prevails when the money is payable is to govern; and it is now provided by sec. 163 of the Bills of Exchange Act, R.S.C. 1906, ch. 119, that that is to be the governing rate as to bills drawn out of but payable in Canada,

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where the sum payable is not expressed in the currency of Canada; and it is also provided by sec. 136 of the same Act that:—

"In the case of a bill which has been dishonoured abroad . . . . the holder may recover from the drawer or any endorser, and the drawer or an endorser who has been compelled to pay the bill may recover from any party liable to him, the amount of the re-exchange with interest thereon until the time of payment."

This was the law before the Act, and depended upon the custom of merchants, in accordance with which the holder of a bill payable in a foreign country in the currency of that country, which was dishonoured, was entitled to raise there the exact number of the pieces of the foreign currency which was to be paid, by drawing and negotiating a cross-bill payable at sight on his British customer for as much English money as would produce in the foreign country the exact number of pieces of the currency at the rate of exchange on the date of the dishonour.

The principle upon which those Judges who have held that the date at which in all cases the value of the foreign currency is to be ascertained is the time when payment is to be made, is, that foreign currency is a commodity, and that the value of it is to be ascertained, as in cases of other commodities, as of the time when it should have been delivered.

The question is elaborately discussed in Story's Conflict of Laws, 8th ed., p. 425 *et seq.* Referring to *Scott* v. *Bevan*, it is said (p. 426): "It is difficult to reconcile this case with the doctrine of some other cases," and reference is made to *Lee* v. *Wilcocks* (1819), 5 Serg. & R. (Pa.) 48. In that case the payment was made in Turkish piastres, and it was held to be the settled rule at p. 49, "where foreign money is the object of the suit, to fix the value according to the rate of exchange at the time of the trial." The author says that: "It is impossible to say that a rule laid down in such general terms ought to be deemed of universal application; and cases may easily be imagined which may justly form exceptions;" and then states what, in his opinion, the proper rule is, as follows (p. 426):—

"The proper rule would seem to be, in all cases, to allow that sum in the currency of the country where the suit is brought, which should approximate most nearly to the amount to which the party

is entitled in the country where the debt is payable, calculated by the real par, and not by the nominal par of exchange."

He further says (p. 427) that consideration must be had as to "the place where the money is, by the original contract, payable; for wheresoever the creditor may sue for it, he is entitled to have an amount equal to what he must pay, in order to remit it to that country."

It is then pointed out (p. 428) that there is an irreconcilable difference in some of the authorities on the subject.

In New York and in Massachusetts the rule adopted in all cases except those relating to bills of exchange is that the creditor is entitled to recover according to the par of exchange, and not the rate of exchange necessary to remit the amount to the foreign country.

In the Circuit Courts of the United States the opposite doctrine has been maintained, and it is held that the general doctrine is that the creditor is entitled to receive the full sum necessary to replace the money in the country where it ought to have been paid, with interest for the delay.

The case of *Pilkington* v. *Commissioners for Claims on France* (1821), 2 Knapp 7, 12 E.R. 381, and the opinions of foreign jurists are referred to. In the *Pilkington* case the question was as to the amount which the French Government ought to pay under the following circumstances. That Government had confiscated all debts due by the subjects of France to the subjects of Great Britain. The decree of confiscation was afterwards repealed. After the repeal, the debtor paid into the French treasury, in the name of his creditor, the amount of his debt, calculated in the currency of the time of payment, which was much depreciated since the debtor had acknowledged his indebtedness before the proper authorities. The British Government had entered into a treaty with France, by which that country was to make compensation for all undue confiscations and sequestrations, and the question was as to how the amount which was to be paid was to be calculated. What was decided was that the calculation must be made as of the date of the debtor's declaration, the ground of the decision being that the case was to be treated, not as a case between debtor and creditor, but of reparation by a wrongdoer. No opinion was expressed as to what, as between the debtor and the creditor,

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would have been the latter's right, although that subject was discussed.

The rule suggested by Story does not touch the question with which we have to deal, viz., as of what date is the calculation to be made?

I have already referred to what was decided in *Lee* v. *Wilcocks*. The rule applied in that case was adopted and applied by the Supreme Court of Wisconsin in *Hawes* v. *Woolcock* (1870), 26 Wis. 629, which was an action on a promissory note made in Canada and payable in Canadian currency. Paine, J., delivering the judgment of the Court, said (pp. 635, 636):—

"Perhaps a strict application of logical reasoning to the question would lead to the result that the premium should be estimated at the rate when the note fell due . . . . in view of these uncertainties and fluctuations in the rate, upon grounds of policy as well as for its tendency to do as complete justice between the parties as is possible, we have come to the conclusion that the true rule in such cases is to give judgment for such an amount as will, at the time of the judgment, purchase the amount due on the note in the funds or currency in which it is payable."

The disposition of the appeal has been delayed because of the importance of the question to be determined and of there being no means by which our decision could be reviewed by a higher Court, in the hope that the law might be authoritatively declared by the English Courts in cases pending in that country.

Although it cannot be said that the law applicable to the facts of such a case as the one at bar has yet been authoritatively declared, enough has been decided to enable us to dispose of the appeal.

Since the appeal was argued, six cases bearing upon the question have been decided in England.

The first of them is *J. A. Kirsch and Co.* v. *Allen Harding and Co. Limited*, [1919] W.N. 301, 36 Times L.R. 59, 122 L.T.R. 159, a decision of Roche, J.; the next *Di Ferdinando* v. *Simon Smits & Co.*, [1920] 2 K.B. 704, a decision of the same Judge, affirmed by the Court of Appeal, [1920] 3 K.B. 409; then *Barry* v. *Van den Hurk*, [1920] 2 K.B. 709, a decision of Bailhache, J., followed by *Lebeaupin* v. *Crispin*, [1920] 2 K.B. 714, a decision of McCardie, J.;

then *The Volturno*, [1920] P. 447, a decision of Hill, J.; and lastly *Cohn* v. *Boulken* (1920), 36 Times L.R. 767, a decision of Acton, J.

All of these, except *The Volturno* and the *Cohn* case, were cases in which the plaintiffs were entitled to unliquidated damages for breaches of contract, and, except in the *Kirsch* case, it was held that the amount in English money which they were entitled to recover was the equivalent of the foreign currency, calculated according to the rate of exchange prevailing at the date of the breach. In the *Volturno* case the damages to be assessed were damages arising from a collision between two vessels, and the same rule was applied.

In the *Di Ferdinando* case the plaintiff, who carried on business in Milan, Italy, purchased in England 25 tons of sodium sulphide, and the defendants, a firm of shipping agents and shippers, contracted to carry the sulphide for the plaintiff and to deliver it to him in Milan on the 10th February, 1919. The defendants failed to deliver the sulphide. The Judge fixed the value of the sulphide on the 10th February, 1919, at 190 lire per 100 pounds and held that the amount for which judgment was to be entered was to be determined according to the rate of exchange prevailing on that day, and, as I have said, his ruling was affirmed by the Court of Appeal.

This ruling, in my judgment, should be taken to be correct. The basis of it was that what the plaintiffs had lost was what it would have cost them on the 10th February, 1919, to replace the goods that the defendants had failed to deliver, and it was held that it followed that, if that was 190 lire per 100 pounds, the amount of the loss expressed in terms of English money was the equivalent of the Italian currency ascertained according to the rate of exchange prevailing on that day.

It must be admitted that some anomalous result may follow from this conclusion. The exchange on the 10th February, 1919, and for a considerable period after that day, was 31 lire to the pound, but it was at the date of the trial 62 lire to the pound. Had the defendants before action tendered to the plaintiffs in Italy the number of lire they were liable to pay, and pleaded the tender and paid into Court the equivalent in English money according to the exchange on the date of the tender, they would have been entitled to succeed in the action; or, again, if they had

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been sued in Italy, judgment would have passed against them for the 190 lire per 100 kilos, and they could have satisfied the judgment by paying that sum in lire, so that in each of these cases the plaintiffs would have received just one half of the sum for which they recovered judgment.

However, as far as a decision of the Court of Appeal may be said to settle the law, the law as applicable to such cases as these is settled, and in a similar case I think that a Divisional Court of this Province should follow the *Di Ferdinando* case.

That, however, does not dispose of the question which we have to decide. The respondent's claim is not for the recovery of unliquidated damages for breach of a contract, but he is suing for a debt owing to him for services performed by him for the appellant; and the principle of the decision in the *Di Ferdinando* case has, in my opinion, no application.

In the *Lebeaupin* case, McCardie, J., seems to consider that there may be a different rule from that which he applies where the claim is for a liquidated sum ([1920] 2 K.B. at p. 725), and on p. 723, referring to Story on the Conflict of Laws (secs. 308 to 312), he said: "Story does not appear to distinguish between non-payment of a debt and non-payment of ordinary damages for breach of contract."

Roche, J., in the *Di Ferdinando* case, referring to cases that had been cited, said ([1920] 2 K.B. at p. 708): "These, however, were all cases where the defendant was indebted to the plaintiff in a sum of money in foreign currency, and the question to be solved was what sum in English money was to be paid in order to satisfy that sum of money in foreign currency. It seems to me that the conclusion is natural if not inevitable that the rate of exchange at the time of suit or judgment must be the rate to be adopted in such circumstances."

In the *Di Ferdinando* case the observations of Scrutton, L.J. ([1920] 3 K.B. at p. 416), seems to indicate that he entertains the same opinion. He is there reported to have said:—

"In some cases of non-payment of money the plaintiff recovers interest by agreement; in other cases, where there is no agreement for payment of interest, and the case cannot be brought within any statute giving a right to interest, interest may yet be awarded by way of damages for the failure to pay on the agreed day . .

It occurred to me it might possibly be that subsequent variation in the exchange could be included in the damages, in the nature of interest. I have been unable to find that interest by way of damages has ever been allowed to cover alteration in the exchange, and counsel have also been unable to find any such case. I think the reason is the one that I have already given—namely, that those damages are too remote. The variation of exchange is not sufficiently connected with the breach as to be within the contemplation of the parties."

Cohn v. *Boulken* was an action on a cheque for 7,680 Paris francs, and Acton, J., held that the rule as to the conversion of foreign currency into sterling in actions of debt differed from the rule in actions for damages, and that the plaintiff was entitled to the sterling equivalent for the 7,680 francs at the rate of exchange on the day of the trial.

This ruling is contrary to the opinion I have expressed as to the effect of the Bills of Exchange Act and the custom of merchants; but, if correct, it is *à fortiori* that the rule is applicable to the claim for which the respondent is suing in the case at bar.

My conclusion is that the value of the 2,000 francs owed to the respondent, not being damages for breach of a contract, and not being money payable at a fixed time and place, must be determined according to the rate of exchange which prevailed when judgment was pronounced in the Court below, and that with that variation the judgment should be affirmed

If the parties are unable to agree as to what that rate was, the case may be spoken to before a member of this Court.

I would leave each party to bear his own costs of appeal.

MACLAREN and FERGUSON, JJ.A., agreed with MEREDITH, C.J.O.

MAGEE, J.A.:—In 1912 and 1913, when the plaintiff's services were retained and performed, he resided, as since and still, in France; and the defendant then and since resided in Ontario. The defendant by letter and verbally instructed Mr. Bisaillon, a member of the Quebec Bar, to retain the plaintiff, an advocate, to act for the defendant on the taking of evidence in France under a commission issued in a prosecution then pending against the

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defendant in Ontario. The plaintiff's charge was made in francs, and the defendant had been frequently asked in 1913 and 1914. to pay the amount, 2,000 francs, or rather its equivalent, $400 When, after the war began, and in the plaintiff's absence with his regiment, the account was rendered, the previous equivalent, $400, was placed opposite the sum of 2,000 francs. And it is significant that the mistaken contention of the defendant at the trial was that a sum of $600 which he had paid to Mr. Bisaillon in 1913, as the equivalent of 3,000 francs, was for these services of the plaintiff.

The defendant being resident in Ontario, and this being a simple contract liability, not evidenced by a document such as a bond or bill of exchange, it was an asset situate in the country of the debtor, in which it could be recovered and enforced: Dicey on Conflict of Laws, 1st ed., pp. 318, 319. Being an Ontario asset and payable here, the amount actually due and recoverable here was at that time, in round numbers, $400. It has ever since remained an Ontario asset, and I see no reason why it should be reduced in the Courts of Ontario, especially when the real reason for any reduction is a change in the law of France whereby payment in gold there can no longer be enforced.

It is, I think, the result of the cases that if, instead of the plaintiff's claim being for a specific sum for services, he were entitled to damages, those damages would be assessed here at the rate of exchange existing when the damage accrued. I am unable to understand any principle upon which a sum payable on the 1st July, 1913, for a debt, should be treated in any different way from plaintiffs, subcontractors and lien-holders, entitled to enforce the like sum then payable for damages, and the less so when one considers that, though the plaintiff claimed a specific sum for his services, it was open to the defendant to dispute the amount and have it reduced if he could to the proper *quantum meruit*—and that it would formerly have been recoverable in an action of assumpsit, which was really an action on the case, in which the amount was awarded strictly and only as damages.

I would dismiss the defendant's appeal.

Judgment below varied (MAGEE, J.A *dissenting*.)

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Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee and Hodgins, JJ.A. January 31, 1921.

BROKERS (§ IIA—5)—AGENT'S COMMISSION ON SALE OF LAND—AGENT'S AUTHORITY—WITHDRAWAL AFTER OFFER OBTAINED BY AGENT—BONA FIDES—SALE BY PRINCIPAL—RIGHT OF AGENT TO COMMISSION.

A real estate agent who has authority in writing from the owner to sell certain property at a stated price, the owner agreeing to pay him a stipulated rate of commission should a sale be effected, and whose authority is to remain until withdrawn in writing by the owner; who acting in good faith finds a purchaser who is ready and willing to purchase at the agreed price, is entitled to recover the agreed commission notwithstanding that the owner has previously sold the property to a third party, no notice in writing according to the agreement having been sent to the agent until after his offer to purchase has been submitted to the owner for acceptance.

[*Adamson* v. *Yeager* (1884), 10 A.R., (Ont.) 477, distinguished. See Annotation on Brokers, 4 D.L.R. 531.]

THE following statement is taken from the judgment of HODGINS, J.A.:—

Appeal by the plaintiff from the judgment of KEHOE, Judge of the District Court of the District of Sudbury, dismissing the appellant's action, brought in that Court, for commission as agent in finding a purchaser for the respondent's (defendant's) property in Sudbury.

The authority was given on the 16th September, 1919, and is as follows:—

"Sudbury, Ont., Sept. 16, 1919.

"P. Gorman & Co.,

"Sudbury, Ont.

"Sir: You are hereby authorised from this date, and until withdrawn by me in writing, to offer for sale the property described on the reverse side of this card for the price of $7,500, and I agree to pay you the regular rate of commission, 2½ per cent., on this or the selling price, should you effect a sale.

"Owner—H. S. Young,

"Address—Niagara Falls, Ont."

On the same evening, just as he was leaving by train for Niagara Falls, the respondent sold the property to one Mulligan for $7,000.

On the 18th September, the appellant obtained the following offer from one Busby and a cheque for $1,000:—

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"To Catherine Conn Busby, Sudbury. Paid $1,000.

I hereby offer and agree to purchase through P. Gorman & Co., agents, lot 78, block , having a frontage of about 50 feet on the south side of Cedar street, for $7,500 cash, payable .....$.....down, balance.....instalments of $..... Restrictions—vendor's form of contract to be executed within 15 days from date or deposit forfeited.

"Subject to owner's acceptance.

"Witness, Mac Peake. "C. C. Busby (seal).

"Accepted this 18 day of "per F. C. Busby, Atty."

"Sept. 1919, Sudbury, Ont."

The appellant forwarded the written offer and the cheque to the respondent on the same day, and they reached Niagara Falls on the 19th September.

No notice in writing was given to the appellant of the sale to Mulligan until the 20th September. On that day, the respondent, having received the Busby offer and cheque, returned them, advising the appellant of the previous sale.

J. E. Lawson, for appellant.

F. W. Griffiths, for respondent.

The judgment of the Court was delivered by

HODGINS, J.A.:—The judgment was supported on three grounds: (1) that Busby had no authority as agent to sign his wife's name; (2) that the letter of the 20th September was a written withdrawal, and was effective; (3) that the appellant was not entitled to the full commission, but only to recover in an action on a *quantum meruit*, citing *Adamson* v. *Yeager*, 10 A.R. (Ont.) 477.

As to the first ground: Busby produced a power of attorney from his wife, which, however, does not confer authority to buy land. Its terms are wide enough to shew that Busby had warrant for believing that he was his wife's general agent. However, apart from that, he swears that his wife was fully aware of the proposed purchase, and had, before the cheque was given, made all arrangements to complete it. This is not controverted in any way and is sufficient to make the offer her offer.

As to the second ground, the written notice of the 20th September, after the appellant had, pursuant to his authority, in good faith, procured the offer at the stipulated price, was ineffective to deprive him of whatever rights he thereby acquired.

As to the third ground, the authority of the appellant was such that he might have completed the contract to sell by accepting Busby's offer: *Keen* v. *Mear*, [1920] 2 Ch. 574; instead of which, he forwarded it on to the respondent for his sanction.

The *Adamson* case, relied on by the respondent, does not really help him. There the question was as to the duration of the authority, which the Court thought had in fact expired; but, in any case, as the defendant had refused to sell to the proposed purchaser procured by the plaintiff, an action would lie, not on the authority itself, but for damages for wrongful refusal to sell, or an action as for a *quantum meruit*. And, as pointed out by Burton and Osler, JJ.A. (10 A.R. (Ont.) at pp. 484 and 494), the proper measure of damages in that case would *primâ facie* be an amount equal to the full commission.

In the case now before us the offer received was for the full price stated in the authority, and no objection to it was taken except on the sole ground that the property had already been disposed of. So that, as the terms of the appellant's authority had been duly carried out before it was withdrawn in writing by the respondent, he would be entitled to recover, not damages, but the agreed payment for his services.

The appeal should be allowed and judgment entered for him for $187.50 and interest from the 18th September, 1919, with costs of action and of this appeal. *Appeal allowed.*

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Ontario Supreme Court, Orde, J. January 27, 1921.

WRIT AND PROCESS (§ IIC—37)—ORDER FOR SUBSTITUTIONAL SERVICE—IMPROPERLY ISSUED—MOTION TO SET ASIDE—SOLICITOR MAKING APPLICATION NOT SOLICITOR OF DEFENDANT—LOCUS STANDI—APPLICATION AS OFFICER OF COURT TO CORRECT ERROR—INHERENT JURISDICTION OF COURT TO CORRECT AN ABUSE OF PROCESS—RULE 16.

Where substitutional service is ordered by service on the alleged solicitor of an absent defendant, the solicitor may apply on behalf of the defendant to set aside the order on the ground that he is not the solicitor of the defendant and has no instructions from him, such application may be made as an officer of the Court, to advise the Court that an error has been committed and the Court exercising its inherent power will set aside the order where it is in substance an abuse of the process of the Court.

The mere fact that it is a matter of some difficulty to reach an absent defendant does not entitle the plaintiff to an order for substitutional service.

[*Taylor* v. *Taylor* (1903), 6 O.L.R. 356, explained; *Japhet* v. *Luerman* (1904), Annual Practice 1921, p. 78; *The Pommerania* (1879), 4 P.D. 195, discussed.]

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AN appeal by the plaintiff from an order of the Master in Chambers of the 8th January, 1921, setting aside an earlier order made by him, on the *ex parte* application of the plaintiff, authorising substituted service of the writ of summons upon the defendant Laduke.

J. S. Duggan, for the plaintiff.

Henry J. Martin, a barrister and solicitor, upon whom the writ was served pursuant to the Master's earlier order, appeared on behalf of the defendant Laduke (but without instructions from him) and as an officer of the Court, and supported the order appealed from.

ORDE, J.:—On the 16th November, 1920, the plaintiff issued a writ from the central office against the defendants Sainsbury and Laduke, both described as of Moose Factory, in the District of Temiskaming, claiming to recover 20,999 shares of the capital stock of the Belcher Islands Iron Mines Limited, to set aside a certain release, and for an injunction. The writ was served personally upon the defendant Sainsbury. Upon an affidavit of the plaintiff to the effect that it was impossible to effect prompt personal service upon the defendant Laduke, because he was "at present somewhere in the locality of Moose Factory" (which is a Hudson Bay post on the southern shore of James Bay), and that if the writ were served substitutionally upon Laduke by serving one James H. Gilmour, and Mr. Henry J. Martin, a practising barrister and solicitor in Toronto, the service would be brought to the notice of Laduke, the Master in Chambers made an *ex parte* order for substitutional service upon Mr. Gilmour and Mr. Martin and also by sending the same by registered letter to Laduke at Moose Factory. Upon being served with the writ, Mr. Martin moved before the Master in Chambers to rescind his order for substitutional service, and on the 8th January, 1921, the Master made an order rescinding the earlier order and setting aside the substitutional service of the writ.

The application to rescind the order was based upon affidavits made by Mr. Martin, Mr. Gilmour, and the defendant Sainsbury. They are to the effect that Laduke left Toronto for the Hudson Bay region in June last; that he has not been in Toronto since; and that his intention was to return to Toronto next May or June; that they have been informed that he has his headquarters at Fort George, in the Province of Quebec, about 300 miles north-east of

Moose Factory, and that he is engaged in fur trading with the Indians and Esquimaux in the Hudson Bay region and will be necessarily absent from Fort George and Moose Factory for some time; that there is no postal service to Moose Factory or Fort George; that the only way to communicate with Laduke is by dog-team from the railhead at Cochrane or Pagwa, which would cost a large sum of money; and that it would be doubtful whether he would be at Moose Factory when the messenger arrived, as he would probably be off at a great distance trading with the Indians and Esquimaux. Mr. Martin says he is not Laduke's solicitor, has no instructions from him, and has never discussed the matters in question in this action with him. Mr. Gilmour says he knows nothing about the matters in question in this action and is not acting in any way for Laduke.

From the Master's order of the 8th January, 1921, the plaintiff now appeals, upon the ground that Mr. Martin has no *locus standi* if he made the application otherwise than on behalf of the defendant Laduke, in support of which the plaintiff relies upon an unreported decision of Jelf, J., in *Japhet* v. *Luerman* (1904), Annual Practice for 1921, p. 78; and that if he makes it as representing Laduke he must be presumed to be doing so as his solicitor, and must, therefore, be deemed to have been instructed for the purpose of the motion, in which event he must be presumed to be able to communicate with Laduke. In support of the latter objection Mr. Duggan relies upon *Taylor* v. *Taylor* (1903), 6 O.L.R. 356, 545, and *Meldrum* v. *Allison* (1916), 10 O.W.N. 148.

The notice of Mr. Martin's motion to the Master in Chambers to rescind the order for substitutional service is signed "Henry J. Martin, on behalf of E. E. Laduke," and the rescinding order of the 8th January, 1921, purports to be made "upon the application of Henry J. Martin, acting on behalf of the defendant Eugene E. Laduke."

Rule 16, which deals with the service of the writ of summons, provides that "if it appears that the plaintiff is unable to effect prompt personal service, substituted service, by advertisement or otherwise, may be ordered." Such an order is, of course, made *ex parte*. Rule 217 enables "a party affected by an *ex parte* order" to move to rescind or vary the order before the Judge or officer who made it, and it was in the exercise of his power under this Rule that the Master in Chambers was acting when he

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rescinded the earlier order. The Rules do not provide for any special procedure for rescinding or setting aside an *ex parte* order for substitutional service which may have been improperly issued, and an absentee defendant might conceivably find upon his return that his property had been seized and sold under an execution upon a judgment recovered against him during his absence, in an action of which he had had no notice whatever. There is of course always risk of that in the case of an order for substitutional service, even where it is properly made, because the person served substitutionally may fail to communicate the fact to the defendant with whom it is alleged he is in communication. But where the person served with the writ in substitution for the absent defendant shews that he does not act for and is not in communication with the absent defendant, what is he to do? Should he sit still and allow the action to proceed to judgment? It is suggested that if he does not act for the defendant, that is a matter with which he is not concerned, but he may nevertheless be interested in relieving himself from the odium of having received the writ and done nothing, apart altogether from a natural desire to see justice done even to a person for whom he does not act. If the position taken by counsel for the plaintiff is correct, then the person so served has no *locus standi* to move on his own behalf, because he is not "a party affected by the *ex parte* order," and he dare not move "on behalf of the defendant," as that would imply agency for the defendant. The reference in the Annual Practice, 1921, at p. 78, to the case of *Japhet* v. *Luerman* is as follows:—

"Where substituted service was ordered by service on the alleged solicitor of a defendant who was abroad, and the solicitor applied to the Judge in Chambers to set aside the order, the Judge dismissed the application on the ground that the applicant had no *locus standi* (*Japhet* v. *Luerman* (unreported), Jelf, J., in Chambers, 9 Mar., 1904)." Then there appears the following note: "*Semble*, the words 'no *locus standi*' indicate that the solicitor applied on his own behalf as the person who received the writ, not as representing the defendant applying to set aside the order for substituted service of the writ. There could be no question that the defendant applying by his solicitor to set aside the order for substituted service would have a *locus standi*."

In the present case Mr. Martin purported by his notice of motion to apply not on his own behalf but on behalf of the defend-

ant Laduke. He does not represent Laduke as his solicitor.

In the case of *Taylor* v. *Taylor*, 6 O.L.R. 545, the circumstances were substantially the same, and the late Chancellor Boyd C. held that if the solicitor moved as agent for the defendant his doing so implied that he had been instructed by the defendant. But he points out at p. 545 that the solicitor "might have moved as an officer of the Court to advise the Court that an error had been committed in ordering service upon him as the defendant's solicitor, as was done in *The Pommerania* (1879), 4 P.D. 195." The Chancellor stated at p. 546 that "the Court will not set aside substitutional service if it appears, or can fairly be inferred, that the defendant had notice of what was going on." In that case he inferred such notice from the form of the application and from the affidavits. I do not regard this as holding that he felt himself bound in every case to infer notice from the form of the application, but that that was merely an element in arriving at the inference.

In this case, I am satisfied upon the material before me that the order should not have been issued. In addition to what I have stated above, it is also proved that the plaintiff's solicitor, prior to making the *ex parte* application, asked Mr. Martin to accept service on behalf of Laduke, and that he refused on the ground that he had no instructions to act for him in this suit, but that it was impossible to communicate with him, and Mr. Martin asked that he might be given notice of any application for an order for substitutional service, if the plaintiff's solicitors intended to apply for it. They replied that if he was not acting for Laduke he could not be interested in making any representation to the Court. And they accordingly applied *ex parte* for the order; and, notwithstanding Mr. Martin's disclaimer of any instructions from Laduke, they included Mr. Martin as one of those to be served.

I think that the objection which Mr. Duggan takes to the application made by Mr. Martin is technically correct, in view of the decision in *Taylor* v. *Taylor*, but I do not gather from that decision that, had the late Chancellor not thought that the order was a proper one on the merits, he would have failed to deal with the motion in such a way as to do substantial justice.

Mr. Duggan argued that if Laduke's headquarters were at Moose Factory or Fort George Mr. Martin could communicate with him by sending in word by dog-train from Cochrane, and he

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suggested that fact as good ground for an order for service substitutionally. But it is certainly a novel suggestion that because it is difficult or expensive for the plaintiff to serve a writ personally, he should be allowed to make some other person his bailiff to serve his writ for him, and at the bailiff's own expense. The Rule allowing substitutional service was not intended to save the plaintiff the trouble and expense of effecting personal service, if personal service can be made, but primarily to prevent the defendant from evading service by going to parts unknown. In such a case if some person is in communication with him, under circumstances which will bring the service of the writ upon such person to the defendant's notice, substitutional service is ordered. I am not stating this as indicating the exact scope of the Rule. It has doubtless been extended to other cases. But where a man is said to be at some distant part of the Province, or even at some place outside the jurisdiction, the mere fact that it may be a matter of some difficulty to reach him does not of itself relieve the plaintiff of the obligation of serving him personally. It is not suggested that Laduke is trying to evade service. He is away on his own business. If the plaintiff wishes to sue him he must either find him and serve him or wait until he returns.

Under the circumstances, is the Court to allow an order for substitutional service to stand, and leave the defendant after his return to Toronto to move to set aside any judgment which may be recovered against him in the meantime? I do not think so. The Master in Chambers was right in rescinding the *ex parte* order, though I think on technical grounds it was not proper to treat the application as having been made on behalf of the defendant Laduke. For the purposes of this judgment I shall treat the application as having been made by Mr. Martin as a solicitor and as such as an officer of the Court; and, exercising the inherent power of the Court to rectify what is in substance an abuse of the process of the Court, I declare that the order for substitutional service, and the service made thereunder upon Mr. Martin and Mr. Gilmour and by registered letter, should be set aside, and that the order of the Master in Chambers of the 8th January, 1921, be confirmed, with this variation, namely: that it be so worded as to shew that the application came before the Court by way of advice received from one of its own officers, and not on behalf of Laduke.

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I question whether the unreported case of *Japhet* v. *Luerman*, referred to in the Annual Practice, can really be regarded as any authority for the theory that a solicitor served with a writ for another person has no *locus standi* to move to set aside the service, in view of the decision in *The Pommerania*, (1879) 4 P.D. 195. The late Chancellor in *Taylor* v. *Taylor* speaks of the solicitor "moving as an officer of the Court." It seems to be of no consequence how the solicitor approaches the Court in the matter, except that, having no instructions from the defendant, he cannot make his application on behalf of the defendant.

It would be well, I think, if the practice under such circumstances could be settled by a Rule of the Supreme Court clearly defining the status of a person so served and his right to apply to set aside the service.

As to the costs, the order of the Master in Chambers ought not to have awarded any costs to the defendant Laduke, and that paragraph in his order will be struck out. I think, having regard to all the circumstances, there ought to be no costs to either party, either before the Master or upon this appeal.

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Ontario Supreme Court, Orde, J. January 19, 1921.

PLEADING (§ I S—146)—ACTION BY ATTORNEY-GENERAL—FAILURE TO STATE THAT SUING ON BEHALF OF HIS MAJESTY—PLEADING DELIVERED IN ANSWER — COUNTERCLAIM AGAINST CROWN FOR DAMAGES—RULE 5—RIGHT TO MAINTAIN COUNTERCLAIM AGAINST CROWN—PROPER REMEDY BY PETITION OF RIGHT—NECESSITY FOR FIAT—STRIKING OUT PLEADINGS.

The provision in para. (1) of Rule 5 that the writ of summons shall shew the characters in which the parties sue and are sued, was not intended to apply to actions brought on behalf of the Crown; para. 2 in effect except Crown actions from the operation of para. (1) in this respect and deals with them specially and is in reality merely declaratory of a right which the Crown already possessed, and was not intended to restrict the right of the Attorney-General or to require that in coming into Court for relief on behalf of the Crown he should make use of any particular form of words either in the style of cause or in the pleadings to indicate that he is suing on behalf of His Majesty. His failure to formally state that he sues on behalf of His Majesty does not entitle the defendant to plead by way of counterclaim against the Crown as of right, or relieve him from the necessity of proceeding by the ordinary way of petition of right and fiat.

[*Atty'y-Gen'l of Ontario* v. *Hargrave* (1906), 11 O.L.R. 530 followed; *Dyson* v. *Attorney-General*, [1911] 1 K.B. 410, *Electrical Development Co. of Ontario* v. *Att'y-Gen'l of Ontario*, 47 D.L.R. 10, [1919] A.C. 687, distinguished.]

AN appeal by the plaintiff from an order of the Master in Chambers dismissing a motion made by the plaintiff for an order

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striking out or for particulars of certain portions of the defendants' pleading, called "Statement of Defence, Set-off, and Counterclaim."

H. S. White, for the plaintiff.

W. Lawr, for the defendants.

ORDE, J.:—This action was commenced by writ of summons in the name of "The Attorney General for Ontario," as plaintiff, against Walter H. Russell and the Russell Timber Company Limited, as defendants.

The causes of action in respect of which relief is sought are two: first, the statement of claim alleges that certain Crown patents, whereby certain lands in the District of Thunder Bay were granted, were issued upon false and fraudulent representations made or caused to be made by the defendants, and asks that the patents be cancelled; and, secondly, it is alleged that the defendants have unlawfully cut and removed pulpwood and logs from the lands covered by the patents and also from other lands of the Crown, and damages are claimed therefor. The statement of claim also prays incidentally for an account, an injunction, and a declaration. To this statement of claim, the defendants delivered a pleading which is styled "Statement of Defence, Set-off, and Counterclaim." The introduction of the word "set-off" into the style of the pleading calls for a few words of comment.

The term "set-off" is often used loosely to describe a right which is really the subject-matter of a cross-action or counterclaim, and there are many cases where the right may be of such a character that it may be pleaded by way of set-off, or by way of counterclaim, or alternatively, at the option of the defendant, but as a matter of pleading it must be pleaded either as a defence or as a counterclaim. The suggestion conveyed by the style of the defendants' pleading here that there is a pleading styled a "set-off" is not authorised by the Rules.

Upon the delivery of this pleading by the defendants, the plaintiff moved before the Master in Chambers to strike out paragraphs 14, 15, 16, 18, 19, and 20 thereof, and also paragraph (b) of the prayer with which the pleading concludes, upon the ground that they tend to prejudice, embarrass, and delay the fair trial of the action, and that the alleged claim of the defendants against the plaintiff is the subject of a counterclaim and cannot be pleaded as a set-off, and that the defendants have not obtained

a fiat enabling them to set up any counterclaim; and in the alternative for particulars.

The paragraphs in question are as follows:—

"14. The defendants allege that the plaintiff has been making use of its claim against the defendants for ulterior purposes, and is endeavouring in every way that is possible to proceed harshly against them, and continues to attack the defendants for any alleged wrongdoing of other people, without rather suing such other people, and has caused the defendants by such wrongful action much loss and damage and has injured their credit with those with whom they have been doing business and has caused much financial loss to the defendants through wrongful and unfair proceedings against the defendants.

"15. The defendants, from the beginning of July, 1920, both before and after the commencement of this action, have been endeavouring, both by correspondence and by personal interviews, to obtain and pay the claim of the plaintiff, but save as set out in the statement of claim, and then only for the first time, have been unable to obtain any particulars of such claim or to settle the same.

"16. Meanwhile, and during the months of July and August and September, 1920, the plaintiff, without seizing the defendant's wood, has been hampering and impeding the defendants in the carrying on of their business, and has caused much loss and damage thereto, for which if the plaintiff were a fellow-subject it should and would have to pay."

"18. The defendants further submit that the plaintiff should furnish particulars of what patents are referred to in the first paragraph of the prayer of the statement of claim, which the plaintiff is desirous of having cancelled, and that, if any claim is sought to be made as against the defendants as regards the lands mentioned in schedule C, the owners registered thereof are necessary and proper parties to this action, and should be added before trial thereof, and also so that the defendants may have any necessary relief over against them.

"19. The defendants further submit that, if it be sought to cancel the patents, the proper action should be brought against the owners of the lands mentioned in schedules C and B; and, until the disposition of such action or the plaintiff decides to abandon such claim, that the trial of this action should be stayed.

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"20. By reason of the damage suffered by the defendants because of the acts of the plaintiff as above set out, the defendants seek to set off as against any amounts that may be found to be due the plaintiff, such amounts of said damages as shall equal such claims if so found to be due and owing and seek to counterclaim for the balance."

"(b) The defendants further seek to claim and obtain, if necessary, a fiat to counterclaim for $100,000 damages for the unjust and wrongful acts of the plaintiff against the defendants."

Upon the motion before the Master in Chambers, the plaintiff referred to *Attorney-General of Ontario* v. *Hargrave* (1906), 11 O.L.R. 530, in which an order of the Master in Chambers striking out certain paragraphs of the statement of defence as embarrassing, and also striking out the counterclaim on the ground that no action is maintainable against the Crown except by petition of right, for which a fiat must be obtained, was upheld by the late Chancellor. The Master distinguishes that case from the present, because, as he says, the action there was brought by the Attorney-General for Ontario "on behalf of His Majesty the King," and he points out that Rule 5* (2) provides that any claim on behalf of His Majesty may be enforced by an action brought by the Attorney-General on behalf of His Majesty. He says that, "as the plaintiff has not complied with the provisions of this Rule, all defences are open to the defendants," and that the motion to strike out the paragraphs in question must be dismissed. His judgment also goes farther, and on the ground that "as the action is at present constituted the defendants have the right to counterclaim without obtaining a fiat," the words "to claim and obtain, if necessary a fiat," in para. (b) of the prayer in the statement of defence should be struck out, and he relies upon *Dyson* v. *Attorney-General*, [1911] 1 K.B. 410, and *Electrical Development Co. of Ontario* v. *Attorney-General for Ontario*, 47 D.L.R. 10, [1919] A.C. 687.

From the order of the Master in Chambers, the Attorney-General now appeals.

*5.—(1) All actions shall be commenced by the issue of a writ of summons . . . which . . . shall contain the names of the parties and the characters in which they sue and are sued, and the office in which and the time within which the defendant is to enter his appearance, and shall be endorsed with a short statement of the nature of the plaintiff's claim.

(2) Any claim on behalf of His Majesty, including a claim to repeal letters patent under the great seal, may be enforced by an action brought by the Attorney-General on behalf of His Majesty.

Upon the motion before me the original record in *Attorney-General for Ontario* v. *Hargrave et al.* was produced. If by his statement that the action was brought by the Attorney-General for Ontario "on behalf of His Majesty the King," the Master-in-Chambers meant that the style of cause contained those additional words, he is in error. The action is styled "The Attorney General for Ontario, plaintiff." The fact that he there sued on behalf of His Majesty is to be gathered from the statement of claim, and from the very nature of the action and the relief sought; but there is no distinction whatever that I have been able to find between the form of that action and the form of this. If the practice really requires that the words "on behalf of His Majesty the King" must appear in the style of cause or in the body of the statement of claim, and their omission really has any bearing upon the matter, then the fact that they were omitted in the *Hargrave* case does not make that case a binding decision upon the point, for it does not appear to have been raised there. But it is of some significance as a matter of practice that the *Hargrave* action was commenced in the same way as the present action and that no objection was taken.

Counsel for the defendants urge that the provision in para. (1) of Rule 5, that the writ "shall contain the names of the parties and the characters in which they sue and are sued," applies to actions brought on behalf of the Crown, and that, reading the provision of para. (2) that any claim on behalf of His Majesty may be enforced by action brought by the Attorney-General on behalf of His Majesty, with para. (1), it is essential that the writ should shew "the character" in which the Attorney-General sues, by stating that he does so on behalf of His Majesty; and that, in the absence of some such statement, the Attorney-General must be deemed to be suing on his own behalf. It is hardly necessary to dwell upon the inconsistency of this contention with the nature of the allegations contained in the defence and counterclaim, all of which are directed against the Crown and His Majesty's Government of the Province of Ontario, and not against the Attorney-General either in his official or in his private character. If the defendants' theory in this regard were sound, the greater part of the statement of defence and counterclaim might be struck out as disclosing no defence to the plaintiff's claim or any cause of

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action against the plaintiff. An action brought in the name of "The Attorney-General for Ontario" must of necessity be brought in his official capacity. There is no rule of practice which would enable him to use his official title in an action personal to himself.

Rule 5 (2), which came into force on the 1st September, 1913, was doubtless intended to simplify the procedure in actions brought by or on behalf of the Crown. Prior to that, the old practice, which had been preserved by Rules 238 to 241 of the Consolidated Rules of 1897, still prevailed. Under that practice the procedure in actions by the Crown varied according to the relief sought. It will not serve any useful purpose to enter upon an elaborate discussion of the numerous methods whereby the Sovereign through the medium of the Attorney-General sought relief in the Sovereign's Courts, whether by information of intrusion, or of debt, or *in rem*, or by writ of extent or by writ of *scire facias* (only to mention the more usual ones). In all these actions, although doubtless there grew up certain practices as to the style of the proceedings, it was probably immaterial whether the plaintiff was styled "His Majesty the King," or "the Attorney-General on behalf of His Majesty the King," or "the Attorney-General." In England the practice in suits by information appears to have been to regard the Attorney-General as plaintiff, and that practice was followed in this Province. The practice followed in the Exchequer Court of Canada, when the Crown proceeds by information, is to regard His Majesty as plaintiff, the style of cause commencing "Between The King, on the information of the Attorney-General for the Dominion of Canada, plaintiff." But I have been unable to find that it was ever held, or even established as a rule of practice, that it was essential to add to the words "The Attorney-General" the words "on behalf of His Majesty the King." On the contrary, in the heading of a number of reports of English cases brought by the Attorney-General by means of an information, no such additional words appear. It is true that in some of them the body of the report begins with words to the effect that "this is an information by the Attorney-General on behalf of the Crown," but I think this is merely to indicate that the information had not been at the instance of a relator. Even if the Attorney-General laid the information at the instance of a relator, he did so on behalf of the Sovereign, who in either case "as *parens patriæ* sued by the

Attorney-General:" *Attorney-General* v. *Cockermouth Local Board* (1874), L.R. 18 Eq. 172, at p. 176; *Attorney-General* v. *Logan*, [1891] 2 Q.B. 100. I have not found any case in our own Courts which requires that the Attorney-General shall say in so many words that he sues on behalf of His Majesty. In the famous Mercer escheat case, *Attorney-General of Ontario* v. *O'Reilly* (1878-80), 26 Gr. 126, 6 A.R. (Ont.) 576, which was brought by information, there is no indication in the reports that the Attorney-General formally declared that he was suing on behalf of Her Majesty the Queen.

While Rule 5 (2) is intended to simplify the practice in Crown actions by providing that they may be commenced by writ, I think that the Sovereign by the Attorney-General could always have commenced an action in that way had the Attorney-General seen fit to do so. In *Attorney-General* v. *Walker* (1877), 25 Gr. 233, the Attorney-General for Canada filed a bill in the Court of Chancery of Ontario, to which the defendants demurred on the ground that the Attorney-General must sue in a Court of law, but it was held that the Crown, though not named in the Administration of Justice Act, 1873, (Imp.)was entitled to avail itself of the benefit of the provisions of that Act to the same extent as a subject could do,and Blake, V.-C., points out that the King could always sue in any Court he pleased.

Counsel for the defendants contends, however, that, whatever may have been the former practice, Rule 5 (2) is explicit in its requirement, that is, that the proceedings shall shew that the Attorney-General is suing "on behalf of His Majesty." If there had been any rule or practice which prior to this Rule had required this, then there might be ground for this argument. But, as there was not, and as the Attorney-General necessarily comes into Court "on behalf of His Majesty," I cannot see that the Rule has made the addition of those words essential.

In my judgment, the provision in para. (1) of Rule 5 that the writ shall shew the characters in which the parties sue and are sued was not intended to apply to actions brought on behalf of the Crown. Paragraph (2) in effect excepts Crown actions from the operation of para. (1) in this respect and deals with them specially. Paragraph (2) is in reality merely declaratory of a right which, in my view, the Crown already possessed. That being the case,

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I cannot think that it is intended to restrict the rights of the Attorney-General or to require that in coming into His Majesty's Supreme Court of Ontario for relief on behalf of the Crown he should make use of any particular form of words either in the style of cause or in the pleadings to indicate that he is suing on behalf of His Majesty.

It was suggested by counsel for the defendants that the Attorney-General merely appears in Court as the solicitor or counsel for His Majesty, but this is not correct. The Sovereign is deemed to be always present in all his Courts. The Attorney-General does not appear merely in the capacity of a solicitor or as counsel for the Crown. He is an officer of state, and is the proper legal representative of the Crown in the Courts; and his status as such is so well recognised that I need not refer to any authority. The question is discussed in Robertson's Civil Proceedings by and against the Crown, p. 9. There is a very interesting review of the law as to the position of the Attorney-General in a recent judgment of Benedict, J., in a case in New York, *Long Island R.W. Co.* v. *Staten Island Rapid Transit Co.*, reported in the New York Law Journal for December 27th, 1920.

For these reasons, I am unable to agree with the view of the Master in Chambers that the Attorney-General, by not formally stating that he sues "on behalf of His Majesty," has not complied with Rule 5 (2), and that therefore all defences are open to the defendants. If by the expression "all defences are open to the defendants" the Master means that all matters by way of counterclaim may therefore be raised against the plaintiff, as I presume he does, then once it is clear that His Majesty is to all intents and purposes the plaintiff, it follows that no counterclaim either for a money demand or for damages for breach of contract or for damages for tort can be set up. A counterclaim is merely a cross-action, and cannot be pleaded against the Crown as of right: *Attorney-General of Ontario* v. *Hargrave*, 11 O.L.R. 530; *The Queen* v. *Montreal Woollen Mills Co.* (1895), 4 Can. Ex. C R. 348.

It is urged on behalf of the defendants that under the authority of *Dyson* v. *Attorney-General*, [1911] 1 K.B. 410, and *Electrical Development Co. of Ontario* v. *Attorney-General for Ontario*, 47 D.L.R. 10, [1919] A.C. 687, they may nevertheless ask for a declar-

ation in respect of the matters set up in the paragraphs to which the plaintiff objects. That the Attorney-General may be made a party defendant in certain actions of an equitable or declaratory nature is well-established by many cases, of which *Dyson* v. *Attorney-General* is one of the latest. But none of these cases has gone the length of establishing that in every case where relief is sought against the Crown the ordinary procedure by way of petition of right and fiat can be avoided by commencing a declaratory action. In no case has it been held that by suing the Attorney-General a direct judgment against the Crown can be obtained, and in the leading case referred to by the Master of the Rolls in *Dyson* v. *Attorney-General* that of *Hodge* v. *Attorney-General* (1839), 3 Y. & C. (Ex.) 342, 160 E.R. 734, Baron Alderson held that he could not make any direct order against the Crown.

In the *Dyson* case, at p. 421, Farwell, L.J., says: "It has been settled law for centuries that in a case where the estate of the Crown is directly affected the only course of proceeding is by petition of right, because the Court cannot make a direct order against the Crown to convey its estate without the permission of the Crown."

In the present case, the defendants seek by way of counterclaim to have it declared that they are entitled to damages against the Crown, the alleged causes of action being of a tortious nature. Without commenting upon the futility of endeavouring to assert a claim for damages against the Crown based upon tort (except in cases where relief is given by statute), even if the Crown were to grant a fiat upon a petition of right, it would be straining the meaning and intention of the provisions of the Judicature Act as to declaratory judgments to hold that it permitted a declaratory judgment to be pronounced against the Attorney-General to the effect that the Crown was liable in damages to a subject. I think that the case comes squarely within the principle referred to by Farwell, L.J., in the passage just quoted from his judgment, and that the only course for the defendants to pursue, if they are so advised, is to seek relief by way of petition of right.

In *Electrical Development Co. of Ontario* v. *Attorney-General for Ontario*, 47 D.L.R. 10, [1919] A.C. 687, the Judicial Committee reversed the decision of the Appellate Division on the ground that it was not so clear that no declaration would be made against the

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Attorney-General under the circumstances of that case as to make it right that the action should be summarily stopped as against the Attorney-General. In the present case, I think it is clear that no declaration can properly be made against the Attorney-General upon the allegations contained in the paragraphs objected to by the plaintiff; and, following the decision in *Attorney-General of Ontario* v. *Hargrave*, 11 O.L.R. 530, they should be struck out.

The appeal from the order of the Master in Chambers is therefore allowed, and paragraphs 14, 15, 16, 18, 19, and 20, and paragraph (b) of the prayer for relief in the statement of defence and counterclaim, will be struck out, and the defendants will pay the plaintiff's costs of the motion before the Master and of this appeal.

There are certain parts of the paragraphs struck out which, if alone, might be allowed to stand as not being within the mischief dealt with by the judgment. If so, the defendants ought to be at liberty to amend their statement of defence as they may be advised.

The defendants moved for leave to appeal to the Appellate Division from the order of ORDE, J., as above.

The motion was heard by ROSE, J., in Chambers.

ROSE, J.:—So far as I am aware, there have not been conflicting opinions by Judges in Ontario upon any matter involved in the proposed appeal; indeed, upon the main issue, which is as to the right to counterclaim for damages without first obtaining a fiat, Orde, J., followed the only Ontario case cited in the argument before me, *Attorney-General of Ontario* v. *Hargrave*, 11 O.L.R. 530. Paragraph 3 (*a*) of Rule 507 has, therefore, no application: *Gage* v. *Reid* (1917), 39 O.L.R. 52; and, if leave to appeal is to be granted, it must be under para. 3 (*b*), that is to say, it must appear to me that there is good reason to doubt the correctness of the order, *and* the appeal must involve matters of such importance that, in my opinion, leave ought to be given.

The question whether, in such an action as this, Rule 5 requires that the writ of summons shall state, in so many words, that the Attorney-General is suing on behalf of His Majesty, or whether, as my brother has held, the provisions of Rule 5 (1) do not apply to an action instituted by the Attorney-General under

Rule 5 (2), is interesting, but, in my opinion, it is not necessary to discuss it in order to arrive at a conclusion upon the question which I have to decide, viz., the question whether there is good reason to doubt the correctness of the order striking out those paragraphs which were struck out. The action is, obviously, one brought on behalf of His Majesty; and, whether or not it can properly proceed without an amendment of the style of cause, it must, in the discussion of the question as to the right to set up any particular counterclaim, be treated as what it really is, and not as an action by the Attorney-General in his personal capacity.

It is a little difficult to understand exactly what cause of action the pleader intended to assert by the paragraphs in question, and against whom he intended to assert it: it is possible to read the paragraphs as setting up a claim either against His Majesty or as against the Attorney-General, personally. If the claim is one against the Attorney-General personally, of course it cannot be set up in this action, in which, as I have said, the Attorney-General sues on behalf of His Majesty. If, therefore, it is to go to trial, it must be because it is a claim against His Majesty. But, if it is a claim against His Majesty, there are two difficulties in the way: the one, that it is a claim for damages for tort, which does not lie against the King; and the other, that no fiat was obtained to raise it by action. Both of these objections are stated by Mr. Justice Orde, and the latter is elaborately discussed. In the face of them, it would require some very clear authority to make it appear that the defendants' case (as set up in these paragraphs) is not "so clearly bad as to make it right that the appellants should by a summary order be prevented from having it tried" in this action: see *Electrical Development Co.* v. *Attorney-General for Ontario*, 47 D.L.R. 10, at p. 16, [1919] A.C. 687, at p. 695. None of the cases cited to Mr. Justice Orde and referred to in his judgment seems to me to be such an authority; nor is *Hettihewage Siman Appu* v. *The Queen's Advocate* (1884), 9 App. Cas. 571, cited to me, but not referred to by him, a case in point. In it the Judicial Committee found that the practice of suing the Crown in the manner there followed had become incorporated into the law of Ceylon by legislative recognition.

I see no reason to doubt that it was correct to strike out the paragraphs; and the motion must be dismissed with costs to the plaintiff in any event in the cause.

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RICHER v. BORDEN FARM PRODUCTS Co.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Latchford, Middleton and Lennox, JJ. January 28, 1921.

JUDGMENT (§ VIIC—282)—SUMMARY—GRANTED IN COUNTY COURT—MOTION UNDER—RULE 57—DEFENCE—PREVENTION FROM PAYING ON ACCOUNT OF ATTACHMENT PROCEEDINGS IN QUEBEC COURT—JURISDICTION OF QUEBEC COURT—EFFECT OF GARNISHEE ORDER NISI—ABUSE OF PROCESS—COSTS.

Rule 57 (Ont.) is not intended to provide a summary method of adjudicating upon disputed rights, but a simple method of enforcing admitted rights or rights concerning which there is no real dispute, and a summary judgment under this rule will be set aside and the case ordered to proceed to trial in the usual way, where the case involves the question of the effect of garnishee proceedings and an attaching order in the Quebec Courts.

APPEALS by the defendants in two actions from orders of the Judge of the County Court of the United Counties of Stormont Dundas and Glengarry, bearing date the 6th November, 1920, awarding summary judgment under Rule 57*, in one case for $313.39 and in the other for $250.90, with costs.

The actions were brought respectively by Louis Richer and Fabien Richer to recover moneys alleged to be due to the plaintiffs, but which, the defendants said, they were prevented from paying by reason of garnishing proceedings taken by one Lauzon in a Quebec Court.

H. W. Shapley, for appellants.

J. A. Macintosh, for plaintiffs.

MIDDLETON, J.:—The circumstances giving rise to this litigation are fortunately very unusual. One Lauzon, on the 6th February and 4th March, 1919, recovered a judgment in the Superior Court of the Province of Quebec against Louis Richer and Fabien Richer for the sum of $1,797 with interest and costs. The way in which this judgment was recovered and the circumstances under which it is suggested that the Court of Quebec obtained jurisdiction are not disclosed.

On the 4th October, 1920, a process called "*tiers-saisie*" issued from the Quebec Court, attaching all moneys due by the present defendants to the present plaintiffs, defendants in the Quebec

*57.—(1) Where the defendant appears to a writ specially endorsed and files the affidavit required by Rule 56, the plaintiff may cross-examine upon such affidavit and move for judgment, and if the Court is satisfied that the defendant has not a good defence to the action on the merits, or has not disclosed such facts as may be deemed sufficient to entitle him to defend the action, judgment may be given for the plaintiff.

action. This process is practically the same as a garnishee order *nisi*. Upon the return of this summons, the defendants here—*tiers-saisie* there—contested the jurisdiction of the Court to seize this indebtedness. On the 29th November, 1920, Mr. Justice Bruneau gave *congé* to the said *tiers-saisie*, or, in more familiar language, made the garnishee order *nisi* absolute, and directed payment by the Borden company to the plaintiff in the Quebec action of the amount of indebtedness, in satisfaction *pro tanto* of the judgment creditor's claim. It does not appear from the papers filed whether the Borden company have, as yet, paid this claim, but it does appear in the copy of the proceedings in the Quebec Court produced that that company have assets in the Province of Quebec, and consequently can readily be made to pay, for they are a substantial company, carrying on a large business, both in Ontario and in Quebec.

The Richers, dissatisfied with this situation and denying the jurisdiction of the Quebec Court to make an effective order in the premises, sued the Borden company in the County Court; and, upon appearance being entered, accompanied by an affidavit setting out the facts, moved for judgment, and judgment has been granted.

Without entering upon a discussion of the very difficult questions involved, it is plain that this is not a case in which a summary judgment should have been granted. The Rule (57) was not intended to provide a summary method of adjudicating upon disputed rights but a simple method of enforcing admitted rights, or rights concerning which there is no real dispute.

As I have already indicated, there is difficulty on the threshold, for the circumstances relied upon as conferring jurisdiction upon the Quebec Courts are not disclosed.

It is now established law that no territorial legislation can give jurisdiction to the court of any country which any foreign court ought to recognise against absent foreigners who owe no allegiance or obedience to the power which so legislates, and that for the purpose of extra-territorial recognition the court of domicile alone has jurisdiction, unless the litigant chooses to attorn to some other court which asserts jurisdiction and submit himself to that tribunal for the examination and adjudication of his rights: *Sirdar Gurdyal Singh* v. *Rajah of Faridkote*, [1894] A.C.

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670; and the same principle applies as between the different Provinces: *Deacon* v. *Chadwick*, 1 O.L.R. 346.

It is also plain that a contractual liability is personal, and therefore ambulatory, so that the court of any country has jurisdiction, no matter where the contract is made or between whom, if service can be effected. Service can be made either within the jurisdiction of the country whose court is in question or beyond that jurisdiction if so authorised by its own law and practice. Whether the writ is properly served out of its territorial jurisdiction or not is a question which, for that court, is determined by its own law, but the wider question whether a judgment so obtained is in any way entitled to be recognised as having extra-territorial effect depends, not upon the domestic rules governing the matter, but upon the wider principle already indicated: *Western National Bank of City of New York* v. *Perez Triana & Co.*, [1891] 1 Q.B. 304.

It follows from this that, where a court other than the court of domicile asserts jurisdiction, the defendant is called upon to consider the situation with care, for, while the court, other than the court of domicile, is not entitled to pronounce a judgment entitled to extra-territorial recognition, it has the power of pronouncing a judgment which can be enforced by the machinery which the local law provides; hence, even if the court in Quebec had no jurisdiction over the Richers which our Court would be bound, on the principle of comity, to recognise, it undoubtedly had jurisdiction to pronounce a judgment which would be effective in the Province of Quebec and could be enforced by any mode of execution against any assets available in that Province, and here unquestionably this method of enforcement was admissible.

Whether the court of Quebec should allow its machinery to be made use of for the purpose of reaching a debt due in Ontario with respect to a transaction in Ontario by a debtor resident in Ontario, merely because there is power to reach such debtor by reason of his having assets within Quebec, is a question, it seems to me, for the Courts of that Province. Suffice it to say that the English Courts have thought it not proper to exercise such a jurisdiction, for in *Martin* v. *Nadel*, [1906] 2 K.B. 26, the Court of Appeal, in a case analogous to the present, refused to grant an attachment of a debt due by the Dresdner Bank to an English judg-

ment debtor, because the debt was one which arose in Germany and could be enforced against the bank in Germany. It was deemed inequitable and unrighteous to place the bank in such a position that it would be liable to pay twice. If the same principle had been recognised in the Province of Quebec, the order would not have been made there.

At the same time this case indicates the recognition by the Courts of a wide principle at p. 29: "The law will never compel a person to pay a sum of money a second time which he has paid once under the sanction of the court having competent jurisdiction;" and it may be that when this case is ripe for hearing our Courts will find this a reason for refusing to compel these defendants to pay the same debt twice. It seems contrary to natural justice that after the defendants have been compelled to pay money in satisfaction of a judgment against these plaintiffs, the plaintiffs could be at liberty to compel payment again to themselves.

At present the solution of the matter appears to me to be this:—

When judgment passed against these present plaintiffs in the Province of Quebec, either by consent or default, the risk of seizure of their property by the Courts of that Province was theirs, and the burden must be borne by them, and it is not permissible for them to shift it to these defendants.

The matter to which I would direct the attention of the defendants is that it has been held in many cases that a garnishee order *nisi* does not take away the right of the judgment debtor himself to sue. The garnishee order *nisi* affords no defence, and it is only an actual payment that can be set up. As at present advised, I should not allow this to defeat the defendants' right, and if the case were ripe for hearing I should be inclined to direct that the matter be stayed until the defendants can pay under the order of the Quebec Court. I merely draw attention to this now so that the defendants may govern themselves accordingly.

The appeal should be allowed. The actions should proceed to trial in the ordinary way; the plaintiffs should pay the costs of the motion for judgment and of this appeal forthwith after taxation. I make this drastic direction as to the costs because I regard the motion for summary judgment as an abuse of the practice.

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RIDDELL, J.:—I agree and have nothing to add.

LATCHFORD and LENNOX, JJ., also agreed with MIDDLETON, J.

MEREDITH, C.J.C.P.:—These admitted facts seem to me to make it plain that this appeal should be allowed and that the plaintiffs should be obliged to take their cases down to trial in the ordinary way, if they wish to have them tried upon their merits:—

The defendants are a company, incorporated under the laws of Canada, having their head-office in Ontario, but an agency and their main place of business in Quebec, where they own property of considerable value.

C. Lauzon has an unsatisfied judgment of the Superior Court of Quebec against the respondents here, in full force, for a large sum of money.

In garnishee proceedings in that Court the debt of the appellants to the respondents, to recover which these actions were brought, has been attached for the satisfaction in part of the Quebec judgment against these respondents; and an application to the Quebec Court to set aside the attaching order, made in it, for want of jurisdiction has been, after consideration, refused.

In these circumstances, it seems to me that it is impossible to support a judgment, made upon a summary application, in that which seems to me to have been a very summary manner, the effect of which is: the Superior Court of Quebec was wrong in its considered judgment; that it had no jurisdiction; and that the defendants must pay the debt in question twice, to the plaintiffs under the judgment now appealed against, and to the plaintiffs' judgment creditor under the Quebec judgment.

Until all the material facts have been disclosed upon a trial of this action, I should decline to hear argument upon any question of the validity of the Quebec judgment; and, until that question has been fully considered, the mere fact that the defendants have not, if really they have not, paid the amount of the Quebec Court judgment in the garnishee proceedings should have no weight in this case, though it might, in some cases, make it proper that the money in question should be paid into Court.

I desire to avoid saying anything upon the merits of the case, further than enough to make it plain that the summary judgment

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appealed against is wrong; and that can be done by calling attention to the fact that in this Province there would, under the Rules of this Court, have been jurisdiction to attach as the Quebec Court has attached.

In cases of "foreign" attachments all that is required is that the debt to be attached is one which might be sued for in Ontario; and, if the garnishee is neither a British subject nor in British dominions, that notice of the order, not the order itself, shall be served: Rules 590, 25(3), and 25(1) (*h*); and also Rule 23.

If there were any discretion as to making the attaching order, that discretion was one under the Quebec laws, to be exercised by the Quebec Courts; and as to any such discretion, as well as in regard to the power and the duty of the Court to prevent enforcing payment of a debt twice, the case at present seems to be altogether in the appellants' favour.

The appeal must be allowed and the judgment appealed against set aside with costs here and below.

Appeal allowed.

WALLACE v. GRAND TRUNK R. Co.

Ontario Supreme Court, Appellate Division, Mulock, C.J. Ex., Magee and Hodgins, JJ.A., and Masten, J. January 26, 1921.

RAILWAYS (§ IV—91)—ACCIDENT AT CROSSING—PERSON DRIVING OVER TRACKS STRUCK BY TRAIN—ACTION UNDER FATAL ACCIDENTS ACT—NEGLIGENCE OF COMPANY IN NOT GIVING STATUTORY WARNINGS—CONTRIBUTORY NEGLIGENCE—RULE AS TO SUBMITTING CASE TO JURY—DAMAGES—NEW ASSESSMENT OF.

A Judge is not justified in withdrawing a case from the jury where contributory negligence is set up as a defence and the reasonableness of the plaintiff's conduct is called into question or where there is a conflict as to whether the negligence of the plaintiff or the defendant was the direct and effective cause of the accident.

The rule is the same in Ontario as it is in England as established by the case of *The Directors of the Dublin, Wicklow and Wexford R. Co.* v. *Slattery* (1878), 3 App. Cas. 1155.

[*Wabash R. Co.* v. *Misener* (1906), 38 Can. S.C.R. 94; *Grand Trunk R. Co.* v. *McAlpine*, 13 D.L.R. 618, 16 C.R.C. 186, [1913] A.C. 838; *Ottawa Electric R. Co.* v. *Booth* (1920), 60 D.L.R. 80, applied. See also *Wabash R. Co.* v. *Follick* (1920), 56 D.L.R. 261, 60 Can. S.C.R. 375; *Canadian Pacific R. Co.* v. *Smith* (1921), 59 D.L.R. 373, 62 Can. S.C.R. 134; and Annotation 39 D.L.R. 615.]

The following statement of the facts is taken from the judgment of MASTEN, J.:—

This was an appeal by the defendant company from a judgment

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pronounced by LOGIE, J., after a trial with a jury, at Belleville, on the 4th May, 1920.

The action is brought under the Fatal Accidents Act, R.S.O. 1914 ch. 151, for the death of one George Clifford Wallace.

On the 20th December, 1919, the deceased was, with his brother Arthur, driving to the city of Belleville and along a highway in the township of Thurlow. A railway, alleged to be operated by the defendant company, intersects by a level crossing the highway on which the deceased was travelling, and a railway engine, also alleged to be operated by the defendant company, collided with the buggy in which the deceased was driving, and he was killed.

The plaintiff claims both as the mother of the deceased and as administratrix with the will annexed of his estate, alleging breach of statutory duty on the part of the defendant company causing the accident.

By its statement of defence, the defendant company denies negligence and alleges that the deceased was guilty of contributory negligence.

At the trial, questions were put to the jury, which with the jury's answers were as follows:—

"1. Was the death of the late George Clifford Wallace caused by the negligence of the defendants? A. Yes.

"2. If so, wherein did such negligence consist? Answer fully. A. By not ringing the bell on the engine or blowing the whistle.

"3. Could the deceased, by the exercise of reasonable care, have avoided the accident? A. No.

"4. In what respect do you think the deceased omitted to take reasonable care? (No answer).

"5. Damages? A. $2,500."

On these answers, judgment has been entered for $2,500 and costs.

The grounds of appeal, as set forth in the notice of appeal, are as follows:—

1. That the finding of the jury is perverse and against the evidence and the weight of the evidence.

2. That there was no evidence to connect the locomotive alleged to have caused the accident with the defendant company, its officers, servants, or agents.

3. That there was no evidence to shew that the deceased died as a result of the accident.

4. That on the evidence the failure of the deceased to look either caused or contributed to the accident, and the case should have been withdrawn from the jury.

5. That upon the evidence it appears that, had the deceased looked, he could have seen the approaching train, and the finding of the jury is perverse.

6. That, had Arthur Wallace used reasonable care, he must have seen the train, which was unquestionably there; and the proper inference to be drawn from the evidence is, that he did not look nor use proper or reasonable care, or at least did not look at the proper time.

7. That, inasmuch as Arthur Wallace only looked once, at some distance from the crossing, he did not discharge the duty cast upon him, nor did the deceased discharge the duty cast upon him of looking again before passing from a place of safety into a place of danger.

8. That the damages are excessive.

D. L. McCarthy, K.C., for the appellant company.

E. G. Porter, K.C., and *W. Carnew*, for the plaintiff, respondent.

The judgment of the Court was read by MASTEN, J. (after setting out the facts as above):—On the hearing of the appeal, counsel for the appellant company presented four points for the consideration of the Court:—

1. That the trial Judge should have granted the appellant company's motion for a nonsuit and should have withdrawn the case from the jury, because the deceased was driving, and did not, before attempting to cross the railway line, personally look out to see if there was an approaching train, and was not entitled to rely on what was done in that regard by his brother, even if what the brother did established reasonable care. In any case, the appellant company contended, on the facts disclosed, that the onus as to contributory negligence was shifted from the defendant company to the plaintiff, and the plaintiff failed to satisfy such onus.

2. That the finding of the jury on the question of contributory negligence was perverse and against the evidence, relying on the

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1st, 5th, 6th, and 7th grounds above set out; and that there should be a new trial.

3. That the assessment of damages proceeded on a principle that was wrong and illegal, and the damages were excessive.

4. That there was no evidence to connect the locomotive alleged to have caused the accident with the defendant company, its officers, servants, or agents.

Dealing with the point last mentioned, I think that the lack of formal evidence on the question raised is a slip, and that, unless the defendant company admits that the engine which collided with the horse and buggy was being operated by it, the plaintiff should now be given leave to adduce evidence before this Court to establish that fact.

On the question whether the trial Judge should have withdrawn the case from the jury, I am against the appellant company. If Mr. McCarthy, in his able and interesting argument, meant to suggest that the cases to which he referred established in this Province a doctrine different from that which exists in England since the decisions in *Bridges* v. *North London R.W. Co.* (1874), L.R. 7 H.L. 213, *Metropolitan R.W. Co.* v. *Wright* (1886), 11 App. Cas. 152, and *The Directors Dublin Wicklow and Wexford R. Co.* v. *Slattery* (1878), 3 App. Cas. 1155, I do not agree with his contention.

The contrary is established by such cases as *Morrow* v. *Canadian Pacific R. Co.* (1894), 21 A.R. (Ont.) 149; *Scriver* v. *Lowe* (1900), 32 O.R. 290; *Makins* v. *Piggott* (1898), 29 Can. S.C.R. 188; *Toronto R. Co.* v. *King*, [1908] A.C. 260; *Champaigne* v. *Grand Trunk R.W. Co.* (1905), 9 O.L.R. 589, at p. 599; *Peart* v. *Grand Trunk R.W. Co.* (1886), 10 O.L.R. 753.

In his argument counsel for the appellant referred particularly to three cases: *Johnston* v. *Northern R. Co.* (1873), 34 U.C.R. 432; *Wabash R. Co.* v. *Misener* (1906), 38 Can. S.C.R. 94; *Grand Trunk R. Co.* v. *McAlpine*, 13 D.L.R. 618, 16 C.R.C. 186, [1913] A.C. 838

Johnston v. *Northern R.W. Co.* was decided in 1873, before the leading cases of *Bridges* v. *North London R.W. Co.*, *Metropolitan R.W. Co.* v. *Wright*, and *Dublin Wicklow and Wexford R.W. Co.* v. *Slattery* were determined, and it is not too much to say that some of the wider expressions which are to be found in

the judgment in that case must be taken to be inconsistent with the law as it was laid down in these cases and as it has been ever since applied in our Courts. The case of *Wabash R.R. Co.* v. *Misener* appears to me to be against rather than in favour of the appellant company. The circumstances were not unlike those of the present case:—

"M. attempted to drive over a railway track which crossed the highway at an acute angle where his back was almost turned to a train coming from one direction. On approaching the track he looked both ways, but did not look again just before crossing when he could have seen an engine approaching which struck his team and he was killed. In an action by his widow and children, the jury found that the statutory warnings had not been given and a verdict was given for the plaintiffs and affirmed by the Court of Appeal. *Held*, affirming the judgment of the Court of Appeal (12 Ont. L.R. 71), Fitzpatrick, C.J., *hesitante*, that the findings of the jury were not such as could not have been reached by reasonable men and the verdict was justified."

It is true that Davies, J., in his judgment at p. 100, says: "I do not desire, even by implication, to cast a doubt upon the reasonable and salutary rule so frequently laid down by this Court as to the duty which the law imposes upon persons travelling along a highway while passing or attempting to pass over a level railway crossing. They must act as reasonable and sentient beings and, unless excused by special circumstances, must look before attempting to cross to see whether they can do so with safety. If they choose, blindly, recklessly or foolishly, to run into danger, they must surely take the consequences." But at p. 101 he says: "In deference to the strong argument pressed by Mr. Rose upon us, I have gone over the evidence with great care and the conclusion I reached was not one that the findings were such as, in the face of the conflicting evidence, reasonable men could not fairly have found. There were two or three points in the case to which the appellants did not seem to me to attach sufficient importance. One was that the railway crossed at an acute angle and not at right angles and that a traveller going northwesterly, when crossing the railway tracks, would have his back turned almost to the approaching train. Another was the unwonted speed with which the unattached engine which killed the deceased

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approached the highway and another that he could not have seen the approaching train until he was past the railway fence at the the crossing."

The result of that case was that the action of the trial Judge in submitting the case to the jury was upheld.

In the case of *Grand Trunk R.W. Co.* v. *McAlpine* the question turned on certain obvious misstatements of law in the Judge's charge; but I do not understand that the Privy Council in that case intended to lay down any new principle or to modify the principles established in the cases in the House of Lords to which I have referred.

I am therefore of opinion that these cases fail to establish a different rule in this Province from that which has been established in the Courts of England. The judgment of Nesbitt, J., in the case of *Grand Trunk R.W. Co.* v. *Hainer* (1905), 36 Can. S.C.R. 180, is probably the strongest presentation of the argument in favour of the appellant company which is to be found in our more recent reports, but the leading judgment in that case, concurred in by Sedgewick and Girouard, JJ., was delivered by Mr. Justice Davies, who says at p. 186:—

"The general rule as to the necessity of persons crossing a railway track or street car track looking both ways to see whether they can safely cross is a most salutary and proper one. But that it is not an absolute and arbitrary one admitting of no exceptions under any circumstances seems to be apparent from the late case of *Barry R.W. Co.* v. *White*" (1899), 15 Times L.R. 474, reversed on other grounds (1901), 17 Times L.R. 644 (H.L.)

The circumstances in the case of *Ramsay* v. *Toronto R.W. Co.* (1913), 17 D.L.R. 220, 17 C.R.C. 6, 30 O.L.R. 127, illustrate the application of the rule to circumstances such as exist in the present action. In that case Lennox, J., had, after submitting questions to the jury, directed a nonsuit; the Divisional Court reversed his decision and entered judgment for the plaintiff. My Lord the Chief Justice of this Court, in delivering the judgment in that case, says at p. 234 ;

"The duty of a person about to cross a railway track is not to be guilty of negligence, which is another way of saying that he must exercise reasonable care. In each case what is reasonable care is a question of fact to be decided by the jury, according to the

facts of the case, and that is the only interpretation of which the above-quoted observations of Lord Atkinson" [in *Grand Trunk R.W. Co.* v. *McAlpine*] "admit."

The rule established in the *Slattery* case, 3 App. Cas. 1155, is epitomised in the 3rd edition of Beven on Negligence, p. 135, as follows:—

"Where facts, from which negligence" (on the part of the defendant) "can be inferred, are given in evidence, their effect cannot be neutralised by other evidence contradictory of them, and the whole must be left to the jury to draw what inference they may please; subject, of course, to an application to the Court *in banc* to set aside the verdict as not being 'such as reasonable men might find.'"

And see the further discussion on pp. 136 to 139 of Beven.

In Halsbury's Laws of England, vol. 21, pp. 442, 443, 444, the author states the rule in these words:—

"A Judge may nonsuit or withdraw the case from the jury:—

"(3) Where on the undisputed facts of the case it appears that the accident was directly caused by the plaintiff's own negligence, although there may have been on these facts some negligence on the part of the defendant; but this power should not be exercised except in a very clear case, where the evidence is so strong that it would be wholly unreasonable for the jury to find that the plaintiff had not caused the accident by his own negligence.

"A Judge may not withdraw the case from the jury:—

"(5) Where contributory negligence is set up as a defence and the reasonableness of the plaintiff's conduct is called into question, or where there is a conflict as to whether the negligence of the plaintiff or the defendant was the direct and effective cause of the accident."

The cases cited by him appear to me to bear out these statements.

In the very admirable judgment of Palles, C.B., in *Coyle* v. *Great Northern R. Co.* (1887), 20 L.R. Ir. 409, he examines at length all the leading authorities down to that date, and at p. 418 states the rule now under consideration in these words:—

" . . . I venture to think it will be found that the following proposition is correct in point of law, and consistent with, if not established by, all the authorities:—that, to justify the

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Judge in leaving the case to the jury, notwithstanding the voluntary act of the injured person, which contributed to the injury complained of, the circumstances must be such as either, firstly, to make the question whether that act is negligent (either *per se*, or having regard to the conduct of the defendants inducing or affecting it), a question of fact; or, secondly, the circumstances must be such as to render reasonable an inference of fact, that the defendants, by using due care, could have obviated the consequences of the plaintiff's negligence. If the case be so clear that the determination of those two questions involves no inference of fact, it is for the Judge and not for the jury."

I have referred to these various statements of the rule in question because, while in substance they agree, yet they all assist in the application of the rule to the particular facts of this case.

Such being the rule, I proceed to state the facts to which it is here to be applied:—

The deceased and his brother Arthur were travelling on the highway, in a vehicle well known in this country as a covered or top buggy. The cover was up and its top extended some three feet in front of the single seat occupied by the two passengers. The side-curtains were in place and extended downwards diagonally on either side of the vehicle from the front of the top to the front of the seat. The buggy was drawn by a single horse, fairly spirited, but nervous with regard to railway trains when close to them—evidently a horse which required handling. The deceased was driving and sitting on the right hand side of the buggy, which was the side on which was situated the railway track. The railway track and the highway intersected each other at an acute angle—like the letter V—and the railway train and the buggy approached the point of intersection from approximately the same general direction. The horse was trotting at an easy, ordinary pace. The railway train is described by some of the witnesses as going at a very fast rate, and it is plain therefore that it came up from behind the buggy in such a way that the deceased could only see it by leaning well forward and looking backward out of the right side of the buggy. There was no wind, and there was a little snow on the ground, which would have the effect of lessening the sound of the horse's feet and the rattle of the buggy. It was

not very cold. The hearing and eyesight both of the deceased and of his brother were good.

When the buggy was from 200 to 300 feet from the railway crossing, Arthur, the brother of the deceased, leaned well forward and looked to his right and backward past the curtains of the buggy to see if a train was coming, and he saw nothing. He then resumed his position in the buggy without saying anything to the deceased. But that act can only be taken as conveying to the deceased the information that the crossing was safe and clear. Assuming the distance to the crossing from the point where the brother Arthur looked out to be approximately 250 feet—then, if the horse was trotting at 6 miles an hour, it would take about a half minute to reach the crossing. The deceased was unaware of any train being due at that time and place; the horse was not checked nor its pace varied; the ground between the highway and the railway was clear of obstructions, so that an approaching train could be seen for a considerable distance, just how far, the evidence does not make entirely plain.

When the brother Arthur leaned forward and looked out, he saw nothing. His evidence appears to have been both honest and frank; he not only says that he did not hear the whistle sound nor the bell ring, but he swears with positive certainty that the whistle did not sound nor the bell ring, and the jury have so found. The fact that he looked out, and the positive character of his statement that no bell was rung or whistle sounded, may well indicate that he was on the alert and that if the bell had been rung he would have heard it and have been warned.

In the present case the facts are not in dispute, as the defendant company called no evidence, but questions do arise as to the proper inferences to be drawn from these facts:—

(1) Did the breach of statutory duty (failure to whistle and ring the bell) contribute to the accident in question?

(2) Did the deceased, considering all the circumstances above detailed, exercise reasonable and ordinary care before attempting to cross the railway track, or did the accident result from his own recklessness?

(3) Assuming that both defendant and plaintiff were guilty of some negligence, whose negligence occasioned the accident?

The answer to these questions is not obvious, but in each case

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is an inference of fact to be drawn from all the circumstances, and it was therefore the province of the jury to draw the inferences of fact which properly arise from the uncontroverted evidence. Consequently it was the duty of the Judge to leave the case to them for that purpose.

Then, are the inferences which the jury have drawn so unreasonable that they should be set aside and a new trial granted?

The inference that the failure of the defendant company to whistle and ring the bell was connected with and contributed to the accident is plainly warranted.

The second inference relates to the act of the deceased in driving over a level crossing under all the circumstances above detailed—was it or was it not negligent? Did he take ordinary and reasonable care before attempting to cross the railway tracks?

If in broad daylight a man were to step in front of a fast oncoming train when 20 yards away, a finding of the jury that he took reasonable care would be so opposed to the evidence that it could not stand; but I am quite unable to say that in all the circumstances which here are shewn there was not evidence from which a jury might have concluded that the deceased was entitled to rely on the outlook by his brother, on the sound of the bell, and on the warning likely to be afforded by the actions of a nervous horse. As a juryman I should have had difficulty in finding that he took all reasonable precautions, but that is very different from holding that on this evidence no jury could honestly find as they did.

Turning now to the third inference. Assuming that the defendant company was guilty of a breach of statutory duty contributing to the accident, and that the deceased was also negligent, the question for the jury was: Whose fault caused the accident? The jury have drawn the inference of fact that it was the fault of the defendant company. Is their finding unreasonable?

It is clear that the defendant company was guilty of a breach of statutory duty leading to the accident. Thereupon, if the defendant company was to avoid liability, the onus rested on it of establishing two things: first, contributory negligence by the plaintiff; and, second, that, even if the bell had been continuously rung till the crossing was reached, the accident would not have been averted. This has not been done. The evidence would

seem to indicate that the horse could have been pulled up in 5 or 10 feet. Who can say that if the bell had been continuously rung the deceased would not probably have heard it in time to stop? On this footing the inference drawn by the jury, ascribing the accident to the defendant company's fault, and exonerating the deceased, appears to me to be warranted.

Since writing the above, my attention has been drawn to the recent case of *Ottawa Electric Co.* v. *Booth*, [(1920) 60 D.L.R. 80] not reported, decided last month in the Supreme Court of Canada, which strongly supports the views which I have just indicated. The appeal arose in an action under the Fatal Accidents Act R.S.O. 1914, ch. 151, for the death of a man who went rapidly with his head down or bent forward around the rear end of a south-bound car from which he had alighted, and who in so doing came in contact with a north-bound street car on the other track. His head struck the car and he sustained injuries from which he subsequently died. The jury found as facts that the gong of the north-bound car had not been sounded as the car approached Slater street (the place where the accident occurred), and that it was travelling at an excessive rate of speed at the crossing—and negatived contributory negligence on the part of the plaintiff. The majority of the Court—Chief Justice Davies alone differing—refused to disturb these findings.

Mignault, J., says at p. 95: "I must therefore conclude that the trial Judge's charge to the jury . . . . was a proper one and in effect left to the jury to decide and it was eminently a question for them to determine whether it was the negligence of the defendant or the folly and recklessness of the deceased which brought about the accident."

Anglin J., says at p. 90: "Whether the deceased was or was not negligent under the circumstances is eminently a question for the jury. While, if trying the case upon the printed evidence now before us, I should strongly incline to think that contributory negligence had been established and should probably on that ground have dismissed the action, I am not prepared to hold that on the undisputed facts contributory negligence of the deceased is so clear that no reasonable jury could refuse to find it proven or that the verdict . . . is so perverse and contributory negligence so undisputably shewn that the trial Judge

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erred in failing to take the case from the jury and dismiss the action."

Duff J., reaches the same result, and in so doing states that the crucial question in the case was, "whether, if they found the issue of reckless want of precaution on the part of the victim in favour of the company and the issues touching the ringing of the gong and the speed of the car in favour of the plaintiff, the real cause of the plaintiff's injury was the recklessness of the victim or the negligence of the company in respect of speed and failure to give warning.—Whether or not, in other words, notwithstanding the recklessness of the victim, he would probably have been roused to attention if the motorman had exercised proper prudence in respect of speed and given due warning by sounding the gong."

I am therefore of opinion that this case was properly left to the jury and that their findings in regard to liability cannot be disturbed.

Turning now to the question of damages, in my opinion the amount allowed by the jury is clearly excessive and unwarranted by the evidence. The deceased was 20 years old, his father and mother are well-to-do farmers, owning 100 acres, worth $9,000; there are two or three younger brothers. While it is true that the deceased was at the time of his death working at home, there can be no reasonable probability that the extravagant suggestion made by the father that he would work for him for nothing for the next 9 years ought to be credited. If he remained at home the probabilities are that he would have exacted wages equal to those paid to a hired man, or, if he did not receive full wages, then within a short time he would probably marry and obtain assistance from his father in establishing himself.

In cross-examination the father says, when referring to a suggested purchase of a farm near Port Hope: "Q. Having helped to pay for it, what interest would he have in it? A. If anything occurred to me he would get his share, he would get a share any way as soon as we paid for it."

Assuming that he stayed at home and worked, his maximum pecuniary value to his father, after allowing for clothes and spending money, could not well exceed $300 per annum. Now $2,500 would at current rates of interest purchase an annuity of about $300 per

year payable for 13 years. Is it within the bounds of reasonable expectation that a bright young man, with war experience overseas, would settle down on a farm, decline to marry, and work for his father for 13 years for nothing? I cannot find any reasonable proportion between the amount awarded and the loss sustained, and I can only repeat the remark of the late Garrow J., in *London and Western Trusts Co.* v. *Grand Trunk R.W. Co.* (1910), 22 O.L.R. 262, at p. 268: "One would be inclined to think from the result that the jury wholly misapprehended what they had to try, which was not the value of the life, under the statute, but, what, if any, pecuniary interest the parents had in the life."

At pp. 264, 265 of the same report, Moss, C.J.O., says: "It then remained for the jury to ascertain and fix the value of the expectation of pecuniary benefit. But in exercising their functions in this respect the jury are not justified in going beyond what appears to be fair and reasonable, as against the defendants. It is not the province of juries nor are they privileged to be generous with other people's money. And it is the plain duty of the Court to see that an award of damages, in an action of this kind, which appears to have been arrived at upon considerations not warranted by the evidence, shall not stand. In such a case the Court may and should interpose a controlling hand in order to prevent what appears to be an injustice. In the present case it seems clear that the jury have not paid sufficient attention to the evidence or to the directions of the learned trial Judge, otherwise they could not reasonably have considered themselves warranted in placing the value they did upon the expectations of pecuniary benefit to the parents of the deceased from the continuance of his life."

See also the cases referred to by Garrow, J.A., at p. 268.

The views there expressed are in entire accordance with the principles that have been established in England and in Ireland, where this class of case has been very much discussed. I refer particularly to *Hull* v. *Great Northern R. Co. of Ireland* (1890), 26 L.R. Ir. 289. As was said by Moss, C.J.O., in the *London and Western* case (22 O.L.R. at p. 265): "We cannot, of course, force the plaintiffs to accept a sum named by us. All we can do is to send the case back for a new assessment of damages.

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And that must be the order unless the parties agree upon some amount."

That ought, I think, to be the order on this appeal. The costs of the former trial should be costs in the cause, and the costs of this appeal should be to the defendant company in any event. *Order for new assessment of damages.*

ROWLATT v. J. & G. GARMENT MANUFACTURING Co.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee and Hodgins, JJ.A. January 31, 1921.

NEW TRIAL (§ II—5)—WITNESS DISCREDITED BY TRIAL JUDGE—MISCONCEPTION BY JUDGE AS TO WHAT WITNESS SAID.

An Appellate Court does not, in ordinary circumstances, reverse the finding of a trial Judge as to the credibility of a witness; but where in discrediting him the Judge has proceeded upon an erroneous view of what the witness said, an Appellate Court ought to reverse a judgment founded upon that erroneous view.

ASSIGNMENTS FOR CREDITORS (§ VIIA—55)—CHEQUE GIVEN BY INSOLVENT BEFORE ASSIGNMENT—ACCEPTANCE BY BANK ON DAY OF ASSIGNMENT—DATE OF PAYMENT OF CHEQUE NOT SHEWN—ASSIGNMENTS AND PREFERENCES ACT (ONT.), SEC. 6—BILLS OF EXCHANGE ACT, SEC. 165.

A cheque does not operate as an assignment of the funds of the drawer in the hands of the person on whom it is drawn. It is by the provisions of sec. 165 of the Bills of Exchange Act, R.S.C. 1906, ch. 119, a bill of exchange, and unless paid by the drawee before the assignment is not protected by sec. 6 (1) of the Assignments and Preferences Act (R.S.O. 1914, ch. 134), but if paid by the person on whom it is drawn before an assignment by the drawer is made, it is a payment in cash as of the date when the cheque is paid by the drawee.

[*Delory* v. *Guyett* (1920), 52 D.L.R. 506, 47 O.L.R. 137, applied.]

THE following statement is taken from the judgment of MEREDITH, C.J.O.:—

This is an appeal by the defendant from the judgment, dated the 16th April, 1920, which was directed to be entered by LOGIE, J., after the trial before him sitting without a jury on that day.

The respondent (plaintiff) is the assignee for the benefit of creditors of M. Silverman, and this action is brought to set aside as fraudulent against creditors, or as fraudulent preferences, certain transactions entered into between Silverman and the appellant.

The transactions attacked are:—

1. A transfer by the insolvent to the appellant made in February, 1918, of a number of suits of clothing, which it is

alleged was made without consideration, or for much less than their value, and in fraud of creditors.

2. A transfer by the insolvent to the appellant, made four or five days prior to the assignment, of a sum of $985.50, which it is alleged was made in fraud of creditors, and it is also alleged that this sum was given by the insolvent for an accommodation note held by the appellant.

These transactions are also attacked as fraudulent preferences.

The answer which the appellant makes to the first of these attacks is that in November, 1917, the appellant accepted for the accommodation of the insolvent two bills of exchange drawn by him on the appellant for $726.50 and $552 respectively, and that as security to the appellant he deposited with the appellant 11 pieces of cloth; that, when the bills were about to fall due, the insolvent applied to the appellant for a return of the cloth; that the appellant refused to do this, but said that it could use some "made up stuff," and that upon receipt of it the cloth would be released; and that the insolvent supplied the appellant with "made up stuff" to the amount of about $1,700 (in fact $1,708.56), and that the cloth was then given up to him; that the bills of exchange were paid at maturity by the appellant; that for the difference between the $1,708.50 and the amount of the two bills of exchange ($1,276.50), the appellant gave its promissory note to the insolvent for $432, which was paid by cheque of the 4th March, 1918 (included in cheque for $984, part of exhibit 8).

The learned trial Judge held that the transaction was entered into within 60 days of the making of the assignment, and that the appellant had not rebutted the statutory presumption resulting from this, and gave judgment against the appellant for $1,278.50.

Upon the other branch of the case the judgment was also against the appellant.

The assignment to the plaintiff was executed on the 14th March, 1918.

A. J. Thomson, for appellant company.

A. C. McMaster, for respondent.

The judgment of the Court was read by MEREDITH, C.J.O. (after stating the facts as above):—The trial Judge did not credit the testimony of the insolvent's husband or of Jacobs, the president of the appellant company. His view as to the evidence of

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Jacobs was affected by what he thought to be a direct contradiction between the statements made by him in answer to the questions of the learned Judge himself and to questions by the appellant's counsel as to the nature of the transaction. He appears to have thought that Jacobs had said, in answer to his question, that suits were taken in lieu of the cloth. In this he was mistaken. The accounts given by Jacobs of the transaction did not vary: he said that the purchase of the suits was made in order to enable the insolvent to get back the cloth, and that when the suits were delivered the cloth was returned.

The view of the learned trial Judge as to the credibility of Jacobs was influenced, if not formed, owing to the misapprehension he was under as to the testimony which Jacobs had given. An appellate Court does not, under ordinary circumstances, reverse the finding of a trial Judge as to the credibility of a witness; but where in discrediting him he has proceeded upon an erroneous view of what the witness has said, an appellate Court not only may, but ought to, reverse a judgment founded upon that erroneous view.

Even if the transaction had been what the learned trial Judge apparently thought it was—an exchange of the suits for the cloth—it ought not to be set aside without restoring what had been given up by the appellant.

There is much to support the testimony of Jacobs—evidence of a documentary character—there is the letter of the 7th February, 1917, from the appellant to the insolvent, evidencing the deposit of the cloth and the terms upon which it was deposited, and there are the bills of exchange, cheques, and invoices, all apparently in order, and it is difficult for me to understand how all these are to be treated, to use the language of the learned trial Judge, as "camouflage" designed to cover up a fraudulent transaction.

There was, in addition to this, the evidence of Hill, a former bookkeeper of the appellant, that, when stock was taken, the cloth, which was then in the appellant's place of business, was not included in the inventory, and that the reason given to him for this by Jacobs was that it did not belong to the appellant, but was being held "for some accommodation Mr. Jacobs was making to Mr. Silverman."

Mr. McMaster urged that the return of the cloth to the insol-

vent was not satisfactorily proved—that the carrier who must have delivered it was not called to corroborate the evidence of Silverman and Jacobs as to its having been returned.

But for this and the fact that no evidence was given as to the value of the cloth, I should have been disposed to reverse the judgment as to this transaction; as it is, I think that the ends of justice will be best served by directing a new trial.

The circumstances relating to the other transaction that is attacked are that the appellant purchased from the insolvent on the 27th February, 1918, a number of coats and suits for $1,000, for which the promissory note of the appellant, payable on the 10th March following, was given. This note was discounted by the Molsons Bank for the insolvent, and was in its hands unpaid on the 11th March, 1918.

Some of the goods purchased were found to be badly made, and were returned to the insolvent, and the appellant was given a credit-note of the 28th February, 1918, for $535, which was the price at which they had been bought. On the 2nd March following, the insolvent, being in need of money to pay wages, applied to the appellant for assistance, with the result that on that day the appellant lent to the insolvent $450; the cheque for which is exhibit 6.

On the 11th March, 1918, owing to rumours that reached the appellant as to the insolvent being in difficulties—"getting weak" —the appellant got from him his cheque on the Molsons Bank for these two sums ($985); this cheque was presented for payment three times, but was not paid because there were not sufficient funds to meet it. It appears that the cheque was marked by the bank as accepted on the 14th March, but I do not find any evidence as to when it was actually paid. If it was paid on the 14th, it would no doubt have been paid during banking hours, and probably before the assignment came to the knowledge of the respondent, and the payment would therefore be protected by sec. 6 (1)* of the Assignments and Preferences Act, R.S.O. 1914, ch. 134.

It is settled law that a cheque does not operate as an assignment of the funds of the drawer in the hands of the person on whom it is drawn. It is by the provisions of sec. 165 of the Bills

* Section 6 (1) excepts from the operation of sec. 5, *inter alia*, "any payment of money to a creditor."

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of Exchange Act, R.S.C. 1906, ch. 119, a bill of exchange, and, in my view, unless paid by the drawee before the assignment, would not be protected by sec. 6 (1) of the Assignments and Preferences Act.

Applying the principle of our decision in *Delory* v. *Guyett* (1920), 52 D.L.R. 506, 47 O.L.R. 137, I am of opinion that, where a cheque is paid by the person on whom it is drawn before an assignment by the drawer is made, it is a payment in cash as of the date when the cheque is paid by the drawee.

The date of that payment not having been proved, and as the other branch of the case is to go down for a new trial, I would direct a new trial on this branch also.

In order to save expense, either party should be at liberty to use the evidence that has been taken and to supplement it with such other evidence as he may see fit to adduce, and I would direct that the costs of the last trial and of the appeal be costs in the cause to the party who is ultimately successful unless the Judge before whom the new trial takes place otherwise directs.

New trial ordered.

LINDSEY v. HERON & Co.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Latchford, Middleton and Lennox, JJ. February 25, 1921.

CONTRACTS (§ID—50)—SALE OF SHARES OF COMPANY—STOCK CERTIFICATE HANDED OVER WHEN CHEQUE GIVEN—ALLEGED MISTAKE AS TO WHAT SHARES WERE BEING SOLD—PAYMENT STOPPED ON CHEQUE—ACTION TO RECOVER—MUTUALITY.

The apparent mutual assent of the parties essential to the formation of a contract, must be gathered from the language employed by them, and the law imputes to a person an intention corresponding to the reasonable meaning of his words and acts. It judges of his intention by his outward expressions and excludes all questions in regard to his unexpressed intention. If his words or acts judged by a reasonable standard, manifest an intention to agree in regard to the matter in question, that agreement is established, and it is immaterial what may be the real but unexpressed state of his mind on the subject.

[*Smith* v. *Hughes*, L.R. 6 Q.B. 597; *Watson* v. *Manitoba Free Press Co.* (1908), 18 Man. L.R. 309; *Northwest Transportation Co.* v. *McKenzie* (1895), 25 Can. S.C.R. 38, applied.]

APPEAL by defendants from a County Court judgment in an action to recover the amount of a cheque given in payment for certain shares in the capital stock of an incorporated company, the stock certificate being delivered at the time the cheque was given. Affirmed.

The judgment appealed from is as follows:—

"In the city of Montreal there was a company known as "Eastern Cafeterias Limited," which had been carrying on business there for a number of years and apparently successfully. In 1919, this company was reorganised under the name of "Eastern Cafeterias of Canada Limited," the new company taking over the assets and business of the old one. This was finally consummated on the 1st November, 1919, after which date the first named company ceased to exist. In working out the reorganisation it was arranged that the shareholders in the old company should receive three shares in the new company for each share they held in the old one. It took some time to get in all the old shares, and it was about the middle of April, 1920, before this was done and the new share-certificates issued. The par value of the shares of each company was the same—$10. The reorganisation and the formation of the new company were duly advertised in the Canada Gazette and were to a considerable extent matter of common knowledge in Montreal.

The plaintiff is 20 years of age and sues by his next friend, and is now and has been for some time employed in the claims department of the United States Fidelity Company, in the city of Toronto, of which department one W. A. Riddell is in charge.

The Fidelity Agency Corporation, of which one Stanley Moss, a friend of the plaintiff, is manager, has offices in the same building as the United States Fidelity Company. Colonel Kirkpatrick is the manager of the company last named. About the end of April last, Stanley Moss told the plaintiff that he had 75 shares in the Eastern Cafeterias of Canada Limited, and the plaintiff, understanding that this paid 7 per cent. and that Colonel Kirkpatrick held some of it, and being desirous of securing a paying investment for himself, and thinking this stock would be suitable, approached Mr. Moss on the 20th April and secured from him an option good for 5 days, for which he paid $5, and by which he could purchase the 75 shares mentioned for $410.

The plaintiff wrote this option, and in it the company is described as "Eastern Cafeterias Limited." He says he abbreviated the name, but knew the correct name of the company the shares of which he was buying.

Later in the day, he saw Col. Kirkpatrick, who offered him $500 for these shares. He did not accept this, as Mr. Riddell, with whom he was quite intimate, told him that

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before doing so it might be well to see what other brokers might be willing to give.

They together called on two firms of brokers, who informed them that, as this stock was unlisted, they did not deal in it. They referred them to Heron & Company, the defendants, who, they said, dealt in unlisted stocks and might give a quotation.

On returning to the office, the plaintiff, in the presence of Riddell, who heard what he said, called up Heron & Company, got in touch with Mr. Lewis, an employee there, and asked for an offer for the 75 shares of stock mentioned, and swears that he gave Mr. Lewis the full and correct name of the company, the "Eastern Cafeterias of Canada Limited." In this he is corroborated by Mr. Riddell. Lewis, on the other hand, says the name he gave him was "Eastern Cafeterias Limited," and at this time neither the plaintiff nor Lewis nor Heron & Company knew anything about the old company being reorganised, or that there was or had been any more than the one company, and I think the defendants were not very clear about the exact name of the original company, and assumed that the one respecting which the inquiry of the plaintiff was made was "Eastern Cafeterias Limited."

Mr. Lewis told the plaintiff to wait a short time. He thereupon wired his Montreal agents and got a quotation on "Eastern Cafeterias Limited," and thereupon called up the plaintiff on the 'phone and made him an offer of $10.50 per share for his 75 shares.

Lewis says in making this offer he used the name "Eastern Cafeterias Limited," but the plaintiff says that, as brokers always abbreviate the names of companies when referring to them, especially in conversation, he assumed, quite naturally, that, even if Mr. Lewis did abbreviate the name, this was the company he mentioned to him.

On receiving this offer the plaintiff went to Mr. Moss, gave him his cheque for $410, and received from him the certificate for the 75 shares. The cheque was paid, by the bank on which it was drawn, on the 1st May following.

The plaintiff and Riddell called at the office of the defendants, and the plaintiff introduced himself to Mr. Lewis as the person to whom he (Mr. Lewis) had made the offer for the stock a short time before, and handed him the certificate, which was open; at the top of it and also in the body of it there was printed in large capitals the name "Eastern

Cafeterias of Canada Limited," so that a glance at it was all that was needed to inform any one what was the exact name of the company whose stock was being offered for sale.

Lewis asked them to wait a few minutes and he went out into the outer office and gave the certificate to Mr. Hammond, who attends to the entering of certificates in the firm's books, and he also had full opportunity of seeing what it really was. Lewis was out from 8 to 15 minutes, and then returned and handed the plaintiff a cheque for $787.50, and he and Riddell went away.

Soon after they had gone, Lewis, on making inquiries from another firm, discovered his mistake, and that stock in "Eastern Cafeterias of Canada Limited" was not much more than one-third as valuable as that in the old company.

He thereupon called up the plaintiff, told him about this, and asked him to return the cheque, and the certificate would be handed over to him. The plaintiff did not consent to this, and the defendants stopped payment of the cheque and wrote a letter to the plaintiff explaining the matter.

The plaintiff, after consulting with solicitors, refused to return the cheque, and this action, to recover the amount of it, is the result.

Counsel for the defendants strenuously argued that the plaintiff had misrepresented the name of the company whose stock he was selling. He absolved the plaintiff from all corrupt or fraudulent intent, and said quite frankly that the plaintiff made the misrepresentation innocently, but that this was enough to defeat his claim. He referred me to *McDonell* v. *McDonell* (1874), 21 Gr. 342, especially p. 345; *Slouski* v. *Hopp* (1905), 15 Man. 548; and *Cole* v. *Pope* (1898), 29 Can. S.C.R. 291, and authorities there cited, which I have perused. He also argued that there was a complete failure of consideration, as the defendants did not get what they were bargaining for; and, even if the plaintiff had said "Eastern Cafeterias of Canada Limited," and they had understood or assumed that it was the old company, then, on discovering their error, they could have the transaction set aside and the cheque returned.

The counsel for the plaintiff contended that the defendants made the mistake; that there was no fault on the part of the plaintiff; and a one-sided mistake will not avoid the contract. He referred to Anson on Contract, 14th ed. (1917), p. 170; Halsbury's Laws of England, vol. 21, pp. 7, 8, 9, 11, 12, 16, and 17.

The plaintiff says, as I have stated, that in the first tele-

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phone conversation with Lewis, he (the plaintiff) named the company "Eastern Cafeterias of Canada Limited," and Riddell says he heard him saying this. They explain that they remember this quite well now because that evening they had a conference with the plaintiff's father, when the whole matter was fresh in their minds. Lewis, as I have mentioned, denies this. In considering this, I have concluded that the plaintiff's version is correct, though I confess that, if the question rested altogether on the telephone conversations, in finding for the plaintiff I should not be altogether free from doubt; but it does not depend altogether on this. The certificate "opened out and face up" was handed to Lewis. There was no attempt at deception either by word or act on the plaintiff's part at this time. He honestly believed he was giving them the shares they had offered to buy, and that they were "Eastern Cafeterias of Canada Limited." If the defendants had exercised the slightest care, they would have seen the true state of affairs at once. They did not do so, and it was in no sense the plaintiff's fault.

If they bought these shares thinking they were something else, I do not see how I can relieve them. It is, no doubt, a hardship; but, after receiving their offer, the plaintiff bought the shares from Moss, and so changed his position.

I may mention that it came out at the trial that the plaintiff, during some negotiations for settlement, had offered to take $415 and costs, but this was not accepted.

I do not think the authorities cited for the defendants quite touch this case; and, after giving it careful consideration, I think it falls within the principle of the authorities cited for the plaintiff; and I give judgment, therefore, for the plaintiff for $787.50 and costs."

I. F. Hellmuth, K.C., for appellants.

T. N. Phelan, for the respondent.

MEREDITH, C.J.C.P.:—If this case were to be determined in the market-place, if it related to an ordinary transaction there, such for instance as a sale of a dozen eggs, I cannot think that any one should question the liability of the buyer; but cases are not, in these days, to be decided there; resort must be had to the learning of the law-courts, with their innumerable helpful, but sometimes hindering, law-books.

Yet, I am quite in accord with market-place views and methods.

The plaintiff sold and the defendants bought some shares in the capital stock of an incorporated company. There was

no mistake or misunderstanding as to the shares which were sold and which were bought. They were represented by the usual stock certificate: a certificate which for all substantial purposes is the stock itself; a thing which, with the usual assignment of it printed upon the back of it, signed in blank by the first or any subsequent owner, makes the stock transferable by mere delivery of the certificate so endorsed, and gives any purchaser the right to insert his own name as assignee and obtain a transfer on the company's books of the shares to him whenever he may desire to do so.

Such a certificate so duly endorsed was delivered by the seller to the buyer, who then paid to the seller the price: then and there only the contract was made and the goods delivered and the price paid and the transaction ended.

To say that a buyer ought not to have bought those shares because they were not as valuable as some other shares about the value of which he had had information, cannot affect the question of his liability to pay for those he actually bought and had delivered to him, with his eyes open.

It does not appear that there were shares of two companies of like names on the market, though it would make no difference in this case if there had been. What happened was a thing not unusual: a new company, with a like name, had taken over the old company, which was to exist only as the new company.

In these circumstances, the defendants, before buying the shares in question, made a careless inquiry of their Montreal correspondents as to the value of the company's stock, and got a careless answer, giving the price at which stock in the old company had sold, without anything being said about its going out of practical existence or the coming into existence of its successor. The defendants knew nothing of the old company, and could have had no intention to buy its shares: they intended to buy the shares which the plaintiff had for sale; they bought those shares, and they were delivered to them in such a form and manner that they could not have been under any mistake as to the goods they had bought. All that could be said in their favour is that, through the want of care of themselves and of those to whom they applied for information as to price, they paid too much for them.

A plea of *non ad idem*, in the mouths of those who admit that at the time they purchased they did not even know of

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the existence of the thing it now is contended they really meant to buy, seems to me a plea of nonsense. The most that they can say is: that, owing to their own want of care and that of others from whom they sought information as to value, they paid too much for the thing they bought; but even that *ad misericordiam* appeal comes ill from those who were offered—to prevent litigation—and rejected a reduction of the price to the sum actually paid by the seller for the shares. One who buys a "pig in a poke" has only himself to blame if it prove to be a kind quite different from that which he needed and wanted.

Returning to the market-place for inspiration, let me ask what should be said of the buyer who sought to get her money back for the price she paid for a dozen eggs, because, when she bought them, she thought they were, but they were not, Dorkings' eggs, and some one had shortly before told her the price of Dorkings' eggs? Assuredly it should be said: When you want to buy Dorkings' eggs you must say so. And I cannot but think the woman's plea would be stronger than that of the men in this case: the woman had not that which the defendants, shrewd and capable dealers in stocks, had before their eyes, that which in her case would have been the words "these are Orpingtons' eggs," written on them.

The appeal should, I feel sure, be dismissed.

LATCHFORD, J.—What Mr. Lewis, the defendants' office manager, intended to buy was shares in the "Eastern Cafeterias Limited." He was not aware that for each share in that company three shares had been issued in a new corporation called the "Eastern Cafeterias of Canada Limited." What the plaintiff intended to sell was shares in the new company. He did not know that Mr. Lewis thought he was buying shares in the old company, and was guilty of no misrepresentation.

The case is that of one of two parties to a contract claiming to repudiate it, on the ground that he misunderstood what the other party meant. The general rule laid down in *Freeman* v. *Cooke*, 2 Ex. 654, and often approved, applies to the circumstances of this case.

The appeal therefore fails, and should be dismissed with costs.

MIDDLETON, J.:—The law applicable to this case is most clearly expressed in Corpus Juris, vol. 13, p. 265:—

"The apparent mutual assent of the parties essential to

the formation of a contract, must be gathered from the language employed by them, and the law imputes to a person an intention corresponding to the reasonable meaning of his words and acts. It judges of his intention by his outward expressions and excludes all questions in regard to his unexpressed intention. If his words or acts, judged by a reasonable standard, manifest an intention to agree in regard to the matter in question, that agreement is established, and it is immaterial what may be the real but unexpressed state of his mind on the subject."

"If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms:" Blackburn, J., in *Smith* v. *Hughes*, L.R. 6 Q.B. at p. 607.

"If a man's words or acts, judged by a reasonable standard, manifest an intention to agree in regard to any matter, that agreement is established, and it is immaterial what may be the real but unexpressed state of his mind on the subject:" *Watson* v. *Manitoba Free Press Co.* (1908), 18 Man. 309, 312.

When a contract is to be found in a series of communications between the parties and not in a formal note or memorandum signed as evidence of the contract, "the whole of that which has passed between the parties must be taken into consideration:" *North-west Transportation Co.* v. *McKenzie* (1895), 25 Can. S.C.R. 38, 40.

Here the vital parts of the transaction are the question put by the plaintiff to the defendants, "What will you give me for 75 shares of Eastern Cafeterias of Canada?" To which the defendants' manager in effect answered: "I shall look into it and let you know." The defendants' manager made such inquiry as he saw fit, and then telephoned the plaintiff, "I will give you $10.50 a share for your Eastern Cafeterias," and the plaintiff replied, "I accept your offer." He then delivered his Eastern Cafeterias of Canada Limited and received the cheque sued upon. The defendants' manager now says that he meant to buy "Eastern Cafeterias Limited," another stock, and so, the parties not being *ad idem*, there was no contract.

Applying the principles quoted above, I cannot agree. I think that, judged by any reasonable standard, the words

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used by the defendants manifested an intention to offer the named price for the thing which the plaintiff proposed to sell, i.e., stock in the Eastern Cafeterias of Canada Limited. Had the plaintiff spoken of "Eastern Cafeterias," the words used would have been ambiguous, and I should find no contract, for each might have used the ambiguous term in a different sense; but the defendants, by use of these ambiguous terms in response to the plaintiff's request couched in unambiguous language, must be taken to have used it in the same sense.

I was at first in some doubt owing to some vague expressions in some cases pointing to the conclusion that there might not be a contract when the parties were not in fact *ad idem*, though the language used according to its natural meaning would indicate that they were, an idea which, if it had any foundation, would undermine all confidence in contracts and agreements; but the Scotch case *Stewart* v. *Kennedy* (1890), 15 App. Cas. 108, and the statement of Lord Watson, pp. 121 and 122, adopted by the Supreme Court of Canada in *Hobbs* v. *Esquimalt and Nanaimo R.W. Co.* (1899), 29 Can. S.C.R. 450, removes all doubt. The contract there discussed was a written document, but there is no room for difference upon this point between oral and written contracts. Where there is a writing there cannot be any uncertainty as to the words used. When the contract is oral, once the words are ascertained the law is the same. The statement of Lord Watson is this: "The erroneous belief of one of the contracting parties, in regard to the nature of the obligations which he has undertaken, will not be sufficient to give him the right" (to rescind) "unless such belief has been induced by the representation, fraudulent or not, of the other party to the contract." Lord Watson then deals with the view entertained in the Court below that there was no consensus in fact, by saying (p. 123): "To give any countenance to that doctrine would, in my opinion, be to destroy the security of written engagements. . . . He contracted, as every person does who becomes a party to a written contract, to be bound, in case of dispute, by the interpretation which a court of law may put upon the language of the instrument." I add that parties contracting orally equally contract to be bound by the interpretation which a court of law may place upon the language used.

In the case in the Supreme Court of Canada there was an easily understood mistake as to the subject-matter of the contract.

The appeal should be dismissed.

LENNOX, J.:—As a preliminary question, it is important to have an accurate conception of the reasons for the judgment of the trial Judge and the basis and theory upon which it rests. To allow the appeal does not necessarily disturb any finding of fact of the learned trial Judge. I have read the evidence very carefully more than once. This was necessary in order to understand the considerations of fact and law founding the judgment in appeal. They are to be ascertained, not by perusal of the reasons for judgment alone, but by noting as well the authorities relied on by the plaintiff's counsel—and referred to in the judgment—and the circumstances by which the learned trial Judge was evidently impressed, as shewn by the questions he occasionally put, and the specific findings. I shall have occasion to quote at some length from the reasons for judgment later on. In the meantime, as illustrating the matter I am now dealing with, I need only refer to one very prominent and specific finding, namely, that the plaintiff in asking the defendants for a quotation on stock used the name "Eastern Cafeterias of Canada Limited."

The learned Judge had already found, in terms which I shall have to include in a quotation, to be made later, that, whatever the plaintiff may have said in asking for a quotation, what the defendants offered to buy was 75 shares of Eastern Cafeterias Limited.

In coming to a conclusion as to why the trial Judge decided that the plaintiff was entitled, and weighing the decision as a matter of law, it is necessary that I should quote from the reasons for judgment. It is said: "In considering this" (a conversation between the plaintiff and his father and the plaintiff's assertion that he asked for a quotation on "Eastern Cafeterias of Canada Limited"), "I have concluded that the plaintiff's version is correct, though I confess that, if the question rested altogether on the telephone conversations, in finding for the plaintiff I should not be altogether free from doubt; but it does not depend altogether on this. The certificate 'opened out and face up' was handed to Lewis. There was no attempt at deception either by word or act on the plaintiff's part at this time. He honestly believed he was giving them the shares they had offered to buy, and that they were 'Eastern Cafeterias of Canada Limited.' If the defendants had exercised the slightest care, they would have seen the true state of affairs at once. They did not do so, and it was in no

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sense the plaintiff's fault. If they bought these shares thinking they were something else, I do not see how I can relieve them. It is, no doubt, a hardship; but, after receiving their offer, the plaintiff bought the shares from Moss, and so changed his position."

I am not assailing the findings of fact; I am, however, with respect, very decidedly of opinion that, admitting every fact as found and every legitimate inference of fact, the plaintiff was not entitled to recover. Counsel for the plaintiff, "as he lawfully might," both at the trial and on the argument of the appeal, very adroitly kept away from the fundamental issue, "What did the defendants offer to buy?"

Nobody is likely to controvert the soundness of the proposition of law upon which the decision at the trial manifestly turned, and which was so much dwelt upon during the argument of the appeal, namely: "If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms:" *Freeman* v. *Cooke*, 2 Ex. 654, 663, as paraphrased in *Smith* v. *Hughes*, L.R. 6 Q.B. at p. 607, and quoted in Anson on Contract, referred to by the trial Judge, 14th ed. (1917), p. 170. But *Freeman* v. *Cooke* was a case of estoppel, and the defendants here were entitled to offer to buy what they liked, and to refuse to accept what they did not offer to buy, however similar in name, and even if it were "just as good"—which it was not. Their offer was the beginning of the contract —I do not mean the beginning of communication—it was the first step in the negotiation. The action was decided and the judgment supported on appeal as if the alleged contract were made out in this way: (1) an offer by the plaintiff to sell 75 shares of Eastern Cafeterias of Canada Limited; (2) a telephone reply from the defendants to the plaintiff that they "would be willing to pay $10.50 a share;" and (3) acceptance by the plaintiff by delivery of 75 shares of Eastern Cafeterias of Canada and receipt of cheque. If this had been what occurred, this would, I think, constitute a binding contract, even though the defendants, by mistake, inquired about the wrong stock, to wit "Eastern Cafeterias Limited," and, in consequence, were misled as to the value. The plaintiff upon this assumption had done all he was called upon to do, and the appeal might quite properly be

decided against the defendants: *Smith* v. *Hughes*, L.R. 6 Q.B. 597; although that is a case touching quality, not identity.

This, however, is not what occurred; there was no offer by the plaintiff to sell anything. I let the plaintiff speak for himself, and to his own counsel upon examination in chief, and for the rest I quote from the reasons for judgment:—

"Q. Then what did you do? A. When I went back from lunch to the office I 'phoned up Heron & Company.

"Q. Do you know to whom you spoke? A. I found out afterwards it was Mr. Lewis.

"Q. What was the conversation? A. I asked him for a quotation on 75 shares of Eastern Cafeterias of Canada Limited stock.

"Q. What was his answer to that? A. He told me that he would have to find out and he would let me know in the course of half an hour or so . . . .

"Q. When next did you have any conversation with Mr. Lewis? A. About half an hour later . . . .

"Q. What did he say to you? A. He told me he would be willing to pay $10.50 a share for the stock."

He did not say "for the stock," he said "for Eastern Cafeterias," as sworn to by two witnesses and found by the Judge.

I quote from the reasons for judgment:—

"Lewis, on the other hand, says the name he gave him was 'Eastern Cafeterias Limited,' and at this time" (that is, when the plaintiff telephoned asking for a quotation) "neither the plaintiff nor Lewis nor Heron & Company knew anything about the old company being reorganised, or that there was or had been any more than one company, and I think the defendants were not very clear about the exact name of the original company, and assumed that the one respecting which the inquiry of the plaintiff was made was 'Eastern Cafeterias Limited.'

"Mr. Lewis told the plaintiff to wait a short time. He thereupon wired his Montreal agents and got a quotation on 'Eastern Cafeterias Limited,' and thereupon called up the plaintiff on the 'phone and made him an offer of $10.50 per share for his 75 shares." (The learned Judge inadvertently used the word "his," as is shewn by what immediately follows).

"Lewis says in making this offer he used the name 'Eastern Cafeterias Limited,' but the plaintiff says that, as

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brokers always abbreviate the names of companies when referring to them, especially in conversation, he assumed, quite naturally, that, even if Mr. Lewis did abbreviate the name, this was the company he mentioned to him."

The last sentence quoted is surely conclusive. I quite agree that the plaintiff "assumed quite naturally" that the defendants were referring to "his 75 shares." We are all prone to assume that other people are thinking of what for the time being is uppermost in our own thoughts; but the question is not what he assumed, but what the others said, and their offer was to buy "Eastern Cafeterias," leaving out it may be the word "Limited," common to both. The mistake was in beginning at the wrong point, and one result of it is a misapplication of the doctrine of *Freeman* v. *Cooke*. Quite too much importance was attached to the question as to whether or not the plaintiff used the words "of Canada" when he inquired for prices in the morning. The question is of no consequence whatever except in so far as it might assist in determining the weight of evidence. If the plaintiff did inquire as to Eastern Cafeterias of Canada Limited, there is no finding that he made himself understood: on the contrary, it is specifically found that the defendants understood him to ask about Eastern Cafeterias, wired to their agents in Montreal in consequence, asking a quotation on this stock, and, having received a quotation, and acting upon it, 'phoned the plaintiff offering $10.50 per share for Eastern Cafeterias. There was no duty cast upon the defendants to find out what the plaintiff had to sell—he hardly knew himself for that matter—the defendants' offer to the plaintiff had a definite legal and commercial meaning; and the plaintiff could not alter its meaning by attempting to deliver something else.

There is no getting away from the fact that the alleged contract took this form:—

(a) An offer by the defendants to purchase 75 shares of Eastern Cafeterias Limited.

(b) A nominal or apparent acceptance by the plaintiff by delivery of a certificate for 75 shares of Eastern Cafeterias of Canada Limited, and receipt of a cheque in payment, on the understanding, common to both parties at the time, that the certificate was for the shares the defendants offered to buy.

It is to no purpose to suggest that the defendants would not have appreciated the difference if they had noticed the words "of Canada" on the face of the certificate. It is not

to any purpose, either, to argue that they were lacking in vigilance. On discovery they promptly repudiated the transaction, and the plaintiff had not "altered his position" in the meantime. The matter appears to me to be very simple. There was no agreement. The parties were never of one mind, they were not referring to the same thing—there was no *consensus ad idem*. There must be mutual assent, and to the same thing, and in the same sense—without this there can be no contract: *Raffles* v. *Wichelhaus* (1864), 2 H. & C. 906 (two ships of the name "Peerless"); *Thornton* v. *Kempster* (1814), 5 Taunt. 786; *Cundy* v. *Lindsay* (1878), 3 App. Cas. 459; *Falck* v. *Williams*, [1900] A.C. 176 (P.C); and other cases collected in Blackburn on Sale, Canadian ed., pp. 177, 178: see also *Baillie's Case*, [1898] 1 Ch. 110.

There are many other defences to the action: for instance, that the thing contracted for had ceased to exist: *Hastie* v. *Couturier* (1853), 9 Ex. 102 (Ex. Ch.); *Couturier* v. *Hastie* (1856), 5 H.L.C. 673. There was mutual mistake as to this and a complete failure of consideration.

If there was a contract, and I am not of that opinion, the plaintiff did not offer and has never been in a position to perform the contract on his part.

I think the appeal should be allowed, and the action dismissed, with costs here and below.

Appeal dismissed.

CROSS v. WOOD.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Latchford, Middleton and Lennox, JJ. February 25, 1921.

BROKERS (§IIB—10)—LANDS LISTED WITH AGENT—SPECIAL CLAUSE IN AGREEMENT—OWNER DISCOVERING PURCHASER AND INSISTING ON SALE TO HIM—PROMISSORY NOTES GIVEN—PAYMENT ON ACCOUNT OF PURCHASE—MEANING OF—RIGHT OF AGENT TO COMMISSION.

The owners of a farm and farm equipment entered into an agreement with a real estate agent for the sale of the property by him. The agreement providing amongst other things that the commission is "to become due and payable when the purchase-money or any part thereof has been paid," and "the owners hereby agree that the said property shall not be offered for sale at a less price or on more liberal terms without first giving the said agent an opportunity of doing likewise and that all inquiries which the owners receive from prospective purchasers.....will be referred immediately to the agent who is hereby appointed solely and exclusively for the purpose of making a sale. The owners agree not to sell the property, nor to receive any money to apply on the purchase-price without first communicating with the said agent and obtaining his approval in writing." The owners discovered a purchaser and sponsored him in spite of repeated warnings and remonstrances by the agent who had at least one other good pros-

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pect of selling in view, insisted that his purchaser was all right and under their instructions, the agent closed the deal and put the purchaser into possession. The Court held that certain promissory notes which were given by the purchaser, must be treated as a payment on account of the purchase and that the agent was entitled to his commission.

[*Fletcher* v. *Campbell* (1913), 15 D.L.R. 420, 29 O.L.R. 501, distinguished; *Howe* v. *Smith* (1884), 27 Ch. D. 89, followed; *Upper Canada College* v. *Smith* (1920), 57 D.L.R. 648, 61 Can. S.C.R. 413, applied. See Annotation, 4 D.L.R. 531.]

APPEAL by plaintiff from the judgment of a County Court Judge dismissing an action to recover commission on the sale of farm property and equipment. Reversed.

THE following statement of the facts is taken from the judgment of LENNOX, J.:—

The action is to recover a commission for the sale by the plaintiff of the defendants' farm, farm equipment and stock, under the terms of a written agreement, providing, amongst other things, that the commission is "to become due and payable when the purchase-money or any part thereof has been paid," and "the owners hereby agree that the said property shall not be offered for sale at a less price or on more liberal terms without first giving the said agent an opportunity of doing likewise, and that all inquiries which the owners receive from prospective purchasers . . . . will be referred immediately to the said agent, who is hereby appointed solely and exclusively for the purpose of making a sale. The owners agree not to sell the property, nor to receive any money to apply on the purchase-price, without first communicating with the said agent and obtaining his approval in writing," etc.

By this agreement the sale-price was fixed alternatively, that is, for the farm alone $8,500, of which $2,000 was to be paid in cash and the balance secured by mortgage, and if the farm and farm stock and equipment should be sold together the sale-price for the whole was fixed at a bulk price of $12,500, on the basis of a cash payment of $6,000 and the balance to be secured by mortgage.

The land and chattels were sold *en bloc*, and at the combined price fixed, $12,500, and on the terms above set out, by the plaintiff to one Stinson, with the concurrence and approval of the defendants, early in August, 1919. Referring to the purchaser, the defendant Lloyd Wood, who represented his co-defendant throughout, wrote the plaintiff on the 1st August, 1919, as follows:—

"I have reason to believe that a man by the name of

Stinson will go to see you the first of next week. He is just the buyer we want. He has the money, and will most likely pay the whole amount in cash . . . as he seems anxious to get it at once, you will be all ready and I will be ready and we can close the deal at once."

The learned Judge of the County Court of Leeds and Grenville, in which Court the action was brought, dismissed it with costs. After finding that an agreement for sale was procured by the plaintiff and duly entered into by the vendors and vendee, amongst other things, the learned County Court Judge said:—

"The giving of the notes and their acceptance by the defendants from the purchaser cannot be considered as a payment on account of the purchase-money, and, the notes not being paid, the plaintiff cannot succeed. . . . No purchase-money has been paid, and there is therefore nothing due to the plaintiff: see *Fletcher* v. *Campbell* (1913), 29 O.L.R. 501, 15 D.L.R. 420."

H. H. Davis, for the appellant.

W. A. Lewis, for the defendants.

The Judgment of the Court was read by

LENNOX J. (after stating the facts as above):—There were other issues raised by the pleadings, there was a good deal stated when appearances were entered that ought not to have been sworn to, but the only question argued and to be determined upon appeal is: Were the conclusions of the learned County Court Judge, above set out, right?

With respect, I am of opinion that they are not well-founded. *Fletcher* v. *Campbell*, 29 O.L.R. 501, 15 D.L.R. 420, is not well-applied in the decision of this action. The decision of this Court in that case turned upon the question whether—money having been obtained by the defendants, the agents, as a deposit to secure the carrying out of the agreement for sale, and the sale falling through by default of the purchaser—the agents could afterward treat the deposit as a payment on account of the consideration-money which the purchaser agreed to pay, and so apply it on account of their "commission to be paid out of . . . . . the purchase-money." It was held that this could not be done. On the authority of *Howe* v. *Smith* (1884), 27 Ch. D. 89, if the agreement is carried out the deposit goes as part payment of purchase-money, it is true, but if the purchaser fails to complete his contract the deposit is retained by the vendor, not as a payment, but as a forfeiture. There being

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no payment of the purchase-money, the defendants of course had no answer. Their commission was to be paid only out of the purchase-money. In real estate agency contracts the exact terms govern: *Marriott* v. *Brennan*, 14 O.L.R. 508. In the *Fletcher* case everything was arranged and the offer to purchase signed before the vendor knew anything about the transaction, and, to adopt the phrase frequently used during the argument, the purchaser was a typical "man of straw," and nothing was done by either vendor or vendee beyond signing the agreement. The vendor knew nothing whatever about him. The "man of straw" cases have no application here. It is quite true that the agent does not earn his commission by simply bringing forward a worthless man, willing to contract. The vendor has a right to say "no" and stand by it.

This action presents a radically different state of facts. Lloyd Wood discovered the purchaser, sponsored him, seized upon him, and, in spite of repeated warnings and remonstrances by the plaintiff, would not let him go. The plaintiff had at least one other good prospect of selling in view, desired to be present when the agreement was prepared and signed, insisted that at least $1,000 should be paid as a guarantee before the signing of an agreement; and the defendants, still insisting that Stinson was all right, closed the agreement and put him into possession notwithstanding.

I am of opinion that the promissory notes referred to must be treated as a payment on account of the purchase, as cash so far as the plaintiff is concerned: *Beatty* v. *O'Connor*, 5 O.R. 731. That was a case of an accounting mortgagee selling under the power of sale in his mortgage and taking back a mortgage as part of the consideration-money. At p. 735, Boyd, C., after referring to the circumstances, said: "He did sell in that way and was bound to charge himself with the full amount of the purchase-money, treating the mortgage securing the balance as cash: *Davey* v. *Durrant* (1857), 1 DeG. & J. 535, and *Thurlow* v. *Mackeson* (1868), L.R. 4 Q.B. 97. The cases cited shew that the mortgagee can sell on time . . . . provided he credits the price as cash. The reason is that he can deal as he pleases about giving time on his own debt . . . .

The principle is the same here. The plaintiff brought about a sale of the defendants' property satisfactory to the defendants, in all respects in accordance with his commission-agreement, and entitling the defendants to a cash pay-

ment of $6,000. They could do as they pleased about the manner of payment, but not to the plaintiff's disadvantage: *Smith* v. *Upper Canada College* (1920), 47 O.L.R. 37, 48 O.L.R. 120, 54 D.L.R. 548; *Upper Canada College* v. *Smith* (1920), 61 Can. S.C.R. 413, 57 D.L.R. 648.

The same is recognised in *Fletcher* v. *Campbell*. It is to be kept in mind too, and appears to have been overlooked, that the real and personal property are not to be treated as separate items of contract—they were sold together and for one bulk sum, and whatever was paid was a payment on account of the total consideration of $1,250. It is of consequence too that the security taken by notes is not identical with the original liability. Stinson's son joined in the notes, and I am of opinion that the plaintiff is entitled to recover without reference to the promissory note transaction—that there was a direct and specific payment of at least $200 in actual money; whether there was not also an additional payment of $225 I need not stop to consider. On the 9th October, 1919, the defendant Lloyd Wood wrote the plaintiff: "I managed to get two hundred the other day after a great deal of pressure. He sold his farm and out of a thousand dollars he was able to give me two hundred." This letter contains the first note of dissatisfaction with Stinson, expressed by Wood. Until then Stinson was always, in the opinion of Wood, all right, although slow, and Wood always excused him. There is no doubt about the alleged source of this money or the time of payment. And Mr. Wood was slow too, and quite too slow, in discovering that he did not owe the plaintiff a commission. Quite half a dozen letters from the plaintiff asking for it, and in reference to other matters, were left unanswered as to this question, and as late as the 6th December Wood wrote: "Mr. Stinson and I have come to a friendly agreement and everything is satisfactorily settled between us. Now we would like to know what is the best you can do for us," etc.

It was pointed out that Stinson and Wood supported each other at the trial in swearing that it was not $200 that was paid but $225, the proceeds of a sale of cattle. I prefer the defendant Wood's letter to his afterthought. I am a little puzzled as to the meaning of the letter I have just referred to and the character of the partnership it implies, and I am not surprised to find that these two men, in the end, made common cause to defeat the plaintiff's claim.

I would set aside the judgment appealed from and substitute a judgment for the plaintiff for the amount claimed with costs, here and below. *Appeal allowed.*

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Re HANLAN.

Ontario Supreme Court, Orde, J. February 28, 1921.

HUSBAND AND WIFE (§IIIB—146)—DESERTION BY HUSBAND—ACTION BY WIFE UNDER DESERTED WIVES' MAINTENANCE ACT (R.S.O. 1914, CH. 152)—ORDER FOR WEEKLY PAYMENT—JURISDICTION OF MAGISTRATE.

Where a wife voluntarily leaves her husband and with his consent goes to live with her parents in a different county from that in which the husband resides, and subsequently refuses to return to him because of his inability to provide her with a proper home, it is questionable whether there is a "desertion" as defined by the Deserted Wives' Maintenance Act (R.S.O. 1914, ch. 152), which justifies an order for payment of a weekly sum to the wife by the husband, but assuming that there is such a desertion the domicile of the husband is not the determining factor of the Magistrate's jurisdiction but the place where the desertion takes place.

[*Johnson* v. *Colain* (1875), L.R. 10 Q.B. 544, referred to.]

JUSTICE OF THE PEACE (§III—13)—OBJECTION TO JURISDICTION OF—BIAS —TIME FOR RAISING—WAIVER.

Objection to the jurisdiction of a magistrate on the ground of bias, must be raised at the outset of the proceedings before the magistrate. If no objection is raised until after the hearing, it cannot be raised afterwards.

[*Regina* v. *Steele* (1895), 26 O.R. 540; *Regina* v. *Huggins*, [1895] 1 Q.B. 563, referred to.]

MOTION by a husband for an order of prohibition to two justices of the Peace from proceeding further with an order for payment of a weekly sum under the Deserted Wives' Maintenance Act R.S.O. 1914, ch. 152, on the ground of want of jurisdiction in the justices to make the order and also on the ground of bias on the part of one of the justices. Motion dismissed.

C. H. Porter, for John Hanlan.

Gordon Waldron, for Maud Hanlan.

ORDE, J.:—On the 3rd August, 1920, Maud Hanlan obtained from James Tolton and Lynus A. Brink, two Justices of the Peace for the County of Bruce, an order under the Deserted Wives' Maintenance Act (R.S.O. 1914, ch. 152) directing her husband, John Hanlan, to pay her $10 per week and certain costs. John Hanlan now applies for an order prohibiting his wife and the two Justices from proceeding further with the matter.

The application is made upon two grounds: 1st, want of jurisdiction in the Justices to make any such order; and, 2nd, bias on the part of one of the Justices.

I can find nothing in the Deserted Wives' Maintenance Act, or in the Ontario Summary Convictions Act (R.S.O. 1914, ch. 90) to define the limits of the Magistrate's jurisdiction under the first mentioned Act. It is clear, of course,

that the Magistrate or Justices, who are empowered by sec. 2 of the Deserted Wives' Maintenance Act to order the husband of a deserted wife to pay her a weekly sum, cannot act judicially beyond the limits of the municipality for which they are appointed. There is no suggestion that the Justices did so here, but it is argued that the subject-matter which came before them was beyond their jurisdiction because John Hanlan, the husband, did not reside within their jurisdiction. This calls for an examination of the facts under which the order was made.

John and Maud Hanlan were married at Teeswater, in the county of Bruce, on the 17th July, 1918. He swears that since that date his residence and home have been at the city of Toronto, that his wife resided with him there until the 1st July, 1919, when she went to Teeswater to visit her parents, and that since that date she has not returned to his home. He admits that his work requires him to be temporarily employed out of Toronto, but says that Toronto is his home, and he denies having resided at the village of Teeswater or anywhere within the county of Bruce since his marriage.

Maud Hanlan swears that at the time she became engaged to John Hanlan he resided at Teeswater. He admits this, but says that about a year before the marriage he left Teeswater and since that date he has not resided in the county of Bruce. There seems to be some uncertainty about his place of residence immediately before the date of the marriage. His residence prior to that date is really of no consequence otherwise than as throwing light upon the disputed facts as to the subsequent residence. She says that since the time of their engagement Hanlan has had no permanent home, living at different times in Toronto, in the United States, in the county of Ontario, and in the Provinces of Manitoba and Saskatchewan. Shortly after the marriage he went to Western Canada, and she went back to her parents, and remained with them until November, 1918, when she returned to Toronto and remained with her husband there until January, 1919. She then returned at his request to her parents, but went back to Toronto in March, remaining until July, 1919. He then told her to go back to her parents, which she did, he going later to Saskatchewan. Since then, she says, he has been twice to Saskatchewan and twice to Detroit, Michigan. In his affidavit in reply he explains the trips to Saskatchewan and Detroit, the latter being the home of his sister, whom he visited. He went to

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Saskatchewan upon harvesters' excursions to assist in harvesting operations. He is desirous that his wife should return to him, and says that he has a home for her if she will come back.

When the application was first made to the Magistrates, there was some correspondence between the husband and wife with a view to a settlement, which however came to nothing. Hanlan went to Teeswater before the summons was served in order to meet the charge, and had several interviews with Mr. Brink, one of the Justices, who, according to Hanlan's affidavit, appeared unduly solicitous on Mrs. Hanlan's behalf.

On the 3rd August, 1920, Hanlan appeared with counsel before the two Justices at Walkerton, and, after they had heard the evidence, the order in question was made. No objection was then made on Hanlan's behalf to the jurisdiction of the two Justices.

Hanlan having failed to make the payments to his wife as directed by the order, the two Justices issued a summons to Hanlan to appear and shew cause why proceedings for enforcing the order should not be had against him under the Act. This was served on Hanlan in Toronto, and was returnable in Walkerton 11 days after such service.

After the service of the summons, there was an exchange of correspondence between the solicitors for both parties with a view to a settlement of their differences, but with no result. On the 27th November, 1920, no one appearing for Hanlan, the two Justices made an order directing Hanlan to pay his wife forthwith the sum of $100, and $5.58 for costs, and ordering that if these sums were not paid they should be levied by distress, and in default of distress that Hanlan be imprisoned in the common gaol of the county of Bruce for 30 days. This motion was then launched.

Although the Magistrates were acting within the limits of the county for which they were appointed, and there can be no question as to their jurisdiction on that score, the question to be determined here is whether the subject-matter with which they purported to deal came within their jurisdiction. That the judicial jurisdiction of a Magistrate is limited to matters arising within the limits of the municipality over which his commission extends and goes no farther is well-settled: *Regina* v. *Beemer* (1888), 15 O.R. 266; Paley on Summary Convictions, 8th ed., p. 28 et seq.

Although the Deserted Wives' Maintenance Act in no way expressly limits the jurisdiction of the Magistrate as

to the locality of the subject-matter, it could hardly have been intended to give a Magistrate power to deal with a matter which had arisen wholly beyond the limits of the municipality covered by his commission. If there is no limit to his jurisdiction in this respect, then a wife living with her husband in the county of Essex might leave him and go to the county of Prescott, and by applying to a magistrate compel her husband to appear in the county of Prescott. In the absence of an express provision conferring such an extensive jurisdiction upon the Magistrate, I must hold that the ordinary rule applies, and that his jurisdiction is confined to matters arising within his own municipality.

Under the Act the subject-matter is the desertion of the wife by the husband. It is the fact of such desertion which is the foundation of the Magistrate's jurisdiction. "Desertion" under the Act is given a meaning somewhat wider than its natural meaning, for sub-sec. 2 of sec. 2 extends it to cases where the wife is living apart from her husband because of his acts of cruelty or because of his refusal or neglect without sufficient cause to supply her with food and other necessaries when able to do so, so that the Act applies to cases where the wife is compelled to leave the husband, and is not confined to cases where the husband leaves the wife.

In the present case there was no leaving of the wife by the husband, nor is there any suggestion of any acts of cruelty on his part. The trouble appears to be his inability to provide such a home as she thinks she is entitled to. Had she left him while living with him in Toronto, then I think the Magistrates in the county of Bruce would have no jurisdiction, because the "desertion," that is, the cause of her leaving him, would have taken place in Toronto. But that is not quite the case here. She left Toronto on the 1st July, 1919, for Teeswater, to stay with her parents there. This was quite voluntary on her part, and was with his consent. It was intended that she should return. Then, because of his alleged inability to provide her with a proper home, she refused to return to him. I have no power on this motion to deal with the merits of the matter which came before the two Justices. It would seem to me to be questionable whether upon the facts there was any such "desertion," even as defined by the Act, as would justify the order in question. Perhaps upon a motion to quash or upon an appeal, or upon a fresh application to the Justices under sec. 9, that question might be reviewed. All that I can deal

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with here is the question of jurisdiction. Counsel for the husband contends that the husband's domicile fixes the locality of the subject-matter; and, his domicile being in Toronto, no other Magistrate than one exercising jurisdiction in Toronto can make any such order. But, even assuming Hanlan's domicile to be in Toronto (and this is open to question), I do not think domicile is the determining factor. Suppose a man travelling with his wife deserts her at some distance from their home, leaving her without means of support, and without the means even to return home for the purpose of taking proceedings under the Act; the Magistrate in the municipality in which the desertion takes place would, in my judgment, have jurisdiction. So that it is not the place where the husband resides, but the place where the "desertion" takes place, that determines the jurisdiction.

Applying this test to the present case, the wife living with the husband's consent at Teeswater, it might well be that under the circumstances there was a failure on his part to supply her there with food and other necessaries, which would give the local Magistrates jurisdiction. In the absence of evidence which would clearly exclude their jurisdiction in that regard, I must hold that there were circumstances in the present case which, whether the Justices came to a right conclusion upon the merits or not, gives them jurisdiction over the subject-matter of Mrs. Hanlan's application. The fact that Hanlan went to Teeswater in the hope of adjusting things, and was present at the hearing at Walkerton, while not conferring jurisdiction, if no jurisdiction existed (*Johnson* v. *Colam* (1875), L.R. 10 Q.B. 544), is to some extent an element in localising the matter in the county of Bruce. I am of the opinion, therefore, that the objection to the jurisdiction of the Justices upon this ground fails.

The order is also attacked upon the ground that one of the Justices, Brink, was biased against Hanlan. Whatever ground there may be for the contention that there was bias on the part of Brink, I think that Hanlan cannot now raise this objection. When bias is alleged and the party is aware of it, he must take objection to the Magistrate's jurisdiction at the outset. If he raises no objection until after the hearing the objection is waived, and cannot be raised afterwards. It is sufficient upon this point to refer to *Regina* v. *Steele* (1895), 26 O.R. 540, at pp. 546-7; and to *Regina* v. *Huggins*, [1895] 1 Q.B. 563.

The motion will therefore be dismissed with costs.

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Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins and Ferguson, JJ.A. January 31, 1921.

CONTRACTS (§IID—185)—BUILDING CONTRACTS—CONSTRUCTION—LARGE AMOUNT OF EVIDENCE—CASE PROPERLY DEALT WITH UNDER RULE 268.

Actions relating to the faulty execution of building contracts where the evidence taken is of great length result in a disproportionate length of time being devoted to them by the Court under conditions which can never be satisfactory owing to the nature of the case, and should be dealt with under Rule 268, under which the Court may obtain the assistance of merchants, engineers, accountants, actuaries or scientific persons, in such a way as it thinks fit.....and may act upon the certificate of such persons.

CONTRACTS (§IID—145)—TO REPAIR OLD HOUSES—"IN FIRST CLASS SHAPE"—MEANING OF—CAPACITY OF BUILDINGS TO TAKE ON REPAIRS.

An agreement to put old, decayed and tumble-down houses "in first class shape" must have reference to their capacity for taking on repairs, which could be only those which their aged condition permits, and the referee having found, on contradictory evidence, that the contract had been substantially performed, and the work accepted by the owner the Court on appeal will not interfere with such finding.

APPEAL by the defendant, the owner, from the judgment of the Acting Assistant Master in Ordinary, as Referee, in an action by the contractor against the building owner to enforce a mechanic's lien. Affirmed.

By the judgment it was found that the plaintiff company was entitled to be paid $1,386.80, with interest from the 16th May, 1918, and costs.

The sum of $1,386.80 was made up of the contract-price for remodelling houses Nos. 114, 116, and 118, D'Arcy street, Toronto, $1,500, and $526.80 for extras, less the sum of $140, which the Referee deducted for defects and omissions.

D. L. McCarthy, K.C., and *J. Singer*, for appellant.

B. N. Davis and *F. A. A. Campbell*, for respondent.

The judgment of the Court was read by

HODGINS, J.A. (after briefly stating the facts):—The argument before us was followed by lengthy written references to the evidence, which dealt not only with the case generally, but traced up each item of defect or shortcoming, small or large, in great detail and with extreme care. It is a pertinent observation that actions relating to the faulty execution of building contracts, where the parties indulge in evidence running to over 400 pages,

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are an enormous and unnecessary expense to them, and result in a disproportionate length of time being devoted to them by the Court, under conditions which can never be satisfactory owing to the nature of the case. They ought to be dealt with under Rule 268*, and I am glad to find that this suggestion has been already made by the Chief Justice of the Common Pleas in *Brazeau* v. *Wilson* (1916), 36 O.L.R. 396, 30 D.L.R. 378, also a case under the Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140. There is some doubt, notwithstanding sec. 34† of that Act, whether the Referee can act under Rule 268. It would be well, in my opinion, if this doubt were resolved by the granting of explicit power to the Referee in this direction, so as to obviate the expense and annoyance occasioned in these cases by the present mode of inquiry. The Mechanics and Wage-Earners Lien Act should be so amended as to permit the interposition of architects or engineers, appointed by the Court to report to the Referee, instead of requiring him to spend days in listening to descriptions and discussions about conditions and operations which can only be fully understood through personal inspection. In this case the Referee made such an inspection, as did also Thatcher, an engineer and architect, and Bustard, a builder, for the respondent, and Jeffrey and Cotton, both architects, for the appellant. The respective architects differ. The evidence for the appellant, apart from himself, is from men formerly in the respondent's employ in doing this work on sub-contracts, the roofer who put on the roofing, and an inspector on the work.

The impression gained on reading the evidence is that on the one hand the appellant wanted three old, uninhabited houses made over anew, while the respondent thought that "first class shape" was a relative and not a positive term, and acted accordingly. I think the respondent was right in that view, because the houses were old, decayed, and tumble-down. "Putting these

*268. The Court may obtain the assistance of merchants, engineers, accountants, actuaries or scientific persons, in such way as it thinks fit, the better to enable it to determine any matter of fact in question in any cause or proceeding, and may act on the certificate of such persons.

†34. The Master in Ordinary, the Local Masters, Official Referees, and the Judges of the County and District Courts, in addition to their ordinary powers, shall have all the jurisdiction, powers and authority of the Supreme Court to try and completely dispose of the action and all questions arising therein.

properties in first class shape" must have reference to their capacity for taking on repairs, which could be only those which their aged condition permitted. The contract is as follows:—

"Toronto, Dec. 12th, 1917.

"H. Miller, Esq., 61 Wellesley St., Toronto.

"Re 114, 116, 118 D'Arcy Street.

"We have examined the above premises and beg to submit the following tender in detail for putting these properties in first class shape.

"We will install new windows with stone heads in the basements of each of the three houses facing on D'Arcy street, and also install new front doors with plate glass panels for same, as well as putting in suitable new doors inside the above houses where necessary.

"We will also re-roof the above houses with first class ready roofing, guaranteed for ten years.

"We will build new fence on Huron St. front and re-build the other fences.

"We will also raise the kitchens and repair underpinning and put in new front steps and platforms with canopies over the same. We will also put in suitable steps leading to the cellars.

"We will also straighten up and level all windows and ceilings where required throughout the houses, and install whole window panes wherever broken or pieced.

"We will also put the plumbing in first class condition throughout and install two new baths in place of old ones.

"Install two new suitable Pease furnaces if price does not exceed price quoted us $105.00 in 116 and 118 and two new chimneys for the same, and put the furnace at 114 in good condition and build new chimney for same.

"We will also repair plastering throughout the three buildings, inside and out.

"We will install new electric bells, repair all brickwork, colour and stripe all outside brick walls, paint all woodwork both inside and out, old work two coats, new work three coats, paper the houses throughout with paper to cost an average of 10 cents per roll, and repair and replace all eave-troughing, down-pipes, and valleys on the buildings.

"Also supply all door-locks and keys throughout the buildings wherever necessary, repair all floors, and scrub and paint the same.

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"We agree to do all the above work in the best workmanship manner and supply all material required for the job for the sum of fifteen hundred dollars ($1,500.00).

"We are satisfied that the above work is all that is necessary to put these properties in first class condition throughout. If any additional items may be required, the work shall be done without additional cost to you and to your entire satisfaction.

"Yours truly,

"House Repair & Service Co. Limited.

"C. A. Hull.

'Work to be started forthwith and completed within four weeks, weather permitting. C. A. Hull."

There is a question of extras as well as of 18 alleged defects or omissions; but as, in my judgment, only a few of these are of any moment in determining what principle of decision to apply, I will deal with them from that standpoint.

I do not think it is needful to follow the Referee through the minute detail on which he was obliged to involve himself in order to come to a conclusion. For if the rule invoked, that in *Munro* v. *Butt* (*infra*), is not applicable, those details lose their significance and become items of deduction only. It would necessitate very strong evidence to induce an appellate Court to interfere with the Referee's finding as to quantum on such items as are involved in this appeal. The Referee finds as follows:—

"I find that the contract has been substantially performed by the plaintiff, with some exceptions hereinafter dealt with, and that the work has been accepted by the defendant, who is reaping a most satisfactory return upon his investment."

The whole evidence is extremely unsatisfactory and contradictory. The respondent undoubtedly took the contract too low, but it has spent on it, including extras, $2,314.80 or $814.80 over the contract-price. The appellant turned over the inspection to Hill & Smerdon, and, he says, depended on them. He derives his evidence from those who worked on the job and were themselves to blame if things were wrongly done, but even they testify to remedying defects pointed out, and one of them, Tanner, who had previously supported the respondent's side of the case and gave a statement to his solicitor, went back on it at the trial, and hedged considerably on cross-examination. The result of the evidence of

these men is not convincing. Apart from these witnesses, the others, architects and builders, after viewing the premises, give estimates quite out of line with the contract-price—reading "first class shape" as requiring work much superior to what was done, or was, I have no doubt, intended to be done when the contract was signed.

Upon this basis, it is extremely difficult, if not impossible, to reverse the findings of the Referee founded upon his judgment of the value of the testimony and upon a personal inspection of the work in the presence of both parties.

To judge whether the workmen were right in excusing themselves and in blaming the contractor, and to determine whether the architects called as experts were qualified from their experience and reasonableness to express a just opinion, it is necessary to see and hear them, and I do not think the impression made on the Referee can be disregarded in a case so peculiarly depending upon his judgment of their truthfulness and capacity.

[The learned Judge examined those of the items which were most strenuously debated, and did not see his way to interfere with the Referee's findings as to any of them.]

The other objections, and some of those I have dealt with, as being for work badly done or improperly completed, fall quite outside the rule to which I have referred, and are in some cases based on what I think is an erroneous construction of the contract. Indeed the appellant's architect, Cotton, agrees on cross-examination that "first class" is a relative term, though in that sense he will not go so far as to pronounce the work up to the proper standard.

As to the extras which have been allowed, amounting in all to $526.80, the Referee has found, as to $284.40 (including profit), that these were specially ordered and should be paid for. It is not easy, upon the evidence, to differ with this finding, as there is much to support it, notwithstanding denials by those who are said to have given the directions. As to the remainder, the item for locating, repairing, and thawing the water-pipes seems to rest upon a reasonable basis of liability having been cast upon the contractor by the conditions which supervened before he began work. The claim for cartage is for drawing away old rubbish not caused by

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the respondent's work. And as to the extra plastering, repairing, and papering after the plumber, the claim is properly maintainable as an extra, being done after the tenants were in, owing to the bursting and repair of water-pipes.

The result of the whole case, to my mind, is that the contract has been substantially completed, though in some respects the work is inferior and the results not as beneficial as the appellant would like. These defects have been appraised after an extremely patient hearing and a personal inspection, and as deducted by the Referee are not serious in amount. Perhaps more should be allowed, but the absence of any definite written complaint until 18 months had passed—although there were two inspectors [employed by a real estate agent for this very purpose, at a very insistent owner's request]—must have a strong bearing in gauging the situation. Added to this is the fact that the houses were taken possession of before completion and well rented, and that the inspection of them after such occupation by tenants, 18 months later, could hardly give a proper view of their condition when they left the contractor's hands. There is nothing to shew that, had the respondent been desirous of supplying any defects originally complained of and still remaining during the 18 months, any consent from the tenants had been obtained to interfere with their possession or comfort.

These considerations make it impossible to apply the principle of *Munro* v. *Butt*, 8 E. & B. 738, so strenuously contended for by counsel for the appellant.

The decision in that case has a wide and well-recognised effect, but it has been held to be inapplicable to such a case as the present, in *H. Dakin & Co. Limited* v. *Lee*, [1916] 1 K.B. 566 (Court of Appeal)—already followed by this Court in *Diebel* v. *Stratford Improvement Co.*, 38 O.L.R. 407, 33 D.L.R. 296, and in *Taylor Hardware Co.* v. *Hunt*, 39 O.L.R. 85, 35 D.L.R. 504, and with discrimination by the Second Divisional Court, in *Burton* v. *Hockwith*, 45 O.L.R. 348, 48 D.L.R. 339; also by the Appellate Division in Alberta, in *Canadian Western Foundry and Supply Co.* v. *Hoover* (1917), 37 D.L.R. 285. The remarks in the *Dakin* case of the Master of the Rolls might almost be applied literally in this case. Mr. Justice Sankey in the Court below laid down three rules which are adopted in the head-note as the result of the

decision of the Court of Appeal. He says (p. 574): "Where a builder has supplied work and labour for the erection or repair of a house under a lump sum contract, but has departed from the terms of the contract, he is entitled to recover for his services, unless (1) the work that he has done is of no benefit to the owner; (2) the work he has done is entirely different from the work which he has contracted to do; or (3) he has abandoned the work and left it unfinished."

This is not new law, as appears by reference to the charge of Tindal, C.J., to the jury in *Cutler* v. *Close* (1832), 5 C. & P. 337. See also *Farnsworth* v. *Garrard* (1807), 1 Camp. 38; *Thornton* v. *Place* (1832), 1 Moo. & R. 218.

The standard set up by the stipulation that the work should be done to the entire satisfaction of the owner differs somewhat from what is demanded where a third party is to be the judge. In each case, however, there must be the element of reasonable conduct.

Where the work has to be done to the approval of the employer or building owner, in the absence of express and unambiguous provision making such approval a condition precedent, the maxim that "no man shall be judge in his own cause" (Broom's Legal Maxims) is strong to raise a presumption against the right of the employer or building owner to determine in his own favour and without appeal any dispute as to the character of the workmanship or the amount of the price to be paid; and such approval, therefore, cannot be withheld by him unreasonably: see *Dallman* v. *King* (1837), 4 Bing. N.C. 105.

Here there is no evidence of a desire to be reasonable on the part of the owner, but rather the reverse, while the inference may well be drawn from the facts detailed that the owner is bound by the acts of his inspectors, and that their objections were substantially complied with so as to enable the owner to rent the property. He did this without further detailing of complaints till long after the respondent had, as he thought, finished the work. The provision, indeed, as to satisfaction, as expressed, refers only to additional items.

Appeal dismissed with costs.

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DELANEY v. CITY OF TORONTO.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Middleton and Lennox, JJ. April 21, 1921.

HIGHWAYS (§ IVA—127)—NON-REPAIR—AUTOMOBILE ACCIDENT—ACTION UNDER FATAL ACCIDENTS ACT FOR DEATH OF PASSENGER—DRIVER OF AUTOMOBILE INTOXICATED — CONTRIBUTORY NEGLIGENCE—GUEST PARTY TO CONTRIBUTORY NEGLIGENCE — DISMISSAL OF APPEAL.

If the owner of an automobile is so intoxicated as to render it dangerous for him to drive the vehicle, a person who knowing of his intoxicated condition and being more or less himself intoxicated, voluntarily takes his place in the vehicle as the guest of the driver cannot escape the consequences of the driver's contributory negligence when that contributory negligence is the result of the driver's intoxicated condition; he really makes himself a party to the contributory negligence and is equally guilty with the driver.

[*Mills* v. *Armstrong, The Bernina* (1888), 13 App. Cas. 1, distinguished; *Plant* v. *Township of Normanby* (1905), 10 O.L.R. 16; *Miller* v. *County of Wentworth* (1913), 5 O.W.N. 317, applied. See Annotation criminal responsibility for negligence, 61 D.L.R. 170.]

APPEAL from the judgment of Orde, J., in an action under the Fatal Accidents Act, brought by the administrator of the estate of James Delaney, for damages for his death in an automobile accident, caused by the alleged negligence of the City of Toronto, in allowing a portion of Dundas street to be and remain out of repair.

The judgment appealed from is as follows:

ORDE, J.:—The plaintiff lives with his wife at Orangeville. Their son, James Albert Delaney, was 25 years of age and unmarried at the time of his death and was employed as an instrument-man on the engineering staff of the Canadian Northern Railway, his work taking him to North Bay and places in that vicinity.

On Sunday the 2nd November, 1919, the day of the accident, James Delaney was spending the week-end in Toronto. Early in the afternoon of that day, James Delaney, his brother Harry Delaney, and a friend named Staunton met at Harry's place and about 2.30 or 3 p.m. started out in a motor car belonging to Harry and Staunton for a drive about the city. Harry was 27 years of age, and was an automobile mechanic and driver employed in a garage, with 12 years' experience in driving motor cars, and he had driven cars during the war in France. The afternoon was spent in driving about town, there was a stop somewhere for tea, and

also later for supper, and they had also called to see some friends. After supper the driving continued, apparently with no special objective: as Harry Delaney expressed it, they "fooled about town." Some time between 8 and 9 o'clock they were driving southerly along the west side of Dundas street, Harry Delaney driving, with Staunton beside him and James Delaney in the rear seat. At a point a few feet past the south-west corner of Kenneth avenue and Dundas street, the car struck a hole in the pavement and after running a distance of 90 feet struck one of the Toronto Street Railway poles on the edge of the kerb on the west side of Dundas street, and James Delaney was so badly injured that he died shortly afterwards.

That this street was in a very bad state of repair and had been so for some time was abundantly proved. The pavement is of brick, laid upon a concrete foundation. Matthews, the city corporation's foreman, said that he had had a report from one of his patrol-men about three weeks before the accident that the road had become badly worn and should be repaired, and he admits having seen the hole which it is alleged caused the car to swerve, some time before the accident. The evidence of those who lived in the street was that the hole had been there a long time. Mr. Geary did not attempt seriously to contend that the street was not in a state of disrepair which might render the city corporation liable under certain circumstances, but he contended that the accident in this case was not caused by the negligence of the city corporation or by the nonrepair of the road, but by that of the deceased or of Harry Delaney, the driver of the car.

Harry Delaney said that the party had all had drinks at his place before they started in the afternoon, but denied having drunk anything after drinking at his sister's place. He also denied having liquor in the car, but his evidence as to the drinking was not at all clear or satisfactory. He admits having had at least two drinks himself before they started, but says that he drank less than the others. He says he thinks Staunton was not drunk, but could not say that either Staunton or his brother was sober. The physician who was called in immediately after the accident says that the deceased had been drinking and that he smelt liquor on him, and he says that one of the deceased's friends appeared to have had liquor.

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Both Harry Delaney and Staunton were taken in charge by the police immediately after the accident, and they were locked up on a charge of drunkenness. The charges were either dropped or dismissed the next day, but two constables and a police sergeant swear that Delaney and Staunton were both drunk when arrested, that liquor could be smelt on them, and that they staggered. Against the evidence of the police was that of James Turkington, into whose house James was taken after the accident. He says that Harry Delaney was very much excited but was "sober enough," and that he gave no indication of being under the influence of liquor. This was corroborated by the evidence of Mrs. Louisa Riddell. But the evidence of the police, coupled with the admissions of Harry Delaney, makes it fairly evident, I think, that the whole party were under the influence of liquor at the time of the accident.

There was some contradictory evidence as to the speed at which the car was going, but in my judgment the car was going at a high rate of speed when it struck the hole. Delaney says he was going between 15 and 20 miles an hour, that he felt a sudden jar which jerked the steering wheel out of his hand, that one of the tires blew out, and that the car threw in towards the kerb, struck the iron post, and was completely wrecked.

The defendants sought to establish by expert evidence that a car running at a proper rate of speed could have been stopped before it struck the pole, and that the distance travelled after it struck the hole shewed that it was either travelling at a high rate of speed when it struck the hole or that the driver was negligent in failing to get the car under control after it struck the hole. There was some doubt as to whether the blow-out of one of the tires had not occurred before the car struck the hole. What the plaintiff, in my opinion, failed to explain, was the distance the car travelled after it struck the hole before it struck the pole. The car was either going at such a high rate of speed that it was impossible to stop it, or Harry Delaney was not in such a condition as to enable him to act in an emergency and stop the car in time to avoid the accident. Under these circumstances I find it impossible to avoid the conclusion that the car was going at a high rate of speed and that the driver of it was not in a condition to exercise such control of the car as to avoid striking the pole, and

I so find. It may be that, notwithstanding the speed, a sober driver could have so acted after striking the hole as to avoid striking the pole, or that but for the high rate of speed Harry Delaney in spite of his condition could have stopped the car in time or have so steered it as to avoid the pole, but the combined speed and lack of proper control constituted, in my opinion, contributory negligence upon Harry Delaney's part.

It was, however, contended on behalf of the plaintiff that, notwithstanding my finding Harry Delaney guilty of contributory negligence, James Delaney was not so identified with the car and its driver as to be affected by it, and that on the principle of the *Bernina* case the plaintiff is entitled to recover: *Mills* v. *Armstrong, The Bernina* (1888), 13 App. Cas. 1; and the plaintiff also relies upon *Coop* v. *Robert Simpson Co.* (1918), 42 O.L.R. 488, 42 D.L.R. 626; *Godfrey* v. *Cooper* (1920), 46 O.L.R. 565, at pp. 570 and 575; 51 D.L.R. 455, and *Fafard* v. *La Cité de Québec* (1917), 55 Can. S.C.R. 615, 39 D.L.R. 717. These cases are examples of the application of the decision in the *Bernina* case that the innocent passenger is not precluded by the negligence of the owner or driver of the car from recovering if there was negligence on the part of the defendants. But counsel for the defendants contends that James Delaney is not in the position of an innocent passenger. He was clearly not a passenger in the sense in which the plaintiff was in the *Bernina* case or in the *Fafard* case, in both of which the plaintiffs had paid for their accommodation in the vessel or vehicle. On the other hand, he was not in quite the position of the plaintiff in *Dixon* v. *Grand Trunk R.W. Co.* (1920), 47 O.L.R. 115, 51 D.L.R. 576, for in that case the plaintiff was one of five men who together procured the motor car, and the driver (also one of the five) was driving as their agent and under their control. Here the car belonged to Harry Delaney and Staunton, and James was merely their guest. But, even with this distinction from the *Dixon* case, is it one to which the *Bernina* case applies? That this question is not a simple one may be gathered from the judgment of Lord Bramwell in the *Bernina* case, 13 App. Cas. 1, at p. 11, where he speaks of the cases as being of "extreme difficulty." And Lord Bramwell there suggests many of the difficulties which may arise in endeavouring to apply the principle. The doctrine of "identification" with the driver of the vehicle which had been

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propounded in *Thorogood* v. *Bryan* (1849), 8 C.B. 115, was of course exploded by the decision in the *Bernina* case. Lord Herschell in the latter case suggested a class of case in which the injured person would be precluded from recovering when the driver of the vehicle or the person navigating the vessel is guilty of contributory negligence, namely, where the one is the servant or the agent of the other: 13 App. Cas. at pp. 5 and 6. And it is on the principle of agency that *Dixon* v. *Grand Trunk R.W. Co.* rests. But it does not follow that the right to recover in spite of the contributory negligence of the third person depends solely upon any such legal relationship as that of principal and agent or of master and servant. These are merely examples of cases where that relationship precludes the master or principal from recovering against one of the negligent parties, or tort-feasors, because of the contributory negligence of a third party, the other tort-feasor. And in endeavouring to establish a principle for cases to which the *Bernina* principle ought not to apply, there is the danger of trying to adjust the circumstances to fit the "identification" theory of *Thorogood* v. *Bryan*. In cases where the person who is guilty of contributory negligence is the servant or agent of the injured person, there is in a sense an "identification" of the injured master or principal with the guilty servant or agent. But the reason why the master or principal cannot recover in such a case seems to be that the relationship makes the negligent act of the servant or agent that of the master or principal, so that in an action against another negligent person he cannot be held to say that he himself was not negligent. But that there are other grounds on which one who is a guest in a vehicle may himself become a party to the contributory negligence of the driver, though having no control over the latter, is shewn by the cases of *Plant* v. *Township of Normanby* (1905), 10 O.L.R. 16, and *Miller* v. *County of Wentworth* (1913), 5 O.W.N. 317. In *Plant* v. *Township of Normanby* Meredith, J. (now Chief Justice of the Common Pleas), discusses the position in which a guest of the driver of a vehicle is placed when the driver is guilty of contributory negligence. There the plaintiff was injured while in a vehicle driven by her mother. Both the defendant township corporation and the mother were guilty of negligence, that of the mother consisting of careless driving and the use of defective harness. It

was held that the lack of knowledge of the condition of the harness on the part of the plaintiff under the circumstances exempted her from being a party to the contributory negligence of the mother, but it is clear that, had she known of it, or had the circumstances been such as to cast upon her the duty of satisfying herself that the harness was safe, she would not have been entitled to recover. In *Miller* v. *County of Wentworth* Middleton, J., comments upon *Plant* v. *Township of Normanby* and distinguishes the two cases. He holds that, while the driver's negligence is not necessarily to be attributed to the passenger, the circumstances were different where the whole situation was as much known to the one as to the other.

In the present case James Delaney voluntarily accompanied his brother and another as a guest in a motor car, when all three were more or less intoxicated. Harry Delaney's condition was such as to render it dangerous for him to drive the car. In my judgment, a man who in such circumstances chooses, even as a guest, to entrust himself to the care of the driver, cannot be allowed to escape the consequences of the driver's contributory negligence, when that contributory negligence is itself the result of the driver's intoxicated condition. While the doctrine of *volenti non fit injuria* is not strictly applicable, there is practically the same voluntary taking of the risks involved. James Delaney really made himself a party to the negligent driving of the car by his brother, and was himself, under the circumstances, equally guilty of contributory negligence.

The action will, therefore, be dismissed; but, as the negligence of the defendants also contributed to the accident, the dismissal will be without costs.

Lennox, K.C., for the appellant.

Geary, K.C., for the defendants, respondents, was not called upon.

THE COURT dismissed the appeal with costs. The Chief Justice referred to *Flood* v. *Village of London West* (1896), 23 A.R. 530.

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Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins and Ferguson, JJ.A. January 31, 1921.

CRIMINAL LAW (§IIA—30)—MURDER—JUDGE'S INSTRUCTIONS TO JURY—SUFFICIENCY.

The failure of the trial Judge on a trial for murder to pointedly direct the attention of the jury to the fact that there was no evidence to support a conviction without the testimony of the widow of the deceased and to the contradictory statements made by her going to shew that she was not a credible witness. Held not to be want of direction sufficient to vitiate a conviction for murder.

The failure to charge the jury as to the law respecting justification or excuse in self-defence was not misdirection or non-direction vitiating the verdict where the evidence shewed that the death was caused by a blow on the head and a rope tied around the neck of deceased probably while he was unconscious.

The rule requiring the trial Judge to advise the jury that it is not safe to convict on the uncorroborated evidence of an accomplice is a rule of practice and not of law, and failure to follow the rule is not in Ontario the subject of a reservation under the statute.

[*Reg.* v. *Smith* (1876), 38 U.C.R. 218; *Reg.* v. *Lloyd* (1890), 19 O.R. 352; *Rex. v. Frank* (1910), 21 O.L.R. 196, followed. See Annotations, 1 D.L.R. 103, 64 D.L.R. 1.]

CASE stated by LATCHFORD, J., pursuant to the direction of the Second Divisional Court: see *Rex* v. *Dumont* (1921), 19 O.W.N. 426.

The prisoner was found guilty of the murder of Cyrille Raymond, after trial before LATCHFORD, J., and a jury, at North Bay, on the 5th October, 1920.

Marie Raymond, the wife of the deceased, was the principal witness for the Crown. She admitted that the prisoner had been her paramour before and after the death of her husband. It appeared that at the inquest and at the preliminary inquiry before a magistrate she had, probably with a view of shielding the prisoner, withheld the story which she told at the trial, which supported the theory of the Crown that Raymond in his own house was struck with a bottle in the hands of the prisoner and was afterwards strangled. The defence was that the prisoner did not do this, and that he was not in Raymond's house when, according to the testimony of Marie Raymond, the blow with the bottle was struck.

Marie Raymond also testified that her husband was in the act of turning round to take hold of an axe when the prisoner struck him with the bottle.

The questions framed by the Second Divisional Court, and stated by the trial Judge, were as follows:—

1. Was there a want of direction to the jury, vitiating the verdict, in not pointedly directing the attention of the jury to the fact that, without the testimony of the woman, there was no evidence to support a conviction; and to the contradictory statements made by her going to shew that she was not a credible witness?

2. Was there misdirection or nondirection, or both, vitiating the verdict, in that part of the charge dealing with the evidence regarding getting the axe and the effect of that evidence; and in not charging the jury as to the law respecting justification or excuse in self-defence?

J. W. Curry, K.C., and *G. L. T. Bull*, for the prisoner.

Edward Bayly, K.C., for the Crown.

MEREDITH, C.J.O.—The theory of the Crown was that Raymond was struck with a bottle in the hands of the prisoner and afterwards strangled. The defence was that the prisoner did not do this, and that he was not in the house of Raymond when, according to the testimony of Marie Raymond, the widow of the deceased, the blow with the bottle was struck.

According to the evidence, Marie Raymond, who was of easy virtue, lived with her husband in a house in Sturgeon Falls, owned by the father of the prisoner or the prisoner, with whom she became acquainted owing to his calling at the house to collect the rent, and she became "intimate sexually" with him. In the afternoon of the 23rd April, 1919, she went with the prisoner and Cyrille Laberge, who was a witness for the defence, taking with her her baby and a little sister, and the prisoner had connection with her then. On the evening of that day, the prisoner came to her house and invited her to drive with him to Cache Bay. She consented, and after they had started they met Laberge and he got into the "rig" in which they were driving. They returned to the house later on, according to the testimony of Marie Raymond about 11 o'clock p.m., and according to Laberge about 10 p.m. The stories of Marie Raymond and Laberge differ widely at this point. She says that the prisoner and Laberge entered the house. Laberge says that they did not but went to their homes. The testimony of Marie Raymond was that after entering the

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living room of the house her husband said to the prisoner: "I told you before never to put your foot in my house again and here you are again to-night;" to which the prisoner replied, "It is none of your business;" that her husband then said: "I will attend to this. I will take my axe and I wil' ·t you out of my house;" and that her husband then turned around to take hold of the axe, and that the prisoner then struck him on the side of the head with a bottle, "like a rye bottle;" that the deceased was felled by the blow and fell down on the side of the stove and then rolled on to the floor, and that she did not see him move; that she then went upstairs. In about ten minutes she came down and saw the prisoner picking her husband up. When upstairs she heard the prisoner swearing; when she came down the prisoner told her to go up stairs, that she had no business there; she came back again in about 10 minutes and found the door leading to the kitchen closed; she opened the door about 3 inches in order to see what was going on in the kitchen and saw the prisoner holding her husband in his arms; Laberge was then "laying against the door inside with his hand on the latch;" the prisoner was holding her husband in his arms, was leaning towards him; she then shut the door and went and sat near the stove in the living room. She then heard the side door of the kitchen that leads outside opened; she then went into the kitchen and saw the prisoner and Laberge carrying her husband through the doorway; the horse was standing close to the back door of the kitchen, and the back of the buggy was towards the front of the house; after seeing this, she closed the door and went back into the house, and from there she "heard the rig go;" she saw the prisoner passing the house on foot about 1 o'clock in the morning; he had a flash light, and he turned it on her window and then on himself; she saw the prisoner the next morning at the house next door to hers, and asked "what he had done with her husband;" and he told her that she had no business to know that; the prisoner came to her house the next night, and she had sexual connection with him; she then asked him what had become of her husband, and he replied, "If I tell you, you will give me away in some way;" she saw him often after that, and often asked him about her husband, and he told her "there was no need of me knowing anything about it, and if he told me that I might give him away."

This evidence was uncontradicted except in so far as the testimony of Laberge was in conflict with it.

Nothing was heard of the deceased after the 23rd April until the 6th May following, when his dead body was found in a little shrubbery 30 or 35 feet from the road between Sturgeon Falls and Cache Bay. The body was lying on its back, "just sideways," and was clothed; a rope about 16 inches long was tied very tightly about the neck; there was a mark as of a blow on the head, back of the ear, and decomposition had set in. Sylva Mayer, who gave evidence as to this and was then Chief of Police of Sturgeon Falls, removed the body to the undertaker's.

A *post mortem* was performed by Dr. Colonmbe, assisted by Dr. Aubin, at the undertaker's on the 8th May. According to his testimony, the probable cause of the death was direct violence; the right eye-ball was punctured, "collapsed and shrunken;" there was a wound on the head of the size of a hen's egg, and the cheek had been cut through; there was a half-inch rope around the neck, which had made "a hard dry furrow on a st aight horizontal line," which had left a bluish yellow mark. His opinion was that the wound was probably caused by a forcible blow with a blunt instrument, and he ascribed the death to the blow and the tying. He thought that the blow might have caused concussion of the brain, rendering the deceased unconscious, and the tying caused asphyxia.

Dr. Aubin corroborated the testimony of Dr. Colonmbe, and he added the statement that the death was caused by "strangulation or smothering or asphyxia."

It was also shewn that a strap was found lying on the body when at the morgue, and that there were creases on both hands as if they had been tied with the strap.

Peter Dupuis, the livery stable keeper from whom the buggy was hired, testified that when he left the stable about midnight it had not returned, contradicting in this respect the testimony of Laberge, whom he also contradicted as to payment having been made to him for the hire of the buggy when it was returned, and it was also shewn that the deceased's residence was distant about a quarter of a mile from the livery stable.

The only evidence adduced by the prisoner beyond that of

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Laberge was as to character, and the prisoner did not testify on his own behalf.

In his charge to the jury the learned trial Judge told them that they were the only judges of fact, and that his only duty in regard to the fact was to try to point their way—that was all—"not to direct your minds in any way to any conclusion that you do not in your own view regard as right." He then put to them the question, "Was the deceased killed?" and asked if, in view of the medical evidence, they could have any doubt of that; he then referred to the evidence as to the finding of the body and the condition of it when found, stating that what he told them was the evidence as he understood it but that it was for them to say whether or not he stated it correctly, and he asked if that indicated to them that the deceased was killed, telling them that if they were satisfied that he was not killed, they need consider the matter no further; he next told them that if they were satisfied that the deceased was killed, the next question was, "Was the prisoner the man who killed him?" He then told them that in considering that question they would have to consider all the circumstances disclosed, and said that Marie Raymond "was a woman of evil courses, call her what you like, strumpet or harlot or prostitute, any of these words describe the woman she was."

The learned Judge thus recapitulated, accurately I think, the testimony of Marie Raymond down to the time, as she said, when the three entered the house on the evening of the 23rd April, and referred also to the testimony of Laberge that after reaching the house he and the prisoner drove away, and told the jury that, if they believed Laberge, "they did not kill that man that night, neither the one nor the other, they had nothing to do with it."

He then turned to the woman's story and pointed out that it agreed with the testimony of Laberge down to the time when they reached the house, telling the jury: "You are entitled to regard probabilities, what was likely to have happened, when you have a contradiction between two witnesses, and there are other matters which you must regard, but you can regard the probabilities."

He then repeated his statement that, if they were satisfied

that Laberge was telling the truth, they need go no further, and went on to refer to the fact that the woman on two occasions—at the inquest and at the preliminary inquiry before the magistrate—had withheld the story which she told at the trial, and asked the jury: "Now is there any reason why on two occasions she preferred to be silent regarding Dumont, and is there a reason why on another occasion she told the same story that she told here? Was she telling the truth to-day? Making all allowances for her immorality, for her want of morality, since, unfortunately, she is not alone in that, there have been members of her profession from very early days and there always will be, but did she tell the truth? If she told the truth, Laberge was not telling the truth; if Laberge was telling the truth, she was not. Now, when a person makes a false statement, there is some motive for it. Possibly you can understand the motive she had in protecting this man on two occasions when she was brought face to face with the circumstances of the death of her husband. When she was asked to-day why she did it, she said she was afraid of him. If her story to-day is correct, she wanted to protect him and did protect him on two occasions—telling the truth on the afternoon of the preliminary hearing and as she swears to-day that what she says is the truth."

The learned Judge recapitulated the outlines of the story she told at the trial, and, after referring to the contradiction of Laberge by Dupuis, said that, assuming that what happened in the house was as Laberge told it, the prisoner was not guilty; but that, assuming that the woman's story was true and the prisoner killed the deceased, the next question was, "Was his act murder or manslaughter?" He then defined the difference between murder and manslaughter and illustrated it by examples.

The learned Judge concluded his charge by telling the jury that they had three questions to answer:—

"Was this man killed? If not, the prisoner is not guilty." "If he was killed, did the prisoner kill him?" and "If he did kill him, was the killing murder or manslaughter?"

The learned Judge said that the prisoner was entitled to the benefit of any reasonable doubt, and that after the able addresses of counsel he did not think that he could usefully add anything else, and expressed his regret at having taken up so much of the jury's

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time, "in roughly directing or attempting to direct your attention to what I think is the law and the salient facts of the case."

Although counsel for the prisoner at the close of the charge asked to be permitted to put in an answer said to have been made by Marie Raymond on cross-examination at the preliminary hearing, and to have the jury's attention called to the fact that she did not mention the 23rd April, no objection to the charge was made, nor was the trial Judge asked to call the jury's attention to anything else than what I have mentioned, or to instruct them otherwise than he had done. No suggestion was made, at any stage, that Marie Raymond was an accomplice or an accessory after the fact, and that the jury should therefore have been advised not to convict upon her evidence unless it was corroborated in some material part involving the guilt of the prisoner.

I am unable to see any ground upon which Marie Raymond could be held to be an accomplice or an accessory after the fact.

Section 69 of the Criminal Code defines who are to be deemed parties to and guilty of an offence. They are those who: (1) actually commit the offence; (2) do or omit an act for the purpose of aiding any person to commit the offence; (3) abet any person in the commission of the offence; (4) counsel or procure any person to commit the offence.

An accessory after the fact to an offence is one who receives, comforts, or assists any one who has been a party to such offence in order to enable him to escape, knowing him to have been a party thereto (sec. 71).

An accomplice is one who, under the provisions of sec. 69, is a party to the offence.

There is nothing to shew that Marie Raymond, though she was present when her husband was struck with the bottle, did or omitted anything which rendered her guilty of the offence which was committed; there was nothing to indicate that she had any part in the killing, either by direct act or by aiding or abetting the murderer. Indeed, everything pointed to the opposite conclusion. The blow was struck as the result of an altercation between the prisoner and the deceased, which resulted in the deceased reaching for his axe and the prisoner striking him with the bottle. Even if she had been passively acquiescing in the act of the prisoner, that would not have made her a party to

the offence. Mere passive acquiescence is not such a participation in an offence as will constitute a person an aider or abettor or make him criminally liable for the offence: *Rex* v. *Hendrie* (1905), 11 O.L.R. 202.

She did nothing after the offence was committed to make her an accessory after the fact. She did nothing to receive, comfort, or assist the prisoner; her failure to disclose the offence did not make her an accessory after the fact: 1 Hale P.C. 618; *Regina* v. *Smith* (1876), 38 U.C.R. 218.

The rule requiring the trial Judge to advise the jury that it is not safe to convict on the uncorroborated evidence of an accomplice is a rule of practice and not of law, and the cases in this Province have decided that failure to follow the rule is not the subject of a reservation under the statute: *Regina* v. *Smith* (*supra*); *Regina* v. *Lloyd* (1890), 19 O.R. 352, 356, and cases there cited.

In England, the jurisdiction of the Court of Criminal Appeal is wider than that possessed by this Court. There the Court has jurisdiction to entertain an appeal on any ground which appears to the Court to be a sufficient ground of appeal, provided that leave to appeal has been granted; our jurisdiction is limited to questions of law and to granting a new trial on the ground that the verdict is against the weight of evidence.

The case of *Rex* v. *Tate*, [1908] 2 K.B. 680, for a reference to which I am indebted to my brother Ferguson, has therefore no application. In that case, the conviction was quashed because the trial Judge had not cautioned the jury against convicting upon the uncorroborated evidence of an accomplice, and the rule requiring the Judge so to caution the jury was treated as a matter of settled practice, and therefore not, to use the language of Harrison, C.J., in *Regina* v. *Smith*, "of positive law."

I have dealt with this aspect of the case although the question is not open on the reserved case, and according to my recollection it was not argued at the bar. I refer to it only because since the argument it has been suggested that Marie Raymond was an accomplice, and that the jury should have been instructed in accordance with the rule of practice to which reference has been made.

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In my opinion, both of the questions asked should be answered in the negative.

I have carefully read the evidence and the charge of the learned Judge, and have summarised them in what I have written—perhaps at too great length—and I am quite unable to see that there was any want of direction by the learned Judge in not pointedly calling the attention of the jury to the fact that without the testimony of the woman there was no evidence to support a conviction, and to the contradictory statements made by her going to shew that she was not a credible witness.

It will have been seen, from what I have said, that the learned trial Judge more than once pointed out to the jury that if they believed the testimony of Laberge they should acquit the prisoner, but that if they believe the testimony of Marie Raymond he was guilty of homicide amounting either to murder or manslaughter, leaving them to say which.

As I have said, he also referred to the contradictory statements which had been made by Marie Raymond, and they were doubtless pressed upon the jury by counsel for the prisoner as ground for disbelieving her and for accepting the testimony of Laberge. If the latter part of the question is based on the theory that it was the duty of the trial Judge, in effect, to tell the jury that they should not accept the woman's testimony because of her character and the previous contradictory statements she had made, I am, with respect, unable to agree that any such duty rested upon him. If, as I gather from the charge, my brother Latchford, who saw the witness and observed the manner in which she gave her testimony, believed that she was telling the truth, which is the conclusion to which I have come after a careful perusal of the reporter's notes, he was justified—if indeed it was not his duty—in pointing out to the jury any reason disclosed at the trial why, notwithstanding her previous statement, her testimony given before them should be accepted, not, of course, telling them that they should accept it, but giving the reasons which he thought should lead to that conclusion.

We had to consider a somewhat similar question in *Rex* v. *Coppen*, 47 O.L.R. 399, 53 D.L.R. 576, and there dealt with the principle upon which a Judge's charge is to be dealt with when it is attacked for nondirection or misdirection, and reference

may be made to the cases there cited and to *Rex* v. *Immer* (1917), 13 Cr. App. R. 22.

I come now to the second question, and am unable to understand on what ground the prisoner had the right to have it left to the jury to say whether he was not justified in striking the blow with the bottle as an act of self-defence. There was nothing to warrant that conclusion. Apart from the fact that, according to the medical testimony, the death of the deceased was caused by strangulation subsequent to the blow, the facts are such as to shew that there was no justification for striking with the bottle; although the deceased was reaching for his axe, there was nothing to prevent the prisoner from leaving the house as he had been ordered to do, without having been injured. The very object of reaching for the axe was to compel him to leave the house.

But, even if he was justified in striking the blow, he had no answer to the charge of strangulation except his defence of not guilty.

The fact to which I have already referred, that my learned brother's charge was not objected to and that he was not asked to direct the jury to anything with which he had not dealt in his charge, or to call their attention to anything to which he had not referred, would seem to indicate that counsel for the prisoner was satisfied with it except as to the one matter which he mentioned, to which reference has been made.

I entertain the opinion that, if those who knew what happened on the fateful night and early morning would speak and speak the truth, it would be found that when the prisoner and Laberge saw the unconscious body of the man who had been struck with the bottle, lying on the floor, they came to the conclusion that he was dead and determined to get rid of what they thought to be the dead body, and that afterwards, having discovered that there was still life in the man, they finished their work by strangling him to death.

MACLAREN, J.A., agreed with MEREDITH, C.J.O.

HODGINS, J.A.:—I agree entirely with the judgment of my Lord the Chief Justice of Ontario, and only desire to add a word as to one question.

The learned trial Judge having declined to reserve a case, the Second Divisional Court, on the prisoner's application,

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directed the trial Judge, under sec. 1015 of the Criminal Code, to do so. I presume that counsel urged there all grounds which he thought were properly open to him. The Court confined its direction to two questions, and these questions were accordingly stated by the learned trial Judge, their form being settled by the Divisional Court. That this was proper appears from *Rex* v. *Tansley* (1911), 3 O.W.N. 411, 19 Can. Crim. Cas. 42, and *Rex* v. *Coleman* (1898), 30 O.R. 93, 108.

In my opinion, it is neither our duty nor within our province to travel outside the limits thus defined by another Divisional Court. But, as opinions have been expressed upon something which has not come before us in the stated case, I may perhaps be pardoned for dealing with it, notwithstanding my objection to its introduction.

I cannot regard the widow as an accomplice. The test is: could she have been indicted, under the wide provisions of our Code, for the offence for which the prisoner has been convicted? If she could, then any spectator of a crime might find himself described as an accomplice, for here she only saw the first blow struck and later witnessed the carrying out of her husband. However much she was to blame by her conduct in causing the prisoner to frequent her house, she was no party to his act, nor did she do or omit any act for the purpose of aiding him, nor did she abet, counsel, or procure him to do it, nor receive, comfort, or assist him in order to enable him to escape, knowing him to be a party to the crime. She may have suspected, but upon the evidence she did not know, nor, until the jury pronounced the prisoner guilty, did any one know of a surety who murdered Raymond. If she were an accomplice, yet there is no rule of law which requires in this Province a caution to the jury that they should not convict on the uncorroborated evidence of an accomplice alone. I may add to the cases cited by my Lord, *Rex* v. *Frank* (1910), 21 O.L.R. 196.

If it was necessary to find corroboration, the evidence of Laberge that he and the prisoner were on the road outside the house on that night, and the conduct of the prisoner in refraining from denying in the witness-box his presence inside the house on the night in question, with all that this involved, was sufficient for the jury to act upon. In *Rex* v. *Clark* (1901), 3 O.L.R. 176,

Osler, J.A., with whom concurred Armour, C.J.O., Maclennan, Moss, and Lister, JJ.A., said (p. 181): "The Judge was at liberty (as a jury are, though they must not be told so) to draw an inference unfavourable to the prisoner from the fact that he did not testify on his own behalf."

And in the more recent cases of *Mash* v. *Darley*, [1914] 3 K.B. 1226, and *Rex* v. *Marks Feigenbaum*, [1919] 1 K.B. 431, silence or neglect to give evidence has been considered as corroboration of the evidence implicating the accused.

But, if the widow were considered as an accomplice, then how does the case stand? In *Rex* v. *Tate*, [1908] 2 K.B. 680, 21 Cox C.C. 693, where the jury had not been cautioned in accordance with what Lord Alverstone, C.J., stated to be the universal practice, yet at the end of his judgment, as reported in Cox, this significant sentence appears (p. 696): "I repeat that if, in this case, there had been corroborative evidence our decision would have been different, notwithstanding the absence of warning to the jury."

Lord Reading, C.J., in *Rex* v. *Ahlers*, [1915] 1 K.B. 616, expresses much the same idea, which accords with sec. 1019 of our Code, when he says (p. 626): "Before we can uphold a verdict of guilty after misdirection, we must be satisfied that, had the proper direction been given, the jury would have come to the same conclusion and convicted the prisoner."

There can be no doubt, I think, that after the evidence of the widow, the contradiction of the exculpatory testimony of Laberge, and the want of denial by the prisoner of his presence inside the house, the jury would have come to the conclusion that the prisoner was guilty of the crime charged. The widow's evidence left her without a shred of moral respectability, yet the jury must have been impressed with its truth and the support which it undeniably got from the circumstances I have referred to. It is not possible, to my mind, to determine that the absence of the usual caution, under the circumstances, occasioned any substantial wrong or miscarriage of justice.

MAGEE, J.A.:—In this case several questions arise out of those directly stated for our opinion, and one must try to deal with them irrespective of any idea one may have formed as to the propriety of the verdict. My Lord the Chief Justice has detailed the facts of the case very fully, and I will only refer to

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what seem to me the outstanding features which present themselves for consideration.

The deceased Cyrille Raymond resided with his wife and child at Sturgeon Falls, but he worked at Cache Bay, about five miles distant. He was in the habit of going from home to his work at the beginning of the week and returning at the end or frequently at intervals of two or three days during the week. His wife, about 18 years old, had fallen into evil ways and frequently received men at the house during her husband's absence and despite his expostulation. One of these men was the prisoner Dumont, whom, according to the wife's evidence, Raymond had, on more than one occasion shortly before his death, found at the house and whose presence he had forbidden. The prisoner had to him given as a reason for being there that he had come about the rent of the house, which it would appear belonged to his father. On the Friday before his death Raymond had taken a police officer with him to the house and there found the prisoner Dumont and one Laberge with the wife. On Tuesday and Wednesday the 22nd and 23rd April, 1919, he was at his work at Cache Bay, and on that Wednesday evening, about 6 p.m. or later, left his employer with the expressed intent of walking home. Except as detailed by his wife at the trial, he is not known to have been again seen alive, and nothing more was heard of him until his dead body was found on the 6th May, 1919, in a clump of undergrowth between Cache Bay and Sturgeon Falls, about half a mile or more from his house. It bore the indications of murder to which my Lord has referred. An inquest was held on the 10th May, 1919, and the widow being called as a witness swore that she had last seen her husband on Monday the 21st April, and had not seen him on Wednesday the 23rd April, and he had not come home then, and she had expected him on Saturday the 26th April. In May, 1920, in consequence of some statements made by her while in charge of police officers, the prisoner Dumont and Laberge were arrested on the charge of the murder of Raymond, and the preliminary investigation was held before the Police Magistrate on the 29th May, 1920. Mrs. Raymond was called as a witness for the prosecution, and then again swore that she had not seen her husband on that Wednesday night nor from the previous Tuesday morning, when he left for his work, until after his body

was found; and, though admitting that she had on that Wednesday afternoon been with Dumont and Laberge on the outskirts of Sturgeon Falls and there had improper intercourse with them and that she had had a buggy-drive with them that same evening to Cache Bay, returning with them about 11 p.m., she swore that when they arrived at her house neither of the two men had got out of the buggy, that both had driven away as soon as she herself got out of it, and neither of them had entered the house; and, while professing not to remember having made some previous statements, accounted for others by saying they were not made under oath, and said that what she now stated was under oath and the truth. It was not until her examination was resumed in the afternoon of the same day after a midday adjournment that she changed her story and gave evidence of what occurred at the house on the return from the buggy-drive and told of the husband's presence there, the blow by Dumont, subsequent occurrences in the outshed, and the carrying out of the body by Dumont and Laberge to the buggy at the back door, and her own inaction—as my Lord has detailed.

It would not, I think, be an unreasonable inference that the murder was completed in the house and that her husband was being strangled when she saw Dumont bending over and holding him. A double house was next door to her with only the width of a roadway between, and the nearer half of it was occupied. Other houses were across the street. There was nothing to have prevented her going out for assistance. She made no such attempt and no outcry. Later in the night Dumont went past, signalling his presence to her.

She admits having had intercourse with Dumont several times within a few days after the horrible evening, and during the following week, when apparently no one but Dumont and Laberge and she knew what had happened; she went away from her home for four days and nights with Dumont and passed as his wife. She professed to her relatives and to others that she knew nothing of the reason of her husband's absence. On the two subsequent occasions referred to, she, according to her present testimony, committed perjury and denied the facts, to screen this prisoner and prevent his punishment. She says that several times before the body was found she asked Dumont what had been done with

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her husband, but it is manifest that neither question nor answer indicated belief in the husband's existence. She says now that in her former denials she was actuated by fear of Dumont, who told her it could only be through her that discovery could be had—that of course and her alleged non-participation would be for a jury to pass upon.

If what occurred in the house that Wednesday night had been seen through a window and heard by an observer outside, and if the other facts referred to were proved, and if a jury found the wife guilty of murder as a participant or an accessory before the fact, I question very much whether the verdict could be disturbed. Her subsequent acts as well as her previous conduct would be available as indications of previous intent, and their weight as evidence is not confined to their own or subsequent dates of criminality.

But whether such a verdict of a jury would or would not be disturbed, she was, I think, undoubtedly an accessory after the fact, by her perjury on two occasions to prevent the discovery and punishment of the murderer. An accessory after the fact was defined as a person who, knowing a felony to have been committed by another, receives, relieves, comforts, or assists the felon: 1 Hale P.C. 618; 1 Russell on Crimes, 7th ed., p. 126; 4 Bl. Com. 37; and generally any assistance whatever given to a felon to hinder his being apprehended, tried, or suffering punishment, makes the assister an accessory: 4 Bl. Com. 37.

In *Regina* v. *Hansill* (1849), 3 Cox C.C. 597, Erle, J., said (p. 599): "The assistance must be such as would tend to prevent the principal felon from being brought to justice. The question is, did he, after the felony was complete, assist the felon to elude justice?"

I have not found an instance of assisting by perjury, but I cannot imagine anything of more effectual assistance in such a case as this than the refusal to do her duty to the State to tell the truth on these two pertinent occasions, and not only refusing to tell the truth but telling actual untruths. It was certainly more effectual than, after telling the truth, to have furnished the guilty man with a horse or money to escape or concealing him from pursuit or bribing his gaoler. But see *Anon.* (1561), Francis Moore's Reports, p. 8 (case 29), as to the victim of robbery agreeing for

reward not to give evidence. It is of course necessary that the person assisting should know of the guilt. Here there was ample evidence to convince a jury of the knowledge. The Criminal Code, sec. 71, which defines an accessory after the fact, does not change the law in declaring him to be one who receives, comforts, or assists the party to an offence in order to enable him to escape, knowing him to have been a party thereto.

If then Mrs. Raymond was an accessory after the fact, she was an accomplice. That term "includes all the *participes criminis*, whether they are considered in strict legal propriety as principals in the first or second degree, or merely as accessories before or after the fact:" 1 Russell on Crimes, 4th ed., p. 49, citing Fost. 341—as to which see *Regina* v. *Smith*, 38 U.C.R. 218 (1876).

It has long been considered that the evidence of accomplices should be scanned with very serious consideration, not to say suspicion and doubt, so that many Judges advised juries not to act upon it unless it was corroborated, but to acquit, and in some cases took it upon themselves to withdraw the case from the jury and discharge the prisoner, and it came to be seriously argued as a rule of law that without corroboration juries could not properly convict. That contention could not be maintained, and it is well-settled that, if the jury chooses so to do, it may accept and convict upon the evidence of the accomplice alone without any corroboration, and that the rule which treated such evidence as insufficient was one of practice only and not a rule of law, and the verdict could not be set aside for absence of corroboration.

But it still remained and remains the duty of the Judge to point out to the jury the danger which attends the acceptance of an accomplice's testimony, and the strong temptation to throw all or the chief blame upon others concerned or even to inculpate innocent persons. Despite some dicta that this is discretionary with the Judge and that his refusal or failure cannot be reviewed, it is, I think, clear that it is a duty which is owing to the accused person, the failure to perform which vitiates the conviction, unless the Court is able to apply sec. 1019 of the Criminal Code, which provides that no conviction shall be set aside or new trial directed unless in the opinion of the Court of Appeal some substantial wrong or miscarriage was occasioned.

In *Rex* v. *Tate*, [1908] 2 K.B. 680, the Judge had omitted to

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advise the jury that they ought not to convict upon the uncorroborated testimony of an accomplice, and simply left it to them to say which of the two stories they believed, and the jury found the prisoner guilty. The Court of Criminal Appeal, in agreeing that there was no power to set aside a verdict of guilty for want of corroborative evidence, added (p. 682) this qualification, "assuming that the jury was cautioned in accordance with the ordinary practice," and they quoted with approval the statement that though the practice—that is the practice of not convicting, not the practice of cautioning the jury—rested only upon the discretion of the trial Judge, it had obtained so much sanction from legal authority that it deserves all the reverence of law, and a deviation from it in a particular case would be justly considered of questionable propriety. The Court held that there had been a miscarriage of justice and set aside the conviction. That case was an appeal by the prisoner, apparently without leave; and under the Act of 1907 constituting that Court the accused could only appeal without leave on a ground involving a question of law alone (7 Edw. VII. ch. 23, sec. 3, Imp. Act), and there is no hint that the Court was not dealing with the case as a matter of law or under sec. 4 (1). They did not act upon the proviso to that sub-section, whereby an appeal might be dismissed if no substantial miscarriage of justice had occurred. And see *Rex* v. *Baskerville*, [1916] 2 K.B. 658, where the law is reviewed.

Under sec. 1014 of our Criminal Code the trial Court may reserve any question of law arising on the trial or any of the proceedings, or arising out of the direction of the Judge, for the opinion of the Court of Appeal. In *Rex* v. *Akerley* (1918), 30 Can. Crim. Cas. 343, the Supreme Court of New Brunswick set aside a conviction on one count, on the ground that the trial Judge had not cautioned the jury and it was his duty to do so—see pp. 354 and 356. Such duty was also pointed out by the present Chief Justice of the Common Pleas in *Rex* v. *Frank*, 21 O.L.R. 196, 16 Can. Crim. Cas. 237. In *Rex* v. *Ratz* (1913), 21 Can. Crim. Cas. 343, 12 D.L.R. 678, where the trial Judge had given no caution and had only referred to the fact that the accomplice already convicted of the same murder stood in the shadow of the gallows and had nothing to hope or fear in telling the story, the Supreme Court of Saskatchewan held, following *Rex* v. *Tate*,

[1908] 2 K.B. 680, that there was misdirection, and granted a new trial, and Brown, J., pointed out that the statement in *Rex* v. *Reynolds* (1908), 15 Can. Crim. Cas. 209, in the same Court, that "it seems well established that if a Judge fails to advise a jury as stated the omission will not be ground for a new trial," was a mere dictum—as to which see also *Regina* v. *Beckwith* (1859), 8 U.C.C.P. 274, and *Regina* v. *Smith*, 38 U.C.R. 218; and see also *Rex* v. *Morrison* (1917), 29 Can. Crim. Cas. 6, in Nova Scotia, where a new trial was ordered. I need not refer to the numerous cases such as *Rex* v. *McNulty* (1910), 22 O.L.R. 350, in which due caution has been given. On the other side, in *Rex* v. *Betchel* (1912), 19 Can. Crim. Cas. 423, 5 D.L.R. 497, in Alberta, a new trial after acquittal was granted at the instance of the Crown because the jury had not been told that they had the power to convict without corroboration. Those cases, I think, shew that under our Code a conviction will be set aside for want of due caution to the jury in such cases.

The next question is, was there such caution in the present case? The man Laberge, who is also in custody, charged as an accessory after the fact, was called as a witness for the prisoner, who was not himself examined. Laberge denied that he or Dumont had entered the house, and on cross-examination was asked if he knew any reason why Mrs. Raymond would make up such a story against them, and he could not suggest any unless it was to cover up some one else. That suggestion, whatever it might be worth, the prisoner was entitled to have weighed. It at once raised the question of value of an accomplice's evidence. The learned trial Judge in a careful charge pointed out to the jury the facts involved and the previous contradictory statements made by Mrs. Raymond, and that, if Laberge's evidence was true, hers could not be, and that the jury must decide which to believe. But nowhere do I find any reference to the fact of her being a possible accessory or accomplice or of the caution with which evidence of such a person should be weighed, or of the practice of the Courts in dealing with it. The jury were invited to consider the weight to be attached to her former denials, but hardly in a way to add to their value. Without quoting, I think there was not a caution in accordance with the practice such as was thought proper in *Rex* v. *Tate*, and that the jury were rather left, as in that

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case, to say which of the two witnesses to believe, or, as in *Rex* v. *Ratz*, to deal with the woman's evidence on the same basis as that of an ordinary witness, while Laberge's interest as charged with being an accessory was indicated to them. I would therefore be of opinion that proper direction was not given to the jury in that respect.

But then comes the question, is that before this Court? In the first question which has been reserved under the direction of the Second Divisional Court, no mention is made of the word "accomplice" or "accessory" or "corroboration." Its first part reads: "Was there a want of direction to the jury, vitiating the verdict, in not pointedly directing the attention of the jury to the fact that, without the testimony of the woman, there was no evidence to support a conviction?"

It seems to me that, fairly read, this means want of direction that there was no corroboration of the woman, and that it must mean, in the circumstances of this case, was there such want of direction, and not merely of direction but of pointed reference—such pointed reference as the prisoner was entitled to have made under the facts of the case? That pointed reference or direction to the absence of corroboration of an accomplice surely called for that warning which for generations the Courts have in such cases felt it their duty to give—and under the authorities to which I have referred its absence, in my opinion, "vitiates the verdict." I would therefore answer the first part of the first question in the affirmative.

Although no objection on that score was made at the trial to the learned Judge's charge, this is not a case in which absence of objection on the part of counsel can prejudice the right of the accused on a capital charge.

As to the second part of question 1, whether there was want of direction to the contradictory statements made by the woman, it should be answered in the negative. They were fully dealt with by the learned Judge.

As to the second question, I agree that, in view of the fact of strangulation, it should be answered in the negative, as the considerations which might arise had the death been only from the blow and wounds have not to be dealt with.

If the first part of question 1 is answered in the affirmative,

I see no ground for saying that sec. 1019 should apply to sustain the conviction; and, in my opinion, there should be a new trial.

FERGUSON, J.A.:—Having read and considered the evidence, I am unable to say that the jury were not justified in accepting and acting upon the testimony of the witness Mrs. Raymond, notwithstanding the fact that she admitted having previously made, under oath, statements contrary to her testimony at the trial; but the question remains: Is there evidence that this woman was an accomplice or an accessory, and, if so, was there a mistrial by reason of the learned trial Judge having failed to warn the jury of the danger of acting upon her uncorroborated testimony?

While the witness does not admit that she was an accomplice, or an accessory before or after the fact, yet there is, I think, in the circumstances related by the witness, coupled with her admission of having told different stories exculpating the accused, evidence from which the jury might reasonably have inferred that the witness was an accomplice or at least an accessory after the fact, making it proper, if not necessary, for the trial Judge to tell the jury that, if they were of opinion that the witness was either an accomplice or an accessory, it was unsafe for them to convict on her uncorroborated testimony. That it is proper for a trial Judge so to charge the jury, and that the jury is entitled, if it thinks fit, to disregard the caution and find the prisoner guilty, is, I think, well-established: *Rex* v. *Jones* (1809), 2 Camp. 131; *Regina* v. *Smith*, 38 U.C.R. 218; *Rex* v. *McNulty*, 22 O.L.R. 350.

On the trial of this prisoner, the Judge was not requested to caution or warn the jury, and did not do so, and this brings us to the question: must the trial Judge caution the jury against the danger of convicting on uncorroborated testimony that comes from an accomplice or an accessory?

The question was considered by the English Court of Criminal Appeal in *Rex* v. *Tate*, [1908] 2 K.B. 680, and it seems to me to be there decided that the trial Judge must caution or warn the jury against acting upon uncorroborated testimony of a witness who may have been an accomplice or accessory. See also *Rex* v. *Beauchamp* (1909), 73 J.P. 223.

The same question was considered by the Appellate Division

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of Saskatchewan in *Rex* v. *Ratz*, 21 Can. Crim. Cas. 343, and that Court followed the law laid down in *Rex* v. *Tate*.

It may be argued that this is not a rule of law, but merely a rule of practice, and that a deviation from such a rule does not raise a question of law within the meaning of the sections of the Criminal Code providing for a stated case. The question as to whether this was such a rule of law or a rule of practice was considered in *Rex* v. *Tate*, and Lord Alverstone, delivering the opinion of the Court, quotes with approval a statement in Russell on Crimes, 6th ed., vol. 3, p. 646, where "it is said that, although the practice in strictness rests only upon the discretion of the Judge at the trial, it may be observed that the practice in question has obtained so much sanction from legal authority, that it 'deserves all the reverence of law,' and a deviation from it in any particular case would be justly considered of questionable propriety;" and proceeds: "In the present case the Judge did not direct the jury in accordance with the settled practice, but told them that the question for them was which of the two witnesses they believed, the boy or the prisoner, thereby leading them to suppose that if they believed the accomplice's story they might properly convict although his evidence was entirely without corroboration. Under these circumstances we are of opinion that there has been a miscarriage of justice, and that the conviction should be set aside."

In *Regina* v. *Smith*, Harrison, C.J., expressed the opinion that the question was not one of law, but the opinion was not there necessary to the decision, and seems to me to be in conflict with the later practice of considering such a question, which has been done in Ontario in *Rex* v. *McNulty*, 23 O.L.R. 350, 17 Can. Crim. Cas. 26; in Alberta in *Rex* v. *Betchel*, 19 Can. Crim. Cas. 423, 5 D.L.R. 497; in Saskatchewan in *Rex* v. *Ratz*, 21 Can. Crim. Cas. 343, 12 D.L.R. 678, and in New Brunswick in *Rex* v. *Akerley*, 30 Can. Crim. Cas. 343.

I am not prepared to say that all these Courts have been in error in treating this question as one of law. Though the question as to whether the witness Raymond was or was not an accomplice was discussed on the application for the stated case, and also before us on the argument of the stated case, my doubt is as to whether or not the question submitted involves the question I have dealt with, rather than as to whether the witness might, in

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the opinion of the jury, have been an accomplice or an accessory, or as to what was the duty of the Judge in case she was an accomplice or an accessory.

I was a member of the Divisional Court that granted the stated case, and was of opinion that the point I have dealt with was to be stated. The Chief Justice of the Common Pleas, who settled the questions, agrees with me, and is of opinion that the point is raised, and it seems to me to be covered by the first part of the first question, which reads: (1) "Was there a want of direction to the jury, vitiating the verdict, in not pointedly directing the attention of the jury to the fact that, without the testimony of the woman, there was no evidence to support a conviction?"

I am, for these reasons, of opinion that there was before the trial Judge and jury, evidence from which it could be reasonably inferred that the witness Raymond either consciously assisted in the commission of the crime, or was an accessory after the fact, and that it was the duty of the trial Judge to have pointed out to the jury that without the evidence of the woman there was no evidence to support a conviction and to have warned them of the danger in acting on her uncorroborated testimony, and that the first part of the first question should be answered in the affirmative.

Conviction affirmed (MAGEE *and* FERGUSON, JJ.A., *dissenting*).

BRENNER v. AMERICAN METAL Co.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins and Ferguson, JJ.A. March 1, 1921.

WRIT AND PROCESS (§IIA—16)—SERVICE OF WRIT OF SUMMONS OUT OF ONTARIO—RULE 25—DISCRETION OF THE COURT—FORM OF ORDER.

The practice of bringing a foreigner to Ontario under this Rule, where he has assets in the Province, should be done according to the discretion of the Court.

AN appeal by the plaintiff from the order of MIDDLETON, J., (1920), 57 D.L.R. 743, 48 O.L.R. 525, directing that proceedings in this action be forever stayed. Order amended.

W. Lawr, for appellant.

G. R. Munnoch, for the defendant company, respondent.

The judgment of the Court was delivered by

MEREDITH, C.J.O.:—We think nothing will be gained by taking time to consider our judgment in this case.

It is conceded, and it could not otherwise have been, that it rests in the sound discretion of the Court whether per-

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mission should be granted to serve notice of a writ of summons out of the jurisdiction by reason of the fact, and the only one, that a foreigner has assets in the Province to the amount of $200 which would be available to satisfy the judgment if recovered. Now, if there ever was a case in which discretion should be exercised against such service, it is this. There were none of the circumstances which in *J. J. Gibbons Limited* v. *Berliner Gramophone Co. Limited* (1913), 28 O.L.R. 620, 13 D.L.R. 376, led the Court to reverse the order of my brother Middleton (1912), 27 O.L.R. 402, 8 D.L.R. 471. As has been pointed out in the course of the argument, in that case the services for which compensation was claimed were performed in Ontario, the defendants were carrying on business in Ontario, and the books and accounts were there. These were strong grounds for exercising the discretion in favour of allowing the service to be made. There was the additional circumstance that the defendant was not a foreigner—it was the case of a Canadian company.

The amount sought to be recovered in this case is $91,000, and what is seriously proposed is that, in a case where the contract was made in the State of New York, and the breach occurred there, simply because the company happens to have a fugitive kind of asset in this Province amounting to $200, we should assume jurisdiction to try the case, haling the foreigner to this Court and compelling him to attorn to its jurisdiction.

The Rule* is an extraordinary one; it is a Rule that does not exist in any other country; and, if my recollection is right, it has been said to be contrary to international practice.

I should be sorry to be a party to a decision the result of which would be that the plaintiff, if he recovered judgment —as in all probability he would—would realise upon it only a small amount in this Province (perhaps not $1,000), and,

* 25.—(1) Service out of Ontario of a writ of summons or notice of writ may be allowed wherever:—

. . . . . .

(*h*) Service may also be allowed where the action is for any other matter and it appears that the plaintiff has a good cause of action against the defendant upon a contract or judgment . . . and that the defendant has assets in Ontario, of the value of $200 at least, which may be rendered liable for the satisfaction of the judgment: but the order allowing service shall in such case provide that in case the plaintiff should recover judgment, if the defendant does not appear, the plaintiff shall prove his claim, in such manner as may be deemed proper.

in order to make his judgment of any service to him, would have to sue in the State of New York or at least in the United States, where in all probability his judgment would be treated as a mere nullity—as an assumption by this Court of a jurisdiction which it did not possess.

As I have said, if ever there was a case in which the discretion ought to be exercised against allowing such service, it is this.

THE COURT, while dismissing the appeal with costs, amended the order appealed from by striking out the part "staying the action," and by directing that the order for the issue of the writ of summons, the writ itself, and the service thereof be set aside.

McWILLIAMS v. FLYNN.

Ontario Supreme Court, Middleton, J. March 9, 1921.

DISCOVERY AND INSPECTION (§IV—38) — PARTY TEMPORARILY OUT OF ONTARIO—APPLICATION OF RULE 328, NOT RULE 337.

The examination for discovery of a party temporarily out of Ontario is provided for in Rule 328, and Rule 337 does not apply.

MOTION by plaintiffs for a writ of attachment and for an order striking out defence and for judgment as for default, upon the theory that the defendant was in default for failing to attend for examination for discovery. Motion dismissed.

A. D. Armour, for the plaintiffs.

A. J. Thomson, for the defendant.

MIDDLETON, J.:—The defendant is ordinarily resident at the city of Toronto, but, as was known to the plaintiffs' solicitor, as appears from his affidavit filed, she is now temporarily in California. Her solicitor states that she left for Los Angeles some time in January, upon the advice of her physician.

This action was begun on the 12th January, 1921, and I am ready to presume, although it is not shewn, that the writ was served before the defendant left Ontario. It appears that she had employed the plaintiffs as agents for the purpose of selling her house. An agreement for the purchase of the house had been made, but the purchaser repudiated the contract upon the ground that it was not under seal, and was in truth unauthorised by the corporation on whose behalf it purported to be made. The sum of $1,000 had been paid as a sale-deposit. This was forfeited, and the plaintiffs, who had this money in their possession, thought

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it fair to divide it between the defendant and themselves, and accordingly sent her a cheque for $500, retaining the other $500. Afterwards, learning that on threat of litigation the corporation had paid $1,100 further to the defendant, the plaintiffs sued to recover $1,600, being the difference between the amount they had been content to accept as commission and the whole amount received by the defendant.

It is not suggested that the defendant left Ontario with the idea of in any way hindering, delaying, or defeating this action, nor that it was a factor in determining her course of action.

An appointment was issued by a special examiner, on the 12th February, 1921, returnable on the 22nd February, and this was served upon the day of its issue upon the defendant's solicitor, and $1 conduct-money was paid at the same time. The defendant's solicitors immediately advised the plaintiffs' solicitors that the defendant was not within Ontario, but in California, whereupon the plaintiffs' solicitors insisted on the examination proceeding unless the defendant would forthwith pay into Court the amount claimed, with interest from the date claimed until the 1st June next; that proposal being declined, the defendant's solicitors returned the conduct-money, and upon the return of the appointment the plaintiffs' solicitors took a certificate from the examiner of the defendant's default, and launched this motion.

The plaintiffs rely upon the provisions of Rule 337 which provides: "A party within Ontario shall attend for examination for discovery before the proper officer in the county in which he resides upon service of an appointment upon his solicitor 7 days before the day appointed for the examination, and conduct-money shall be paid or tendered to the solicitor."

Ordinarily any person liable to be examined can be compelled to attend upon service of a subpœna. A party to an action who is liable to be examined may be compelled to attend upon personal service of an appointment by the examiner 48 hours before the examination, the subpœna being dispensed with in the case of the "party:" Rules 345, 346. Rule 337, passed with the idea of simplifying the practice and reducing expense, provides a mode of substitutional service upon a party who is within Ontario, enabling the appointment to be served upon the solicitor, who is charged with the duty of communicating with his client. (See para. 2). This Rule, according to its terms and according to its

plain intention, is strictly confined to the case of a "party" within Ontario. It was never intended or contemplated that a person who is not within Ontario shall in this way be compelled to come from the ends of the earth to submit to examination. Rule 328 deals with the case "where a party to be examined is out of Ontario," and provides that the examination is then to take place in such manner and in such place as the Court in its discretion may think most convenient.

Mr. Armour contrasts the wording of the former Rule, which speaks of a party residing in Ontario and a party residing out of Ontario, and he argues that the change of phraseology cannot be regarded as indicating a change of meaning, and the party ordinarily resident in Ontario is a party "within Ontario" within the meaning of the Rules. He points out that it has been held that a person, being transient through Ontario, and who is served while on the train, or passing through the Province, can, under certain reported cases, be regarded as liable to be examined where he may be so served, and he suggests that, if Rule 337 is given its plain meaning, then these cases must be regarded as overruled. I do not think that the consequence that he suggests would follow from this decision. Under Rule 337 examination is to take place before the proper officer of the county in which the party resides, and any transient would be protected by this requirement from the evil result feared.

I have no hesitation in holding that the Rule is not applicable to the case where the party is temporarily out of Ontario. The Rule is predicated upon the physical presence of the party to be examined within the Province. The words "within Ontario" are, in the Rule itself, contrasted with "the county in which he resides."

It follows that the motion fails, and should, I think, be dismissed with costs.

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Ontario Supreme Court, Orde, J. March 8, 1921.

INDIANS (§II—8)—INDIAN LANDS—ACTION FOR DECLARATION THAT ASSIGNMENT OBTAINED BY FRAUD—DECISION OF SUPERINTENDENT-GENERAL OF INDIAN AFFAIRS—JURISDICTION OF COURT—JUDICATURE ACT, R.S.O. 1914, CH. 56, SEC. 16 (B)—QUESTION OF LAW—MOTION FOR JUDGMENT.

The Supreme Court of Ontario has jurisdiction to entertain an action which seeks merely a declaratory judgment and the power given the Court in such an action is to make "binding declarations of right."

A motion for judgment on the question of law may be dismissed.

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MOTION by defendant for judgment on a point of law raised in the pleadings, and set down (by consent) for hearing , under Rule 122.

A. G. Chisholm, for the defendant.

A. R. Douglas, for the plaintiffs.

ORDE, J.:—The defendant moves, by consent, under Rule 122, upon a point of law raised by the pleadings.

The two plaintiffs and the defendant are Indians, belonging to the Chippewa Indians of the Thames, upon the Chippewa Reserve, in the township of Caradoc, in the county of Middlesex.

The statement of claim alleges that the plaintiffs are the daughters of Mrs. Betsy Grosbeck, who died intestate on the 19th February, 1915, and that at the date of her death she was the owner of certain lands in the Chippewa Reserve, which were then leased to a tenant, whose lease expired in the month of April, 1919; that, upon the expiration of the lease, the defendant wrongfully took possession of the said lands and is now wrongfully in possession thereof, under a location ticket issued by the Department of Indian Affairs, which the plaintiffs allege was obtained fraudulently. The plaintiffs allege that the said location ticket was issued to the defendant upon the production of a certain agreement, together with certain receipts for moneys paid and an assignment of the location ticket of the deceased Betsy Grosbeck, and that the signature of the said Betsy Grosbeck to such documents, if she signed them at all, was procured by fraud and misrepresentation on the part of the defendant, and that Betsy Grosbeck never sold the said lands to the defendant, and that he has no right, title, or interest therein. And the plaintiffs claim a declaration that the location ticket of the defendant was obtained by him by fraud and misrepresentation, and such further and other relief as the Court may deem meet.

The amended statement of defence denies the allegations of the plaintiffs, alleges the defendant's lawful and peaceable possession and occupation of the lands, and further sets up that this Court has no jurisdiction, on the ground that all the parties are Indians, that the lands form part of the said Indian Reserve, and that the claim of the plaintiffs was heretofore fully investigated by the Superintendent-General of Indian Affairs, under the provisions of the Indian Act, and was disallowed, and further that the defendant is the holder of a location ticket issued to him

under secs. 21, 22, and 23 of the said Act. By a paragraph added by amendment to meet more specifically the charge of fraud as raised by the amendment of the statement of claim, the defendant says that all the allegations of fraud and misrepresentation were fully investigated by the Superintendent-General of Indian Affairs; and that, after such investigation and an adjudication thereon, the Superintendent-General of Indian Affairs concluded that such allegations had been disproved, and adjudged the defendant to be entitled to the lands, and directed that a location ticket be issued to him, and that since the issue thereof the said Superintendent-General has left the defendant in quiet and undisturbed possession.

The question of law raised by the statement of defence was very fully and ably argued on both sides; but, after giving the arguments very careful consideration, I am of the opinion that the question which it is open to me to consider upon this motion is very limited in its scope, and that the larger questions which were discussed are such as can be properly dealt with only at the trial. The fact that this motion was set down by consent does not enlarge the power of the Court to deal with the point summarily. Consent is merely an alternative for leave to set the motion down.

The point raised by the defence is that the Supreme Court has no jurisdiction because the claim of the plaintiffs has already been adjudicated upon in favour of the defendant by the Superintendent-General of Indian Affairs, who is, by sec. 31 of the Indian Act (R.S.C. 1906, ch. 18), "the sole and final judge" as to who are the persons entitled to the property of a deceased Indian. It was stated on the argument that the Superintendent-General had adjudicated under this section, and this was not denied by counsel for the plaintiffs. I do not attempt to determine the exact scope of the Superintendent-General's power under this section, but it seems to be clearly limited to questions as to those entitled to the "estate" of a deceased Indian, and it may not extend to a determination of the rights of a person claiming as the defendant does here, not as one entitled to the estate, but under some agreement made with the deceased Indian in her lifetime.

It was stated on the argument without contradiction that the Superintendent-General of Indian Affairs had by letter intimated the desire or willingness of the Department that the question of fraud should be determined by the Courts as a preliminary to some action looking towards a recon-

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sideration of his previous adjudication upon the matter.

While there are cases in which, under the corresponding English Rule, the facts upon which the question of law raised by the pleadings is based, have been allowed to be proved by affidavit, the practice is not to be encouraged. If parties are agreed upon facts which are not set out in the pleadings they may state a case under Rule 126, but it is embarrassing upon a summary motion to be called upon to consider facts not disclosed by the pleadings. It is true that, as the facts upon which the point of law is raised are set forth broadly in the statement of defence, the plaintiffs might seek to dispose summarily of the question of law so raised, because for the purpose of the motion they can admit the truth of the defendant's allegations of fact. And upon the same principle a defendant who raises a question of law upon the allegations of fact contained in the statement of claim may move, because for the purposes of his motion he admits the facts so alleged. But here the facts upon which the defendant raises the point of law are alleged by himself, and upon those allegations the defendant asks that the Court shall determine summarily that it has no jurisdiction to entertain the action.

The anomaly of this method of bringing a question of law summarily before the Court is commented upon by Moss, C.J.O., in *Bank of Ottawa* v. *Township of Roxborough* (1909), 18 O.L.R. 511. In that case the defendant raised a question as to the jurisdiction of the Supreme Court to entertain the action. At p. 518 the learned late Chief Justice of Ontario says: "For the purpose of the argument as to want of jurisdiction, the allegations of the statement of defence ought not to be regarded." He then points out the danger of relying upon the defendant's allegations, though he says that the parties might admit all the essential points in such a way as to reduce the matter to a pure point of law.

In one sense every defence raises a question of law. A defendant, setting up certain facts in answer to the plaintiff's statement, and then pleading that upon that state of facts the plaintiff is not entitled as a matter of law to the relief claimed, might then ask the Court to determine that question of law in a summary way under Rule 122. The Rule was, of course, not intended for any such purpose. Its object was to provide either for the disposal of the whole action or some important phase of it, by dealing with some question of law upon a state of facts admitted for the pur-

poses of the motion. Here the defendant asks the Court, upon a state of facts which he alleges, to hold that the matter is in effect res adjudicata by virtue of sec. 21 of the Indian Act, and this notwithstanding that the Superintendent-General of Indian Affairs is apparently willing under certain circumstances to reconsider his previous decision. The defendant argues that I ought not to consider that fact and should hold that the Superintendent-General is himself bound by his own decision. Perhaps he is, but does not the fact that the argument involves the consideration of these matters indicate how necessary it is that the summary power to deal with a question of law under Rule 122 should be exercised cautiously, and that if there is any doubt as to the facts or circumstances upon which the point turns, it should be left for determination at the trial? This was the conclusion of the Court of Appeal in *Bank of Ottawa* v. *Township of Roxborough*, supra.

Leaving the wider question of law raised by the defendant, as to the effect of the Superintendent-General's adjudication, there is still to be considered the objection raised by the defendant, that upon the amended statement of claim as framed the action ought to be dismissed because all that the plaintiffs seek is a declaratory judgment, and as the lands in question are part of an Indian Reserve, and as such vested in the Crown, there is no power in the Court to enforce any judgment in favour of the plaintiffs. This point comes rather under Rule 124, which empowers the Court to strike out a pleading on the ground that it discloses no reasonable cause of action, than under Rule 122.

The jurisdiction of the Supreme Court to entertain an action which seeks merely a declaratory judgment is given by sec. 16 (b) of the Ontario Judicature Act, but it is significant that the power given to the Court in such an action is to "make binding declarations of right." The defendant says that a judgment merely declaring that the defendant obtained the location ticket by fraud and misrepresentation cannot advance the position of the plaintiffs as against the defendant, and that it would not constitute a binding declaration of right, as the defendant's rights could not be in reality affected, nor would the judgment "bind" him to anything. It would be a mere finding upon a question of fact from which no legal result would flow. Even admitting that the Superintendent-General of Indian Affairs has intimated his willingness to act upon that finding, it is not suggested that he is under any obligation to do so, and if

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he is free to re-open his own investigation as a result of any judgment of this Court, he is equally free to do so without such a judgment.

Counsel for the defendant refers to *Ottawa Young Men's Christian Association* v. *City of Ottawa* (1913), 29 O.L.R. 574, at p. 581, 15 D.L.R. 718, and *Re Toronto General Trusts Corporation and McConkey* (1917), 41 O.L.R. 314. These cases are not quite in point, though they establish the principle that the Court ought not to be called upon to pronounce declaratory judgments in cases where the jurisdiction over the subject-matter is vested in some other tribunal, such as a court of revision or an arbitrator.

In reply to this contention of the defendant, counsel for the plaintiffs relies upon two cases: *Bull* v. *Frank* (1865), 12 Gr. 80, where Mowat, V.-C., held that the Court might, in a case of fraud in obtaining an assignment of the interest of a locatee of the Crown, pronounce a decree though no patent for the lands had yet been granted by the Crown; and *Pride* v. *Rodger* (1896), 27 O.R. 320, in which a Divisional Court held that, notwithstanding the fact that the Crown grant had not issued, under the jurisdiction conferred by the Judicature Act as then in force to decree the issue of letters patent from the Crown to rightful claimants, "declaratory relief may in a suitable case be given . . . if the Crown is willing to act upon the judgment of the Court" (p. 323). In view of these two cases, I should hesitate before coming to the conclusion that the action should be summarily disposed of merely because the judgment sought is declaratory only. The cases, while not quite parallel, are nearly so, and if the matter rested there I would dismiss the motion on the ground that the question whether or not a declaratory judgment should be pronounced in a case like this would be determined better after a trial when all the facts and circumstances are before the Court than upon a summary application.

But there is one aspect of the motion as affecting the plaintiffs' rights which must not be overlooked. I have dealt with the defendant's objection to the plaintiffs' claim for a declaratory judgment upon the theory suggested by the defendant that the decision of the Superintendent-General of Indian Affairs is final and conclusive under sec. 31 of the Indian Act. But, as already pointed out, his jurisdiction under sec. 31 may not extend beyond the mere determination of questions of heirship or arising under a will, and it may be held that he has no power to deal with a

claim arising, not as a matter of distribution of the deceased's estate, but solely under an agreement inter vivos. That claim was quite independent of the succession to the estate. That it arose upon Betsy Grosbeck's death was merely an incident in her bargain with the defendant. His claim was not in fact to any part of her estate; it was that, as she had sold her interest in the land to him, it formed no part of her estate. If the plaintiffs succeed in establishing that the jurisdiction of the Superintendent-General does not go this far, then the claim for a declaratory judgment may enable the Court to make a "binding declaration of right" which can be enforced in some way against the defendant. This issue being open furnishes an additional reason for declining to hold that the action should be summarily dismissed. In my judgment, it should go down to trial in the ordinary way.

The motion will therefore be dismissed with costs to the plaintiffs in the cause.

It is expedient that the trial should not be delayed, and there has been delay already by reason of the amendments to the pleadings. The order ought to provide that the case be set down for the sittings at London on the 22nd inst., and that 5 days' notice of trial shall be sufficient.

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Ontario Supreme Court, Rose, J. March 10, 1921.

CONTRACTS (§IIIA—195)—AGREEMENT WITH CROWN RESPECTING TIMBER—LEASE OF WATER POWER—ALLEGED AGREEMENT TO TAKE POWER FROM HYDRO ELECTRIC COMMISSION—ASSIGNMENT OF RIGHTS BY GRANTEE TO COMPANY—CONTRACT TO TAKE POWER NOT ENFORCEABLE AGAINST COMPANY.

The Government cannot force a company, which is the assignee of certain rights and privileges affecting timber on Crown lands, to take power from the Hydro-Electric Commission, even if there is a valid contract between the grantee of such Crown lands and the Government; the company taking their assignment without any knowledge of any restrictive covenant.

ACTION for a declaration and an injunction, and counterclaim for a declaration and damages. The facts of the case are fully set out in the judgments following.

G. H. Kilmer, K.C., *C. S. MacInnes*, K.C., and *Christopher C. Robinson*, for the plaintiff.

I. F. Hellmuth, K.C. and *A. M. Stewart*, for the defendants.

ROSE, J.—In this action the Attorney-General, suing

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on behalf of His Majesty, seeks a declaration that in virtue of an agreeemnt alleged to have been made in or about the month of March, 1917, between the Government and a predecessor in title of the defendants, the defendants are bound to take from His Majesty through the Hydro-Electric Power Commission of Ontario, at cost, the supply of electrical power requisite to operate certain mills and plant which the defendants, as holders of two concessions to cut pulpwood on lands of the Crown, are under obligation to erect and operate; and an injunction is asked to restrain the defendants from obtaining otherwise than from His Majesty through the Commission the said supply of electrical power, or any part thereof. The defendants deny that their predecessor in title entered into the alleged contract, and they say that, even if the contract was made, it is not binding upon them; and they ask for a declaration that His Majesty is bound by agreement to grant to them a lease of a suitable water-power, which they may develop for themselves, and that they are entitled to damages for default in granting such lease; also a declaration that they are at liberty to obtain their electrical power from whom they will.

Some time before December, 1916, the Government advertised for tenders for the right to cut pulpwood and pine on a certain area on the north shore of Lake Superior, a hundred or more miles east of Port Arthur, called the Pic River Pulp and Timber Limit; and some time before February, 1917, they advertised for tenders for similar concessions on another area north of Port Arthur called the Black Sturgeon River Pulp and Timber Limit. The successful tenderers were, for the Pic River Limit, J. J. Carrick, and for the Black Sturgeon River Limit, S. A. Marks.

The conditions upon which the two concessions were offered were similar. In each case the successful tenderer bound himself, amongst other things, to enter into an agreement with the Government to erect on the limit, or at some approved place, a pulp-mill costing with its equipment, etc., not less than $1,000,000, and to operate it so that its daily output should be at least 150 tons of pulp, and so that, on the average, 300 hands should be employed during 10 months of each year. Of the $1,000,000, $200,000 were to be spent in the first year, $350,000 in the second year, and the balance in the third year. The agreement was also to provide that the tenderer should erect, at such

time and place as should be directed, a paper-mill of the capacity of at least 100 tons of paper per day, and should operate it so that the daily output should not be less than 75 tons. In each case the successful tenderer was to be entitled to obtain a lease from the Crown, upon the usual terms, of some suitable water-power either within the limit or at some other suitable point within the Province, as might be agreed upon, the lease to be subject to such conditions and stipulations as the Minister of Lands Forests and Mines might deem expedient, and to contain a provision for the development of the power to the full extent thereby required according to plans and specifications approved by the Hydro-Electric Power Commission.

Mr. Carrick was notified on the 13th December, 1916, that his tender for the Pic River Concession had been accepted, and he at once telegraphed that he was prepared to sign the formal contract whenever it should be got ready. Mr. Marks was notified on the 7th February, 1917, that his tender for the Black Sturgeon Concession had been accepted, and on the 17th February he was told that the agreement was being prepared, and he was asked to name those who were financially interested with him in the undertaking. On the 20th February, he wrote giving the names of Mr. Carrick and others as his associates; and on the 22nd February, after he had examined the draft agreement, he wrote to the Deputy Minister saying:—

"Regarding clause 20, I wish you would expedite matters in connection with the water-power lease which goes with this concession and the Pic. The understanding with the Minister was that a new lease of the Cameron Falls power should be granted in connection with the Pic Concession, but a stipulation was made that power had to be furnished to the successful tenderer of the Black Sturgeon. There will likely be a consolidation of the Pic and Black Sturgeon limits, and the lease could either be made to Mr. Carrick or myself, or, if it would be satisfactory to you, make it a joint lease in the names of Carrick and Marks. I wish you would take this matter up at once, as we have gone as far as possible until we get the above lease."

Later on, by a formal assignment dated the 8th May, 1917, and assented to by the Deputy Minister on the same day, Mr. Marks assigned to Mr. Carrick all his right, title, and interest in and to his tender and the acceptance thereof, thus effecting the "consolidation" foretold in the letter of the 22nd February. As between Marks and Carrick, how-

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ever, the consolidation was, apparently, effected at a time earlier than the date of the formal assignment, for Mr. Marks's name does not appear in any of the correspondence produced bearing date later than the 22nd February, and the negotiations which are alleged to have resulted in the contract which the Attorney-General seeks to enforce appear to have been negotiations between Mr. Carrick and the Government.

Neither side saw fit to adduce at the trial any parol evidence either as to what those negotiations were or as to what, if any, agreement was actually reached. The plaintiff says that the correspondence and the documents to which I shall refer shew that the agreement set forth in the statement of claim was made, whereas the defendants say that the correspondence shews that it was not. This particular issue, then, has to be determined by an analysis of the writings.

Under the conditions upon which the concessions were offered for sale, the successful tenderers were entitled, as has been stated, to obtain leases of water-powers from the Crown. This was a privilege granted to them; they were in no sense bound to apply for the leases, and they were quite free to operate their plants by steam or by any other power that they could obtain. The suggestion on the part of the plaintiff is, that Carrick's option to take a lease of such water-power as he might need for the development of the electrical energy requisite to the operation of the plant to be established for the manufacture of the wood cut from the two limits, was converted, by agreement made between him and the Government, into a contract on the part of the Government to supply, and on his part to take, power developed by the Hydro-Electric Power Commission. This is the contract which the plaintiff seeks to compel the defendants to perform. It may be noted in passing, although it has no real bearing upon the matter in issue, that the defendants are willing to take power from the Government through the Commission, and that there is no difficulty about the price to be paid, but that the parties failed to agree upon the terms of a power contract. The only contract which the Commission is willing to execute contains conditions which the defendants say might be disastrous to their enterprise, and they are not willing to take power without a formal contract setting forth the conditions, and under a mere undertaking on the part of the Government to supply it "at cost."

On the 26th March, 1917, Mr. Carrick had an interview with the Prime Minister, of which there is a partial account in letters written to him on the 27th by the Prime Minister and the Minister of Lands Forests and Mines. The defendants objected to the reception of these and of many other letters, some of them written by Carrick or on his behalf, on the ground that the statements contained in them are not evidence, as against the defendants, of the facts stated; and they were received subject to the objection. I do not quite see how the expressions in these letters which the plaintiff would construe as statements that certain things were agreed upon between the Government and Carrick are evidence, as against the defendants, that such things were really agreed; but the letters—or parts of them—are admissible as the original evidence that certain things were done—e.g., that the Government requested Mr. Carrick to accept, in satisfaction of the Government's obligation to grant a lease of a water-power, the making available for his purposes of power developed by the Commission—and all of them will have to be referred to, an effort being made to use them only for the purposes for which it seems to have been proper to receive them in evidence.

The Prime Minister's letter of the 27th March was as follows:—

"In further reference to our conversation of yesterday, I beg to say that the Cities of Port Arthur and Fort William desire to make an arrangement with the Hydro-Electric Power Commission for an ample supply of power for their use. In view of the present demands and future requirements of these cities and the great importance of the Province retaining in its own control all large supplies of power near such great industrial centres as these cities, I think that such powers should be reserved for development through the Hydro-Electric Power Commission. Obviously this action would greatly benefit you in the operation of your pulpwood concessions.

"The development of power by the Hydro-Electric Commission in that district would not only permit of an ample supply for your power requirements but also at the same time provide for the future requirements of the cities at the head of the lakes.

"I am not forgetful of what you urged with reference to the conditions attached to the sale of the pulp limits in the Nipigon territory; but the spirit of that agreement would be fulfilled by the Hydro-Electric Power Commission fur-

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nishing you with all the necessary electrical power to operate any plants that might be erected for the manufacture of the timber of these limits, and the Government, I am assured, will be able to make arrangements with the Hydro-Electric Commission for Ontario for the supply of this power to you, and, as the Hydro does not sell power at a profit but at actual cost, such should be both beneficial and in all respects satisfactory to you.

"I have no doubt in addition to the Hydro supplying you power that the City of Port Arthur will be glad to meet you in your negotiations with the Hydro, and, by adding their demands for their city to your requirements for power, reduce the price to the lowest possible from the Hydro.

"With power at cost to the Hydro and with the large supply of raw material and the shipping facilities, both by rail and water, now subsisting at the head of the lakes, you should have most favourable conditions for the future welfare of your enterprise. Such being the case, it will therefore redound to the benefit of your industries and of that part of this Province, and which of course this Government is anxious to see come to pass."

And the letter from the Minister of Lands Forests and Mines was as follows:—

"Under the conditions of sale of the Pic and Black Sturgeon Pulp and Timber Limits, the second last clause thereof provided that the successful tenderer shall be entitled to a lease of a water-power from the Crown upon the usual terms, etc. (see clause 13).

"Since these tenders were received and accepted, the Government of the Province has decided, as a matter of policy, and as now agreed upon with you, not to issue a lease of the Nipigon or other water-powers contemplated, and in lieu thereof, as the Premier has said in his letter to you of the 27th inst., the Government, through the Hydro-Electric Commission for the Province of Ontario, will arrange for the power to operate the mills necessary to manufacture the pulp and paper from such limits at some point adjacent to Port Arthur, satisfactory to you and the Department.

"I naturally infer that such will be satisfactory to you and your associates."

In the spring of 1917, there was under consideration the development of water-power by the Hydro-Electric Commission for the purpose of supplying electrical energy for the use of the cities of Port Arthur and Fort William. On

the 26th March, Mr. Carrick's solicitor wrote to the chairman of the Commission, making an application—or asking what the rate would be—for power, and pointing out that, as Mr. Carrick would need 20,000 horse power, his requirements added to the requirements of the two cities would justify a development of 30,000 horse power. No agreement was reached between the Commission and Mr. Carrick, but, later on, the Commission, apparently in the belief that Mr. Carrick would be a customer, decided to develop a water-power at Cameron Falls which would be adequate to supply both him and the cities, whereas if the requirements of the cities alone had been considered the power could have been furnished by developing it at Dog Lake, at a much smaller capital expenditure. Herein lies the importance to the cities of securing the defendants as customers for power furnished through the Commission. The development at Cameron Falls is approaching completion, and if the cities are the only customers the rate per horse power which they will have to pay will be greater than the rate which would be charged them if the defendants were also customers, and greater also than the rate which would have been chargeable if the development had been at Dog Lake. The anxiety of the Government to compel the defendants to take power from them through the Commission is therefore quite natural.

To return now to the documentary evidence. The formal contract between the Government and Mr. Carrick giving to the latter the right to cut pulpwood and other wood on the two limits is dated the 9th May, 1917. Instead of a pulp-mill in connection with each limit to cost $1,000,000, it provides for one mill to cost $2,000,000, and instead of two paper-mills, each of a capacity of 100 tons a day, it provides for one paper-mill of 200 tons' capacity. It is quite silent as to power.

On the 18th September, 1917, solicitors writing on behalf of Mr. Carrick wrote to the Minister of Lands Forests and Mines, referring to the Minister's letter of the 27th March, in which he made "mention of the agreement between the Government and the licensee, that the Government would arrange for the supply of power necessary to operate the mills referred to in the license," and going on to say that Mr. Carrick and his associates desired to commence operations at once, and would like to know when power would be available, and also whether there would be objection on the

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part of the Government to Mr. Carrick's getting power from other sources in the meantime.

The next letters are letters written by Mr. Carrick to the Prime Minister and the Minister of Lands Forests and Mines on the 18th January, 1918. In them he points out that without a supply of power available he cannot proceed with his work, and he asks to be advised that further action on his part under his agreement is not required until such time as the Government are able to proceed with the power development, which, as he says, was halted by the fact that it was not deemed to be in the public interest to raise large sums of money for public works during the War. He refers to the supply of power through the Hydro-Electric Commission as something which "the Government volunteered to give in lieu of the stipulation offered by the Government in the call for tenders," and he says: "The Government, in lieu of my relinquishing my rights to a water-power, specifically agreed to develop and supply me power at cost." He does not say, in so many words, that he had agreed to take power through the Commission when it should be ready for delivery, or that his right, under the conditions of the tender, to have a lease of a water-power had been changed into an obligation to take power from the Government; but he makes it quite plain that his intention had been, and still was, to use Hydro-Electric power, and he seems to admit that the Chairman of the Commission had been within his rights in refusing him permission to obtain a temporary supply elsewhere.

On the 31st January, 1918, the Minister of Lands Forests and Mines wrote to Mr. Carrick, saying, "until the power is available, the Department cannot fairly ask you to make the other expenditure in connection with the erection of your plant," and this was followed, three months later, by a formal agreement dated the 8th May, 1918, between the Government and Mr. Carrick, which recited as follows: "Whereas it was agreed between the parties . . . that an adequate supply of electrical horse power should be available to the grantee to operate the pulp and paper-mills stipulated for in the said agreement (of the 9th May, 1917); and whereas there is not yet available such power for use the use of the grantee as aforesaid and it is agreed that the grantee shall not be required or called upon to perform and discharge the duties and obligations and to make the payments imposed upon him as in the said agreement set forth until an adequate supply of such power is made

available for all such purposes," and went on to witness that the grantee (Carrick) should not be called upon or required to perform or enter upon the performance of the terms, conditions, duties or obligations, or any of them, and should not be deemed to be in any default whatsoever under the said agreement of the 9th May, 1917, until such time as an adequate supply of electrical power should be made available for him sufficient for the operation of the mills; and that the time for the construction of the mills was extended until such time as the said adequate supply of electrical power should be made available. Again there is not a word about any obligation on the part of Carrick to take the power when available.

By an assignment dated the 1st June, 1918, Mr. Carrick assigned to Messrs. G. M. Seaman and L. L. Alsted an undivided $\frac{51}{100}$ share or interest in, under, and to the agreement of the 9th May, 1917, together with a like share and interest in and to the licenses and concessions granted by the said agreement, "and in and to any and all other agreements in respect of the said matters or any of them which might" have been or might thereafter "be entered into between" the Government and himself, "whether by way of renewal, extension, enlargement, modification or otherwise, and in and to every right, interest, benefit, profit and advantage" which might "accrue or be derived from the said agreements, licenses, concessions, pulpwood and timber or any one or more of them." By another assignment dated the 23rd January, 1919, he assigned to Messrs. Seaman and Alsted another 15⅔ per cent. interest in the things mentioned in the first assignment. By a similar assignment dated the 22nd March, 1919, he assigned a 16⅔ per cent. interest to James Whalen, and by an assignment dated the 29th March, 1919, he assigned his remaining 16⅔ per cent. interest to Messrs. Seaman and Alsted. Then, by an assignment dated the 6th November, 1919, Mr. Whalen assigned to Mr. Seaman his 16⅔ per cent. interest. All these assignments, except the last one (Whalen to Seaman), were duly assented to by the Government. The last mentioned one was filed, but no assent to it was given. How the rights which by the assignments had become vested in Messrs. Seaman and Alsted were transferred to the defendant company does not appear, but the parties are agreed that the defendants are the owners of the concessions granted by the agreement of the 9th May, 1917; the dispute is as to their obligations.

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Between the time of the first assignment by Mr. Carrick of a part of his interest to Messrs. Seaman and Alsted (the 1st June, 1918) and the time of his assignment to Mr. Whalen (the 22nd March, 1919), he was negotiating with the Hydro-Electric Power Commission as to the terms upon which power would be supplied, and he was asking the Government for assurances as to when power would be ready for him. The correspondence indicates that there were meetings with the Minister of Lands Forests and Mines and with officers of the Commission, but exactly what was discussed does not appear, and probably it is not important to inquire, for the contract upon which the Attorney-General relies is alleged to have been made long before, viz., in or about March, 1917; also the letters which passed during this period do not seem to contain anything of great importance: they shew that Mr. Carrick was waiting for and was expecting to use Hydro-Electric power when it should be available, but they do not contain much, if anything, that goes to shew whether or not he thought he was bound to use it—even if letters written by him indicating what he thought on that subject would be evidence against the defendants.

The only other letters that need be referred to are some that passed between the Hydro-Electric Commission and the Minister of Lands Forests and Mines in the spring of 1919. The Commission applied for a grant of land required for use in the Cameron Falls development. The Minister asked whether the development was being undertaken as a municipal enterprise, or on behalf of the Province. He was informed that it was being undertaken as a municipal enterprise, and that power contracts had been made with the two cities, and that it was "expected that the other pending contracts and agreements for power in the district (would) be completed in due course." He then wrote to the secretary of the Commission a letter dated the 1st May, 1919, to which the defendants attach great importance (without prejudice, however, to their position as to the admissibility of the correspondence generally). He said:—

"Replying to yours of the 15th, the Commission is aware of the Government's undertaking to see that Carrick gets power to take care of his pulp-mill requirements. This undertaking was given Carrick in lieu of the right to power he secured in connection with his purchase of the pulp area.

"The Government is in honour bound to see that this obligation is carried out, and until the actual completion

of the substituted arrangement it would be scarcely proper for the Crown to part with the title and so place it out of its power to implement the undertaking given Mr. Carrick. I understand that he is now negotiating with the Commission, and I am hopeful, if you have not already reached an arrangement, that you will be able to do so at an early date. This will relieve the Crown of its obligation under the sale, and there will be no further reason why the title should not pass to the Commission. In the meantime you will readily understand that the Commission is taking no risk so far as expenditures on properties is concerned, because it has already been announced that the policy of the Government is that Nipigon power should be developed by the Commission."

It is argued that this letter shews clearly that the result of the negotiations between the Government and Mr. Carrick in March, 1917, was no more than this—viz., that Carrick, who was entitled to call for a lease of a water-power, agreed not to insist upon his rights, if the Government made available for him power developed by the Commission, which he could take or not as he saw fit, just as he might have used or not, as he saw fit, any electrical power which he might have developed for himself, if he had been granted a lease of a water-power.

After reading and re-reading the papers, I am unable to find that it is proved as against the defendants that the agreement which the Attorney-General seeks to enforce was ever made; indeed, I do not think that the making of it could have been said to have been proved as against Mr. Carrick if the endeavour had been to prove it as against him, instead of as against the present defendants. It is proved that before Mr. Marks made over to Mr. Carrick his rights in respect of the Black Sturgeon River Limit he had elected to take the lease of the water-power to which the conditions of the advertisement for tenders entitled him; and it may safely be assumed, although it is not proved (unless the statements contained in Mr. Marks's letter of the 22nd February, 1917, are evidence against the defendants), that Mr. Carrick had also elected to take the water-power to which the acceptance of his tender for the Pic River concession entitled him. It is proved that the Government requested Mr. Carrick to accept the development of power by the Commission and the making of it available for his purposes as a fulfillment of the Government's obligation to grant a lease of a water-power (see

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the Prime Minister's letter of the 27th March, 1917), and I think it must be inferred that Mr. Carrick acceded to the Government's request. It is proved that the time for the commencement of the work which Mr. Carrick was to perform under the agreement of the 9th May, 1917, was extended until an adequate supply of electrical power should be made available for him; and it is quite plain that the adequate supply of electrical power meant an adequate supply of power developed by the Hydro-Electric Power Commission. It is proved that every one—the Government, the Commission, and Carrick himself—expected that when the Hydro-Electric power became available Carrick would avail himself of it. Finally it is proved that Mr. Carrick and solicitors acting for him thought—or were prepared to admit—that the Government or the Commission had a right to prevent the use by him, pending the completion of the Hydro-Electric development, of electrical power which he thought that a company having a plant near Port Arthur would be willing to supply. For the proof of these things (except perhaps the last—Carrick's belief) it seems to me that the letters which were objected to were properly receivable in evidence; but, even if they are receivable for all purposes, they do not prove, as it appears to me, much, if anything, more than has been stated. They do not shew what led Mr. Carrick to think that he had no right without special permission to get a temporary supply of power from the company mentioned; for all that appears he may have thought that, as his work was to be upon lands of the Crown, the company could not bring its supply to him without the Crown's permission, or he may have thought that some agreement which he had made with the Government expressly or impliedly prohibited his taking electrical power developed by any one other than the Commission, or his opinion may have had some basis quite different from either of those suggested. Whatever his reason was, it is not set forth, and, in my opinion, there is no justification for setting aside all other possible constructions and construing any of his statements as an admission that he had contracted to take power from the Government through the Commission, and from no one else. If he had stated in so many words that he had made such a contract, it appears to me to be at least doubtful whether the statement would have been evidence against the defendants; but the question of admissibility need not be considered unless the statement can be found in the letters, and I do not think

it can be found, either expressly or by necessary deduction from something that is said.

A finding that the alleged contract was made would, as it seems to me, have no more certain foundation than a guess as to what may have happened: I have not discovered anything which shews that there is any more reason for saying that the contract was made than there is for saying that no one thought it necessary to exact from Mr. Carrick even an informal promise to take his supply of power from the Government through the Commission. He had to have power; he had given up his right to insist upon a lease of a water-power; the Government was going to arrange with the Commission to make a supply available for him; self-interest would seemingly drive him to draw upon the supply so made available, assuming, of course, that he could get it upon satisfactory terms: why assume, without proof, that he bound himself to do that which probably every one thought he would do, whether bound or not?

If Mr. Carrick did not agree to take his supply of power from the Government through the Commission, the fact that he stated (if it can be found that he did state) his intention so to take it, and the further fact (if it is a fact) that the Government, thinking that there was no reason to suppose that he would change his intention, induced the Hydro-Electric Power Commission to undertake the expensive development at Cameron Falls, can make no difference. He either contracted or he did not; a truthful representation of an intention is not converted into a contract by the mere fact that the person to whom it is made sees fit to act upon the strength of it without insisting that it be turned into a promise.

Kny-Scheerer Co. v. *Chandler and Massey Limited* (1903-4), 2 O.W.R. 215, 4 O.W.R. 187, and in the Supreme Court of Canada, sub nom. *Chandler and Massey Limited* v. *Kny-Scheerer Co.* (1905), 36 Can. S.C.R. 130, is a case directly in point. It is not very fully reported, but the judgments of the Ontario Courts can be seen in the printed case on the appeal to the Supreme Court of Canada of which there is a copy in the Library at Osgoode Hall—volume 262. The plaintiffs were importers of surgical instruments carrying on business in New York and having some connection with manufacturers in Germany. The defendants were also importers, carrying on business in Toronto. Surgical instruments were subject to custom duty on importation into the United States, but not upon

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importation into Canada. The plaintiffs represented to the defendants (as the fact was) that they intended to establish a Canadian depot and to keep in it at all times a full supply of their goods, imported directly from Europe, and therefore capable of being sold at a lower price than the price at which they could be supplied out of their New York warehouse. They had, in fact, arranged to send an employee to Canada to prepare the way for the establishment of the Canadian department of their business. The defendants, assuming that the plaintiffs would do what they said they were going to do, agreed to cease importing from Europe and to buy all their supplies from the plaintiffs—an agreement which would have been senseless from the defendants' point of view but for the assumption that the Canadian stock would be available. The plaintiffs, however, changed their minds, and did not open the Canadian depot, and, because there was merely a representation of an intention, and not a promise, the defendants were without redress.

The cases cited by counsel for the Attorney-General in support of their argument that it ought to be held that Mr. Carrick agreed to take his supply of power from the Government through the Commission are not, in my opinion, of much assistance.

Cannock v. *Jones* (1849), 3 Ex. 233, and *Great Northern R.W. Co.* v. *Harrison* (1852), 12 C.B. 576, are cases in which, upon the true construction of a document, it was plain to the Court that, although technical words to effect the intention were not used, the intention was that the defendant should be bound, in the first case to put in repair and keep in repair the buildings in question, and in the second case to take the sleepers, etc., which the plaintiff was agreeing to supply. They are simply cases of the construction of documents and of applying the rule that in order to constitute a covenant no technical words are necessary—that it is sufficient if you can collect from the terms of the instrument that the thing is to be done: 3 Ex. at p. 238.

Canada Cycle and Motor Co. Limited v. *Mehr* (1919), 45 O.L.R. 576, 48 D.L.R. 579, was a case in which the majority of the Judges in the Divisional Court thought that, in the circumstances of the case, Mehr's agreement to buy necessarily involved an agreement on the part of the company to sell.

Churchward v. *The Queen* (1865), L.R. 1 Q.B. 173, a case in which the Court was unable to find the agreement which the plaintiff sought to enforce, was cited for the well-known

statement by Cockburn, C.J., at p. 195, as to the circumstances in which a court must imply obligations on the part of one party to a contract corresponding with and correlative to those expressly imposed upon the other party—e.g., when the act to be done by the party binding himself can only be done upon something of a corresponding character being done by the opposite party—as well as for the hypothetical case stated on p. 197 (as to which see *Moon* v. *Mayor etc. of Camberwell* (1903), 89 L.T.R. 595), and for the statement by Mellor, J., on p. 202, to the effect that, if it can be seen that certain stipulations and conditions must have been necessarily intended by the parties, effect must be given to them, although they are not expressed in words.

In *Ex p. Ford* (1885), 16 Q.B.D. 305, there was no evidence that when the mortgagor's brother consented to postpone his charge upon the mortgagor's property, so that the mortgagor might raise more money, he had any intention of making a present of his security to the mortgagor; and the Court thought there was implied a promise by the mortgagor to indemnify him. In it Lord Esher, M.R., makes a very broad statement as to the circumstances under which a promise may be inferred.

None of these cases is, in its facts, in the least like the present one; but I do not think that, even if the facts of the cases in which the general statements were made were left out of consideration, any of those general statements would be applicable here. Take the *Churchward* case. Cockburn, C.J., puts it that if the thing to be done by the party binding himself can only be done upon something of a corresponding character being done by the opposite party, you would there imply a corresponding obligation to do the thing necessary for the completion of the contract, and that so, where there is an agreement to manufacture some article, a corresponding obligation on the other party is implied to take it; and note why: "for otherwise it would be impossible that the party bestowing his services could claim any remuneration." Take also the statement of Mellor, J., already referred to, that if it can be seen that certain stipulations must have been necessarily intended by the parties, effect must be given to the intention. I do not propose to go through all the cases cited and quote all the general statements made. Those I have mentioned, together with Lord Esher's statement in *Ex p. Ford*, 16 Q.B.D. at p. 307, that "whenever circumstances arise in the ordinary business of life in which, if two persons were ordinarily honest

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and careful, the one of them would make a promise to the other, it may properly be inferred that both of them understood that such a promise was given and accepted," will suffice to illustrate what I mean. The fact that they are inapplicable seems to me to appear as soon as they are carefully read, and an effort is made to pick out the particular one which is to be applied. Thus, assuming that there is to be found in the documents an engagement by the Government to cause the supply of power to be developed by the Commission and made available for Mr. Carrick, it cannot be said that that supply of power cannot be made available unless Carrick is bound to take it; nor can it be said that if Carrick does not take it the Government cannot be remunerated for doing that which it agreed to do. The Government were under obligation to grant a lease of a water-power, and asked Carrick to accept, instead of such a lease, the making available a supply of power developed by the Commission; and Carrick, as I think it is proved, acceded to the request. In that agreement, on his part, to accept the making available a supply of power as a performance of the obligation to grant a lease, is ample consideration for any promise on the part of the Government, and there is no need to imply any promise on Carrick's part to give any further or other consideration. The case, then, does not come within the rule stated in *Churchward's* case. Nor does it come within the rule stated in *Ex p. Ford.* That rule, in its terms, applies only to circumstances arising in the ordinary business of life, i.e., to circumstances with which the Courts are so familiar that they can say with some feeling of certainty that ordinarily honest and careful men do, in those circumstances, make the promise which they proceed to hold that the person in question did make. But in this case we have very unusual circumstances: a man has contracted to erect and operate an extensive plant for turning into paper certain wood, and he is to pay royalties for the privilege of cutting the wood; he has been promised a water-power and has probably calculated what the cost of developing it will be; he is asked to accept, instead of that water-power, the privilege of obtaining a part of certain electrical power which the other contracting party is about to cause to be developed; but, except for a general statement that the power will be supplied "at cost," he is not—as far as appears—told what the expense to him will be, or given other particulars; he agrees that if the supply is made available he will not insist upon having the pro-

mised water-power; can any Court say that it knows that the ordinarily honest and careful man in such circumstances does agree to take his supply of power from the proposed source, and, therefore, that it is justified in inferring that the man in question did so agree? I think not.

My conclusion upon this branch of the case is, that there is no document which can be construed as containing an agreement on the part of Mr. Carrick to take power from the Government through the Commission; that there is no justification for implying or inferring such an agreement on his part; that the most that can be said is that he had and expressed an intention to take the power; but that *Kny-Scheerer Co.* v. *Chandler and Massey Limited* (supra), and the cases there referred to shew that no action can be based upon such an expression of intention.

There is a further difficulty in the plaintiff's way. If it could be found as a fact that Mr. Carrick did make the contract alleged, there is no principle that I know of upon which it can be held that that contract can be enforced against the defendants.

So far as I can discover, the cases in which a person—without contract upon his part—becomes bound by the undertakings of his predecessor in title, are either cases in which the assignee of a term is bound by those covenants of his assignor (the lessee) which run with the land, or cases in which the grantee of land is bound by covenants entered into by his predecessor in title of which he had notice at the time when he acquired his title: see the notes to *Spencer's Case* (1583), 1 Sm. L.C. (12th ed.) 62, at pp. 97, 98.

I proceed, therefore, to consider whether the defendants can be made liable by the application of any rule applicable where the relationship of the parties is that of a landlord and the assignee of the term, or that of a covenantee and the assignee of the land in respect of which the covenantor's covenant was given.

To take first the case last mentioned—the case of the covenantee suing the assignee of the covenantor. The defendants do not hold any land to which they trace their title through Mr. Carrick; but the subject-matter of the agreement of the 9th May, 1917—the license to cut the wood and to do the things incidental to cutting it and making it into paper, such as to erect mills, etc.,—was, I think, an incorporeal hereditament: *In re Shier Lumber Co. Assessment* (1907), 14 O.L.R. 210; and covenants made by the

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owners of such incorporeal hereditaments seem to be within the rules applicable to covenants made by the owners of land: *Norval* v. *Pascoe* (1864), 34 L.J. Ch. 82; *Hooper* v. *Clark* (1867), L.R. 2 Q.B. 200. Therefore, if the other conditions requisite to the maintenance of the action exist, the fact that the covenant was not made by the owner of land does not seem to present much difficulty. Perhaps also, the fact that the supposed agreement was an affirmative agreement to take the power from the Government, and not, in form, one of those restrictive covenants to which alone the rule applies—see *Haywood* v. *Brunswick Permanent Benefit Building Society* (1881), 8 Q.B.D. 403; *London and South Western R.W. Co.* v. *Gomm* (1882), 20 Ch. D. 562; *Austerberry* v. *Oldham Corporation* (1885), 29 Ch. D. 750; *Ferris* v. *Ellis* (1920), 48 O.L.R. 374; 1 Sm. L.C., ut supra, at p. 101—might be got over by treating the positive agreement as involving a negative one not to obtain power elsewhere, and enforcing it by injunction: see *Clegg* v. *Hands* (1890), 44 Ch. D. 503, 519.

But, even if these difficulties are out of the way, there remain two others which seem to be insurmountable. First, there is the fact that the supposed covenant was not made with the Government as the owner of land which was to be benefited by it, and the doctrine "does not extend to the case in which the covenantee has no land capable of enjoying, as against the land of the covenantor, the benefit of the restrictive covenant; if the covenant does not run with the land in law, its benefit can only be asserted against an assign of the land burdened, if the covenant was made for the benefit of certain land, all or some of which remains in the possession of the covenantee or his assign suing to enforce the covenant:" *London County Council* v. *Allen*, [1914] 3 K.B. 642, 660, 672. Secondly, there is no evidence that the defendants took their assignment with notice of any such restrictive covenant having been made by Mr. Carrick. If the covenant could be read into the agreement of the 8th May, 1918, and if it could be assumed that that agreement was handed over to the defendants by Messrs. Seaman and Alsted, it could be found as a fact that they took their assignment of the agreement of the 9th May, 1917, with notice of the covenant. There is no other possible way, as I think, upon the evidence given, of bringing notice home to them. But it is, in my opinion, impossible to read the agreement of the 8th May, 1918, as evidencing, or, by its recital, suggesting, the existence of such a covenant. The

recital is that there was an agreement between the parties to the agreement of the 9th May, 1917, and to the document in question, that a supply of power should be available to Mr. Carrick for his purposes; which is far from a recital that Carrick had agreed that he would not use, in connection with his work, power obtained from any one other than the Government. For these reasons, I think the covenant, even if proved, could not be enforced against the defendants in virtue of any rule applicable as between a covenantee and a grantee from the covenantor.

Turning now to the rules applicable as between a lessor and an assignee of the term, the case seems to be equally plain. In order that these rules should be applied, the document of the 9th May, 1917, conferring upon Mr. Carrick the right to cut the wood, would have to be considered a lease. It is not clear to me that it would be right so to consider it, but, for the purposes of the discussion, I will assume that it is a lease. The subject-matter of it is, as has been stated, an incorporeal hereditament; and the statute 32 Henry VIII. ch. 34 would apply, so that an assignee from the Crown of the reversion could sue upon any covenant in the agreement running with the incorporeal hereditament demised: *Martyn* v. *Williams* (1857), 1 H. & N. 817, at p. 826 et seq.; and an assignee from the licensee could be sued upon such of the licensee's covenants as run with the subject-matter of the license: *Norval* v. *Pascoe*, 34 L.J. Ch. 82. A covenant by the licensee to use, in the operation of the mills situate on the land mentioned in the license, electrical power supplied by the licensor, would probably run with what is called in the head-note to *Norval* v. *Pascoe* "the subject-matter of the grant," in the same way as an agreement by the lessee of a public-house to take his beer from the lessor would run with the land demised: see *Clegg* v. *Hands*, 44 Ch. D. 503; *Manchester Brewery Co* v. *Coombs*, [1901] 2 Ch. 608.

If, then, Mr. Carrick did covenant with the Crown to take his electrical power from the Crown through the Hydro-Electric Power Commission—using the word "covenant" in the same sense in which it is used in the cases—the plaintiff's claim is established: the covenant runs with the "subject-matter of the grant," and the defendants can be sued upon it. But he did not "covenant" in such sense. In the first place, unless his agreement is contained in the document of the 8th May, 1918 (which is not where the pleadings, which state it as made in March, say it can be found), it is not a

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covenant in the proper sense of the word—it is not contained in an instrument under seal—and, while there are many cases in the United States in which Courts, in dealing with the rule now under discussion, seem to treat any agreement, however made, as a covenant—e.g.: *Rugg* v. *Lemly* (1906), 93 S.W. Repr. 570; *Ferguson* v. *Worrall* (1907), 101 S.W. Repr. 966; *Sjoblom* v. *Mark* (1908), 114 N.W. Repr. 746—I have not found any English case in which the rule was applied to anything other than a contract contained in a sealed instrument. Secondly, the covenant must be contained in the instrument creating the term, and there is no suggestion that it is contained in the document of the 9th May, 1917. The rule is thus stated by Lush, J., in *Elliott* v. *Johnson* (1886), L.R. 2 Q.B. 120, 127: "The doctrine of conditions running with the land is confined to covenants annexed to the land by the indenture of demise." In Redman's Law of Landlord and Tenant, 7th ed. (1920), *Elliott* v. *Johnson* is cited, and it is said (p. 694): "The doctrine of covenants running with the land applies only where the demise is under seal and the covenant is annexed to the estate by the instrument which creates it." See also Foa's Relationship of Landlord and Tenant, 5th ed. (1914), p. 412.

Counsel for the plaintiff invoke another principle, stated in Anson on Contract, 15th ed., p. 292, as follows:—

"The assignee of contractual rights must take care to ascertain the exact nature and extent of those rights; for he cannot take more than his assignor has to give, or be exempt from the effect of transactions by which his assignor may have lessened or invalidated the rights assigned."

I think however that the cases cited by the author make it plain that the rule stated has nothing to do with what is here under discussion, viz., the right of the Crown to compel the defendants to perform a contract alleged to have been made by Mr. Carrick. I think that no more was intended to be stated in the text-book, and that no more is decided in the cases cited, than that the assignee of a chose in action takes subject to equities. The rule does apply so as to defeat the claim set up by the defendants in their counterclaim for a declaration that the defendants are entitled to a lease from the Crown of a suitable water-power; for Mr. Carrick agreed that, if power developed by the Hydro-Electric Commission was made available, he would not insist upon his right to a lease; and the defendants, taking subject to those equities which could have been set up if

there had been no assignment, cannot insist upon a lease if the Crown prefers to make available power developed by the Commission, rather than to grant a lease; but any right which there may be on the part of the Crown to compel the defendants to take power developed by the Commission must be attributed to some covenant made by Mr. Carrick which has become enforceable against the defendants by reason of the assignment to them of the concessions granted by the agreement of the 9th May, 1917.

For the foregoing reason, I am of opinion that the plaintiff's action fails.

In the counterclaim the defendants ask (1) for a declaration that they are not bound to take power from the Government through the Commission at cost, irrespective of what the cost may be and subject to onerous conditions. As I have held that the plaintiff cannot compel the defendants to take the power, it is unnecessary to consider whether the defendants are entitled to set up this counterclaim without first obtaining a fiat authorising them to do so. They ask (2) for a declaration that they are entitled to a lease of a water-power. I have held that they are not, or that they are not unless the Government fail to make available, at cost, power developed by the Commission. They seek (3) a declaration that they are at liberty to obtain a supply of electrical power from other persons, firms, or corporations. As I have decided that the plaintiff is not entitled to an injunction to restrain them from doing that which they ask to be declared entitled to do, it is unnecessary to deal with this part of their prayer, or to decide whether the claim can be made without a fiat. Finally, they ask (4) for a declaration that there have been breaches and default in the obligations to furnish a supply of power, and that they are entitled to damages. I do not really know what this means. If the agreement of the 8th May, 1918, postponing the time for the commencement of Mr. Carrick's work, amounts to an agreement on the part of the Government to make available a supply of power developed by the Commission—which I doubt—it does not contain any promise to make that supply available within any particular time, and I do not see how it can be said that there has been default. It is, therefore, unnecessary to consider whether this claim can be made without a fiat.

The action will be dismissed. There will be no judgment upon the counterclaim. The plaintiff ought to pay the costs, none of which, so far as appears, are specially referable to the counterclaim.

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Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Latchford, Middleton and Lennox, JJ. March 11, 1921.

JUDGMENT (§IVA—226)—ACTION ON—ALIMONY AND COSTS—FOREIGN LAW—JUDGMENT NOT ABSOLUTE—COSTS ONLY RECOVERED.

A foreign judgment for alimony not being an absolute judgment cannot be made so in this Province and arrears of alimony cannot be recovered under the same, although costs may.

[*Aldrich* v. *Aldrich* (1893), 23 O.R. 374, 24 O.R. 124, followed.]

APPEAL by plaintiff from a judgment of Mulock, C.J. Ex. in an action to enforce a judgment of the State of Minnesota, whereby it was adjudged and decreed that the plaintiff should recover from the defendant "the sum of $365 temporary alimony and suit-money," and also "the further sum of $20 per month payable in advance from the date of the order for judgment herein until the further order of this Court." Affirmed as to main action, reversed as to costs.

The judgment appealed from is as follows: "In support of the plaintiff's case, Mr. Boland put in an exemplification of the judgment in question and proved that the moneys therein mentioned had not been paid. For the defence, Mr. Willoughby proposed to cite the general statutes of the State of Minnesota, more particularly sec. 7129.

When I called the attention of both counsel to the fact that production of the statutes of the State of Minnesota would not in itself prove the law of that State, and inquired whether both counsel were content that I should accept the statutes as evidence, counsel assented thereto.

Thereupon Mr. Willoughby produced what was described as a volume purporting to be the "General Statutes of Minnesota," calling attention to sec. 7129. That section reads as follows:—

"After an order or decree for alimony or other allowance for the wife and children, or either of them * * * the Court may revise and alter such order or decree respecting the amount of such alimony or allowance and the payment thereof," etc.

Thus it appears that the District Court is still seised of the case to the extent that it may revise its order or decree, both in respect of the said sum of $365 and also its payment: that is, the District Court still has jurisdiction to alter the decree by reducing or increasing the amount or by relieving the defendant wholly from payment.

When it is sought to enforce in this Court a foreign judg-

ment ordering payment of a sum of money, it must appear that the foreign Court has finally established the existence of the debt in question so as to make it res adjudicata: *Nouvion* v. *Freeman* (1889), 15 App. Cas. 1.

By reason of the provision of the section of the statute above quoted, it is still open to the said District Court to revise and alter its decree, by relieving the defendant wholly or partly from payment. Thus there has been no final adjudication by the District Court, and therefore this Court is not entitled to give effect to the judgment in question; and this action is dismissed with costs.

J. F. Boland, for the plaintiff.

G. M. Willoughby, for the defendant.

RIDDELL, J.:—An appeal from the judgment at the trial dismissing the action.

It appears that a judgment was obtained in Minnesota for a certain sum of alimony and $50 costs.

There does not seem to be any difference proved between the effect in Minnesota and in Ontario of such a judgment; and, unless we are prepared to reverse *Aldrich* v. *Aldrich*, 23 O.R. 374, and, in a Divisional Court, 24 O.R. 124, we must hold that a "decree for alimony is not an absolute judgment, but the judgment for costs is:" 24 O.R. at p. 125.

I have reviewed the cases cited in *Aldrich* v. *Aldrich* and those cited before us on the argument, with others, and I am not prepared to overrule the case mentioned.

The appeal should be allowed with costs and judgment directed to be entered for the plaintiff for $50 and costs on the proper scale.

LATCHFORD, J.:—In *Nouvion* v. *Freeman*, 15 App. Cas. 1, 13, Lord Watson lays down the proposition that "no decision has been" (Dicey on Conflict of Laws, 2nd ed., p. 412, interpolates "or can be") "cited to the effect that an English Court is bound to give effect to a foreign decree which is liable to be abrogated or varied by the same Court which issued it."

The judgment sued upon, so far as it relates, not to costs, but to alimony, has been once varied and may be varied again. Except in so far as it relates to the costs, $50, the appeal, in my opinion, fails. To that extent it should, I think, be allowed, with costs of the appeal.

MIDDLETON, J.:—Appeal by the plaintiff from the judgment of Sir William Mulock dismissing an action for the recovery of overdue instalments of alimony payable under the order of the District Court of the State of Minnesota.

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The fundamental principle is most clearly stated in *Williams* v. *Jones* (1845), 13 M. & W. 628, 633:—

"Where a Court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an action of debt to enforce the judgment may be maintained."

This is explained by what is said in *Nouvion* v. *Freeman*, 15 App. Cas. 1, at p. 9:—

"In order to establish that such a judgment has been pronounced it must be shewn that in the Court by which it was pronounced it conclusively, finally, and for ever established the existence of the debt of which it is sought to be made conclusive evidence in this country, so as to make it res judicata between the parties. If it is not conclusive in the same Court which pronounced it . . . then I do not think that a judgment which is of that character can be regarded as finally and conclusively evidencing the debt."

It is there pointed out that the existence of a right of appeal has never been deemed to prevent a judgment from being regarded as final and conclusive for the purpose under discussion. The question is whether the judgment is final and conclusive so far as the tribunal which pronounced it is concerned. Can it thereafter ordain that there is no obligation and no debt? If it can, the element of finality is lacking.

It will also be observed that there is no distinction between an action upon a foreign and upon a domestic judgment. A lack of finality is fatal in either case.

The judgment of the Supreme Court of the United States in *Sistare* v. *Sistare* (1910), 218 U.S. 1, is useful as an examination of the "full faith and credit" clause of the constitution when applied to alimony judgments. Past due instalments of alimony payable under a judgment are recoverable in another State as a debt upon a judgment, "unless the right to receive the alimony is so discretionary with the Court rendering the decree that, even in the absence of application to modify the decree, no vested right exists." The context shews that what is meant by "an application to modify the decree" is to modify the general declaration of the right to alimony and not to change the amount payable. There is a discussion of the different views taken in different jurisdictions as to the nature of a decree directing payment of an alimentary allowance. In many of the States there is statutory provision. In New York, where the judgment in question in the *Sistare* case was pro-

nounced, it was the settled doctrine that no power existed to modify a judgment so as to affect past due instalments.

In other jurisdictions, a different rule prevails; e.g.—"The decree is not final and conclusive as a matter of law, because it does not purport to be final and conclusive as a matter of fact. The reservation in the decree plainly indicates an unfinished determination of the judicial mind; that is, the Court has not completely disposed of the case. The power of the Court not having been exhausted, it reserves to itself the right to exercise the unexhausted portion of its power in such manner as changed conditions and circumstances may indicate to be just:" *Ruge* v. *Ruge* (1917), 97 Wash. 51, 56.

In Ireland there are two instructive cases. In *Nunn* v. *Nunn* (1880), 8 L.R. Ir. 298, the Court treated past due instalments of alimony payable under an English decree for separation as a debt. The payments were "subject to further order," but, as no order had been made, in the view of the Court the order for payment had the necessary element of finality. In *Keys* v. *Keys*, [1919] 2 I.R. 160, the question was again discussed, and it was held that arrears of alimony cannot be recovered by an action. *Nunn* v. *Nunn* (supra) was either decided upon a misapprehension of the nature of alimony payable under an English judgment, or the decree there considered must have been made under a statutory power when the alimony was not subject to its usual incidents.

The English Courts have no doubt as to the nature and effect of an alimony judgment. In *Bailey* v. *Bailey* (1884), 13 Q.B.D. 855, Grove, J. (pp. 857, 858), said:—

"It has also been shewn that with reference to unpaid instalments of alimony the Court has frequently varied, changed, or possibly annulled it. But the plaintiff has contended that instalments already due and unpaid are in the nature of debts and are not upon the same footing as instalments due in the future. It may well be that there are cases in which the Court might interfere with respect to future but not with respect to past payments, but no case has been cited to shew that the Divorce Court has not the power to interfere with respect to past payments . . I think that such a proposition is monstrous, and that there is nothing in the decisions to support it."

In appeal, the case turned upon another point, but Brett, M.R., speaks (p. 859) of the decision given by Grove, J. as "weighty," and there is no sign of any dissent from it.

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Lennox, J. Meredith, C.J.C.P.

In our own Courts, *Aldrich* v. *Aldrich*, 24 O.R. 124, and *Lee* v. *Lee* (1895), 27 O.R. 193, are to the same effect.

In *Hadden* v. *Hadden* (1899), 6 B.C.R. 340, an action was maintained for arrears of alimony under an Ontario judgment, but this was based upon the fact that the judgment was upon consent, and this imported a degree of finality which the judgment would not otherwise have had.

In the case in hand, the statute quoted by Sir William Mulock and the form of judgment both go to shew that the Minnesota Court has full power over the payments, past as well as future, and the affidavit now tendered from a member of the State Bar does not suggest that this is not so.

I agree that the costs stand in a different position, and I agree that there should be judgment for the sum of $50, with costs on the proper scale.

LENNOX, J.:—This action furnishes another example of the occasional evil resulting from precedents, the sacrifice of the substance for a shadow. Inasmuch as a judgment or order directing periodical payments of alimony is theoretically not final, it is quite logical that the wife cannot obtain a judgment in its nature final by suing for payments in arrear: but for this it would be quite reasonable that she should have judgment for what is overdue.

Having regard to the law here and in Great Britain, the judgment of the learned Judge at the trial is right, and for the reasons he assigns, except as to the $50 for costs in the Minnesota Court. The appeal should be allowed to this extent only.

MEREDITH, C.J.C.P., (dissenting):—If we are to regard the injunction stare decisis, this appeal must be allowed as to the claim of the plaintiff in this action for the amount of the costs of the action in the Minnesota Court, with interest: *Aldrich* v. *Aldrich*, 24 O.R. 124; but the appeal in other respects cannot be so easily decided.

This action is based upon a judgment of the District Court of the Fourth Judicial District of the County of Hennepin in the State of Minnesota, one of the United States of America, which judgment, as finally settled and entered, on the 26th day of June, 1913, adjudged and ordered, among other things: "that the defendant pay to the plaintiff the sum of $50 as attorney's fees;" "that the plaintiff recover from the defendant the sum of $365 temporary alimony and suit-money, which said sum is a lien

upon the following described premises of the defendant, to wit: . . . and that the said premises of defendant be sold to satisfy the judgment for temporary alimony and suit-money;" and "that the plaintiff have and recover of the defendant the further sum of $20 per month, payable monthly in advance, from October 23, 1911, until the further order of this Court, and it is hereby adjudged that defendant pay to the plaintiff the said sum of $20 a month in advance from said October 23, 1911."

It is to be observed that the judgment from which these quotations are taken is one that was made for the expressed purpose of "amending" the earlier judgment; and that one of the amendments made was the addition of the words, "and it is hereby adjudged that defendant pay to the plaintiff the said sum of $20 a month in advance from said October 23, 1911;" the earlier judgment being in these words only: "That plaintiff have and recover from said defendant the further sum of $20 per month, payable monthly, in advance, from the date of the order for judgment herein"—which was October 23, 1911"—"until the further order of this Court." So that what was added was an unqualified judgment for payment; though it may be added that, if that which was added were intended to be qualified as the earlier judgment was, the result should not be affected; it would be a very lame Court that would not have statutory or inherent power or both to stop such payment in a proper case.

The amended judgment is dated the 26th June, 1913, and it has remained ever since and still is in full force and effect, the defendant's land described in it was sold under it and the proceeds were applied in the manner provided for in the judgment; but the defendant has paid nothing—except perhaps $10—upon it, though he always has been and still is subject to it, and if he had any property subject to execution in the State of Minnesota it could be seized and sold in or towards satisfaction of the sum claimed by the plaintiff in this action.

No attempt was made to disclose any defence upon the merits of this action at the trial; but, at the last moment, leave was obtained to set up a lawyer's defence: that the judgment of the Minnesota Court is "inconclusive;" and upon that defence only the defendant succeeded at such trial.

No evidence was given in support of such defence, but the trial Judge was referred to one of the general statutes

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of Minnesota, and counsel for the plaintiff was asked to consent that it be put in as evidence, but he did not; that is made very plain in the shorthand notes of the trial, the trial Judge saying, "Mr. Boland does not admit;" and, in the last words said at the trial: "I put this qualification upon receiving it: subject to the objection that the production does not prove the statute or that the alleged statute is the law."

Judgment was reserved at the trial, and was not pronounced until some days afterward; and when pronounced was based altogether upon that statute, the trial Judge being then under the plainly mistaken impression that "both counsel were content that I should accept the statute as evidence."

Nothing could be more dangerous than for a Judge of this Court to determine as a matter of law what the law of some other country, with the laws of which he is not familiar, is; and it is perhaps as dangerous to attempt to do so upon statute-law as it is upon "case-law," especially in these days when statute-laws are sometimes changed as readily, and perhaps as quickly, as some men change their suits of clothes. Foreign laws can be rightly dealt with in our Courts only as questions of fact to be proved by competent witnesses.

This case must be dealt with here, as it should have been at the trial, as if no evidence had been adduced at the trial as to the law of the State of Minnesota.

It may be well now to say a few words concerning the substance of the matter involved in this action, excluding for the moment those things which are so enticing and interesting to some minds—law-points and technicalities.

The defendant treated the plaintiff, who was his wife, in such "a cruel and inhuman manner" that it was "unsafe" and would "be injurious to her health for her to continue to live with him." A Court of the State of Minnesota, having jurisdiction in, and being quite competent in every way to deal with, the matter, made the judgment from which I have quoted; and by the same judgment gave to the plaintiff "the care, custody, and control of the two minor children" of the plaintiff and defendant.

Under that judgment there was justly due and payable to the plaintiff by the defendant $2,465, without interest, when this action was brought.

No attempt has ever been made to revise or alter that

judgment; none could have been, and none can be now reasonably made. The defendant's evidence given in this action makes that quite plain; he had, and has, no legal, or moral, excuse for non-payment, if he is, or ever was, able to pay.

He is now living in this Province, and apparently is able to pay in whole or in part. What sane reason can be given why he should not be made to pay according to his ability? If the judgment were for any kind of extravagances, or, in some places, even if a gambling debt, this Court would lend its aid, admittedly, to compel payment, but being for the support of his wife, and of his children in part, he may snap his fingers at the judgment of the Minnesota Court and be "backed up" in doing so by the Ontario Courts, no matter how much property he may have liable to execution here. Unless plainly driven to it, by the injunction to follow the decisions, I must firmly dissent from any judgment that has any such effect.

But it is said that the cases require it. Before dealing with them let me—at the risk of a needless repetition—repeat: that the judgment of the Minnesota Court is an unqualified one: as to the costs—$50; as to the temporary alimony and suit-money—$365, of which $100 has been levied, leaving $265 payable; and also as to the $20 a month—in all $2,160, up to the time of the commencement of this action, unless the words contained in the earlier judgment, and repeated in the revised one, as before mentioned, create a qualification. But, if they do, it cannot be a qualification as to any sums that have become payable; the words "until further order of this Court" must have reference to future payments; such a restriction of a positive order to pay so much monthly, must mean until payment is stopped, reduced, or otherwise changed.

And, if it were otherwise, no change has been made, no change has been applied for, and no ground for any change can be suggested as to past due money; it is not enough to say that, though substantially impossible, it is in a technical sense legally possible; one might as well, out of the law courts, base an argument in favour of substantial worldly advantage on the ground that the moon may be made of green cheese.

But, if the judgment was as revocable, and as alterable as the trial Judge deemed it, what cases compel us to turn this plaintiff, with a just and more than ordinarily meritorious claim, out of our Courts?

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The case relied upon by the trial Judge, *Nouvion* v. *Freeman*, 15 App. Cas. 1, has no such effect. It was a case altogether of a different character. It was an action upon a judgment, which might to some extent be attacked in the same action; but its downfall, as a support of an action in a foreign country, did not depend on that so much as upon its wholly unstable character, because "either plaintiff or defendant if successful" in it might "in the same Court and in respect of the same subject-matter" take ordinary or "plenary" proceedings in which "all defences and the whole merits of the matter" might "be gone into." The surprise in that case seems to have been the strong argument that was made in favour of the contention that even so unstable a foundation as that might support a judgment upon it in a foreign country: an argument that caused even one as capable, in such a case, as Lord Bramwell, to flounder somewhat in meeting it. And in these days there are more and easier ways of getting rid of a judgment than by way of the writ of audita querela; see Rule 523* of our Rules of Court, confirmed by statute.

The case of *Bailey* v. *Bailey*, 13 Q.B.D. 855, as a decision gives no aid to the contention that that case required a dismissal of this action; it indeed tends the other way. It was a case involving a claim for alimony pendente lite only: and it was only an appeal from an order made by a Master at Chambers giving leave to enter speedy judgment. Grove, J., who, with Huddleston, B., heard the appeal in Court—it having been referred from Chambers into Court—expressed the opinion that an action would not lie upon such a claim, and Huddleston, B., agreed with him. The result was that the Chambers order for speedy judgment was set aside, Grove, J., saying that he considered the application for such a judgment an attempt to carry Order XIV. further than was ever designed. So the plaintiff was left to proceed with the action in the ordinary way, but naturally she preferred to appeal for the purpose of having the order at Chambers restored. She failed; but not on the ground upon which Grove, J., and Huddleston, B., proceeded. It was held in the Court of Appeal that, because a judgment

*523. A party entitled to maintain an action for the reversal or variation of a judgment or order, upon the ground of matter arising subsequent to the making thereof, or subsequently discovered, or to impeach a judgment or order on the ground of fraud, or to suspend the operation of a judgment or order, or to carry a judgment or order into operation, or to any further or other relief than that originally awarded, may move in the action for the relief claimed.

of the Divorce Court in England is to be enforced—by statute—as a judgment in the High Court of Chancery, and as in England no action ever lay upon a decree of the Court of Chancery, that action could not succeed. It is true that one of the Judges in the Court of Appeal spoke of the reasons given by Grove, J., being "also weighty;" but it is also true, and obviously true, that none of the Judges in the Court of Appeal relied upon them—they all took to that which they must have thought safer ground. The judgment does not affect this case, because, although such an action will not lie in England, it has there also been firmly settled that an action will lie upon the decree of a court of equity of a foreign country, as it would on the judgment in England of a common law court, if the decree be merely for the payment of money. And as to the reasons of Grove, J., which were spoken of as weighty, it may be stated that the same state of affairs which he supposed for the purposes of argument might happen as well under a separation deed containing a dum casta clause as under a decree for alimony; and, if judgment had been obtained upon it by concealment of the facts, I cannot doubt the power of any court in which the judgment was obtained to grant relief on the ground of fraud or under Rule 523; or of any court in which judgment on the decree had been obtained to alter the judgment in accordance with that of the Divorce Court.

The English cases in which it has been occasionally said that an action does not lie upon a decree or order for alimony must always be read with the knowledge that that is so in England for the same reason that no decree or order in Chancery could be made the foundation of such an action. Bearing this in mind, and bearing in mind that in the case of *Lee* v. *Lee*, 27 O.R. 193, it was said that it was "not needful to decide" that the County Court judgment was a nullity, the judgment of Boyd, C., in that case, stands in no one's way upon the question here involved. On the other hand, the case of *Swaizie* v. *Swaizie* (1899), 31 O.R. 81, 324, seems fully to support the plaintiff's claim in this action.

The reason why a home decree in equity could not be sued on, while a foreign one might, in England, should be obvious: a court of equity in England had as effectual means of enforcing its decrees as a common law court had of enforcing its judgments; but there was no power to enforce a foreign decree or judgment in England except in an action there; so that, if no action lay, the decree or judg-

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ment was impotent if the debtor chose to remove himself and his wealth from the jurisdiction of the court which pronounced the decree or judgment. The practice and cases in England must be followed only after circumspection.

It is needless to discuss other cases; the two first mentioned were the mainstays of the defendant's contentions here. But it is proper to refer to the general principles applicable in the case.

Such expressions as that the judgment sued upon must be final and conclusive, and, as more strongly put in one of the opinions of one of the Law Lords, "a judgment which does not conclusively and forever as between the parties establish the existence of a debt in that court cannot be looked upon as sufficient evidence of it in the courts of that country," must be looked upon as to some extent figurative; for, however it may have been in the days of old, in these days no law, and no judgment of any court, is unalterable. Common law judgments, no matter how far back pronounced, though very inelastic, were never unalterable; they were subject to appeals, and might always be avoided for fraud, and they were, among other things, subject to the writ of audita querela; whilst decrees in equity were more amenable to the requirements of justice and good conscience.

And now that there has been for years a pretty complete fusion of the two systems in all respects; and now that the rules of equity prevail in all courts; and also that Rule 523 is in full force and effect; it is more and more a figure of speech to describe laws or judgments here as unalterable: or any judgment, decree or order, as conclusively and forever establishing a debt.

So, too, regard must be had to the needs and signs of the times. It is not the comity of nations, it is the needs of mercantile and other intercourses the world over that must govern. To those so concerned, refusing relief to a plaintiff, in such a case as this, against a wealthy defendant, might very properly bring ridicule upon the administration of justice here; as also it must if it were known that, although the Minnesota courts should promptly enforce the judgment in question if the defendant had property in that State, yet the courts would not enforce it here, no matter how much property the defendant might have here, only because the courts here imagined that technically the judgment there does not conclusively, finally, and forever establish a debt between the parties; and that the Minnesota courts might not enforce it.

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It must be remembered that judgment is not sought in regard to future payments, but only for those long overdue and which should have been paid long ago; and also the very wide powers which the courts here have under Rule 523, and inherently, must be borne in mind; so that, if anything should or could be done affecting the right of the plaintiff to recover the money in question in Minnesota, effect could be given to that change here; though in this case any such change is out of the question. The defendant is, and has been continuously for over 9 years, disobeying and disregarding the judgment and order of the Minnesota Court; and we are asked to aid him in continuing to do so.

It must be remembered, too, that alimony in England is upon a different footing from alimony here and also in many of the United States of America; here, and in them, it is based upon statute, and to be dealt with in the ordinary courts, not in matrimonial courts or under any separate or peculiar practice.

The law of this Province* provides that "alimony when granted shall continue until further order of the Court;" and I doubt that in as many as one in a thousand cases has any order for discontinuance been made.

No case stands in the way of justice being done in this action; I am therefore in favour of allowing this appeal altogether, and in doing so feel entirely free from any kind of disregard of any injunction to follow the decisions.

Appeal allowed as to the costs and dismissed as to the main part of the claim.

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*The Judicature Act, R.S.O. 1897, ch. 51, sec. 34.

NOTE: See the Imperial enactments 10 & 11 Geo. V. ch. 33 and ch. 81, part II.

KIME v. HAMILTON RADIAL ELECTRIC R. Co.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Latchford and Lennox, JJ. March 11, 1921.

CARRIERS (§IIG—130)—COLLISION—PASSENGER ON PLATFORM—INJURY—LACK OF ACCOMMODATION INSIDE—RAILWAY ACT, 9 & 10 GEO. V., CH. 68—SECS. 295 (1) AND 390.

A passenger injured in a collision while standing upon the platform of a railway car, may recover, even if the regulations prohibit his standing there, the evidence shewing that owing to the crown he could not possibly move inside as the regulations direct.

APPEAL by plaintiff from a County Court judgment dismissing an action to recover damages for injury sustained

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Riddell, J.

by the plaintiff while a passenger on a car of the defendants, by reason of a collision with another car. Reversed.

G. W. Ballard, for appellant.

Colin Gibson, for respondents.

RIDDELL, J.:—An appeal by the plaintiff from the judgment of the Judge of the County Court of the County of Wentworth refusing to give effect to the findings of fact by the jury and dismissing the action.

It seems that the plaintiff, a painter, residing at Hamilton Beach, between 5.20 and 5.25 p.m., the "rush hour," got on car No. 608, at Hamilton. Having a parcel in his hand, he pitched it into the rack, putting one foot over the door-sill, but the "car was crowded, all the seats were occupied and people standing in the aisles;" or, as he says in another place: "The people were right inside the door, I could not get all the way in; if I had, I would have gone in."

Accordingly he stood on the platform with two other men.

The car proceeding, it was run into by another car of the defendants, admittedly by the negligence of the defendants, and the plaintiff was injured.

At the trial questions were left to the jury. The questions and the jury's answers thereto were as follows:—

"It being admitted that the accident was due to the negligence of the defendants:—

"1. Q. Could the plaintiff, by the exercise of reasonable care, have avoided the accident? A. No.

"2. Q. If so, in what way did he fail to exercise reasonable care?

"3. Q. Could the plaintiff have got a seat inside the car? A. No.

"4 Q. If not, was there standing room inside the car? A. Yes.

"5. Q. If there was a seat or standing room inside the car, what was his reason for not going in? A. Standing passengers prevented him.

"6. Q. At what sum do you assess the damages in case the plaintiff is entitled to recover? A. $350."

The learned County Court Judge, however, held the plaintiff not entitled to recover, being barred on the following grounds:—

The Dominion Railway Act, 1919, 9 & 10 Geo. V. ch. 68, sec. 390, provides: "No person injured while on the platform of a car . . . . in violation of the printed regulations posted up at the time, shall have claim in respect of the

injury, if room inside the passenger cars, sufficient for the proper accommodation of the passengers, was furnished at the time." And the following printed regulation was so posted: "Passengers other than policemen in uniform, city detectives, and company officials, shall not be allowed to ride on the front platform of any closed car, nor to ride on the rear platform of any closed car, when there is room and space that might be occupied by them inside the car, and women and children shall not ride on the front platform or steps of any open car; passengers refusing to comply with this rule shall be considered disorderly persons and subject to a penalty for the violation of this rule not exceeding $10 and may also on such refusal be ejected from or put off the car." This by-law was approved and passed by the directors of the company in accordance with the powers given by the Railway Act. It was approved by the Railway Board. So that it is regular in all respects, and it is alleged to be in accordance with sec. 390 of the Railway Act. The plaintiff read it or at least saw it there, posted up in the car.

I assume, without deciding, that sec. 390 is operative even though the injury does not arise from the position of the injured person on the platform, and also that the by-law proved was one under sec. 390. The answer of the plaintiff is, I think, conclusive.

Section 390 appears to bar an injured person only "if room inside . . . . sufficient for the proper accommodation of the passengers, was furnished at the time."

While there may not have been room inside sufficient for the proper accommodation of the passengers, I assume, without deciding, that there was. It was not "furnished at the time." "Furnished" means "provided for use:" *Southern Express Co.* v. *The State*, 107 Ga. 670; and "in such a position as will reasonably enable one to make use of what is furnished:" see *Southend Waterworks Co.* v. *Howard* (1884), 13 Q.B.D. 215.

No one can say that room is furnished where access thereto is barred, and the jury have given credit to the plaintiff's evidence that he could not get in for the people standing. "Standing passengers prevented him."

Moreover, the by-law prohibits passengers from riding on the platform only "when there is room and space that might be occupied by them inside the car," and this passenger could not occupy the room and space inside the car.

Not providing space and "proper accommodation" within must be considered equivalent to an invitation and a license

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to ride without, to a passenger rightfully on the car, as this plaintiff was.

I would set aside the judgment with costs and direct judgment for the plaintiff for $350 and costs.

LATCHFORD, J.:—The appellant is entitled to the damages fixed by the jury unless precluded from recovering by sec. 390 of the Dominion Railway Act, 1919, and the regulations of the defendant company.

Although the jury found as a fact that Kime was prevented by standing passengers from entering the car, they also found that there was standing room inside it for him. The learned trial Judge held that, as the plaintiff was injured while on the rear platform, he acted in violation of the printed rules posted up in the vestibule and the statute.

In my opinion, Kime was guilty of no violation of the regulations, which I am assuming were passed and posted up in conformity with the statute.

Their provision that passengers shall not be allowed to ride, as the plaintiff was riding, on the rear platform of a closed car, does not prohibit a passenger from riding thus, as it does prohibit passengers (with exceptions unnecessary to be considered) from riding on the front platform.

What it does provide is that passengers shall not be *allowed* to ride on the rear platform, and that a passenger becomes "disorderly" when, and only when, he *refuses* to comply with the regulations, which, it is to be observed, contain no request addressed to passengers not to stand on the rear platform. "Allowed" is clearly used in the sense of "permitted," although "allow" is somewhat less positive than "permit," being more of a synonym for "suffer:" *Wilson* v. *State of Indiana* (1897), 46 N.E. Repr. 1050, 1051.

Who was to exercise the right or power of not allowing or not permitting or not consenting to Kime's standing on the rear platform? Plainly the conductor in charge of the car. This is all the more evident when the use of the word "refusal" subsequently in the regulation is considered. There can be no refusal unless there is a request or demand: and no request or demand whatever was made to Kime. Until there was a refusal by him to comply with a request which the conductor might properly have made, he was not disorderly under the regulations posted up, and was not violating either them or the statute.

I think the appeal should be allowed and judgment directed to be entered in favour of the plaintiff for $350 and costs here and below.

LENNOX, J.:—The plaintiff sustained injuries while travelling as a passenger on one of the cars of the defendant company. The whole contest is as to whether the plaintiff is entitled to retain the $350 damages awarded him, or is barred from recovering damages, by reason of the fact that he was on the platform, instead of being in the car, when the collision occurred.

This involves consideration of (1) sec. 390 of the Dominion Railway Act, 1919, 9 & 10 Geo. V. ch. 68, which enacts that "no person injured while on the platform of a car . . . . in violation of the printed regulations posted up at the time, shall have any claim in respect of the injury, if room inside of the passenger cars, sufficient for the proper accommodation of the passengers, was furnished at the time;" (2) the by-laws of the company sanctioned by the Governor-General in Council; (3) posting of the by-laws so sanctioned; (4) the Judge's charge, especially all that was said as to standing on the platform and the reason for being there; and (5) the findings of the jury on the case and evidence as submitted to them.

Inverting the order to some extent, the learned Judge reviewed all the evidence, dealt with the questions seriatim, explaining the meaning and significance of each, and particularly pointed out that the all-important question was whether the plaintiff was compelled to remain upon the platform or could have found standing room, at least, inside the car.

[The learned Judge then set out the questions put to the jury and their answers, as above].

Upon, or notwithstanding, these findings, the action was dismissed with costs, and, as I will assume for the moment, upon the ground that the combined effect of the statute and the posted by-laws is to bar the right of action; although it is impossible to read the reasons assigned without realising that the learned Judge, in effect, reversed the findings of the jury in reaching this conclusion. If the statute and by-laws apply, it is not a case of contributory negligence at all, it is a case of statutory elimination of the right of action. As to the questions generally, it is to be regretted that they were not framed on the lines of the statute and better adapted to a determination of the essential facts. However, as it turns out, there is not any great difficulty in disposing of the appeal, when sec. 390 is read as printed, and para. 3 of the by-law of 1907 (which was

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not referred to even upon the argument of the appeal) is taken into account.

The company's by-laws have no force, or effect, until they are sanctioned by the Governor-General in Council nor until they are printed and posted up in the manner provided for by secs. 390 and 295 (1) of the Railway Act.

The first by-law in evidence was passed on the 28th October, 1907, and para. 3, evidently lost sight of, is still in force. Paragraph 1 was amended on the 24th February, 1913, and I will assume, for it is immaterial, that 1 (a) and (b) of the printed notice, exhibit 2, comply with the by-laws as amended. Paragraph 2 of exhibit 2 is in the exact words of para. 2 of the by-law of the 28th October, 1907. The identity in wording is of some consequence, as it affords inherent evidence that it was printed before the amendment of this paragraph, on the 6th April, 1916, and the amendments do not appear in exhibit 2.

There is nothing said about "standing room" in sec. 390, or "bunching up," or the peculiar danger voluntarily incurred by standing upon the platform. The section speaks for itself, and, at least impliedly, throws upon the company the obligation of furnishing room inside of the passenger cars, sufficient for the proper accommodation of the passengers, and affords conditional exemption from the ordinary common law liability for negligence in cases where it applies. What is or is not proper accommodation is not a question to be dealt with by the Court, but a question of fact for the consideration of the jury, and to be determined in each case with due regard to all other facts and the surrounding circumstances in evidence at the trial. There is no direct finding as to this, and, with great respect, I am of opinion that, balancing the alternative dangers incident to railway travel, it cannot be confidently affirmed that it is always safer inside a trolley car than upon the rear platform. In this case two of the men on the platform jumped off in time. If the impact had been greater, those shut up in the car would have fared badly; and what about panic, and fire, and jumping the track and derailments, to say nothing of epidemics and microbes and the deadly hat-pin in the closed car?

As a conditional abrogation of a common law right, and a concession to the company, the statute and by-laws are to be construed strictly; and, as an exception to the general principles of the common law, the company is called upon to give strict proof that the statutory conditions have been fulfilled. I cannot find evidence of this. Section 390 pro-

vides only for exemption from liability in cases where the injured passenger was at the time of the accident "on the platform . . . . in violation of the printed regulations posted up at the time." I have not to argue whether the posting up relied on might be as effective or "just as good" as any other method of publication. It is enough to say that what was done is not what the statute prescribes. What the statute requires, in addition to being sanctioned as referred to, is that the by-laws of the company, in order to be effective, "shall be openly affixed, and kept affixed, to a conspicuous part of every station belonging to the company, so as to give public notice thereof to the persons interested therein or affected thereby:" sec. 295(1). There is no pretence that this provision was complied with.

And, aside from this, I cannot find evidence that the sanctioned by-laws or regulations as to passengers upon the platform—I do not refer to fragments of the by-laws—were ever posted up anywhere. There is the evidence of exhibit 2 that they were not. There were three paragraphs in the original by-law of 1907. Paragraph 3 is as follows:—

"3. The conductor must politely call the attention of passengers violating or who appear to intend to violate the two rules hereinbefore set forth to the provisions of the said rules and firmly request observance thereof before taking any other action."

This is a fundamental, and I would say precedent, condition of the right to prosecute, and à fortiori, I should think, of the right of the company to be exempt from liability. It is surprising to find that the case went to the jury, was dismissed as a matter of law, and was solemnly argued upon appeal without any reference to either of these basic facts—statutory conditions precedent to the exoneration of the company.

The result is that the statutory bar relied on has no application whatever to the determination of this action, and a result of this misconception undoubtedly was that the issues were submitted to the jury upon terms which were more unfavourable to the plaintiff than they should have been. Stripped of the statutory protection set up, this was and is an ordinary action for negligence, except in this, that the company's negligence as to the originating cause of the injury is admitted.

The only question then that should have been submitted to the jury was as to contributory negligence. In submit-

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ting this question, the learned Judge would refer to and explain all the facts and circumstances in connection with the accident, as he in fact did; and the jury's deliberations would, and no doubt did, involve the consideration of the circumstance that the plaintiff at the time was riding upon the platform; and the further question of fact, of course, whether there was sufficient room and proper accommodation furnished by the company, inside the car. The jury has pronounced upon all the questions submitted in favour of the plaintiff, including the fifth, which under the circumstances was quite unfair to the plaintiff, and which I am sure would not have been submitted but for the misapprehension of fact and law already referred to.

Having regard to the Judge's charge, the answer to question 5, "Standing passengers prevented him," might have presented serious obstacles in the way of the company, even if the statute had been complied with; but, as it happens, nothing turns upon it now. The question should not have been submitted, and if it had been answered unfavourably to the plaintiff would have to be ignored; and, as it is, the answer cannot count to the prejudice of the plaintiff.

The company did not cross-appeal, but the plaintiff's application may involve consideration of the jury's findings, and at all events it is as well to deal with them. There was evidence upon which reasonable men might find as they did. The statute being eliminated, and the negligence of the company admitted, the verdict is eminently just, and for a very moderate amount. "The verdict should not be disturbed unless it appeared to be not only unsatisfactory, but unreasonable and unjust:" Lord FitzGerald in *Metropolitan R. W. Co.* v. *Wright* (1886), 11 App. Cas. 152, at p. 155. And in *Commissioner for Railways* v. *Brown* (1887),13 App. Cas. 133, the same learned Lord, delivering the judgment of the House of Lords, said: "Chief Justice Tindal, about 50 years since, laid down the rule to this effect: that where the question is one of fact, and there is evidence on both sides properly submitted to the jury, the verdict of the jury once found ought to stand; and that the setting aside of such a verdict should be of rare and exceptional occurrence. Their Lordships are not aware that the rule thus laid down has been abandoned." And in our own Courts see *Windsor Hotel Co.* v. *Odell* (1907), 39 Can. S.C.R. 336, following *Commissioner for Railways* v. *Brown*.

The learned Judge in his reasons for judgment says: "Then the question arises . . . . was there room inside of

this car sufficient for the proper accommodation of passengers? I submitted that question to the jury, and they say there was." With very great respect, I am of opinion that the answer of the jury cannot be interpreted in that way. The question of "proper accommodation" was not directly submitted. It would have been eminently proper to have submitted it, and very satisfactory if it had been done; but, as I have said, it is not a question for the Court, and the matter is concluded by the findings the Court obtained. The Judge cannot supplement the jury's findings and thereby reverse them: *Ramsay* v. *Toronto R. W. Co.* (1913), 30 O.L.R. 127, 17 D.L.R. 220. It is not the province of the Judge to find contributory negligence: *London and Western Trusts Co.* v. *Lake Erie and Detroit River R. W. Co.* (1906), 12 O.L.R. 28. The finding will not be set aside unless it be a finding that reasonable men could not conscientiously make: *Gray* v. *Wabash R. R. Co.* (1916), 35 O.L.R. 510, 28 D.L.R. 244; and in the same case it was held that, where the Judge at the trial improperly dismisses the action, there will not be a new trial, but judgment will be directed according to the findings of the jury; so too in *London and Western Trusts Co.* v. *Lake Erie and Detroit River R. W. Co.*, just referred to.

I would allow the appeal and direct judgment for the plaintiff for the amount found, with costs here and below.

MEREDITH, C.J.C.P., (dissenting):—At the trial, and upon the argument of this appeal, this case was treated as if the rights of the parties, involved in it, depended altogether upon the provisions of sec. 390 of the Railway Act: it is quite too late now to deal with it in a different way; to do so would necessitate a new trial of the action, in which evidence might be adduced shewing that any new questions that might be raised were altogether imaginary: we can therefore rightly deal with it only as the parties have throughout treated it and have left it to be considered by us.

The plaintiff was "a person injured while on the platform of a car," and so, under sec. 390, has no claim "in respect of the injury, if room inside of the passenger cars, sufficient for the proper accommodation of passengers, was furnished at the time."

That there was no need for the plaintiff to stand upon the platform, that there was plenty of room inside, is plainly shewn by him in his testimony at the trial.

His passage was not taken hurriedly at a way-station; it

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was taken at the defendants' station at the terminus of their road in Hamilton; and the plaintiff had time enough to make a choice of cars.

He first entered car 303, and might have remained in it: but he chose to leave it, and the only reason given by him for doing so was that there was no "rack" in that car in which he could place a small parcel which he was carrying; I say a small parcel because it was one, according to his testimony, that he was able to toss into a rack without entering the car, merely putting one foot in the door.

In view of that testimony, in no manner contradicted or questioned, the plaintiff should have been, as he eventually was, nonsuited. The defendants not only provided sufficient accommodation inside the car, but the plaintiff had it and voluntarily abandoned it.

So too he was, in my opinion, rightly nonsuited if that had not taken place, if the only car which he could have taken were that to which he went, after leaving car 303, and on the platform of which he was injured, car 608.

There is no finding of the jury that proper accommodation was not provided in car 608: there is really a finding that there was, that there was standing room in this car, and so there was no need for any passenger to stand outside upon the platform. No seats are provided upon platforms, and so no question as to room in a seat can arise: there was better standing room with "hand-holds" for standing passengers inside, where the law says, for several reasons, passengers should be. Some persons prefer standing on the platform outside to being comfortably seated inside, and persons with such preferences—some may call them peculiarities—have, of course, a thousand and one arguments in favour of them: but the practice is so dangerous and otherwise objectionable—for instances, obstruction of passengers coming in and going out: obstructions of, and other interferences with, trainmen when performing their duties; and this case in which the only passenger injured was the plaintiff—that universally it is prohibited, and on all car-doors warnings are given respecting it.

But, though there was abundance of room inside the car, if the plaintiff could not go there because of any obstruction for which the defendants are answerable, they cannot say that proper accommodation was furnished, and so sec. 390 would not afford a defence to this action.

But there is no reasonable evidence of any such obstruc-

tion; and, if there had been, there is not a tittle of evidence that the defendants are blamable for it.

There was abundant standing room in the car 608 for at least a score of passengers, with hand-rails attached to the outside of the seat, placed there for the safety and accommodation of such standing passengers. There were only two or three persons standing inside the car, but they were near the door on the outside of which the plaintiff and two other men stood—one because some ailment he had made it, he thought, impossible for him to travel inside a car, he must have more air.

Of all the witnesses called not one testified to any obstruction more than is common in entering a filled car. The whole case for the plaintiff is based upon one isolated statement of himself in giving evidence for himself at the trial: "The people were right inside the door, I could not get all the way in; if I had I would have gone in." Nothing else in his testimony supports this: "the people" are proved by all the witnesses to have been only two or three men standing near the door: there is no assertion by the plaintiff or any one else that he tried to get in; that he even asked those he says were in the way to let him pass: and no reasonable man could believe that, if he had asked for room to pass in, it should have been refused.

There is no evidence upon which reasonable men could find that the plaintiff's way in was really obstructed in either car: and the jury have not found that it was: what was found is: that "standing passengers prevented him;" that that was his reason for not going into car 608: there is no finding, there could be none, that he was prevented from going into car 303.

There may be prevention without any physical obstruction: one may be prevented from going into a house, a car, or a room because some one disliked is there: one may be prevented from going into a car because she dislikes asking a person in the way to make way for her. The finding in question would be quite true if the plaintiff did not go in only because he did not like asking those in his way to let him pass in. The truth is he did not go in because he preferred to stay out.

But, if the plaintiff's way had been physically obstructed so that he could not pass in, the defendants would not be answerable for the wrongs of the obstructing passengers, unless they were in some way blamable for permitting it. The "conductor" of the car was in the car attending to his

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duties, and could have been called, and should have been if there had been any kind of misconduct on the part of any passenger: and, besides that, if fear, shyness, or any other emotion, or indeed force, prevented the plaintiff entering at that door, he might have tried the other; or have gone back to car 303.

The learned trial Judge was, in my opinion, right in dismissing this action; as I would this appeal.

Appeal allowed.

RE FERRIS AND ELLIS.

Ontario Supreme Court, Middleton, J. February 4, 1921.

VENDOR AND PURCHASER (§IC—13)—SALE OF MILLING PROPERTY—FISHING PRIVILEGES PREVIOUSLY GRANTED—RIGHTS OF PARTIES.

On a sale of milling property the fact that certain parties have previously acquired the sole privileges in the waters of the pond, does not prevent the use of the pond for the purposes of the mill on the land, nor the repair of the dam in question.

MOTION by Ellis, the purchaser, under the Vendors and Purchasers Act, for an order determining a question of title to land, notice having been given (see Rule 602) to persons claiming fishing rights in the land which was the subject of a contract of sale, pursuant to leave reserved by MIDDLETON, J., in giving judgment in the action of *Ferris* v. *Ellis* (1920), 48 O.L.R. 374.

I. B. Lucas, K.C., for the purchaser.
C. R. McKeown, K.C., and *Rufus Layton*, for the vendor.
H. H. Davis, for the persons claiming fishing rights.

MIDDLETON, J.:—Mr. Davis contends that his clients have rights beyond the mere fishing right granted by the instrument of the 1st August, 1904, for which I allowed compensation as between the vendor and purchaser. His clients' rights depend upon the effect of two instruments—the grant and the bond. In each of these instruments the word "dam" is used in more than one sense: sometimes it means the physical structure or barrier; sometimes the water detained by the barrier—the pond. In the grant the word is used as "pond" in the operative part; it conveys "the sole use of the dam (pond) . . . and the streams or creeks flowing into the said dam (pond) for fishing and as a fishing reserve." It is true that the expression

"dam erected on the described lands" is used, but this I think means "pond formed on the lands" rather than the barrier. To treat it as the physical structure would render the document meaningless. This instrument gives only a right to use the pond for fishing and as a fishing reserve and for the propagation of fish, and does not preclude the use of the pond for the ordinary purposes of the mill.

The bond was taken as supplementary to this grant, and it primarily deals with the dam in the sense of the physical barrier, and was intended to secure that it should be kept in repair. Gadke is to "keep the dam on the said described lands at the height the said dam now is that is to say not less than six feet high and in a good state of repair so that the fish will be preserved in the said dam" (i.e. pond) "and in the streams and creeks flowing into the said dam" (i.e. pond). I cannot think that the meaning of this bond is that the water is to be kept at the height of 6 feet, for it must fluctuate in the use of the mill, and beyond this that which is to be kept at this height is also to be kept in repair.

It is contended that this bond is in effect a restrictive covenant and runs with the land; that it prevents the water being lowered; and the purchaser having notice of it will be bound by it, not only because it runs with the land but upon the principle of *De Mattos* v. *Gibson* (1859), 4 DeG. & J. 276.

I am against the contention upon all grounds. As already intimated, I do not think this is the true construction of the bond. Then the bond is not a covenant at all. In the third place, it is not a covenant running with the land. And lastly *De Mattos* v. *Gibson* is one of a series of cases founded on *Tulk* v. *Moxhay* (1848), 2 Ph. 774, and, for the reasons pointed out in my former judgment, has not the effect contended for.

I think the proper order now to make is to declare that Morgan and his associates and their successors in title under the grant acquire the sole right of fishing and using the waters of the pond on the land in question as a fishing reserve and for the propagation of fish, but that the right does not prevent the use of the pond for the purposes of the mill nor does it prevent the repair of the dam. It should be further declared that the obligations of the bond do not run with the land or bind the purchaser of the mill.

I would give no costs of the application.

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I may say that if the fishing club had any such rights as it claims they would depreciate the mill to a greater extent than the amount of compensation awarded by my judgment and would be of great value to the club. This is a matter that ought not to be lost sight of in construing the documents; $400 was the price paid, and it is not to be thought likely that the intention was to render the mill a thing of no value, as well as to undertake the upkeep of a dam for all time for this sum.

MAGUIRE v. MAGUIRE and TORONTO GENERAL TRUSTS. CORP'N.

Ontario Supreme Court, Rose, J. March 21, 1921.

TRUSTS (§IIB—45)—TRUST MONEYS OF INFANT—INVESTMENT MADE AT REQUEST OF INFANT—MONEYS PAID OUT BY BROTHER—LOSS—ACTION BY INFANT AGAINST BROTHER—DELAY.

An infant's brother who handles his trust moneys at the request of the infant may become a trustee *de son tort*, but will not be liable to the infant in an action brought after majority has been attained by the infant, when the transaction is such as may be adopted by the infant on majority, and there is considerable delay in bringing the action.

[*Murray* v. *McKenzie* (1911), 23 O.L.R. 287, followed.]

ACTION to recover the sum of $400 lent to one Barrett out of the plaintiff's money when he was an infant, by his guardian, in the circumstances mentioned below.

A. B. Cunningham, for the plaintiff.

E. G. Porter, K.C., for the defendant Maguire.

G. M. Macdonnell, K.C., for the defendants the Toronto General Trusts Corporation.

ROSE, J.: — The plaintiff was entitled to a considerable sum under the will of an uncle, under which the Toronto General Trusts Corporation were trustees. His aunt, Miss Mary Maguire, now deceased, was his guardian. The Toronto General Trusts Corporation are trustees under her will also. During the infancy of the plaintiff, the corporation, acting under an order of the Court, paid the interest of the plaintiff's estate to his aunt for his maintenance. Early in 1914, the plaintiff, who was then aged about 19, desired to make a loan of $800 to one Barrett. His aunt was unwilling to let him have the money, but finally signed

a cheque for the amount, drawn payable to the order of the defendant J. D. Maguire, who is the plaintiff's elder brother, and who was his aunt's adviser in matters of business. The cheque was made payable to the order of J. D. Maguire apparently because the bank would have refused to cash it upon the plaintiff's endorsement, and also probably because Miss Maguire wanted J. D. Maguire to be responsible for the making of the loan. J. D. Maguire endorsed it over to Barrett; and took a note from Barrett and gave it to Miss Maguire. Barrett afterwards failed, and the loan has not been repaid. The plaintiff seeks, in this action, to recover the amount from the Toronto General Trusts Corporation, as the executors of Miss Maguire's will, and from J. D. Maguire.

As against the Toronto General Trusts Corporation, the plaintiff is clearly out of Court, by reason of a release which he gave to Miss Maguire in 1916, a year after he had attained his majority.

As against J. D. Maguire, the case is not so plain. This defendant knew all about the trust upon which Miss Maguire held the plaintiff's money; and, when he took from her $800 of such money, I think he became trustee *de son tort*, and when he lent it to Barrett, without security, I think he committed a breach of trust.

The cases cited by Mr. Porter in which agents of the trustee have been held not liable to the *cestui que* trust in respect of trust funds dealt with by them in a way unauthorised by the trust instrument, are, in my opinion, quite distinguishable. J. D. Maguire was not acting under the direction of Miss Maguire in making the loan. He was acting on his own responsibility, although at the solicitation of the plaintiff, and I think that his responsibility was that of a trustee.

He seems, however, to be entitled to succeed upon another of the grounds taken by Mr. Porter. The action is not barred by the Statute of Limitations; but the loan to Barrett, made on behalf of the plaintiff, was, apparently, one of those transactions which the plaintiff could adopt after he attained his majority: see *Murray* v. *McKenzie* (1911), 23 O.L.R. 287; and I think that in the release given to Miss Maguire, and in the fact that, although the plaintiff came of age on the 27th December, 1915, he made no claim upon J. D. Maguire until he commenced this action on the 30th November, 1920, there is evidence which

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can and ought to be accepted as proof that the plaintiff did adopt the transaction as his own: see *Cory* v. *Gertcken* (1816), 2 Madd. 40, 17 R.R. 180. If he adopted the transaction, that is the end of any claim against J. D. Maguire, in whatever way that claim may be framed.

For these reasons, the action will be dismissed, as against both defendants, with costs.

INTERLAKE TISSUE MILLS Ltd. v. GEORGE EVERALL Co. Ltd.

Ontario Supreme Court, Middleton, J. March 26, 1921.

SALE (§IV—90)—BULK SALES ACT (1917), 7 GEO. V., CH. 33—SALE UNDER THE ACT—NON-COMPLIANCE WITH PROVISIONS—ACTION BY CREDITOR—LIMITED TIME—DISTRIBUTION OF PURCHASE MONEY.

Any sale falling within the Bulk Sales Act (1917), 7 Geo. V., ch. 33, must comply with the provisions of that Act, otherwise on action by the creditor within the time limited by the statute, the transaction will be adjudged void, and a direction made to distribute the purchase money among the creditors.

MOTION by the plaintiffs for judgment upon the pleadings and upon the examination for discovery of Alberta Everall, president and manager of the defendant company, as an officer of the defendant company.

G. H. Sedgewick, for the plaintiffs.

E. F. Raney, for the defendant company.

No one appeared for the defendant Wakelin.

MIDDLETON, J.:—Both parties desire that the questions arising in this action should be disposed of on this motion so as to save the expense of a trial.

I pointed out that one of the facts in issue was the existence of the claim of the plaintiffs as creditors of the defendant Wakelin. Counsel for the defendant company agreed to the motion being disposed of upon the footing that the plaintiffs are creditors as alleged, leaving the adjustment of their claim, if any dispute exists, to be determined upon a reference, which will be necessary if the plaintiffs are entitled to succeed.

The plaintiffs sued on behalf of themselves and all other creditors of the defendant Wakelin for a declaration that a sale of certain property by Wakelin to his co-defendant is fraudulent and void as against the plaintiffs by reason of non-compliance with the provisions of the Bulk Sales Act (1917), 7 Geo. V. ch. 33 (O.), and for appropriate relief.

There is no doubt that the provisions of the Bulk Sales Act were not complied with.

Two questions are raised: first, whether a class-action such as this can be maintained at all, or whether the plaintiffs' course is not to prosecute their claim to judgment, and then seize the goods under their execution, leaving the purchaser to assert his right to the goods if so advised; secondly, it is contended that the sale in question is not a bulk sale within the meaning of the Act.

The case of *Ellis* v. *Duke of Bedford*, [1899] 1 Ch. 494, *Duke of Bedford* v. *Ellis*, [1901] A.C. 1, is authority for the general proposition that where a statute confers certain rights upon a class an action will lie by any member of the class on behalf of all for a declaratory judgment in assertion of these rights. The familiar class-action, by one creditor on behalf of all others, for a declaration that a conveyance is fraudulent and void as against creditors, under the statute relating to fraudulent conveyances, is a familiar instance of the application of this general principle.

The statute itself contains internal evidence that such an action is contemplated by it. A "creditor" is defined (sec. 2 (*a*)) as including creditors whose claims are not yet payable, and therefore incapable of being sued upon. The time is limited within which proceedings must be taken to have declared void any sale in bulk for failure to comply with the provisions in this Act (sec. 9)*. If it is necessary first to obtain an execution, the Act will be of comparatively little value, because creditors whose claims are not yet matured may be precluded from taking advantage of it, and a debtor may prevent the creditor from obtaining the advantage of the Act by defending an action brought against him.

Further, the statute, in sec. 9, refers to an action brought for a declaration of the invalidity of the sale.

It is perhaps well to draw attention to the rapidly expanding idea as to the possible scope of actions for a declaration of right, as indicated in the more recent English cases: see, for example, *Barwick* v. *South Eastern and Chatham Railway Cos.*, [1912] 1 K.B. 187.

Turning to the second question, apparently Wakelin carried on a business in which he combined the manu-

*By sec. 9, the action must be brought within 60 days from the date of the sale or from the date when the creditor attacking the sale first received notice thereof.

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facture of paper bags and envelopes. He decided to discontinue the manufacture of envelopes, and on the 23rd June, 1920, he sold the plant and machinery connected with the envelope branch of his business to the company defendant for $2,000. This sale is evidenced by a bill of sale, duly registered, and there is no suggestion that the transaction was not entirely in good faith, the entire purchase-money being paid in cash. Unfortunately the parties did not consider the bearing of the Act in question.

This Act, as I interpret it, is most radical and far-reaching. It appears to go far beyond sales of the character indicated by its title. The effect of the Act is that any sale falling within it is void as against the creditors of the vendor, unless the vendor furnishes, and the purchaser obtains, a written statement, verified by a statutory declaration, giving the names and addresses of all creditors of the vendor, with the amount of his indebtedness to each, and unless the purchaser on obtaining this declaration shall either obtain a written waiver from the creditors or put the whole of the purchase-money into the hands of a trustee for distribution *pro ratâ* among those creditors (subject to all just preferences). The County Court Judge is authorised to appoint a trustee, and the fee of the trustee, not to exceed 3 per cent. of the proceeds, is to be taken out of the creditors' dividend, and not to be charged to the debtor. Failing these precautions, the sale is void as against the creditors unless all creditors are paid in full out of the purchase-money.

By sec. 7 of the Act, combined with the interpretation of the word "stock," found in sec. 2 (*c*), any sale or transfer of stock, or part thereof, which covers not only the goods, wares, and merchandise, in which the person in question trades or which he produces, but all chattels "with which he carries on" his business or trade, or occupation, "out of the usual course of business or trade of the vendor," is to be deemed a sale in bulk. From this it is clear to me that the transaction here complained of is within the Act. The sale of part of the plant and machinery of a manufacturer cannot be regarded as a transaction in the usual course of the business of the vendor.

This being my view of the effect of the statute, and the action having been brought within the 60 days (sec. 9), I think there is no course open to me save to declare that the

transaction is void by reason of the provisions of this Act, and to refer it to the Master to inquire and determine the creditors who would be entitled to come in and share *pro ratâ* in the moneys which the purchaser ought to have paid over for distribution among the creditors.

Owing to the novelty of the Act, and the good faith of the purchaser, I do not think I should order it to pay the costs of the action. These may be paid out of the funds to be distributed, before their distribution.

Some discussion took place before me as to the scale of costs. If the creditors' claims, in the whole, amount to a sum taking the case out of the jurisdiction of the County Court, then the costs will be taxed on the Supreme Court scale; if not, then they will be taxed upon the appropriate scale. The Taxing Officer will determine this after the result of the reference is known. The formal judgment should be carefully considered, and should be analogous to that adopted where a conveyance is declared to be void at the instance of a creditor and the matter is referred to the Master for inquiry and report.

[The action was settled before judgment was delivered: at the request of the parties, the reasons prepared by the learned Judge were made available for reporting.]

Re TOWN OF COCHRANE and COWAN.

Supreme Court of Ontario, Appellate Division, Meredith, C.J.O., Maclaren, Magee and Ferguson, JJ.A. April 1, 1921.

TAXES (§IIIB—110)—ASSESSMENT OF LANDS OF CROWN—INTEREST OF TENANTS—ASSESSMENT ACT, SEC. 39—OCCUPATION BY SERVANTS OF CROWN—LIABILITY FOR TAXES.

The tenants of lands owned by the Crown may be assessed in respect of such land as if the land was owned by a private person, except when such tenants occupy the same in an official capacity under the Crown.

Sec. 39 of the Assessment Act, R.S.O. 1914, ch. 195, as enacted by (1917) 7 Geo. V., ch. 45, sec. 7, is *intra vires* of the Provincial Legislature.

[*Smith* v. *Vermillion Hills*, 30 D.L.R. 83, [1916] 2 A.C. 569, followed.]

The following statement is taken from the judgment of MEREDITH, C.J.O.:—

Case stated by the Judge of the District Court of the District of Temiskaming, under sec. 81 of the Assessment Act, as enacted by sec. 6 of the Assessment Amendment Act, 1916, 6 Geo. V. ch. 41.

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The questions asked are the following:—

"1. Was I right in holding that the Municipality of the Town of Cochrane had no authority to assess and levy taxes on the lands described?

"2. What is the true meaning and construction of sec. 39 of the Assessment Act, as enacted by the Assessment Amendment Act, 1917, being 7 Geo. V. ch. 45, sec. 7, and are the respondents, by virtue of the said section, severally liable to assessment in respect to the premises occupied by them as tenants in accordance with the assessment in the assessment-roll of the Town of Cochrane for the year 1918, or are the respondents exempt as being tenants occupying the premises in respect of which they are severally assessed in an official capacity under the Crown?"

E. G. Long, for Town of Cochrane.

Edward Bayly, K.C., for the Attorney-General for Ontario.

J. M. Ferguson and *F. A. Day*, for Cowan and others.

MEREDITH, C.J.O.:—The question for decision relates to the liability of certain employees on the Dominion Government Railways to assessment in respect of land vested in the Crown which is occupied by them, and it is contended that they are liable under sec. 39 of the Assessment Act, as enacted by sec. 7 of the Assessment Amendment Act, 1917, 7 Geo. V. ch. 45. That section provides that:—

"39. The tenant of any land owned by the Crown (except a tenant occupying the same in an official capacity under the Crown) and the owner of any land in which the Crown has an interest and the tenant of any such land shall be assessed in respect of the land in the same way as if the land was owned or the interest of the Crown was held by any other person; in addition to the liability of every such person to pay the taxes assessed against such land the interest, if any, of every person other than the Crown in such land shall be subject to the charge thereon given by section 94 and shall be liable to be sold under the provisions of this Act for arrears of taxes accrued against the land."

It is perhaps open to doubt whether these employees are tenants: see *Fox* v. *Dalby*, L.R. 10 C.P. 285; that question is not open upon the case as stated, but it is unimportant because, if not tenants, they are occupants.

It was argued by Mr. Ferguson that what the section assumes to authorise is the assessment of the land occupied, and not merely the assessment of the tenant's interest in the land, and the assessor appears to have acted on that

view, and this, it was argued, was not competent for a Provincial Legislature to authorise, as it is in effect to authorise the assessment of land belonging to the Crown.

That question is not covered by the special case and is not open.

The only question open is whether or not the persons assessed occupy the land in respect of which they have been assessed in an official capacity under the Crown, within the meaning of sec. 39.

There is nothing in the stated case to indicate that it is compulsory upon the employees to reside in the houses which they occupy; and the inference I would draw from the statement of the learned Judge of the facts is that there is no compulsion and that an employee occupies for his personal convenience.

If this be correct, it is difficult to see how he can be said to occupy in an official capacity under the Crown.

The cases cited by counsel for the town corporation are poor-law cases and do not assist very much. Some of them are, however, helpful because they distinguish between occupation by a servant of the Crown where his occupation is for the purpose of the immediate execution of his office and where it is for the benefit of the servant. *Gambier* v. *Overseers of Lydford* (1854), 3 E. & B. 346, is the leading case on the subject, and it was followed in *Martin* v. *Assessment Committee of West Derby Union* (1883), 11 Q.B.D. 145, and *Showers* v. *Assessment Committee of Chelmsford Union*, [1891] 1 Q.B. 339.

As put by Lord Coleridge, C.J., in the *Martin* case, at p. 149, to escape rating the occupation must be really that of some one else, and where the occupation is not that or that of a mere servant, but a beneficial occupation, the occupant is liable to be rated.

I refer also to *Rex* v. *Hurdis* (1789), 3 T. R. 497.

In my opinion, the employees whose assessments are in question do not occupy in an official capacity under the Crown. They occupy for themselves just as any other tenant does, and have the exclusive right to occupy until their tenancies are determined. It is not even, as I understand the case, a term of the tenancies that they shall continue only so long as the employee remains in the service of the Crown, though no doubt in practice when they cease to be in that service their tenancies, being at will, would be determined by the exercise of the will of the landlord to put an end to them.

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I would, for these reasons, answer the questions put as follows:—

The respondents are not exempt from assessment as being tenants occupying the premises in respect of which they are severally assessed, in an official capacity under the Crown.

The second question is not one that should be asked. All that is necessary for the disposition of the appeal by the District Court Judge is covered by the answers given to the other questions.

Since the foregoing was written, an additional case has been stated, in which the following additional questions are propounded:—

1. Was it competent for the Legislature to enact sec. 39 of the Assessment Act, as enacted by sec. 7 of the Assessment Amendment Act, 1917?

2. If the legislation is valid, is the tenant to be assessed in respect of the value of the land occupied by him or only in respect of the value of his tenant-interest in it?

3. If the legislation is valid, are the respondents exempt as being tenants occupying the premises in respect of which they are severally assessed in an official capacity under the Crown?

By sec. 5 of the Assessment Act (R.S.O. 1914, ch. 195), the interest of the Crown in any property is exempt from taxation, as it is under the provisions of the British North America Act. The changes made by sec. 7 of the Assessment Amendment Act, 1917, in sec. 39, as it was enacted in ch. 195, R.S.O., are mainly verbal, and do not appear to have made any change in the effect of the section.

It was settled by the case of *Smith* v. *Council of the Rural Municipality of Vermillion Hills*, 30 D.L.R. 83, that it is competent for a Provincial Legislature to impose taxation upon the interests of persons having interests in Crown lands. It was previously so decided by the Supreme Court of Canada in that case (*Smith* v. *Rural Municipality of Vermillion Hills* (1914), 49 Can. S.C.R. 563, 20 D.L.R. 114), as well as in several other cases.

It is however contended that sec. 39 goes farther, and in effect authorises the imposition of taxes upon lands of the Crown. This contention is based upon the provision that the assessment upon the tenant is to be the same as if the lands were owned by a person other than the Crown.

This contention is not, I think, well-founded. It is the tenant that is to be assessed, and it is only his interest in

the land that may be sold under the provisions of the Act for arrears of taxes accrued against the land.

I see no reason why a Provincial Legislature may not provide that, in assessing the interest of an occupant of Crown lands or of any other person in them, it shall be assessed according to the actual value of the land, or in other words that the taxes payable by him shall be based upon that value; the manifest injustice that would otherwise exist, at all events in the case of an occupant or tenant, is obvious. He would be assessed only for the value of his interest, which might be little or nothing, while his neighbour, who is an occupant or tenant of property owned by a private person, would be taxed on the actual value of the land. Subject to certain exceptions, which it is not necessary to mention, land is to be assessed at its actual value (Assessment Act, sec. 40 (1)); and, by sub-secs. 3 and 4 of sec. 37, land occupied by any person other than the owner is to be assessed against the tenant as well as the owner.

The effect of sec. 39 is to make an exception as to this in the case of lands owned by the Crown, and to make such land, if occupied by a tenant, assessable only against the tenant.

I would answer question No. 1 of the original case in the negative, and I would answer the questions asked by the supplementary case as follows:—

1. In the affirmative.

2. The amount of the assessment may be the actual value of the land, determined as provided by sec. 40.

3. In the negative.

In the circumstances, I would leave the parties to bear their own costs of the proceedings before us.

MACLAREN and MAGEE, JJ.A., agreed with MEREDITH, C.J.O.

FERGUSON, J.A. (dissenting):—The legislation, the validity of which is in question herein, seems to me to have, and to have been intended to have, an effect far beyond anything which the Courts in *Smith* v. *Council of the Rural Municipality of Vermillion Hills*, [1916] 2 A.C. 569, 30 D.L.R. 83, held to be a valid exercise of the powers of a Province.

It was in that case determined that the interest which the Crown in the right of the Dominion had transferred to a tenant might be assessed, but this legislation is designed to provide and does provide, not that the estate of the tenant

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may be assessed, or that he may be assessed by reference to the value of his estate, but that the tenant may be assessed by reference to the value of the Crown's estate, and he personally and his interest in the estate may be charged with the payment of a tax calculated and levied upon that basis.

Though the legislation takes the form of authorising only an assessment upon the tenant as a person rather than an assessment of Dominion lands, or an interest therein, yet, in my opinion, in pith, substance, and effect, it authorises an imposition upon lands owned by the Crown in the right of the Dominion, contrary to the British North America Act, and, in so far as it purports to authorise an assessment of tenants of lands owned by the Crown in the right of the Dominion, is beyond the powers of the Ontario Legislature.

Questions answered as stated by Meredith, C.J.O.

CANADIAN SANDER MANUFACTURING Co. v. CANADIAN GENERAL ELECTRIC Co. Ltd.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee and Hodgins, JJ.A. April 1, 1921.

DAMAGES (§IIIA—71)—BREACH OF CONTRACT—LOSS—DELAY—GOODS OBTAINED ELSEWHERE—MEASURE OF DAMAGES.

The profit which might have been made had the contract been carried out is not the measure of damages in assessing damages for breach of contract. The loss is measured by the difference in the price of goods purchased elsewhere plus the loss occasioned by the delay in obtaining the same.

APPEAL by defendant company and cross-appeal by plaintiff company from the trial judgment in an action for damages for the breach of two contracts to supply the plaintiff company with 300 electric motor cars. Affirmed.

H. W. Shapley, for defendant.

H. J. Scott, K.C., and *M. Parish*, for plaintiff.

MEREDITH, C.J.O.:—This is an appeal by the defendant from the judgment dated the 16th June, 1920, which was directed to be entered by Middleton, J., after the trial before him sitting without a jury on the 15th and 16th days of that month, and a cross-appeal by the plaintiff as to damages.

The action is brought for the recovery of damages for the breach of two contracts between the parties. No formal contracts were entered into, but they were the result of correspondence.

The correspondence began with a letter from the appellant's manager for the Ottawa district, written on the 8th July, 1919, suggesting that an arrangement should be entered into by his company with the respondent to carry in stock a large quantity of fractional horse power motors upon which the respondent might draw and from which shipment would be made as required by the respondent. A letter from the same official to the respondent followed on the 29th July, in which the writer said that his company could commence shipments in 2½ months after the receipt of the order and that, "if favoured with your valued order for the equipment mentioned in the letter, we will arrange to carry the motors in stock in this warehouse and ship them to you as required."

Further correspondence resulted in the respondent, on the 21st October following, accepting an offer of the appellant made by letter of the 15th of that month for 250 motors, in which it was said that shipment could be started in 12 to 14 weeks, "at the rate of 15 to 20 motors per week." In the respondent's letter of acceptance there was the following term: "You to carry the motors in stock at Ottawa warehouse and deliver to us as required."

This letter was acknowledged by letter of the 24th October, in which the writer thanks the respondent "for accepting our proposition to stock 250 motors for you."

On the 22nd November, 1919, the respondent wrote to the appellant asking to have the order as to 150 of the motors changed to 100-60 cycle, 110 and 50 three phase and as to 75 of these changed to 50-25 cycle and 25-220 D.C. On the 25th November the appellant replied saying that it would "try and make the change you have suggested." The appellant subsequently refused to make this change, but offered to add the 50 additional motors to the order for the 250, and this offer was accepted by the respondent by letter of the 18th December, 1919.

There were thus two contracts, one for 250 and the other for 50 motors, the terms of the 250 contract being, as the learned trial Judge finds, and in that I agree, applicable to the subsequent contract.

None of the motors contracted for were supplied by the appellant. The respondent succeeded in getting 18-110 and 2-220 single phase 60 cycle motors from the Syracuse Sander Manufacturing Company, and requested the appellant to replace them out of the 250 order, which the appellant refused to do, stating that the motors must be "shipped and

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billed" to the appellant, and that any motors which the respondent brought in from the American Sander Company could not be "handled" by the appellant, and would have no bearing on the contract which the respondent had entered into with the appellant.

Besides these 18 motors, the respondent obtained from the American Sander Company 28 motors. I do not find in the evidence the date of this purchase, but it was no doubt made before the 1st January, 1920, when the respondent's factory was "shut down."

It is clear that the two contracts I have mentioned were entered into, and it is also clear that the appellant made default in performing them, and the only question is what damages is the respondent entitled to.

The learned trial Judge assessed the damages at $16,180. The evidence was that, after making up 46 of the sanders for which the respondent had motors, its works were "shut down." The sander is an appliance of which there are two types—one being a disc and the other a spindle—the power for operating them being supplied by means of the motor, and the respondent also manufactures motor-driven hand-saws. All the parts of these machines except the motors are manufactured by the respondent at its factory in Brockville.

The loss which the respondent alleges that it suffered owing to the breach consisted of the following:—

1. Loss by the factory having been shut down.

2. The loss of the profit that would have been made on the 300 sanders, which it is said there would have been no difficulty in selling at a profit of $100 on each sander, if the motors had been supplied in accordance with the provisions of the contracts.

It is obvious that the respondent is not entitled to be compensated for both of these alleged losses, because, if the respondent had been in a position to make and sell the 300 sanders, the factory must have been kept in operation.

It was shewn that it was impossible to purchase the motors for immediate delivery. They could, however, have been contracted for for delivery in from 6 to 8 months, but at a price in excess of the contract price. In arriving at the figure at which the damages were assessed my brother Middleton allowed for the increased price that the respondent must pay and for the loss occasioned by the delay that there would be in getting the motors. This allowance for the latter loss includes "something" for the capital that would be idle owing to the delay; something for the time

the respondent's manager "is himself" idle and unable to carry on business, and "something fairly substantial for the interference in the operation of the business—that is to say, the factory is idle and the expenses of maintaining a factory as a going concern are not absolutely ended—one man has to be kept there employed—and the fact that the whole factory organisation is disorganised and demoralised owing to its having been substantially closed down during the whole period of time, the fact that the advertising expenditures were to a certain extent lost, and other incidental expenditures must take place." And the damages in respect of this loss he assessed at $5,000, and the difference between that sum and the total sum allowed as damages, $16,180, was allowed for the difference between the contract price and the price at which the motors could be obtained elsewhere.

The first question to be determined is, whether or not the damages were assessed on the right principle. The respondent to the main appeal contends that they were not, and that the profit that would have been made had the motors been delivered according to the contract is the measure of its damages, and that is the subject of the cross-appeal.

In my opinion, that contention is not well-founded. It was the duty of the respondent to minimise the loss; and, as the motors were obtainable, though at an increased price and only for delivery in 6 months or more, the respondent should have procured them. Its loss for which it is entitled to be compensated is therefore the difference in the cost and the loss occasioned by the delay, and it is upon that principle that the damages have been assessed.

It was contended by the appellant that the respondent should have accepted the offer, which was made for the first time, as I understand, at the trial, to supply the motors at the contract price, but on condition that they should be paid for in cash, and only to deliver them in the future. If the offer had been for immediate delivery the case would be very similar to *Payzu Limited* v. *Saunders*, [1919] 2 K.B. 581.

The test to be applied is what a prudent man ought in reason to have done in the circumstances. That, as was pointed out, is a question not of law, but of fact. My brother Middleton held that, applying that test, the respondent had not acted unreasonably in rejecting the offer, and in my opinion his holding was right. As I have said, the offer was not for immediate delivery. In view of this and of the ap-

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pellant's failure to supply any of the motors and the late period at which the offer was made, I think that the respondent was justified in rejecting the offer.

I am, with respect, however, unable to agree as to the damages assessed for the loss occasioned by the non-delivery apart from the increased cost of the motors.

There is nothing to shew that the appellant was informed or had knowledge when the contracts were entered into that the result of failure to deliver the motors would be the shutting down of the respondent's factory, and therefore I think that the awarding of damages for losses occasioned by the shutting down of the factory was not warranted. See *Hadley* v. *Baxendale* (1854), 9 Ex. 341, 96 R.R. 742. In addition to this, I do not understand why it was necessary to close the factory because of the non-delivery of the motors; the motor was only one part of the sander, and I do not see why the respondent did not keep the factory running and make the parts of the sander which were to be made there, especially as, according to the testimony of the respondent's manager, there was a practically unlimited demand for all the sanders that it could make; there would, no doubt, be some inconvenience in doing this, and possibly some pecuniary loss, and I would allow for this $1,000, following what was done in the *Payzu* case, [1919] 2 K.B. at p. 587.

The learned trial Judge, as I understand his reasons for judgment, allowed under the main head of damages the loss in respect of the whole 300 motors. This was, in my opinion, wrong; the 46 motors which the respondent obtained elsewhere should have been deducted.

I would, with these variations, affirm the judgment, and there should, I think, be no costs of the appeal to either party.

MACLAREN and HODGINS, JJ.A., agreed with MEREDITH, C.J.O.

MAGEE, J.A.:—The correspondence between the parties shews that each knew the other to be an offshoot of a like company operating in the United States—and that the parent companies there were dealing with each other, the General Electric Company there supplying from its factory at Fort Wayne to the Sander Manufacturing Company at Syracuse motors for the Sander machines which the latter was making there similar to those which the plaintiff

company proposed making at Brockville in Ontario under the Canadian letters patent. It is evident from the later correspondence that the defendant company expected at first at least to get motors from the Fort Wayne factory to supply to the plaintiff company, though it seems to have been considering the advisability of making them in Ontario.

The plaintiff company was not incorporated in Canada until the 10th August, 1919. About that time it began operating in a very modest way at Brockville, where it rented a building and used the two upper flats, subletting the lower—its net monthly outlay for rental being $22.50.

The Sander machines are operated each by a small motor, which forms part of it, and is described as its heart or propelling power. The castings for the other parts it intended to purchase as it did the motors, and then finish and assemble all parts at the works in Brockville and sell the product. At the date of the trial, in June, 1920, the plaintiff company's manager, Mr. Jones, was residing in Syracuse, but spending the business part of the week in Brockville, whither he had gone in June, 1919, as he says, "to open their business manufacturing wood-working machinery." He began with 4 employees, and the largest number employed was 8 or 10 in September and November, 1919. By January, 1920, they had completed 46 machines, all of which were sold. At the time of the trial they had complete (except the motors) "parts for up to 200" and "pretty well 100 complete ready for the motors." This 100 seems to be included in the 200. But Mr. Jones says that in consequence of the defendant company's default the plaintiff company's business had been disrupted and it had not been able to make an aggressive selling campaign, and even the machines finished had cost it more. The authorised capital of the company was $20,000, of which $15,000 was paid-up. The Canadian patent had been taken over by the company for $5,000. Owing doubtless to the relations between the American companies, it would appear that the plaintiff company did not negotiate a contract with any one but the defendant company. In fact no small motors such as were required were then made in Canada. The negotiations began in July, 1919, but apparently the plaintiff company was not in a hurry, for no contract resulted until the 22nd October following. Representatives of the defendant company visited the works at Brockville, and it is evident from this and the correspondence that the defendant company

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well knew how essential the motor was to the plaintiff company and its machines. The defendant company also knew and emphasised in its letters that the motors were "special, having totally enclosed shields with special bearings and dust-proof washers." The defendant company also knew that it was not an isolated transaction of the plaintiff company, but part of a continuing business, and sought in a letter of the 12th August, 1919, to stipulate for the total exclusive motor requirements of the plaintiff company. The defendant company began on the 29th July by professing readiness to commence shipment in two and a half months after receipt of order, the lateness being owing to the motors being special. This period was lengthened in the defendant company's letter of the 15th October, 1919, which forms part of the contract, to 12 to 14 weeks. So the plaintiff company had no reason to expect further delay. That letter and the defendant company's acceptance of the 21st October, adding the intended "terms 60 days," followed by the defendant company's assent of the 24th October, formed the contract for 250 motors of different stated specifications to be carried in stock by the defendant company for the plaintiff company so that the plaintiff company could draw on the defendant company as required, and shipment could be started in 12 or 14 weeks at the rate of 15 or 20 motors per week. The defendant company's letter of the 24th October, while promising close attention, said that it did not expect delivery to start until about 14 weeks, and in the meantime it advised the plaintiff company to take care of its requirements through "your Syracuse office." In the meantime the plaintiff company had been trying to get some motors through the office or agency of the General Electric Company at Syracuse, but by letter of the 22nd October that office had referred them to the Canadian sales department of the American parent company of the defendant company. The first actual shipping order sent by the plaintiff company to the defendant company was on the 22nd October for 20 "60 cycle" motors, and it asked delivery as promptly as possible. The defendant company replied on the 25th October that it would see if it could get the 20 motors from the (American) General Electric Company, and suggested that the plaintiff company should get "your Syracuse office" to advise that company that they, the Syracuse Sander Company, were willing to let the General Electric (American) Company have 20 of their motors for the plaintiff company.

The plaintiff company on the 28th October wrote of having arranged with the Sander Company at Syracuse to have 10 motors sent by that company for the plaintiff company's account, and that they would try to get this increased to 20 and charged to the defendant, the defendant in turn to invoice them to the plaintiff to apply on the order of 250. The defendant wrote on the 30th October that "any motors shipped to us for your Brockville plant will have to be shipped and billed by G.E. to the Canadian General Electric Company, Ottawa. I believe this is your understanding of the arrangement." "Any motors which you bring in from the Syracuse Sander Company cannot in any way be handled by us, or it will have no bearing on the contract which you have entered into with this company." The plaintiff company replied to this on the 31st October: "Our mutual understanding of the matters covered in your favour of October 30th is the same," and added: "I am having some motors drawn from the Syracuse office for immediate use. It might be an advantage to me to repay these motors out of my contract with you. . . . . In the meantime we understand our contract stands as originally placed." These letters make it clear that any motors the plaintiff was obtaining from the Syracuse Sander Company were entirely outside the contract for 250 motors, and were in fact a carrying out of the defendant's own recommendation of the 24th October. The defendant was in fact holding the plaintiff to the full number of 250.

The letters of the 19th, 21st, 25th, 26th, and 27th November shew that both parties considered the contract for 250 and the shipping order thereon still in force, and the plaintiff endeavouring unsuccessfully to have thereout 18 motors returned to the Syracuse Sander Company.

The contract for 250 motors was increased to 300 by a subsequent letter of the plaintiff, and the defendant's reply of the 18th December, 1919.

On the 1st March, the plaintiff sent in a shipping order for 55 motors of five different stated specifications. Then on the 2nd March the defendant wrote of its inability to perform the contract, and after some correspondence this action followed.

The plaintiff company is, in my opinion, entitled to damages in respect of the whole 300 motors, and no deduction should be made in respect of the 46 motors which the plaintiff obtained—borrowed apparently—from the Syracuse Sander Company—and which the defendant itself was in-

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sisting upon keeping outside of the contracts. When it repudiated the contract on the 2nd March, it was a repudiation of contracts for 300 motors to be thereafter delivered, which up till then both parties considered in force. Even if the defendant company had filled the whole contract with goods of its own or goods borrowed from its parent company and to be returned to it, although such might have cost even less than the price to be paid the defendant, that would not relieve the defendant. I need only refer to the reasons of the Privy Council Judicial Committee in the recent case of *Sheik Mohammad Habib Ullah* v. *Bird and Co.* (1921), 37 Times L.R. 405.

But, although entitled to damages in respect of the whole 300 motors, the plaintiff will, I think, be amply compensated by the sum to which the judgment is now being reduced. Its damages are of course purely conjectural. It has been delayed for months in its business and has lost probably many sales, besides incurring increased cost of motors, and so much of the duration of its letters patent has been wasted, though that would be covered if its loss otherwise be allowed for. But, inasmuch as the patented invention was apparently the chief element in the product, and not merely the profit on the work and handling of component parts, considering the small amount at which the invention was valued and the moderate capital and expenditure with which the plaintiff company set out, where so much has to be merely probable and not reasonably certain, the amount now proposed is sufficient for the months of business which have been lost—and I agree that the judgment should be so reduced.

Judgment below varied by reducing the amount of damages.

REX v. McKENZIE (No. 1).

Ontario Supreme Court, Middleton, J. March 18, 1921.

INTOXICATING LIQUORS (§IIIJ—91)—OFFENCE UNDER SEC. 40—LIQUOR IN CELLAR—PRICE LIST—ADMISSION IN EVIDENCE—EFFECT OF TO BE DETERMINED BY MAGISTRATE.

A charge being laid against the accused of keeping liquor for sale, a price list found in his cellar may be properly admitted in evidence, and the magistrate must determine the effect to be given to it.

MOTION to quash a conviction of the defendant, by a Police

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Magistrate, for selling intoxicating liquor contrary to the Ontario Temperance Act. Conviction affirmed.

R. T. Harding, for the defendant.

F. P. Brennan, for the magistrate.

MIDDLETON, J.:—The accused was convicted of selling liquor contrary to the provisions of the Ontario Temperance Act, fined $1,500 and costs, and in default of payment sentenced to 4 months' imprisonment in gaol.

In this case there is ample evidence to support the finding of the magistrate; and, so far as I can see, there is nothing which can be relied upon as indicating that there has been a miscarriage of justice.

In the cellar where the liquor was found was a memorandum in the handwriting of the accused, which I think the magistrate rightly regards as a price-list for the sale of liquor, and I think that this document was unquestionably admissible in evidence, and that it was for the magistrate to determine the effect to be given to it.

Cases have been cited shewing that, notwithstanding the provisions of the statute, a conviction may be quashed by reason of erroneous ruling by the magistrate as to evidence. As at present advised, I do not think that this is a ground upon which a conviction ought to be quashed. If the magistrate has jurisdiction to enter upon the inquiry he may possibly err, but his error does not deprive him of jurisdiction, nor confer upon this Court the right to entertain an appeal under the guise of a motion to quash. A case which appears to determine the contrary may not now be the law by reason of a change in the Act. I merely mention this so as to leave the question open as far as I am concerned, as here I think the document was clearly admissible.

The motion will be dismissed with costs.

REX v. McKENZIE (No. 2)

Ontario Supreme Court, Middleton, J. March 18, 1921.

INTOXICATING LIQUORS (§IIIJ—94)—OFFENCE AGAINST SEC. 40—KEEPING LIQUOR FOR SALE—PRIOR CONVICTION—PRICE LIST ADMITTED AS EVIDENCE—FORMER CONVICTION ALSO ADMISSIBLE.

A price list of liquor which was admitted in evidence when the accused was found guilty of selling liquor may be properly admitted in evidence on a subsequent charge of the same nature as might the record of the prior conviction.

MOTION to quash the conviction of defendant, by a Police Magistrate, whereby the accused was convicted for unlawfully keeping liquor for sale contrary to the provisions of

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the Ontario Temperance Act. A fine of $1,000 was imposed and in default of payment 4 months' imprisonment. Conviction affirmed.

R. T. Harding, for the defendant.
F. P. Brennan, for the magistrate.

MIDDLETON, J.: — This conviction is attacked upon the ground that the magistrate erroneously admitted the price-list referred to in the case of the earlier conviction (*Rex* v. *McKenzie* (No. 1), *ante. p.* 222), and I need not repeat what I there said.

In this case the accused went into the witness-box and attempted an explanation of this document, which the magistrate found incredible. Had I to deal with the matter, I should not hesitate to use a much stronger expression.

The conviction is also attacked upon the ground that, although on this second conviction the offence was not laid as a second offence, yet the conviction in the earlier case was admitted in evidence. At best this objection is of the most technical character, for the cases were tried by the same magistrate, the one on the heels of the other. I think there are two answers at any rate to the objection. In the first place, it is clear that the conviction was not put in as evidence. Counsel for the prosecution, at p. 20 of the notes, which were taken by a stenographer, says, "I wish to file the conviction made in the first case as evidence in this case." No objection was taken, and apparently the conviction was not put in. When the magistrate delivered judgment in the first case he reserved the fixing of the penalty until after the second case should be heard, and from the notes in the second case it is clear that the penalty had not then been fixed, and the conviction had not then been drawn up, so that it could not be put in, and it is not returned with the papers as having been put in.

In the second place, from the very careful reasons for judgment given by the magistrate I am satisfied that he disposed of this case entirely upon receivable evidence, and did not in any way act upon the conviction in the earlier case, so that it cannot be said that the accused was in any way prejudiced thereby.

Furthermore, I am by no means persuaded that the conviction cannot be received in evidence. The charge upon which the accused was being tried was that during the period mentioned he kept liquor for sale contrary to the provisions of the Act. That he had the liquor was abun-

dantly proved, and it appears to me that the fact that he sold would be the most cogent evidence of a keeping for sale, and that this might be well proved by the production of his conviction for selling.

This motion likewise fails and must be dismissed with costs.

REX v. GOSLING.

Ontario Supreme Court, Middleton, J. March 17, 1921.

INTOXICATING LIQUORS (§IIIJ—91)—OFFENCE AGAINST SEC. 40—LIQUOR HIDDEN—PRIVATE DWELLING—ABSENCE OF EVIDENCE—ERRONEOUS VIEW OF LAW—WEIGHT OF EVIDENCE—DOUBT.

No statutory presumption arises from the fact that liquor is found concealed in a private dwelling, though the fact that it is concealed may be important in deciding whether or not the keeping of the liquor is within the provisions of the Act.

Evidence must be duly considered and properly weighed, and the accused given the benefit of any reasonable doubt.

MOTION to quash the conviction of the defendant by a Deputy Police Magistrate, for keeping intoxicating liquor for sale contrary to the Ontario Temperance Act. Conviction quashed.

George A. Stiles, for the defendant.

F. P. Brennan, for the magistrate.

MIDDLETON, J.:—This conviction is attacked as unwarranted upon the facts and upon the ground of misconduct of the magistrate.

The facts relating to the offence are as follows:—

A search was made by the police and there were found upon the premises of the accused:—

(1) 2½ bottles of Canadian rye whisky.
(2) 3 bottles of Scotch whisky.
(3) Some empty gallon tins smelling of liquor.
(4) A case of beer, some of which had been consumed.

It is not shewn that the beer was an intoxicating liquor, and, as the constable removed the rye and Scotch whisky, it may be assumed that the beer was not regarded as of importance.

The accused was then charged with having liquor in a place other than his private dwelling (sec. 41 of the Act). The trial took place and the contest seemed to centre on the bottles of Scotch whisky, which were found in a storehouse used as a summer kitchen forming part of the de-

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fendant's residence, the argument for the prosecution being that this did not form part of the residence. The Canadian whisky found in the pantry was shewn to be part of a shipment from Montreal to the defendant's son, a grown young man, received by him some three months before the search. The defendant had come to Cornwall from Montreal nearly two years before the search, and said that he had brought the Scotch whisky with him but had not used any of it. The three bottles were intact—and all that he had brought. He was in the employ of the express company and had then been given charge of the agency at Cornwall. The defendant denied any knowledge of the empty tins and said that they never had contained any liquor while in his possession.

While the trial was in progress the magistrate sent the constable for the tins so that he might satisfy himself as to the smell. They were not found, and it is suggested that the defendant's son removed them. This he denies.

The magistrate reserved judgment, intimating that his impression was that the Scotch whisky was not in a dwelling within the meaning of the Act, but finally came to the conclusion that the liquor was not being kept in a place other than a private dwelling. Instead of dismissing the complaint, the magistrate amended the information and charged the accused with keeping liquor for sale contrary to sec. 40 of the statute.

It appears that when the constable made his search for the tins he found in the kitchen a bottle (opened) containing some gin, and the accused had denied all knowledge of this. The magistrate before the amendment summoned the son to give evidence. The son stated that the Canadian whisky and gin were his, that he knew nothing of the three bottles of Scotch; the tins were empty syrup tins. The accused was also recalled and denied that the liquor was kept for sale. On this the magistrate convicts for keeping for sale.

He gives elaborate reasons for this finding, commenting on the fact that the wife of the accused was not called, and on the fact (not shewn in the evidence) that the three bottles were not entered in the railway books when the defendant's furniture came from Montreal, though it was not stated that it came with the furniture, and then adds:—

"I do not feel satisfied that the defendant has complied with the requirements of sec. 88 of the Act in satisfying

me that this liquor was not kept for sale. Some of it was most certainly concealed contrary to sec. 67, and the defendant has not satisfied the onus cast upon him by that section nor by sec. 70, sub-sec. 9. Nor did the defendant, taking his own evidence, and although he was acting as agent for the express company, comply with sec. 70*a*.* in regard to this liquor being brought from Montreal with his furniture, as it should have been reported either to the express company or to the railway company."

He then imposes a fine of $200 or 30 days with hard labour and orders the confiscation of the unopened bottles of whisky and the destruction of the opened bottles of whisky and gin.

The reference to the concealment of the liquor upon the defendant's premises relates to the fact that the three bottles of Scotch were hidden in a grain-bin under grain.

The magistrate speaks of this as being contrary to secs. 67 and 70 (9). Section 67 does not deal with this subject at all. It enables a search-warrant to be issued and a search to be made. Section 70 relates to goods in the custody of a carrier, and provides (sub-sec. 9) that when liquor shipped is described as "other goods" or is "covered or concealed in such manner as would probably render discovery of the nature of the contents of" the packages more difficult, it shall be *primâ facie* evidence that the liquor was intended to be sold or kept for sale in contravention of the Act. There is no provision in the Act which renders it improper to conceal liquor in a private dwelling, nor which renders such concealment evidence of unlawful conduct. The magistrate has erred in assuming that there is any statutory presumption such as he supposes. If there has to be considered the question whether the keeping of liquor is within what is permitted by this Act, then, under certain circumstances, concealment may be a most important matter, but this is then to be dealt with as an element in resolving a question of fact and not as a statutory presumption..

The presumption under sec. 88* must have some limitation. It cannot be meant that one who has liquor lawfully in his private dwelling is liable to be convicted, under all circumstances and in the face of overwhelming and un-

*Added by the amending Act of 1917, 7 Geo. V. ch. 50, sec. 27.

*88. If, in the prosecution of any person charged with committing an offence against any of the provisions of this Act in the selling or keeping for sale or giving or keeping or having or purchasing or receiving liquor, primâ facie proof is given that such person had in

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contradicted evidence, of an offence against the Act. It has been held that when the only evidence is that the liquor was within a private dwelling the accused cannot be convicted of keeping liquor in a place other than a private dwelling. By parity of reasoning, when, upon the evidence, circumstantial as well as oral, the suggestion that liquor was being kept for sale is absurd, it must be taken that the magistrate has proceeded upon some unwarranted view of the law. This is, I think, clear in this case.

The conviction is also attacked on the ground of bias and improper conduct on the part of the magistrate. As I quash the conviction on the ground indicated, I do not think it is expedient to deal with this matter in detail.

I venture once more to point out the importance of maintaining such a standard of fairness and judicial impartiality on the part of those charged with the most important duty of administering the law under this Act that all will be impressed with the idea that the best traditions concerning the administration of the law have not been forgotten. The relation of the magistrate to the administration of the law ought to be purely of a judicial character. He must not in any way allow himself to be in truth the prosecutor in cases in which he is the judge. He must remember that the duty of prosecution rests upon the Crown Attorney and not upon him, and that as soon as it appears that the magistrate assumes a function he does not possess and takes upon himself the duty of prosecution he has abdicated his judicial position, and public confidence in his fairness and impartiality is undermined.

I do not intend to go into the controversial matters alleged, but think it proper to point out some things appearing in the affidavit of the magistrate.

Some officious persons called upon the magistrate to suggest that he should not convict because of the standing of the accused and the serious consequences to him of a conviction. The magistrate in his affidavit says: "To all of which I replied that I would simply have to perform my duties as required by the Act and if there was no evidence to convict under the Act there would be no conviction. *but if there was any evidence to convict there would be a conviction.* I would entertain no feeling one way or the other."

his possession or charge or control any liquor in respect of, or concerning which, he is being prosecuted then unless such person proves that he did not commit the offence with which he is so charged he may be convicted accordingly.

The italics are mine. The magistrate is here, in a carefully drawn document, stating his views as to his judicial duty. He is a barrister of many years' standing and experience, and knows that in almost all cases there is evidence both ways. It is then the duty of the magistrate to weigh the evidence and to convict or acquit as he may find upon all the evidence, remembering that the accused is entitled to the benefit of the doubt which a learned writer expounds thus:—

"There is a strong and marked difference as to the effect of evidence in civil and criminal proceedings. In the former, a mere preponderance of probability, due regard being had to the burden of proof, is a sufficient basis of decision; but in the latter, especially when the offence charged amounts to treason or felony, a much higher degree of assurance is required. The serious consequences of an erroneous condemnation, both to the accused and society, the immeasurably greater evils which flow from it than from an erroneous acquittal, have induced the laws of every wise and civilised nation to lay down the principle, though often lost sight of in practice, that the persuasion of guilt ought to amount to a moral certainty; or, as an eminent Judge expressed it, 'such a moral certainty as convinces the minds of the tribunal, as reasonable men, beyond all reasonable doubt:'" Best on Evidence, 11th ed., para. 95—Parke, B., in *Regina* v. *Sterne*, Surrey Sum. Ass. 1843, MS.

How completely this is ignored when the magistrate announces that his intention is not to weigh the evidence at all, but to convict if there is any evidence, is obvious.

The next thing calling for comment is the conduct of the magistrate with reference to the finding of the part bottle of gin. This was found, on the second search, when the trial was well advanced, in the kitchen pantry. The accused stated he did not know of its existence. Obviously this was not the liquor "in respect of or concerning which he" was "being prosecuted," and so sec. 88 did not apply. The finding of this bottle ought not to have been proved in this case, and this evidence ought not to have been admitted, and this alone might invalidate the conviction. I do not stop to discuss this. After the magistrate had reserved judgment, he wrote to counsel for the defendant suggesting that he would give him an opportunity of calling the wife and the son of the accused, and added: "The finding of the bottle of gin on second search has not been accounted for by the father, who simply says he knows nothing about

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it, and I do not think that explanation is an accounting as required by the Act." "If no explanation is given, but you desire to rely on the case just as it is, I will deliver judgment, but it may be possible that an amendment to the information will be required."

Counsel for the accused desired the case to be disposed of as it stood, but the magistrate then amended the information so as to charge keeping for sale. The Crown Attorney, not deeming this proper, then withdrew from the case. The magistrate, it is said at the instance of the Chief of Police, then issued a summons to the son as a witness, and the son was examined and acknowledged that the Canadian whisky and gin were his. There was some suggestion against the son, and counsel for the accused remarked, so the magistrate says, "You should not punish the father for the sin of the son," to which he replied, "If the father is simply trying to shield the son, then the son should come forward and plead guilty." The son did not accept the invitation, and it is impossible to avoid the feeling that this really was an ingredient in the conviction.

Two further matters should be mentioned. After the January election, the Chief of Police was dismissed by the new municipal council. The magistrate says: "The question of the dismissal of the Chief of Police was made one of the issues in the municipal election, and, in my opinion, was brought about entirely by a campaign of the bootleggers and those who have been prosecuted under the highway traffic regulations of the Town of Cornwall." The other matter is the charge by the magistrate that the reason the Crown Attorney withdrew from the case was that he was a Free Mason.

This has little to do with the case save to demonstrate that the magistrate had ceased to have that serene and judicial calm essential to a fair trial.

I am quite aware that in a small place, where the magistrate is a solicitor engaged in active practice and taking a keen interest in public affairs and strongly impressed with the undoubted evil of the illegal traffic in liquor, it must be a matter of great difficulty to avoid partiality, but at all hazards the due administration of justice must be protected. While the enforcement of the liquor law is of importance, it is of minor moment compared with the upholding of due respect for the administration of justice.

The conviction should, I think, be quashed, and the usual order for protection should be made. No costs.

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Ontario Supreme Court, Sutherland, J. March 18, 1921.

WILLS (§IC—32)—ALTERATIONS AND ADDITIONS—EXECUTION—UNDUE INFLUENCE—CHARITABLE BEQUESTS—QUESTION OF UNCERTAINTY—DISCRETION OF EXECUTORS.

Manifest alterations and additions if shewn by evidence to be made before execution will not prevent a will being admitted to probate.

A gift "to assist sick people of small means" is a good charitable bequest, is not void for uncertainty and does not offend the rule against perpetuities.

ACTION for a declaration that a certain document purporting to be the last will and testament of the plaintiff's deceased wife was invalid and should not be admitted to probate and that she died intestate; and, even if the will was valid, that a certain bequest therein was void. Action dismissed.

A. J. Russell Snow, K.C., and *N. B. Gash*, K.C., for the plaintiff.

D. C. Ross, for the Public Trustee of Ontario.

D. Urquhart, for the defendants Elizabeth Simpson and Agnes Londry, the executrices of the will.

The other defendants were not represented.

SUTHERLAND, J.:—One Sarah Harrison, a widow, was, in and prior to the year 1913, living in her own house in Toronto, with her daughter Mary Ann. The mother had for some time been in ill-health and apparently partly paralysed. She was possessed of real and personal estate to the value of $25,000 or thereabouts.

The plaintiff, Robert Moorcroft, had some sort of an electrical apparatus and seems to have thought he could alleviate, or cure, rheumatism. He was acquainted with one William Londry, the husband of the defendant Agnes Londry, and in a casual conversation with him was told that Mrs. Harrison was well-off, and had an unmarried daughter, Mary Ann. Londry offered to give him an introduction and did take him to Mrs. Harrison's house, where he met mother and daughter.

The plaintiff was a widower with a son, at that time about 13 years of age. He himself owned a house and had steady employment at the city hall. He began to try his healing skill on the mother and claimed to have helped her. He, at first at all events, made a good impression on both of

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them. He contrived a sort of perambulator and wheeled the mother out at times to the park. He testified that as time went on the mother suggested to him the idea of marriage with her daughter, adding that she herself had means enough for both of them. Having duly considered the suggestion, he determined to take advantage of it. Thereupon, on sounding the daughter, he learned, as he says, that he had gained her respect and affection.

In due course the marriage followed, on the 11th September, 1913. Mary Ann Harrison at the time was about 37 years of age and the plaintiff considerably older. Upon his marriage he sold his own house and moved into the house of Mrs. Harrison, with his son, where they continued to reside until the death of his wife.

It was not long before Mrs. Harrison's opinion of her son-in-law began to change. The reason was that he early became, as she thought, unduly anxious about her affairs and desirous of assisting her in the management thereof. This was resented by her and also by her daughter. Other causes of dissatisfaction seem to have been that he led them to think he was better off than he was, contributed less than they thought he should weekly towards the household expenditures, and his son continued to go to school instead of going out to work.

The mother had, on the 6th February, 1903, executed a will, wherein she disposed of her estate in favour of her daughter. The daughter, at the time of her marriage, had several thousand dollars of her own, and her mother and herself were apparently led to think it desirable so to arrange that, if the daughter should predecease the mother, anything which she had should be given to her mother rather than pass to the husband. The daughter consulted a firm of reputable solicitors, who had been doing her mother's business, and had a will prepared for her in the year 1914, in which it was provided that her property should be devised and bequeathed to her mother if she were living at the time of her daughter's death, but if not the net income should go to her husband, the plaintiff, for the term of his natural life, and after his death to any child or children he and she might have, and, in the event of her dying without children, to her uncle, Thomas Edwards, one of the present defendants. This will was never executed by her, owing possibly to some objection raised by the mother as to the proposed disposition of the property in case she herself were to die before her daughter.

There can be little or no doubt that, while at times the relations were amicable in the household, considerable friction had arisen between the date of the marriage and the death of Mrs. Harrison, which occurred on the 10th March, 1917. Mrs. Moorcroft appears to have been a woman careful to the verge of penuriousness and not anxious to spend money unnecessarily on the services of lawyers. She was an intelligent woman, who wrote a good, plain, vigorous hand. On the back of one of the sheets of the draft unexecuted will prepared in 1914 for her by her solicitor, she, some time later, and possibly after her mother's death, wrote and signed, though without having the signature attested, what was apparently at one time intended to be her will. By this document she had proposed to give to her husband the sum of $10 monthly as long as he should remain a widower, and if he should "re-marry the said to go back to my estate and should he interfere with this my wish, then he shall receive $1." In this document she named the defendant Elizabeth Simpson an executor and apparently intended to appoint some one else in association with her, because the clause reads thus:—

"3. I hereby appoint Elizabeth Simpson executors to use *theeir* judgment in dividing my estate of whatever I may die *possed* off. That is to see that whoever waits on me at my last *illess* shall be suitably rewarded. And *whitiver* is left of my estate to be used to assist sick people this contribution to be given in loving memory of dear mother as I received all my money & estate from her."

On the 3rd May, 1918, she made the will in question herein. It is admittedly written in her hand, with some possible exceptions, which I shall later advert to. It is in the following terms:—

This is the last will and testament of me Mary Ann Moorcroft of the city of Toronto in the county of York, married woman.

"1. I direct my executors hereinafter named to pay all my just debts and funeral and testamentary expenses as soon after my decease as convenient.

"2. To my Husband Robert Moorcroft I give the sum of Ten Dollars. The reason that I am leaving my husband Robert Moorcroft only $10 is his bad treatment of me.

"3. Should any child or children survive me, if one child to receive all my estate if more than one *than* equal shares.

"4. In the event of my dying without children, I give,

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devise and bequeath all my estate real and personal to my Executors and Trustees hereinafter named.

Mrs. Elizth Simpson,

"Mrs. Agnes Landry.

"5. And whatever is left of my estate to be used to assist sick people of small means, this contribution to be given in loving memory of my dear mother as I received all my money & estate from her. I cannot state the sum I am leaving as times are so uncertain.

"My Executors to use their discretion in dividing my estate with full power and authority to sell or dispose of my estate where necessary, and execute all Documents requisite to carry out this my will and should my Executors wish to retire with power to appoint a successor instead.

"Should any one attempt to have this will set aside or should any Lawyer advise or interfere in this my last will and testament, they to receive no fee.

"Witness my hand at Toronto this signed published and Declared by the Testatrix as and for her last will and testament in the presence of us both present at the same time, who at her request in her presence of each other have hereunto subscribed our names as witnesses,

"This day of May 3rd, A.D. 1919.

"Mary A. Moorcroft."

"Henrietta E. Farrell,

"Robert Simpson."

The executrices named therein having in the month of March, 1919, made an application to lead a grant of letters probate, the plaintiff, on the 18th day of that month, entered an appearance and lodged a caveat. The estate is inventoried at $31,905.40, all of which is personal estate, with the exception of $2,300.

On the 23rd March, the Imperial Trusts Company of Canada were appointed administrators *pendente lite* of the estate of the deceased.

On the 1st April, 1919, an order was made directing that the "cause or proceedings testamentary be withdrawn from the jurisdiction of the Surrogate Court," and "removed into the Supreme Court of Ontario for hearing and disposition."

Mrs. Harrison had relatives in England with whom she had friendly relations and occasional correspondence, and the defendants other than the executrices, namely, Grace Almond, Thomas Edwards, William Edwards, and Mary Ann Stordy, are said to be the heirs-at-law and next of kin

of Mrs. Moorcroft. They are taking no part in the litigation and the proceedings have been noted closed as against them.

In his statement of claim, the plaintiff says that his deceased wife left her surviving himself and the defendants other than Mrs. Elizabeth Simpson and Mrs. Agnes Londry, all residing in England, her sole and only next of kin. He alleges that for several years prior to the death of his wife, the defendants Mrs. Elizabeth Simpson and Mrs. Agnes Londry were her most intimate friends, and that she was almost a daily visitor at their homes, which were in the immediate vicinity of her own; that they took advantage of this intimacy to make false statements to her to the effect that he had married her for her money, and suggested that she should make a will depriving him of any interest in her estate; that, thus having it in their power to exercise great influence over her, they "procured" her to come to the house of one of them, where they prevailed upon her to prepare and sign, in their presence, the alleged will, depriving him of a share of his wife's property and causing her to make statements therein which they knew were untrue. He further alleges that each time his wife returned from visits to the defendants she was in a distracted and frenzied state of mind, stating to him that they had told her he had married her for her money, and making other foolish and exaggerated statements regarding himself, which she would not have done but for their influence upon her. He also alleges that they retained the will secretly in their possession, and he was unaware of its existence until after her death.

He further alleges that he and his wife lived happily together, except when the defendants interfered, and that she promised to leave him one-half of her property on account of his personal kindness to her and care of her mother during her long illness, prior to her death in 1917; and that, by reason of the undue influence of the defendants, she was persuaded not to carry out this promise. He also alleges that it was by the undue influence of the defendants Mrs. Simpson and Mrs. Londry that the alleged will was made.

He further pleads that when his wife executed the alleged will she was 43 years of age, was pregnant for the first time, and was not of sound mind, memory, and understanding for a "period of 10 months, at least, prior to her death," and that at the time of the execution of the will she was wholly

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incapable of understanding its nature and effect, did not in fact understand its nature and effect, and that it was not her will.

It is further alleged that the will was not executed in accordance with the Wills Act, and that the bequest in the said alleged will to the trustees of "whatever is left of my estate to be used to assist sick people of small means" is not a charitable bequest "under the Mortmain and Charitable Uses Act," and the said bequest is void for uncertainty and remoteness and violates the rule against perpetuities.

I think it is plain from the evidence that lucre played quite as important a part as love in leading the plaintiff to make a second matrimonial venture. What he had learned from his friend, when the introduction to mother and daughter was first talked of, about the former's financial position, and from them later, raised expectations of financial benefit from the marriage which ultimately failed of realisation and has led to his attack on the will.

He testified that the mother, some time before her death, had stated that she would make an alteration in her will and give him $10,000 for his kindness and services, and that thereupon the wife had intimated to her that there was no need for her to do this, as she herself would share everything with her husband. In this statement he was corroborated by his son. I regret to say that I did not form a favourable view of their testimony, and cannot credit their statement in this connection. There can be no doubt that friction and irritation arose between husband and wife almost from the beginning over money matters.

The plaintiff also testified that, at the end of each month or the beginning of the next, his wife was subject to fits of ill-temper and frenzy, during which she was intimating to him that he had married her for her money and that she had no intention of leaving any of it to him. Upon the other reliable evidence given, I cannot at all find that this was so. It would rather appear that, desiring to raise doubts as to her ability to make a will at the time that in question herein was executed, he has drawn on his imagination for this.

There is considerable evidence—to which some effect must be given—that he did not treat her well.

A casual perusal of the will suggests the possibility that in para. 3 the words and figures "only $10" at the left-hand margin, and the word "his" between the words "is" and

"bad" and the words "of me" at the end of the paragraph might have been written at different times and by a different hand. It is to be noted, however, that their introduction in reality makes no substantial change in the effect of the clause and appears to be an attempt to make certain what was already clear. Read without them, the meaning seems to be that the reason the testatrix was giving her husband, the plaintiff, the insignificant sum of $10 was on account of alleged bad treatment of her.

In para. 4 it is suggested that the names "Mrs. Elizabeth Simpson" and "Mrs. Agnes Londry" were penned in a different hand than that of the testatrix, and that the ink used is of a different colour and resembles that in the words and figures "only $10," already referred to.

There does seem to be some dissimilarity in the handwriting, and this was pointed out in detail by Mr. Staunton, an expert on handwriting, called by the plaintiff. The general effect of his testimony was somewhat weakened by reason of his answers to questions about certain signatures of the testatrix submitted to him for consideration. The space between the last line in para. 4 and the first line in para. 5 of the will is a much wider one than in the case of any other of the paragraphs, and this was obviously for the purpose of providing ample room for the insertion, possibly and probably at a later date than the preliminary writing of the will otherwise, of the names of the executors. It is to be noted that there was an apparent intention to appoint executors and trustees and to name them; that the omission to insert the names would have left the will incomplete in this respect, and a reasonable and natural presumption would be that the names were inserted by the testatrix herself or by her direction. On the whole evidence, I came to this conclusion. As to the insertion of names of executors, see Jarman on Wills, 6th ed. (1893), vol. 1, p. 157; Theobald on Wills, 7th ed. (1908), p. 38.

It is also to be observed that one of the two executrices named is the same Mrs. Elizabeth Simpson (the defendant) whom she had already named in the same capacity in the signed but incompletely executed will already referred to.

It appears that Mrs. Agnes Londry, like Mrs. Simpson, was an old and intimate friend of Mrs. Harrison and Mrs. Moorcroft. That the will was not written all at once but at two different times appears to be suggested from the fact that commencing with the words "should any one attempt" to the end inclusive of the attestation clause, it appears to

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have been written at a different time and with different ink from the major portion of the will preceding, but obviously, and in the end indeed admittedly, in the handwriting of the testatrix.

It is also to be noted that there is a continuing intention "to assist sick people." Apparently on its date the testatrix called at the house of Mrs. Simpson for the purpose of securing witnesses to her will. It happened that Henrietta E. Farrell, a married daughter of Mrs. Simpson, was there, and that Robert Simpson, a son, was either in the house or in the shop adjoining, and these two were asked by Mrs. Moorcroft to come over to her house, a short distance away, and act as such. They went. In the house she produced the will from a drawer, and, without reading it to them and without their having any opportunity to inspect it closely, executed it in their presence, and they attested it by writing their signatures to the left of hers as they appear on its face. They were unable to say whether the alleged additions, alterations, or interlineations, were or were not in the will at the time.

Upon the whole evidence I come to the conclusion, and find, that they were.

It appears that in the spring of 1918, and whether in the month of May or June, or in what month precisely, is not made absolutely clear, Mrs. Moorcroft became pregnant. Shortly before the 15th February, 1919, she and her husband went to see Dr. Coatsworth, as he says, "to engage him" "for her labour." He thought at that time she looked well for a woman of her years. He was called to the house on the 15th February, when he found her much altered for the worse in appearance, and directed that she should be at once taken to the hospital. This was done, but she died in childbirth the next morning, from shock. The child did not survive her. Dr. Coatsworth expressed the view that her conception would have been probably some time in May, 1918.

I am quite unable to find that the defendants Mrs. Simpson and Mrs. Londry, or either, made any statements to the testatrix to induce her to make a will depriving the plaintiff of any interest in her estate, or to procure or induce her to make or execute the will in question. I think the proper finding to make is that she cut him off with the $10 in consequence of his conduct towards her. The evidence shews this to have been her intention, and it is the testatrix's own plain statement of the matter in para. 2 of the will.

At one point in his evidence the plaintiff made the statement that he knew nothing of the will until after her death. At another point he said that a couple of months before her death she spoke of keeping her mother's promise and would change her will.

On all grounds, I come to the conclusion that the will is that of a competent testatrix, was duly executed in the form in which it now is, and should be admitted to probate.

While it was suggested by the plaintiff that his wife was not a charitably disposed woman, there is no intimation anywhere in the evidence that Mrs. Simpson, or Mrs. Londry, or any one else, suggested to her to leave her money "to assist sick people of small means." This seems to have been entirely her own idea, and the only question is as to whether the bequest can be given effect to.

It appears to me that there is a clear intention to make a charitable bequest, an intention that a limited class, namely, sick people and those of them who are of small means, shall be helped or assisted: Mortmain and Charitable Uses Act, R.S.O. 1914, ch. 103, sec. 2, sub-sec. 2*; *Commissioners for Special Purposes of Income Tax* v. *Pemsel*, [1891] A.C. 531, at p. 583; *Kendall* v. *Granger* (1842), 5 Beav. 300, at p. 303; *Re Orr* (1917), 40 O.L.R. 567, at pp. 582-3; S.C., *sub nom. Cameron* v. *Church of Christ Scientist* (1918), 57 Can. S.C.R. 298, 43 D.L.R. 668.

The union of the two expressions—"sick people" and "of small means"—is of significance and importance.

In the case of *In re Gardom*, [1914] 1 Ch. 662, the expression "residence for ladies of limited means" was in question, and Eve, J., at p. 667, said: "The obvious intention of the testatrix is that her money is to be used for the purpose of providing a temporary home for ladies whose means are too restricted to permit of their providing or enjoying unassisted the advantages of such a home."

So here, people of small means are mentioned and such of them as are sick and unable, it would plainly seem to appear, to secure needed care in their distressful condition. It is these who are to be assisted. Reference also to *Trustees of the Mary Clark Home* v. *Anderson*, [1904] 2 K.B. 645, at p. 656.

*(2) The following shall be deemed to be charitable uses within the meaning of this Act:
(a) The relief of poverty;
(b) Education;
(c) The advancement of religion; and
(d) Any purpose beneficial to the community, not falling under the foregoing heads.

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It was argued, however, that if there was a charitable bequest, it was void for lack of certainty. The general rule, however, is that "a charitable bequest never fails for uncertainty:" *In re White*, [1893] 2 Ch. 41, 53; *Pieschel* v. *Paris* (1825), 2 S. & S. 384; Theobald on Wills, 7th ed. (1908), p. 367. The "executors" are empowered also "to use their discretion in dividing the estate," and if they find any difficulty, and later apply for a direction, a reference can be had and a scheme devised.

It was also urged that this bequest was contrary to the rule against perpetuities, but the rule does not apply in the case of a charitable gift such as this: Jarman on Wills, 5th ed. (1893), vol. 1, p. 262, and cases cited; Theobald on Wills, 7th ed. (1908), p. 367.

As to the question of costs. Having regard to the appearance of the will and the insertions or additions referred to, one would in an ordinary case be led to think there would be justification in calling for proper proof of due execution by a competent testatrix. Here, however, the will was in effect what the plaintiff knew was the expressed intention of his wife in so far as he was concerned. He knew of her intention to leave him little or nothing. This is his real ground of complaint.

While it may appear to be a harsh thing for a wife so to deal with a husband, that is a matter for her consideration. With the knowledge of her expressed intention, he began the action and made in the course of the litigation what must be found to be cruel and baseless accusations against her. Further possible litigation was hinted at in the course of the trial with reference to the matter of the $10,000 claim and to certain Victory bonds which the plaintiff is alleged to have taken possession of subsequent to the death of his wife.

In these circumstances, I do not think I should allow the plaintiff costs out of this estate.

There will be no order as to costs in so far as the defendants other than two executrices are concerned, as they have not participated in the litigation. The executrices will have their costs as between solicitor and client out of the estate.

[By subsequent consent of the parties, the disposition of costs, as endorsed on the record and embodied in the formal judgment, was as follows: that the costs of all parties appearing and of the Public Trustee, to be taxed (those of the executrices and of the Public Trustee as between solicitor and client), be paid out of the assets of the said deceased.]

Re COBOURG and GRAFTON TOLL ROAD Co.

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Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Latchford, Middleton and Lennox, JJ. March 11, 1921.

EXPROPRIATION (§IIIC—137)—TOLL-ROADS—EXPROPRIATION BY CROWN—ESTIMATION OF COMPENSATION—AWARD—AVERAGE EARNINGS FOR FIVE YEARS—CAPITALIZATION—INTEREST—STATUTORY RATE.

In estimating the compensation where a toll-road is expropriated by the Crown, the damage to the owner not the value to the expropriator must govern.

A general statute may repeal a special statute when the latter is repugnant to and inconsistent with the former; the compensation will be estimated according to the provisions of the repealing statute.

APPEAL by the company from an award of the Ontario Railway and Municipal Board of the 12th July, 1920, fixing the sum of $18,954.28 as the compensation to be paid to the company for its road expropriated by the Province of Ontario. Reversed.

R. S. Cassels, K.C., for appellant.

T. J. Agar, for the Crown, respondent.

RIDDELL, J.: — The Cobourg and Grafton Road Company (hereinafter referred to as "the company"), which is the owner of the road, was incorporated by special Act of the Parliament of Canada (1857) 10 & 11 Vict. ch. 93, and was authorised to construct a good and substantial road from Cobourg to Grafton, with power to expropriate and hold land for that purpose and to collect tolls; and the road, and all materials from time to time got or provided for constructing, building, maintaining, or repairing the same, and the tolls, were vested in the company forever.

The company, soon after the incorporation, purchased certain rights of way and constructed a road from Cobourg to Grafton, and subsequently from time to time graded, gravelled, and otherwise altered and improved this road.

The company expended in the acquisition of land for and the original construction in 1847 of the road over $16,000; and, in addition to this first capital expenditure, considerable sums have from time to time been spent out of the earnings of the company in the construction of improvements of various kinds.

The toll-road in question was taken over by the Department of Public Highways on the 23rd May, 1919, under the provisions of the Provincial Highway Act, 1917, 7 Geo. V. ch. 16.

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The Department of Public Highways offered to pay the company in full of all claims the sum of $7,400, and the company declined, contending that this was an inadequate compensation.

Proceedings were taken as directed by 7 Geo. V. ch. 16, sec. 9, under the Ontario Public Works Act, R.S.O. 1914, ch. 35, before the Ontario Railway and Municipal Board; and the Board, on the 12th June, 1920, awarded the sum of $18,954.28 as compensation for damages necessarily resulting from the exercise of the powers by the Minister—R.S.O. 1914, ch. 35, sec. 22—interest was allowed at 5 per cent. from the 23rd May, 1919 (sec. 39 (1)), and the company was allowed its costs.

The company now appeals.

By sec. 41 of the Act of incorporation (1847), 10 & 11 Vict. ch. 93 (Can.), the Government was authorised to purchase the road at any time upon giving three months' written notice and upon payment of a sum equal to 25 years' purchase of the annual divisible profits, estimated on the average of the three next preceding years; and, if these profits should be less than 6 per cent., then upon payment of the amount of capital stock paid in and 20 per cent. thereon; and upon such purchase the Government was to assume all the contracts, debts, and liabilities of the company.

It was contended before the Board that this Act, being a special Act, must be applied rather than the general Provincial Highway Act of 1917—this contention was not pressed before us; nor, as I think, could it be successfully made.

No doubt, the rule stated by Lord Selborne, L.C., in *Seward* v. *The "Vera Cruz"* (1884), 10 App. Cas. 59, at p. 68, is regularly followed: "Where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so." And, as is said in the Judicial Committee in *Barker* v. *Edger*, [1898] A.C. 748, at p. 754: "When the Legislature has given its attention to a separate subject, and made provision for it, the presumption is that a subsequent general enactment is not intended to interfere with the special provision unless it manifests that intention very clearly. Each enactment

must be construed in that respect according to its own subject-matter and its own terms."

But it is quite clear that a general may repeal a special statute: *Pellas* v. *Neptune Marine Insurance Co.* (1879), 5 C.P.D. 34, at p. 40—and it will do so when they are absolutely repugnant to and inconsistent with each other.

In the present instance, I think that the Legislature had in mind the special purpose of forming provincial highways which would necessitate the acquiring of existing highways, that it was recognised that some at least of these highways would be toll-roads "not under the immediate control of a municipal corporation" (sec. 9), and it was intended to make one general law superseding all local laws and repealing (pro tanto) all local acts: per Lord Campbell in *Bramston* v. *Mayor of Colchester* (1856), 6 E. & B. 246. See *Great Central Gas Consumers Co.* v. *Clarke* (1863), 13 C.B. N.S. 838; Craies' Statute Law, 2nd ed., p. 340 sqq. Accordingly we must apply sec. 22 of the Public Works Act, R.S.O. 1914, ch. 35; and it has already been said in this Court in *Re Nepean and North Gower Consolidated Macadamised Road Co.* (1920), 18 O.W.N. 368, 369, that, "in determining the amount to be allowed for compensation, the matter must be looked at as a business proposition, with all its possibilities and contingencies: and the person whose property is taken away . . . for public advantage should not have his compensation weighed in golden scales."

Of course it is not the value to the expropriator, but the damage to the owner, which must govern.

I am not satisfied with the award of the Board—I do not apply local knowledge to enable me to accept the Board's finding that the road had a "capacity of earning revenues increasing from year to year while in the possession of the company without a disproportionate increase of operating and maintenance costs." It seems to me that the Board on that finding should have been distinctly more liberal in the estimate of damages.

If the average earnings for 5 years be taken as the basis and the income capitalised, we should be reasonably certain that a fairly permanent and safe investment can be readily found producing from such capital the required income. While it may be that at the present moment the rate of interest is high and a temporary investment can be obtained at as high a rate as 7 per cent., this rate cannot be expected to continue. Interest is always high after a great war, when

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industries are re-establishing themselves, but it does not remain at the height permanently.

Both Dominion and Province allow only 5 per cent. on compensation money detained from the owner: Expropriatory Act, R.S.C. 1906, ch. 143, sec. 31; Public Works Act, R.S.O. 1914, ch. 35, sec. 39; the Supreme Court of Ontario allows 5 per cent. on suitors' accounts: Rule 722 (3)*; this fund is most economically administered, and the Finance Committee has not thought it wise to increase the rate even temporarily; nor has the Dominion changed the 5 per cent. rate fixed by the Interest Act, R.S.C. 1906, ch. 120, sec. 3.

If $1,326.70 annual income be capitalised at 5 per cent. or 20 years' purchase, the amount to be allowed would be $26,534.00 (the special Act of incorporation would allow 25 years' purchase, $33.167.50).

In England and in certain cases in Canada, 10 per cent. additional has been usually allowed: Cripps on Compensation, 5th ed., p. 111—but, waiving this additional sum and taking all the circumstances of the case into consideration, I think the Government cannot complain if the award be increased to $25,000.

I would allow the appeal with costs and increase the award accordingly.

MIDDLETON, J.:—I can see no reason why the estimate of the Board as to annual earnings should be interfered with, but would capitalise at 5 per cent.

As the earnings of 1916 and 1918 may be regarded as in some respects abnormal, I am ready to agree in the figure suggested by my brother Riddell, $25,000.

LENNOX, J., agreed in the result stated by RIDDELL, J.

MEREDITH, C.J.C.P. (dissenting): — I can find no just ground for increasing the amount awarded, by the Ontario Railway and Municipal Board, to the appellants, in this matter; if there had been a cross-appeal, I should have considered that the facts of the case required a reduction of the amount.

The appellant company's contention that its compensation shall be computed in accordance with the provisions of sec. 41 of its Act of incorporation is manifestly fallacious.

*In Rule 722 (3), as passed in 1913, the rate named was 4½ per cent. By Rule 773 (e), passed on the 1st October, 1917, "5 per cent." was substituted.

Its road has not been purchased under the provisions of that section, and the provisions of the section apply only to such a "purchase." Its road has been taken from it under the provisions of the Provincial Highway Act, and the compensation it is entitled to is that which is provided for in the Ontario Public Works Act. There is no question of repeal of statutes.

It is common knowledge that toll-road companies' stock has, for a number of years past, been greatly reduced in value, owing largely to the very strong public feeling against such roads, which have been commonly described as "relics of barbarity," and so the number of such roads has dwindled greatly, and commonly with much loss to the stockholders. Some evidence of this seems to have been afforded by some of the witnesses upon this arbitration; another road owned by the appellant company, and of about the same length as the road in question, seems to have been sold for $15; it is, of course, said to have been a road needing much more repair than this; but the capital stock of each seems to have been the same. And, owing to the feeling against such roads, the corporation of the united counties in which this road is took steps to acquire the appellant company's rights in it. An arbitration was had, and the value was fixed at $10,500, in October, 1903, but the municipalities would not take it at that price. It is said that bridges upon it were reconstructed after that; but so they must be now and from time to time as they wear out and are broken down or washed away. Roads should be very valuable properties if it were not for the necessary constant outlay upon them, anticipated and unanticipated.

It is strange that there was no evidence as to the capital stock of the road company, or what has become of it, or to whom the money awarded is to go. If in this respect the road is like other roads, and if it has passed through the like vicissitudes, anything coming back to the shareholders upon their stock might well look like that which is commonly called "a godsend." There ought to have been some evidence as to the value of the stock; for one cannot but see that if the Province, or any one for it, could have purchased all or a large part of the stock for a "song," even a large song, too much is being paid for it, if, under the award, shareholders get about par. The Act of incorporation (sec. 22) puts the capital stock at £5,000 or $20,000.

The Board seem to have ignored—having none offered perhaps—all such evidence as that, as well as other evidence

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shewing what is a fair selling price of the property the appellant company has in the road, and to have taken that which they found to be the average net yearly earning profit of the road in the 4 years next before it was acquired under the Provincial Highway Act, and to have capitalised such earning upon a 7 per centum basis, and to have fixed upon that as the actual value and proper price of the road in making the award in question.

That seems to me to have been quite too arbitrary a method; other things, all the evidence available going to shew the actual value, or fair price, should have been considered, just as in estimating the value, for the purposes of a sale, of any other property. A few of the things going to shew that are: if the average had been for the life of the company or for any more than 5 years, the amount awarded must have been much less. In one of the 4 years, because of exceptional circumstances, the "profits" were much greater than usual, but the wear and tear of the road was also much greater than usual, and no allowance was made for that, the "rule of thumb" prevented it: and the fact that the cost of future upkeep must be much greater than past; and that in truth, if such a road be kept up to the real needs of the traffic over it, it never could be a profitable investment: and, although the appellant company is under a legal obligation to expend a sum which if the obligation was enforced now would amount to from $15,000 to $20,000, an obligation imposed by law for the safety of persons travelling upon this road, yet no allowance was made in this respect, and so the respondent must bear the appellant company's load whenever it is put upon the respondent, as it must be some time, for, if the public safety required it before the war, it requires it more now, in view of the increased and increasing traffic over the road.

It was urged that the capitalisation "should have been at a lower rate than 7 per centum." I cannot assent to that; "even Victory bonds" could have been bought, at the time the award was made, to realise that rate of interest. The subject is not to be looked at with the eye of a hampered trustee, private or public; it is to be looked at as the facts are to be. Those who have stock of little or no value get paid in full or nearly so, and they invest it not in low rate interest bonds, but in business and other ways as they see fit, getting, some of them, possibly seven times seven per centum per annum, profit or advantage of one kind or another upon their "godsend."

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That this road was not different from the general run of profitless privately owned toll-roads is made plain by its history extending over more than 70 years; it does not appear from the papers before us to have been anything but a losing concern, except for two years, and then profitable in appearance rather than fact. It is foolish to treat the difference between the tolls collected and outlay in repairs as the profits of the road. The interest on the outlay must be deducted—interest on probably $20,000; and, that done, this road is proved to be, with such roads generally, in the unprofitable rut.

It should have been interesting, it generally is, to have had discovery of what, if any, income tax—municipal or federal—was ever paid on the profits of the road; and what, if any, statements as to income were made for the company for the purposes of such taxation.

So too it would be foolish to treat the motor traffic as a new goose to lay only golden eggs; in the past year or two they might be gathered with glee, but the harvest of wear and tear and renewal must inevitably follow, a harvest of loss more than counterbalancing the gain. The golden eggs should be a source of joy if it were not for the fact that soon they can be laid only in nests of more costly repair and renewal, and oil-tar coating at least once a year; so that the old traffic is more than likely to have been better paying than the new ever can be.

I am in favour of dismissing this appeal; the subject of it is one peculiarly within the capabilities of the Board, arising from much experience, if nothing more, in such matters, and so one in which the amount awarded should not be increased unless it is demonstrated that it is not enough. The tide of evidence seems to me to be altogether the other way.

LATCHFORD, J. (dissenting), agreed in the result of the judgment of MEREDITH, C.J.C.P.

Appeal allowed.

Re RICHARDSON and GURNEY FOUNDRY Co.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Latchford and Middleton, JJ. March 11, 1921.

LANDLORD AND TENANT (§IIC—24)—LEASE—RENEWABLE—PROVISION FOR ARBITRATION — SPECIFIC TIME MENTIONED — PROPER NOTICE BY LESSEE—DELAY IN APPOINTING ARBITRATORS—APPOINTMENT BY COURT ON REQUEST OF LESSEE—ARBITRATION ACT.

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Where provision is made in a lease for renewal on notice by the lessee, the terms to be fixed by arbitration, and the lessee is given proper notice, but does not appoint an arbitrator until after the time has expired, this delay does not forfeit all the rights of the lessee, and an order may be properly made by the Court appointing an arbitrator to represent the lessors on their refusal to do so.

APPEALS by James J. McCaffrey, Lawrence Solman, and the O'Keefe Brewery Company Limited, and also by Robert D. Richardson, from two orders made by LENNOX, J., in Chambers, on the 15th July, 1920.

The applications for these orders were made by James Bohan, under sec. 9 of the Arbitration Act, R.S.O. 1914, ch. 65, in the matter of a lease dated the 20th May, 1899, between James Henry Richardson, lessor, and the Gurney Foundry Company Limited, lessees, leasing part of lot No. 4 on the south side of Adelaide street west, in the city of Toronto, and in the matter of another lease, bearing the same date, made by James Henry Richardson and Sarah Jane Brett, lessors, to the same lessees, leasing another part of the same lot.

By certain mesne conveyances, the terms acquired by the foundry company passed to Bohan, the applicant.

The orders made by LENNOX, J., appointed Charles J. Holman, K.C., arbitrator, pursuant to the provisions of the leases, to represent McCaffrey (the owner of the freehold) and the other appellants (mortgagees of the freehold) in an arbitration in connection with the renewal or determination of the leases, to fix the rent in case of renewal and to ascertain the value of the buildings and improvements upon the demised premises.

H. J. Scott, K.C. for appellants McCaffrey, the company, and Solman, and *A. C. Heighington*, for appellant R. D. Richardson.

J. M. Ferguson, for respondent.

MEREDITH, C.J.C.P.:—It seems to me to be needful only to state the main facts of this case to make it plain that the appellants' contention upon these appeals must fail.

The leases in question provide for a possible perpetual renewal of them in terms of 21 years, in the manner provided in them, which is: the lessors shall—subject to the right of the lessors, contained in the leases, to determine them—if "requested in writing" by the lessees "at least 30 days before the expiration of" the term then running, "grant another lease" for a further term of 21 years, and so on perpetually; and, in case of such request, the lessors

and lessees should each forthwith appoint an indifferent arbitrator, and that such arbitrators should appoint an umpire; and that the said arbitrators and umpire should proceed to "fix and determine on a just and proper annual rent" for the succeeding term; and should also "fix and determine the then value of such buildings and improvements as shall then have been erected and standing on the said demised premises;" that "the arbitrators and umpire as the case may be" should, before the expiration of the before-mentioned 30 days—that is, the 30 days next before the end of the then existing term of 21 years—give notice to the lessors of the amounts "fixed and determined" by them; and that, after "the award of the said arbitrators as aforesaid" shall be communicated to the lessors. they "shall have the right and option, in their absolute and uncontrolled discretion, either to grant a new lease or to allow the said lease to expire, paying to the lessees the amount or value of the buildings and improvements, so assessed and ascertained as aforesaid, within 30 days after the expiration of the said lease."

The lessees, in good time—between 2 and 3 months before the expiration of the first term of 21 years—duly requested a renewal of the term; but neither party appointed an arbitrator until 2 and a half months after the expiration of that term, when the lessees appointed their arbitrator and called upon the lessors to appoint theirs, but that was never done, and in June, 1920, these proceedings were begun by the lessees; and, in them, under the provisions of the Arbitration Act, the High Court Division of this Court made the orders which are now appealed against, appointing an arbitrator for the lessors.

The lessors' reason for not sooner appointing an arbitrator is that they were in negotiation with the lessees for the purpose of effecting an agreement as to the rent or value which would save the expense and trouble of an arbitration. Judging by the present attitude of the lessors, it is difficult to come to any other conclusion than that the real reason for the lessors' failure to appoint an arbitrator was and is that they may get the lessees' buildings and improvements, said to be worth tens of thousands of dollars, for nothing.

The lessors' sole contention upon this appeal is, that the orders appointing an arbitrator should not have been made, because there is nothing to arbitrate about, that the lessees have lost all their rights under the leases because no award

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was made before the expiration of the first term of 21 years—that the leases are ended and that the lessors are entitled to confiscate the lessees' tens of thousands of dollars' worth of property: in effect that their own wrong—and their own trickery if it was done intentionally—have given them all such things as spoils.

It is extraordinary that any one should be able to imagine that the law could give effect to such a contention.

It is not needful to consider whether the law could give effect to such a contention if the lessees had failed to make due request for the renewal: nor if, after due request, they alone had failed to appoint an arbitrator; but I may add that the power of the Court to relieve from forfeiture, not to speak of confiscation, is very wide and is generally exercised when the exercise of it would effect the real purpose of the parties: and that such a case as this must not be confused with one in which the right lost is only a right of renewal and does not carry with it the lessee's property of great value.

It was quite within the rights of any of the parties to waive any of the provisions of the lease in their favour, and to extend the times in which anything was to have been done: and once the lessees had duly requested a renewal the paramount thing was done: the rent was not payable in advance; and, if it had been, as it was sure to be increased, it was the lessors who only were interested in the arbitration and alone to be benefited by it. It was therefore the lessors' concern, not the lessees', to bring about the arbitration, and they might waive it with the right to any increased rent, as well as the right to buy out the tenants' rights, if they saw fit to do so. In these proceedings the lessees seem to me to be aiding the lessors rather than helping themselves.

Test it by supposing an action by the lessors for possession, and an answer by the tenants, "We have duly requested a renewal, and have always been and still are willing and anxious that the lessors shall have the arbitration and any benefit it may bring them, but they will not have it:" and the absurdity of an endeavour to meet that answer with the reply, "But you did not compel us to have the arbitration before the first term expired."

No objection is taken to the power of the Court, under the Arbitration Act, to appoint an arbitrator and enlarge the time for making the award, if the lessors have not the power of confiscation they wish to exercise. No such objec-

tion could be well made by them; for, if they are wrong as to their claim to confiscate, they must take hurriedly to the protection of the Act if they are to get any right to buy or any higher head-rent.

The only real question that these appeals present to my mind is: whether, if the lessees were not asking for, or consenting to, an arbitration, the case would not be one of a renewal upon the old terms in all respects.

These appeals should, in my opinion, be dismissed.

LATCHFORD, J.:—These appeals are from orders made in Chambers on the 15th July, 1920, each appointing Charles J. Holman, K.C., an arbitrator under the terms of two leases, both dated the 20th May, 1899, one by the late Dr. J. H. Richardson and the other by Dr. Richardson and Mrs. Sarah Jane Brett. The leases cover adjoining lands on the south side of Adelaide street, and were made to the Gurney Foundry Company Limited. By certain mesne conveyances, the terms acquired by the company duly passed to the respondent Bohan.

The appellants are respectively the owners and the mortgagees of the freehold in both properties in succession to the original lessors.

Under each lease, the term demised was for 21 years, and was due to expire and did expire on the 1st August, 1920. Bohan and his sub-tenants have continued in possession.

The respondent claims that he is entitled under a covenant, identical in terms in both leases, to a renewal of the term for 21 years, at a rental to be fixed by arbitration; or to be paid for the buildings erected on the premises their value—also to be determined by arbitration.

It is contended by the appellants that Bohan is not entitled either to a renewal or to be paid the value of the buildings, and that no case has been made for the appointment of an arbitrator.

Each party rests his contentions on the same clauses in the leases—a covenant followed by a proviso.

Reduced to its simplest form, and applied to the parties now affected, the covenant obliges the appellants (subject to the option in their favour, presently to be mentioned) to grant to the respondent a renewal of the lease for an additional term of 21 years, if thereunto requested by Bohan, at least 30 days before the expiration of the term. This request was duly made by Bohan.

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By a proviso following the covenant, arbitrators were to be forthwith appointed by the appellants and by Bohan, and these arbitrators were to appoint a third. The duty of the arbitrators was, first, to determine a just and proper annual rental for a term of 21 years; and, secondly, to fix the value of the buildings on the demised premises. When the result was communicated to the parties concerned, the owners of the freehold had the right and option either to grant a new lease for 21 years at the rental so arrived at or to allow the lease to expire, paying to Bohan the value of the buildings as determined by the arbitration.

The lease, it may be proper to observe, was further renewable for successive terms of 21 years, subject to the same option.

It is well-known that, on the faith of similar leases, buildings of great value have been erected in business sections of the city such as that on which the property in question is situate. Mr. Ferguson stated to this Court, and his statement was not questioned, that buildings approximately worth $40,000 have been erected on the demised premises.

After the request for renewal was made, no action was taken by the owner of the freehold nor by the mortgagees. This was doubtless attributable to the foreclosure proceedings which were pending at the time between them. Bohan was unable to get anything done by the appellants. They failed to appoint an arbitrator, as they were bound to do by the covenant. Bohan on the 17th October appointed Mr. Drayton to act for him, and notified all the parties interested of the appointment. The representatives of the parties met and agreed orally upon a value to be paid to Bohan for the buildings. When this was reduced to writing, the appellants refused to sign it.

Bohan then applied to the Court, and the orders now in appeal were made.

The appeals should, in my opinion, be dismissed.

A gross injustice will be suffered by Bohan if he is not granted a renewal or paid for his buildings. When he requested a renewal he did all he was required to do to entitle him to one or other of two advantages. The proviso states what each party shall do. Action on the part of the appellants should have been taken. That Bohan did not at once appoint an arbitrator cannot, in the circumstances, effect a forfeiture of his rights. Such an appointment would have been as futile then as that of Mr. Drayton was later. Be-

cause the appellants failed to appoint an arbitrator, they cannot be heard to allege that Bohan also was remiss for a time. He was not bound to do what was impossible—create alone a tribunal requiring on the part of the owners of the freehold concurrent action which they refused or neglected to take.

As in *Moss* v. *Barton*, L.R. 1 Eq. 474, the owners of the freehold allowed their tenant to continue in occupation though they knew his rights continued until the covenant was carried into effect or waived.

The appointment made by the orders in appeal is proper and regular under the Arbitration Act, and the appeals should be dismissed with costs.

MIDDLETON, J.:—I entirely agree with the judgment of my brother Latchford.

I do not regard the clause which is introduced by the word "provided" as a condition; it is merely an agreement, and in it time is not of the essence.

The agreement contemplated an award before the expiring of the term. Neither party did anything to secure the appointment of arbitrators in due season, and neither can set up the common default to defeat the right of the other.

The agreement to renew or purchase the buildings is absolute, and not in any way conditional, and must be given effect to notwithstanding any defect in the carrying out of the clause dealing with the determination of the amount of rental and price of the buildings.

RIDDELL, J. (dissenting):—The landlord has no objection to the arbitrator appointed if any arbitrator should be appointed, and it becomes a question of law on the true interpretation of the leases.

As it seems to me, the leases contemplate, if the tenant desires a renewal: (1) a request in writing by the tenant at least 30 days before the expiration of the term; (2) an arbitration and award of a certain rental and also the value of the buildings and improvements before the expiration of the said 30 days, i.e., before the end of the term.

I think that the award is to be made before the end of the term so as to enable the landlord to make up his mind and to exercise his option either (*a*) to give the lease on the terms so fixed, or (*b*) pay the lessee the value of the buildings and improvements. The landlord "was entitled to know the moment the lease expired whether or not he had a tenant:" *Nicholson* v. *Smith*, 22 Ch. D. 640, at p. 657. To

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have had such knowledge, he must have had the opportunity clearly provided for of determining whether he has a tenant or is to pay a certain sum of money and look for another. Without this, the notice or request is an empty gesture.

The present case is rather different from a very usual one where the tenant only has an option to continue the tenancy. The rights of the landlord are here carefully and explicitly provided for, and I think full effect must be given to these rights.

The term expiring on the 20th July, 1919, the request for a new lease was given on the 20th May, 1919, and ample time remained to appoint the arbitrators and to have the award made. The tenant, however, did nothing towards appointing an arbitrator until the 15th October, nearly 3 months after the expiration of the term; nothing was done by the landlord to prevent the tenant acting.

I would allow the appeals and set aside the appointment, with costs here and below.

Appeal dismissed.

MARKS v. ROCSAND Co. Ltd.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Latchford, Middleton, and Lennox, JJ. January 28, 1921.

COMPANIES (§IVG—116A)—POWER OF MANAGER AS SUCH TO CALL SHAREHOLDERS' MEETING—VALIDITY OF RESOLUTION PASSED AT MEETING CALLED BY MANAGER—RECOVERY OF SALARY—QUANTUM MERUIT.

The manager of a private company incorporated under the Ontario Companies Act has no authority as manager to call a meeting of shareholders, and where a meeting has been called by him as manager "to discuss matters of importance pertaining to the company's affairs," unless all the shareholders are present at the meeting or are represented by proxy after due notice of the business to be transacted, no resolution passed thereat can bind the shareholders, and a by-law passed at such meeting giving such manager a salary of $200 per month, but payable only "when the finances of the company will warrant so doing," is not binding on the company, and the manager cannot recover on an implied contract as on a *quantum meruit*.

APPEAL by defendant company from the judgment of Orde, J. (1920), 55 D.L.R. 557, in an action to recover $1,200 alleged to be due to the plaintiff for salary as manager of the defendant company's business for a certain period. Reversed.

W. K. Fraser, for appellant.

H. J. Martin, for respondent.

MEREDITH, C.J.C.P.:—The judgment in the plaintiff's favour is based upon an implied contract by the defendants to pay to

him, for his personal services, the amount of the judgment. No such claim was made: the claim was for "six months' salary" at $200 a month, based on an expressed contract; and payment was not sought: what was sought was only a judgment "declaring" that the plaintiff was entitled to a salary as alleged in his claim.

The trial Judge evidently considered that the claim on an expressed contract could not be supported, but that the plaintiff could recover on an implied contract; and, if that be so, the judgment for payment of the money due and payable is right. A declaratory judgment is out of the question in such a case.

The first question for consideration is whether the judgment upon an implied contract can be sustained. In my opinion, it cannot.

When one accepts, and has the benefit of, the services of another, and there is no reason why those services should be given gratuitously, ordinarily no other conclusion can be reached than that there was a tacit agreement between the parties that the services should be paid for.

But there are cases in which no such obligation should be implied, and this seems to me to be one of them. And ordinarily I should experience great difficulty in finding any contract—tacit or expressed—in any case in which no contract was asserted by either party and of which each party was ignorant. I do not, of course, speak of obligations imposed by law.

The plaintiff was and is a large shareholder of the defendants; he is said to have owned and yet to own about one-fourth of its whole capital stock; and he is and was during half of the time for which he claims remuneration one of the defendant's directors. The services rendered were not of an onerous character; they were not more than it might reasonably be expected a large shareholder might do in the interests of his company, and so indirectly for his own benefit, without salary or other remuneration. Then there are statutory provisions against payment to directors of companies unless such payment is expressly provided for as required by the statute, and in this case the defendants were bound by a law which they had made themselves—by-law 18—giving power to the directors to grant and fix the amount of salaries and remuneration of the president, directors, officers, etc., of the company, including the salaries and remuneration of such officers as may be directors whether such salary or remuneration be paid to them as directors or otherwise.

The conclusion that there was no implied contract necessitates a consideration of the question whether an expressed contract

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was proved; whether the trial Judge erred in considering that the plaintiff could not recover on that ground.

In that I find that he was right.

It is not contended that anything done under by-law 18 helps the plaintiff; but a resolution passed at a general meeting of the shareholders of the company is relied upon, and it very plainly gives to the plaintiff a salary of $200 per month, but payable only "when the finances of the company will warrant so doing."

As this is all that the plaintiff can rely upon in support of his claim, and as there is no evidence that when this action was brought the finances of the company warranted payment, the action fails and should have been dismissed.

And I may add that I agree with the trial Judge that, for the reasons stated by him, there was no power in the shareholders at that meeting to pass such a resolution so as to bind the company.

I am therefore in favour of allowing this appeal and dismissing the action.

LATCHFORD, MIDDLETON, and LENNOX, JJ., agreed with MEREDITH,, C.J.C.P.

RIDDELL, J. (dissenting in part):—An appeal by the defendant company from the judgment of Mr. Justice Orde, 55 D.L.R. 557, 48 O.L.R. 224.

Upon the facts as found by the learned trial Judge, I agree that the plaintiff cannot take advantage of the resolutions, etc., but must rely on a *quantum meruit*. I think too that he would be entitled to be paid as on a *quantum meruit* but for a by-law not noted by the trial Judge.

By-law No. 18 of the company provides:—

"18. That the directors are hereby authorised and empowered to grant and fix the amounts thereof and regulate from time to time, as they deem fit, the salaries and remuneration of the president or of any director or officers, servants, employees, and agents of the company, including the salaries and remuneration of such officers of the company who may also be directors, and whether such salary be paid to them as directors or otherwise."

It is therefore plain that, so far as the company could, it provided against any claim being made against it for any services rendered by any one who was in fact a director, unless the amount amount had been fixed by the directors. A contract for remuneration for services might well be implied in favour of one wholly unconnected with the company, but no such implication arises in favour of a director, who must be held to know of the by-law, as it was his duty to the company to know, for a director

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is not only an agent but to a certain extent a trustee for the company. It is true that, at the time the services began, he was not a director, but he became such a short time thereafter. He must be held bound by the by-law from the time of his becoming a director: before that time I see no reason for depriving him of compensation.

The appeal should be allowed with costs: and the judgment reduced to an amount proportional and limited to the time during which the plaintiff was not a director, with costs on the proper scale under Rule 649—costs of this appeal also to be set off.

Appeal allowed and action dismissed.

BONNER-WORTH Co. v. GEDDES BROS.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins and Ferguson, JJ.A. April 1, 1921.

CONTRACTS (§IVE—365)—SALE OF GOODS—DELAY IN DELIVERIES—CONTRACT TREATED AS SUBSISTING—EXTENSION OF TIME—DEFINITE NOTICE NECESSARY TO PUT PARTY IN DEFAULT—RIGHT OF PURCHASER TO DELIVERY OF GOODS AND DAMAGES.

Where deliveries are delayed beyond the dates mentioned in the contract and yet the contract is treated as subsisting the legal result is that the time for delivery is extended. To make time of the essence of the contract after that extension, a reasonable notice requiring delivery is necessary before the other party can properly be put in default. While it is quite within the province of the buyer to go into the market and buy goods to supply his sub-contracts, he cannot recover the additional cost of his outside supply as damages for non-delivery while insisting on the delivery of the goods as well. If he elects to have damages, the vendor who pays may retain the goods whose non-delivery is the cause of his liability for damages.

[*Dudley Clarke* v. *Cooper Ewing*, unreported, cited in *Hartley* v. *Hymans*, [1920] 3 K.B. 475, at 495; *Bentsen* v. *Taylor Sons & Co.*, [1893] 2 Q.B. 274; *Panoutsos* v. *Raymond Hadley*, [1917] 2 K.B. 473, followed. See Annotation 58 D.L.R. 188.]

APPEAL by defendants from the judgment of Latchford, J., in an action for the price of wool shipped by the plaintiffs to the defendants pursuant to orders given by the defendants and counterclaim by the defendants for damages for breach of contracts. Affirmed.

The judgment appealed from is as follows:—

"This action was commenced by a specially endorsed writ claiming from the defendants $22,550 for woollen yarn

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shipped from the plaintiffs' factory at Peterborough to the defendants at Sarnia between the 9th and 16th December, 1918. No dispute arises as to either the quality or price of the yarn shipped on and between the dates stated.

The defendants entered merely an appearance to the writ. This was set aside, and the defendants were allowed to file an affidavit of merits and appear to the writ, paying into Court at the same time $13,530, being in full for all the shipments of yarn up to and including that of the 12th December.

The defence filed sets forth that, on receipt of the invoice for the shipment of the 12th December, the defendants notified the plaintiffs that they would accept no more yarn. Notice of the cancellation was not received by the plaintiff company until the evening of the 16th December. In the meantime, on the 13th, 14th, and 16th, shipments had been made to the value of $9,020. The wool so refused was afterwards sold, by an arrangement made between the solicitors for the parties to this action, without prejudice to their respective rights.

The defendants assert that cancellation was exercised as of right, owing to the failure of the plaintiffs to fulfil the terms of the contracts existing between them and the plaintiffs, and counterclaim for $15,000 damages for breach of contract. The plaintiffs do not dispute the defendants' right to cancel the order as to shipments not made when the telegram of the 16th December was received; but say that shipments made prior to that time must be paid for.

The yarn was supplied under two orders dated the 6th October, 1917, one for 1,550 spindles and the other for 4,000 spindles; and a third order, dated 10 days later, for 4,000 spindles. The price was $9 per spindle of 6 pounds. Under the orders of the 6th October, the yarn was to be shipped "S.A.P.," meaning "as soon as possible." Shipment of the third order was to begin on completion of former orders, and to proceed at the rate of 600 spindles a week.

The orders were taken by one McClung, a sales-agent of the plaintiffs. McClung informed the defendants on the 5th October that the best the plaintiffs could do was to ship 200 to 250 spindles on the 6th and commencing on the Tuesday of the following week 200 to 300 spindles daily. This representation was made owing to some misunderstanding of a telephone conversation, and was unauthorised by the plaintiffs. In any case it was prior to the date of the orders of the 6th, which, as accepted by the plaintiffs, express no

term as to shipment beyond what may be inferred from "as soon as possible."

In the contract for 1,550 spindles, the parties appear to have intended to include 330 spindles actually shipped prior to the date of the order. An undated memorandum, in McClung's hand, produced by the defendants, states with reference to the first of the orders of the 6th October, "Complete in 9 weeks," and in reference to the second, "Complete in 16" (weeks). This would indicate that delivery was not to be of 200 or 250 spindles a day, but of about 200 to 250 spindles a week. However, shipments of about 600 spindles a week were made during October. Towards the end of the month, when the defendants were pressing for additional shipments, they were informed that they must have misunderstood McClung, as the plaintiffs promised only 600 spindles a week, and this they had been keeping up. They could, they stated, do no better and might in fact have to drop off a little, as wool was becoming more scarce every day.

In November deliveries declined to 1,620 spindles, and in December to 740.

The defendants appear to have realised that the third order could not be completed at anything like the rate of 600 spindles a week. On the 7th January they paid for the shipment made in November and for 700 other spindles delivered in December, and on the 8th wrote complaining of failure to deliver. The plaintiffs replied on the 10th January, stating that they had been obliged to turn their plant over to complete large Government contracts, and that the defendants could rely on the spinners doing the best they could.

In January but 230 spindles were delivered, and between the end of that month and August only 65 spindles.

The defendants complained again and again during the spring and summer, and were answered that wool could not be obtained. The supply was, according to Mr. Worth, controlled by some War Board in England, and was greatly restricted.

To some extent contracts with other customers of the plaintiffs were carried out; and it is undoubted, I think, that, had the defendants wished, they could at that time have treated the last contract with the plaintiffs as broken, and successfully brought an action for damages. "If," said Bigham, J., in *Millar's Karri and Jarrah Co.* v. *Weddel*

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Turner and Co. (1908), 100 L.T.R. 128, 129, "the breach is of such a kind, or takes place in such circumstances as reasonably to lead to the inference that similar breaches will be committed in relation to subsequent deliveries, the whole contract may then and there be regarded as repudiated, and may be rescinded."

Instead of so doing, the defendants chose to regard the contract as subsisting, and on the 21st September wrote urging the plaintiffs to "rush forward as quickly as possible the balance of yarn on our order." Again, on the 18th October, the defendants wrote: "We are compelled to insist that you deliver the balance of yarn we have on order." Still later, on the 7th December, when enclosing cheque for purchases up to the 23rd November, they said: "We would thank you to look into the question of the delivery of the balance of our order, as it is important that we get maximum deliveries."

Not only was there no intention on the part of the defendants of treating the contract as broken, but they evinced plainly an intention of treating it as subsisting. Any infraction of the time-limit for delivery, even if of the essence of the contract or a condition, was expressly waived. See observations of Coleridge, C.J., in *Freeth* v. *Burr* (1874), L.R. 9 C.P. 208.

The plaintiffs had at this time succeeded in obtaining wool, and in December, before the telegram cancelling the order was received, had shipped 2,500 spindles. All such shipments were made pursuant to the original order of the 16th October, 1917, and the letters of the 21st September, 18th October, and 7th December.

The defence, therefore, fails. The counterclaim also fails. There will be judgment for the plaintiffs for the $13,530 in Court with accrued interest, and for $9,020 and interest from the date of the writ, the 24th March, 1920, with costs. The counterclaim is dismissed with costs."

A. Weir, for appellants.

R. C. H. Cassels and *J. E. L. Goodwill*, for respondents.

The judgment of the Court was delivered by

HODGINS, J.A.:—Appeal from the judgment of Mr. Justice Latchford delivered on the 5th June, 1920, by which the appellants were ordered to pay the sum of $9,561.20, in

addition to the moneys paid into Court by them, while their counterclaim for damages was dismissed.

The action was for the price of wool yarn under three written orders, and the counterclaim was for damages alleged to have been suffered by the appellants by reason of the non-delivery of part of this yarn in accordance with the contracts.

The facts are not difficult nor complicated, and are very fully set out in the judgment appealed from.

The argument in the Court of Appeal turned particularly upon two questions: (1) whether the respondents were justified in shipping on the 12th, 13th, 14th, and 16th December, 1918, more wool yarn than at the rate of 600 spindles weekly, namely, 6,000 lbs. or 1,000 spindles, after having on the 12th December sent forward 9,000 lbs. or 1,500 spindles; and (2) whether the appellants were justified in buying, during October and November, 1918, against the last contract, and charging the respondents with the cost over and above the contract-price, for the reason that small shipments or none at all were then being made to them.

The contracts were three in number, two of them being dated on the 6th October, 1917, and one on the 16th October, 1917, and were for 4,000 spindles of gray yarn, 1.550 spindles of gray and khaki yarn, and 4,000 spindles of gray yarn respectively. Under the two earlier cantracts the yarn was to be shipped "as soon as possible," that being the meaning of the letters "S. A. P." used therein. In the last contract the words are, "shipments 600 spindles per week, commencing immediately on completion of former orders for 1,550 and 4,000 spindles."

Attached to each of the contracts is a typewritten memorandum shewing the deliveries under it, and it may be convenient to shew the shipments that took place:—

Oct.	1917	12,720	lbs.	2,120	spindles
Nov.	"	9,750	"	1,625	"
Dec.	"	4,440	"	740	"
Jan.	1918	1,380	"	230	"
Feb., March, and April, none.					
May		240	"	40	"
June, none.					
July		150	"	25	"
Aug.	"	1,740	"	290	"
Sept.	"	1,500	"	250	"
Oct.	"	1,800	"	300	"

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Nov. "	2,700	"	450	"
Dec. 12	6,000	"	1,000	"
Dec. 12 "	3,000	"	500	"
Dec. 13 "	4,500	"	750	"
Dec. 14 & 16	1,500	"	250	"

This record shews that deliveries under the two earlier contracts were in fact finished by the 18th September, 1918. Objection was taken to the words "as soon as possible" being construed without reference to the memorandum made on a small piece of paper by McClung, the respondents' salesman, before the contracts were entered into. This memorandum provides for 160 spindles at once and from 200 to 250 spindles daily thereafter. I do not think this memorandum can control the actual words, or rather initials, in the contract, which provide for delivery. It was an estimate only, gathered by McClung in a telephone message to the respondents, after he had made provisional contracts subject to confirmation by his company. The respondents, on being apprised immediately after confirming the orders of what it was alleged McClung had arranged, disavowed it, stating that he must have misunderstood them over the telephone. The confirmation by the respondent company was not on the terms of the memorandum I have mentioned, and as they, and not McClung, were the ultimate authority, I think the contracts must be read as they are, and the figures antecedently jotted down by McClung taken as a mere expression of hope and expectation. These figures, if effective, must be an addition to the written contracts as controlling the other words therein and requiring definite deliveries instead of allowing them to be made as soon as possible. They were, at best, part of the inducement for the contracts, and as the appellants did not repudiate them, but continued to treat them as subsisting, urging greater speed in delivery, they cannot now complain. Deliveries having been completed, the point loses much of its importance.

Apart from that contention, a further objection was made that the respondents, after the making of the contracts in question, entered into others, one with the Murray-Kay Company Limited, and one with the T. Eaton Company Limited, dated respectively 20/3 October, 1917, and 22nd October, 1917, and supplied these two firms with similar yarn during the time they should have been delivering in larger quantities to the appellants.

The argument founded upon this is that the respondents did not in fact deliver "as soon as possible," as they might have diverted to the appellants the shipments which were sent to these companies. I do not think that, under the circumstances, that can be a factor in determining whether the respondents delivered as soon as possible. A commercial house, dealing in a commodity which it has to purchase wherever it can be got, and distributing it by means of various contracts, is not, I think, obliged, after making a contract providing for instalment deliveries, to refrain from making any other contract, or from delivering anything under other contracts, until it has completed the one first made. Business could not be carried on under such conditions, and it would be unreasonable to expect the respondents to suspend their dealings altogether with the outside world until they had finally delivered everything contracted for with the appellants. It is fair to conclude that neither party contemplated that the respondents were to put aside or refrain from entering into any other engagements in order that the appellants' contracts should be performed.

The agreements with these two companies were produced and the deliveries under them proved. On examination it is evident that the respondents dealt fairly with all three parties to their contracts, and, when not delivering or delivering in smaller quantities to the appellants, were treating these two concerns in very much the same way. Nor can the fact be disregarded that the War Board did control the wool business in Canada, and this, I think, must be taken to have been known to the appellants as well as the respondents. Both were very actively engaged in the wool market. Military exigencies were paramount at the time; and, although the appellants were reselling to the American Red Cross Society, the deliveries to the two firms of whom mention has been made were, no doubt, used to supply in Canada yarn for military or Red Cross purposes; so that there seems to be no reason to assume that the respondents were doing anything more than endeavouring to make a reasonably fair distribution, having regard to war exigencies, among all their customers, of the yarn they were able to get from time to time.

"As soon as possible" must, I think, have reference to the conditions of the trade generally, and also to the particular conditions affecting the respondents, due to the action of the War Commission, their ability to procure the

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yarn, and, as well, their liability to others. If it had been demonstrated that undue partiality had been shewn to these firms, I do not say that that might not have been a factor in deciding whether the goods had been supplied according to the contract, but no such thing appears here, and I am satisfied that the appellants have no cause for complaint on that score.

The authorities seem to bear out this view as to the effect of other contracts. In *Atwood* v. *Emery*, 1 C.B. N.S. 110, the same words, "as soon as possible," were used in the agreement. The Court held that they must be read as indicating that delivery was subject to the facilities of the manufacturer, the extent of his business, and to the contracts then on hand. In *Hydraulic Engineering Co.* v. *McHaffie* (1878), 4 Q.B.D. 670, while the *Atwood* case is criticised by Bramwell, L.J., nothing is said to indicate disapproval of the consideration of other contracts as matters legitimately affecting the possibility of early delivery. In *Tennants (Lancashire) Limited* v. *C. S. Wilson & Co. Limited*, [1917] A.C. 495, in construing an exception which dealt with the "hindering" of the vendors in the execution of their contract, a point was made that, if they had ignored the other contracts already on hand, they could have delivered under that of the plaintiffs. The Court was of the opinion that "hindering" applied not to the mere delivery to one purchaser amongst many of the quantity purchased by him, but delivery under the normal engagements of the vendor's trade to the whole body of the customers to whom they were bound to deliver in the year 1914. Lord Shaw of Dunfermline expresses himself as follows (pp. 522, 523):—

"What remains in the case is the argument that, by rigidly confining their entire or almost their entire business to the particular contract with the respondents, it would have been possible for the appellants to deliver. After full consideration I cannot see my way to limit and restrict on the grounds stated the right of the merchant to appeal to the condition. The condition appears to me to be one applicable to a hindrance in the delivery of an article of trade in the ordinary and usual course of trade in such an article. A mere fluctuation of price would not constitute such a hindrance; but in the present case the actual article itself is prevented or hindered from coming into the British market. It does not seem to me to make the condition unavailable to the merchant that he could have avoided the

situation by interrupting his whole course of trade and concentrating his business on one order. With much respect to the majority of the Court of Appeal, I do not feel myself free so to construe a commercial contract."

It is true that in all these cases the contracts dealt with were antecedent to the making of the contract sued on in each particular instance. Here they were taken practically at the same time as the appellants' contracts, and while in point of fact a day or so later in date they may fairly be considered as establishing a very similar situation to that which would have arisen had they been entered into prior to the 6th and 16th October, 1917. The supervening of the War Board control was subsequent to all these contracts, and so the stringency as to yarn affected them all equally and at the same time. It is, therefore, not necessary to consider what would be the result if they had been taken on after the shortage had become apparent and the War Board had issued its instructions.

With regard to the performance of the two earlier contracts, it appears that about January, 1918, the Government Wool Commission of the War Board, who controlled the distribution of wool yarn, insisted upon priority being given to military orders. This very much hampered deliveries, and, during the months of February, March, April, and June, 1918, prevented the respondents from shipping any yarn to the appellants, and from January onward reduced the shipments down to a very small point. Notwithstanding this, correspondence went on, the appellants urging shipments and the respondents making some, as shewn in the table of deliveries.

I think the proper conclusion from the evidence is that the appellants were well aware of the conditions in the wool trade, that the supply was entirely controlled by the War Trade Board, and that they continued to urge shipments not expecting or believing that they could be made with any regularity or of any definite number of spindles, but hoping that the contracts would ultimately be carried out, they on their part endeavouring to get their customers to accept what they could get. The situation was similar to that mentioned in a late English case regarding a contract for cotton yarn:—

"I am satisfied that the failure of the plaintiff to deliver was not due to any neglect on his part. It arose through the difficulties of the times which affected both his sub-contractors and himself, and it was due to no small extent to

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the existence and operations of the Cotton Control Board:" per McCardie, J., in *Hartley* v. *Hymans*, [1920] 3 K.B. 475, at p. 481.

It is to be noted that the appellants paid with reasonable promptitude for what yarn they got during the entire period, and in their letter of the 7th December, 1918, apologised for their delay in settling for the October purchases.

Mr. Gordon Geddes in his evidence stated that it was not till after the receipt of the circular in October, 1918, sent to the respondents' customers, announcing that preference to khaki yarn had been ordered by the War Board, that they gave up hope of getting the contracts carried out. The appellants did not, however, on that account refrain from insisting that the contracts must be completed, and the correspondence then ensuing shews very clearly what their position was. It must be borne in mind that the two earlier contracts had then been completed, and that the third contract, providing for 600 spindles weekly, was the only one under which deliveries could be claimed. In September, 1918, the respondents delivered on this contract about 160 spindles, so that they were, on the 18th October, short by about 2,000 spindles.

In the same month the appellants took a large contract to supply the American Red Cross Society.

Mr. Gordon Geddes in his evidence said that he counted on the yarn purchased from the respondents when he took this order in September. It was for 35,000 lbs. of the same quality of yarn. He bases his refusal of the balance of the yarn on the fact that he had then finished the Red Cross order, having used the yarn shipped by the respondents on the 9th, 10th, 11th, and 12th December, about 9,000 pounds, to complete that order. He says he had done everything he could in October and November to get yarn to fill his contract, and it was this urgency that prompted the correspondence with the respondents as to future deliveries.

On the 18th October, 1918, the appellants wrote:—

"We are compelled to insist that you deliver the balance of yarn we have on order as per your recent promise. All this yarn is sold and we are under contract to deliver it and must do so."

This letter evidently refers to a promise made in Peterborough by Mr. Worth which Gordon Geddes repeats thus, "He would do the best he could to get us yarn," but it is not

suggested that there was then any reference to specific deliveries per day or per week.

On the 7th December, after about 600 spindles more had been delivered, making in all about 850 spindles or some 5,000 pounds, under the third contract, the appellants wrote again:—

"We would thank you to look into the question of the delivery of the balance of our order, as it is important that we get maximum deliveries, as there is great danger that we will have these orders cancelled. We have this yarn all sold, and if we receive the cancellation on account of non-delivery we would expect to be recompensed by you for the loss of profit on said balance."

This letter was after the appellants had purchased yarn in the market, but without the knowledge of the respondents.

"On the 9th December, 1918, the respondents wrote:—

"We are in a position to complete your order No. 1 domestic yarn within the next few days and shall be pleased to hear if you are prepared to receive the total amount."

On the 11th December, they again wrote as follows:—

"We wrote you a few days ago asking you if you were able to accept all your contract without delay and your letter received this morning informs us that you can take it."

This evidently refers to the letter of the 7th December, which, according to the evidence, was received by the respondents on the morning of the 11th December. Their letter of that date then proceeds: "Large shipments are coming forward to-day and we will complete your contract without delay." In answer to that the appellants telegraphed on the 16th: "Make no further shipments to our order until we advise you further."

Apparently this was because, having received the 9,000 lbs. sent on the 12th December, and used it to complete the American Red Cross order, their urgency ceased.

On the 20th December they wrote: "This is further to advise you that we cannot accept any further shipments from you under our order for 59,820 lbs. of yarn."

They also added that they had sustained a loss because of the respondents' failure to deliver this yarn, and that they would expect them to make this good.

In the meantime, and before the receipt of the telegram, the shipments in question, for the price of which judgment has been given, had already been made. I think it is im-

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possible to come to any other conclusion than that at which the learned trial Judge arrived, namely, that the correspondence referred to the entire balance due on the unfilled contract, and that the appellants were insisting upon it being delivered, and delivered at once, though perhaps hardly expecting that this would actually happen. I do not think it can be read as meaning that the appellants were only prepared to take it in instalments of 600 spindles a week.

The counterclaim of the appellants for damages is based upon the allegation that the appellants bought after the 11th October, 1918, and between that and the 15th November, 8,206 lbs. of wool, paying therefor in excess of the contract price $6,403.20, which they claim as damages.

In support of that claim they point to the fact that the respondents were supplying the Murray-Kay Company and the T. Eaton Company Limited with yarn during the pendency of their contracts, and they contend that that was a wrongful diversion of yarn which should have come to them. It is not suggested that they knew that, or that they bought in consequence of that, or that the respondents deliberately abstained on that account from sending the appellants the yarn to which they were entitled. I have already dealt with this phase of the subject, which I think affords no support to the claim for damages.

The appellants admit that they did not notify the respondents that they were going to buy against the contract after the 11th October, 1918; but, on the contrary, in their correspondence they urged in the strongest possible way immediate delivery to supply their own forward contracts.

The foundation for the claim for damages, which affects only the latest contract, seems to be lacking in two respects:—

(1) The contract was not repudiated in whole or in part, but was treated as a still subsisting contract which the appellants were insisting upon having completed, and they did not at any time notify the respondents that they regarded the contract as repudiated in whole or in part, and that they were therefore intending to buy against it.

(2) The appellants could not buy against the contract and claim damages for non-delivery, and at the same time require delivery of the shipments which they had otherwise procured. This would give them both damages and delivery. While it is quite within the province of the buyer to go into the market and buy goods to supply his sub-contracts, and while he can still press for the delivery of

goods under contract which when delivered will have for him a certain value, he cannot recover the additional cost of his outside supply as damages for non-delivery, while insisting on the delivery of the goods as well. He must take his position, and if he elects to have damages then the vendor who pays may retain the goods whose non-delivery is the cause of his liability for damages.

Where, as here, deliveries are delayed beyond the dates mentioned in the contract, and yet the contract is treated as subsisting, if the purchaser desires to have damages, instead of the delivery of the goods, he must take care to make his position clear. The legal result of treating the contract as still enforceable is that the time for delivery is extended. To make time of the essence of the contract after that extension, a reasonable notice requiring delivery is necessary before the other party can properly be put in default: *Dudley Clarke & Hall* v. *Cooper Ewing & Co.* (unreported), cited in *Hartley* v. *Hymans*, [1920] 3 K.B. 475, at p. 495; *Bentsen* v. *Taylor Sons & Co.*, [1893] 2 Q.B. 274, 283; *Panoutsos* v. *Raymond Hadley Corporation of New York*, [1917] 2 K.B. 473. Such notice was not given, and it is a fair conclusion from the evidence to say that the appellants, while pressing vigorously as late as the 7th December for the balance of the orders, did not expect that the respondents would be able to comply. Hence they bought part elsewhere and were glad to use the 9,000 lbs. from the respondents to complete. I have no doubt they intended to cancel immediately the Red Cross contract was filled, but the vendors responded too quickly to the pressure exerted, to permit this to be done in time.

Appeal dismissed with costs.

PAUL v. PAUL.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins and Ferguson, JJ.A. April 1, 1921.

COVENANTS AND CONDITIONS (§IID—23)—CONVEYANCE BY FATHER OF FARM TO SON—PROVISOS AS TO PAYMENT OF DEBTS AND MAINTENANCE OF FATHER BY SON—PROVISOS ALSO AGAINST MORTGAGING OR SELLING—AGREEMENT FOR SALE OF FARM ON DEATH OF FATHER—FATHER KNOWING OF AND BENEFITING BY AGREEMENT—ACTION FOR DECLARATION THAT CONVEYANCE AND AGREEMENT NULL AND VOID.

By deed made in pursuance of the Short Forms of Conveyances Act R.S.O. 1914, ch. 115 the plaintiff conveyed his farm to his son the consideration being the sum of one dollar. The conveyance contained provisos that the son should keep his father

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and his father's wife upon the farm during their lives and provide for them certain specific things with a substituted allowance in the event of disagreement. It was provided also that the son should not sell or mortgage the premises without the consent of the father and his wife. The son subsequently entered into an agreement for the sale of the farm on the death of the plaintiff and on the conditions therein mentioned. In an action by the father to obtain a declaration that the deed to the son was null and void and the rights of the son under it forfeited, and also that the agreement made for the sale of the farm by the son was null and void and that its registration should be vacated, the trial Judge held the plaintiff knew of and benefited by the agreement and that the transaction was neither a sale nor a mortgage of the land. The Court held on appeal that the action also failed because the provision against selling or mortgaging was not, in effect, a condition upon which the conveyance was to become void, but was only a covenant for breach of which the only remedy open to the plaintiff was an action for damages. Held also that the provision against alienation being in form absolute but being against alienation without the written consent of the plaintiff and his wife was necessarily limited to the duration of their lives.

[*Blackburn* v. *McCallum* (1903) 33 Can. S.C.R. 65; *Hutt* v. *Hutt* (1911), 24 O.L.R. 574, referred to.]

APPEAL by the plaintiff from the judgment of Latchford, J., at the trial, dismissing an action brought to obtain a declaration that a deed of the plaintiff's farm executed by him in favour of his son, the defendant Dolphice Paul, was null and void and the rights of the son under it forfeited, and that a certain agreement made by the son with the defendant Morin was also null and void, and that its registration should be vacated.

The conveyance to the son was executed in 1917, by a deed made in pursuance of the Short Forms of Conveyances Act. The grant was in fee simple, and the consideration stated was $1 and "provisoes hereinafter stipulated and shall pay all the old debts." The "provisoes" were that the son should keep his father and his father's wife upon the farm during their lives and provide for them certain specified things, with a substituted allowance in the event of disagreement. It was also stipulated that the son should not sell or mortgage the premises without the consent of the father and his wife.

In February, 1920, the defendant Dolphice Paul entered into an agreement with the defendant Morin for the sale of the farm to Morin on the death of the plaintiff and on the conditions mentioned in the agreement, in consideration of the payment by Morin of $1,300.

The trial Judge found that the plaintiff knew of and benefited by the agreement with Morin, and that the transaction with Morin was neither a sale nor a mortgage of the land.

J. U. Vincent, K.C., for appellant.

G. M. Huycke, for respondent.

MEREDITH, C.J.O.:—This is an appeal by the plaintiff from the judgment dated the 21st October, 1920, which was directed to be entered by Latchford, J., at the trial before him, sitting without a jury, at Ottawa, on that day.

The appellant was the owner of a farm in the township of Clarence, consisting of part of lot number 23 in the 4th concession.

On the 12th November, 1917, he conveyed this farm, with certain chattels, to his son, the defendant Dolphice Paul.

The conveyance is made in pursuance of the Short Forms of Conveyances Act; the grant is in fee simple; and the consideration stated is one dollar and "provisoes hereinafter stipulated and shall pay all the old debts."

After the granting part, there follows:—

"Provisoes. The said grantee mutually agrees and covenants with the said grantor and his wife that he the said grantee shall keep the said grantor and his wife during their lifetime and shall provide them with the house which they now reside in and shall provide them with good food good clothing and good stove wood ready cut and split and delivered at their request. And also a seat in the church and the doctor in case of sickness and also their funeral expenses and shall also provide them with a good milk cow the whole year around and shall provide them with good horses vehicles and harness at their request. Then in case of disagreement between the said parties instead of giving the above pension he shall pay the said grantor and his wife a yearly pension of $200 a year . . and provide them with stove wood ready cut and split and delivered at their request and the house which they now reside and also the said grantee shall not remove his brother Onesime from the house which he now reside but his said brother shall be at liberty to live in the said house as long as he is willing to leave (sic) and he shall be at liberty to remove the said house at any time without any obligation from the said grantee but shall have no right to the piece of land after."

After the foregoing, there follows a provision that "the said grantee shall not sell or mortgage the said chattel or premises without the writing consent of the said grantor and his wife," and other provisions which it is not necessary to mention, and after these there follow the habendum and covenants in the statutory form.

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On the 5th February, 1920, Dolphice Paul entered into an agreement with the respondent. This agreement recites that Dolphice Paul is the owner of the lands in question, subject to certain conditions and provisoes mentioned in the conveyance of the 12th November, 1917; that disagreements had arisen between him and the appellant, which culminated in an action being brought against him by the appellant, and that a consent judgment was pronounced in the action, by which it was adjudged that Dolphice Paul should pay to the appellant $150 per annum during his lifetime and should make certain other provisions for him, and that Dolphice Paul was unable at present to meet all the conditions mentioned in the judgment; and the agreement is that, in consideration of $1,300, the receipt of which is acknowledged, Dolphice is to sell to the respondent, at the death of the appellant and on the condition mentioned in the agreement, the lands in question with all the agricultural implements, all the stock and horses, and all other machinery then used in the working of the farm and then on it; that Dolphice Paul shall fulfil all the conditions mentioned in the deed to him and the conditions of the judgment; pay interest on the $1,300 at 7 per cent. half-yearly until the principal sum is repaid or until 6 months after the death of the appellant. Dolphice is to be at liberty, at any time before the death of the appellant or within 6 months after it, to repay the $1,300, if he is not in arrears in the payment of interest or in the performance of the conditions of the deed to him and of the judgment; that, if default occurs either in payment of the interest or in performing the conditions of the deed or of the judgment, Dolphice is to lose all his rights to repay the $1,300, and shall at the death of the appellant execute a conveyance in fee simple of the lands to the respondent, and the respondent shall also have the right to take possession of the lands.

The agreement also provides that upon the execution of the conveyance to the respondent he shall, subject to certain conditions, pay to Dolphice Paul $500.

On the 22nd March, 1920, Dolphice Paul executed a conveyance of the lands to the appellant, in consideration of the release of the obligations undertaken by the deed of the 12th November, 1917, and the appellant's agreeing to pay to the respondent $200 on account of the debt of $1,300 due by Dolphice Paul to the respondent.

The action is brought to have the deed of the 12th November, 1917, declared null and void, and to have it declared

that the rights of Dolphice Paul under it are forfeited, and to have the agreement with the respondent also declared null and void and its registration vacated.

The action is based upon the proposition that the transaction with the respondent was in effect a sale of the lands in question to him; and that, the sale to him having been made without the consent in writing of the appellant and his wife, the rights of Dolphice Paul and of those claiming under him have, by force of the provision against a sale or mortgage without that consent, come to an end.

My brother Latchford found that the appellant knew of the agreement with the respondent before or at all events shortly after it was entered into, and benefited by it, and that $810.05 of the money which the respondent lent went in payment of the appellant's liabilities and of liabilities of his common with his son; and the learned Judge determined that the transaction with the respondent was neither a sale nor a mortgage of the land, and therefore not a breach of the covenant against selling or mortgaging.

In my opinion, the case of the appellant fails on other grounds also.

The provision against selling or mortgaging is not in form or in effect a condition upon which the conveyance was to become void; it is only a covenant for breach of which the only remedy open to the appellant is an action for the recovery of the damages, if any, occasioned to him by the breach.

If it were a condition, we should be bound to hold that it is void. After much difference of judicial opinion both in this Province and in England, it has been settled, as far as this Province is concerned, by authority binding on us, that a restriction upon alienation, though limited to the life of a third person, is invalid. That was the decision of the Supreme Court of Canada in *Blackburn* v. *McCallum*, 33 Can. S.C.R. 65, and it was held by the Court of Appeal in *Hutt* v. *Hutt* (1911), 24 O.L.R. 574, that *Earls* v. *McAlpine*, 6 A.R. 145, in which the contrary was held, must be deemed since the decision of the Supreme Court to be no longer a binding authority.

The provision against alienation in the case at bar is in form absolute, but, being against alienation without the written consent of the appellant and his wife, it is, in my opinion, necessarily limited to the duration of their lives.

The finding of the trial Judge as to the amount of the money borrowed from the respondent which was expended

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for the benefit of the appellant was challenged by his counsel upon the argument; but, in view of the conclusion to which I have come, it is unnecessary to deal with that question, nor is it necessary to determine whether the transaction with the respondent was either a sale or a mortgage.

The result is that the appeal fails.

Counsel for the appellant asked that, if the Court should be against him, the appellant should be allowed to redeem the respondent, and that a judgment for redemption should be pronounced. The appellant is now the owner of the equity of redemption and is entitled to redeem, and it would serve no good purpose to leave him to bring a new action for the relief to which he is entitled. I understood counsel to assent to such a judgment being awarded; and there will therefore be judgment for redemption, in the usual form, with a reference to the proper Local Master.

The judgment of my brother Latchford will be affirmed, and the appellant must pay the costs of the action down to and including the order of this Court and the costs of the appeal.

MACLAREN, HODGINS, and FERGUSON, JJ.A., agreed with MEREDITH, C.J.O.

MAGEE, J.A., agreed in the result.

Appeal dismissed.

FREEAR v. GILDERS.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren Magee, Hodgins and Ferguson, JJ.A. April 1, 1921.

CONTRACTS (§VC—403)—CONTRACT TO PURCHASE LAND CONTAINING 14 OR 15 ACRES—PURPOSE FOR WHICH LAND TO BE USED MADE KNOWN TO VENDOR—LAND SOLD CONTAINING NOT MORE THAN 9 ACRES—LAND USELESS FOR PURPOSE INTENDED—ABSENCE OF FRAUD—RESCISSION.

The general rule is that in the absence of fraud there cannot be rescission of a contract after the formal instrument of transfer has been executed or the formal delivery of a chattel has taken place, but there is an exception to this rule where there is a difference in substance between the thing bargained for and that obtained.

Where a purchaser bargained for a parcel of land containing at least 14 or 15 acres and made known to the vendor the purpose for which the land was to be used, and that less than that would not be sufficient for his purpose, and the vendor sold him a parcel containing not more than 9 acres the Court held that what the purchaser had obtained was something substantially different from that which he contracted to buy and that he was entitled to rescission of the contract although there was no fraud on the part of the vendor.

[*Kinsman* v. *Kinsman* (1912), 5 D.L.R. 871, 3 O.W.N. 966; *Armstrong* v. *Jackson*, [1917] 2 K.B. 822; *Seddon* v. *North Eastern Salt Co.*, [1905] 1 Ch. 326; *Lecky* v. *Walter*, [1914] 1 I.R. 378, applied.]

THE following statement is taken from the judgment of MEREDITH, C.J.O.:—

This is an appeal by the defendant from the judgment, dated the 11th November, 1920, which was directed to be entered by the Chief Justice of the Common Pleas, after the trial before him, sitting without a jury at Cobourg, on that day.

The appellant was the owner of part of lot number 14 in the 8th concession of the township of Darlington, and on the 7th February, 1920, she sold and conveyed it to the respondent for $1,950, $1,000 of which he paid in cash, and for the balance he gave the appellant a mortgage on the land.

The land is described in the conveyance as containing 14 acres more or less, but it actually contains only about 9 acres, and the action is brought for the rescission of the transaction, on the ground that in purchasing the respondent relied upon a representation made by the appellant that the parcel contained 14 acres, and that that representation was untrue.

The learned trial Judge found that the appellant represented to the respondent that the parcel she was selling contained 15 acres; that in purchasing the respondent relied on that representation, and that in the negotiations the appellant was informed by the respondent that less than 14 or 15 acres would not be suitable for the business he intended to carry on upon the land; and that the area of the parcel conveyed was but 8 or 9 acres; and judgment was directed to be entered for the rescission of the transaction and the repayment to the respondent of the $1,000 which he had paid, less $120 which the learned trial Judge allowed as rent up to the 1st April then next, when the respondent was to give up possession, after deducting interest on the $1,000 to the same date.

D. B. Simpson, K.C., for respondent.

MEREDITH, C.J.O. (after stating the facts as above):—

The findings of the learned trial Judge are, in my opinion, supported by the evidence. In addition to other evidence of the representation alleged to have been made, there was the fact that the appellant advertised the land for

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sale, describing it as containing 15 acres, and that her advertisement came to the knowledge of the respondent and led him to enter into the negotiations which resulted in his purchasing.

In my opinion, the advertisement was a representation to the respondent when he became aware of it: the fact that the respondent did not see the advertisement but was told of it by a friend is unimportant. It was intended to be acted on by any one who might have in mind to purchase such a property as was described in it, and, it having come to the knowledge of the respondent, he acted upon it.

It was argued by counsel for the appellant that the respondent had gone over the property before buying it and knew or had the means of knowing that it did not contain either 14 or 15 acres. There is no evidence that the respondent knew this; and that he had the means of knowing it is no answer, because he was entitled to rely on the representation that the appellant had made to him.

The difficulty in the case arises from the fact that the contract between the parties is no longer executory. The representation having been made, as the trial Judge has found, in the honest belief that it was true, and the contract having been executed, the appellant contends that it cannot be rescinded and that the respondent must rely on his conveyance and the covenants which it contains.

It should not be necessary to refer to authorities for the proposition that the general rule is that, in the absence of fraud, there cannot be rescission of a contract after the formal instrument of transfer has been executed or the formal delivery of a chattel has taken place. The authorities for the rule are collected in *Kinsman* v. *Kinsman* (1912), 3 O.W.N. 966, 5 D.L.R. 871, 873, and in *Armstrong* v. *Jackson*, [1917] 2 K.B. 822, 825.

There is however an exception to this general rule where there is a difference in substance betweeen the thing bargained for and that obtained. In such a case, although the misrepresentation was innocent, there may be rescission after the contract has been executed: *Seddon* v. *North Eastern Salt Co. Limited*, [1905] 1 Ch. 326, in which Joyce, J. (p. 333), quoted what was said to that effect by Blackburn, J., in *Kennedy* v. *Panama New Zealand and Australian Royal Mail Co.* (1867), L.R. 2 Q.B. 580, 587. These observations were quoted with approval by O'Connor, M.R., *in Lecky* v. *Walter*, [1914] 1 I.R. 378, 386; and at p. 387 he gives as an instance in which this doctrine should be applied,

the case of a contract to purchase mortgage debentures of a public company, where the buyer "takes delivery of what he believes to be such, but what he afterwards discovers to be ordinary shares."

The case at bar, in my opinion, falls within this exception to the general rule. What the respondent bargained for was a parcel of land containing at least 14 or 15 acres—less than that was not sufficient for the purpose for which he intended to use the land. The appellant was informed of this and of the purpose for which the respondent intended to use the land. What he was bargaining for and what the appellant purported to sell to him was a parcel of land containing at least 14 acres—a parcel of that size was adequate for carrying on that business and a parcel of 9 acres was not. What the respondent has got is therefore, I think, something substantially different from that which he contracted to buy. It would have been different if the representation had been only that the business which he intended to carry on could be carried on on the land.

I would, for these reasons, affirm the judgment and dismiss the appeal with costs.

It is difficult to understand why this litigation had taken place if, as a witness (Tole) called on behalf of the appellant testified, the land conveyed to the respondent can be sold for $2,500.

MACLAREN, J.A., agreed with the Chief Justice.

MAGEE, J.A.:—I agree that in the circumstances of this case there was such misrepresentation, perhaps thoughtless, as to entitle the plaintiff to rescission, and that the appeal should be dismissed.

HODGINS, J.A.:—I agree with the judgment of my Lord the Chief Justice, with some hesitation. The difference in substance alleged as between the thing contracted for and that which was in fact conveyed is not in the mere shortage in acreage, but the fact that the smaller area is insufficient for the operation of the business proposed to be carried on upon it. It is undoubted that the purpose for which the property was bought was a fundamental element in the bargain and not a mere intention or prospect. This was known to the respondent.

That being so, there is ground for the application of the principle enunciated by Lord Blackburn in *Kennedy* v. *Panama New Zealand and Australian Royal Mail Co.*, L.R. 2

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Q.B. 580, at p. 587, and approved in *Seddon* v. *North Eastern Salt Co. Limited*, [1905] 1 Ch. 326, referred to in the judgment of my Lord.

That it may be applied as between vendor and purchaser appears from the case of *Lee* v. *Rayson*, [1917] 1 Ch. 613, where the essential difference arose in connection with the rights of the freeholder as affected by the way in which the rents were in fact payable.

There is a reasonable and relevant doctrine, which Lord Eldon, as long ago as 1817, in *Knatchbull* v. *Grueber*, 3 Mer. 124, 146, thought the Courts were gradually approaching, namely, that "a purchaser shall have that which he contracted for, or not be compelled to take that which he did not mean to have."

My hesitation arises from two things: one is, that a view different from that of the trial Judge might fairly have been reached; and the other, that there is always danger in departing from the well-established rule appealed to by counsel for the appellant as to contracts executed by the delivery of a conveyance.

FERGUSON, J.A.:—I have had the advantage of perusing and considering the opinion of my Lord the Chief Justice. The authorities bearing on the questions of law raised in this appeal, other than *Kinsman* v. *Kinsman*, 3 O.W.N. 966, 5 D.L.R. 871, and *Armstrong* v. *Jackson*, [1917] 2 K.B. 822, were collected and considered by the British Columbia Court of Appeal in *Alberta North West Lumber Co. Limited* v. *Lewis* (1917), 38 D.L.R. 228, 24 B.C.R. 564, and *Foulger* v. *Lewis* (1917), 24 B.C.R. 556.

I have carefully considered all these authorities, and am of the opinion that where it is sought to rescind an executed contract on the ground of innocent misrepresentation, it is not sufficient to establish merely a difference in substance between what was supposed to be sold under the contract and what was in fact conveyed, but it must also be established that the representation amounted to more than a matter of inducement, and was in fact a matter of contract amounting to a vital condition on the breach of which the Court can say there is such a difference in substance between the thing contracted for and the thing conveyed that there has been a failure of consideration, rather than that there has been a failure of a representation which tended to induce the contract or a breach of a term amounting to a warranty entitling the aggrieved party to compensation

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and damages: *Behn* v. *Burness* (1863), 3 B. & S. 751. See *Kennedy* v. *Panama New Zealand and Australian Royal Mail Co.*, L.R. 2 Q.B. 580; Kerr on Fraud and Mistake, 5th ed., p. 408.

Had I been the trial Judge, I do not think I should have found either that the misrepresentation was a matter of contract or that the 9 acres conveyed could not be used as a chicken-farm, and was therefore of no value to the plaintiff; but there is room for difference as to what was the proper meaning and effect of the evidence; and, before undertaking to reverse the judgment in the Court below, it seems to me I ought to be satisfied that the trial Judge was clearly wrong.

The majority of the Court have taken the trial Judge's view as to the meaning and effect of the evidence; and, under these circumstances, I am in doubt, and doubting agree to the dismissal of the appeal.

Appeal dismissed.

HURST v. DOWNARD.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins and Ferguson, JJ.A. March 4, 1921.

INTEREST (§IA—1)—CONTRACT TO BUILD HOUSE—AGREEMENT TO PAY CONTRACTOR 50 PER CENT. OF FIRST MORTGAGE—DEFAULT—INTEREST —ON SUM WHICH SHOULD HAVE BEEN PAID.

An owner, entered into a contract with a building contractor to build a house for $3,375, and one of the terms was "the owner to pay the contractor 50 per cent. of first mortgage loan when the roof is on." When the work had reached the stage entitling the contractor to his first payment, the owner had gone overseas and the payment was not made, the contractor abandoned further work on the building which has stood since then uncompleted. The Court held that as what the contractor was entitled to be paid was one half of the amount to be borrowed on mortgage, that he was entitled to the interest on that amount from the time of default.

[*McCullough* v. *Clemow* (1895), 26 O.R. 467, applied.]

APPEAL by the defendant, Edward Downard, the owner, from that part of the judgment of the Assistant Master in Ordinary, in an action to enforce a mechanic's lien, which found the defendant Wood, the contractor, entitled against the appellant to $2,117.03, of which $458 was for interest on $1,658.50 since the 14th August, 1914.

W. Proudfoot, K.C. and *W. Proudfoot, jun.*, for appellant.

A. A. Macdonald, for respondent.

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MEREDITH, C.J.O.:—The only question remaining to be determined is as to the right of the respondent to interest and if entitled whether it should be on the value of the work done or on the amount which the respondent was entitled to receive if a loan on mortgage had been obtained, which was 50 per cent. of the amount borrowed.

I am of opinion that it is only upon the latter sum that interest should be allowed. It is true that the appellant did not effect a loan and therefore made default which entitled the respondent to discontinue work on the building and to be paid for the work he had done, but his claim in that case would, I think, be for unliquidated damages.

Accepting as the law that where one party to a contract refuses to perform an essential term of it that party in equity is indebted for what but for the default the other party would have been entitled to receive from him, and that the sum so payable carries interest if it would have carried interest if it had become payable under the agreement, I do not think the result is what my brother Hodgins is of opinion that it is.

What the respondent was entitled to be paid was one-half of the amount to be borrowed on mortgage, and that is the sum which in equity was the respondent's interest-bearing debt.

It follows, I think, that we have to determine what amount could have been borrowed on mortgage; and, as the failure to borrow was due to the appellant not effecting the loan, I would fix as that amount the highest figure which the evidence warrants: the evidence as to this is not very satisfactory, but, according to the testimony of the respondent, $2,400 or $2,500 could have been borrowed on mortgage. I would therefore allow interest at the rate of 5 per cent. per annum on one-half of $2,500, from the 14th August, 1914, and I would vary the judgment by reducing the amount accordingly.

The appellant will pay the costs.

MACLAREN, MAGEE, and FERGUSON, JJ.A., agreed with MEREDITH, C.J.O.

HODGINS, J. A.:—Appeal by the owner of lands subject to a mechanic's lien in favour of the contractor, from so much of the report of Boyd, Assistant Master in Ordinary, as directs judgment against the appellant for $2,177.03, of which $458 is for interest on $1,658.50 since the 14th August, 1914. At the hearing the appeal was dismissed on

all the grounds argued except one, and the question to be determined is, whether interest was properly recoverable.

The Assistant Master finds that the contractor was to build a house for $3,375, and one of the terms of the contract was, "The owner to pay the contractor 50 per cent. of first mortgage loan when the roof is on." After that 25 per cent. was to be paid when the plastering was done, exclusive of the back-stairs, and the balance was to be secured by second mortgage.

On the 14th August, 1914, the work had reached the stage at which the contractor became entitled to his first payment, but payment was not made. The owner had gone overseas, and the building has stood since then uncompleted. The contractor was fully justified, under the circumstances, in abandoning further work on the building. He filed a lien, on the 14th January, 1915, claiming $3,375 (the contract price) for work done or to be done, admitting that only part was completed. The Assistant Master has, on the evidence adduced, ascertained the amount due to the contractor on the 14th August, 1914, to be as follows:—

Value of work done	$1,761.50
For survey	8.00
Total	$1,769.50
From this total the Assistant Master deducts for omissions and defects	111.00
Leaving due	$1,658.50

The law as to interest in this Province has been indicated in *Toronto R.W.Co.* v. *Toronto Corporation*, [1906] A.C. 117, after reviewing the Ontario cases, in these words (p. 121): "The result, therefore, seems to be that in all cases where, in the opinion of the Court, the payment of a just debt has been improperly withheld, and it seems to be fair and equitable that the party in default should make compensation by the payment of interest, it is incumbent to allow interest for such time and at such rate as the Court may think right."

On examining the cases on which that opinion is founded, the most instructive is that of *McCullough* v. *Clemow* (1895), 26 O.R. 467. Mr. Justice Osler discusses the statutory provisions, and, while he is decidedly of the opinion that the claim could not be treated as a sum certain or one

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ascertainable by mere computation, yet he would have given it as a jury if the failure of the accountant to make the monthly computations which would have ascertained the claim from time to time had been "attributable to the misconduct, delay, or default of the defendant" (p. 477).

In *London Chatham and Dover R.W.Co.* v. *South Eastern R. W. Co.*, [1892] 1 Ch. 120, the Court of Appeal laid down the principle that, as a person is not allowed to derive any advantage from his own wrongdoing, the first thing is to ascertain what would have been payable under the agreement if the defendants had not wrongfully prevented anything from becoming due, in which case the amount would be treated as a debt in equity, though not in law; and, secondly, whether the sum so payable would have carried interest if it had become payable under the agreement. In the House of Lords the decision of the Court of Appeal was affirmed ([1893] A.C. 429), but the giving of interest because the debt had been wrongfully withheld was, by reason of a decision of Lord Tenterden [the author of the Statute in question regarding interest], considered to be improper as contrary to the settled practice since that decision.

In Ontario the statute is wider, and interest may be given where it has been usual for a jury to allow it.* And no doubt a jury would give interest under the circumstances of this case. See *McCullough* v. *Newlove*, 27 O.R. 627. There is, therefore, no reason, such as long continued practice, why we should not follow the principle quoted from the judgment of the Court of Appeal in England in the *London Chatham and Dover* case, and the view of Osler, J.A., already mentioned.

I think the appellant here was wholly to blame for the cessation of the work. The placing of the mortgage on his property was his own duty, and had he done so the respondent would have been paid a substantial sum. The respondent was, as we have held, justified in treating the appellant's default as a repudiation of the contract which if uninterrupted would have resulted in the claim becoming liquidated. The work having been stopped, the appellant became liable to pay the respondent the amount properly due to him, and it was his duty to pay it without delay.

For this reason I have come to the conclusion that the debt may be considered as one in equity, and so interest

*Judicature Act, R.S.O. 1914, ch. 56, sec. 34: "Interest shall be payable in all cases in which it is now payable by law, or in which it has been usual for a jury to allow it."

may well run from the date when, but for the appellant's default, it would have been ascertained and paid.

It is true that, had the appellant done his duty and procured a mortgage, the respondent would have been entitled to only 50 per cent. of the amount of that mortgage, and that amount would, in that event, have been an ascertained one, on which interest would have run. But the appellant's failure to procure the mortgage would have entitled the respondent to abandon the work, as he did, or to sue for breach of contract, recovering damages for such breach to the extent of 50 per cent. of such a mortgage as the evidence shewed could have been procured. But on these damages no interest would have been payable until they were ascertained. So that I am not able to see that that provision in the contract can advance matters at all, or prevent the application of the rule stated in the cases to which I have referred.

The appeal should be dismissed.

Judgment below varied (HODGINS, J.A., *dissenting*).

Re BRYANT v. CITY DAIRY Co.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins and Ferguson, JJ.A. March 4, 1921.

ACTION (§IIA—47)—CIVIL ACTION IN RESPECT OF TORT—CRIMINAL ACTION PENDING—SUSPENSION OF CIVIL ACTION—JUDICIAL DISCRETION AS TO—PROPER COURT TO EXERCISE—DISCRETION ABSOLUTE.

The rule that where a plaintiff sues in respect of a wrong which is a tort and also a felony, the defendant should be prosecuted in respect of the felony before the civil action is heard, does not make such criminal prosecution an indispensable condition precedent to the right to maintain the civil action. In its modern application the rule is merely suspensory of the civil rights, and is subject to the exercise of judicial discretion, and such judicial discretion must be exercised by the Court by which the case is to be determined, and facts and circumstances arising in and about the case itself and in the criminal proceedings will be considered by that Court in arriving at its conclusion. The right to determine whether or not a stay should be directed is absolute and cannot be controlled by a Judge of a higher Court on a motion for prohibition.

[*Smith* v. *Selwyn*, [1914] 3 K.B. 98; *Carlisle* v. *Orr*, [1918] 2 I.R. 442 (K.B.D.), applied.]

APPEAL by plaintiff from an order of Latchford, J., prohibiting the Judges of the County Court of the County of York from proceeding in an action until after the final disposition of a criminal prosecution of the plaintiff for theft. Reversed.

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G. T. Walsh, for appellant.

Ericksen Brown, for respondents.

HODGINS, J.A.:—Appeal from an order of Latchford, J., of the 10th December, 1920, prohibiting further proceedings in this action in the 1st Division Court of the County of York until after the criminal prosecution of the appellant for theft was disposed of.

An information was laid by the respondents against the appellant on the 12th August, 1920. He was committed for trial on the 22nd September, 1920, and a true bill found against him on the 30th September by the Sessions grand jury. He has since been acquitted. The summons in the civil action was issued on the 23rd August, 1920, claiming $99 for three weeks' wages. The respondents on the 30th August counterclaimed for money and tickets, amounting to $202.74, "fraudulently and without colour of right" converted by the appellant to his own use. On the 21st September, 1920, the civil case came on for trial, and the learned Division Court Judge adjourned it to hear argument as to whether it should be proceeded with before the criminal charge was taken up. After hearing argument on this point, he gave his decision, fixed a day for trial, afterwards postponed until the 11th December, 1920, when the case would have been tried but for the order for prohibition now in appeal.

Owing to the acquittal of the appellant, the sole question left is that of costs. But the matters which the appeal give rise to are important. These are: (1) Had the learned Judge whose order is appealed from the right to prohibit the Division Court Judge from further proceeding in a matter within his jurisdiction? and (2) Who has the controlling discretion to determine whether the trial of the action in the Division Court should be proceeded with before the criminal charge is disposed of—the Judge of that Court or a Supreme Court Judge?

Generally speaking, it must be shewn to the appellate tribunal that the order appealed from, when it depends upon the exercise of a judicial discretion, has been wrongly made, before it will be set aside. But this case differs in a material respect, in that it must be determined here which tribunal is the proper one to exercise its judicial discretion, and not whether one or the other has properly done so. The right to prohibit, under the circumstances, must also

be considered and decided, although not argued, because the appeal cannot otherwise be properly disposed of.

The facts give rise to a curious situation by reason of the respondents' counterclaim. The order stays the plaintiff from proceeding with his action, but does not stay the respondents on their counterclaim, although the rule urged as binding is apparently confined to actions against the criminal.

The appellant, who was charged with a crime, urged the Division Court Judge to proceed with his action, and the respondents, whose counterclaim was founded upon the facts constituting the offence, opposed it.

The rule which is invoked is one which prevents the person who alleges circumstances which shew that a crime has been committed from proceeding with his civil remedy for the tort. Here, however, the respondents, while setting up their counterclaim, desired to delay its trial, and the criminal information which they laid seems also to have pursued a very leisurely course. On both arguments before us charges of delay and interference in the criminal proceedings were freely made. I refer to them and to the unusual position occupied by the respondents only as shewing that these and other circumstances might well be considered by the Division Court Judge in determining whether to proceed with the trial or not, before the criminal proceedings had terminated.

In the 11th edition (1920) of Pollock on Torts, the learned author remarks (pp. 201, 202):—

"The doctrine has long been current that when the facts affording a cause of action in tort are such as to amount to a felony, there is no civil remedy against the felon for the wrong, at all events before the crime has been prosecuted to conviction. . . . . But much doubt was raised in the matter in several modern cases, and for a long time it was hard to say either exactly what the rule was or how it should be applied in practice. Still it is the law that where the same facts amount to a felony and are such as in themselves would constitute a civil wrong, a cause of action for the civil wrong does indeed arise, but the remedy is not available for a person who might have prosecuted the wrongdoer for the felony, and has failed to do so. The plaintiff ought to shew that the felon has actually been prosecuted to conviction (by whom it does not matter, nor whether it was for the same specific offence), or that prosecution is impossible (as by the death of the felon or

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his immediate escape beyond the jurisdiction), or that he has endeavoured to bring the offender to justice, and has failed without any fault of his own.

"While, however, the law was commonly so stated, it was nowhere laid down how practical effect was to be given to it. The objection was not a ground of demurrer, could not be pleaded, and would not warrant a nonsuit if the facts shewing a felony came out in evidence. The Court of Appeal has now decided, in accordance with the suggestion made by Blackburn, J., in 1872, that the proper course is for the Court to stay proceedings (which may be done on interlocutory application) until the defendant has been prosecuted. Discussion of the earlier authorities is therefore no longer useful."

The case referred to is *Smith* v. *Selwyn*, [1914] 3 K.B. 98, in which Kennedy, Swinfen Eady, and Phillimore, L.JJ., took part. The head-note is as follows:—

"An action for damages based upon a felonious act on the part of the defendant committed against the plaintiff is not maintainable so long as the defendant has not been prosecuted or a reasonable excuse shewn for his not having been prosecuted, and the proper course for the Court to adopt in such a case is to stay further proceedings in the action until the defendant has been prosecuted."

Kennedy, L.J., at p. 103, says:—

"It is not easy to find a statement in any case as to what is the course which the Court ought to adopt in a matter of this kind. Some of the decisions are not easy to reconcile. This, however, is certain, that the Court has a right, if not an imperative duty, to stay the proceedings in a civil action for damages, if it is clear that that which is the basis of the claim in the action is a felony committed by the defendant."

Swinfen Eady, L.J., at p. 106, says:—

"We have now to lay down the proper course of procedure in such a case. The proper course is, in my judgment, that indicated by Cockburn, C.J., in the passage I have cited, that is to say, to stay the action, if the present statement of claim is persisted in, until criminal proceedings have been taken against the defendant."

Phillimore, L.J., at pp. 106, 107, says:—

"We are enabled now to pronounce a decision as to the mode of enforcing that rule, because hitherto no mode of procedure has been definitely laid down. I agree with the order which has been suggested."

In *Carlisle* v. *Orr*, [1918] 2 I.R. 442 (K.B.D.), the case was considered. The head-note is as follows:—

"The rule that where a plaintiff sues in respect of a wrong which is a tort and also a felony, the defendant should be prosecuted in respect of the felony before the civil action is heard, does not make such criminal prosecution an indispensable condition precedent to the right to maintain the civil action. In its modern application the rule is merely suspensory of the civil rights, and is subject to the exercise of judicial discretion. In exercising such discretion the Court may consider circumstances, such as the infancy, ignorance, or poverty of the plaintiff, which may afford excuse for the failure to prosecute in respect of the felony. Where the plaintiff has obtained a verdict in the civil action, the Court, on motion for a new trial or for judgment, may consider the circumstance that between verdict and motion the defendant has been prosecuted in respect of the felony."

In this is laid down what I conceive to be the true principle, and it is the same as is involved in the English case, as I read it. And that principle is, that the judicial discretion is and must be exercised by the Court by which the case is to be determined, and that facts and circumstances arising in and about the case itself, and in the criminal proceedings, will be considered by that Court in arriving at its conclusion.

In the case at bar, I think the right of the Division Court Judge to determine whether or not a stay should be directed was absolute, and that it cannot be controlled by a Judge of the Supreme Court on a motion for prohibition. The Division Court Judge had the power on the day fixed for trial to adjourn the trial or to proceed partly with it ,or to stay it, and his action then would naturally depend upon the position of the criminal proceedings at that time. He was, by the order appealed from, debarred from taking any proceedings whatever.

Upon the other point, I am also of the opinion that the order appealed from was improper.

The Division Court was rightly seised of the plaint of the appellant suing for his wages. The counterclaim alone raised the question which has been already considered, and that counterclaim was, to the extent of the appellant's claim, also within its jurisdiction. See Division Courts Rules 105 to 111, and Rule 2, para. 7 (1914); also the Division Courts Act, R.S.O. 1914, ch. 63, sec. 71. The Division Court Judge, by sec. 63 of the statute, "shall hear and determine

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in a summary way all questions of law and fact and may make such order or judgment as appears to him just and agreeable to equity and good conscience, which shall be final and conclusive between the parties, except as herein otherwise provided." The Division Court may stay proceedings, and, by sec. 65 of the Division Courts Act, it has power to grant relief, redress, or remedy, or a combination of remedies, etc., in as full and ample a manner as might be done in the like case by the Supreme Court.

Under these powers the right of the Division Court Judge to stay proceedings or otherwise deal with the case before him cannot be doubted.

The law as to prohibition to an inferior Court is well stated by Osler, J.A., in *In re Long Point Co.* v. *Anderson* (1891), 18 A.R. 401, at p. 408:—

"In a matter within his jurisdiction he may misconstrue a statute or document, or otherwise misdecide the law as freely and with as high immunity from correction, except upon appeal, as any other Judge: *Siddall* v. *Gibson* (1859), 17 U.C.R. 98."

Meredith, J., also said (p. 411):—

"It has long been too firmly settled in this Province to be now disturbed even by this Court, that, however wrong in fact or law the determination of the inferior court may be, prohibition will not lie if the matter be within its jurisdiction."

The principle was applied by Boyd, C., in *In re Hyde* v. *Caven* (1899), 19 C.L.T. Occ. N. 359, and refused prohibition, holding that considerations of public policy were not a sufficient reason for interfering with the discretion of the Division Court Judge in committing an officer in the public service of the Dominion to gaol for non-payment of monthly instalments, he having ample means out of his exempt salary to pay the debt.

This last ground includes the prior one; for, if jurisdiction exists in the Division Court Judge, it seems to follow that he is the only one who can decide whether to proceed or not. Indeed, if it is conceded that the Supreme Court cannot prohibit the Division Court Judge because he possesses jurisdiction, then to deny his right to decide whether he will proceed or not, would be to decide that no one can determine that point.

I would allow the appeal with costs here and below.

FERGUSON, J.A., agreed with Hodgins, J.A.

MEREDITH, C.J.O.:—I agree, but only on the ground that, the Judge of the Division Court having jurisdiction, prohibition does not lie, even if the Judge erred in the conclusion to which he came—but I would give no costs to either party.

MACLAREN, J.A., agreed with MEREDITH, C.J.O.

MAGEE, J.A., agreed with the Chief Justice as to the ground upon which the appeal should be allowed, but agreed with HODGINS, J.A., as to costs.

Appeal allowed with costs here and below (MEREDITH, C.J.O., *and* MACLAREN, J.A., *dissenting as to costs*).

CAPITAL TRUST Co. v. FOWLER.

Ontario Supreme Court, Appellate Division, Maclaren, Magee, Hodgins and Ferguson, JJ.A. March 4, 1921.

EVIDENCE (§IVG—421)—EXAMINATION FOR DISCOVERY PUT IN AS EVIDENCE—PARTY USING IT MAKING IT EVIDENCE IN THE CAUSE—EVIDENCE FOR THE BENEFIT OF BOTH PARTIES—CORROBORATION—EVIDENCE ACT, R.S.O. 1914, CH. 76, SEC. 12—CONSTRUCTION.

If during the trial of an action an admission is used by one party, it must be used in its entirety, that is, every thing must be read that is necessary to the understanding and appreciation of the meaning and extent of the admission, and the party using the admission makes it evidence in the cause both as to himself and as to the opposite party in the litigation as well, but if he desires to contradict or qualify any statement in it he may do so, but if he does not see fit to do this the whole of the admission remains as evidence in the cause for the benefit of both parties.

[*Wallace* v. *Vernon* (1840), 3 N.B. Rep. (Kerr.) 5; *Goss* v. *Quinton* (1842), 3 M. & G. 825; *Cobbett* v. *Grey* (1849), 19 L.J. Ex. 137; *Betts* v. *Venning* (1873), 14 N.B. Rep. 267, applied. See Annotation 64 D.L.R. 1.]

APPEAL by defendant from the judgment of Meredith, C.J. C.P., in an action to recover the balance alleged to be due to the plaintiffs as administrators of an estate, for shares of the stock of an incorporated company purchased by the defendant. Reversed.

The judgment appealed from is as follows:—

"During the trial I was under the impression that even though the case were one of a voidable but not void contract, the defendant might possibly succeed, on the ground that the plaintiff had not made out a case against him: that is, that there might be a nonsuit; that, if the case were being tried by a jury, it might be a case in which it would

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be proper to withdraw it from the jury and direct a dismissal of the action because there was no evidence upon which reasonable men could find for the plaintiffs. A primâ facie case was made against the defendant by putting in disjointed parts of the defendant's evidence, given upon examination for discovery in the action; and, though the plaintiffs had the right, under the practice of the Court, to prove their claim in that way, it is to be borne in mind that it was really only part of the defendant's testimony. The plaintiffs put in testimony which, when completed by the defendant in the witness-box, as a witness on his own behalf, may have proved that he was not liable. Except for the practice of putting in the examination for discovery, the plaintiffs could have obtained judgment—on the defendant's own testimony—only by calling him as a witness at the trial, in which case the claim of the plaintiffs would have been disproved by their own and only witness. And, in any case, a nonsuit may be given, not only at the close of a plaintiff's case, but at any time during the trial. But the plaintiffs could have proved their claim without calling the defendant at all—his signatures could easily have been proved; and further consideration convinces me that the nonsuit course cannot rightly be taken. The plain words of the statute must be given effect; and they are: that an opposite party shall not obtain a decision on his own evidence, in respect of any matter occurring before the death, unless such evidence is corroborated by some other material evidence. However dealt with, or looked at, the defendant can have a verdict, or judgment, in his own favour in this case upon his own evidence only, and that is quite uncorroborated in regard to the misrepresentations on which he relies. Proof of the untruth of the representations does not in the least corroborate the statement that they were made, and there is nothing else that can be relied upon as corroboration. It is not contended that the defendant's testimony should not be believed. It is the statute only that is relied upon to defeat his defence; and I feel bound to hold, as I do, that it does. That whensoever, wheresoever, and howsoever, the evidence is given, it is "his own evidence," and equally within the mischief the statute was intended to remedy.

There must, therefore, be judgment for the plaintiffs, for the amount unpaid upon the price of the stock, with interest, and with costs of the action: and the counterclaim must be dismissed, with costs.

George E. Kidd, K.C., for appellant.

E. J. Daly, for respondents.

HODGINS, J.A.:—Appeal by the defendant from the judgment of the Chief Justice of the Common Pleas ordering the defendant to pay $1,187 (and costs) for certain shares in stock. The learned Chief Justice believed the appellant's testimony, but held that, being uncorroborated on one point, it could not be given effect to.

At the trial the following occurred: Mr. Daly, for the plaintiffs, said, "I have no witnesses, my Lord;" and, after putting in the letters of administration of the estate of Austin Berry, continued, "I wish to read from the examination for discovery of the defendant." Mr. Daly then read questions 7 to 19, 34 to 48, 58 to 66, and 70, and the answers thereto, and added, "That is the case for the plaintiff." Mr. Kidd, for the defendant, asked that all the other answers to the questions be put in. Mr. Daly declined to do so, and, a motion for a nonsuit being refused, Mr. Kidd entered upon his defence by calling the appellant, who proved that the representations were false, and in this he was well corroborated.

The point of the judgment is that the statement that the stock was bought on certain representations made by the deceased Berry, whose administrators were suing, while contained in that part of the examination put in, needed corroboration under the statute and so failed of effective proof. It is undoubted that proof of the fact that the liability was incurred by reason of the representations in question was an essential part of what was necessary to defeat the respondents' claim. The question, therefore, to be settled is, whether, notwithstanding the statutory provision, that fact was effectively proved when the whole admission was put in by those asserting the liability, without their calling evidence to contradict it.

The provision in the Evidence Act, R.S.O. 1914, ch. 76, sec. 12, relied upon by the respondent, is that "an opposite or interested party shall not obtain a . . . . judgment . . . . . on his own evidence," without corroboration "by some other material evidence."

It is contended for the respondents, and indeed it seems to be the basis of the learned trial Judge's decision, that, when the evidence of an opposite and interested party is used or is elicited by his opponent, that evidence uncorroborated can be relied on, by the person eliciting or using it,

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but that it cannot, without corroboration, aid the party who gives it. That result is arrived at by the learned trial Judge through this process of reasoning: A primâ facie case is made against the appellant by putting in as evidence disjointed parts of his examination for discovery; that evidence is, however, really only part of the defendant's testimony; such part was completed by the appellant in the witness-box as a witness on his own behalf; the evidence so taken is, therefore, as a whole, the appellant's evidence, and he cannot have a verdict or judgment upon it when uncorroborated if he needs for his success any part of that which was put in by the respondents.

Upon reflection I have arrived, with great respect, at the conclusion that this position is unsound, both in that it regards the evidence in question, given in support of and as part of the respondents' case, as really part of the opposite party's case, and as therefore controlled by the statutory requirement, and in that it enables the respondents to use a qualified admission of the appellant in such a way as to get the benefit of the admission without the qualification, giving them in this way an undue advantage and one contrary to an old-established and necessary rule of evidence.

The law seems quite settled that, if an admission is used by one party, it must be used in its entirety, that is, everything must be read that is necessary to the understanding and appreciation of the meaning and extent of the admission. It is also equally established that, if a party uses an admission, he makes it evidence in the cause both as to himself and as to the opposite party in the litigation as well; but, if he desires to contradict or qualify any statement in it, he may do so. He can therefore give other evidence so to contradict or qualify it, but, if he does not see fit to do so, the whole of the admission remains as evidence in the cause for the benefit of both parties. If this were not so, there would be no sense in requiring all of it to be read nor any necessity for allowing contradiction of part of it. These rules apply to all admissions, such as answers in Chancery, interrogatories, and depositions, as well as to writings and conversations.

The judgment appealed from treats so much of the admission as asserts that it was upon certain representations that the appellant took the stock and became liable for its price, as ultimately unproved because not corroborated. This, as it appears to me, ignores the true position of the parties, which had come about by the course taken at the

trial. The respondents, as plaintiffs, put in an admission which contained certain statements not necessary for their case, but valuable to the other side. They could not have used the admission without so doing; but, not being conclusively bound by all its terms, they are entitled to contradict those parts which qualified its usefulness to them: Phipson on Evidence, 5th ed., p. 469. If from necessity or choice they left it there undisturbed, as part of their case, I fail to see why the negative fact that it was not, later on, corroborated by their opponent when he developed his defence, can operate to strike it out as not having any evidentiary value in the case. To treat it in that way is to render the qualification, which the respondents were compelled to put in evidence in order to use the admission at all, of no use to the appellant, while the respondents secure the whole benefit of what is left. Besides this, to insist that a party is bound not only to corroborate such evidence as he adduces in order to meet his adversary's case, but as well that which his adversary has already established, is to enlarge the statutory provision beyond its natural meaning. That enactment only requires corroborative proof by the opposite party of the evidence which is necessary to obtain a verdict or decision in his favour as the party adducing it, to meet what has already been put in issue by the other side. What possible reason, it may be asked, is there for reading the statute in such a way as to require additional proof of what is already proved, or so as to work injustice to one party, by allowing his adversary to gain the whole value of an admission of liability while depriving his opponent of the benefit to which fair play, as well as the rules of evidence, entitle him? I am fully convinced that the statute neither warrants nor requires such a construction.

To put the matter upon a broader basis, the intention of the Legislature, as expressed in the statute, is to require the living party to strengthen his own evidence by corroborating facts. This is because he seeks by that evidence a decision against the estate of one who is no longer living and whose testimony is absent. But, if those who represent the deceased have not raised an issue as to one necessary element, but on the contrary have so conducted their case as to supply proof of it themselves, the reason of the statutory rule ceases to operate.

The Courts, since the statute was passed, have steadily set their faces against adding to the burden placed upon the

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opposite party. This may be seen in decisions such as *McDonald* v. *McDonald* (1903), 33 Can. S.C.R. 145; *Radford* v. *Macdonald* (1891), 18 A.R. 167; *Green* v. *McLeod*, 23 A.R. 676; *McGregor* v. *Curry* (1914), 31 O.L.R. 261, 20 D.L.R. 706, and in other cases.

This tendency is in the right direction.

There is another aspect of the matter. If the qualification did require corroboration, was not that requirement satisfied by the fact that the respondents used it as part of their case? It has been held that the giving or the not giving of evidence, or, in other words, the course of the trial, may afford corroboration in certain cases: see *Mash* v. *Darley*, [1914] 3 K.B. 1226. It is not therefore unreasonable to hold that where a party, seeking to establish the liability of another, introduces that person's evidence, which includes a qualification as to the liability alleged, as part of his case, he thereby corroborates it, in the sense that it is a circumstance which goes to shew, for the purposes of the case then being tried, that the qualification is truly stated and that it is so treated by those who use the evidence.

I proceed now to mention some of the more important authorities which bear out the view I take as to this point in the law of evidence. Before doing so, I may say that the decisions draw no distinction between ordinary admissions in letters or conversations and those made or given upon oath.

The examination for discovery of a party, when put in as evidence under our Rules, is merely an admission made under oath before an examiner. Those Rules permit part of the examination to be put in. But such portion as may be selected differs in no way from any other admission, except that its proof is simplified and defined, and it must therefore be taken as a whole.

Phipson on Evidence, 5th ed., p. 218, sums up the law thus:—

"When an admission is tendered against a party, he is entitled to have proved, as part of his adversary's case, so much of the whole statement, document, or correspondence containing, or referred to in, the admission, as is necessary to explain the admission, and although such other parts may be favourable to himself . . . . but the jury may attach different degrees of credit to the different parts."

This statement of Mr. Phipson is correct, I believe, on both points, namely, that the whole admission must be put in and that when this is done it becomes part of the evidence

of the party who has tendered it. The following authorities bear out these positions:—

Lord Hale, in Trials per Pais, cited in Gresley on Evidence, p. 467, as stating the common practice, says: "The confession of a party must be taken whole, and not by parts; as if to prove a debt it be sworn that the defendant confessed it, but withal he said, at the same time, that he paid it, his confession shall be valid as to the payment, as well as that he owed it."

In *Higham* v. *Ridway* (1808), 10 East 109, before Lord Ellenborough, L.C.J., Grose, LeBlanc, and Bayley, JJ., the Lord Chief Justice said (pp. 117, 118):—

"It is idle to say that the word 'paid' only shall be admitted in evidence without the context, which explains to what it refers: we must therefore look to the rest of the entry, to see what the demand was, which he thereby admitted to be discharged. By reference to the ledger, the entry there is virtually incorporated with and made a part of the other entry, of which it is explanatory."

In *Randle* v. *Blackburn* (1813), 5 Taunt. 245, Mansfield. C.J., with whom concurred Heath and Chambre, JJ., says: "The defendant never admitted the account as distinct from the demurrage; his statement was made all in one breath; and I cannot distinguish what he admitted to be due for the timber, from what he claimed for the demurrage: the verdict therefore was only for the balance, and was perfectly right . . . . It would be doing monstrous injustice if we were not to hold this, that the whole of the declaration must be taken together. I always have thought that if a man gives an account of a transaction, the whole of it must be taken together."

In *Thomson* v. *Austen* (1823), 2 Dowl. & Ry. 358, where the plaintiff had proved a primâ facie case, and the defence gave a conversation in evidence relating to a possible compromise, but containing a statement by the plaintiff which amounted to an admission of the receipt of money on account of the defendant, the trial Judge rejected the latter part. On appeal the Court granted a new trial. Abbot, C.J., said:—

"It is at all times a dangerous thing to admit a portion only of a conversation in evidence, because one part taken by itself may bear a very different construction, and have a different tendency, to what would be produced if the whole were heard; for one part of a conversation will frequently serve to qualify and to explain the other."

In *Evans* v. *Verity* (1825), Ry. & Moo. 239, Littledale, J.,

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on the ground that the admission was not unqualified, held that the plaintiff could not recover on proving a statement of the defendant which, while admitting that the debt was owing, went on to make the proviso that this was only so if the plaintiff had not moved certain grates which he considered as fixtures.

In *Harrison* v. *Turner* (1847), 10 Q.B. 482, to assumpsit on an attorney's bill of costs, the defendant pleaded a set-off, and, in support of that plea, put in an account furnished to him by the plaintiff, the credit side of which contained a claim for costs, but of this no signed bill had been delivered. The defendant contended that the debit side only of the plaintiff's account could be looked at. Held, that the whole account was evidence for the jury, as the non-delivery of a signed bill does not bar the debt, but merely (if insisted on) prevents its recovery by action. Patteson, J., remarked that the defendant might or might not set up that there had been no proper delivery of the bill.

In Taylor on Evidence, 11th ed. (1920), pp. 502, 503, para. 725, it is put thus:—

"It will now be convenient to discuss the general law of admissions, apart from any mere rules of practice. Here the first important rule to be borne in mind is that the whole statement containing the admission must be taken together; for though some part of it may be favourable to the party, and the object is only to ascertain what he has conceded against himself, and what may therefore be presumed to be true, yet, unless the whole is received, the true meaning of the part, which is evidence against him, cannot be ascertained. But though the whole of what he said at the same time, and relating to the same subject, must be given in evidence, it does not follow that all the parts of the statement should be regarded as equally deserving of credit; but the jury must consider, under the circumstances, how much of the entire statement they deem worthy of belief, including as well the facts asserted by the party in his own favour as those making against him."

Earlier text-writers take the same view.

In Stephens' Law of Nisi Prius Evidence in Civil Actions, p. 1600, this statement is given:—

"The whole of the account which a party gives of a transaction must be taken together, and his admission of a fact disadvantageous to himself will not be received, without receiving at the same time his contemporaneous assertion of a fact favourable to himself, and that not merely

as evidence that he made such a counter claim, but as admissible evidence of the existence of the matter in his discharge, which he asserts."

Reference may also be had to Phillips on Evidence, 10th ed. (1852), vol. 1, pp. 310, 318; Starkie on Evidence, p. 579.

The following cases make it clear that the whole admission becomes substantive evidence as part of the case of the party putting it in:—

Boardman v. *Jackson* (1813), 2 Ba. & B. 382. Manners, L.C., said: "It is quite clear, that where a party produces a letter or other document, he cannot use it partially; he is not permitted to garble it; and if he by his own act makes that evidence, which otherwise would not be so, he makes the whole of it evidence, and it must be taken all together."

Pennell v. *Meyer* (1838), 2 Moo. & Rob. 98. If an answer in Chancery is produced in evidence the party against whom it is produced is entitled to have the whole bill in Chancery read as part of his adversary's case. Tindal, C.J., said that the answer "could not be differed from the ordinary case of a conversation, in which it never could be allowed that the answers of a party should be given in evidence against him, without also giving in evidence the questions which drew forth those answers." The bill and answer were accordingly both read as part of the plaintiff's case.

Wallace v. *Vernon* (1840), 3 N.B. Rep. (Kerr) 5. An action of covenant by an assignee in fee against the grantor. It appeared that the assignee in fee had parted with his estate previous to the bringing of the action. The question arose as to whether the defendant, not having pleaded that the plaintiff had parted with the fee, was entitled to take advantage of it. It was urged that he could because it had been admitted by the plaintiff in the opening of his case. Chipman, C.J., said (pp. 24, 25): "It was contended on the part of the plaintiff, that the defendant could not avail himself of this matter in his defence without having pleaded it, and I agree that he could not himself have given evidence of the fact, unless he had pleaded it, but if the plaintiff, as a part of his own case, gives in evidence facts which destroy his right of action, he must, I think, be held to have put himself out of court." Carter, J., said (p. 29): "I agree with his Honour the Chief Justice, that as the plaintiff made this conveyance part of his own case, he cannot get rid of the effects of it, although there was no

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issue in support of which the defendant could have given it in evidence."

Goss v. *Quinton* (1842), 3 M. & G. 825. An action by assignees of a bankrupt against the defendant for taking away a certain ship and converting it to his own use. In order to prove the actual taking of the ship the plaintiffs were compelled to put in the examination of the defendant taken before the Bankruptcy Commissioners. Attached to and referred to in this examination was an agreement, the existence of which came out in the defendant's cross-examination by his own attorney, on which the defendant relied as having vested in him the property in the ship, of which agreement there was no other proof. The question was whether the agreement needed to be proved in the ordinary way by calling the attesting witness, or whether, because the examination which had been put in referred to it, it became evidence without further proof. Maule, J., who tried the case, held that the agreement need not be further proved. In appeal, Channell, Serjt., for the defendant, argued that, as the plaintiffs thought proper to use the defendant's examination, they must take it with all its consequences, one of which was that the agreement was proved without the necessity of calling the attesting witness. After very full argument, Tindal, C.J., delivered the judgment of the Court (himself, Erskine and Maule, JJ.). He said (p. 840): "As the agreement is stated, in terms, in the examination of the defendant taken before the Commissioners of Bankrupt, which examination was put in by the plaintiffs themselves and formed part of their evidence, and was, according to the report of the learned judge, read without objection at the trial, there can be no question as to the admissibility of the examination; and if the plaintiffs had, at the time of the trial, sought to have a part only of the examination read, omitting that part which states the agreement, they ought to have been put, and undoubtedly would have been put, to their election, to read the whole or none, the examination being an entire thing."

Cobbett v. *Grey* (1849), 19 L. J. Ex. 137, was tried by Pollock, C.B., and his decision was affirmed by Parke, B., and Alderson, B. Trespass for assault and false imprisonment by a prisoner against Sir George Grey, Secretary of State, and Hudson, the keeper of the Queen's Prison. A return by Hudson was put in by the plaintiff, and no evidence was called by the defendants. In his judgment,

Parke, B., says (p. 141): "The return being put in on the part of the plaintiff, not merely for the purpose of proving that the defendant Hudson had the plaintiff in his custody, but to prove the truth of some of the statements in that return, the whole of that return is made evidence for the plaintiff against Mr. Hudson; it is evidence in the cause." And, speaking of the effect of the admission of a document against a party, and discussing the views to be found in Phillipps on Evidence, he says (p. 142):—

"But there is no doubt that the rule of law has been considered as going much beyond that in every respect, and that what is contained in such an instrument which makes in favour of the defendant, becomes evidence as well as what makes against him, not only so far as it qualifies the statements against him, and shews that they ought not to be understood in a sense affecting him, but even that which consists of statements of fact, which are irrespective of any qualification of the statements against him."

And Alderson, B., says (p. 143):—

"I take it that the rule is, that wherever one party puts in a document stating certain facts which he deems to be necessary to be proved by that document against his opponent, his opponent is entitled to the use of all the facts stated in the same document which are useful to him. The party has no right to say the document is only evidence so far as I choose to make it, and not evidence so far as it really and fully exists. It is evidence for both sides, subject no doubt to be controlled and rebutted by any other evidence which either of the two parties may choose afterwards to give. It seems to me therefore that this is primâ facie evidence. If it be primâ facie evidence, then both Sir George Grey and the defendant Hudson might make use of it. But though it was properly introduced only to fix the defendant Hudson and can only be used against him, when it was produced in evidence it was evidence for the purposes of the whole cause, and I cannot understand how any jury could possibly with one breath, upon the same evidence, find one way, and with the same breath, upon the same evidence, find for another party in the cause the same fact the other way. It would be absurd. They must find the same fact for both parties or not at all. If so, then it is usable both by Sir George Grey and the defendant Hudson." Pollock, C.B., concurred.

Betts v. *Venning* (1873), 14 N. B. Rep. 267. An action for trespass for cutting down a mill-dam. The plaintiff

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called Deacon (one of the defendants), and when on the stand as the plaintiff's witness, the defendants' counsel cross-examined him. Deacon was then called for the defence. The learned trial Judge refused to allow him to contradict the plaintiff as to a conversation because he had been cross-examined when on the stand by the defendants' counsel. The case is interesting because of the way in which it deals with the effect of calling a defendant as a witness for the plaintiff. The judgment of the Court, delivered by Ritchie, C.J., afterwards Chief Justice of Canada, was that, where a defendant calls a witness previously called by the plaintiff, he makes him his witness, and has the right to deal with him precisely as if he were there for the first time on the stand in the case, and that he is not to be treated as a recalled witness, and that his examination should not have been made dependent on or been in any way restricted by what had taken place in the course of his examination as a witness on the part of the plaintiff.

In *Brown* v. *Wren Brothers*, [1895] 1 Q. B. 390, Wills and Wright, JJ., in an action for the price of goods supplied to a firm, held that a letter stating that the defendant had ceased to be a partner was evidence that there was a partnership, which must be presumed to have existed until the contrary was proved, but they add: "No doubt the statement that the partnership had been dissolved is evidence in the defendant's favour; but it is for the jury to say what weight is to be attached to it."

For the reasons I have given, I am of opinion that the appeal must be allowed and the action dismissed, both with costs.

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

MAGEE, J.A.:—The defendant appeals from the judgment of the Chief Justice of the Common Pleas against him for $1,187 and interest. The claim is for the balance of purchase-money of 100 shares purchased by the defendant from Austin Berry, deceased, for $1,200, on which the defendant had paid $200 on the 5th February, 1915, and $100 on the 23rd August, 1915.

The plaintiffs are administrators of the estate of Austin Berry, who died on the 3rd March, 1916.

On the 22nd November, 1913, the defendant signed a document reading thus:—

"The New Russell,
"Ottawa, November 22nd, 1913.

"A. Berry,
"Warden,
"Que.

"Dear Sir:—Please deliver me 200 shares of the capital stock of the Modern Railway Device Manufacturing Company Limited, for which I agree to pay you the lump sum of $2,400 at the Canadian Bank of Commerce here. To be paid in 30 days from date.

"Geo. W. Fowler."

These last words, "to be paid in 30 days from date," as well as the signature, are admitted to have been written by the defendant himself. The rest of the document, except the Ottawa address, is in the writing of Berry. At some time afterward, it is admitted by the defendant, the purchase was reduced from 200 shares to 100 shares at the same price per share. He admits that his memory is not clear as to how or when this came about—he having been absent from Canada with the overseas force for some time. He joined the force here in September, 1915, and left Canada in June, 1916. He received from Berry the company's certificate for 100 shares of $100 each standing in his name, and this is dated the 1st April, 1914. This fact he had forgotten until search revealed it among his papers. That, he says, was the only paper he had in relation to the matter—if he had any other papers he tore them up—when or under what circumstances he does not say.

It appears that Berry was inventor of a device to keep dust out of the wheels of railway cars, and had assigned it to the company and received a number of shares in payment, and he and the company were endeavouring to have the device adopted by railway companies. It appears to have had merit, and it had met with approval from some railway men as to its principle, but defective material was used in their first samples, some of which were used on some railways, and, later on, the general manufacture of munitions and increased cost precluded profit; and, so far, practically no manufacturing has been done and no orders received.

The defence set up is, that the defendant was induced to purchase the shares by wilful representation on the part of Berry that the shares he was selling to the defendant were shares belonging to the company or what are commonly called treasury shares, and that the proceeds of the sale

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were wanted for and would be applied to the manufacture of the device and the operation and development of the company, and that the device had been tested and approved by the Grand Trunk Railway Company and by the Canadian Pacific Railway Company, and a large order had been received from the former company. At the trial the defendant said that Berry had led him to "understand it was company stock, that it was not promoters' stock, that it was not his individual stock I was buying." He could not remember just the words he used, but Berry said the money was for the company's purposes to manufacture this machine and fill the order that had already been given. He could not remember what were his words or that the words "treasury stock" were used, but "I supposed I was buying company stock and I would not buy any other." He also said that Berry had told him that a large order had been received from the Grand Trunk Railway Company, and also of the testing and approval by different railway companies. It was proved by officers of the company that the shares the defendant received were out of Berry's own shares, and that no such order had been received from the Grand Trunk Railway Company—but, though their sample appliances had proved to be of defective material, the invention was "perfect."

It is difficult to understand how a man like Berry, with a meritorious invention, who had evidently been able to interest prominent railway men, could have made two such glaring misstatements to the defendant as that the stock was not his stock, or that a large order had been obtained from the Grand Trunk. Further, it is difficult to understand how the defendant, an experienced business man, could have thought he was applying for company stock on such a form or how he could get $10,000 of stock from the company for $1,200—the company is incorporated under a Dominion charter—or how he could be released from half his purchase—or how it was that he made his two payments a year and a half later to Berry and not to the company.

Further, the defendant will not say when he discovered the misrepresentation, but he says that it was some time after, and he naturally accounts for failure of memory by his detachment from business after his "enlistment." But he never sought to get back his money or offered back the shares, and his last payment was only the month before his joining the forces, and he does not hint that he learned

anything during that month. His defective memory may well lead him to put a wrong construction on something he believes Berry to have said. I point out these things to shew that if any case could call for the corroboration required by our statute it is such a case as this. His evidence as to misrepresentation, which is his only evidence, stands absolutely uncorroborated, and is indeed in a most material part contradicted by the document he himself signed and took the pains to amend. One must give credit for sincerity, but that does not necessarily imply accuracy of memory.

But it is said that the plaintiffs have either corroborated or dispensed with corroboration because they put in certain answers of the defendant on his examination for discovery in order to prove their case. In that examination he admitted signing the order for shares and the receipt of 100 shares and the possession of the stock certificate therefor, and the payments of $200 and $100, and in effect the change from 200 shares to 100 shares; but there were certain questions, Nos. 7 to 19, which formed no part of these admissions, and in the answers to two of these, Nos. 14 and 15, the defendant stated that he signed under the supposition that it was the company's stock he was subscribing for, and that Berry told him the company wanted the money to manufacture the appliances, for they had orders for them from certain railway companies, the Grand Trunk and Canadian Pacific.

I will not dwell on the variance here from his other evidence.

It is argued that, by putting in these answers of the defendant, the plaintiffs have made him their witness, and therefore out of the mouth of a witness for the plaintiffs there is corroboration of the defendant, although he happens to be the same witness.

Our statute, the Evidence Act, R.S.O. 1914, ch. 76, sec. 12, enacts that, in an action by or against the administrators of a deceased person, an opposite or interested party shall not obtain a verdict, judgment, or decision, on his own evidence, in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence.

If this appeal should succeed, there is not, to my mind, any way of getting over the fact that the defendant would obtain a judgment on his own evidence without corroboration.

But the argument that the plaintiffs have themselves

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given credibility to the defendant, if that were sufficient to override the statute and make him their witness, is founded on a misapprehension as to the nature and effect of discovery. By putting in all or parts of his examination, as permitted by our Rules, an opposite party is not made the witness of the party so putting them in. The nature and object of discovery have not been changed from the old relief granted in Chancery, in a separate action, in which the opposite party was put on oath in order to be made to admit the facts. The procedure has been simplified, but the effect is the same. In putting in the examination the defendant is not made the witness of the plaintiff: the plaintiff only proves that the defendant has made certain admissions—on oath it is true, but not one whit more effectual than if made in a letter or verbally. If there were two defendants not identical in interest so that the statement of one would bind the other, the plaintiff could not use the examination of one against the other, and that other would not have any right to cross-examine, nor could this defendant have insisted upon cross-examining himself as a witness for the plaintiffs.

In *Flight* v. *Robinson* (1844), 8 Beav. 22, Lord Langdale had occasion to say (p. 35): "It is singular that it should have become necessary to observe that cases of discovery from defendants in Courts of Equity . . . . relate to the admissions of parties, and not to the testimony of witnesses." These plaintiffs have proved that this defendant made certain statements—but they have not proved that all those statements are true.

Another misapprehension in the contention for this defendant arises from the failure to distinguish between the admissibility of evidence and its effect. If A. is sued upon a promissory note, and the plaintiff calls a witness who says he heard A. admit signing it, but also says that A. at the same time said he paid it, it is only just to admit both statements, so that the defendant may not be prejudiced—but that does not prove his plea of payment. The issue to prove payment is upon him, and it is not proved by his own statement, though that statement be proved out of the mouth of a witness for the plaintiff or even of the plaintiff himself. The fact of a statement and its truthfulness are two different things. So, if the plaintiff's witness denies that he heard the defendant admit signing the note and asserts that what the defendant said was that he paid the note—could that be proof of payment or even corroboration

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of other proof of payment? The question need hardly be asked.

Now here the issue of misrepresentation was wholly on the defendant, and his statement neither proves nor corroborates.

Perhaps I should say another misapprehension arises from the use of the written examination for discovery. It only takes the place of the stenographer or any one present who heard the questions and the answers. If lost, they could be proved by any one present, as is sometimes necessary.

The question of the statements being corroboration is wholly different from the question whether they so qualify other answers that a plaintiff has not proved his case. It also differs from the frequent case which arises when a plaintiff puts the parties to a fraud into the witness-box in order to prove the fraud out of their own mouths. The Court may find fraud from their proved acts, though they may, while witnesses for the plaintiff, assert that there is no fraud. That is a question of weight of evidence. Here there is no evidence of the defendant by his examination, but only evidence of his statement.

I may point out that when questions 7 to 19 were asked no document was before the witness, and it does not appear on the face of the examination that he was then speaking of the same document with which he was later on confronted and which he admitted signing. But I have assumed that they do relate to that document.

From these considerations I would agree with the learned Chief Justice that there was no corroboration. If it were necessary, I would hold that, in view of the agreement itself, the price, the reduction in number, and the payments to Berry, the defence of having purchased shares of the company was disproved; but, in view of the other defence, this is immaterial.

I would dismiss the appeal.

Appeal allowed (MAGEE, J.A., *dissenting.*)

Re HAUN ESTATE.
MANGES v. MILLS.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee and Hodgins, JJ.A. April 1, 1921.

WILLS (§ IA—36)—CAPACITY OF TESTATOR—EVIDENCE AS TO—WEIGHT—DOCTORS AND NURSES—CASUAL ACQUAINTANCES.

In determining the competency of a testator at the time of executing his will the evidence of experienced medical men who

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have been in constant attendance and of the nurse who was in attendance during the last illness is entitled to much greater weight than that of a mere casual acquaintance who paid short visits for brief periods during the illness.

Held, following *Faulkner* v. *Faulkner* (1920), 54 D.L.R. 145, that on the evidence the testatrix was competent to do so at the time she executed her will.

APPEAL by the plaintiffs from the judgment of the Surrogate Court of the County of Lincoln declaring that the will of December, 1919, propounded by the appellants, was not the true and valid last will of Mary Ann Haun, deceased, but that the will of January, 1914, was the last will, and directing that it be admitted to probate.

A. Courtney Kingstone, for the appellants.

George Lynch-Staunton, K.C., *A. W. Marquis*, and *J. A. Keyes*, for respondents.

The judgment of the Court was read by

MACLAREN, J.A.:—This is an appeal from a judgment of the Surrogate Judge of the County of Lincoln, of the 26th April, 1920, dismissing the application for probate of the will of Mary Ann Haun by the executrices named in the will.

The plaintiffs were step-daughters of the testatrix; the will in question was made in the St. Catharines hospital, about 5.30 o'clock in the afternoon of the 12th December, 1919, and she died about 4 o'clock the following morning. She had met with an accident in her home, the preceding Monday, by falling and striking her head against an iron washboard. Her scalp was badly injured, but the skull was not hurt. She continued to do her housework for two or three days. She was attended by Dr. Chapman, her physician, the morning of the accident, and subsequently once or twice each day. She grew worse, and on Wednesday evening he had her removed to the hospital and attended her there.

She continued to grow worse, and it was decided to have an operation on Saturday afternoon. Meantime she had requested Mrs. Ball, a friend, to write to her step-daughter Mrs. Manges, of Buffalo, one of the appellants, who came at once, arriving on Saturday forenoon. At the request of Dr. Chapman, she telephoned her husband, a physician, for advice, and he advised the operation. Just before the time fixed for the operation, Dr. Chapman says he spoke to Mrs.

Manges about its being a very serious case, and asked her if she knew whether Mrs. Haun had any business to do. She said she did not know. He then went to Mrs. Haun and asked her; she said, "Yes." He asked, "What is it?" She said, "I want to see Mr. Ingersoll," a St. Catharines solicitor. While it was being discussed, she said she would not go to the operating room until she did see him.

Dr. Greenwood, who was present to assist in the operation, going out, met Mr. Ingersoll in the street and told him that Mrs. Haun wanted him at the hospital to make her will. On the way there the doctor gave him some information about the Haun family connection, some of whom he had known before.

Mr. Ingersoll had known Mrs. Haun for 30 years, and had done some business for her before. He went to the room where she was; she recognised him at once, and said she had sent for him, adding, "I want you to write my will." He adds: "She spoke with a good deal of difficulty. Her utterance was low, and one had to be constant to get her meaning." He asked her what she wanted him to do. She told him she wanted to give $100 each to her three friends, Mrs. Christie, Mrs. Ball, and Mrs. Brown; to them for life, and after their respective deaths to their daughters, whom she named. He then asked her what she wanted to do with the rest of her estate. She hesitated for a moment or two, and he said, "You have got to make some disposition of the rest of your property, otherwise there will be what we lawyers call an intestacy, or the will will be incomplete." She then said, "Well, I will give it to the children." He said "Now, who do you mean ?" Asked if it was the four members of the Haun family, mentioning them by their christian names as given to him by Dr. Greenwood, she expressed her assent and said, "That is right." Asked as to whether she wanted one to get more than another or all to get alike, or how she wanted it divided, she answered, "In quarters." He said: "Very well, that disposes of all your property . . . . You have given $100 to each person you have named, and have given the balance of your property to your children, but you have not appointed any executors." She deliberated some moments. and he said that under such circumstances people were usually advised to appoint some members of the family. She said, "That is a good idea." He suggested that as the girls were near at hand it might be best to select them. She answered, "Yes, do that." This

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was about 5.30 p.m. He said that he would go to the office, write the will, and come back and have her sign it. No other person was in the room during the instructions.

He went to the hospital office to write out the will. Not being quite certain that he had taken down correctly the christian name of Miss Brown, one of the legatees, he requested Mrs. Manges to ascertain it from Mrs. Haun, which she did. According to the evidence, this was the sole part which she had in the matter of the will.

When he had completed the writing of the will, he went with Dr. Chapman to have it executed. He told her that he had written it out according to her instructions. He read it over to her and asked her if that was what she wanted to do with the property. She signified her assent, and he told her that he had written her name, so that she would not have to rise up and sign the paper; but that it would be necessary for her to put her hand upon the pen. She was wrapped in blankets, and she released her right hand from the blankets and put it out on the pen, and made her mark as she put her hand over his.

He expresses very strongly his opinion of her capacity to make a will at the time he took her instructions, and also at the time the will was executed.

Dr. Chapman, who had been her physician for years, saw her on the morning of the accident, and once or twice a day until her death. He saw her on Saturday morning, when they were considering the question of an operation. He says that her mind was quite clear at that time. Asked as to her mental capacity that afternoon, he said that she was quite clear, and knew everything that she wanted to say. He says that when she asked him at 4 o'clock to get Mr. Ingersoll for her, she was quite clear and her mental condition as clear as anybody's at that time. This is even strengthened in the cross-examination, when he says that she knew enough then to concentrate her mind on all the property she had in town, her household furniture, and cash in the bank, sufficiently to make a disposition of it, and that she was quite competent, if so minded, to have made a complicated will, such as she had made in 1914, the principal terms of which were set out as a hypothetical case by the counsel for the defence. He also speaks of her being so emphatic when she declared that she would not go to the operating room before seeing Mr. Ingersoll.

Dr. Greenwood, a practising physician in St. Catharines,

assisted Dr. Chapman in the operation in question and administered the anæsthetic. He had seen Mrs. Haun earlier in the afternoon, about 3 o'clock. He then had a conversation with her about her condition, pain, and so forth; he was present when she asked to have Mr. Ingersoll come and make her will. Asked as to her mental capacity at the time of the operation, he answered that she acted just as other people do who have their faculties. She objected to the anæsthetic and was not passive. He says he noticed some blotchy marks about the chest which would simply indicate poor circulation. The darkening was very much more marked than in erysipelas and was of a different shade. The coloration did not come from the edge of the wound, which would have been the case if it had been erysipelas.

Miss Caroline Freel was the day-nurse in charge of Mrs. Haun from the Wednesday evening, when she entered the hospital, until the Saturday afternoon, when the will was executed. Asked by the defence as to Mrs. Haun's mental capacity, this witness says she was clear; she asked for everything, and was in her right mind. She thought that on Saturday Mrs. Haun could recollect all the property she owned, the cash she had in the bank, her household furniture and silver plate, and could concentrate her thoughts and recollect all these things and dispose of them. During all this time she did not ever seem stupid, and when any person spoke to her she always answered. She thought the discoloration was from her fall.

Mrs. Marie L. Manges, a step-daughter of the testatrix, and named an executrix in the will, wife of a Buffalo physician, received on Friday evening a letter from Mrs. Christie, telling her of the serious illness of Mrs. Haun. She left Buffalo early on Saturday morning and reached the St. Catharines hospital shortly after 10 o'clock. She was taken to Mrs. Haun's room and found her asleep with a wet cloth over her eyes. When she awoke, Mrs. Manges took her hand and she said, "Oh, Marie, I knew you would come." She inquired about Dr. Manges and other members of the family, and especially Dorothy, who had just written her a long letter. During the day she asked about people in Buffalo whom she had not seen for three or four years. Dr. Chapman and Mrs. Haun requested Mrs. Manges to telephone to her husband about the operation, and he strongly advised it. She corroborates Dr. Chapman about her mother being dull of hearing, and the dulness increasing during this illness. When Mr. Ingersoll asked her about

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the names of her brothers and sisters she had an idea of what he wanted them for, but was not told. She did not see the will until Sunday.

Mrs. Alice Christie appears to have been Mrs. Haun's intimate friend for many years. Mrs. Haun had lived with her for five years, and they had kept together in their church-work and socially. She says Mrs. Haun always called her step-daughters "her daughters, her children." She kept up a continuous correspondence with them and visited them often. Mrs. Manges came in consequence of Mrs. Christie's letter written at Mrs. Haun's request. Mrs. Christie was with Mrs. Haun from Monday to Wednesday at her home; and on Wednesday evening and Thursday at the hospital. Asked as to her mental condition on the Thursday evening, she said it was "perfectly clear."

The defence called only one medical witness, Dr. Armour, who had not seen Mrs. Haun, but formed his opinion from hearing the medical evidence in court and some of the other witnesses. On account of Dr. Greenwood giving his evidence after the trial, the defence had the right, by arrangement, to recall Dr. Armour, or to call other physicians in rebuttal of the testimony of Dr. Chapman and Dr. Greenwood, that if erysipelas had appeared it would have been near the scalp wound, and not in the neck or chest, where the spots were said to have actually appeared, and which the nurse believed were due to bruises from the fall. To my mind, the evidence against the theory of Dr. Armour is simply overwhelming; and, if the defence could have rebutted the evidence of the two doctors and the nurse to the contrary, they would no doubt have done so. Indeed the trial Judge himself seems to have realised the weakness of the defence on this point; as he is at pains to say that, even if the evidence of Dr. Armour were entirely eliminated, he would still have come to the same conclusion.

With great respect, I am of opinion that the trial Judge erred in accepting the testimony of witnesses who had very limited opportunities of observation, in preference to those, of equal intelligence and honesty, who had much better opportunities for coming to a correct conclusion. I have already spoken of the evidence in this regard of the medical men and nurses, and the same may be said of the visitors who called and saw Mrs. Haun at the hospital.

Take for instance the case of the Rev. Mr. Howitt, who had been Mrs. Haun's pastor for about 13 months. The

trial Judge speaks of the effect that his visit would have produced on her if her condition had been normal. There is nothing in the evidence to suggest that there was anything exceptional in their relations. It is stated that she was a very earnest worker in the Ladies' Aid of the church; and she remembered three of her fellow-workers there in the small bequests she made to them. The Rev. Mr. Howitt called at the hospital twice, first on Thursday afternoon, and again on Saturday afternoon. The trial Judge has sought to fortify his conclusions against Mrs. Haun's competency by saying that "Mr. Howitt's view is confirmed by Mrs. Graham, Mrs. Wood, and Mrs. Ball." In his evidence as to the Thursday visit, Mr. Howitt does not suggest any incompetency on the part of Mrs. Haun at that time, but the reverse. He says that she replied to all his questions and joined in the short service. Indeed his evidence as to what occurred on Thursday would be, so far as it goes, entirely in favour of her competency. As to the three ladies named by the Judge as confirming the unfavourable evidence of Mr. Howitt, the only one of the three who was at the hospital on Thursday was Mrs. Ball, whom Mrs. Haun asked to see a city newspaper about an advertisement which she had inserted in it about a room to let, which would indicate that she had her business in mind. As to Mrs. Haun's then condition, she states distinctly that "her mind was clear." Neither of the other two ladies named was at the hospital when Mr. Howitt made either of his calls. He was under the impression that Mrs. Haun was not asleep on the Saturday; but in this it is quite certain that he must have been mistaken, as he says he spoke to her in his ordinary tone of voice and did not attempt to rouse her, and there is evidence that she was somewhat dull of hearing and that this increased during this last illness. Besides, the nurse says that she always answered when spoken to; and she may well have been exhausted by the excitement caused by the preparations then being made for the operation and by the number of visitors she had on that day. It is to be remembered also that Mr. Howitt's visit was only about two hours before the incident of her declaration that she would not go into the operation room until after she had seen Mr. Ingersoll, when she gave ample evidence both of her will power and also of her power of speech, without its being necessary for any person to rouse her. Mr. Howitt says that his visit on this occasion was very brief, only 10 or 15 minutes at the outside.

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I am also of the opinion that there is nothing in the evidence to sustain the charge that the will was brought about by the undue influence of Mrs. Manges; indeed, the contrary appears from the evidence. When Dr. Chapman asked her if she knew whether Mrs. Haun had any business that she wanted to do, she said that she did not know, and she was not in the room when Dr. Chapman put the question to Mrs. Haun herself. If Mrs. Manges had any desire to use any influence in that direction, she had ample opportunity then to do so; but her answer and her action prove the contrary. It is elementary that the person who makes a charge of undue influence in case of a will must prove it affirmatively, and the trial Judge should have found in this instance that it was not proved. The suggestion that Mrs. Manges had, before the drawing of the will, suggested to Mr. Ingersoll the appointment of the daughters as executrices, and had given him the information that they were nearer at hand than the sons, is also wholly unsupported by any evidence; and this also should have been so found.

In cases like the present, where there has been an experienced medical man in constant attendance, the authorities are all agreed that his evidence is considered as of the highest class. In addition, we have in the present instance the testimony of another physician, who was present for some considerable time before the instructions for the will were given and up to the time of its execution. There is also the testimony of a qualified nurse, who was constantly in charge of the patient during the three days immediately preceding the execution of the will—one of a class whom the authorities place as second only to that of a qualified physician, on account of their experience and the fact that they are so much of their time with the patient. As a third class there are frequently the members of the household, of whom we have none in the present instance. In the fourth and last class are usually placed the transient visitors who may call upon the patient from time to time, and who have few or slight opportunities for observation.

Of this last class of witnesses the defence put forward no less than six, mostly elderly fellow church-workers with Mrs. Haun. The first was Mrs. Graham, who called with her sister-in-law, Mrs. Wood, on Friday between 3 and 4. Their names were mentioned and Mrs. Haun put out her hand and said, "It is a bad job." Her eyes were closed and she spoke slowly. They remained about 10 minutes, and

when they left she seemed to be asleep, apparently resting. Mrs. Wood did not speak to her at all.

Mrs. Ball called to see her about 2 o'clock on Thursday, when Mrs. Haun requested her to see the newspaper people about the advertisement. She called again about the same hour on Friday. When she proposed leaving, Mrs. Haun said to her, "Stay, for I am lonely," and she remained about two hours. She says, "Her mind was clear."

Mrs. Brown and Mrs. Bentham called to see her on Thursday, but their evidence was immaterial. None of the visits exceeded 10 minutes except that of Mrs. Ball on Friday, who remained about 2 hours.

When we consider the length of time for which the different witnesses had Mrs. Haun under observation, the contrast between those who formed the opinion that she was competent to make a will and those who were of a contrary mind is very striking.

In favour of her competency we have her physician, a man of high standing, who attended her once or twice a day during the 6 days succeeding the accident, and for several successive hours immediately preceding the making of the will; another medical man who was with her for some hours the same afternoon before the making of the will; a trained nurse who had the care of her in the hospital for the whole of the 3 days preceding the will; Mrs. Christie, one of her oldest and most intimate friends; Mrs. Ball, one of the witnesses for the defence, who saw her on Thursday and Friday afternoons, says that "her mind was clear."

While the witnesses favourable to the plaintiffs would rank much higher than those for the defence according to the classification by the authorities above referred to, the disparity of the time and opportunities which they had respectively for observation of the patient was many times greater.

The time during which she was under observation by the adverse witnesses who saw her after the time of her arrival at the hospital on Wednesday evening, making a liberal estimate for the few cases where the exact number of minutes is not given, would not amount in the aggregate to more than 65 minutes; and this would include the Rev. Mr. Howitt's visit on the Thursday, although his evidence as to her condition on that day is in favour of her competency.

On the other hand, the time during which in the same period she was under observation by witnesses who testified

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in favour of her competency, measuring it in the same manner and wholly omitting the time Mrs. Manges was with her, would not be less than 36 hours, or over 33 times as long as the other class, and with vastly better opportunities of observation.

To my mind, it is a very important circumstance that from the beginning to the end of the testimony there is not the slightest hint or suggestion of any delirium. It is remarked how even the defendants' witnesses, when asked about the state of her mind, declare that "her mind was clear." There are 3 or 4 of the witnesses who speak of her being drowsy at different times, but not a single witness who spoke to her with a view to rousing her failed in doing so. Even Mr. Howitt says that he did not raise his voice, much less touch her, when he spoke to her on the Saturday. The energy that she displayed when she declared her determination not to go to the operating room until after she had seen Mr. Ingersoll, shewed that she did not need much to rouse her and what strength of will and energy she still retained. Dr. Greenwood's testimony as to her antipathy to the anæsthesia some two hours later when she had gone through the preparations for and the execution of the will, is also very significant.

In my opinion the case of *Murphy* v. *Lamphier*, 31 O.L.R. 287 (1914), cited in the judgment of the Surrogate Court Judge in this case, bears no analogy whatever to the present case. There the testatrix died on the 20th September, 1913, the will which was set aside having been made on the 25th May, 1912. She had lived happily with her husband for 56 years, but his name was not mentioned in her will, not even in connection with her description, which was simply "Mrs. Jane Lamphier of the city of Toronto." At times she even forgot that she had a husband. In 1907, she had an apoplectic stroke, and her arteries gradually hardened, and she had several brain hæmorrhages. One of her spiritual advisers said that in the latter part of November, 1911, she was in a state of senile decay, and another spiritual adviser that in April, 1912, "She would mumble and jumble; I could not understand her." Dr. Groves, her physician, said that about the time of the making of the will there was a "progressive deterioration of her mental powers" and that "she was in a markedly senile condition."

Contrast the foregoing with the testimony of Dr. Chapman, Dr. Greenwood, Mr. Ingersoll, and others in the present case.

Since *Murphy* v. *Lamphier* was decided, there has been a case decided in our own Courts which bears a striking analogy in many respects to the present one. I refer to *Faulkner* v. *Faulkner*. The decision of the trial Judge, which set aside the probate of the will, is reported in 44 O.L.R. 634 (1919); the judgment of this Court, which reversed his decision, is reported in 46 O.L.R. 69, 49 D.L.R. 504 (1919); and the judgment of the Supreme Court, which affirmed the judgment of this Court, is in 60 Can. S.C.R. 386, 54 D.L.R. 145 (1920). Faulkner had a severe attack of erysipelas, and was taken to the hospital on Tuesday, and sent for a solicitor, who came and drew his will, which was not then executed on account of exhaustion. It was not signed until the following Friday, and on Saturday he died. He was an unmarried man; the plaintiff and the defendant and their children being his only near relatives. He had made a will some years before, leaving his estate to the defendant and his children and some distant female relatives; but the solicitor was not aware of this. He was blinded by the disease for nearly 3 days before executing the will, and was in a state of stupor except when roused for a short interval.

With regard to the statements made by Mrs. Haun to Mr. Boyle and Miss Ball in 1919, as to all her affairs being settled, these cannot prevail as against her subsequent emphatic action. The utmost that they could prove would be that she had not then the intention which she manifested so clearly afterwards—the intention of revoking the will then in force and substituting a new one. If she had intended to make some minor changes, she would know that this could be accomplished by a codicil, as appears from the codicil in her own handwriting which she attached to her first will. To set aside this new will would destroy something upon which manifestly she had her mind particularly set, namely, the giving of some recognition to the three ladies who had been her close friends and fellow-workers for years.

As to the provision regarding the monument at Oakville, I presume that the executrices would have power to erect a monument, and to place upon it the letters and inscriptions mentioned in the old will. I assume that many of the monuments in our cemeteries have been erected by executors and trustees without testamentary authority. If there should be any doubt about it, application might be made to the Court for direction. It is in evidence that Mrs. Haun

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was buried in the Oakville cemetery by the executrices named in the will.

In my opinion, the evidence of the competency of Faulkner at the time of the execution of his will is not nearly so strong as that in favour of Mrs. Haun in the present case.

I think the judgment should be reversed and probate of the will granted; the appellants should have their costs throughout, out of the estate, as between solicitor and client; no costs to any other party.

Appeal allowed.

PLEET v. CANADIAN NORTHERN QUEBEC R. Co.

Ontario Supreme Court, Appellate Division, Maclaren, Magee, Hodgins and Ferguson, JJ.A. April 1, 1921.

EVIDENCE (§ IIH—237)—CARRIERS—SHIPMENT OF POTATOES—DESTRUCTION BY FREEZING—ACTION FOR DAMAGES—PRESUMPTION AND BURDEN OF PROOF.

If a plaintiff in an action for damages for loss sustained on a shipment of potatoes owing to their being frozen, who establishes that the goods passed into the possession of the carrier and remained in its possession, dominion and control until they were frozen, is entitled to succeed, unless the carrier can establish that the freezing was an act of God which by no reasonable precaution under the circumstances could have been prevented.

CARRIERS (§ IIID—404)—OF GOODS—ARRIVAL AT DESTINATION—NOTICE—DELIVERY OF BILL OF LADING — NEW AGREEMENT TO CARRY TO ANOTHER STATION—GOODS SPOILED ON ARRIVAL—LIABILITY.

Where carriers of goods after the arrival of the goods at their destination, and after delivery of the bill of lading but while the goods are still in their possession enter into a new contract for consideration whereby they undertake the carriage of the goods to another unloading station, their liability under such agreement is that of common carriers and is not affected by any limitation or condition in the bill of lading which has been delivered.

[*Lockshin* v. *Canadian Northern R. Co.* (1919), 47 D.L.R. 516, 24 C.R.C. 362, distinguished; *Pleet* v. *C.N.Q.R. Co.* (1920), 56 D.L.R. 404, reversed.]

APPEAL by plaintiff from the judgment of Latchford, J., 56 D.L.R. 404, in an action for damages for loss suffered by the plaintiff by injury to goods in transit on defendant's railway. Reversed.

A. E. Honeywell, for appellant.
I. F. Hellmuth, K.C., for respondents.

The judgment of the Court was read by

FERGUSON, J.A.:—Appeal by the plaintiff from a judgment of Latchford, J., dismissing the plaintiff's claim for loss sus-

tained by him on a shipment of potatoes, owing to their being frozen.

The potatoes were loaded on the 14th January, and on the morning of the 15th January, 1920, shipped from near Huberdeau, Quebec, to Ottawa, Ontario; the defendants issued their usual bill of lading, in form approved by the Board of Railway Commissioners; and the potatoes arrived at the Canadian Northern Ottawa station late on the night of the 15th. According to the evidence credited by the learned trial Judge, the defendants on the morning of the 16th telephoned to the plaintiff's office and informed one of the plaintiff's employees that the potatoes had arrived at the defendants' station, which, as I read the evidence, is several miles from the centre of the city and the plaintiff's place of business. On the afternoon of the 16th, the plaintiff went to the station and asked to inspect the potatoes, but his request was refused because he did not have the bill of lading.

On the morning of the 17th, the plaintiff attended the Banque Nationale, paid the draft to which the bill of lading was attached, and with the bill of lading attended the defendants, paid the freight, and arranged with the defendants to have the car switched from the Canadian Northern station to the Grand Trunk station, in the centre of the city: at the same time he surrendered the bill of lading covering the shipment from Huberdeau to the defendants' Ottawa station, paid the freight bill, $89.70, and an additional charge of $5.85 which the defendants asked him for switching the car to the Grand Trunk station. There is no document or bill to evidence the contract to switch, or limiting the liability of the defendants in performing the service contracted for.

On the evening of the 17th, the car was switched to the Grand Trunk station. The 18th was Sunday, and on the morning of the 19th, Monday, the Government inspector of fruit and vegetables entered the car and found that the potatoes were frozen.

Exhibit No. 11 shews the temperature as follows:—

At Huberdeau, January 15, 3-34 below zero.
At Ottawa, January 16, 4-25 below zero.
At Ottawa, January 17, 17 above to 8 below.
At Ottawa, January 18, zero to 14 below.
At Ottawa, January 19, 6 to 29 below.

The learned trial Judge found that the potatoes were not

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frozen when loaded or when delivered at Huberdeau. He concluded that the defendants received and held the potatoes as carriers up to the evening of Friday the 16th, and after that time until the potatoes were, on Saturday, transferred to the Grand Trunk Railway Company as warehousemen, and after such delivery the defendants' liability was either that of warehousemen or was defined by sec. 2 of the conditions of the bill of lading, issued at Huberdeau and surrendered on the morning of the 17th. The trial Judge was unable to find where or when the potatoes were frozen, and was of the opinion that the plaintiff had not proved either loss by negligence after Friday, or that the damage occurred before Friday, while the defendants' liability was that of insurers; that the result of the trial turned on the onus of proof; that the onus was on the plaintiff, and that he had failed to prove his case.

The learned trial Judge says (48 O.L.R. at p. 355):—

"I find that the potatoes were not frozen when shipped or when inspected at St. Jerome. Between the morning of the 15th and the morning of the 19th, it is certain that they (the potatoes) were badly damaged by frost. Just when in the interval the damage was done, it is, I think, impossible to conclude, except as a matter of probability."

And at pp. 356, 357:—

"It was merely as a matter of convenience that the plaintiff desired the defendants to switch the car to the exchange tracks with the connecting railway. After Friday evening—a reasonable time for unloading having elapsed—the defendants were, in my opinion, liable only as bailees. Negligence subsequent to that time not having been proved against them, their only liability is as carriers for acts done or omitted before Friday evening, unless their position is altered to their prejudice by the switching contract made with the plaintiff."

And at p. 357:—

"The defendants are thus" (under sec. 2 of the conditions of the bill of lading) "responsible for any loss to the plaintiff caused by the act, neglect, or default of the Grand Trunk Railway Company, and must satisfy the Court that the plaintiff's loss was not so caused.

"The onus cast upon the defendants by sec. 2 has, I find, been fully discharged."

And at p. 358:—

"In the present case the plaintiff has failed to prove—and *the onus was on him to prove*—that the damage to the

potatoes took place while they were under the control of the defendants. As I have stated, the probabilities all favour the conclusion that the freezing occurred after the car passed out of their possession."

I am unable to agree in the opinion that the defendants had ceased to be carriers before the potatoes were found frozen on Monday the 19th; but, assuming for the purpose of argument that the learned trial Judge was right, and the defendants ceased to be carriers on Friday evening, and from that time until the goods were delivered on Saturday evening to the Grand Trunk were warehousemen, and that from Saturday evening till Monday morning their liability was fixed by sec. 2 of the conditions of the way-bill, and the plaintiff did not prove negligence between Friday evening and Saturday evening, and that the Grand Trunk were not negligent, I am of the opinion that the learned trial Judge erred in concluding that the plaintiff could not hold the defendants as carriers unless he established affirmatively that the injury to the potatoes occurred prior to Friday evening.

No doubt the general rule is that he who asserts must prove, and that the onus is generally upon the plaintiff, but there are two well-known exceptions:—

(1) That where the subject-matter of the allegation lies particularly within the knowledge of one of the parties, that party must prove it, whether it be of an affirmative or negative character: *Mahony* v. *Waterford Limerick and Western R.W. Co.*, [1900] 2 I.R. 273, at p. 280; *Kent* v. *Midland R.W. Co.* (1874), L.R. 10 Q.B. 1.

(2) That he who relies on an exception to the general rule must prove that he comes within the exception: *Ashton & Co.* v. *London and North-Western R.W. Co.*, [1918] 2 K.B. 488; *London and North-Western R.W. Co.* v. *Ashton & Co.*, [1920] A.C. 84.

The plaintiff established that the goods passed into the possession of these defendants, and that they remained in their possession, dominion, and control, or the possession, dominion, and control of their connecting carrier, the Grand Trunk, until they were destroyed: the plaintiff had no opportunity of knowing what was done with the potatoes, how they were cared for, how they were handled, how, when, or where they were frozen. On the other hand, the defendants knew or had every opportunity for knowing, learning, and presenting the information to the Court. All the facts were peculiarly within the knowledge of the de-

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fendants, and in these circumstances it seems to me that the onus was on the defendants to furnish it: Taylor on Evidence, 11th ed., p. 375; 1 Sm. L. C., 12th ed., p. 257; and *St. John* v. *Illinois Central R.R. Co.* (1912), 168 Ill. App. 599; and, if it appeared that the freezing took place while the defendants were yet carriers, they were liable unless they established that the freezing was an act of God. But, as already stated, I am of the opinion that the learned trial Judge erred in holding that, under the circumstances adduced in evidence, a reasonable time for removing the potatoes had elapsed on Friday evening, and that consequently the defendants from that time on held as warehousemen: *Corby* v. *Grand Trunk R.W. Co.* (1911), 23 O.L.R. 318; *Moses* v. *Boston & Maine R.R. Co.* (1856), 32 N.H. 523.

The bill of lading provides that, after having given 48 hours' notice in writing, the defendants' liability shall be that of warehousemen only, and that they may charge demurrage. That in itself may not be sufficient to establish that their liability as carriers continues until after they have given 48 hours' written notice, but it is a circumstance to be taken into consideration in arriving at what is notice and when a reasonable time has elapsed after notice.

There is evidence that one of the plaintiff's office staff received verbal notice some time on Friday morning, but there is nothing to shew that this notice reached the plaintiff until the afternoon, when, though he denies it, the learned Judge finds he called to inspect and was refused. Time would not run against the plaintiff till he had notice or knowledge: *Richardson* v. *Canadian Pacific R.W. Co.* (1890), 19 O.R. 369. I cannot think that it can be held that between the time the notice is brought home to the plaintiff on Friday afternoon and closing time on the same evening there was anything like a reasonable time to go to the bank, pay the draft, get the bill, pay the freight, arrange for transportation, and unload a car which it took part of two days to load.

I can find nothing in the evidence which justifies the conclusion that the plaintiff should have known that these potatoes in a supposedly heated car would freeze or were more liable to freeze when the car was standing than when it was moving, or that they were more liable to freeze in the weather conditions which existed at Ottawa on the 16th or subsequently to the 16th than they were on the 15th or 16th, nor is it shewn that the bill of lading was at the bank prior to the 17th, or that the plaintiff had any reason to appre-

hend danger by leaving the potatoes in the car until Saturday morning, the 17th. On the contrary, I think the plaintiff was quite justified in thinking that it would be more dangerous to attempt to unload and cart those potatoes into town than it would be to leave them in the car, and have them switched to the Grand Trunk siding, where they could be removed to his warehouse with less chance of damage from exposure.

The respondents rely on *Lockshin* v. *Canadian Northern R.W. Co.*, 24 Can. Ry. Cas. 362, 47 D.L.R. 516, but that case is quite different from this. The plaintiff's employee accompanied the potatoes, and through him the plaintiff was fixed with notice of the arrival of the car at 5 a.m., and he had a clear day to remove. Here notice is not brought home to the plaintiff till the afternoon of Friday, and he had only a few hours to remove.

I am also of opinion that the learned trial Judge erred in concluding that the terms of the bill of lading, which was surrendered on Saturday morning, in any way govern the rights and liabilities of the parties in reference to switching the car. The defendants had possession of the potatoes, and for a consideration they entered into a new contract whereby they undertook the carriage of the potatoes from their Ottawa station to the Grand Trunk's Ottawa station, and their liability under such a contract must, I think, be that of common carriers, in no way affected or limited by anything in the bill of lading, which had already been surrendered.

For these reasons, I am of the opinion that the defendants were common carriers of the potatoes from the time they received them until after they were found frozen on the Grand Trunk siding.

That brings us to the question: What is the liability of the defendants as carriers of goods susceptible to injury by inherent vice or change of temperature?

Mr. Hellmuth argued that the potatoes were, by their nature, particularly susceptible to damage by frost, and that the damage occurred by reason of this "proper vice" in the potatoes; that damage by frost was an act of God against which the defendants were not insurers; and that their liability is limited to taking reasonable care to protect goods such as these from injury by frost or other change in temperature; that the defendants took reasonable care to protect the goods against damage by reason of their "proper vice" and change in temperature; that the goods

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were damaged by one or other or by a combination of these two causes; and the defendants were not liable.

In their discussions of the common law liability of a carrier, all the text-book writers refer to *Forward* v. *Pittard* (1785), 1 T.R. 27, wherein Lord Mansfield, at p. 33, stated a carrier's liability as follows:—

"By the nature of his contract, he is liable for all due care and diligence; and for any negligence he is suable on his contract. But there is a further degree of responsibility by the custom of the realm, that is, by the common law: a carrier is in the nature of an insurer. It is laid down that he is liable for every accident, except by the act of God, or the King's enemies. Now what is the act of God? I consider it to mean something in opposition to the act of man: for everything is the act of God that happened by his permission; everything, by his knowledge. But to prevent litigation, collusion, and the necessity of going into circumstances impossible to be unravelled, the law presumes against the carrier, unless he shews it was done by the King's enemies, or by such act as could not happen by the intervention of man, as storms, lightning, and tempests."

Later English authorities have either ingrafted a further exception on the common law rule so as to relieve the carrier from liability where the injury is due to the inherent nature of the goods, in some of the cases called "a proper vice in the goods," or have determined that injury from this cause falls within the exception created by the use of the term "an act of God." See cases collected in Halsbury's Laws of England, vol. 4, p. 10; also *London and North-Western R. W. Co.* v. *Richard Hudson and Sons Limited*, [1920] A.C. 324, at pp. 333-336 and 347.

What is a "proper vice" within this rule is considered in Macnamara's Law of Carriers, 2nd ed., pp. 50, 51, and in *Blower* v. *Great Western R. W. Co.*, L.R. 7 C.P. 655; *Kendall* v. *London and South Western R.W. Co.*, L.R. 7 Ex. 373.

The meaning of the term "act of God" as affecting the degree of care to be applied by the carrier has been much discussed and considered. The American cases are collected in Corpus Juris, vol. 10, pp. 111 and 122; the English cases in Halsbury's Laws of England, vol. 4, pp. 8 and 9, and in 1 Sm. L.C., 12th ed., p. 234.

I have read most of the authorities cited in these digests, and my reading of these authorities has led me to the following conclusions:—

A common carrier of goods is an insurer against all acci-

dents except the act of God and the King's enemies; where the goods are lost, destroyed, or damaged by an operation of nature to which no man contributed, the loss is an act of God—that climatic changes of temperature, decay and deterioration from the inherent nature of the goods are operations of nature and acts of God as well as storms, lightning, and tempests; that, if loss occurs and the carrier seeks to escape liability on the plea of act of God, he must bring himself within the exception and establish the loss by an operation of nature to which no man contributed—he may do this by proving that the loss occurred notwithstanding that he took every reasonable means to provide against loss by operations of nature; but, if he fails to establish this, and his neglect has or may have contributed to the loss, the loss is not proved to have been due exclusively to an operation of nature, i.e., an act of God.

The leading English case is *Nugent* v. *Smith* (1875), 1 C.P.D. 19. In the Common Pleas Division (Brett and Denman, JJ.) it was held:—

"Damage or loss may be said to have been occasioned by the act of God where it has been caused directly and exclusively by such a direct and violent and sudden and irresistible act of nature as the carrier could not by any amount of ability foresee, or, if he could foresee it would happen, could not by any amount of care and skill resist, so as to prevent its effect."

This judgment was appealed and reversed. The Court of Appeal, in a judgment reported (1876) 1 C.P.D. 423, held:—

"The carrier does not insure against the irresistible act of nature, nor against defects in the thing carried itself; and if he can shew that either the act of nature or the defect or the thing itself, or both taken together, formed the sole direct and irresistible cause of the loss, he is discharged. In order to shew that the cause of the loss was irresistible it is not necessary to prove that it was absolutely impossible for the carrier to prevent it, but it is sufficient to prove that by no reasonable precaution under the circumstances could it have been prevented."

In the course of his opinion Cockburn, C.J., at p. 434, said:—

"But there being no doubt that in the case before us the shipowner was a common carrier, we have now to deal with the question on which the decision really turns, namely,

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whether the loss was occasioned by what can properly be called the 'act of God.'

"The definition which is given by Mr. Justice Brett, of what is termed in our law the 'act of God' is, that it must be such a direct, and violent, and sudden, and irresistible act of Nature as could not by any amount of ability have been foreseen, or if foreseen, could not by any amount of human care and skill have been resisted. . . . . .

"The exposition here given appears to me too wide as regards the degree of care required of the shipowner, and as exacting more than can properly be expected of him."

And at pp. 437 and 438 he said:—

"All that can be required of the carrier is that he shall do all that is reasonably and practically possible to insure the safety of the goods. If he uses all the known means to which prudent and experienced carriers ordinarily have recourse, he does all that can be reasonably required of him; and if, under such circumstances, he is overpowered by storm or other natural agency, he is within the rule which gives immunity from the effects of such vis major as the act of God. I do not think that because some one may have discovered some more efficient method of securing the goods which has not become generally known, or because it cannot be proved that if the skill and ingenuity of engineers or others were directed to the subject something more efficient might not be produced, that the carrier can be made liable. I find no authority for saying that the vis major must be such as 'no amount of human care or skill could have resisted' or the injury such as 'no human ability could have prevented,' and I think this construction of the rule erroneous. That the defendants here took all the care that could reasonably be required of them to insure the safety of the mare is, I think, involved in the finding of the jury, directly negativing negligence, and I think that it was not incumbent on the defendants to establish more than is implied by that finding."

Mellish, L.J., at p. 441, said:—

"The principle seems to me to be that a carrier does not insure against acts of Nature, and does not insure against defects in the thing carried itself, but in order to make out a defence the carrier must be able to prove that either cause, taken separately, or both taken together, formed the sole and direct and irresistible cause of the loss. I think, however, that in order to prove that the cause of the loss was irresistible, it is not necessary to prove that it was ab-

solutely impossible for the carrier to prevent it, but that it is sufficient to prove that by no reasonable precaution under the circumstances could it have been prevented. For these reasons I am of opinion that the judgment of the Court below ought to be reversed, and the rule to enter a verdict for the plaintiff discharged."

James, L.J., at p. 444, said:—

"The 'act of God' is a mere short way of expressing this proposition. A common carrier is not liable for any accident as to which he can shew that it is due to natural causes directly and exclusively, without human intervention, and that it could not have been prevented by any amount of foresight and pains and care reasonably to be expected from him. In this case the defendant has made this out."

See also *Briddon* v. *Great Western R.W. Co.* (1858), 28 L.J. Ex. 51.

The United States authorities are collected and considered in *Central of Georgia R.W. Co.* v. *Hall* (1905), 124 Go. 322.

The result of the United States authorities appears to me to be that the carrier is not an insurer of fruit and vegetables and other goods of a like nature which are susceptible to injury by reason of "proper vice" or by reason of change in temperature against any injury resulting from their inherent vice or against damage from changes in temperature, but that the carrier is charged with the duty of exercising ordinary care to protect the fruit, vegetables, etc., from decaying as well as from being damaged by changes in temperature. What that duty requires in any particular case must be determined from the circumstances, conditions, and the nature of the goods: *Wolf* v. *American Express Co.* (1869), 43 Mo. 421; *Swetland* v. *Boston & Albany R. R. Co.* (1869), 102 Mass. 276, 282. The American authorities seem to me also to establish that, in the event of loss or injury from decay or change in temperature, the burden is on the carrier to shew that he exercised due care under all the circumstances. He must prove that the case falls within the exception: *Brennisen* v. *Pennsylvania R. R. Co.* (1907), 100 Minn. 102; *White* v. *Minneapolis and Rainy River R. W. Co.* (1910), 111 Minn. 167: *Central of Georgia R. W. Co.* v. *Hall*, 124 Ga. at p. 334.

Applying these authorities—English and American—to the facts of the case at bar, the defendants might have relieved themselves from liability for the loss of the potatoes had they established that the loss occurred by freezing and that such was not in whole or in part attributable to neglect

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on their part. To do this they had to prove affirmatively that they took all reasonable precautions, means and care, to prevent freezing, and consequently that the means they used to transport and protect the potatoes were all the known means to which prudent and experienced carriers have recourse, and that there was no negligence in the operation of these means.

The learned trial Judge says (48 O.L.R. at p. 359):—

"None of the allegations that the defendants were negligent has been proved. The contrary has, in fact, been established. The car supplied was of the type asked for by the plaintiff. The method of treating it was known to him to be in common use on such cars. The heaters were in good order, well supplied with oil, inspected from time to time, and kept burning. More the defendants could not do."

That is a sweeping finding, but the conclusion of no negligence is, I think, based on too narrow a view of what the cases say it is necessary for the carrier to prove in order to establish that it has taken every precaution and care that it could reasonably be expected it would take to protect the potatoes from injury by freezing. The defendants did not attempt to establish that the car which they supplied and used was the best kind of car that they or other carriers ordinarily used for transporting and protecting potatoes, or that in this car the potatoes could not have been better protected. The evidence of Mr. Snow indicates that there are better and other known means of protecting potatoes against frost than what was adopted by the defendants in this case. The defendants proved only that they supplied a heated car and that they from time to time inspected and found the oil burners in each end of the car lighted, and from time to time supplied these oil burners with oil. They did not attempt to shew that there was no better type of car in use or better system of inspection for the purpose of seeing not only that the fires were burning, but that they were burning sufficiently to heat the car, and that the car was heated.

On the evidence submitted it is quite possible, and I think probable, that, at some time between the time the fires were lighted and the potatoes were found frozen, the fires became low, though not extinguished, and that the damage resulted from neglect to turn up and trim the wicks rather than from any defect in the car itself or in the burners or in the packing.

It may be that the car furnished was the best type of

car and was in good order; that the system of inspection followed and the things done to keep the car heated and the potatoes protected are in accord with the best practices of themselves and other carriers; but the evidence is quite consistent with a contrary state of fact, and the onus was on these defendants. In my opinion, they have failed to satisfy the onus put upon them by the authorities.

I am, for these reasons, of the opinion that the appeal should be allowed, and judgment should be entered for the plaintiff for the amount claimed with costs here and below.

Appeal allowed.

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Ontario Supreme Court, Riddell, J. March 20, 1921.

FISHERIES (§IB—7)—ONTARIO GAME AND FISHERIES ACT—STATUTES OF CANADA 1916, ORDERS IN COUNCIL P. CXC—VALIDITY—APPLICATION—RIGHTS OF INDIANS ON MOHAWK RESERVE.

The Ontario Game and Fisheries Act, R.S.O. ch. 262, as enacted by the Statutes of Canada 1916, Orders in Council, page cxc, which enacts (sec. 4) that "No one shall fish by means other than angling or trolling, excepting under lease, license or permit from a duly authorised officer of the provincial government," is within the powers of the Dominion Parliament and applies to the Mohawk Indians residing on the Indian Reservation in the township of Tyendinaga, who are subject to the general law of Canada. [See Annotation, 35 D.L.R. 28.]

ACTION in trover for the value of a seine fishing net seized and taken away by the defendants.

The action was tried by RIDDELL, J., without a jury, at Belleville and Ottawa.

E. G. Porter, K.C., for the plaintiff.

William Carnew and *Malcolm Wright*, for the defendants.

Edward Bayly, K.C., for the Attorney-General for Ontario.

A. G. Chisholm, amicus curiæ.

RIDDELL, J.:—The plaintiff is a widow, a member of the Tyendinaga Band of Mohawks, residing on the Indian Reservation in the township of Tyendinaga, in the county of Hastings. She was the owner of a seine fishing net, partly made by her on the Reserve and partly purchased by her, nearly 400 feet in length (about 23 rods is given as the length), and with a mesh of about 3 inches. This was operated by a number of Indians of the same band, on shares,

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catching fish in the Bay of Quinté, opposite the Indian Reserve. The fishing was done to a certain extent for food for the operators, but also for commercial purposes—for sale of the fish to all who came desirous of buying.

The manner of fishing is well-known—a long rope attached to one end of the seine is wound round a "spool" on the shore; the net itself is loaded on a boat which is rowed out on the water, the rope being unwound from the spool correspondingly; beginning at a convenient distance, generally when the rope is wholly unwound, the seine is wholly paid-out as the boat proceeds; then the boat comes around to a convenient distance from the shore, and a rope at the other end of the seine is paid out, and the end brought to the shore to a spool, at a distance from the other approximately equal to the length of the seine. Then the ropes are both wound in simultaneously, with the effect that the fish captured by the net are brought to shore.

No license had been taken out by the plaintiff or the actual fishermen.

Thomas Gault, one of the defendants, is a fishery inspector; the other, John Fleming, is a game and fishery overseer—they went upon the Indian Reserve, where the seine was lying, seized it, and took it away.

This action is in reality in "trover" for the value of the seine seized and taken away.

The defence of want of notice is set up: while it is true that under *Venning* v. *Steadman* (1884), 9 Can. S.C.R. 206, a fishery inspector is an officer within the protection of the former statute in that behalf, the law was altered in 1911 by the Public Authorities Protection Act, 1 Geo. V. ch. 22—now R.S.O. 1914, ch. 89—so that no notice of action is now necessary.

The substantial defence is that the defendants had a right to act as they did by virtue of statutes of the Dominion and of the Province—and it is necessary to examine this legislation somewhat minutely.

The Dominion Fisheries Act. 1914, 4 & 5 Geo. V. ch. 8, by sec. (*c*), (*e*), (*f*), gives the Governor in Council power to "make regulations . . . . to regulate and prevent fishing . . . . to forbid fishing except under authority of leases or licenses . . . . prescribing the time when and the manner in which fish may be fished for and caught. . ."

Under and in virtue of that Act, an order in council was

passed on the 29th October, 1915—Statutes of Canada, 1916, pp. cxc. sqq.—making the Dominion fishery regulations for the Province of Ontario. These regulations were in the same language as the regulations adopted by the Province of Ontario. Amongst these regulations was: "Section 4 . . . No one shall fish by means other than by angling or trolling excepting under lease, license, or permit from a duly authorised officer of the Provincial Government." It is contended that this regulation, adopted from those of the Province, is open to objection on the principle of law laid down by Strong, J. (afterwards Sir Henry Strong, C.J.), in the Supreme Court of Canada, in *St. Catharines Milling and Lumber Co.* v. *The Queen* (1887), 13 Can. S.C.R. 577, at p. 637: "That Parliament has no power to divest the Dominion in favour of the Province of a legislative power conferred on it by the British North America Act is, I think, clear." I cannot agree with that contention: Parliament gave certain powers to the Governor in Council; the Governor in Council exercised these powers; and that the Governor in Council was satisfied with regulations drawn up by another authority, and enacted the regulations in the same language, is no more an abdication of authority than if the Governor in Council had adopted the language of a scientist or a text-writer. Assuming that the law is correctly laid down by Mr. Justice Strong, it is not applicable here.

The Ontario legislation is the Ontario Game and Fisheries Act, R.S.O. 1914, ch. 262—taken from 3 & 4 Geo. V. ch. 69 (Ont.)—this by sec. 24 gives to the Lieutenant-Governor in Council the power (sub-sec. 1 (*a*) to make regulations "prohibiting fishing except under the authority of a license issued on the terms and conditions prescribed by the regulations." The Lieutenant-Governor in Council made regulations, the wording of which was followed in the Dominion regulations: Statutes of Canada 1916, pp. cxc. sqq.

It was not argued, and it is too late a day to argue, that the Dominion Parliament and the Ontario Legislature had not the power to empower the Governor-General in Council and the Lieutenant-Governor in Council to make regulations having the force of law in respect of a class of subjects within the ambit of the respective powers of the Dominion and Province.

Consequently, as the powers of the Dominion and Province cover the whole field of legislation, there is, *quâcunque viâ*, valid legislation forbidding such fishing as

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is in question in this case without a license, etc.—there is no pretence that there was license, permit, or other authorisation; accordingly, unless other considerations prevail, the fishing in question was unlawful.

The Ontario Game and Fisheries Act, R.S.O. 1914, ch. 262, sec. 61 (5), makes it the duty of every overseer forthwith to seize, *inter alia*, all nets used contrary to the regulations; the Dominion Act, sec. 80, provides, *inter alia*, that all nets used in violation of any regulation made under the Act shall be confiscated to His Majesty and may be seized and confiscated, on view, by any fishery officer. By sec. 5 the Governor in Council is empowered to appoint fishery officers, and by the order in council already mentioned the Governor in Council in substance made every officer having authority from the Department of Game and Fisheries of the Province of Ontario a fishery officer under the Dominion Act (p. cxc.)

If then (1) there is power in either Dominion or Province or in both together to pass such legislation in respect of these Indians, and if (2) the legislation, etc., would, being valid, apply to Indians, the defendants should succeed; but, if either hypothesis fail, the plaintiff succeeds.

It is well-known that claims have been made from the time of Joseph Brant that the Indians were not in reality subjects of the King but an independent people—allies of His Majesty—and in a measure at least exempt from the civil laws governing the true subject. "Treaties" have been made wherein they are called "faithful allies" and the like, and there is extant an (unofficial) opinion of Mr. (afterwards Chief) Justice Powell that the Indians, so long as they are within their villages, are not subject to the ordinary laws of the Province.

As to the so-called treaties, John Beverley Robinson, Attorney-General for Upper Canada (afterwards Sir John Beverley Robinson, C.J.), in an official letter to Robert Wilmot Horton, Under Secretary of State for War and Colonies, March 14, 1824, said:—

"To talk of treaties with the Mohawk Indians, residing in the heart of one of the most populous districts of Upper Canada, upon lands purchased for them and given to them by the British Government, is much the same, in my humble opinion, as to talk of making a treaty of alliance with the Jews in Duke street or with the French emigrants who have settled in England:" Canadian Archives, Q. 337, pt. II., pp. 367, 368.

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I cannot express my own opinion more clearly or convincingly. The unofficial view expressed by Mr. Justice Powell at one time, he did not continue to hold.

The question of the liability of Indians to the general law of the land came up in 1822. Shawanakiskie, of the Ottawa Tribe, was convicted at Sandwich of the murder of an Indian woman in the streets of Amherstburg, and sentenced to death. Mr. Justice Campbell respited the sentence, as it was contended that Indians in matters between themselves were not subject to white man's law, but were by treaty entitled to be governed by their own customs—Canadian Archives, Sundries, U.C., September, 1822. It was said that Chief Justice Powell had in the previous year charged the grand jury at Sandwich that the Indians amongst themselves were governed wholly by their own customs. Powell, when applied to by the Lieutenant-Governor, denied this, and sent a copy of his charge, which was quite to the contrary—ib., October, 1822; and all the Judges, Powell, C.J., Campbell and Boulton, JJ., disclaimed knowledge of any such treaty, and concurred in the opinion that an Indian was subject to the general law of the Province. The Indian was, however, respited that the matter might be referred to England: ib., October, 1822. It was referred to the Law Officers of the Crown, who reported in favour of the validity of the conviction: the Lieutenant-Governor, Sir Peregrine Maitland, was instructed that there was no basis for the Indian's claim to be treated according to his customary law, that the offence was very heinous, the prisoner bore the reputation of great ferocity, and there appeared to be no ground for clemency—but, as Maitland might be in possession of further facts, he was given discretionary power to mitigate the punishment—the warrant sent distinctly recognised the legality of the conviction and authorised the execution of the sentence, but left the discretion with the Lieutenant-Governor: Canadian Archives, Q. 342, pp. 40, 41, 1826.

The law since 1826 has never been doubtful. I may say that I have myself presided over the trial of an Indian of the Grand River when he was convicted of manslaughter, and sentenced. I can find no justification for the supposition that any Indians in the Province are exempt from the general law—or ever were.

But, whatever may have been the status of the original Indian population, the law as laid down by Blackstone in his Commentaries, bk. 1, p. 366, has never been doubted: "Natural-born subjects (as distinguished from aliens) are

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such as are born within the dominions of the Crown of England . . . and aliens, such as are born out of it." He adds (p. 369): "Natural allegiance is therefore a debt of gratitude, which cannot be forfeited, cancelled, or altered by any change of time, place, or circumstance, nor by anything but the united concurrence of the legislature:" *Eyre* v.*Countess of Shaftsbury* (1722), 2 P. Wms. 102, at p. 124.

Halsbury's Laws of England, vol. 1, pp. 302, 303, says: "Persons born within the allegiance of the Crown include every one who is born within the dominions of the Crown whatever may be the nationality of either or both of his parents," with certain well-defined exceptions not of importance here. See the Imperial Acts (1914) 4 & 5 Geo. V. ch. 17 and (1918) 8 & 9 Geo. V. ch. 38; and our Dominion Act (1919) 9 & 10 Geo. V. ch. 38, sec. 1.

Admittedly all parties to this action were born within the allegiance of the Crown; and indeed if they were not, they could claim no higher rights than those who were: Blackstone, Comm., bk. 1, pp. 369, 370; Halsbury's Laws of England, vol. 1, p. 306.

There is no overriding and prohibitive Imperial legislation in the way, and I must hold that the Dominion and the Province have the power to pass such legislation as is here concerned in respect of Indians.

I think, too, that the legislation does apply to Indians i.e., that Indians are not exempt from its operation.

The legislation is general, and there is nothing to indicate any exception in their favour.

The land of this band was beyond question the property of the King; the only rights the Indians have in the land came through royal grant, i.e., the "Simcoe deed" of April 1, 1793—a grant of "special grace. . . . and mere motion" of certain land "purchased . . . of the Messissague Nation . . . bounded in front by the Bay of Quinté . . . to be held and enjoyed by them in the most free and ample manner and according to the several customs and usages . . . ." with a proviso against alienation, etc. It is plain, I think, that these words "customs and usages" are words of tenure, setting out the estate of the grantees in the land, and not indicative of the manner in which they are to use the land. See *Battishill* v. *Reed* (1856), 18 C.B. 696; *Onley* v. *Gardiner* (1838), 4 M. & W. 496. For example, suppose that the custom of the Indians was to grow corn and not wheat, could it be contended that growing wheat would be beyond their rights under the grant—if to make

maple syrup from the sap of the maple, would they be wrong to chop down the trees and form arable land? Or, if they were wont to break up land with mattocks or hoes, were they precluded from using ploughs?

Moreover, there is no evidence that fishing with a seine was one of the customs of the Indians in 1793.

There is nothing in the grant suggesting exclusion from the ordinary laws of the land—and I must hold that the Indians are subject to these laws.

The many other difficulties in the way of the plaintiff I do not think it necessary to discuss.

I think that the action must be dismissed with costs if asked.

I had hoped to find much in the Canadian Archives helpful in this inquiry, but have not been able to apply to this decision a great deal of the interesting information stored at Ottawa.

Mr. A. G. Chisholm, counsel for the Six Nations, whom I heard as amicus curiæ, made a very able and interesting argument, chiefly on historical grounds; but, for the reasons stated, I am unable to accede to it.

Of course, I deal only with the law as I find it, and express no opinion as to the generosity, wisdom, or advisability of the legislation.

SLOAN v. OTTAWA CAR MANUFACTURING Co. Ltd.

Ontario Supreme Court, Appellate Division, Maclaren, Magee, Hodgins and Ferguson, JJ.A. April 10, 1921.

BILLS OF SALE (§IIA—5)—SALE OF CAR—NO POSSESSION—NO REGISTRATION — SUBSEQUENT ASSIGNMENT OF BARGAINOR — POSSESSION GIVEN TO BARGAINEE—BILL OF SALE TO TRUSTEE—RIGHTS OF PARTIES.

According to the Bills of Sale and Chattel Mortgage Act, R.S.O. 1914, ch. 135, a purchase, by bill of sale which is not registered, and no possession given is void as against creditors of the seller.

[*Clarkson* v. *McMaster* (1895), 25 Can. S.C.R. 96, referred to.]

THE following statement is taken from the judgment of FERGUSON, J. A.:—

Appeal by the plaintiffs from a judgment of the Chief Justice of the Common Pleas, dismissing with costs an action brought to recover a motor car, or, in the alternative, damages for conversion.

In October, 1919, the father of the plaintiff Howard Sloan

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advanced to another of his sons, Stanley Sloan, $3,000, for the purpose of starting Stanley in a hotel business in the village of Kemptville. It was intended that another young man named Vale should be associated in partnership with Stanley Sloan, and contribute part of the capital necessary to carry on the business, but he failed to find his share of the capital, and as a consequence the father was requested to and did, prior to April, 1920, advance further sums to his son Stanley until the total of his advances amounted to $3,600.

About the 1st April, 1920, it was decided that the business was not a success, and the father, his two sons, Howard and Stanley, and Vale agreed that the business should be wound up, and that all the assets thereof and of Stanley should be turned over to the plaintiff Howard Sloan to be by him realised upon and the proceeds used to pay off the advances that had been made, and a further sum of $1,800, which it was agreed the plaintiffs should advance to Stanley to pay off the outside creditors. No doubt, the father and his sons hoped in this way to save the name and credit of the family, and as much as possible from the wreck of the unsuccessful venture on which Stanley had been embarked.

Among other things, Stanley Sloan had purchased and owned a motor car, part of the purchase-money for which was advanced by his brother, the plaintiff Howard Sloan, who believed that the car was part of the assets that he was to get when he and his father agreed to advance the sum of $1,800. When, however, the plaintiff Howard Sloan went to Kemptville to take over and realise upon the assets, he found that the motor car was not at Kemptville, and on inquiry was told that it had, during the previous winter, been left in a barn on the farm of one McEvoy, under the following circumstances: Vale, being out in the country with the car, was overtaken by a snow storm which obliged him to leave the car at the farmer's. Howard Sloan was also informed that his brother Stanley had in some way pledged the car to the third party, McGahey; so he sent Vale to get the car and take it to the garage of the defendants in Ottawa to be repaired and put in shape for sale. This Vale did; but, while the car was in the defendants' garage, McGahey put in a claim to it, and as evidence of his title produced the following agreement:—

"Kemptville, Ont., Feb. 24, 1920.

"This is to certify that I have to-day sold Harold McGahey my Chevrolet car, which is in Mr. McEvoy's barn, subject to the following conditions: If upon trial the car fails to satisfy the purchaser, I agree to return the purchase-price, five hundred

dollars. I also agree to pay winter storage and return car to purchaser at Kemptville upon demand.

"W. S. Sloan."

As a result of the claim by McGahey, the defendants delivered the car to him. Hence this action.

A. E. Fripp, K.C., and *Reilly*, for appellants.

H. S. White, for McGahey, a third party, respondent.

R. Quain, for respondents.

The judgment of the Court was read by

FERGUSON, J.A. (after setting out the facts as above):—It is not pretended that McGahey ever had possession of the car prior to obtaining it from the defendants, and the plaintiffs contend that McGahey not having filed a bill of sale as required by the Bills of Sale and Chattel Mortgage Act, R.S.O. 1914, ch. 135, and not having obtained possession of the car within the time allowed for the filing of the bill of sale they, as creditors of Stanley, and as persons who had obtained title to and possession of the car, are entitled, under sec. 8* of the Bills of Sale and Chattel Mortgage Act, to have it declared that the sale to McGahey was, as against them, void.

After possession had been given to McGahey, the plaintiffs obtained a bill of sale and registered it, and the trial Judge seems to me to have dealt with the action as if the rights of the parties depended solely upon this bill of sale, dated the 27th April. I do not so view the transaction. In my opinion, the rights of the parties should be determined by reference to the agreement under which the plaintiffs were to receive and take possession of the assets of Stanley Sloan; and, on my reading of the evidence, the plaintiff Howard Sloan was not, under that agreement, a mere trustee of the assets of Stanley, authorised to realise upon them and apply the proceeds to the payment of the creditors of Stanley Sloan. He was, in my view, a person who took a beneficial interest in the assets to secure the advances made by his father, and the advances that he and his father made or were to make under the agreement to wind up, and

*8. Every sale of goods and chattels, not accompanied by an immediate delivery and followed by an actual and continued change of possession of the goods and chattels sold, shall be in writing, and such writing shall be a conveyance under the provisions of this Act; and such conveyance . . . . accompanied by an affidavit . . . of the due execution of the conveyance, and an affidavit of the bargainee that the sale is *bonâ fide* and for good consideration . . . shall be registered . . . . otherwise the sale shall be absolutely null and void as against the creditors of the bargainor and as against subsequent purchasers or mortgagees in good faith.

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as such was both a creditor and a purchaser entitled to plead and have the benefit of the Bills of Sale and Chattel Mortgage Act, and as against whom the sale to McGahey, which was unaccompanied by delivery and possession, and in reference to which no bill of sale had been filed, was void.

I am also of the opinion that taking possession did not perfect the third party's title against the plaintiff Howard Sloan, either as creditor, purchaser, or as assignee under either the verbal agreement of the 1st April, or under the subsequent bill of sale, dated the 27th April: see sec. 23 * of the Bills of Sale and Chattel Mortgage Act; *Clarkson* v. *McMaster*, 25 Can. S.C.R. 96; *Tidey* v. *Craib* (1883), 4 O.R. 696.

The view of the learned trial Judge as to the effect and meaning of the transaction between Stanley Sloan, his father, his brother, and Vale, is expressed in these words:—

"There was in Stanley Sloan the power to sell the car. Stanley Sloan did sell the car for value received. The car became McGahey's. Stanley Sloan became insolvent and made an assignment for the purpose of carrying out his engagements—not of breaking them—and paying his debts. One of those engagements was this transaction with McGahey."

Paragraph (*b*) of sec. 2 of the Bills of Sale and Chattel Mortgage Act provides that the word "creditors" as used in the Act shall include an assignee for the general benefit of creditors, and it seems to me that, even if the transaction be viewed as it was viewed by the trial Judge, yet the sale or agreement for sale set up and relied upon by the third party cannot stand as against such an assignee.

The learned trial Judge expressed the opinion that, because McGahey obtained possession of the car from the defendants prior to the plaintiffs obtaining the bill of sale, 27th April, by which they sought to perfect their title, such taking of possession by McGahey perfected his title as against such subsequent bill of sale. This seems to me to be contrary to the provision of sec. 23 of the Bills of Sale and Chattel Mortgage Act, and also to the decision in *Clarkson* v. *McMaster* (*supra*).

I would allow the appeal with costs, and direct that judgment be entered for the plaintiffs against the defendants for damages and costs, and I would direct that the third party do indemnify the defendants for the amount for which judgment is entered

*23. A mortgage or sale declared by this Act to be void . . . as against creditors and subsequent purchasers or mortgagees shall not by the subsequent taking of possession of the goods and chattels mortgaged or sold, by the mortgagee or bargainee, be thereby made valid as against persons who became creditors, purchasers, or mortgagees before such taking of possession.

against them, including the costs they are ordered to pay to the plaintiffs, and their costs of defence. The third party should also pay the costs of the third party proceedings. If the parties cannot agree on the amount of the damages, it should be referred to the Master to ascertain and report; further directions and subsequent costs being reserved.

Appeal allowed.

CITY OF OTTAWA v. GRAND TRUNK R. Co.
CITY OF OTTAWA v. OTTAWA AND NEW YORK R. Co.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins and Ferguson, JJ.A. April 1, 1921.

HIGHWAYS (§IA—2)—STREET IN A CITY—DEDICATED BY THE CROWN—LONG USE BY THE PUBLIC—RECOGNISED AS A STREET—LIABILITY OF OWNERS THEREON FOR TAXES.

The Crown may dedicate, as any private person may, any lands for use as a public highway, and dedication may and ought to be presumed from long-continued user of a way by the public.

[*Turner* v. *Walsh* (1881), 6 App. Cas. 636; *Regina* v. *Moss* (1896), 26 Can. S.C.R. 322, followed.]

APPEALS in both actions by defendants from the judgment of Lennox, J. in actions to recover certain rates imposed by the plaintiff, the Municipal Corporation of the City of Ottawa upon the defendants and upon the lands occupied by them for certain improvements upon what was said to be a highway in the City of Ottawa, called Nicholas street. These improvements were undertaken by the plaintiff under the Local Improvement Act, R.S.O. 1914, ch. 193.

The judgment appealed from is as follows:—

LENNOX, J.:—These are two actions tried together, and the questions to be decided are identical. The actions are by the same plaintiff against the two defendants. The Grand Trunk Railway Company took over the rights, assets, and obligations of the Ottawa and New York Railway Company. It may be that the Dominion of Canada is now in possession and control of both lines.

There were other minor points referred to, but the substantial question raised is whether Nicholas street, in the city of Ottawa, is in law a highway. The municipality decided to execute certain work on Nicholas street as a local improvement, and passed the usual by-laws to provide for raising the money and assessing the land-owners proportionately, as provided by the Act.

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The companies say that the land known as Nicholas street is still vested in the Crown, and that they are not liable to contribute. At one time I intended to ask Mr. Proctor to serve a formal notice of the actions upon the Law Officers of the Crown and to intimate that I should be glad to have the Crown represented on a day to be named, and to hear what position the Crown takes in reference to the matter in question. Mr. Proctor, however, stated at the trial that he had communicated with these officers, and I understood him to say that they intimated that they did not intend either to affirm or deny the alleged rights of the Crown or the rights claimed by the plaintiff. This being so, and on further consideration, I am of opinion that it would not be proper for me, under the circumstances, to attempt to press the matter further on this point. My judgment will not of course, *per se*, bind the Crown.

If the actions were to be determined simply upon the question of whether the municipality has or has not shewn a grant of the land in question, mediately or immediately from the Crown—a connected paper-title—it may be that the plaintiff municipality would fail unless it succeeded upon the presumption of a lost grant.

For reasons that will appear later, I have not gone carefully into this question, and I make no declaration, and have formed no final opinion as to it. The court-house for the county of Carleton and the common gaol are built upon land bounded on the west by Nicholas street. The Ottawa Electric Railway Company operate their cars upon it. Although not so densely built upon, it is as definitely defined as the ordinary avenue for ingress and egress to and from ranges of business houses, hotels, factories, residences, etc., as any street in London, England.

A notable body of men, who have attained to a great age, all of them identified with the early history and development of Ottawa—and one of them at least, Mr. J. R. Booth, whose huge business enterprises in and about Ottawa, including railway construction and operation in the immediate neighbourhood of Nicholas street, peculiarly qualified him to speak of early conditions—gave evidence at the trial. The alignment of Nicholas street from end to end has not always been exactly as it is to-day. There were temporary diversions long ago at certain points when the highway was out of repair. There was a deliberate change of route too, some years ago, when Mr. Booth, representing one of the defendant companies, or its predecessor in title, through Mr. Booth, obtained a surrender of part of what was then recognised as Nicholas street, and, in lieu of it, obtained and conveyed to the city corporation land

now used as part of Nicholas street. Subject to these exceptions or qualifications, the effect of the evidence of these gentlemen, as I understand it, was to establish that, for so far as their memories reach back, the land in question has been recognised and used as a street and highway of the city of Ottawa just as it is to-day; and from this other evidence, oral and documentary, it appears to be beyond any doubt that almost from time immemorial, and at all events for more than 60 years, lands have been bought and sold and described with reference to Nicholas street as a boundary, easement, and means of access; and statute labour and municipal funds have been expended upon Nicholas street for its construction, repair, and improvement as a public highway.

I have been referred to many decisions and statutes, and have examined them and some other authorities as well. In addition, as far as I am able to do so, I have carefully read and considered the effect of secs. 433, 434, and 445 of the Municipal Act, R.S.O. 1914, ch. 192, the statutory provisions which these provisions supersede, and sec. 4, sub-secs. 1 and 2 (and the sections and sub-sections there referred to) of the Limitations Act, R.S.O. 1914, ch. 75. What has been done conforms to the statutory requisites for constituting a highway; and the soil and freehold of a highway in Ontario are, by the Municipal Act, as it is now, vested in the municipality in which the highway is. As to the Limitations Act, it is to be observed that not only is the right of action barred, but the title of the former owner, including the Crown, is extinguished by possession of the character contemplated by the statute upon the expiration of the time limited for bringing an action. If the title of the Crown is extinguished, in this case, there is no room for the companies to say anything; but, as the Crown was not represented at the trial, I refrain from saying more under this heading. As I said, the Crown neither affirms nor denies the plaintiff's title. The companies seek to evade responsibility under cover of a title which the Crown does not assert. It would not be proper to speak of their attitude as a quibble; and anything that amounts to a legal defence in an action ought not, I think, to be spoken of as "a mere technicality;" but, all the same, the companies proportionately derive at least as much benefit from these improvements as any specially assessed ratepayer in Ottawa, and their defence is wholly wanting in actual merit. It is probable that in this Province there are many other roads, which are highways in fact, the title to which is very much the same as the title of the plaintiff municipality, and it would seriously unsettle conditions long recognised and concurred in, and lead

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to endless trouble, if a land-owner, after two-thirds of a century had elapsed, could successfully refuse to perform his allotment of statute labour on an alleged title of the Crown, not claimed by the Crown.

Upon the facts appearing in evidence, I do not feel that I am bound as a matter of law to give effect to the contentions of the defendant companies.

There will be judgment against the company in each action with costs.

D. L. McCarthy, K.C., for appellant the Grand Trunk R. Co., and *W. L. Scott*, for appellant the Ottawa and New York R. Co.

F. B. Proctor, for respondent.

The judgment of the Court was read by

MEREDITH, C.J.O.:—Both defendants appeal from the judgment, dated the 13th November, 1920, which was directed to be entered by Lennox, J., after the trial before him, sitting without a jury, at Ottawa, on the 23rd January, 1920.

The actions are brought to recover certain rates upon the appellants and the lands occupied by them for improvements on what is claimed to be a highway in the city of Ottawa, called Nicholas street, undertaken by the respondent under the Local Improvement Act.

The only question remaining to be considered is whether or not Nicholas street is a public highway, the other questions having been decided upon the argument adversely to the appellants, the Court being of opinion that they were not open because of the provisions of sec. 38 of the Local Improvement Act.

If Nicholas street is a public highway, it is only because it has been dedicated as such by the owner of the land which it occupies.

This land was originally vested in the Ordnance Department as part of the Canal Reserve, and a road corresponding somewhat with what is now called Nicholas street was laid out by that Department about 80 years ago. This road appears to have been intended to be used as a means of access to wharfs which would be built on the line of the canal for loading and unloading merchandise, but it does not appear to have been used for that purpose. It early came into use by the public as a road which was used as a means of access to Bytown, as what is now Ottawa, or part of it, was then called, and it was the only means of access to Bytown from the south.

It is unnecessary to follow the various changes in the ownership of the Canal Reserve. It will be sufficient to refer to the

Act of 1856, 19 Vict. ch. 45, and the other Acts to which I shall afterwards refer.

This Act recites that the Ordnance lands then consisted of the lands comprised in two schedules to the Act. In the second schedule appear the Rideau and Ottawa canals, and the description of buildings or military works in "City of Ottawa, barracks, blockhouses and adjuncts of the canals," and by sec. 2 the lands described in the first schedule and all other lands except those mentioned in the second schedule, which had become vested in the Principal Officers of the Ordnance or in any person in trust for Her Majesty for the use of that department or for the defence or security of the Province, and which had not been sold or otherwise disposed of, were vested in the Principal Secretary of State subject to any leases or agreements for leases that had been entered into. By sec. 6 the lands mentioned in the second schedule were vested in Her Majesty for the public uses of the Province and were to be subject to the provisions of the Public Lands Act (16 Vict. ch. 159).

Section 8 recites the Act of the previous session (18 Vict. ch. 91), which provided that the lands and reserves mentioned in it should, if transferred to the Province, be divided into three classes, A, B, and C, and provides that the lands in the first schedule shall be deemed to be in class A; that class B shall be deemed to be such buildings or portions of the lands or other property in the second schedule as should be placed in class B by authority of the Governor in Council; and the remainder of the lands, buildings and other property enumerated in the second schedule should form class C, and that classes B and C should be dealt with as provided by the recited Act; and sec. 9 repeals the recited Act as to the lands comprised in the second schedule.

The Act 18 Vict. ch. 91 provided (sec. 2) that the lands in class A should be retained for occupation by Her Majesty's troops, those in class B should be retained for the defence of the Province, and those in class C might be sold, leased, or otherwise used as directed by the Governor in Council.

This Act was predicated on the Imperial Government transferring these lands to the Provincial Government, and the Act 19 Vict. ch. 45 recites that Her Majesty had signified her intention that the lands comprised in the first schedule should be vested in one of Her Majesty's Principal Secretaries of State, and that the lands comprised in the second schedule should be transferred and become revested in the Crown for the public uses of the Province subject to the provisions of the Act.

The result of this legislation was to vest absolutely in the

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Province of Canada the lands comprised in schedule 2, subject to the power of the Governor in Council to place any of them in class B, the effect of which would be that those put in that class would then be retained for the defence of the Province.

It was argued by Mr. McCarthy that the effect of the Act 7 Viet. ch. 11 was to impress the Ordnance lands with a trust, and that, being so impressed, they could not be sold or disposed of, and therefore, as he argued, could not be dedicated for use as a public highway.

I am unable to agree with this contention. Any trust with which the lands were impressed was put an end to as to the lands embraced in schedule 2 by the legislation to which I have referred, and it is to be observed that the Act 7 Viet. ch. 11 gave power to sell any of the vacant lands in Bytown that were not required for military or canal purposes or the service of the Ordnance Department.

It is not, I think, open to question that the Crown may dedicate as a private person may any lands for use as a public highway: *Regina* v. *Moss*, 26 Can. S.C.R. 322, 332, following *Turner* v. *Walsh*, 6 App. Cas. 636, 639, 640, in which Sir Montague Smith, delivering the judgment, said:—

"The presumption of dedication may be made where the land belongs to the Crown, as it may be where the land belongs to a private person. From long-continued user of a way by the public, whether the land belongs to the Crown or to a private owner, dedication from the Crown or the private owner, as the case may be, in the absence of anything to rebut the presumption, may and indeed ought to be presumed."

I agree with the contention of Mr. McCarthy that in order to constitute a highway by dedication there must be both an intention on the part of the owner of the soil to dedicate and acceptance by the public of the dedication.

Whether or not there was the intention to dedicate is, of course, a question of fact, and the intention may be inferred from long user to the knowledge of the owner of the soil and without objection by him: *Regina* v. *Moss, supra; Turner* v. *Walsh, supra.*

It does not follow necessarily that long user by the public of a private road will result in its becoming a public highway by dedication. Each case depends on its own facts, and there may be a state of facts which will prevent the inference that otherwise it would be proper to draw from being drawn.

In the case at bar, there is the salient fact standing at the threshold of the inquiry that for upwards of 60 years—perhaps for nearly 80 years—the public has used as a high-

way what was practically the situs of Nicholas street until the diversion which was made and which I shall afterwards mention, and so used it without objection on the part of the canal authorities or the Government, and that during all that time it has not been used or required to be used for canal purposes.

It may be true that in the early years, when the population was sparse and travel light, exactly the same spot was not always travelled upon, but there was the like use that was made in early days of an original allowance for road laid out by the Crown.

The appellants are lessees of the Crown of the lands on which the assessment is made. The appellant the Grand Trunk Railway Company derives title from the Ottawa Arnprior and Parry Sound Railway Company, which was the original lessee of the Crown, and the other appellant derives title from the Grand Trunk Railway Company of Canada.

There is, in my opinion, the clearest evidence of the recognition by the Crown that Nicholas street is a public highway. In the lease to the Ottawa Arnprior and Parry Sound Railway Company of the 6th June, 1896, two of the boundaries of the property demised are described with reference to Nicholas street. To an agreement between His Majesty and the Canada Atlantic Railway Company, a successor in title of the lessee railway company, dated the 5th June, 1912, which was entered into for the purpose of correcting certain errors in the lease to which reference has just been made, there is a plan annexed which shews Nicholas street as running to and crossing diagonally parcel number 2 described in the agreement. It was argued by Mr. McCarthy that because the agreement, as the fact is, does not except the street, it affords no evidence that Nicholas street was an existing public highway passing through the lands demised. That contention is not well-founded. The plan also shews an original township road allowance crossing the demised premises, and there is no exception of it. This fact seems to me to make what without it would, I think, be reasonably clear, quite clear, viz., that both roads were recognised and treated as existing public highways and were intended to be excepted from the demise.

Several other documents were put in evidence to shew that the Crown had consistently in all its dealings with what had been Ordnance lands recognised Nicholas street as an existing public highway.

Annexed to a lease from the Crown to John Doran, dated the 8th January, 1867, is a plan which shews Nicholas street as "Canal road."

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A plan is annexed to a lease from the Crown to Martin O'Gara, dated the 3rd June, 1869, on which Nicholas street is shewn marked as "Canal road."

Annexed to a lease from the Crown to Michael Keily, dated the 4th July, 1896, is a plan on which Nicholas street, so named, is shewn.

Annexed to a lease from the Crown to Patrick O'Donnell, dated the 15th June, 1869, there is a plan on which Nicholas street is shewn as "Main road."

Annexed to a lease from the Crown to Patrick O'Donnell, dated the 31st August, 1883, Nicholas street is shewn marked as "Public road."

These documents evidence in the clearest manner the recognition by the Crown of Nicholas street as a public highway, and fully support the conclusion that it was a public highway as a result of the dedication of the situs of it for use as a public highway. I do not discuss all the plans upon which the respondent relies, but refer only to those I have mentioned, because, in my judgment, they shew clearly the recognition by the Crown of Nicholas street as a public highway.

When the railway company came to construct its line it became necessary to divert Nicholas street. The change in the street was assented to by the respondent, though no by-law was passed authorising it, and the railway company proceeded to make, and did make, the diversion and formed the new roadway, and the result of this was that Nicholas street has since then occupied the site which it now occupies and has ever since been treated and used as one of the public streets of Ottawa.

It was contended by counsel for the appellants that what was done was ineffective because of the absence of a by-law of the council of the respondent corporation authorising the diversion and of authority from the Railway Committee of the Privy Council to make it.

In my opinion, the appellants are estopped by their acts and conduct from raising this objection. They have taken possession and are and have been, since the diversion was made, occupying and using as their own what, in my view, was undoubtedly part of Nicholas street, and have permitted, if not induced, the respondent to treat the diverted road as a public highway and to expend its money in the upkeep and improvement of it. The authority of the Railway Committee to make the diversion was, as I understand the Railway Act, to enable the railway company, against the will of the respondent, to make it, and I see no reason for requiring the action of the Committee if, as the fact was, the respondent assented to the diversion

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being made. Although no by-law was passed authorising the diversion, the respondent is bound by acquiescence, and could not now successfully set up the want of a by-law: *Township of Pembroke* v. *Canada Central R.W. Co.* (1882), 3 O.R. 503.

It is clear, too, I think, that, although no formal sanction to the making of the diversion was given, the Committee knew of what was proposed to be done and approved of the plans of the railway company, which involved the necessity of making the diversion (exhibit 24).

It is significant that the Government of Canada, as far as the evidence shews, is not a party to the contention raised by the appellants, and, as far as appears, has never questioned, and does not now question, the existence of Nicholas street as a public highway under the jurisdiction of the respondent's council.

I would, for these reasons, affirm the judgment, and dismiss the appeals with costs.

Appeals dismissed.

ST. CLAIR CONSTRUCTION Co. Ltd. v. FARRELL.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Magee, Hodgins and Ferguson, JJ.A. January 31, 1921.

MECHANICS' LIENS (§VII—55)—DELIVERY OF MATERIAL—REGISTRATION OF LIEN—CERTIFICATE AS TO PROCEEDINGS—TIME—EXPIRY OF LIEN—MECHANICS' LIEN ACT, SECS. 24, 25.

It is essential to strictly comply with the provisions of the statute with reference to the registration of the lien and necessary certificate of proceedings in order to preserve the claims of persons under the Mechanics' Lien Act.

Appeal by the defendants Robert C. Hamilton and Charles D. Daniels, the owners, from the judgment of Mr. F. J. Roche, Referee, acting as Assistant Master in Ordinary, holding the respondents entitled to enforce their lien under the Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140, for $529 and costs, by sale of the property, in default of payment into Court of that amount by the appellants. Reversed.

H. P. Edge, for appellants.

G. H. Gilday, for respondent Farrell.

Alexander MacGregor, for respondents.

The judgment of the Court was delivered by

HODGINS, J.A.:—Appeal by the owners from the judgment of

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Mr. Roche, acting Assistant Master in Ordinary, as Referee, dated the 5th February, 1920, holding the respondents entitled to enforce their lien for $529.25 and costs, by sale of the property, in default of payment into Court of that amount by the appellants. The contractor Farrell is primarily liable to pay this sum. The judgment orders him to pay only the deficiency, if any, after sale. The contract was not completed by Farrell, but was taken over by the appellants and finished at a loss, having regard to the payments made to the contractor.

The material dates are as follows:—

Lien registered the 8th January, 1918; certificate of proceedings having been taken, registered the 23rd May, 1918; last delivery of materials on the 4th October, 1917.

Section 25 of the Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140, provides as follows:—

"If there is no period of credit, or if the date of the expiry of the period of credit is not stated in the claim so registered, the lien shall cease to exist upon the expiration of 90 days after the work or service has been completed or materials furnished or placed, unless in the meantime an action is commenced and a certificate thereof registered as provided by section 23."

Under this provision, there being no period of credit stated in the registered claim of lien, the lien would expire early in January, 1918, and so the respondents' claim is barred by the statute.

Section 24 is as follows:—

"(1) Every lien for which a claim has been registered shall absolutely cease to exist on the expiration of 90 days after the work or service has been completed or materials have been furnished or placed, or after the expiry of the period of credit, where such period is mentioned in the claim for lien registered, or in the cases provided for by sub-section 5 of section 22, on the expiration of 30 days from the registration of the claim, unless in the meantime an action is commenced to realise the claim or in which the claim may be realised under the provisions of this Act, and a certificate is registered as provided by the next preceding section.

"(2) Where the period of credit mentioned in the claim for lien registered has not expired it shall nevertheless cease to have any effect on the expiration of 6 months from the registration or

any registration thereof if the claim is not again registered within that period, unless in the meantime an action is commenced and a certificate thereof has been registered as provided by sub-section 1."

Under this section the registered lien expires in case a certificate of proceedings having been taken has not been registered (1) 90 days after completion or after the furnishing of materials or after the expiry of the period of credit if mentioned in the registered lien; (2) 30 days after registration of the lien where it has been registered under sec. 22, sub-sec. 5, which states the time for registration when an architect, etc., refuses a final certificate.

The certificate here was out of time under this section, as the 90 days from the last delivery of materials and the 30 days after registration (if sec. 22, sub-sec. 5, applies) expired long before the 23rd May, 1918.

The question of abandonment is not material, as sec. 22, sub-sec. 1, only applies to extend the time for the registration of the lien, and not to the taking of proceedings.

The appeal must be allowed and the judgment vacated and set aside, the case remitted to the learned Referee to enter judgment against the contractor pursuant to sec. 49, for the appellants, for $50 damages for non-completion as per the Referee's reasons for judgment, and for the respondents against the contractor for their claim and costs; no costs of the appeal, as the value of the work done and material supplied, including what the respondents furnished, appears to have been in excess of payments made when the appellants intervened, and they escape by this judgment from a very large liability.

Appeal allowed.

REX ex rel LEFAIVE v. OUELLETTE.

Ontario Supreme Court, Mulock, C.J. Ex. April 20, 1921.

ELECTIONS (§IIA—20)—CANDIDATE FOR MUNICIPAL COUNCIL—PROPERTY QUALIFICATION—CHANGE—AMENDING ACT.

The qualification of a candidate for the council of a local municipality does not depend upon his ownership of the property at the time of his candidature, but upon his having been rated on the last revised assessment roll as required by part (a) of the Amending Act repealing sec. 52 of the Municipal Act.

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REX EX REL. LEFAIVE v. OUELLETTE.

Mulock, C.J.

MOTION by the relator for an order declaring invalid the election of the respondent as Reeve of the Township of Tilbury North and declaring the relator duly elected as Reeve.

H. M. Mowat, K.C., for the relator.

A. W. Langmuir, for the respondent.

MULOCK, C.J. EX.:—During the argument, counsel for the relator abandoned the claim to the seat.

The grounds upon which the relator relies are as follows: (*a*) that the respondent at the time of his election did not possess any property qualification; (*b*) that, before taking office, the respondent did not make a declaration of qualification as required by sec. 242 of the Municipal Act.

As to the first ground, the solicitors for both parties filed a written admission to the effect that at the date of the last revised assessment roll the respondent was the owner in his own right and was duly assessed on the last revised assessment roll for certain named lands; that these were the only lands for which he was assessed, and were those in respect of which he had qualified for office; and that in the month of November, 1920, the respondent had sold and disposed of the said lands and had not since acquired any in the said township, whereby it was contended on behalf of the relator that on the 3rd January, 1921, the date of the election, the respondent was not qualified to be elected Reeve of the said township.

This objection, whatever force there might have been in it prior to the amendment to the Municipal Act by "An Act to reduce Property Qualification of Candidates for Membership in Municipal Councils," 1920, 10 & 11 Geo. V. ch. 59, is wholly inapplicable to the election in question.

Section 52 of the Municipal Act, R.S.O. 1914, ch. 192, required the candidate in his right or in that of his wife to be possessed of certain property qualification at the time of election; but the amending Act, which came into force on the 4th June, 1920, repealed sec. 52 and substituted therefor the following section:—

"Every person shall be qualified to be elected a member of the council of a local municipality who

(*a*) is a householder residing in the municipality, or is rated on the last revised assessment roll of the municipality for land held in his own right for an amount sufficient to entitle him to be entered on the voters' list," etc.

By virtue of this amendment, if the candidate is rated on the last revised assessment roll of the municipality for land held in his own right for an amount sufficient to entitle him to

be entered on the voters' list (and is otherwise qualified as is provided in the amending statute), he is qualified to be elected a member of the council, even though after such rating he may have ceased to be owner of the property in respect of which he was rated. The qualification of a candidate does not depend upon his ownership of the property at the time of his candidature, but upon his having been rated on the last revised assessment roll as required by para. (*a*). If he was so rated you cannot look behind or dehors the roll in order to attack such qualification. That such is the meaning of the amending Act is also evident from the language of the declaration of qualification required of the candidate by the amending Act.

By sec. 242 of the Municipal Act and form 2, the candidate was required at the time of the election to make a declaration to the effect that he was then possessed in his own right or that of his wife of certain property qualification, but that form was repealed by the amending Act, sec. 2, and there was substituted therefor a new form of declaration, wherein the candidate is required to declare not that he is then possessed of any property qualification, but that he is either a householder residing in the municipality or is "rated on the last revised assessment roll for land held in" his "own right," etc. The respondent was so rated, and therefore the first objection to his election fails.

As to the second ground, it appears that, before taking office, the respondent made a declaration of qualification, but not according to form 2 in the amending Act. It is obvious that he made an unintentional mistake, and the Court is entitled to relieve him against it: *Regina ex rel. Clancy* v. *Conway* (1881), 46 U.C.R. 85; *Rex ex rel. Morton* v. *Roberts* (1912), 26 O.L.R. 263, 274, 4 D.L.R. 278. Under the circumstances, he should be afforded an opportunity of making the proper declaration of qualification, and for that purpose I give him one month within which to do so. If the respondent does not make such declaration within the said month, the right is reserved to the relator to make such motion as he may be advised because of such default.

The motion fails and is dismissed with costs.

SMITH v. CITY OF WELLAND.

Ontario Supreme Court, Orde, J. April 2, 1921.

NEGLIGENCE (§IIB—88)—ACCIDENT TO INFANT—NEGLIGENCE ON PART OF DEFENDANT—TRESPASS OF INFANT—CONTRIBUTORY NEGLIGENCE—CAUSE OF INJURY—RIGHTS OF PARTIES.

When the act of the plaintiff is analogous to an act of trespass, and is itself the cause of the injury, the negligence of the plain-

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tiff continuing right up to the time of the accident; then, even if the defendants were negligent, their negligence was not the proximate cause of the accident, and they are not liable.

[*Hardy* v. *Central London R. Co.*, [1920] 3 K.B. 459, referred to.]

ACTION by Howard Smith, an infant suing by his father and next friend, and by the father on his own behalf, to recover damages arising from an injury sustained by the infant by reason of his falling from the sidewalk in Major street, Welland, into a hollow excavation in the roadway.

G. H. Pettit, for the plaintiffs.

J. F. Gross, for the defendants.

D. B. Coleman, for the third party.

ORDE, J. :—On the 22nd April, 1920, the plaintiff, Howard Smith, was injured by falling from the sidewalk on Major street in the city of Welland, into a hole or excavation in the street, and this action is brought by the father, on his own behalf and as the next friend of the infant, for damages. The defendants, the Municipal Corporation of the City of Welland, seek indemnity under sec. 464 of the Municipal Act against Herbert L. Hatter, the third party, who is the owner of the lands immediately adjoining that portion of the highway in which the hole is alleged to have been. Major street in the city of Welland runs easterly to the Grand Trunk Railway tracks, but does not cross the tracks, and there is no highway immediately west of the tracks connecting with Major street, so that from Ross street, which is the last street crossing it before it reaches the railway tracks, it is a dead-end or *cul de sac*. The distance from Ross street to the fence which marks the westerly boundary of the railway right of way is about 555 feet. There are some dwelling houses on the north side of Major street for a little more than half the distance from Ross street. For the remaining distance, about 190 feet, to the railway right of way, there are no houses, but there is a cement sidewalk along the northerly side of the street to the easterly end. There is no sidewalk on the southerly side. The sidewalk is 4 feet wide and is not built on the street line, its northerly boundary being 3 feet south of the northerly boundary of the street.

There being no outlet to the east, there is no through vehicular traffic, and, there being no dwellings fronting on the street for the last 190 feet of its length, there is no occasion for vehicles ordinarily to go to the end of the street. Although there is apparently no right of way across the railway tracks, the sidewalk is regularly used by a large number of men going to and

from their work, who cross the railway tracks by climbing the fences.

The plaintiffs live in one of the houses on the north side of Major street already mentioned, and about 6 o'clock in the afternoon of the 22nd April, 1920, the infant plaintiff, then not quite 11 years of age, was playing on the sidewalk on the north side of Major street with a small waggon, commonly called an "express waggon," having a handle or tongue fastened to the front axle. Though the exact size of this waggon was not given, I assume from the fact that the front wheels are 6 inches in diameter, that it was not a mere toy such as a very young child might have, but was of a fairly substantial size, such as a boy of the plaintiff's age would be likely to play with. He says that he had gone up to a point not far from the easterly end of the sidewalk, "paddling" himself along in the waggon, that is, having one knee in the waggon and pushing himself along with the other foot. When he reached the end of the sidewalk he got out and started back with the waggon, pulling it behind him by the handle. At a point about 36 feet from the extreme easterly end of the sidewalk, he felt the front wheels catch in a "lump" on the sidewalk, and turned around to release the wheels. While doing so he either lost his balance and fell or stepped backwards off the northerly edge of the sidewalk, falling into a hole caused by an excavation for a private sewer, and dislocating his shoulder and breaking his arm at the elbow.

Hatter, the third party, owns a house which is built on the last lot at the easterly end of Major street. The lot runs through to the next street, John street, and the house is built at the John street end of the lot. On Major street is a 20-inch trunk sewer built in 1908, which continues beneath the railway tracks. There is a slight grade up Major street towards the east, and, according to the city engineer, the easterly end of the street, where the accident happened, is about the height of land. The sewer is about 25 feet below the surface at this point.

The sewer on John street does not run as far easterly as Hatter's house. So Hatter, desiring sewer connection for his house, some time early in the autumn of 1919 asked the chairman of the sewer committee of the defendant corporation for permission to connect his private sewer with the Major street main sewer. The chairman gave him permission, the city engineer came down, and, in the presence of Hatter and McPherson, Hatter's foreman, marked out the spot where the excavation was to be made, and Hatter's foreman, McPherson, proceeded with the work. A by-law of the City of Welland required that no person should make in any street any private

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sewer connection until an application in writing therefor had been made to and permission in writing obtained from the city clerk, and that such connection should be made only under the direction, supervision, and control of the chairman of the street committee or an engineer or inspector authorised for that purpose, and that the connection should not be covered up until personally inspected by such chairman, engineer, or inspector. It was the practice to grant a written permit for such connections, signed by the city engineer, and when the work was finally completed to the satisfaction of the engineer or his inspector to give what is called "a sewer release slip" certifying that the work had been properly completed. For some reason neither a permit nor a release slip was issued in the present case. The work, however, proceeded with the approval of the engineer, and the trench, which extended from the trunk sewer in Major street northerly across the street under the sidewalk and thence to Hatter's lands, was filled in. Some time afterwards the earth in the trench commenced to settle, either as a result of careless work or because it was undermined by water. The evidence was not at all clear as to whether this settling took place before or after the winter began. Some witnesses speak of this hole being filled with snow during the winter, but it is clearly established that for some weeks prior to the accident the trench had caved in on both sides of the sidewalk, and that on the northerly side, into which the boy fell, there was a hole, 4 feet or more in depth and about 4 or 5 feet wide, extending for some distance northerly from the sidewalk. It is also clearly established, in my judgment, that the cement sidewalk immediately over the trench had subsided so that it slanted somewhat to the north, and that one of the sections or blocks into which the cement is divided had sunk somewhat below the section or block to the west of it, leaving the easterly edge of the westerly block projecting above the line of the easterly block and forming a slight obstruction to anything coming along the sidewalk from the east. This projection was sworn to by the boy as being almost 2 inches above the level of the other block. His evidence is corroborated by his father; and, although the city officials endeavoured to minimise that evidence, I see no reason to doubt the boy's story that his waggon caught in the projection, and it is not of much consequence whether its height was 2 inches or less if in fact it was caused, as I find it was, by the subsidence of the earth in the trench beneath.

There was no evidence of any express notice to the defendants that the trench had subsided or that there was a projection on the sidewalk, but the evidence that the hole had been there

for some weeks before the accident is so conclusive that, in so far as that is concerned, I must hold that the defendants were negligent in not sooner discovering the condition of the street and sidewalk and taking the necessary steps to repair them.

Had the boy stumbled upon the projecting cement block and fallen into the hole in consequence, I think the defendants would be clearly liable. But it is urged that the boy's injuries are not the result of any negligence on the part of the defendants, but of his own disobedience of a by-law of the defendants. This defence requires very careful examination and consideration. By-law 132 of the then Town of Welland was passed on the 6th March, 1901, for "the regulation of the streets, sidewalks, and thoroughfares of the Town of Welland and for the preservation of order and the suppression of nuisances thereon." Section 8 of this by-law is as follows: "No person shall ride, drive, run, draw, push or pull any waggon, carriage, wheelbarrow, cart, hand-cart, truck, hand-waggon, sleigh, bicycle, tricycle, vehicle, or conveyance upon any of the sidewalks of the said town. But this section shall not apply to any person drawing, pushing, or pulling a bicycle or tricycle by hand, on which there is no person sitting or riding, so long as the same does not interfere with pedestrians. This section shall not be held to apply to baby-carriages."

It was not suggested on behalf of the plaintiffs that the express waggon which Howard Smith was pulling when the accident happened might not come within the terms of this section. It is hardly conceivable that it would extend to the very small carts and other wheeled toys which very young children play with, and perhaps the *ejusdem generis* rule would serve to confine the operation of the by-law to wheeled vehicles of some substantial size. But it must not be overlooked that, while it may seem an undue exercise of municipal power to prohibit children from playing with sleighs and waggons on unfrequented sidewalks, the by-law is also intended to prevent them from doing so in crowded business streets, where pedestrians would necessarily be inconvenienced. I think the by-law must be interpreted as applying to the express waggon in this case; so that, however innocent he may have been of wrongdoing, Howard Smith was at the time breaking the by-law.

The mere fact that at the time of the accident the boy was doing something which was unlawful would not of itself disentitle him to recover if the defendants' negligence was the cause of his injuries. Had he tripped upon the projection in the sidewalk and been injured in consequence, the fact that he was at the time pulling a hand-waggon along the sidewalk in

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contravention of the by-law would not be any defence to the charge of negligence against the defendants. That this is the law is stated in Pollock on Torts, 11th ed., p. 177 *et seq.*, and is, I think, borne out by the authorities, though it is strange that there seems to be no case in which the point has come up squarely for decision. The cases in which the question has been discussed are cases where the plaintiff has been a tresspasser in the sense that he was wrongfully upon the spot, or the wrongful or unlawful act of the plaintiff has been treated on the basis of contributory negligence. Here the boy was not a trespasser in the sense that he had no right to be on the sidewalk. He was lawfully on the sidewalk, but was at the time doing something which the law declared to be unlawful and to be subject to penalty. And it was that unlawful act which was, in my judgment, the direct or proximate or decisive cause of the accident.

Under these circumstances can the defendants be held to be liable? Although, but for their negligence, the boy might not have been injured, that is of no consequence if their negligence was not the proximate cause. But it is argued for the plaintiffs that the breach of the by-law is of no consequence, and that, as its infraction was punishable by certain penalties, the defendants cannot set up the boy's unlawful act as an answer to their own negligence. It may seem a hardship that because a boy receives an injury which could not have happened but for the negligence of the defendants, he cannot recover merely because of his trifling breach of a by-law of which he knew nothing, and which was in all likelihood seldom enforced. But the sense of hardship really arises from the circumstances and because the case affords an extreme example of the application of a principle. Had the accident happened to a man who unlawfully rode his bicycle upon the sidewalk and had struck the projection, or to a man who drove upon the sidewalk in his motor car, it would not seem to be a hardship that the man could not recover for his injuries. And yet the principle would be the same as in the present case.

One may not do an injury to another merely because he is breaking the law, nor must one lay a trap for the purpose of injuring another, even though the other must become a trespasser in order to incur the danger. For example, a boy who unlawfully climbs an electric light pole, could hardly complain if he were injured by an electric light wire which had been negligently allowed to become detached from an insulator, but this would not justify the deliberate placing of a wire to injure boys who might unlawfully climb the pole. This, I think, is clearly established by cases like *Bird v. Holbrook* (1828), 4

Bing. 628, where the trespasser was injured by a spring-gun placed on his land by the owner for the express purpose of catching and injuring the trespasser. The judgments there make it clear that it was because of that express purpose that the defendant was held liable, and that, had the trespasser fallen into a pit dug for some innocent purpose or into a trap set to catch game, he could not have recovered. To all intents and purposes the setting of a spring-gun deliberately to injure a trespasser is the same as if the defendant had waited until the trespasser appeared on the ground and then shot him, which clearly he would have no right to do. There is a striking analogy between the setting of a trap to injure a trespasser and the cases where the original negligence is carried on, as it were, beyond the act of contributory negligence, so as to become the proximate or direct cause of the accident.

If the drawing of the waggon upon the sidewalk were not unlawful, then there would be nothing upon which to base a finding of contributory negligence, because, although the boy fell into the hole by reason of his turning round to release the waggon from the projection, his doing so was the natural consequence of the projection's being there and flowed directly from the defendants' negligence.

If the unlawful drawing of the waggon is treated as an act of contributory negligence, then, in my judgment, the plaintiff must fail, because his negligence continued up to the moment of the accident, and there was not, so far as I can see, any scope for the application of any such principle as that laid down by Anglin, J., in *Brenner* v. *Toronto R. W. Co.* (1907), 13 O.L.R. 423, at p. 440, which has been approved by the Judicial Committee in *British Columbia Electric R.W. Co.* v. *Loach*, [1916] 1 A.C. 719, 23 D.L.R. 4. There was no time subsequent to the act of contributory negligence to which the original negligence could be carried over.

Regarded as a case of contributory negligence, this case is not unlike that of *Butterfield* v. *Forrester* (1809), 11 East 60, where the plaintiff rode violently into a pole negligently placed across the highway, and was not entitled to recover because of his own negligence. There his negligence continued up to the time of the accident. But the decision in that case might have been different if the negligent defendant had been standing by the pole, and, seeing the plaintiff approaching, had failed to remove it in time to avoid the accident.

It is not always easy to distinguish between cases where the plaintiff's contributory negligence is not in any sense an unlawful act, but consists merely of a want of care in the circum-

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stances in which he is placed with regard to the defendant's negligence, and cases where the plaintiff's conduct which contributes to or causes the accident is in itself unlawful or wrongful. And in many cases the unlawful or wrongful act has been treated on the footing of contributory negligence when it might better have been treated, in my judgment, on the distinct footing of trespass. For instance, in the recent decision of my brother Rose in *Downing* v. *G.T.R. Co.* (1921), 58 D.L.R. 423, 49 O.L.R. 36, the question of contributory negligence is discussed, but the judgment can be supported, in my judgment (I say it with all respect) upon the mere ground of trespass, the boy having no right to be upon the railway company's property at all. This is the ground of the recent decision in the Court of Appeal in England in *Hardy* v. *Central London R.W. Co.*, [1920] 3 K.B. 459. This last mentioned judgment tends to clear up some of the confusion into which the law was falling in cases of accidents to young children, and meets the difficulty which sometimes arises in determining whether or not a child of tender years can be guilty of contributory negligence. A child of tender years, if a trespasser, is not entitled to recover merely because the defendant has been guilty of negligence, unless there has been some allurement held out. And the cases of allurement come very close to being cases of license or tacit permission and so ceasing to be cases of trespass. See also *Walsh* v. *International Bridge and Terminal Co.* (1918), 44 O.L.R. 117, 45 D.L.R. 701, and *Shilson* v. *Northern Ontario Light and Power Co.* (1919), 45 O.L.R. 449, 48 D.L.R. 627, 50 D.L.R. 696, 59 Can. S.C.R. 443.

Here the act of the infant plaintiff was analogous to an act of trespass, and was itself the cause of his injury. He was guilty, however innocently, of an act of wrongdoing towards the municipality, to whom he owed a duty to observe the by-law; and, in my judgment, the principles applicable to his case are the same as those applicable in cases of trespass.

It is urged that the defendants had allowed the by-law to lapse into non-enforcement. There was no evidence of this beyond the fact that the plaintiffs and their witnesses had no knowledge of its having been enforced. But that argument would hardly avail had the boy been summoned for breaking the by-law, and I know of no principle upon which I can hold that failure to enforce it in any way affects its binding force.

The case of *Burtch* v. *Canadian Pacific R.W. Co.* (1906), 13 O.L.R.632, was cited by the plaintiffs. There Clute, J., held that the defendants, a railway company, could not invoke a by-law prohibiting coasting on the streets when a boy while coasting was injured by the company's negligence. But Clute, J.,

expressly holds that the boy was not a trespasser and was where he was as of right, and that, "so far as the defendants were concerned, he had a right to ride his waggon if he pleased in descending the grade" (p. 643). That case is quite different from this, where, so far as the present defendants, the municipality, are concerned, the plaintiff had no right to draw his waggon along the sidewalk.

For these reasons, I feel bound, somewhat reluctantly, to dismiss the plaintiffs' action, but I think under all the circumstances the dismissal should be without costs.

There being no liability on the part of the defendants for which they can claim indemnity against the third party, the defendants' claim against the third party will be formally dismissed; and as, in the result, the defendants, having a complete defence against the plaintiffs, need not have joined the third party, I think he is entitled to his costs against the defendants.

FIELD v. SARNIA STREET R. Co.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Latchford, Middleton and Lennox, JJ. April 4, 1921.

NEGLIGENCE (§IIF—120)—ACCIDENT—ELECTRIC CAR—WAGON—NEGLIGENCE OF BOTH PARTIES—TIME—PROXIMATE CAUSE OF ACCIDENT.

Negligence on the part of the plaintiff does not prevent him from succeeding in an action, when the defendant, notwithstanding such negligence, might have avoided the accident by the exercise of reasonable care and diligence.

[*Parsons* v. *Toronto R. Co.* (1919), 48 D.L.R. 678, 45 O.L.R. 627 referred to.]

AN appeal by the defendants from the judgment of the County Court of the County of Lambton, upon the findings of a jury at the trial, in favour of the plaintiff.

The action was brought to recover damages for injury to a team of horses and a waggon, owned by the plaintiff and driven by a man in his employment, by reason of the negligence of the defendants, as the plaintiff alleged. The man was attempting to drive the team across the street railway track upon a highway, when a car of the defendants ran into them and caused the injury complained of.

At the trial questions were left to the jury. The questions and the jury's answers thereto were as follows:—

1. Were the defendants or their motorman guilty of negligence which contributed to the accident? A. Yes.

2. If so, in what did such negligence consist? A. By not looking ahead at that point.

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

4. If so, wherein did he fail to exercise reasonable care? A. By not looking up the track at the last moment before he crossed.

5. If both the company and the driver of the waggon were guilty of negligence, could the company or their motorman, after the negligence of the driver became apparent, or should have been apparent, do anything to avoid the accident? A. Yes.

6. If so, what? A. As the street-car travels much faster than a team, it is obvious that the motorman could stop the car in time to avoid the accident, if he was watching the track and had his car under control.

7. If you find the company or their motorman guilty of negligence, by question No. 5, could the driver of the waggon have done anything after such negligence became apparent, or should have been apparent, to avoid the accident? A. No.

8. If so, what?

9. Damages? A. We find that the plaintiff is entitled to $300 damages.

Judgment was directed to be entered for the plaintiff for the recovery of $300 and costs from the defendants; and the appeal was from that judgment.

T. N. Phelan, for appellants.

A. Weir, for respondent.

MEREDITH, C.J.C.P. :—If the drivers of the street car and the heavy rumbling horse-drawn wagon had been approaching each other, the negligence of the one might very well be set off against that of the other, so that the plaintiff could not recover from the defendants, nor the defendants from the plaintiff, for any injury arising out of the accident; and the jury should doubtless have so found; but it is an entirely different case where, as in this case, the one driver is following the other: the one in front cannot see behind, and the one behind cannot but see in front if he is performing his more obvious and more important duty, a duty which not only the safety of those ahead but also the safety of those behind, in the car, makes imperative. The very obvious first duty of every driver on land or water is to keep a vigilant look-out ahead.

According to the testimony of a disinterested witness, the street-car was from 150 to 200 feet behind the waggon when its driver turned the horses to go into the Imperial Oil Company's works; the car was running at a speed of from 30 to

40 miles an hour; and no attempt was made by the driver of it to stop it until almost, if not quite, upon the horses, which by this time were crossing the street-car track.

The answer to all this is that the driver of the street-car did not see the man, waggon and horses, going towards the company's works until his car was almost upon the horses; and the only excuse for not having seen them sooner is that he was not looking ahead but was looking over the fence of the company's works to see if its workmen had quitted work and would be crossing the track, as was usual about that time of the day.

It is sometimes said that a bad excuse is better than none, though the better saying may be that no excuse is better than a bad one. A bad excuse has at least the merit of shewing that there is an appreciation of the need of an excuse; and that is this case. The driver of the car gives the excuse for not seeing the danger during his 150 to 200 feet run, that he was looking over the fence of the Imperial Oil Company's works to learn whether the workmen were coming out from their work so that he might not endanger them. But a glance of the eye should have been sufficient for that; nothing could have been gained by looking over the fence all the time and neglecting the imperative duty to look ahead; and the excuse goes from bad to worse when the fact is known that the workmen coming out from the works must have come out by the very road on which the man, horses and waggon, were going in, and farther from the car than they were.

It therefore does seem to me that this excuse is very like that of a sentinel who would excuse his sleeping on his post by saying that, though the mischief was done whilst he was asleep, the sleep was only a little one.

In all the way, running that 150 to 200 feet, a glance of the eye ahead, a glance which may take only a part of a second, must have revealed the danger ahead and have enabled the driver of the car to have avoided the injury—a glance in the direction in which the driver necessarily must be always looking if danger to those behind, in the car, as well as those ahead, is to be avoided.

It is said that to excuse is to accuse; it goes much farther in this case, it is to condemn.

The driver of the car should have seen the danger and have avoided the injury; and none the less so because the driver of the horses was negligent too.

The real cause of the accident was either the neglect of the driver of the car to see the danger and avoid it, or in seeing

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it and not avoiding it. He was in no fault as long as the horses and waggon were going ahead; he was in fault when they turned to go across his path, because he could, if he had looked, have seen the danger and have stopped the car before reaching the place of the accident; that he admits, but attempts to excuse because he was looking over the fence.

We cannot rightly, in my opinion, reject the verdict; I would not if I could, deeming it, as I do, to be right.

I would therefore dismiss this appeal.

RIDDELL, J.:—Were it not for the answer to the 6th question, I should have thought that the principle of *Jones* v. *Toronto and York Radial R.W. Co.*, 25 O.L.R. 158, applied—but the answer brings in the principle laid down in *Parsons* v. *Toronto R. W. Co.*, 48 D.L.R. 678, 45 O.L.R. 627, as the result of the cases in the Judicial Committee and the Supreme Court of Canada, and I cannot say that the jury could not find as they did.

The appeal should be dismissed.

MIDDLETON, J.:—Had I to determine this case, I should have found the accident to have been the result of the concurrent negligence of both parties, and that the case is one in which what has been called ultimate negligence plays no part.

It is not easy to understand what the jury meant. If the finding is that, after the motorman ought to have known that the plaintiff's horses were, by the negligence of their driver, in danger, there was yet time for the driver to have avoided the accident, then the verdict should stand. I have come to the conclusion that the answer given probably has that meaning. The railway track is some little distance from the travelled road, and I understand the answer to mean that there was ample time between the time when it was plain that the team was being turned across the road to enter the yard and the impact, to enable the motorman to stop his car—had he not been negligent after the danger ought to have been apparent to him.

I cannot understand how the much-misunderstood *Loach* case has any bearing on this case. As I understand it, that case determines that a defendant is liable not only when he fails negligently to avail himself of the last clear chance of averting an injury, but also when he is unable effectually to avail himself of that chance by reason of some earlier negligence on his own part: e.g., as in that case, when he cannot stop the car by the use of the means at hand because he started out with his brakes out of order. See Salmond's Law of Torts, 5th ed., p. 44.

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LENNOX, J.:—This action cannot be distinguished in principle from *Parsons* v. *Toronto R.W. Co.*, 48 D.L.R. 678, a judgment of this Court. In both cases the jury found negligence on both sides, and found in both cases that the motorman had not his car under proper control, and, but for this, could, notwithstanding the plaintiff's negligence, have avoided the collision by the exercise of reasonable care. It is true that in the case at bar the accident occurred at a crossing at a point at which vehicles and pedestrians were of course to be looked for; and the jury found, in addition to want of control, that the motorman was not watching the track. These circumstances, however, go rather to emphasise the negligence of the motorman, than to distinguish the principle upon which the decision is to turn. It will only be necessary to copy two of the questions and answers:—

"5. If both the company and the driver of the waggon were guilty of negligence, could the company or their motorman, after the negligence of the driver became apparent, or should have been apparent, do anything to avoid the accident? A. Yes.

"6. If so, what? A. As the street-car travels much faster than a team, it is obvious that the motorman could stop his car in time to avoid the accident, if he was watching the track and had his car under control."

The accident occurred on Christina street in the city of Sarnia. The track rails are to the westerly side of the street. The car was going south, and the horses and waggon were going in the same direction, along the easterly side of the street, and near the kerb. The works of the Imperial Oil Company are to the west. There is a wide entrance of more than 80 feet to the company's property and plant, and ingress and egress for vehicles and pedestrians is across the company's right of way. Tecumseth street, 239 feet to the north of the oil company's crossing, runs easterly from Christina street. The conductor says that crossing or passing Tecumseth street the car was travelling 4 or 5 miles an hour. The motorman says that at this point, "I was just barely moving." He says that, at a point 10 or 15 feet north of the point of impact, he was travelling at the rate of only 12 miles an hour, and at that rate could stop his car in 60 or 70 feet. Obstructed by a team of horses weighing 3,150 pounds with waggon attached, he did not succeed in bringing his car to a standstill in anything like that distance. There was a good deal of evidence that the car was moving at the rate of 25 to 30 miles an hour, and the facts and discrepancies I have referred to may have prevented the

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jury from accepting the motorman's statements without qualification. He saw the driver Campbell. He says: "After I got half way, anyway, between the Imperial Oil and Tecumseth, he was on Christina street then." . . . "Was there any indication he was going to turn? A. None whatever. Q. What happened then? A. I sounded my gong. I was watching for the men. Sometimes they come out before the half hour. Q. When next did you see Campbell? A. When I turned and stopped looking (over the fence) for them coming out of the Imperial Oil, and of course Campbell was right in front of me. . . . Q. Were you then to the crossing? A. I was on it when I noticed him."

Although there was "no indication whatever," as there would not be, of course, until the team got nearly opposite the crossing, the motorman realised that he might be turning in there, for he says he sounded the gong, and then he looked away and kept looking away while he ran 120 feet to a crossing, and never looked again until he was "upon him," or, as he says elsewhere, until the horses were square across the track, and his car was within 10 or 15 feet of them.

The driver says he looked back when he was some distance from the crossing—he probably did not turn round sufficiently to take in a long range of track, and the jury, quite properly, found him negligent in "not looking up the track at the last moment before he crossed." The motorman's negligence began before this, namely, when he turned away to watch over the fence, and his negligence continued until he again gave attention to where he was running, and it was then too late.

This is exactly the condition presented in *British Columbia Electric R. W. Co.* v. *Loach*, [1916] 1 A.C. 719, where the motorman started out in the morning with a defective brake, and, the negligent want of repair continuing until the emergency arose, he was then unable to avoid the consequences of the supervening negligence of the man driving upon the highway. See also *Columbia Bitulithic Limited* v. *British Columbia Electric R. W. Co.* (1917), 55 Can. S.C.R. 1, 37 D.L.R. 64, following the *Loach* case, and Salmond's Law of Torts, 5th ed., pp. 44, 45, and 46, where, as I think, the *Loach* case is very satisfactorily discussed.

There was some reference made, too, upon the argument of the appeal to the answer to the 6th question, and the suggestion was made that it is not definite. It could be better expressed by a revising barrister, but there can be no doubt as to its meaning, and there is no escaping from its effect. The jury

evidently accepted, or pretty well accepted, the evidence for the plaintiff as to the rate of speed.

In the *Parsons* case, the plaintiff's motor car was standing on the south side of Dundas street and facing east. He looked to the west and saw an approaching car, which he judged to be 250 or 300 yards away. After the lapse of a little time, he got into his car, and before putting it in motion looked into the mirror, and, by this uncertain method, judged the car to be then 150 feet away. He then got partly upon the track and was struck by the car he had seen advancing. There was conflicting evidence as to the speed at which the street-car was running. To the question whether the motorman could, notwithstanding the plaintiff's negligence, have avoided the accident by the exercise of reasonable care, the jury answered that he could, and assigned as a reason that "he should have had his car under control."

The plaintiff has better and more specific answers to rely upon in this case, but in that case, too, the meaning was reasonably clear, and, as I said, the principle of decision is the same.

At pp. 628 and 629, Meredith, C.J.C.P., said: "The case, as it appears to me, is not one in which any question of primary, secondary, and tertiary negligence arises: it is simply a case of negligence on the part of the plaintiff which does not prevent him from succeeding in this action, because, notwithstanding such negligence, the defendants might, by the exercise of ordinary care, have avoided injuring him. It is a breach of that duty, owed to the negligent, and that alone, which gives the right of action. . . . They cannot excuse themselves, in such a case as this, from that duty by shewing that, owing to their own prior want of ordinary care, they had deprived themselves of the power to perform the duty they owed to the plaintiff."

And at p. 631 Mr. Justice Riddell said: "It seems to me to be the fair result of the cases in the Judicial Committee and in the Supreme Court of Canada . . . that, if the motorman was running his car at so great a speed as that he could not, by the exercise of proper care, avoid the result of a negligence of the plaintiff which might be anticipated, then this excessive speed was in itself the efficient, the proximate, the decisive cause of the accident, and that the contributory negligence of the plaintiff does not in law at all neutralise its effect. . . ."

In the present case I think the jury intended to find that the motorman failed to stop his car by reason of the fact that he was going too fast; and, if that was so, the defendants are liable. I can see no kind of difference between sending a car

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out without the proper brakes, and running a car at such a speed that proper brakes are useless.

I could not hope to express the law governing the decision of this appeal nearly as well as I find it stated in advance by these eminent and learned Judges, in a case where the liability of the defendant company was not clearer than, if as clear as, in this action.

I would dismiss the appeal.

LATCHFORD, J., agreed with LENNOX, J.

Appeal dismissed.

LORANGER v. HAINES.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Latchford and Lennox, JJ. March 11, 1921.

SPECIFIC PERFORMANCE (§ IA—12)—AGREEMENT TO CONVEY PROPERTY—CONSIDERATION—IMPROVEMENTS MADE—HOUSE BUILT ON LAND—RIGHTS OF PARTIES.

There is a clear distinction between motive and consideration; the latter means something of some value in the eye of the law which moves from the plaintiff, being either some benefit to him or some detriment to the defendant.

APPEAL by plaintiff from the judgment of Middleton, J. in an action for specific performance of an agreement by the defendant to convey land to the plaintiff. Reversed.

The judgment appealed from is as follows:—

This action is an extraordinary one. Loranger is a Detroit attorney—Haines was associated with him in the promotion of certain company organisations for the handling of certain patents of invention. The headquarters of this project are in Detroit.

Haines acquired certain property in Sandwich on the river-front, upon part of which he intended to build a residence, and the rest he contemplated selling. This parcel cost a large sum and has increased in value.

While things were going well in the patent scheme, and millions seemed to be in sight, love and affection sprang up between these men, and Haines thought all that was necessary to secure him perfect happiness was that his friend Loranger should be ever near him, so he suggested that he would present him with a building site upon which a house might be built next his own.

Loranger accepted, with some pretence of coy reluctance, and drafted an agreement in which, for "consideration hereinafter mentioned," Haines and his wife agreed to convey the lands in question, a parcel 84 ft. in width by 182 in depth, to him.

The real consideration was one moving from Loranger to himself, for it was the building of a house for himself upon the land he was to acquire.

The agreement calls for the payment by Loranger of his equitable proportion of the cost of constructing sewers, watermains, and a roadway. This is said to be for the benefit of Haines as well as Loranger, and so to amount to some legal consideration.

The familiar "one dollar" is not mentioned, and there is no seal to import consideration.

Loranger built without any conveyance, and the modest bungalow expanded into a house costing, Loranger says, $12,500.

From time to time there was talk of a deed, but none was made. The situation, as Loranger well said, called for peculiarly delicate and tactful handling.

Things did not progress any too well in the patent paint company, and this hasty alliance has resulted in leisurely repentance. Haines now finds little pleasure in contemplating the coming and going of Loranger in his motor car from the mansion along the common drive.

Loranger naturally wants his land. At the time of the agreement it was worth $75 per foot and is now worth $100.

Haines takes the position that the real consideration for his contemplated gift was the pleasure to be derived from proximity to his friend, and, this now turning out an apple of Sodom, he ought not to be compelled to consume it.

Loranger's answer is: "Having permitted me to spend my money upon the faith of your promise, you must convey;" and this takes the case out of the class of cases in which equity refuses to award specific performance of an agreement to give.

The written agreement was, as I have said, not under seal, but seals were affixed while in the plaintiff's possession to the copy which he had, and the witness falsely swore that he saw the document signed, sealed, and delivered by the parties. The plaintiff admits that his deed was not sealed by the defendant and his wife, and does not attempt any explanation. The deed and the duplicate are one, and the principle that precludes the use of the one will prevent the wrongdoer from relying on the other copy. For this reason, I do not think specific performance should be granted.

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On the whole case, I would also refuse specific performance, upon the term to which Haines is ready, from his defence filed, to assent, that he repay to Loranger the amount spent in erecting the building, to be determined by the Master if the parties cannot agree. I would not allow interest, setting this off against the occupation—nor would I allow depreciation from ordinary wear and tear, setting this off against increased cost of materials.

I would give no costs down to and including this judgment, and would leave the costs of the reference to the Master, trusting him to award or withhold in accordance with his view of the conduct of the parties upon the reference, and in the light of any offer either party may make without prejudice to fix a sum which will render a reference unnecessary."

E. S. Wigle, K.C., for appellant.

D. L. McCarthy, K.C., for respondent.

MEREDITH, C.J.C.P. :—The single question argued in this appeal was whether there was a good consideration for the defendant's contract to convey the land in question to the plaintiff.

At the trial the transaction was called a gift of the land, and was spoken of as one that would not be enforced in the Courts; and in a popular sense it might, no doubt, be said that the defendant was making a gift of the land, because he was not getting money for it, but was giving it to induce the plaintiff to do things which should be for his own advantage directly and for the defendant's benefit only indirectly.

But as a matter of law, and in fact, the plaintiff was not only to give a good consideration for the land, but was indeed to give ample consideration for it.

In the first place, he was to give up his desire and intention to live in Detroit in a rented house, and to overcome his disinclination to put his money in war-time into land in Ontario, and was to take up his residence in Ontario next door to the defendant's residence there; then he was to improve his part of the one lot on which the two residences were to be; then he was to pay part of the cost of road and sewer conveniences common to both houses; and then, if he should wish to sell his residence within a certain time, he was to give the defendant the first opportunity to buy.

All these things were done by him: how then can it be seriously urged that the defendant's contract to convey the land to him is *nudum pactum?* On the contrary, it is plainly a case in which, if there had been only a verbal agreement to convey, it should be specifically enforced, notwithstanding the

Statute of Frauds, because of the performance by the plaintiff of all that he contracted to do to entitle him to a conveyance of the land.

It need hardly be said that it is not necessary that the defendant should have received any actual benefit from the performance of the obligations he imposed on the plaintiff; the Courts cannot be concerned with the adequacy of the consideration; it is commonly repeated in the Courts that it is enough that the defendant got all he contracted for; and that the value of the things contracted for is measured by the appetite of the contractor; so measured, the defendant seems to have got the best of the bargain, at all events it seems to have needed considerable persuasion on his part to induce the plaintiff to enter into the contract in question; and even yet it may be difficult for any disinterested person to say that he did not; his capricious appetite cannot lessen anything that the plaintiff has done in fulfilment of his part of the bargain.

And, quite apart from any question of contract, the defendant should assuredly be estopped from claiming title to and taking possession of the land upon which, not only with his knowledge but at his request, the plaintiff has expended so much money—with the defendant's knowledge and before his eyes—on the faith of his promise to convey it to the plaintiff.

The general rule is that a representation made by one person for the purpose of influencing the conduct of another, and acted on by him, will be sufficient to entitle him to the assistance of a court of equity for the purpose of realising such representation: *Hammersley* v. *Baron de Biel* (1845), 12 Cl. & Fin. 45.

But the trial Judge's judgment was also put on another ground: the material alteration of the agreement sued on after its completion. During the trial this point was more than once adverted to, the learned Judge then expressing the view that, as the writing was in three original parts, the alteration of one only should not prevent recovery upon either of the others; but in his considered judgment he adopted apparently the opposite view.

That question may be a nice one; and it is one which has been dealt with not infrequently in the Courts of the United States of America, the general trend of the cases being in accord with the trial Judge's earlier expressed views upon it—at all events when the alteration is not made fraudulently: see *Hayes* v. *Wagner* (1906), 220 Ill. 256; *Rhoades* v. *Castner* (1866), 12 Allen 130; *Jones* v. *Hoard* (1894), 59 Ark. 42; *Lewis* v. *Payn* (1827), 8 Cowen (N.Y.) 71; and Corpus Juris, vol. 2, pp. 1189-1220; though a very stringent and exceptional rule seems to

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prevail in the State of Missouri, called the rule in Missouri or the Missouri rule: *Koons* v. *St. Louis Car Co.* (1907), 203 Mo. 227.

However, for several reasons, the respondent cannot take anything on this ground: (1) it was not argued upon this appeal; no attempt was made to support the judgment on that ground; (2) no such defence was pleaded; (3) the contract filed by the plaintiff at the trial—marked exhibit 1—has not been altered in any respect; (4) there is no evidence of any alteration having been made by or with the knowledge of the plaintiff; and, on the contrary, any such act by or knowledge in him is entirely disproved; and (5) the plaintiff can succeed without reference to any written contract (*a*) by estoppel and (*b*) on a verbal contract fully performed on his part.

The agreement was made in triplicate, one part was kept by each of the partners, and the third was given to a very reputable firm of solicitors to be registered; the part registered has seals, as well as the signatures of the three parties, upon it; and the affidavit of execution is that it was sealed as well as signed.

The plaintiff, in his very candid and fair testimony at the trial, said that none of the parts was sealed when they were signed; that the part for registration was taken to the solicitors and left with them, the witness remaining to make the necessary affidavit; and that he has no knowledge of the manner in which, or person through whom, the alteration was made.

If a defence of this character had been set up, the plaintiff could, and doubtless should, have had the witness and the solicitors at the trial; and on one can have any doubt that they should have been able to give a satisfactory account of the alteration; meanwhile any one may reasonably conjecture that the witness had the authority of the parties to attach the seals or that the solicitors thought it proper to attach the seals, seeing that when signed the attestation clause, on each part, contained the words "signed, sealed, and delivered;" which alone might be taken to authorise the witness to attach the seals before subscribing his name untruly under such words.

There is no kind of merit in this point; and so it is not to be wondered at that it was not as much as mentioned in the argument of this appeal.

The appeal must be allowed and the plaintiff must have judgment in the action for specific performance, in the proper form, with costs throughout.

RIDDELL, J.:—This is an appeal by the plaintiff from the judgment at the trial. Most of the findings of fact by my

brother Middleton are unexceptionable, but it is argued that he is in error in the application of the law to the facts so found. The material facts are that the defendant had certain river-front property in Sandwich; and, the parties being associated in business, an affection developed between them to such an extent that the defendant desired the plaintiff, a Detroit attorney, to live near him on the Sandwich property. Thereupon an agreement, not under seal, was entered into, on the 2nd May, 1918, between them, wherein and whereby the defendant agreed to convey to the plaintiff a portion of the Sandwich land particularly described. "The consideration hereof is the agreement by said Loranger to build a residence on said land and also to pay his equitable proportion of the cost of certain sewers, water-piping, and the construction of said private roadway."

There is also a provision that, if Loranger should elect within one year "to sell the property and rights above agreed to be conveyed to him," the defendant should have the right, within 30 days after actual notice, "of purchasing the same . . . . at a price which shall include the actual cost of all the buildings, fixtures, fencing, grading . . . and all other improvements that may have been made to the property."

The plaintiff, without a deed, went upon the property, made improvements thereon worth some $1,200 to $1,500, and built a house worth $12,500—with the knowledge of and without objection by the defendant.

Afterwards the affection between the parties waned and disappeared, and now it appears to be replaced by silent if not open enmity—the defendant no longer wants the plaintiff near him.

An action was brought for specific performance—the defendant set up that the real agreement was that the plaintiff was to erect a bungalow on the land, which would be leased to him at a nominal rent for 10 years, and then the defendant would pay the plaintiff the value of the bungalow—that the agreement sued on was obtained by fraud to obtain an unfair advantage of the defendant.

At the trial these defences were swept away, and the real defence advanced, i.e., as put by Mr. Justice Middleton: "Haines takes the position that the real consideration for his contemplated gift was the pleasure to be derived from proximity to his friend, and this now turning out an apple of Sodom, he ought not to be compelled to consume it."

My learned brother refused specific performance on two grounds:—

1. "The written agreement was . . . . not under seal,

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but seals were affixed while in the plaintiff's possession to the copy which he had, and the witness falsely swore that he saw the document signed, sealed, and delivered by the parties. The plaintiff admits that his deed was not sealed by the defendant and his wife, and does not attempt any explanation. The deed and the duplicate are one, and the principle that precludes the use of the one will prevent the wrongdoer from relying on the other copy."

2. "On the whole case, I would also refuse specific performance, upon the term to which Haines is ready, from his defence filed, to assent, that he repay to Loranger the amount spent in erecting the building, to be determined by the Master if the parties cannot agree."

The formal judgment reads:—

"2. This Court doth order and adjudge that this action be and the same is hereby dismissed.

"3. And this Court doth further order and adjudge that the defendant do pay to the plaintiff the amount of the cost price of the building erected by the plaintiff upon the lands described in the statement of claim.

"4. And this Court doth declare that the said cost of the said building forms a lien upon the said lands, and doth order and adjudge the same accordingly.

"5. And this Court doth further order and adjudge that this action be and the same is hereby referred to the Master at Sandwich to ascertain the cost of the said building."

The former of these reasons was not so much as mentioned before us, and we might therefore pass it over *sub silentio*. The facts, however, as detailed in evidence, are rather different—the agreement was made in triplicate, the defendant got one, another was handed to Mr. Wigle by the plaintiff, and he knows nothing more about it—it is not suggested that the plaintiff had anything to do with affixing the seals, and he does not seem to have known of it until one of the triplicates was produced from the registry office sealed. Nothing was made of the point at the trial, and, as I have said, it was not even mentioned before us. It does not seem to be a case for application of the stringent, if salutary, rule of *Davidson* v. *Cooper* (1843), 11 M. & W. 778; *Bank of Hindostan China and Japan Limited* v. *Smith* (1867), 36 L.J.C.P. 241, at p. 244; *Robinson* v. *Mollett* (1875), L.R. 7 H.L. 802, at p. 813; *Aldous* v. *Cornwell* (1868), L.R. 3 Q.B. 573; *Suffell* v. *Bank of England* (1882), 9 Q.B.D. 555.

As to the second ground, it is to be observed that the exercise of the right by the defendant to buy the plaintiff's buildings, etc., is limited and conditioned on the plaintiff electing to sell

within one year—a time now long gone by—and the plaintiff being unwilling to sell.

Before us the real argument was that there was no consideration for the agreement, and that the desire on the part of the defendant to have his friend near him was the sole foundation and consideration for the agreement. Irrespective of the fact that there is a consideration expressed in the agreement, this argument confuses motive with consideration. It may be true that the motive, the object, the intention, the desire of the defendant, was as he says: but "motive is not the same thing with consideration. Consideration means something which is of some value in the eye of the law, moving from the plaintiff: it may be some benefit to the plaintiff, or some detriment to the defendant:" Patteson, J., in *Thomas* v. *Thomas* (1842), 2 Q.B. 851, at p. 859.

"It is . . . not to be doubted that there is a clear distinction sometimes between the motive that may induce to entering into a contract and the consideration of the contract . . . An expectation of results often leads to the formation of a contract, but neither the expectation nor the result is" the consideration: *Philpot* v. *Gruninger* (1871), 14 Wallace U.S. Sup. Ct. 570, at p. 577.

The consideration (in the legal sense of the term) we find clearly set out in the agreement—that it is ample cannot be disputed.

I can find no defence to this action, and would allow the appeal with costs here and below.

LENNOX, J.:—The plaintiff, at the instance of the defendant, agreed to expend large sums of money in the erection of a dwelling house and making improvements upon a part of the residential property of the defendant, and the defendant agreed that if this were done he would convey a specified part of this property, being the site of the proposed dwelling and its grounds, to the plaintiff in fee simple. There was a writing setting out in substance what I have referred to, and providing for adjustments and the enjoyment in common of certain roadways, drainage, etc., executed by the parties, but not under seal. Relying upon the agreement, the plaintiff performed his part of it, and in carrying it out expended about $15,000. The defendant refuses to convey, and the action is for specific performance. The defence relied on is an incomplete gift, or absence of consideration. I think the agreement is enforceable. I have referred to the written agreement, but this is only important

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as preventing conflict of evidence; the facts being satisfactorily established, the result would be the same even if there were no documentary evidence of the agreement; the plaintiff went into possession, performed the contract on his part, and has been in possession with the knowledge and concurrence of the defendant.

I do not think the transaction was in any sense a gift of the land from the defendant to the plaintiff, and what the plaintiff undertook to do and did at the instance of the defendant was, in my opinion, a good and valid consideration moving from the plaintiff to the defendant for what the defendant in return undertook and promised to do upon his part; and the reciprocal undertakings, acted upon as they have been, constitute an enforceable contract. Where the parties are equally capable of looking after their own interests, and in the absence of evidence of fraud, the Courts do not inquire as to the adequacy or inadequacy of the consideration: they leave the parties to form their own judgment as to this, and to make their own bargain: *Haigh* v. *Brooks* (1839), 10 A. & E. 309, and *Brooks* v. *Haigh* (1840), *ib.* 323 (Ex. Ch.); *Kearns* v. *Durell* (1848), 6 C.B. 596; and *Middleton* v. *Brown* (1878), 47 L.J. Ch. 411, (C.A.) It was for the defendant to judge as to this before he made the proposal, entered into the agreement, and procured the contemplated outlay by the plaintiff; and, although it is unnecessary to the decision of this appeal, I have no doubt, upon the evidence, but that in getting this piece of land reclaimed, built upon and improved, the defendant acted quite prudently and greatly increased the value of the land he retained.

This is a much stronger case than *Dillwyn* v. *Llewellyn*, 4 DeG. F. & J. 517, as in that case no agreement to build the house was exacted from the plaintiff—the defendant merely allowed possession to be taken and assented to what was being done. The principle relied upon by the plaintiff in this action, that is, that, in consequence of the defendant's promise, the plaintiff was induced to enter upon the land, alter his position, and expend money, was carried much farther than is necessary to go here, in *In re Soames, Church Schools Co. Limited* v. *Soames* (1897), 13 Times L.R. 439, namely, that where a person promises to leave a sum of money to a school society for the prosecution of their undertaking, and in consequence the society establish a school, the society can recover the sum promised; although the general rule is that a promise to a charitable object, even if part is paid in the lifetime of the promisor, cannot be enforced against his estate: *In re Hudson, Creed* v. *Henderson* (1885), 54 L.J. Ch. 811.

In our own Courts the objections raised appear to be com-

pletely answered by the judgments of Esten and Spragge, Vice-Chancellors, in *Jackson* v. *Jessup*, 5 Gr. 524, and cases there referred to.

I would allow the appeal.

LATCHFORD, J., agreed with LENNOX, J.

Appeal allowed.

HENRY v. SEXSMITH.

Ontario Supreme Court, Appellate Division, Riddell, Latchford, Middleton and Lennox, JJ. April 4, 1921.

CHATTEL MORTGAGE (§IVA—45) — UNREGISTERED DEBTS INCURRED BY MORTGAGOR—SALE OF EQUITY TO MORTGAGEE—ACTION—EXECUTION CREDITOR—RIGHTS OF PARTIES.

A mortgagee of chattels whose mortgage is unregistered, and who obtains the equity of redemption from the mortgagor, may on taking possession of such goods validate the mortgage in question as against any parties who become creditors after such taking of possession. Bills of Sale and Chattel Mortgage Act, R.S.O. 1914, ch. 135, sec. 23.

APPEAL by the defendant (claimant) in an interpleader issue from the judgment of the County Court of the County of Wentworth finding the issue in favour of the plaintiff (execution creditor).

S. F. Washington, K.C., for appellant.

W. S. MacBrayne, for respondent.

The judgment of the Court was read by

MIDDLETON, J. :—Judgment was recovered in an action *ex delicto* on the 9th March, 1920, and execution was issued on the 22nd March, 1920.

On the 17th March, 1913, the claimant, mother of the execution debtor, advanced him a large sum on the strength of a chattel mortgage which was not registered. The advance was to enable the son to start in business. The young man did not do well, and the father, who was to supervise the business for the son, remained in charge for some time, substantially as the mother's agent—all creditors of the business have been paid.

On the 6th October, 1919, after the liability out of which the action arose was incurred, the son by a written document released all his interest in the business to the mother, and since then the father has undoubtedly held possession for her.

The trial Judge has found this last conveyance void as in-

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tended to defeat the claim of the plaintiff, and so has found the goods exigible under the execution.

I do not think that we should interfere with the finding of fact as to this conveyance; and, as the plaintiff is within the protection of the statute of Elizabeth, this conveyance of the equity of redemption is void as against her claim.

The mother is, however, entitled to maintain her right as mortgagee against the execution, for the plaintiff did not become a creditor within the meaning of the Bills of Sale and Chattel Mortgage Act, R.S.O. 1914, ch. 135, until she recovered her judgment, and the mother had taken possession under her mortgage long before that date.

Section 23 of that Act prevents the taking of possession giving validity to an unregistered mortgage "as against persons who became creditors, purchasers, or mortgagees before such taking of possession."

Clarkson v. *McMaster*, 25 Can. S.C.R. 96, does not help the plaintiff. The question there dealt with is the right of a person who became a simple contract creditor before possession was taken, but who obtained judgment thereafter. The whole discussion in that case shews that the taking of possession removes all invalidity when the claimant becomes a creditor after the possession is taken. This Act affords no protection to those whose claims are in tort only, until judgment has been recovered.

The issue here is not in proper form, but counsel consented to any amendment necessary to determine the rights of the parties.

There should be a declaration that the defendant is entitled to hold the goods now in her possession as security for the amount due to her by her son, the execution debtor, and there should be a reference to ascertain the amount due under the mortgage, the mortgagee to add her costs of the interpleader issue and of this appeal to her claim. There should be the further declaration that the conveyance of the equity of redemption to the defendant of the 6th October, 1919, is fraudulent and void as against the plaintiff's execution and that the equity of redemption in the goods seized is exigible under the execution. The execution creditor should be allowed her costs out of any money realised from the sale of the equity of redemption.

When the amount due under the mortgage is ascertained, there ought not to be much difficulty between the parties in adjusting their respective rights. If the debt overtops the value of the goods, the equity of redemption will be worthless, and the mortgagee ought to be allowed to foreclose, unless within a limited time, say 3 months, the execution creditor

redeems. This will not prevent the execution creditor if she sees fit offering the equity of redemption for sale under her *fi. fa.*, but the purchaser of the equity will be liable to foreclosure unless the mortgage is redeemed within the time limited.

Judgment below varied.

HURLEY v. ROY.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Middleton and Lennox, JJ. April 7, 1921.

SPECIFIC PERFORMANCE (§IE—30)—AGREEMENT TO SELL LAND—JOINT TENANCY—REQUISITION AS TO CONVEYANCE—REFUSAL BY VENDOR—RESCISSION OF CONTRACT—ACTION.

If it appears that the vendor annuls the contract on the ground of unwillingness he must shew some reasonable grounds for the same, that he will be involved in unnecessary expenses or litigation, and that he expressly reserved the right to annul the contract in order to avoid the same.

[*In re Deighton and Harris's Contract*, [1898] 1 Ch. 458; *In re Jackson and Haden's Contract*, [1906] 1 Ch. 412; *Merrett* v. *Schuster*, [1920] 2 Ch. 240, referred to.]

APPEAL by defendant from the judgment of Rose, J. in an action by the purchaser for specific performance of a contract for the sale and purchase of land. Affirmed.

The judgment appealed from is as follows:—

The question is, whether the defendant is entitled to rescind the contract, pursuant to a clause which provides that, if the purchaser shall furnish the vendor with a valid objection to the title, which the vendor shall be unable or unwilling to remove, the agreement shall be null and void.

The defendant acquired the land in 1915, and conveyed it, in 1916, to himself and his wife as joint tenants. Later on, he and his wife separated, and at the time when the contract sued on was entered into they were living apart.

The plaintiff made an effort to purchase in 1919. After some discussion of the price, the defendant said he would sell, but he said it would be necessary that his wife should sign the agreement. He says that he told the plaintiff more than this, but I do not think that he did, and I do not believe that the plaintiff knew, or had reason to know, that there was any necessity for Mrs. Roy's signature other than the necessity of barring her dower. After the plaintiff and the defendant had agreed upon a price and the statement had been made as to the necessity of procuring Mrs. Roy's signature, the plaintiff and the defendant went to see Mrs. Roy at her house, when she express-

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ed a willingness to have the land sold. The defendant and she then consulted apart from the plaintiff, and had some discussion as to whether, in case the sale went through, they should divide the purchase-money, or whether the defendant should keep the purchase-money and allow her a monthly sum for the support of herself and her child. They seem to have agreed upon the latter course, and it is because Mrs. Roy subsequently changed her mind, and insisted upon having one half of the purchase-money, less some taxes which she agreed might be charged against her share, that the defendant decided to rescind the contract.

After Mrs. Roy expressed her willingness to join in the sale, the parties went to a solicitor to have an agreement prepared. This was the solicitor who acted for the defendant when the defendant bought the land in 1915; but, notwithstanding some statements made by the defendant in the witness-box, I see no reason to think that the solicitor knew that the defendant's wife had acquired an interest in the property, or that there was any reason for her signing the contract other than to agree to bar her dower. The agreement that was drawn and executed is an agreement by which the defendant agrees to sell, and his wife agrees to bar her dower, and the plaintiff agrees to buy.

After the title had been searched, it was found that the defendant's wife was jointly interested with him, and the plaintiff had a requisition drawn in which it was said: "We find that Mrs. Roy is a joint owner with you, so we will require conveyance by her instead of a bar of dower." The defendant waited for the 10 days which the plaintiff had for searching the title, and then purported to rescind the agreement. Mrs. Roy, however, executed a conveyance of her interest in the land, and left it with the plaintiff's solicitor in escrow, to be delivered upon payment of one half of the proceeds of the sale.

I think that, in the circumstances, as I have stated them, the defendant is not entitled to rescind. I think that to hold that he could do so would be, to quote the language of Rigby, L.J., in *In re Deighton and Harris's Contract*, [1898] 1 Ch. 458, 464, to enable him to "ride off upon a condition to rescind which was obviously not framed with reference to any such case."

The case seems to be covered by the decisions in *Nelthorpe* v. *Holgate* (1844), 1 Coll. 203, and *In re Jackson and Haden's Contract*, [1906] 1 Ch. 412, in which *Nelthorpe* v. *Holgate* is discussed by Collins, M.R., and the expression of Rigby, L.J., which I have quoted, is quoted by Romer, L.J., at p. 424.

There will be judgment in the usual terms for specific performance with an abatement of one half of the contract price.

Any reference that is necessary will be to the Local Master at Sandwich. The defendant must pay the plaintiff's costs."

F. D. Davis, for appellant.
R. S. Robertson, for respondent.

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RIDDELL, J.:—While it is quite clear that a vendor may take advantage of such a condition as is a question in this action, where the quantity he can convey is much less that the amount contracted for *In re Terry and White's Contract*, (1886) 32 Ch. D. 14, he cannot do so if he made the agreement recklessly or with the knowledge of his inability to carry it out: *In re Jackson* and *Haden's Contract*, [1906] 1 Ch. 412; *Merrett* v. *Schuster*, [1920] 2 Ch. 240.

There is nothing in the present case to indicate an innocent mistake; and I think the defendant cannot take advantage of the condition, but must suffer abatement, conveying all he can.

The agreement to sell itself put an end to the joint tenancy in equity: Williams on Vendor and Purchaser, 2nd ed., vol. 1, p. 572, and cases in note (z)—and I am of the opinion that the judgment appealed from is right.

MIDDLETON, J.:—To me it is clear that the judgment is right, and the appeal should be dismissed. The defendant agreed to sell the land, it appears that he only owns half, and his wife half, but she is ready to convey, receiving half the price, so that the defendant can carry out his contract by procuring a conveyance of the whole, and this without submitting to any hardship. As between the vendor and purchaser, the purchaser is not concerned with the domestic difficulties of the vendor, and so long as the vendor can carry out that which he agreed to the purchaser has the right to have the agreement implemented.

The contrary view enables the vendor to play fast and loose. He could make the purchaser accept the conveyance from the wife, as this would give title; yet it is suggested that he may tender it or withhold it at his option. The fact that the vendor may change a joint tenancy to a tenancy in common seems to me quite beside the mark—it is an incident of the nature of the estate; and, if the wife chooses, she can effect the change by conveying her interest.

The provision enabling the vendor to rescind has no application to the facts. The vendor can convey if he allows his wife to have her share of the price. This provision was not intended to make the contract one which the vendor can repudiate at his sweet will. The policy of the Court ought to be in favour of the enforcement of honest bargains, and it should be remembered

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that, when a contract deliberately made is not enforced because of some hardship the agreement may impose on one contracting party, the effect is to transfer the misfortune to the shoulders of the other party, though he is admittedly entirely innocent.

LENNOX, J., concurred.

MEREDITH, C.J.C.P. (dissenting) :—I find no difficulty in reaching the conclusion that this action should be dismissed, on any one of several grounds:—

First, because the contract is for the defendant to convey to the plaintiff the land in question, his wife joining in the deed to bar her dower. That contract the defendant was always willing to carry out; but the plaintiff was not. He sought a conveyance of substantially a half interest in the land for half the price, and this action is really for that object, to which the judgment appealed against gives effect: and gives effect in the absence of the defendant's wife, who was just as much a party to the contract as the plaintiff or the defendant, and in whose absence no judgment upon that contract can rightly be made. The Courts do sometimes go pretty far in refusing to give effect to a contract which the parties have made: but they have not yet, as far as I am aware, made a different contract for the parties and compelled them to carry it out. It is not material whether a deed such as the contract provides for would or would not convey all the rights of the husband and wife, because neither the vendor nor his wife is seeking to enforce that contract or any other; the defendant very fairly says: "If you do not want what you bargained for, I shall not even ask you to take it:" but I may say that at present I do not see why such a conveyance would not give title to the land: the wife, not only standing by, but actually joining in a conveyance of the fee simple by her husband, should be estopped from claiming afterwards any title to the land other than that which was conveyed.

Second, because the contract does not give a mere right to rescind; but it provides that, in the events which have happened, the contract shall be null and void. The parties might of course waive that provision; but they have not done so.

Third, because, if this were the ordinary case in which the defendant is bound to make a good title, alone: having a right to rescind if unable or unwilling to remove a valid objection to the title: the case would be one in which that right might be exercised. The material facts are these:—

The husband owned the lands: he made a deed of them to

himself and his wife as joint tenants. That is a thing which is sometimes done in these days, and a thing that has given rise to much more litigation than merely this action. Such a conveyance is sometimes made with the object of saving the expense of a will of a husband and an administration of his estate, if he should die before his wife; sometimes to give another vote to the family in cases in which property qualification is needed; and doubtless sometimes for other reasons; but generally the land is afterwards treated just as before—as if the husband's. When the contract was made, the wife agreed to become a party to it, upon the promise of the husband to pay to her a fixed monthly sum for the separate maintenance of herself and her child: the parties then went all together to the purchaser's solicitor, who drew the agreement in question, which was then signed by all of them. The purchaser's solicitor had previously drawn the deed from the husband to his wife and himself. When the plaintiff demanded a conveyance from the husband and wife jointly, instead of as the contract provided, the wife was willing to join in such a conveyance if she got half the purchase-money: the husband offered to pay her, as he had agreed, the monthly sum, but naturally refused to pay more. I should have thought that in these circumstances a case of a clear kind had been made for rescission under the usual provision for rescission. Why not? Assuredly it was the most needful thing to be provided against; indeed the only thing. His title was good: the only uncertain thing was his wife. If she would not execute the deed when the time came, it meant a law-suit by the purchaser to compel her to join in her husband's deed, and the husband might very reasonably wish to avoid, and provide for the avoidance of, that: the only thing that needed to be provided against: he had had some experience which might have caused him readily to endorse the familiar words, "Changeable as the wind." One has only to look at the strait in which he might be, if he had not made provision against a demand that he might be unable or unwilling to comply with. He contracted to get the whole purchase-money, and made arrangements so that he should: if the judgment stand, he can get only half of it. He agreed to pay his wife so much a month only: if the judgment stand she will get half the price of the land: she may squander it, and the support of his child and possibly his wife may fall back on him—whether legally or only morally is not material so long as the the burden comes to and is borne by him. He loses his right of survivorship, which might sooner or later bring the whole estate back to him, and he gets nothing for it. None of these things were included, or intended to be includ-

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ed, in the contract in question: and that contract only has the Court power to enforce. The trial Judge seems to have quite ignored that, and to have sought to give effect to a verbal contract or rather a contract constructed out of some of the circumstances of the case—mainly those that were unfavourable to the defendant—only. I can find no good reason why the defendant could not rescind, if he had no other answer to this action. And I can find nothing in any of the cases that stands in his way: but I do find everything needful of the opposite character. Let us turn to the cases relied upon by the trial Judge, and take the first one that comes to hand: in the case *In re Jackson and Haden's Contract*, [1906] 1 Ch. 412, these words of Lord Justice Turner, spoken in the case *Duddell* v. *Simpson* (1866), L.R. 2 Ch. 102, are adopted with approval by the Master of the Rolls (pp. 419, 420): "I think that in a case where the vendor annuls the contract on the ground of unwillingness, he must shew some reasonable ground for unwillingness; thus, for instance, he may shew that if he proceeds to comply with a requisition, he will be involved in expenses far beyond what he ever contemplated, or be involved in litigation and expenses which he never contemplated, and for avoiding which he reserved to himself the power of annulling the contract."

I do not read those words because I deem them a comprehensive, exact statement of the law, but do read them because they are very applicable to this case—treating it as if the agreement in question gave only and expressly a right to rescind: what was contemplated was the carrying out of the agreement actually made, a deed with bar of dower, the husband to pay the monthly sum agreed upon to the wife; that which was demanded was a deed from the husband alone of a half interest in the land, a deed destroying his right of survivorship, and taking away from him and giving to his wife half the purchase-money, all of which under the agreement he was to get. Whether the wife has been instigated by the plaintiff to break her bargain and demand half of the price, or whether they two are only acting in collusion in this entire change of position, or whether there is no collusion between them, makes no substantial difference, the result is the same: but it may be added that, as the plaintiff has now a deed from the wife, and has not made her a party to this action, but in it is seeking a conveyance entirely different from that bargained for, and something that enables her to demand more than she bargained for, there is a good deal of evidence of instigation or collusion. But, however that may be, this case, relied upon to support the judgment appealed against, is distinctly against it.

The next case so relied upon, *In re Deighton and Harris's Contract*, [1898] 1 Ch. 458, is equally as strong an one, if not stronger, in the defendant's favour. These words of the Master of the Rolls are also very appropriate to this case (p. 463):—

"Amongst other things, there was a difficulty with regard to getting in an outstanding interest in the official receiver in bankruptcy of the estate of one Baker. The purchaser said it was quite plain that it was necessary to get the concurrence of the official receiver because there was some interest outstanding in him. The vendor objected to that, and said it was a mere conveyancing question: that it would be troublesome for him to get that concurrence, that it was not really material, and that, if insisted on, he could not get it. The purchaser still insisted; and the vendor says, 'Very well, I rescind the contract.' Why is he not entitled to rescind under the very wide condition I have read?" He and the other Judges decided that the vendor was; and the only difference between that case and this is that in this case the vendor has much greater reason for refusing to comply with the plaintiff's demands and claims.

And the third case adds to the extraordinary unanimity with which the cases cited against the defendant support him, and it is extraordinary how much they are like this case. In the case of *Nelthorpe* v. *Holgate*, I Coll. 203, the learned Vice-Chancellor who decided it said that if the vendor had entered into his contract in consequence of any promise or representation on the part of the life-tenant, that she would concur in the sale; or, if at the time of the making of the agreement the purchasers knew that the vendor could not make title without her consent, the case would have been different. This case is essentially the different one.

I am quite unable to perceive any attempt on the defendant's part to "ride off upon a condition to rescind which was obviously not framed with reference to any such case;" but I see, very plainly, an attempt to drive the vendor to perform a contract he never made: one which would be entirely different from that which all three parties entered into: and one which would be very unjust to him.

I am in favour of allowing the appeal and dismissing the action.

Appeal dismissed.

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FLEMING v. SPRACKLIN.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Latchford and Lennox, JJ. and Ferguson, J.A. April 7, 1921.

INTOXICATING LIQUORS (§IIIH—90)—YACHT—SPECIAL OFFICER—RIGHT OF SEARCH—MEANING OF VEHICLE UPON PUBLIC HIGHWAY—LIQUOR FOR SALE—BELIEF OF OFFICER IN MAKING SEARCH.

A yacht riding upon international waters is not a "vehicle on the public highway or elsewhere" within the meaning of sec. 70 (2) Ontario Temperance Act. But if such were the case the right of entry and search can only be justified when there is actual belief on the part of the officer that liquor kept for sale or intended for sale was contained therein.

AN appeal by the defendant from the judgment of MIDDLETON, J., 48 O.L.R. 533, 56 D.L.R. 518. Affirmed.

J. H. Rodd, for appellant.

D. L. McCarthy, K.C., for respondent.

MEREDITH, C.J.C.P.:—The unfortunate position in which the defendant finds himself in this action is the result of his disregard of the familiar warning: *sutor ne supra crepidam.*

The office which the defendant took, without any kind of experience or training, was one for which he has in this case proved himself entirely unfitted. The proper exercise of the duties of a peace officer require much experience, tact, patience, and knowledge, or training, and for a partisan to undertake them must be to court just such things as have happened in this case: bringing trouble and loss to the unfitted officer, wrong to others, and ill-repute to the administration of the law. If the law is to be respected, and properly enforced, the enforcement of it must never be committed to such persons as the defendant, it must be left to trained, experienced, and impartial officers of the law.

The whole course of conduct of the defendant, and the men under him, in the matters of which the plaintiff complains, makes that all very plain. It had more the appearance of a stage burlesque of the administration of justice in Ontario than such as it should have been and has been always hitherto. The experienced officer does not go, even among criminals, with a senseless display of firearms: to do so among a few highly reputable young persons in a private yacht was altogether stupid and inexcusable.

It is to be borne in mind that no mere infraction of any of the provisions of the Ontario Temperance Act, or of any other provincial enactment, is a crime: though the conduct of the defendant indicates that he deemed such infractions not only crimes but crimes of the most flagrant character, the detection

and punishment of which was of paramount importance, in which nothing ever was to be regarded, but all else might be ignored or overridden.

Immediately after boarding the yacht, if not before, the defendant became aware of its true and altogether innocent character: so that if he ever had any belief, or even suspicion, that it was engaged in any infraction of any of the provisions of the Act, that was immediately dispelled, and he and his assistants should have at once left the vessel. The search of the vessel after that was altogether illegal and inexcusable, and having been done with the ludicrous and offensive display of firearms and otherwise as detailed in the evidence at the trial, the case is plainly one in which exemplary damages might be awarded: and, having regard to all its circumstances, including the manner in which and the purpose for which an ardent partisan was given and took the power to override in the name of the law all those who were not of the same mind as he respecting it, I feel bound to say that $500 damages are in no sense excessive. No one doubts the defendant's sincerity; but that sincerity may only add to the injury of the person wronged: the sincerity of a partisan wrongdoer may tend only to increase the wrong done, in the warped belief that it is right, not wrong.

It is not necessary to consider some of the questions of law discussed upon the argument of this appeal, and therefore it should be undesirable to do so: there is enough admitted, or, if not expressly admitted, so plain that there can be no doubt about it, enough illegal conduct on the defendant's part, after boarding the vessel, to support the judgment appealed against.

I am therefore in favour of dismissing the appeal.

The foregoing words were written at the conclusion of the argument of this case; and were written in the expectation that it should not be necessary to consider any of the more important questions which are involved in it, their consideration being quite unnecessary in determining this appeal; but, as some of the members of the Court deem it better to express an opinion in which I am quite unable to agree, it has become necessary for me to add to the foregoing words, the following:—

The more important questions to which I have referred, though several, may, in a general way, be stated in a few words: Had the defendant any lawful authority for bringing to, boarding, and searching the plaintiff's yacht?

For the defendant, sec. 70 (2) of the Ontario Temperance Act is relied upon as giving such authority.

That subsection (as amended by (1917) 7 Geo. V. ch. 50, sec. 26 (2)) is in the following words:—

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"(2) Any inspector, policeman, constable or officer, if he believes that liquor intended for sale or to be kept for sale or otherwise in contravention of this Act, is contained in any vehicle on a public highway or elsewhere, or is concealed upon the land of any person, may enter and search such vehicle, and may enter upon and search such land and seize and remove any liquor found there and the vessels in which the same is kept; or if he finds, either upon the public highway or elsewhere, any trunk, box, valise, bag or other receptacle whatever which he believes contains liquor for sale or otherwise in contravention of this Act he may forthwith seize and remove the same together with the package or packages in which the liquor is contained, whether in the custody of or under the control of any person or not."

The words relied on are, "any vehicle on a public highway or elsewhere."

Before proceeding to a consideration of the important questions involved, it may be well to impress these things upon the mind: the enactment is provincial only: in no way strengthened or widened by Dominion legislation; the provincial Legislature has no power to create crimes or to legislate otherwise regarding the criminal law or criminal procedure; its powers in such matters as are mainly involved in this branch of this case are: the imposition of punishment by fine and imprisonment for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects which by Imperial legislation are assigned to its exclusive jurisdiction: and its legislative powers are confined within its territorial limits.

Out of the comprehensive question before stated there arises, first, the question: whether the words "any vehicle on a public highway or elsewhere" covered the plaintiff's family yacht when navigating the international waters of the Detroit river.

To assert that a man-of-war, one of the great passenger "boats" of the "Great Lakes," a steam-yacht, or a row-boat, navigating international waters, is really a "vehicle upon a public highway," could not but, I am sure, be met with derision from all those who travel upon the highways, byways, and waterways. If the Legislature meant a vessel upon a public waterway, why not say so? The language of the Legislature is not used for the concealment of its meaning. Nor is it intended for a Cæsar, a Cleopatra, or a Cicero. We are not to turn to the dictionaries to find some obscure or ancient meaning for legislative words of the present day. The school-boy, fresh from school, may assert that a carriage is not that which carries a man but is that which he carries, and may prove his assertion

from the highest authority: but such things have no place when the meaning of modern words in their modern sense is in question. Every one is supposed to know the law: that is hard enough; but, if he is not only to know the law according to the popular meaning of the words in which it is written, but to know it according to the meaning which some one 2,000 years ago attributed to it, in a now long dead tongue, much harder, indeed intolerable, must be every one's lot. I count myself among those who cannot think it possible that, if the Legislature meant a vessel upon a public waterway, they could have said a vehicle upon a public highway, knowing the vocabulary of those to be affected by the legislation, a vocabulary which is also their own.

More to be preferred to antiquated, obsolete, or doubtful definitions to be found in larger dictionaries, are these words of one of the most notable lexicographers of this continent: Vehicle: "that in which anything is or may be carried, any kind of carriage moving on land, either on wheels or runners. The word comprehends coaches, chariots, gigs, sulkies, waggons, carts of every kind, sleighs and sleds. Those are all vehicles. But the word is more generally applied to wheeled carriages, and rarely I believe to watercraft:" Noah Webster's Dictionary. So too is the judgment of the Court in Indiana, in which it was said that the word "vehicle" was rarely applied to watercraft, and, therefore, it was decided that it did not apply to a ferry-boat: *Duckwell* v. *City of New Albany* (1865), 25 Ind. 283, 286: though if applicable to any watercraft one might think it most applicable to a ferry-boat, which is generally propelled by wheels and enables the vehicular and other traffic of the highways on one side of a navigable stream to reach and travel on the highways on the other side of the stream—is in short a connecting link of vehicular traffic. Until some one finds an instance on this continent, or in modern times anywhere, in which the word "vehicle" has been applied to watercraft, I shall be unable to say even that it is rarely so applied, but rather shall say, in accord with my knowledge, that it is never so applied.

And what excuse can there be for searching the general dictionaries for antiquated meanings and expressions, having at our hands the dictionaries of the Legislature whose words are to be given their proper meaning, their dictionaries contained in their statute-books which we all have always beside us: and when we should have always in mind the vocabulary of the Province?

In such enactments as the Highway Travel Act, the Motor

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Vehicles Act, the Snow Roads Act, it is on every page, if not in every section, made plain that the word "vehicle" in the mind of the Legislature is a wheeled or runnered conveyance such as is used on the roads of the Province. The same word is used with precisely the same meaning in several parts of the Municipal Act: but nowhere in any of their dictionaries can any excuse be found for holding the word applicable to any kind of craft on water.

In the enactment next preceding the Ontario Temperance Act—the Load of Vehicles Act—the same thing appears: and it could hardly be that the Legislature in one breath meant one thing and in the next something very different by the words "vehicle on a public highway."

And, again, whenever it has been necessary to refer to the sale of intoxicating liquors on vessels, the Legislature has found no difficulty in employing appropriate words—for instance: "Any ferry boat or any vessel navigating any of the great lakes or the rivers St. Lawrence or Ottawa, or any inland waters of Ontario:" The Liquor License Act, R.S.O. 1914, ch. 215, sec. 11.

Then, no one could say: there is no such word as vessel, ship, yacht, or boat, in the vocabulary of the Province: nor could any one say that the Legislature was obliged to resort to such landlubber words as a "vehicle on a public highway" to describe a vessel upon the water: or that the Legislature had quite forgotten its own appropriate words contained in the Liquor License Act.

The added words "or elsewhere" give no assistance to the defendant: they tend to make his contention rather more plainly erroneous: "or elsewhere" are necessary on land, because vehicles are generally more elsewhere than on the highway—in the stable, or farm-yard, not always in motion, or standing upon the highway—with ships it is otherwise, it is somewhat difficult to get them out of the waterway—"or elsewhere."

On the other hand, search the statute-books as you may, no sort of encouragement is found for contending even that the Legislature might have used the word "highway" for the words "navigable waters." Again, what need for it? Not want of appropriate words, for throughout these statute-books on all—and many there are—occasions, appropriate words have invariably been employed: and not once—as far as any one has yet discovered—the word "highway," which at best must have been ambiguous and full of doubt.

One instance may be enough to make my meaning, in this respect, plain: "The Minister may sell, lease and make appropriations of land covered with water in the harbours, rivers

and other navigable waters in Ontario, under such conditions as he may deem proper, but not so as to interfere with the use of any harbour as a harbour, or with the navigation of any harbour, river or other navigable water:" The Public Lands Act, R.S.O. 1914, ch. 28, sec. 31. Other instances may be found throughout the statutes of Ontario, such as those contained in the Bed of Navigable Waters Act, the Rivers and Streams Act, and the Municipal Act.

These instances are referred to mainly to shew the capability of the Legislature as grammarians in general, but particularly in regard to highways, water highways, waterways, and navigable waters: and at the same time they prove also their knowledge of the limitation of their legislative powers in regard to such things; their ability to make laws within their powers; and such as all can understand at sight.

But it is said: if these land-words are not also water-words there is no power, under the Act, to overhaul navigation and search vessels. Two obvious answers, in the form of questions, are: Why should there be? and, if there should be, how could there be under provincial legislation?

Other provisions of the Act, in the same section and other sections, afford very wide means of enforcing it, and in subsec. (1) is where the power claimed should be if it were intended to be given. Indeed I should have thought that only a zealot, without experience in or knowledge of the law, could have imagined that the Act conferred upon him the high-handed powers which the defendant exercised: and not only conferred it upon him but as fully also upon any other inspector and every constable, policeman, or officer: so that either of the men acting with him, equally with him, might have held up and searched this vessel, or might hold up and search any vessel, merely to display his conceit under a disguise of impartiality. For only plain words could make it reasonably believable, in the matter merely of the enforcement of a provincial enactment, which cannot even create a crime. It should need plain words even if the search were for a felon: because no enforcement of the law can need the unlimited powers to invade vessels or houses indiscriminately, much less that that power should be conferred upon all petty officers.

If there were power to bring to and search and take intoxicating liquor from the plaintiff's vessel, there was the same power over the innumerable vessels that ply the great lakes and connecting waters, among them the great foreign passenger ships that traverse them regularly for more than a thousand miles, without touching or communicating with any Canadian

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port: and, even though under the law of their own country it might be lawful for such vessels to have and to sell spirituous and fermented liquor, yet, if they happened to cross the imperceptible international boundary-line at any point, they might be by any common constable of the Canadian locality brought to and searched and have all of such liquor removed from them by a petty officer, of the lowest grade, employed by, or in, the local Ontario municipality.

It is quite too preposterous to imagine that the Legislature could have intended to have conferred any such authority, or to have thought that it had power to do so: and the more so to imagine that if it were meant it should have been conferred in the words "search any vehicle on a public highway." The matter would be one not only above the Legislature of a Province, but one doubtless to be dealt with by higher authority even than the Parliament of Canada. That at the present time foreign laws may not give such rights to foreign vessels can make no difference: when the Act in question was passed they did: and may again: but the administration of foreign laws is no part of the right or duty of a Province in any case: foreign relations are altogether foreign to its powers and concerns.

It should be interesting to hear what a mariner, ancient or modern, knowing the importance of a ship and the multifarious duties, judicial, religious, social, medical, and otherwise of its captain, should say to a judgment which decided that not only was his ship in a class with a wheelbarrow, but was really a vehicle on the highway.

All this, however, does not exhaust all the contentions made in the defendant's behalf: nor indeed all things that shew how entirely unwarranted and inexcusable his conduct was. It is said, with much earnestness, that: if the power exercised does not exist then the purposes of the Act cannot be enforced in Essex, or indeed elsewhere. Too much zeal generally creates blindness of a sort—inability to see the other side of the question.

What purpose of the Act could be even aided by conferring the power?

All of which the defendant had any kind of suspicion, in respect of this yacht, was that it might be engaged in carrying intoxicating liquor out of Ontario into a foreign country. The object of the Act is to curtail the use in Ontario of intoxicating liquor as a beverage. How could taking liquor out of Ontario thwart that purpose?

Any one, and especially one blinded by zeal, may misunder-

stand the spirit of an enactment: but no one has any kind of excuse for disregarding its plain words.

The defendant must have known—or, if he did not, there is no excuse for his ignorance—of the provisions of sec. 139 of the Act, in which it is declared that the Act "shall not affect and is not intended to affect *bonâ fide* transactions in liquor between a person in the Province of Ontario and a person in another Province or in a foreign country, and the provisions of this Act shall be construed accordingly."

In this, and in the other enactments from which I have read, the Legislature has displayed an accurate knowledge of its legislative limitations, and has taken pains to shew that it had no intention to overstep them: though, if it had, the effect should have been the same, the legislation should, to that extent, have been altogether invalid: see *Graham & Strang* v. *Dominion Express Co.* (1920), 48 O.L.R. 83, 55 D.L.R. 39, and *Rex* v. *Lemaire* (1920), 48 O.L.R. 475, 57 D.L.R. 631.

In the last quoted legislation, the Legislature has properly avoided any encroachment upon Parliament's exclusive legislative powers over the subject of trade and commerce: and, in the next preceding quotation, has properly avoided any encroachment upon Parliament's exclusive legislative powers over navigation and shipping, and upon Dominion ownership of all public harbours.

Then it was asked: how could the keeping of grog-shops in vessels on navigable waters be prevented if the defendant had not the power to do that which he did in this case? But what has overhauling a vessel to prevent the sale of liquor in a foreign country to do with keeping a grog-shop in Essex? And, if grog-shops are kept under the disguise of navigating shipping, what is there to save the keeper from any of the pains and penalties imposed by the Act for selling liquor without a license?

To put a grog-shop upon water does not make a ship navigating navigable water. None are so blind as those who will not see.

The words "vehicle on a public highway or elsewhere" do not mean or include a vessel navigating international waters: if they did, they could not be applicable to this case, (1) because of sec. 139 of the Act, and (2) because they would be *ultra vires* of the provincial Legislature.

It is necessary also to add a few words on the question of damages.

Exemplary damages are not given to a plaintiff as merely a money compensation for the injury he has sustained; they are damages over and above such compensation, and are alto-

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gether of a preventive character—to prevent the defendant, and all others, doing such wrongs. Unless they are enough for such purpose they are inadequately awarded, and fail in their purpose. To award them and then remit them would be to stultify the Court. If they should be awarded they should not be remitted: if they should be remitted they should not have been awarded.

I am quite in agreement with the learned trial Judge in each branch of this case: my inclination being, however, to go farther in each than he did; but I accept and join him in his moderation in the matter of damages.

We are all in favour of dismissing the appeal: it must be dismissed accordingly.

The appeal is dismissed with costs.

RIDDELL, J.:—The defendant is an inspector under the Ontario Temperance Act—the plaintiff is a barrister of Windsor, who owns a yacht which he uses to sail in the Detroit river and other waters.

On the 17th September, 1920, the defendant, with two assistants, boarded the plaintiff's yacht in Canadian waters and searched it for intoxicating liquor, finding none.

On being asked for an apology, the defendant refused and asserted the propriety of his acts. The plaintiff brought an action and recovered judgment for $500 from my brother Middleton, who tried the case without a jury. The defendant now appeals.

On the argument, many interesting and some intricate questions of law and a few of fact were raised. I do not think it necessary expressly to decide any of them but one of fact, i.e., the amount of damages.

The defendant justifies his acts under sec. 70 (2) of the Ontario Temperance Act: he says that he believed that liquor intended for sale, etc., was contained in the yacht, and that consequently he had the right to enter and search the yacht.

This implies: (1) that the yacht was a vehicle; (2) on a public highway or elsewhere; and (3) that he had such belief.

As at present advised, I think that the yacht was a "vehicle" under the Act. Cicero speaks of a ship as "*furtorum vehiculum*," and the word may well have that significance. In my view, it never could have been intended to allow boats or ships to float down or across our lakes and rivers, loaded with liquor, without being subject to search—the Act would be a travesty with such an interpretation.

And I think the yacht was "on a public highway or elsewhere."

For the purpose of this appeal I am content to assume in favour of the defendant that he believed there was contained in the yacht, liquor intended for sale, although the evidence is far from satisfactory or convincing. In fact I am content to accept the defendant's own story as emphasised and enlarged on by his counsel.

The result is correctly put by the learned trial Judge (48 O.L.R. at p. 534):—

"When he boarded the boat and was told it was Mr. Fleming's yacht he did not doubt the fact, for he recognised young Mr. Fleming. He admits that he then had no suspicion that the boat was carrying liquor or in any way engaged in illicit liquor traffic, yet he searched it so as to convince his men of his impartiality. He searched all boats on the river, quite irrespective of any suspicion he might have as to a particular boat carrying liquor. He had no warrant.

"Mr. Fleming wrote the defendant complaining of this action, asking for an explanation and apology. The defendant made no written reply, but, meeting Mr. Fleming in the street, in an offensive manner attempted to justify his conduct."

It is quite clear that, before the search, all suspicion even—not only everything that could be called belief—had disappeared from the defendant's mind. I think, to justify a search under sec. 70 (1), there must be a belief at the time, not simply a past-perfect belief. That the defendant did not have, and he had no right to search. By searching he became a trespasser and should pay damages.

If the amount of damages depended upon his becoming a trespasser *ab initio*, there might be difficulty—the law is apparently not quite clear. See *The Six Carpenters' Case* (1610), 8 Rep. 146a.; Sm. L.C., 12th ed., vol. 1, p. 145, and cases cited. I do not think it necessary here to pass upon this technical question of law, because I think that the damages are by no means excessive if we assume that the only trespass was in the search.

In a case of trespass, the whole circumstances, the conduct of the trespasser, the acts of trespass, etc., must be taken into consideration: Halsbury's Laws of England, vol. 10, p. 325.

Putting the most charitable construction upon the conduct of the defendant—and a man charged with such an invidious and onerous duty should have all charity in his mistakes—I cannot think that $500 is an excessive sum to award by way of damages for the trespass undoubtedly and admittedly committed.

I would dismiss the appeal.

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LATCHFORD, J.:—Whether or not the plaintiff's yacht was a "vehicle" or the Detroit river a "highway" within the meaning intended by sec. 70 (2) of the Ontario Temperance Act, is not, I think, of moment in the present case. I desire, however, to state as my firm opinion that, as used in the section mentioned, "vehicle" cannot properly be considered to include such a vessel as was Mr. Fleming's motor-boat, nor "highway" the Detroit or other river. In any view, the boarding of the vessel by the defendant was a trespass. He admits that he did not "believe" that liquor intended for sale or kept for sale in contravention of the Act was contained in the yacht. The right of entry and search cannot be justified when there is, as here, an absence of such belief. Hence the boarding of the yacht by the defendant was a trespass. It was, moreover, an aggravated trespass, for which it is proper for a Judge, or a Judge sitting as a jury, to award exemplary damages. The reverend defendant boarded the yacht *vi et armis;* and the Hallam brothers, if not Mr. Spracklin, displayed their pistols like veritable pirates. Fortunately for those on board the invaded craft, no resistance was made. Even when any grounds for the mere suspicion which the defendant had entertained were removed, as he admits, by the knowledge that the boat belonged to the plaintiff, the search was continued. The original trespass was thus aggravated.

As no justification of the act of the defendant is afforded by the statute, the only question to be considered is, whether the amount of the judgment should be interfered with.

In *Huckle* v. *Money* (1763), 2 Wils. 205, the plaintiff was taken into custody by the defendant, a King's messenger, on suspicion of having printed the *North Briton, No. 45.* The plaintiff was kept in custody for about 6 hours, and used very civilly according to the standards prevailing at the time, being treated by his captors to beefsteaks and, *horrible dictu,* to beer: so that he suffered little or no damage. The defendant attempted to justify under the general warrant of the Secretary of State to apprehend the printers and publishers—not naming them—of Wilkes' famous issue, but was overruled by Lord Mansfield presiding at the trial. The jury awarded Huckle, who was in the employ of the actual printer as a journeyman, £300 damages—an amount equal in our day to $6,000 or $7,000. In delivering judgment dismissing an application for a new trial, on the ground that the damages were excessive, the same great Lord Chief Justice said:—

"The law has not laid down what shall be the measure of damages in actions of tort; the measure is vague and uncertain,

depending on a vast variety of causes, facts, and circumstances. . . . The small injury done to the plaintiff, or the inconsiderableness of his station and rank in life, did not appear to the jury in that striking light in which the great point of law touching the liberty of the subject appeared to them at the trial; they saw a magistrate over the King's subjects exercising arbitrary power, violating *Magna Charta*, and attempting to destroy the liberty of the kingdom, by insisting upon the legality of this general warrant before them; they heard the King's counsel, and saw the solicitor of the treasury endeavouring to support and maintain the legality of the warrant in a tyrannical and severe manner. These are the ideas which struck the jury on the trial; and I thing they have done right in giving exemplary damages. To enter a man's house by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish inquisition; a law under which no Englishman would wish to live an hour; it was a most daring public attack made upon the liberty of the subject. . . . I cannot say what damages I should have given if I had been upon the jury. . . . Upon the whole, I am of opinion the damages are not excessive; and that it is very dangerous for the Judges to intermeddle in damages for torts."

In the well-known case of *Merest* v. *Hervey* (1814), 5 Taunt. 442, the defendant, a banker, a magistrate, and a member of Parliament, insisted on joining a shooting party conducted by the plaintiff on the plaintiff's land, and refused to desist when requested. A jury awarded the plaintiff £500 damages. In delivering judgment refusing a rule, Chief Justice Gibbs asked:—

"In a case where a man disregards every principle which actuates the conduct of gentlemen, what is to restrain him except large damages? . . . Suppose a gentleman has a paved walk in his paddock, before his window, and that a man intrudes and walks up and down before the window of his home, and looks in while the owner is at dinner, is the trespasser to be permitted to say, 'Here is a halfpenny for you, which is the full extent of all the mischief I have done?' Would that be a compensation? I cannot say that it would be."

Heath, J., said he remembered a case in which a jury gave £500 damages for merely knocking a man's hat off. He thought the award of exemplary damages prevented the practice of duelling.

I would add that it is only by awarding exemplary damages, and collecting them from the offender, that over-zealous officers enforcing the Ontario Temperance Act shall be restrained from

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any infringment of the rights of a citizen of Canada that is not warranted by that or some other law.

The appeal fails and should be dismissed.

LENNOX, J.:—The financial consequence to the litigants in this action is not the most weighty question involved in the decision of this appeal. It involves the interpretation of a much-debated statute, protection from unwarranted intrusion, and generally matters of grave public concern; and, although I could, I think, deal justly between the parties to the action without specifically referring to some of the questions most keenly debated by counsel, I conceive it to be my duty to express the opinion I entertain as to the proper construction of the relevant provisions of the Ontario Temperance Act. As part of the machinery for its enforcement, the defendant was appointed an inspector under the provisions of the Act.

Section 70 (2) enacts that "any inspector . . . . . *if he believes* that liquor intended for sale or to be kept for sale or otherwise in contravention of this Act, is contained in any vehicle on a public highway or elsewhere, or is concealed upon the land of any person, may enter and search such vehicle, and may enter upon and search such land," etc. The question arises then: What is the meaning of the words "vehicle" and "highway" as used in sec. 70 (2) of the Act?

As to the word "highway," it was suggested that, as the expression in the statute is "highway or elsewhere," an easy way out would be to seize upon the word "'elsewhere," and the meaning of highway would become unimportant. It seems to me that in a matter so closely touching the public interest I should, as far as I am able, deal directly with the matters upon which the learned trial Judge based his conclusions, particularly as regards questions of construction and matters of law.

It is universal knowledge that the Act is intended to prevent illicit traffic in intoxicating liquor within the Province. Referring to sec. 70 (2) the learned Judge said (48 O.L.R. at p. 535): "The section could apply only if the defendant believed that liquor intended for sale or to be kept for sale or otherwise in contravention of the Act, was on the boat; and, secondly, if the boat should be regarded as a 'vehicle on a public highway or elsewhere.'" It is notorious that waterways and watercraft, whenever and wherever available, have always been favourite agencies for the transport of contraband commodities. Having regard to this historical fact, the physical features of the Province, external as well as internal, the incessant activity

upon our waterways, and the general scope and obvious purpose of the Act, I am, with very great respect, of the opinion that the boat in question is a "vehicle" and the navigable water (within the Province) upon which it floated is a "highway," within the meaning of the Ontario Temperance Act.

This, however, does not take the defendant very far towards the winning of his appeal: for I am also of the opinion, as the learned Judge points out, that there can be no justification of the defendant's acts short of his shewing that he actually believed that there was at that time in the "vehicle" he boarded and searched "liquor intended for sale . . . in contravention of this Act:" and this for the all-sufficient reason that the statute says so in plain terms. The defendant does not pretend that he "believed" this when he boarded the vessel with the intent to search; and, as belief was an indispensable condition precedent of the right to enter, he became a trespasser *ab initio*. Of the two offences committed this was morally the less serious, for it is probably attributable to ignorance of the meaning of the Act and the extent of his powers. He was in the habit of indiscriminately overhauling all watercraft, upon the assumption, as he says, that these "might be" engaged in illicit traffic. But, when he proceeded to search the boat after he knew the situation and had found out his mistake, I fear his conduct must be regarded as wholly indefensible; and the motive he assigns does not put it in a better light.

I can see no justification for reducing the damages.

Since writing this, I have had the advantage of reading the judgments of the Chief Justice and my learned brother Ferguson. The validity or invalidity of sec. 70 has not come up for decision in our Courts, and is not up for decision now. Neither the Attorney-General nor the Minister of Justice has been heard or asked to argue the appeal, nor was the question raised when the appeal was heard. I have not, of course, overlooked the exceedingly cogent argument—if I may say so—of the Chief Justice, of *ultra vires* as proving that the Legislature could not have intended the Act to apply to conditions such as this case presents; but, except as the basis of an inference, I have not been able to discover the relevancy of the question raised, namely, whether the statute is *intra vires* or *ultra vires* of the Legislature. The statute is a speaking, vital force until it has been declared invalid, and until then must be interpreted and applied according to the plain, ordinary, and obvious meaning of the terms the Legislature has used, and with regard to the remedy and purpose of the Act. I have not discussed the question whether the Act is *intra* or *ultra vires;* I have attempt-

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ed to deal with it as it is, its intent, meaning, purpose, and interpretation, as I understand it, not its fate; and I am not tempted to go beyond this point. If the Legislature desires to know the opinion of a Divisional Court or of any of the Judges of the Supreme Court, in advance, as to its powers to regulate the liquor traffic upon the water highways of the Province, including international waterways within the international boundary-lines, the Lieutenant-Goveror in Council can obtain it under the Constitutional Questions Act, as was done very recently concerning race associations and betting.

I would dismiss the appeal.

FERGUSON, J.A.:—Sub-section 2 of sec. 70 of the Ontario Temperance Act provides that if an officer believes that liquor intended for sale or to be kept for sale in contravention of the Act is contained in any vehicle, etc., he may enter and search.

The defendant, in his testimony, seems to me to have fallen short of even asserting that he had the belief by the Act made a necessary foundation for the right to enter and search. He deposes only to a belief that there might be liquor upon the boat of the plaintiff: in other words, he asserts merely a suspicion, which, in my opinion, is not a sufficient foundation for the right he asserted and purported to act upon.

The defendant admitted that he continued the search after all suspicion had been removed. The judgment may be supported on both or either of those grounds, and it is not necessary to deal with the other questions argued; but I have been asked to express an opinion on the meaning of the word "vehicle."

It is argued that because the defendant deposed that he believed that the plaintiff's yacht might be engaged in running rum from Ontario to the United States, it was a "vehicle" within the meaning of sec. 70. I am of opinion that this contention is not tenable. The framers of the Ontario Temperance Act, in order to protect it from attack on the ground of being *ultra vires* of the provincial Legislature, by sec. 139 provided as follows:—

"While this Act is intended to prohibit and shall prohibit transactions in liquor which take place wholly within the Province of Ontario, except under license or as otherwise specially provided by this Act, and to restrict the consumption of liquor within the limits of the Province of Ontario, it shall not affect and is not intended to affect *bonâ fide* transactions in liquor between a person in the Province of Ontario and a person in another Province or in a foreign country, and the provisions of this Act shall be construed accordingly."

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[The learned Judge also set out the text of sub-sec. 2 of sec. 70, which is transcribed above.]

Section 139 makes it clear that the Act is not intended to apply to or affect the validity of transactions in liquor between citizens of Ontario and citizens of other Provinces or countries; and it seems to me to follow that the Act does not apply to the transportation of liquor from the Province of Ontario to another Province, or to a foreign country, and that a vessel engaged in export trade does not, by reason of the fact that it is carrying liquor for export, become a "vehicle" within the meaning of sec. 70, and, as such, subject to search.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Re CITY OF WINDSOR and McLEOD.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Latchford and Lennox, JJ. April 7, 1921.

TAXES (§VI—220) — INCOME FROM ESTATE — NOT BEING DISTRIBUTED— DOMICILE OF TESTATOR—ESTATE AND BUSINESS CARRIED ON IN MUNICIPALITY—MEANING OF ASSESSMENT ACT, SECS. 5 AND 133.

Under sec. 5 of the Assessment Act, R.S.O. 1914, ch. 194, the income from an estate in Ontario which under a will is to be accumulated for a period of 21 years, and at the end of that time distributed among persons at present unknown, is subject to assessment for income tax in the municipality in Ontario in which the person receiving it, that is the surviving executor and trustee, resides.

[*Re Gibson and City of Hamilton* (1919), 48 D.L.R. 428, 45 O.L.R. 458, distinguished.]

Case stated for the opinion of the Court by the Senior Judge of the County Court of the County of Essex, upon an appeal to him under the Assessment Act from the assessment for income of the estate of John Curry, deceased, by Alexander Black, Assessment Commissioner for the City of Windsor, for the year 1920, at the sum of $100,000, against James Barber McLeod, surviving trustee and executor under the will of John Curry, and from the judgment of the Court of Revision of the City of Windsor confirming the said assessment for income.

The case as stated by the Judge was as follows:—

"The late John Curry died on or about the 11th May, 1912, leaving a last will and testament by which he appointed as his executors and executrix and trustees James Barber McLeod, Charles F. Curry, and Frances Arabella Curry, and the will was proved, and subsequently to the issue of letters probate thereof, and on the 21st October, 1912, Frances Arabella Curry died, and Charles F. Curry died on the 24th March, 1920, leaving James Barber McLeod sole surviving executor and trustee under

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the will, and at that time McLeod resided in the city of Windsor and has continued to reside there.

"The income received in Ontario by McLeod as trustee under the will was in the previous year $126,157.80, in addition to the further sum of $13,873.34 for interest paid by purchasers of real estate within Ontario upon the balance owing by them on their respective purchases, such purchasers being in possession and paying taxes on the said lands, the total amount of said income so received being $140,031.14.

"Out of this amount so received there were payable various expenses, amounting in all, as shewn by a statement submitted by McLeod, to the sum of $53,720,57, leaving the net income within Ontario at $86,310.57. Out of this there was paid to one beneficiary residing within Ontario, that is, Verene May McLeod, a daughter of the said deceased, the sum of $8,000, and to another beneficiary residing out of Ontario, Gladys Alma Curry, another daughter of the deceased, the sum of $6,000. Under the provisions of the will the balance of the above mentioned net income, together with that of previous and subsequent years, is to be accumulated by the trustees for a period of 21 years, commencing on the 11th May, 1912, and expiring on the 10th May, 1933, whereupon the accumulated trust fund is to be divided among persons at present unascertained, and whose right and title will depend on the circumstances at the time fixed for the division.

"At the hearing upon the above facts, I decided that I was bound by the authority of *Re Gibson and City of Hamilton* (1919), 48 D.L.R. 428, 45 O.L.R. 458 and allowed the appeal of McLeod and reduced the assessment for income to $14,000. In view of my disposition of the appeal, it did not become necessary to decide the question whether or not the above mentioned interest received on agreement for sale of real estate, amounting to $13,873.34, is exempt from taxation under sec. 5 (21) of the Assessment Act. In my view, the interest on the amounts of such agreements falls within the meaning of the term "interest on mortgages," as used therein, and if its non-assessability depends on that sub-section I would hold that it was assessable.

"The questions for the opinion of the Court are:—

"*First*, whether the income from the said estate is assessable for income under the Assessment Act.

"*Second*, whether, in the event of income being payable by said estate, as found by the Assessment Commissioner for the City of Windsor and the Court of Revision thereof, the interest upon moneys payable under the said agreements for sale of real estate of the deceased is exempt from income tax under sec. 5 (21) of the said Assessment Act, or otherwise."

By sec. 81 of the Assessment Act, as enacted by sec. 6 of the Assessment Amendment Act, 1916, 6 Geo. V. ch. 41, the procedure by way of a special case stated by the County Court Judge is provided where a party desires to appeal from the judgment of the Judge on a question of law or the construction of a statute. The appeal in this case was by the Municipal Corporation of the City of Windsor from the judgment of the County Court Judge reducing the assessment as confirmed by the Court of Revision.

F. D. Davis, for appellants.

A. C. McMaster, for J. B. McLeod.

MEREDITH, C.J.C.P.:—Unfortunately the case of *Re Gibson and City of Hamilton*, 45 O.L.R. 458, 48 D.L.R. 428 decided nothing except that, on the facts of that case, there had not been a valid assessment. Two of the four Judges who considered the questions which were raised in it thought that the income then in question was not assessable, and therefore that "the appeal should be allowed" on that ground; another of them thought that the income was assessable, but that it had not been assessed in the proper municipality, and that, on that ground, the appeal should be allowed; and the fourth Judge merely "agreed in the result:" so manifestly that case is not an authority for the contention in this case on either side, and it is our duty to consider the questions asked in this stated case, and to give effect to our own conclusions regarding them.

The first question is: whether the Curry estate can be assessed in respect of the income in question.

It is pure income, of which the estate gets the full benefit—except as to $14,000, $8,000 of which is payable now to a legatee who resides in Ontario, and the rest is payable likewise, except that it is payable to a legatee who resides out of Ontario.

Why should it not be taxable in the hands of the testator's representatives just as it would if the testator were living and had it in his own hands?

It is admitted for the estate that it can be taxed in respect of the $14,000; but as to the rest it is said, by the executor, that it cannot, because no one is beneficially entitled to it now, and also because it was not received by the trustees by or on behalf of a person resident out of Ontario; and the learned County Court Judge who stated this case, deeming that he was bound by the case of the *Gibson* estate to do so, gave effect, as far as he could, to that contention; but the case is brought here for further consideration.

If an estate cannot be taxed, except in respect to income received for a person residing out of Ontario, then, through

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some extraordinarily stupid clerical mistake, the Assessment Act fails in its manifest purpose, and causes manifest injustice, in a matter of much greater moment; all of which, it may be added, the executors have admitted, and have given effect to their admission, in consenting to be assessed and taxed in respect of $8,000 held by them for the legatee residing in Ontario.

But no such mistake has been made. The purpose of the Act is the taxation of all property which and persons whom the provincial Legislature has power to tax, except that property, and those persons, expressly exempted by its provisions.

The general words (sec. 5 of the Assessment Act, R.S.O. 1914, ch. 195) are:—

"All real property in Ontario and all income derived either within or out of Ontario by a person resident therein . . . ."

Pausing there, it could not be reasonably said—and indeed it has not been said at all—that the income in question does not come within those words.

There is no reason why it should not be taxed; it is clear income "derived" within Ontario; and has been received by persons—the executors—resident in Ontario; and it was received by persons who cannot give the Province the benefit of it by expending it in the Province, but who are bound to put it to uses least beneficial to the public; they are bound to hoard it for a number of years; and so it is income which especially should be taxed.

The words of the Act following those which were read are: "or received in Ontario by or on behalf of any person resident out of the same . . ."——words which seem to have created the difficulties which this case is said to present.

But they create no difficulty unless they are read as curtailing the preceding words, when, in truth, their purpose is to extend them.

The earlier words covered every person—"person" having the very wide meaning given to it in the Interpretation Act—resident in Ontario; but, being so limited as to residence, it was necessary to add words so as to bring non-residents into the taxation-net; and so, by the later words, all non-residents who, directly or through any other person, received income in Ontario, were made also liable to taxation upon that income.

Nothing can reasonably be said against the taxation of the resident; to exclude him and include the non-resident should be manifestly unjust if it could be held to be legal. Provinces have power to impose only "direct taxation within the Province," for a specific purpose. But, when a non-resident is taxable,

there is always this fact to be borne in mind: that he is liable to taxation, and is pretty sure to be taxed, and taxed heavily, on the same income, where he resides—double taxation. So that the taxation of a non-resident, and the exemption of a resident, in respect of the like income, should be an absurdity that no legislative body could have intended to enact; and I could find no excuse for saying so, if I should say that the Ontario Legislature has so enacted.

Though the point is not raised, yet, as it illustrates that which I have said, in my opinion: the legatee who is a non-resident was, under the latter part of the section of the enactment which I have read, properly taxed through the estate; but the resident legatee, being absolutely entitled to the legacy immediately, should have been taxed directly. These differences account for the use of the word "received" in the one case and "derived" in the other. In the case of the agent for the non-resident person, the money must have been received by him; in the case of the resident principal it is enough if it is "derived" in Ontario, the source of derivation of the income must be Ontario; not the destination as in the other case. Properly it is enough if the principal is entitled to the income whether he chooses to receive it or not. But, properly, it is not enough as to the agent, it is not his tax; he can properly be taxed for another only when the other's money, out of which the tax can be paid, has come into his hands.

This is further indicated in sec. 13 of the Act; which also provides for the place of such non-resident income taxation; it is to be at the place of business of the receiver of the income; in this case Windsor, where the business of the Curry estate is carried on.

If the income in question is not taxable, then any one and every one can by a very simple device escape all taxation upon all such income.

It is easy to create a trust, of all the taxable income of the persons creating it, under which, after any period that may suit the evader, the accumulated fund is to be paid to him, or, if he is not living, as his will provides; in the meantime he may enjoy himself upon his income that is not taxable and upon so much of his capital as he may see fit to devote to that purpose. And such periods may be renewed, to continue the purposes of the trust without any kind of inconvenience to its creator, or disturbance of its effect.

The income would be received by the trustee for an unknown, or uncertain, person or persons, and not for a person resident out of Ontario: very like this case.

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Being unable, therefore, to find anything in reason, or in the Act, indicating that the income in question should not bear its burden as other incomes must; I answer the first question: Yes.

As to the second question: the income in question is not "rent or other income derived from real estate," nor is it exempted "interest on mortgages:" it is interest upon money due from a debtor to a creditor: that the debtor cannot get a deed of the land he has purchased unless he pays it, cannot make it anything but ordinary income, not derived from a mortgage or from rent or real estate, but from money due on a contract to pay it.

I therefore answer this question: No.

Treated as an appeal, and it is so named in the Act, which provides for it, the Assessment Amendment Act, 1916, the appeal should be allowed, with costs.

LENNOX, J.:—This matter comes into this Court by way of appeal, upon a stated case, from the decision of the learned Judge of the County Court of the County of Essex, who held, upon the authority of *Re Gibson and City of Hamilton*, 45 O.L.R. 458, 48 D.L.R. 428, that the income, except as to $14,000 thereof, presently payable to the beneficiaries, is not assessable. I will postpone the consideration of the *Gibson* decision until I have, unaided, formed the best opinion I can of the relevant provisions of the Assessment Act, R.S.O. 1914, ch. 195.

The deceased John Curry, until the time of his death, in May, 1912, was domiciled in the city of Windsor, and at his death all his estate, whether he purported to dispose of it by his will or not, immediately vested in his personal representatives, of whom the respondent, James Barber McLeod, was one, and is now the sole survivor, by force of the Devolution of Estates Act, R.S.O. 1914, ch. 119, sec. 3. Mr. McLeod is in a double sense the representative of the deceased and his estate, that is, he is, as he describes himself, the sole surviving executor of the will and trustee of the estate of the deceased, and he is a trustee by force of the Act, sec. 3, without being named by the testator. He is the person seised or possessed of the estate; and, for so long as any part of the estate remains undisturbed and he retains his office, he takes the place of his testator, and is the person to be assessed, from time to time, in respect of all undistributed portions of the estate to the same extent and with the same effect as the deceased, if he were still alive, would be for property remaining in his hands.

Section 22 of the Assessment Act, defining the "Duties of Assessors," does not permit an assessment to be made "against the name of any deceased person," but provides that it shall be made against the name, as here, of the person who should be assessed "in lieu of the deceased," if the name of the personal representative can be ascertained, and, if not, "he may enter instead of such name, the words 'Representatives of A.B., deceased' (giving the name of such deceased person):" sub-sec. 1 (*h*) of sec. 22.

Subject to specified exceptions which do not affect this appeal (except sub-sec. 21, later referred to), sec. 5 enacts that "all real property in Ontario and all income derived either within or out of Ontario by any person resident therein, or received in Ontario by or on behalf of any person out of the same, shall be liable to taxation." With this section is to be read sec. 13, which provides: (1) "Every agent, trustee, or person who collects or receives, or is in any way in possession or control of income for or on behalf of a person resident out of Ontario, shall be assessed in respect of such income.

(2) "Every person assessed under this section shall be assessed at his place of business, if any, or if he has no place of business, at his residence."

Of the exemptions provided for by the paragraphs of sec. 5, there is only one suggested, or that could be suggested, as possibly applicable, namely para. 21, "Rent or other income derived from real estate, except interest on mortgages." This touches only $13,873.34 of the $86,310.57 net income in question. It is income received as interest on the outstanding purchase-money of the land sold by the testator or his estate. It is suggested that, even if the other income is assessable, this, at all events, is exempt, and we are directly asked if it is not so. I may as well dispose of this question by saying now that, in my opinion, it is exactly upon the same plane as the other income. If balances of purchase-money are to be regarded as in the nature of a mortgage—and such moneys certainly constitute an equitable lien upon the land as against the vendees at least —it is not exempt, for interest on mortgages is expressly excepted from the exemptions of para. 21. Without that, however, the interpretation clause, sec. 2 (*e*), affords a conclusive answer: "Income . . . shall include the interest, dividends or profits directly or indirectly received from money at interest upon any security or without security, or from stocks, or from any other investment, and also profit or gain from any other source." The answer to this second question should be: No.

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I interpret sec. 5 as imposing taxation on: (1) income of, or payable to, a resident of Ontario (*a*) from a source within the Province, or (*b*) from a source outside the Province; as, for instance, in the latter case, a resident of Ottawa carrying on a business or having investments in Hull, or a resident of Windsor having a similar source of revenue or income in Detroit; and (2) income of an outsider, say a resident of Hull, or Detroit, or China, if such income is (*a*) received by the outsider personally in Ontario, or is (*b*) received by or on behalf of such outsider by his agent or representative in Ontario. In both cases I interpret "received" as the equivalent of, and, where necessary, including, "enjoyed, earned, obtained, acquired," and other like expressions; and I would not interpret this part of the section in the interest of the tax-evader, or in a way that would enable the person by whom the income was earned or to whom it accrued in Ontario, or his agent or representative, by crossing the bridge to Hull, or the ferry to Detroit, and deferring the actual receipt until he had retreated across the provincial boundary, to escape from payment.

The basis of fact upon which the learned County Court Judge rests his decision is that: "Under the provisions of the will the balance of the . . . net income, together with that of previous and subsequent years, is to be accumulated by the trustees for a period of 21 years, commencing on the 11th May, 1912, and expiring on the 10th May, 1933, whereupon the accumulated trust fund is to be divided amongst persons at present unascertained, and whose rights and title will depend on the circumstances at the time fixed for the said division." Well, how does the uncertainty help the respondent? The answer is obvious and unanswerable: it does not help him, for there is in the statute no exemption by reason of uncertainty of ultimate destination. There are exceptions provided for by paragraphs of sec. 5, but this is not one of them, and the statute says that "all income," that is, all income of the statutory description, "shall be liable to taxation," and there is no difficulty in the way. The will provides that the business of the estate shall be carried on and the earnings capitalised and accumulated, and the interest in effect compounded for 21 years after his death by the testator's *alter ego*, the respondent, the trustee under his will, the statutory trustee under the Devolution of Estates Act, and the "personal representative" pointed out as the taxable party by the Assessment Act, as I have said.

It would be unjust to suggest that the provisions of the will were intended as a device to evade payment of a fair and ratable

contribution to the common burden—the basic and indispensable condition of organised society—but, all the same, the method adopted, if successful and generally followed, as it would be, would inevitably undermine our whole system of equal taxation, and subject the poorer classes to intolerable burdens. In principle, it would be the same if, avoiding the danger zone of perpetuities, the testator had tied up the property for lives in being plus 21 years, or, in all, say for about a century. The law does not contemplate or sanction a break in the continuity of ownership. The chain of succession is sometimes by implication only, as, for instance, an heir *en ventre sa mère*, or under the devolution of all property, in this Province, upon the personal representative, although none has been named in the will, or there is no will. All the same, the moment it happens that, in contemplation of law, there is no one seised or possessed, and theoretically enjoying or entitled to its incidents, and subject to its obligations, the property passes to the Crown.

Well, then, what happens in this case? This has happened, that until the last moment of the 21 years this part of the testator's estate has not been disposed of; until the last moment it is uncertain whether any of the contemplated objects of bounty will take any of it, until then it is legally possible that it may ultimately go to the right heirs of the testator; and until then the legal ownership is vested in the respondent as nominated and statutory trustee thereof, with all its rights and incidental advantages—in accordance with the terms of the will—and subject to all the municipal obligations of seisin or possession and control, and, as I interpret the statute—without for the moment adverting to decisions—subject to the inconvenience of assessment, the common burden of taxation, and the obligation to pay. Still, keeping to the statute, and without extraneous aid, why should I think otherwise, how does the uncertainty aid the respondent? To my mind it emphasises the reason and the need of the law as I understand it to be. I admit I am not greatly concerned as to who has the best of it, in the over-subtle argument as to beneficiaries in or out of Ontario. There are no ascertained beneficiaries for the present, and consequently for the present there are no beneficiaries—there are persons who, in certain contingencies, may be benefitted after the 10th May, 1933, or they may not be—nobody knows. It is of no consequence, but, if these are existing persons, they are either "within Ontario" or they are not, and the statute takes care of both classes.

It was, however, argued that the decision of this appeal turns upon the conclusion come to in *Re Gibson and City of Hamilton*,

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45 O.L.R. 458, 48 D.L.R. 428. In that case the testator's domicile was at Beamsville. He had never lived in Hamilton, and of the five trustees, two only resided in that city, two in Toronto, and one in Winnipeg. The income assessed had been actually received by the trustees resident in Hamilton, and this appears to have been the only foundation upon which the municipality could claim the right to assess. By the terms of Mr. Gibson's will, no one was presently entitled beneficially to the income assessed, nor could it be determined, until a future time, who would become beneficially entitled. Upon this latter point the circumstances are much the same as here. Upon appeal the learned Judge of the County Court of the County of Wentworth affirmed the right of assessment. An appeal was taken to this Court. The questions stated for the opinion of the Court were: (1) Was this income assessable anywhere? (2) If so, was it assessable in Hamilton? The learned Chief Justice of the Exchequer held that it was not assessable at all, and in this judgment Mr. Justice Riddell agreed. Mr. Justice Clute, on the other hand, held that the income in question was assessable in the municipality where the testator resided and carried on his business, but, as he did not reside or carry on business in the city of Hamilton the income was not assessable there; and in the result of this judgment Mr. Justice Sutherland agreed. I agree with the learned Chief Justice presiding in this Court that we are not bound by the decision of the *Gibson* case. It does not apply here, and, with the greatest respect for the opinion of the two distinguished and experienced Judges who held that the income in that case was not assessable at all, I have come to the conclusion—though necessarily with hesitation in the face of eminent opinion to the contrary—that the income in question is assessable and taxable. The *Gibson* case, as I understand it, only decides that, having regard to the circumstances there, the income was not assessable in Hamilton. In this case the testator was domiciled in Windsor, and his estate, and its continuing activities and money-making, and the sole trustee, are all in that municipality.

I would allow the appeal.

LATCHFORD, J., concurred.

RIDDELL, J. (dissenting):—I am of opinion that this case is wholly covered by *Gibson's* case, 45 O.L.R. 458, 48 D.L.R. 428, and would dismiss the appeal.

Appeal allowed.

REX v. KENNY.

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Ontario Supreme Court, Kelly, J. June 28, 1921.

SUMMARY CONVICTIONS (§VIIB—80)—ONT. TEMPERANCE ACT—KEEPING INTOXICATING LIQUOR FOR "SALE OR DISPOSAL"—ALTERNATIVE OFFENCE—CONVICTION BAD ON ITS FACE—MOTION TO QUASH—AMENDMENT UNDER SEC. 101—KEEPING FOR SALE ONLY—EVIDENCE—ONUS—SEC. 88.

A summary conviction under the Ontario Temperance Act, which is objectionable in form because in the alternative for "keeping liquor for sale or disposal" may be amended by the Court in *certiorari* proceedings if the Court is satisfied that the evidence supports a conviction in an amended form.

[Ontario Temperance Act 1916, ch. 50, sec. 101, applied.]

MOTION to quash a magistrate's conviction of the defendant for an offence against the Ontario Temperance Act.

R. S. Robertson, for the defendant.

F. P. Brennan, for the magistrate.

KELLY, J., in a written judgment, said that on the 4th February, 1921, the defendant was convicted by the Police Magistrate for the City of Stratford for that "during the last three months ending on the 1st day of February in the year 1921" the defendant "did keep liquor for sale or disposal"; and a penalty was imposed upon him therefor.

The defendant in December, 1920, and January, 1921, had taken into his house a substantial supply of intoxicating liquor, which he asserted was for his own personal use; and he sought to shew that a large part of it, which disappeared within a limited time, was consumed in a legitimate way by himself and friends of his who from time to time visited his house.

One of the grounds for the present motion was that important evidence which the defendant gave on the hearing before the magistrate was not taken down or considered; and he tendered his own affidavit to that effect. The record shewed that several witnesses gave evidence which was taken down by the magistrate and was signed by these respective witnesses. It did not shew that objection was taken at the time to these alleged omissions. The learned Judge therefore would proceed to dispose of the motion on the record of the proceedings as returned by the magistrate.

The defendant also maintained that the conviction did not disclose any offence punishable by law; that there was no evi-

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dence to shew that he kept liquor for sale or illegal disposal; that the conviction was not warranted by the evidence, but was made merely on suspicion.

It was contended that there was no such offence as that for which the conviction was made; that the conviction was in the alternative and so open to objection; and that, in any event, and even if there was a disposal, the case did not fall within the provisions of the Act; and, consequently, the defendant was not called upon to prove that he did not commit the offence with which he was charged.

The defendant had in his possession, charge, or control a substantial quantity of liquor; he himself admitted so much, and it was also shewn by the evidence of other witnesses. It was, therefore, open to the magistrate, under sec. 88—but subject to what might be said of the objection now raised in the alternative form of the information and conviction—to convict, unless the defendant should prove that he did not commit the offence with which he was charged.

It was also suggested that, because of the absence from sec. 40 of the word "disposal," keeping for disposal should be regarded as an innocent act—"disposal" not necessarily meaning in the nature of a sale; and that therefore the conviction, in so far as it was for keeping liquor for disposal, was not an offence recognised by the Act. In other sections of the Act, however, "disposal" and "keeping for disposal" are not treated as innocent acts but as involving penalties (see secs. 67, 68, 77, and 83).

The conviction being objectionable in that it was in the alternative, it became necessary to determine whether this was a proper case in which to invoke sec. 101, which permits of an amendment to a conviction in circumstances therein indicated. To justify the application of that section, it is necessary that it can be understood from the conviction, warrant, process, or proceedings that the same was made for an offence against some provision of the Act within the jurisdiction of the magistrate. It could be understood from this conviction and proceeding that it was made for such an offence. It should then be considered whether there was evidence to prove some offence under the Act, the conclusion as to which "must depend upon whether there is, in the opinion of the Court (not the magistrate), evi-

dence to support the proposed amended conviction:" *Rex* v. *Newton* (1920), 19 O.W.N. 249, 48 O.L.R. 403, at p. 405.

Reading the evidence as recorded, it was, in the learned Judge's opinion, sufficient to establish — not merely raise a suspicion—that an offence under the Act had been committed. That being so, sec. 101 might properly be invoked, the conviction amended accordingly, and, as so amended, confirmed, and the motion then dismissed, but without costs.

Conviction amended.

REX v. OLLMAN.

Ontario Supreme Court, Rose, J. February 10, 1921.

INTOXICATING LIQUORS (§IIIJ—91)—ONTARIO TEMPERANCE ACT—CONVICTION FOR OFFENCE AGAINST SEC. 40—KEEPING INTOXICATING LIQUOR FOR SALE—EVIDENCE—FAILURE TO SHEW THAT LIQUOR WAS OWNED BY OR UNDER CONTROL OF ACCUSED—OCCUPANT OF PREMISES . . —"ACTUAL OFFENDER"—SEC. 84 (1), (2)—SUSPICION.

Where there is no proof of guilt, a conviction under the Ontario Temperance Act will be quashed, although there may be suspicious circumstances on which the magistrate based the conviction.

MOTION to quash a conviction of the defendant, made by the Police Magistrate for the City of Hamilton, on the 26th January, 1921, for an offence against the Ontario Temperance Act.

J. L. Counsell, for the defendant.

F. P. Brennan, for the magistrate.

ROSE, J., in a written judgment, said that Ollman and Sawyer and Henderson were accused, each in a separate information, of having or keeping intoxicating liquor for the purpose of barter or sale, at a certain house in Hamilton, on the 22nd January, 1921.

They were tried together, Henderson was acquitted, Sawyer pleaded guilty, and was convicted, Ollman pleaded "not guilty," but was also convicted.

There was evidence that Ollman had rented the house for the months of December and January for Henderson; but that, when Henderson found that he could not have it for so long a period, he had decided not to take it at all, and that Ollman had let Sawyer into possession. There was also evidence that on the day named in the information there was beer in the house, and that there were persons drinking and playing cards in the house, and that some money passed; so that it was quite

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fair to take it as established that the beer was there for sale. There was, however, no evidence that Ollman was in the house on that day or for some days previously. He lived next door, and was found outside when the policemen visited the premises; but, except for such inference as could be drawn from the fact that he had in the first place rented the house from the owner, there was no evidence that he had any possession or control over the beer. There was evidence that a week before, just after he had let Saywer into possession, he had had beer there, which he had said was for his friends; but there was no evidence at all that the beer in respect of which he was prosecuted was his or was under his control. It was really unfair that he and Sawyer should be tried together, for the greater portion of the evidence consisted of an account by the constables of statements made by Sawyer which were not made in Ollman's presence, and were, of course, no evidence against him.

If Sawyer was "the actual offender," and Ollman's guilt was to be taken as established by reason of the fact that he was the occupant (sec. 84, sub-sec. 1), the conviction of Sawyer was a bar to the conviction of Ollman (sub-sec. 2, added by the amending Act of 1917, 7 Geo. V. ch. 50, sec. 30). Therefore, if the conviction could be supported, it must be upon the ground that Ollman and Sawyer were acting together, and that each had the beer; and the learned Judge did not think there was any evidence at all upon which the magistrate was justified in finding that they were so acting together. Sawyer's statements were no evidence against Ollman, and Sawyer's latest statement, which was that he was the tenant and owned the beer, was no evidence in Ollman's favour; and it did not follow from the fact that Sawyer's last statement and his plea of "guilty" were accepted that it was established in Ollman's favour that Ollman was not the tenant and had no ownership in the beer. But the question was not whether Ollman proved that he was innocent; but whether there was any proof that he was guilty, and there was no proof of his guilt. No doubt there was suspicion, but the magistrates cannot convict upon suspicion under this Act any more than under any other Act.

The conviction should be quashed, with the usual order for the protection of the magistrate and officers.

Conviction quashed.

REX v. CORDELLI.

Ontario Supreme Court, Mulock, C.J. Ex. June 23, 1921.

CERTIORARI (§IA—9)—SUMMARY CONVICTION—HAVING INTOXICATING LIQUOR IN PLACE OTHER THAN PRIVATE DWELLING HOUSE OF ACCUSED—EVIDENCE—ONUS—FINDING BY MAGISTRATE.

Where there was evidence to support a summary conviction for an offence under the Ontario Temperance Act and it could not be said that the magistrate erred in his findings of fact, a motion to quash on *certiorari* must be dismissed.

MOTION to quash the conviction of the defendant, by a magistrate, for an offence against sec. 41 (1) of the Ontario Temperance Act, which provides that no person shall have or keep intoxicating liquor in any place other than the private dwelling house in which he resides.

T. P. Galt, K.C., for the defendant.

F. P. Brennan, for the magistrate.

MULOCK, C.J.Ex., in a written judgment, said that from the evidence it appeared that two cases of Imperial whisky arrived by rail at the express office in the city of Sault Ste. Marie, consigned to M. Viau; that the defendant applied to the express company for these two cases of whisky, producing the shipping bill; that they were accordingly handed over to him, and that he put them in a borrowed automobile, which he then drove from the express office, and that he placed these two cases of whisky in the house of his brother. The defendant did not reside in that house. His explanation of the transaction was that Mrs. Viau was the purchaser of the liquor, paid for it with her own money, and engaged him to go to the express office and obtain it and bring it to her house; that on the way one of the tires blew out, whereby he was prevented from continuing the journey to Mrs. Viau's, and that he temporarily deposited the liquor in his brother's house, intending later to take it to Mrs. Viau's, but, before making any further move in that direction, he was arrested on the charge in question.

Mrs. Viau swore that she was the purchaser; that she lived in the house with her children, one young girl, and that the liquor was for the young girl for external use. On cross-examination she gave a further reason for desiring to procure

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the liquor, namely, to give it to her sons, who, she swore, were not healthy; that their ages were 8 and 12; and that she gave them liquor, and that she had been giving liquor to them off and on before, under instructions from a doctor. The doctor referred to, she said, lived in Bay City.

The magistrate gave judgment in the following words: "My conclusions are clear. I find, on the evidence, that the two cases of liquor were purchased by the defendant in the name of M. Viau; that the liquor actually belonged to the defendant and was taken by him purposely to 122 West street, which is not the private dwelling house of the defendant. I do not believe the story of the defendant that a tire blew out as he was on his way to Mrs. Viau's. The defendant was making use of the Viau name, just as crafty liquor dealers frequently use young boys to aid in 'bootlegging,' thinking they will escape prosecution."And he found the defendant guilty and imposed a fine of $400 and costs.

Prima facie the defendant was guilty, and he failed to discharge the onus of proving his innocence. There was evidence to support the conviction, and it could not be said that the magistrate erred in his findings of fact.

Motion dismissed with costs.

DRURY v. STUMP.

Ontario Supreme Court, Sutherland, J. April 11, 1921.

PARTIES (§IB—55)—MOTOR ACCIDENT—DRIVER AND TWO PASSENGERS—ONE OCCURRENCE—JOINDER OF PARTIES—MOTION BY DEFENDANT TO TRY ACTIONS SEPARATELY—HARDSHIP—APPEAL FROM MASTER—ORDER.

When the driver of a car and the passengers therein have a claim against another driver they may properly be joined as plaintiffs, even although the defendant may claim contributory negligence on the part of the driver plaintiff; the matter should be disposed of in one action.

[*Coop* v. *Robert Simpson Co.* (1918), 42 D.L.R. 626, 42 O.L.R. 488, referred to.]

APPEAL by defendant from an order of the Master in Chambers, in an action arising out of a motor accident.

J. P. MacGregor, for the defendant.

T. J. Agar, for the plaintiffs.

SUTHERLAND, J.:—The plaintiffs are W. B. Drury, his wife Jessie Drury, and their infant daughter Rebecca Drury, who sues by her father as her next friend.

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The plaintiff W. B. Drury was, at the time of the accident, driving his motor car, in which his co-plaintiffs were with him. They allege in their statement of claim, para. 5:—

"5. On or about the 26th day of October, 1920, about 11.50 p.m., the plaintiffs were lawfully in an automobile, owned and being driven by the plaintiff W. B. Drury in a westerly direction upon a public highway, to wit, Hepbourne street, in the said city of Toronto, and were in the act of crossing over Concord avenue, which intersects Hepbourne street aforesaid, when suddenly, without notice or warning, the automobile of the plaintiff W. B. Drury was struck by a motor vehicle of the defendant, which was proceeding in a southerly direction on Concord avenue aforesaid.

"6. The said collision was due to the negligence of the driver of the motor vehicle of the defendant, and at the time of the said collision the said motor vehicle was in the possession, control, and charge of a person in the employ of the defendant, and the said motor vehicle was in his possession with the defendant's consent."

Various grounds of negligence are set out.

The defendant moved before the Master in Chambers for an order staying the action of the plaintiffs Jessie Drury and Rebecca Drury until the disposition of the action of W. B. Drury, or in the alternative for an order adding the plaintiff W. B. Drury as a defendant "in these actions of Jessie Drury and Rebecca Drury, or in the alternative for an order giving leave to the defendant to serve a third party notice in the actions of Jessie Drury and Rebecca Drury against the said W. B. Drury."

The Master, by his order bearing date the 18th March, 1921, dismissed the application, and this appeal is from his said order.

It is argued on behalf of the defendant that, unless the plaintiffs other than W. B. Drury will consent to be identified with him, the defendant cannot safely go down to trial, as they may contend thereat that, even if joint negligence is shewn on the part of the defendant and the said plaintiff W. B. Drury, they (the other plaintiffs) would have a right to recover.

It is contended by the defendant that the joinder of the three plaintiffs will embarrass him on the trial of the action, and that his liability may be argued to be greater with reference to the plaintiffs Jessie Drury and Rebecca Drury than with reference to the plaintiff W. B. Drury; that the driver class and the passenger class are different and must be differentiated in order that the jury may not be confused and the defendant subjected to possible and probable prejudice.

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The plaintiffs, on the other hand, contend that any right to relief sought by them therein is in respect of or arising out of one transaction or occurrence.

I am inclined to think that the defendant is too apprehensive. This is a case of two motor vehicles being involved, and the provision as to the onus of disproving negligence, sec. 23 (1) of the Motor Vehicles Act, R.S.O. 1914, ch. 207, does not, under sub-sec. 2 (added by (1919) 9 Geo. V. ch. 57, sec. 5), apply.

There is nothing very complex about the case. If the order asked by the defendant were made, the costs would necessarily be increased, which, if avoidable, is not desirable.

I am of the opinion that, if questions are carefully framed and the jury properly instructed, no difficulty will arise, or prejudice occur: *White* v. *Belleperche* (1917), 12 O.W.N. 165; *Coop* v. *Robert Simpson Co.* (1918), 42 O.L.R. 488, 42 D.L.R. 626; *Hoffman* v. *Hamilton Grimsby and Beamsville Electris R. W. Co.* (1920), 18 O.W.N. 92; *Hill* v. *Wells* (1920), 19 O.W.N. 266.

The appeal will therefore be dismissed; costs in the cause.

REX v. SAKALOV.

Ontario Supreme Court, Orde, J. May 20, 1921.

CERTIORARI (§IA—9)—KEEPING INTOXICATING LIQUOR FOR SALE—POSSESSION—PRIMA FACIE EVIDENCE OF GUILT—FAILURE OF DEFENDANT TO ACCOUNT UPON SEARCH OF HIS HOUSE FOR GREATER PART OF SUPPLY RECEIVED — PRODUCTION OF MISSING BOTTLES BEFORE MAGISTRATE—EVIDENCE THAT THEY WERE CONCEALED IN HOUSE—CASE REMITTED TO MAGISTRATE TO TAKE FURTHER EVIDENCE.

On a motion by way of *certiorari* to quash a summary conviction made under the Ontario Temperance Act, the Court may remit the case to the Magistrate to hear further evidence under sec. 102 (*a*).

[1918 Ont., ch. 40, sec. 19.]

MOTION to quash a conviction of the defendant by a magistrate.

N. S. Macdonnell, for the defendant.

F. P. Brennan, for the magistrate.

ORDE, J., in a written judgment, said that there was in this case evidence of the possession of intoxicating liquor, which, upon a charge of keeping liquor for sale contrary to the provisions of sec. 40 of the Ontario Temperance Act, constituted *prima facie* evidence of guilt (sec. 88), and the magistrate convicted the accused. The magistrate did not base his conviction upon the evidence of possession alone, but upon the additional evidence that the defendant was unable to account for the disappearance of 21 bottles of brandy out of the 24 which he had received a few days before. The defendant produced 21 bottles

of brandy before the magistrate and swore that they had been hidden behind his sideboard when the police searched his house. The magistrate, accompanied by the prosecuting police, the defendant himself and his counsel, went to the house of the defendant and moved the sideboard. The magistrate said that the accumulated dust and rubbish indicated that it was impossible for any bottles to have been hidden there. Counsel for the defendant in an affidavit said that "there was nothing in the appearance of the situation to indicate that the liquor could not have been behind the sideboard." He said further that after the trial he was informed by Slough, a police officer, that he had seen the liquor behind the sideboard about an hour after the search had been made by the officer who laid the charge. This latter statement, if correct, would tend to destroy the inference which the magistrate drew from the subsequent examination of the sideboard.

As the magistrate's decision did not seem to have been based upon the mere evidence of possession, it was open to the Court to consider whether, in all the circumstances, the accused had a fair trial. The apparent impossibility of the defendant's statement as to the hidden liquor being there caused the magistrate to conclude that the defendant had disposed of it in some way; and, as he had not accounted for its disposal, the magistrate would be justified in assuming that it had been unlawfully disposed of. But if the magistrate had been satisfied that the bottles were really behind the sideboard, that ground for his finding would have disappeared, though it might still be open for him to convict upon other grounds if the defendant failed to meet the onus placed upon him by sec. 88. In view of the statement said to have been made by Slough, the defendant should be given an opportunity of laying Slough's evidence before the magistrate.

The learned Judge accordingly directed, under the provisions of sec. 102*a*. (8 Geo. V. ch. 40, sec. 19), that the proceedings be remitted to the magistrate and that he rehear the case by admitting such additional evidence as may be submitted on behalf of the prosecution and of the defendant, and that upon such rehearing the evidence already before the magistrate shall be treated as part of the evidence upon the rehearing. If upon such rehearing the magistrate convicts the defendant, the costs of this motion shall be paid by the defendant. If there is an acquittal, there will be no costs, and the magistrate will be entitled to the usual order for protection if any such order is necessary. *Case remitted.*

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LAESSER v. ORECHKIN.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Latchford, Middleton and Lennox, JJ. April 21, 1921.

MECHANICS' LIENS (§VI—45)—BUILDING—CONTRACTOR—SUB-CONTRACTOR—ABANDONMENT OF CONTRACT—LIEN OF SUB-CONTRACTOR—TIME FOR REGISTRATION.

The lien of a sub-contractor in order to be valid must be registered during the performance of the original contract or within thirty days after the completion or abandonment of the said original contract.

[*Dempster* v. *Wright*, 21 C.L.T. Occ. N. 88 Nova Scotia, referred to.]

APPEAL by plaintiff from a County Court judgment in an action under the Mechanics and Wage-Earners Lien Act, brought by a sub-contractor, claiming a lien against the building owner, the mortgagees and the principal contractor. Affirmed.

The action was tried by the Judge of the County Court of the County of Essex, who gave judgment as follows:—

1. That the plaintiff do recover from the defendant Barney Mechanic $210 for debt and $86.87 for costs.

2. Declaring that the plaintiff had not proved any lien under the Act, and that he was not entitled to any lien, and ordering and adjudging that the claim of lien registered by him against the lands described in the schedule to the judgment be and the same is hereby discharged.

3. That the plaintiff pay to the defendant Orechkin $61 for costs and to the defendants the Canada Permanent Mortgage Corporation $25.87 for costs.

The learned County Court Judge gave reasons for his judgment as follows:—

I give judgment in favour of the plaintiff against the defendant Mechanic for $210 and costs.

I dismiss the action as against the other defendants, on the ground that the principal contractor, Mechanic, had abandoned his contract in March, and that there was no request, expressed or implied, from the owner, Orechkin, to the plaintiff to do any work after that, and that such work as was subsequently done by the plaintiff, which I find consisted of putting a few brushes of paint on the steps, was done against the will of and in face of protest from the owner.

The lien, not being registered until June, was too late to be supported by the work done by the plaintiff before the date on which the defendant Mechanic abandoned his contract.

The plaintiff must pay the costs of the defendants Orechkin and the Canada Permanent Mortgage Corporation.

B. N. Davis, for appellant.

R. Rodd, for respondent.

MEREDITH, C.J.C.P.:—The only real question, involved in this case, is: within what time must a sub-contractor's lien be registered?

The obvious practical answer must be—apart from the provisions of any enactment—before, or within a limited time after, the contract, between the owner and the contractor, comes to an end.

The contractor has no power to give to a sub-contractor any longer time for performing his sub-contract than the contractor has for performing his contract; nor any power to give to a sub-contractor or assignee any greater rights against the owner than those he has acquired from the owner under his contract.

Then, turning to the Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140, it is found, in sec. 22 (1), as was to be expected, that that is just what is expressly and plainly provided for, in these words: "A claim for lien by a contractor or sub-contractor . . . may be registered before or during the performance of the contract, or within 30 days after the completion or abandonment thereof."

I should have thought that too plain for any serious controversy over it. "The contract," not a contract; "the contract," not the contract or a sub-contract; "the contract," not the contract or the sub-contract respectively. The marked difference between the words a "contract" and a "sub-contract," when used in the Act, is made plain in its interpretation section—sec. 2 (*a*) and (*b*).

It should not be needful to refer to any of the absurdities that should follow if it were otherwise, except for the long and earnest argument of Mr. Davis; but, even with that in view, it should hardly be justifiable to set out more than the most obvious one. When a contractor abandons his contract, the owner is driven—and generally driven at much cost and trouble, unless he abandons the building—to make a new contract, with some other contractor, for the completion of the work; there is no contract between him and the sub-contractors; he has no power over them in respect of their contracts; therefore, unless they come to him and enter into a contract with him, there is nothing for him to do but contract without regard to them. He is in no way bound to them, nor they to him, under their sub-contracts.

But it was suggested to Mr. Davis during the argument that it might be that there had been only a partial abandonment of the contract in this case, that it might not have been abandoned as to the painting and glazing, which were the subject of the plaintiff's sub-contract; and a scrap of the owner's testimony at the trial of this case, in these words: "You can't paint any;

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I have been waiting, holding the building back for you to do it. I have got another man;" was said to support that contention. I was at the time unable to perceive how those words, in all the circumstances of the case and having regard to the rest of the owner's testimony, could afford any kind of evidence of a partial abandonment, or indeed how there could be a partial abandonment in law. The failure to perform part of the contract could be only a breach of the contract to that extent; if, by a new agreement between the owner and the contractor, part of the work was omitted, that would not be an abandonment of the contract, it would be an alteration of the contract only; and I am bound to say that I cannot overlook the difference between the abandonment of a contract and the failure—call it improperly if you will abandonment—to perform part of the work which should be done under it; and, if the contractor could "abandon" any part, it could not be painting and glazing, which can be done only after the other work is done. Then it was not the owner who abandoned the contract; he could not; only the contractor could, and nothing the owner could do, short of entering into a new contract with the sub-contractor, could affect the result of the abandonment of the contract by the contractor.

There was no suggestion that the contractor did not altogether abandon the contract; there was nothing upon which such a suggestion could be based. He seems to have been behindhand always and to have incurred penalties by his default; but in Jauuary, 1920, the penalties were forgiven, and further time, until the 1st April, 1920, was given to him for completion. Some more work was done, but about the end of March, being still hopelessly behindhand, he abandoned the contract altogether.

But, as he gave no notice of abandonment, the owner could only wait until a sufficient length of time had passed without anything being done to be afforded conclusive evidence of the abandonment; accordingly the plaintiff—no doubt under legal advice—waited until the latter part of May, when, nothing having been done by contractor or sub-contractors, though there was some painting as well as all the other work that could have been done, the defendant employed, and entered into a contract with another builder and tinsmith and painter for the completion of the building, and these new contractors were proceeding with their work under their contracts when the plaintiff came and endeavoured to interfere, but, after an unseemly squabble with the defendant's wife, was driven off.

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Middleton, J.

It is quite clear that what took place on this occasion affords no evidence of an employment of the plaintiff by the defendant; though contention went very far, it did not reach the point of relying on any kind of contract between the plaintiff and the defendant. And, even if we go so far as to imagine that it was not the contractor who could abandon his contract, but was the owner, what kind of evidence could there be that he saved or intended to save the plaintiff's sub-contract, if in law he could? Saved that which could be done only after the new construction work was completed.

That which the defendant said was only that which went to prove his legal and moral right to enter into the new contracts. "You, you former workmen, had until the 1st April to complete your contract; you did not; then I waited to see if you had abandoned; I waited nearly two months, and not one of you came; if you had all gone on and finished the work without more delay, I should have been willing, should have been glad; it would have saved me the trouble of a new contract; but not one of you did a stroke of work, nor did any of you come to me to ask for time or give any excuse; then I made new contracts, and am liable under them, and the work is being promptly done under them; it is too late; the contractor abandoned his contract, and I had no contract with you." That there could be no waiting for the painter only is manifest; there was nothing very substantial that could be done by him until the other workmen had done their work. To hold the defendant in any way bound to the painter with whom he had no contract, as well as the one he contracted with, would, in these circumstances, be unjust and discreditable.

The plaintiff has nothing to complain of: he had from the time of the making of the first contract until the 1st May, 1920, to register his lien, but did not choose to do so.

The learned Local Judge was, in my opinion, quite right. I would dismiss this appeal.

MIDDLETON, J.:—The evidence quite fails to support the argument of Mr. Davis on the facts.

The only question is, whether the lien was registered in time. Under the provisions of sec. 22 (1) of the Act, the lien of the sub-contractor, as well as the lien of the contractor, may be registered during the performance of the contract or within 30 days "after the completion or abandonment thereof."

This means after the completion or abandonment of the work called for by the original contract, and does not refer to the sub-contract. This was determined by Ritchie, J., in *Dempster v. Wright*, 21 C.L.T. Occ. N. 88 (Nova Scotia).

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The owner of the building is not concerned with the distribution of the work between the contractor and his sub-contractor. When, as here, the work as a whole is abandoned, in 30 days all unregistered liens cease.

The evidence is very unsatisfactory. The judgment appealed from finds an abandonment of the work in March, and I cannot see my way clear to reverse this.

LATCHFORD, J., agreed with MIDDLETON, J.

RIDDELL and LENNOX, JJ., agreed in the result.

Appeal dismissed with costs.

Re DOMINION SHIPBUILDING AND REPAIR Co.; HENSHAW'S CLAIM.

Ontario Supreme Court, Masten, J. April 28, 1921.

COMPANIES (§VI F—350)—CONTRACTOR FOR DEBTOR COMPANY—WINDING-UP—RIGHTS OF CONTRACTOR—PAYMENT OF WAGES TO EMPLOYEES—CONTROL BY COMPANY—PREFERRED CLAIM.

A contractor, who employs workmen on work for the company, and who, as well as his workmen, is under the control of the company with respect to its rules and regulations, is entitled to a preferred claim for wages under the Dominion Winding-up Act.

[*Re Parkin Elevator Co. Ltd.* (1916), 31 D.L.R. 123, 37 O.L.R. 288, followed.]

AN appeal by George Henshaw, claimant, from a ruling of J. A. C. Cameron, Official Referee, in the course of a reference for the winding-up of the company under the Dominion Winding-up Act, R.S.C. 1906, ch. 144, and amending Acts, that the appellant was not entitled to be collocated in the dividend-sheet by special privilege over other creditors in respect of his claim, by virtue of the provisions of sec. 70 * of the Act or otherwise.

W. Zimmerman, for the appellant.

G. M. Willoughby, for the liquidator.

April 28. MASTEN, J.:—The claimant was employed to do furnace work, angle work, and liner work on ships which the insolvent company were building. He was to be paid at "so much per piece," plus a bonus of $400 per ship. He had under

*70. Clerks or other persons in or having been in the employment of the company, in or about its business or trade, shall be collocated in the dividend-sheet by special privilege over other creditors, for any arrears of salary or wages due and unpaid to them at the making of the winding-up order, not exceeding the arrears which have accrued during the 3 months next previous to the date of such order.

him to assist him in the work other men whom he himself employed and for whose wages he was responsible and whom he paid. The amount of the company's indebtedness to him is admitted at $2,500, but the question of his right to a preference is contested.

The claimant alleges that he is a person who was in the employment of the company, and that his claim consists of arrears of salary or wages due and unpaid at the time of the making of the winding-up order, being salary or wages which had accrued within 3 months prior to the winding-up order, and so entitled to the preference accorded by sec. 70 of the Winding-up Act, while the liquidator contends that the claimant was an independent contractor, and was not a "clerk or other person" in the service of the company.

In support of the liquidator's position it is urged that the claimant employed and paid his own gang of workmen; that he was not recompensed by the company the precise wages which he paid his workmen, but was paid a lump sum "by the piece," and that, in consequence, his was a gainful employment, in which the profits accrued to the claimant in proportion to the cheapness and efficiency of the labour employed by him. He also relies on the payment of a bonus of $400 as indicating a contract "by the ship."

For the claimant it is urged that he was employed as a skilled labourer to work personally and (so far as appears) exclusively on this job. To help him in his work he had to get the assistance of subordinates, over whom he exercised supervision, for whose wages he was responsible, and whose wages he had paid. But it is contended that, while this circumstance looks in the direction of an independent contract, it is yet only one circumstance. It is not decisive and does not prevent him from claiming his remuneration as wages: *Ex p. Allsop* (1875), 32 L.T.R. 433.

The claimant further urges that he worked under the general rules of the company as to hours, time-checks, and other matters, did his work under the supervision in all respects of the general manager and of the superintendent of the company, and that he was subject to direction, control, and dismissal at any time by these superior officers—in other words, that his contract was a contract for service, not for services, to be paid for at piece-work rates; further, that the company had control not only over the claimant but also over the subsidiary workmen whom the claimant employed; and that they also worked subject in all respects to the rules of the company.

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RE DOMINION SHIP-BUILDING CO. LIMITED.

Masten, J.

A perusal of the evidence satisfies me that it supports the claimant's contention, so far as the facts go.

The law applicable to such facts is thus laid down by the Court of Appeal in *Re Parkin Elevator Co. Limited* (1916), 37 O.L.R. 277, at p. 288:—

"Provided control is retained by the employer, the fact that the employee is hired and paid by the piece or by the job, or uses his own implements, makes no difference," referring to *Sadler* v. *Henlock* (1855), 4 E. & B. 570; *Simmons* v. *Heath Laundry Co.*, [1910] 1 K.B. 543, at p. 552; and *Re Western Coal Co. Limited* (1913), 12 D.L.R. 401; and approving the opinion of Beck, J., in the latter case, where it is said that "the extent of the right of control seems to be the important question in distinguishing between the position of a servant and that of an independent contractor, rather than the question whether, in addition to the personal services of the servant, he employs property of his own to aid him in his services."

The employment of subordinate helpers seems to me to stand on no different footing than the employment by the claimant of his own team and waggon to carry out the work.

For these reasons, I am of the opinion that the appeal must succeed.

I ought not to part with the case without adverting to a point not touched on in the argument, but which has given me some concern. Is the claimant a "clerk or other person" within the meaning of sec. 70? He is in no sense a clerk; but, having regard to the *ejusdem generis* rule, is he an "other person?" Is a skilled workman and foreman *ejusdem generis* with "clerk?"

What is the genus referred to in the section, or can a common genus be found?

Manifestly, if there is a genus, it is something wider than "clerks," for if not why mention "other persons?" Then how wide is it?

Having regard to the views expressed by Meredith, C.J.C.P., in *Re Parkin Elevator Co. Limited*, 37 O.L.R. at p. 282: to the judgment of Globensky, J., in *Miquelon* v. *Vilandre Co.* (1913), 16 D.L.R. 316; and to the decision of Beck, J., in *Re Western Coal Co. Limited*, 12 D.L.R. 401; I think if a genus can be found it is at least wide enough to include manual labourers of a class whose wages are generally needed for and generally expended in the support and maintenance of themselves and their wives and families. If a common genus cannot be found (and it is difficult to see how a genus can be discovered, when only one species, viz, "clerk," is

named), the necessary conclusion is that the words "other person" cannot be limited by the doctrine of *ejusdem generis*: *Tillmanns & Co.* v. *S. S. Knutsford Limited*, [1908] 2 K.B. 385, at p. 295; see also *S. S. Magnhild* v. *McIntyre Bros. & Co.*, [1920] 3 K.B. 321.

In either case, whether the *ejusdem generis* rule is or is not applicable to sec. 70, I am of opinion that the section is intended to include all such persons as the appellant.

The appeal is allowed with costs here and below, to be added to the claim, and the appellant will be collocated in the dividend-sheet by special privilege over other creditors for the full amount of his claim.

[Reversed by the App. Div. of the Supreme Court, October 24, 1921.]

REX v. DOUGHTY.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Latchford, Middleton and Lennox, JJ. May 6, 1921.

EVIDENCE (§XIIL—990)—CRIMINAL TRIAL—CONVICTION—EVIDENCE OF WITNESS THEREAT—OBJECTION—ADMISSION OF EVIDENCE—APPLICATION FOR STATED CASE.

Evidence which may tend to shew an intention on the part of the accused to secure in some unlawful way property of his employer is admissible in the trial of the accused for theft from the employer.

[*Makin* v. *Att'y-Gen'l, N.S.W.*, [1894] A.C. 57, referred to.]

MOTION by the defendant by way of appeal from the refusal of DENTON, Junior Judge of the County Court of the County of York, presiding as Chairman at the General Sessions of the Peace, to state a case for the opinion of the Court, upon the trial and conviction of the defendant before the Chairman with a jury, for the theft of certain bonds, the property of one Ambrose Small. The main ground for the motion was the alleged improper admission of the evidence of one Daville, who related a conversation with the defendant, in which the defendant suggested a way of getting money out of Small, by a series of fraudulent letters, etc. Motion dismissed.

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

Edward Bayly, K.C., for the Attorney-General.

MEREDITH, C.J.C.P.: — The learned Chairman of the General Sessions of the Peace refused to state a case for the prisoner on the question whether there had been a mistrial of this case by reason of the improper admission of the evidence of the witness Daville: and, although we now affirm that refusal, yet the prisoner is in rather a better position than if the case had been stated instead of refused, because he has had the ques-

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tion fully argued and considered here, without any restriction such as the stated case might have put upon him; this peculiar state of affairs arises from the practice regarding such appeals as this provided for in the Criminal Code, substantially allowing a convicted person to state a case himself if the Court in which he is convicted refuses to do so. But, though anomalous, there is really no substantial objection to such a practice; and it is referred to now only to make it plain that the prisoner has had his objection to the manner of his trial as fully considered here as if the Court in which he was tried had granted instead of refused his application for a stated case, if indeed not more fully considered.

The objection to the testimony of the witness Daville is that it was not relevant to the issue upon which the prisoner was tried: that that which the prisoner is said to have told Daville had no connection with the question whether the prisoner really stole the bonds in question.

But admittedly the prisoner took the bonds, and admittedly they were not his, but were the property of his employer, and the real question in the case was, whether they were so taken, or after being so taken were retained, with the intention of stealing them; and the testimony of the witness Daville was relevant to that question; and was, in my opinion, clearly admissible; it went to prove an *animus furandi*, not only generally, but from his employer, the owner of the bonds subsequently taken by the prisoner. And, if any part of that which he said was admissible, the whole connected statement was and should have been given, as it was; and the fact that it might go forward shewing that some other crime had also been committed, or some civil liability incurred, could not, of course, have affected its admissibility in this case. To state part of an admission and withhold the rest must generally be more or less misleading and manifestly improper.

And, if it had not been admissible, its improper admission could hardly vitiate the trial, because no substantial wrong was caused by it; indeed, in view of the main undoubted facts of the case, it is difficult for me to perceive the need of the testimony of the witness Daville at all; the bonds were taken by the prisoner, were given by him to one of his near relations and concealed, and he absconded and remained for a long time a fugitive from justice, the bonds being given up only after his arrest and return as a prisoner to this Province, a long time after the bonds were taken. The retaining of the bonds during all that time, when they might at any time have been returned without giving any kind of a clue that might lead to the discovery of

his hiding place, and his apprehension, made quite plain his felonious intent without any need of any other evidence.

Objection was also taken to the evidence of the prisoner's relative to whom he entrusted the bonds, proving where they were from that time until given up after the prisoner's apprehension, but upon the argument of this appeal it was pointed out that such evidence was unobjectionable—obviously I should have thought.

The appeal must be dismissed.

RIDDELL, J.:—John Doughty was indicted on a charge of stealing bonds, the property of Ambrose Small. Admittedly he took and (at least for a time) detained them, and the sole question for determination by the jury was the intent.

At the trial, a witness, Daville, was called for the Crown, and testified that, some time before the alleged stealing, he, being angry against Small, had a conversation with Doughty. An objection was taken to evidence of the conversation, on the ground, as put by Mr. Hellmuth, that "it will let in the whole of the kidnapping case." It appears that Doughty had also been indicted on a charge of "kidnapping" Small, but this is the first mention of the fact in the trial of the present case. The evidence being admitted, Daville went on to testify that he had told Doughty that he would like to get a smash at Small, he was so angry, and Doughty said there was a way of getting even; that Daville said, "Well, the only way I see of doing it is to kill him." Doughty "suggested a way that we could get money out of Mr. Small, there was no reason why we should not get $250,000 or an amount equivalent to $250,000 . . . by letters signed and written by Mr. Small and posted from time to time to Mr. Cowan at the Grand Opera House with an authority to hand the money over to Doughty to take it to Mr. Small from this reported place, whether it might be Montreal, Buffalo, or Chicago . . . we would split fifty-fifty."

His Honour Judge Denton was applied to for a case reserved on the ground of the improper admission of this evidence. He refused, and the application is now made to us.

I can see no possible ground for such an application.

The fact, if it is a fact, that the evidence objected to is or might be evidence on another charge is *nihil ad rem*; the same facts might be of importance on a dozen charges, and evidence of them could be given in each; if not they could not be proved in any.

The sole question here is, was the evidence admissible in the present case if there were no other prosecution intended or possible?

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It seems to me that the intent to obtain money or the equivalent of money from Small by illegal means is shewn by the latter part of the evidence mentioned; and, of course, the remainder of the alleged conversation is so connected with that plainly admissible that it could not be excluded.

The other ground taken before us, viz., that evidence was allowed of the disposition made of the bonds by the person to whom they were handed by Doughty, is equally untenable. The bonds were, it is said, handed by Doughty to his sister with instructions what to do with them; she did not deliver them to Mrs. Small or to the police authorities, nor did she act according to what she swears were her instructions. It is not a violent presumption that an agent entrusted with property will act according to instructions, and a jury would be quite justified in finding that what the agent did was in accordance with instructions, whatever the agent might himself swear concerning his instructions.

I would dismiss the application.

LATCHFORD, J.:—This is an application for an order granting leave to the accused to appeal from the refusal of His Honour Judge Denton to state a case for the opinion of the Court on the following question:—

Was the learned trial Judge right in admitting evidence, against the objection of counsel for the said John Doughty, and in particular the evidence of one F. Daville, and evidence as to the disposition of the bonds which the said Doughty was charged with stealing, which disposition took place without any knowledge or concurrence of the said John Doughty?

The latter point was not pressed by counsel.

Jean Doughty had stated that, when her brother, on the night of the 2nd December, gave her the parcel containing the $105,000 in bonds at the railway-station, he told her it was valuable and belonged to Small. Three weeks later, when Doughty was at his sister's house all day, no mention was made of the bonds according to her evidence. When there again on the 27th or 29th he told her they were bonds which he had had no opportunity of returning. Small had disappeared on the afternoon of the day on which Doughty had removed the bonds, and had not been heard of since. Miss Doughty was still in possession of the bonds when her brother absconded from Canada. Her subsequent secretion of them and her non-disclosure of their hiding place to the inquiring police officers add force to her testimony that her brother told her the bonds were the property of Small, and form cogent evidence on the charge of theft preferred in the first count of the indictment.

The other question was stressed very strongly by Mr. Hellmuth, but his contention is, I think, untenable.

Daville's evidence was to the effect that, about 9 months before the date on which Doughty removed the bonds from Small's safety-vault, Doughty proposed to him a scheme for extorting a large sum of money—$250,000—from Small. This evidence was admitted against the objection of counsel for the accused. In the circumstances, it was, I think, properly admitted.

The taking and the asportation of Small's bonds by Doughty were proved. The intent to deprive the owner of the bonds was the third element necessary to be proved in order to constitute the crime of theft. That Doughty had proposed extorting a large amount of money from Small was pertinent to the issue, even though the act involved another offence.

In the celebrated case of *Duke of Norfolk* v. *Germaine* (1692), 12 How. St. Tr. 927, an action for *crim. con.*, the defendant's plea was that he had not been guilty *within 6 years*. If that plea had been proved the action stood barred. Proof of acts committed prior to the 6-years period was admitted, not—as Holt, L.C.J., pointed out to the jury—for any damage that might be expected—but to explain some actions that afterward had been between the Duchess and Germaine. "For my part," said the Lord Chief Justice (cols. 945, 946), "I must declare that these matters may be given in evidence to explain, but they are not to be given in evidence to any other purpose." For many years the subsequent decisions were not completely in accord; but the precise point raised in this case has been disposed of in a series of recent decisions by Courts of the highest authority.

The famous judgment of Lord Herschell in *Makin* v. *Attorney-General for New South Wales*, [1894] A.C. 57, at p. 65, states the principle applicable: "The mere fact that the evidence adduced tends to shew the commission of other crimes" (or another crime) "does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused."

This principle was followed and applied in *Rex* v. *Bond*, [1906] 2 K.B. 389, and *Rex* v. *Bell*, [1911] A.C. 47. Referrring to the latter case in *Rex* v. *Gibson* (1913), 13 D.L.R. 393, 28 O.L.R. 525, Magee, J.A., quoted from Lord Alverstone's judgment the words, "You cannot convict a man of one crime by prov-

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ing that he had committed some other crime," and added, on the authority of the *Ball* case, "Nevertheless, evidence of facts relevant to the immediate charge against him is not the less admissible because it necessarily discloses the commission of other crimes by him" (p. 531).

In the present case the intent with which Doughty took and retained the bonds was material to the issue whether he was guilty or not guilty of stealing them, and evidence that he had previously proposed a scheme for unlawfully obtaining money from Small was pertinent to the determination of that issue, and was properly admitted.

I therefore think the application should be refused.

MIDDLETON, J.:—I think this application should be refused. The evidence tends to shew an intention on the part of the accused to secure in an unlawful way some part of the property of his employer. This evidence is admissible, not upon the principle of the *Makin* case, but because it may well have been the birth or inception of the crime actually committed.

LENNOX, J.:—Notwithstanding the very able and persistent argument of Mr. Hellmuth—but by no means too persistent—I am of opinion that there is not ground to justify an order or direction for a stated case. I was tentatively of this opinion before the close of the argument, but desired to hear all that could be said, and carefully to read and consider the evidence before coming to a final conclusion. I have very thoughtfully gone over and weighed the evidence and what was submitted by counsel more than once; and, although I have no doubt at all that leave to appeal should be refused, yet, with the greatest respect for the learned Judge who presided at the trial, and for the learned, and, as I know, notably fair and conscientious counsel representing the Crown, I cannot bring myself to feel that the trial at this point was entirely satisfactory. It is not enough, if the cherished traditions of our courts of criminal jurisdiction are to be maintained, that the result is unassailable, that the guilty is found guilty and the innocent goes free—it must happen, and it must be manifest, that at every stage and in every particular the trial was fair. I quite realise that the situation was one of peculiar difficulty. I have had the advantage and gratification of having the learned counsel to whom I refer take the criminal business at several courts at which I presided, and I do not need to be assured that the paramount purpose of the presiding Judge and the Crown counsel was to secure a trial in every respect just and fair—fair as regards the public interest, and fair to the accused, and I have no doubt at all that it was a matter of disappointment and regret to both that in eliciting

that which was undoubtedly evidence of motive and intention in the removal of the bonds, the discussion as to obtaining money or "its equivalent" from Small, this quite eager witness, Daville, interwove that which was undoubtedly calculated to create prejudice against the accused, his expressed intention to kill.

I would not have felt called upon to refer to this at all were it not for the statement during the argument, repeated and emphasised, that the whole of the alleged conversation upon the occasion referred to had to be put in evidence, a rule of law in which, with the greatest respect, I cannot concur. As a general rule, it is a good rule, but like all good things it may be abused; and I cannot help but think, seeing that the evidence of this witness, in a general way, was known in advance, that it was possible to elicit what was clearly relevant and proper without putting in evidence the statements directly relevant to another charge; and, with respect, I think it would have been much better if this had been done. I agree that there was abundant evidence to support the finding of the jury without reference to this, and it is almost inconceivable that upon the evidence generally any jury could acquit. It is a case in which, in the end, a new trial would inevitably be refused, under sec. 1019 of the Criminal Code. In the legal, technical sense, it cannot be said that "evidence was improperly admitted;" and, even if this could be successfully argued, there is no ground, having regard to the whole trial, for an inference that "substantial wrong or miscarriage was thereby occasioned."

I would dismiss the motion.

Motion dismissed.

COHEN v. BOONE.

Ontario Supreme Court, Middleton, J. May 6, 1921.

EASEMENT (§III—41)—GRANT OF RIGHT OF WAY OVER LANE—GATES PUT UP—KEYS MADE AND OFFERED TO GRANTEE—RIGHT OF USER—OBSTRUCTION—NO INTERFERENCE.

A person having a right of way by grant over certain lands cannot complain so long as his right to pass from his property over the said lands to the highway is not interfered with or obstructed in any substantial way.

[*Pettey* v. *Parsons*, [1914] 2 Ch. 653, followed. See Annotation on Easements of Way, 45 D.L.R. 144.]

AN action for a declaration of right, an injunction,, and other relief, as set out below.

T. J. Agar, for the plaintiff.

J. M. Ferguson, for the defendant Fitzgerald.

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A. C. McMaster, for the defendant Tamblyn.

J. M. Bullen, for the defendants the Boones.

MIDDLETON, J.:—The plaintiff, who is the owner of certain lands on the south side of Queen street, in the city of Toronto, having a right of way appurtenant to these lands over a lane leading to Richmond street, and an open place for turning north of this lane, in common with other persons also entitled to a right of way, sues for a declaration of his rights over the lane and turning place, and for an injunction restraining the defendants from using the lane as a standing place for vehicles and horses in interference with the plaintiff's right, and for a mandatory order requiring the defendants to remove a gate erected by them across the lane, and for the removal from the registry of a certain agreement as being a cloud upon the plaintiff's title, and for damages.

The lane and turning place in question are upon lot No. 120 fronting on Richmond street, lying immediately to the south of the plaintiff's property fronting upon Queen street. Immediately east of this is the property owned by the Boones and now leased by them to Tamblyn—the owners of this property and their tenants having a right of way over the lane and turning place.

Fitzgerald owns lot No. 122, immediately west of the lane, and also owns the fee of the lane and turning place, subject to the right of way of Cohen and of the Boones. The Boones, it is said, some time ago made improper use of the lane by blocking it by teams standing in the lane for the purpose of loading and unloading into their warehouse from an entrance in the building abutting the lane, the result being litigation in which it was alleged that the use they were making of the lane exceeded their right. This litigation was settled by an agreement of the 11th February, 1914, by which the Boones paid Fitzgerald $3,000 for a half interest in the lane, and the privilege of using the turning place for the purpose of loading and unloading into their warehouse, an entrance to the warehouse being made from the rear of their building. This agreement contains elaborate provisions for the use of the right of way and turning place, and adequate provisions protecting any right that the plaintiff might have to the use of the lane, subject only to what may be said in reference to the provision for the erecting of a gate. Under this agreement the lane and turning place have been properly paved, and they are now in vastly better condition than they were before.

Owing to the nature of the use being made by Mr. Cohen of his property, he has had practically no desire to use this right

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of way to Richmond street for a considerable time; and apparently he has, I think quite unnecessarily, become anxious as to the possibility of his right being extinguished by reason of a much greater right that is being exercised by the occupants of the Boones' and Fitzgerald's buildings. He has never recently sought to use the lane, and his user of the lane has never in any way been interfered with.

At the earlier stage of the trial some complaint was made concerning the covering over of some old entrance-way to his building, an area having been constructed upon the turning place, but it was admitted that there was no right to this areaway, and that no wrong had been done him in this respect. There was also some trivial claim with reference to dust and sweepings having been placed in an opening for a window in the cellar-wall, but Mr. Cohen very properly disclaimed this as constituting any real cause of action.

The situation as to the gates is this. Before the agreement referred to, gates had been erected near the north end of the lane for the purpose of keeping vagrants and undesirable persons from entering the back premises. This was with the entire concurrence of Mr. Cohen. When the place was put in order at the time when the pavement was constructed iron gates were placed near the Richmond street entrance, the old gates being removed. These gates are open during the day-time, but are closed at night and upon Sundays, the purpose of the gates being to protect the premises from trespass by undesirable and dangerous persons.

Before action, Mr. Cohen and Mr. Fitzgerald discussed the existence of the gates, and Mr. Cohen asked if the gates were being erected for the purpose of interfering with his rights, and was assured that there was no such intention, and he was told that a key would be given him. By some oversight the key was not actually handed over, although prepared. Mr. Cohen and Mr. Fitzgerald have been neighbours for many years, and the best of good feeling has always existed between them, and I am glad to say, from the evidence that was given, still exists, and there is no doubt that Mr. Cohen could have had a key at any time had he so desired. it It is quite obvious that not the slightest inconvenience was occasioned to Mr. Cohen by the locking of the gates during the times that they were closed.

After the action was threatened, and after it had been begun, the solicitors for some of the defendants, at any rate, made every endeavour to assure and satisfy Mr. Cohen and his solicitors that there was no intention whatever to interfere with his

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right of way or to deny its existence, but nothing came of these negotiations, and the action proceeded.

At the trial it was abundantly plain that there was no attempt to dispute the plaintiff's right to his easement, and it seemed to me to be very plain from Mr. Cohen's own attitude that the last thing in the world that he wanted was to have the gates removed, so that easy access could be afforded to his rear premises for nocturnal marauders.

The fundamental error underlying the bringing of this action was the idea which seems to have possessed Mr. Cohen that he had some right over and above the right of free ingress and egress over the lane and turning place to and from his premises. It is plain that his right has never been in any way interfered with, but he seemed to think that the arrangement made between the Boones and Fitzgerald and the tenants of the respective properties and the great use made by them on this lane in some way derogated from his right. In this, I think, he was clearly wrong. He had the right to come and go over this property, as and when he pleased, and that right has never been interfered with; and, subject to that right, the owners of the property can do with it as they please. The document which was executed could not destroy the registered right of the plaintiff. It would prevail over all subsequent conveyances by the parties to it, but beyond this it has no effect. The document was not entitled to, and in my view does not purport to, interfere with Mr. Cohen's rights in any way, shape, or form. It forms no cloud upon his title to this easement, and it ought not to be removed from the registry, and it does not render any acknowledgment of Mr. Cohen's title necessary.

The question of the gates presents slightly more difficulty. I think that the fact is that Mr. Cohen consented to the erection of the gates at the time the earlier gates were erected, and that the precise location of the gates is not a matter of any moment. It may be that he ought to have been furnished with a key to the new gates, but it was perfectly plain that the gates were always open at the time when he would use the right of way in connection with his property, that the locking of the gates never did in fact interfere with his user, and it is also plain that he could have had a key at any time.

In the case of *Siple* v. *Blow* (1904), 8 O.L.R. 547, the law as to the erection of gates across a right of way was considered, and it was held that the owner of the land was entitled to erect the gates, the majority of the Court taking the view that the grant of a private right of way is only a grant of reasonable

user of the right of way. To hold otherwise would manifestly defeat the intention of the parties; and, inasmuch as the owner of the soil which is subject to the right of way is entitled to make such use of it as he sees fit, and to exclude those not within the privilege of the granted right, he may adopt any means that are reasonable for that purpose; and it was not unreasonable, under the circumstances, to erect the protective gates, which imposed merely a slight inconvenience upon the user by those who had the right to it.

In that case the dissenting Judges took the view that according to English law, once there was a grant of a private right of way without qualification, there could not lawfully be any obstruction by gates or otherwise.

Since that decision the whole question has been fully discussed in the Court of Appeal in England in the case of *Pettey* v. *Parsons*, [1914] 2 Ch. 653, and the earlier English case upholding the view of the minority in our Court may now be regarded as overruled. One of the objections to the erection of a gate was that it necessarily encroached upon the right of way, and prevented the person having the right of way from travelling over every portion and part of the land which was subject to the right of way. It is there pointed out that this is not the meaning of the grant of a right of way. All that the grantee has the right to do is to cross over the land for the purpose of passing from his property to the highway, and he cannot complain so long as this right is not interfered with or obstructed in any substantial way.

In the case of a highway the right is otherwise—there is the right to have every portion of the highway unobstructed. What is said by Lord Justice Pickford is particularly in point.

Were it not for the fact that I find that Mr. Cohen agreed not only to the erection of a gate, but to the locking of the gate at night and upon holidays, I should have had some difficulty upon the question of the right of Fitzgerald to lock the gates, even though Mr. Cohen were supplied with keys. In the case of *Guest's Estates Limited* v. *Milner's Safes Limited* (1911), 28 Times L.R. 59, it was held that it is an obstruction to a person's free right of way if gates across the way are locked, and it is no answer to the complaint to say that keys for the gates will be supplied. But this decision was the decision of a single Judge (Swinfen Eady, J.), in 1911, three years before the decision in *Pettey* v. *Parsons*, in which he also took part and agreed with the views there given effect to.

The Irish case *Flynn* v. *Harte*, [1913] 2 I.R. 322, shews that the grant of a right of way must be construed in accordance

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with the presumed intention of the parties, and that the presumed intention in the case of a private right of way is that gates may be erected. As put by Mr. Justice Dodd, "the question in most cases is convenience or 'cussedness'; convenience or 'cussedness' in putting up the gate, and convenience or 'cussedness' in closing a gate after passing through."

In the action of *Deacon* v. *South-Eastern R.W. Co.* (1889), 61 L.T.R. 377, the decision of Mr. Justice North goes far towards shewing that the erection of a gate of which keys have been given to the person entitled to the right of way, is not a substantial interference with the right.

In my view, this action is entirely unfounded and unnecessary and ought to be dismissed; but, lest the dismissal of the action could be taken as in itself constituting a cloud upon the title of the plaintiff, I think that the judgment should contain a recital stating that all parties to the action admit the right of way of the plaintiff stipulated for in the deed mentioned in the statement of claim. Keys of the gate ought also to be handed over to him.

As the plaintiff fails in all matters of substance, and as in my view the action is one that was entirely unnecessary, I can see no way of relieving the plaintiff from paying costs.

MITCHELL v. MITCHELL.

Ontario Supreme Court, Middleton, J. May 6,1921.

DOWER (§III—50) — HUSBAND AND WIFE LIVING APART — SALE OF PROPERTY TO DAUGHTER—ORDER MADE UNDER DOWER ACT EX PARTE—ACTION BY WIFE.

In an application under the Dower Act to dispense with dower, where the same is obtained ex parte, care must be taken to disclose all facts of the case, or upon action of the wife to recover dower the order may be declared a nullity.

[See Annotation on Dower, 55 D.L.R. 259.]

THIS action was brought by Ann Mitchell, the widow of the late Alexander Mitchell, to recover dower in lots Nos. 22 and 23 in the 3rd concession of the township of Stephenson. The defendant, Mary Mitchell, was the stepdaughter of the plaintiff, born some 10 years before the plaintiff's marriage.

J. E. Lawson, for the plaintiff.

B. H. Ardagh, for the defendant.

MIDDLETON J.:—It appears that Mitchell became the owner of the lands in question in 1876. He married the plaintiff in 1877. She lived with him as his wife until 1885. During part of the time she lived in a separate house upon the farm, Mitchell, and his daughter living in

a second house about 100 yards away from the house in which the wife lived. After this condition of semi-separation had continued for some little time, the wife, who received no adequate maintenance from her husband, accepted a position as housekeeper in the family of an old man named Keeler. Shortly after she entered his employment, Keeler died. His wife survived him for about a year, when she also died, and the plaintiff remained in the employ of a son and a daughter, who survived. Some 10 years later the daughter died, and the plaintiff remained in the employment of the son, who died in July, 1920. The son married in 1890, but his wife left him shortly after marriage. At the time of his death he was an old man.

The defence filed disclosed that Mitchell conveyed the lands to the daughter on the 19th October, 1903, the conveyance being in consideration of past and future services, love and affection, and $1, and that on the occasion of this conveyance, on the 17th October, 1903, an order was made by Mr. Justice Britton, under the provisions of the Dower Act, dispensing with the concurrence of the plaintiff for the purpose of barring her dower. This order was obtained *ex parte*. It is also said that from the year 1885 until the death of John Keeler the plaintiff had lived apart from her husband, under such circumstances as disentitled her to dower.

Upon the hearing before me, the plaintiff denied any improper relations with Keeler, and no evidence was given in support of the allegation made by the defendant. The defence rests solely upon the order made by my late brother.

I have come to the conclusion that the order is a nullity, as it was not warranted by the provisions of the statute then in force, the Dower Act, R.S.O. 1897, ch. 164, sec. 12. Under that statute, a Judge is authorised to make an order allowing the husband to convey free from his wife's dower "where the wife of an owner of land has been living apart from him for two years under such circumstances as by law disentitled her to alimony, and such owner is desirous of selling or mortgaging the land;" but, "unless the wife has been so living apart from her husband under such circumstances as to disentitle her to dower," the Judge shall ascertain and state in the order the value of the dower, and secure it for the benefit of the wife.

The order in question was made upon material which shews that the husband was not desirous of selling, but had conveyed the lands to his daughter in consideration of love and affection,

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and her agreement to assist and render services to him during the rest of his life. I do not think that this is the kind of transaction which the statute contemplates. In the second place, the material does not shew that the conduct of the wife was such as would disentitle her to dower. Both the husband and his daughter state that she was living apart under such circumstances as should disentitle her to alimony, and this might well be true, for apparently she left voluntarily and under such circumstances as would disentitle her to alimony, but there is no justification for the suggestion that her conduct was such as would disentitle her to dower, save a statement in an affidavit which is entirely inadequate for that purpose. It was said, "My wife is now and has been for upwards of 18 years living with one John Keeler in the township of Stephenson." This was true, so far as the evidence before me discloses, only in the sense that she was living in his employ as a domestic assistant upon his farm.

Although the husband and daughter both well knew where the plaintiff resided, at a distance of less than two miles from the residence of the husband, this fact was not disclosed upon the material before the learned Judge. It is true that the statute gives the power of the Judge to make the order either "*ex parte* or upon notice to be served personally unless the Judge otherwise directs," but it is not conceivable that the learned Judge would have made the order *ex parte*, and without notice to the wife, had the true facts been disclosed to him. The order appears to have been made *per incuriam*, and for the reason indicated affords no bar to the plaintiff's right.

I do not think that the plaintiff is entitled to arrears of dower, because it has been held that no such right exists where the husband does not die seised of the land.

Both parties desired to avoid the expense of a reference, and requested that I should ascertain the proper amount to be paid, and agreed that for this purpose the land might be taken to be worth $4,000. Following the practice of the Court in such cases, and in the absence of any evidence as to the rental value, I would assume that the annual value would be 6 per cent. upon this sum, or $2,440, and the plaintiff's right would be to have one-third of this, $80 per annum, commencing from the date of the writ, the 3rd November, 1920. If either party is dissatisfied with this, there may be a reference, at the risk as to costs to the party objecting. The amount involved is necessarily small, as the plaintiff is now 85 years of age.

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O'HEARN v. YORKSHIRE INSURANCE Co.*

Ontario Supreme Court, Middleton, J. May 9, 1921.

INSURANCE (§VIB—325)—ACCIDENT—DEATH—INSURANCE PROTECTION—CRIMINAL NEGLIGENCE—CONVICTION—LIABILITY OF INSURER.

The insurer will not be liable on the policy of insurance where the assured is guilty of criminal negligence, as it is against public policy to agree to indemnify any one against the consequences of a criminal act.

[*Weld-Blundell* v. *Stephens*, [1920] A.C. 956, referred to.]

ACTION upon an insurance policy, whereby the defendant company, for the period between the 18th December, 1918, and the 18th December, 1919, agreed to indemnify the plaintiff, the owner of an automobile, against loss by reason of liability imposed upon him by law for damages in respect of bodily injuries sustained by any person, including death, resulting therefrom, and fixed the limit of the liability at $5,000.

F. J. Hughes, for the plaintiff.

T. N. Phelan, for the defendant company.

MIDDLETON, J.:—On the 11th September, 1919, the plaintiff, while operating the automobile in question upon King street, in the city of Toronto, struck and fatally injured one Matthew Plum. Plum was an employee of the Toronto Railway Company, and his representatives elected to take compensation under the provisions of the Workmen's Compensation Act, and the Workmen's Compensation Board directed the railway company to deposit with the Board the sum of $6,133.51 to provide for the payment due to the dependants of Plum.

Thereupon the Toronto Railway Company, claiming to be subrogated to the rights of the widow and infant child of Plum, brought suit against the present plaintiff, in the names of the widow and infant, and on the 10th June, 1920, recovered judgment against the plaintiff for $6,275 and costs. On the same day an order issued, reciting the fact that in truth the action was the action of the Toronto Railway Company, and directing that this amount, instead of being paid into Court, as the judgment directed, should be paid to the Toronto Railway Company.

On the 9th April, 1920, the present plaintiff paid to the railway company $1,275 on account of this judgment, and a year later, on the 8th April, 1921, he, or his father for him, paid a further sum of $5,000.

In the meantime, on the 8th September, 1920, the plaintiff brought this action to recover $5,000, alleging that to this extent he was insured against the liability of $6,275 which he had paid.

Two defences are set up: first, that, according to the conditions of the policy, no action will lie upon it to recover any loss

*Affirmed by the Appellate Division of the Supreme Court of Ontario (1921), 67 D.L.R.

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thereon unless "it shall be brought by the insured for loss actually sustained *and paid by him in money in satisfaction of a judgment* after trial of the issue." It is said that this precludes recovery for anything over the $1,275, as the remaining money was not paid before this action was brought. I am afraid that the letter of the bond must prevail, and that no action will lie save for money actually paid.

A further argument was, that payment made by the plaintiff's father would not aid the plaintiff, but I do not think that this is so.

The main argument, however, is that the death of Matthew Plum was caused by the criminal negligence of the plaintiff. He was intoxicated when operating the car, and ran over this unfortunate man while driving the car at a speed of about 40 miles an hour upon one of the main highways of the city. The accident took place at about 2 o'clock in the morning, when the street was practically free from traffic, and when Plum was making some repairs upon the street railway tracks, protected by red lights shewing that this repair-work was being carried on.

On the facts shewn, there is no doubt that the plaintiff was guilty of criminal misconduct. He was convicted of an offence against sec. 285 of the Criminal Code, which makes every one guilty of an indictable offence and liable to two years' imprisonment who, being in charge of any carriage or motor vehicle, by wanton and furious driving, or wilful neglect, does bodily harm to any person. Upon this he was sentenced to two years' imprisonment in the gaol farm.

Before me it was conclusively shewn that he was on that occasion guilty of criminal negligence, and was intoxicated. His condition was such that after the accident he was not aware of what had happened. He claims to have taken only a small quantity of liquor, but it is only charitable to suppose that the condition of oblivion which prevented him being aware of what took place has also caused him to forget a good many other things that happened before the accident.

I am of opinion that the defence set up is a complete answer to the claim. I think it is against public policy to agree to indemnify any one against the consequences of a criminal act. This question is discussed as a general principle, not as applicable to insurance, in the case of *Weld-Blundell* v. *Stephens*, [1920] A.C. 956.

The law upon the subject is very clearly stated in the case of *Ritter* v. *Mutual Life Insurance Co. of New York* (1898), 169 U.S. 139. It was there laid down that an insurance policy upon the life of an individual who subsequently committed sui-

cide while sane could not be enforced against the company, and that any provisions in the policy to the contrary would be void as offending against public policy. The tendency of the contract would be to endanger public interest, and injuriously affect the public. Such a contract would be subversive of sound morality, and one which ought not to receive the sanction of a court of justice or be made the foundation of an action. This aspect of the insurance law is there most thoroughly discussed. It is pointed out that to give effect to a contract would take away one of the most potent restraints operating upon the minds of those contemplating the commission of a crime. Obviously, to remove from those violating the law with respect to the operation of automobiles upon the highways the fear of liability for damages to those injured by their criminal negligence is to place a premium upon wilful misconduct. Accidents which do not result from criminal misconduct are bound to take place. There is no law that prevents indemnity with respect to such occurrences, but when the misconduct is criminal the situation is different.

In the result, the action is dismissed with costs.

PEDEN v. GEAR.

Ontario Supreme Court, Logie, J. May 12, 1921.

GIFT (§I—6)—PROMISSORY NOTE—GIVEN BY DECEASED IN LIFETIME TO DAUGHTER—UNPAID AT DEATH—NOT GIFT "INTER VIVOS"—NOT THE SUBJECT OF "DONATIO MORTIS CAUSA"—ACTION AGAINST ESTATE FAILS.

A promissory note given by the deceased to one of his children for no consideration is not a valid gift *inter vivos* or as a *donatio mortis causâ*, and cannot be enforced by action against the executors of the estate.

[*Rupert* v. *Johnston* (1876), 40 U.C.Q.B. 11, *Re Bernard* (1911), 2 O.W.N. 716, referred to.]

ACTION by Mary Peden, daughter of Donald Gear, deceased, against the executors of his will, to recover the amount of a promissory note made by the deceased in favour of the plaintiff and also a sum of money for her services to him in his last illness.

C. R. McKeown, K.C., for the plaintiff.

J. W. Curry, K.C., and *A. A. Hughson*, for the defendants.

LOGIE, J.:—Donald Gear, on the 1st March, 1919, having made two promissory notes, for $1,000 each, in favour of his daughter, the plaintiff, payable one month after date, gave them to her as a gift *inter vivos*.

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He paid one of these notes by cheque on the 4th April, 1919, and died on the 15th October, 1920, without having paid the other, which remained in the plaintiff's hands unendorsed by her.

The plaintiff now sues the executors of Donald Gear upon it and also for the value of services performed by her for the deceased in his last illness.

The latter account is not disputed, and the sole question is whether the plaintiff can recover upon the note.

It is admitted that the note was not the subject of a *donatio mortis causâ*.

If it were, it would not help the plaintiff—a donor's own promissory note is not the subject of a *donatio mortis causâ*: *In re Leaper*, [1916] 1 Ch. 579; see also *Basket* v. *Hassell* (1882), 107 U.S. 602.

Is the claim of one who seeks to establish her position as a creditor of the deceased, upon the strength of his promissory note given by the deceased to her without consideration, as a gift *inter vivos*, any stronger? I think not: Chalmers on Bills of Exchange, 8th ed., p. 112.

That there was no consideration to support it is admitted, and a purely moral consideration such as natural love and affection is insufficient: *Holliday* v. *Atkinson* (1826), 5 B. & C. 501.

There cannot possibly be any claim by way of action on a promissory note by the original payee to whom the promissory note was given, if she never gave any consideration for it; she is not a creditor of the deceased; and the enforcement of such promises by law, however plausibly reconciled by the desire to effect all conscientious engagements, might be attended with mischievous consequences to society, one of which would be the frequent preference of voluntary undertakings to claims for just debts, to the prejudice of real creditors.

The temptations of executors would be much increased by the prevalence of such a doctrine, and the faithful discharge of their duty be rendered more difficult.

Accordingly neither the fact that the deceased was apparently distributing a large portion of his estate among his children by gifts *inter vivos*, nor the plaintiff's plea that her father is dead and the claim is resisted only by his executors, should receive any consideration. The executors are entitled and in duty bound to set up the want of consideration. The authorities are clear that a cheque not paid either actually or constructively during the lifetime of the drawer is not capable of being the subject of a *donatio mortis causâ*: Chalmers, 8th ed., p. 289; *Re Bernard* (1911), 2 O.W.N. 716.

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The donor's own promissory note given voluntarily is in no better position. A cheque is no more than an order to obtain a certain sum of money. A promissory note is no more than a promise to pay a certain sum of money. I find no case to sustain the contention that the delivery of the maker's own voluntary note is a valid gift either as a *donatio mortis causâ* or as a gift *inter vivos*. See *Rupert* v. *Johnston* (1876), 40 U.C.R. 11.

I was referred to *In re Whitaker* (1889), 42 Ch. D. 119. That was the case of a man who, while sane, delivered certain notes of his own without consideration as a gift to one to whom he considered himself morally indebted. He was subsequently, before all the notes were paid, declared a lunatic. The Court of Appeal in England held that, although the payee was not entitled to claim as a creditor against the lunatic's estate (the gift being voluntary), yet the Court in the exercise of its discretion would order payment to be made thereout (the committee being joined), by way of bounty and as in discharge of a debt of honour on the part of the lunatic, which, under the circumstances, it ought to recognise.

But the position of a committee is quite different from that of an executor. The Court may and does exercise jurisdiction over the property of a lunatic; and, as Lord Justice Lindley says in that case, will see that the honour of the lunatic is upheld.

An executor stands in a wholly different case. On the death of his testator, rights of others intervene—rights which the Court recognises and which prevent the distribution of the estate of the deceased among persons whom the law does not recognise.

That is the case here. The deceased intended to benefit his daughter to the extent of these two promissory notes, in addition to the provision made by his will. One note he paid, but as to the other he failed to give effect to his intention in such a way as to be legally cognisable by the Court, and in the result has unfortunately only given to the plaintiff one-half of his purposed gift.

There will be judgment for the plaintiff for $75 admitted to be due her from the estate of her father for services rendered, and the action will in other respects be dismissed.

In the exercise of my discretion as to costs, and as the action of the deceased invited the plaintiff's claim, I direct that the costs of both plaintiff and defendants—those of the defendants as between solicitor and client—be paid out of the estate of the deceased.

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HOOD v. CALDWELL.
BLAGDEN v. WENTWORTH ORCHARD Co.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins and Ferguson, JJ.A. May 13, 1921.

COMPANIES (§VE—222)—ORGANISATION—PURCHASE OF ASSETS—ALLOTMENT OF SHARES—CONSIDERATION—INADEQUATE COMMISSION TO DIRECTOR—APART FROM DIRECTOR'S DUTIES.

The record of a company since organisation will influence the Court in deciding whether or not certain assets purchased by the company on organization with fully paid up stock were "good consideration."

If proper by-laws are enacted, a director may be paid a commission or share of the profits for services rendered outside his duties as a director.

[See Annotation on Company Law, 63 D.L.R. 1.]

COMPANIES (§IVF—100)—SHAREHOLDER—ACTION BY—ALLEGED IRREGULARITIES IN ORGANISATION—NO ALLOTMENT—DIRECTOR FOR SOME YEARS RECEIVED DIVIDENDS ON STOCK—LACHES—DISMISSAL OF ACTION TO REPUDIATE SHARES.

A shareholder in a company after having acted as a director in the organisation for five years, and accepting dividends on shares held by him, cannot then repudiate his shares on the ground of irregularities in organisation of the company or in his subscription for shares therein.

THE following statement is taken from the judgment of MEREDITH, C.J.O.:—

These are appeals by the plaintiffs from the judgment, dated the 29th July, 1920, which was directed to be entered by Sutherland, J., after the trial before him, sitting without a jury, at Hamilton, on the 14th, 15th, and 16th October, 1919.*

The first action is brought by 12 shareholders of the Wentworth Orchard Company Limited against A. C. Caldwell, that company, and George E. Nicholson, to have the minute-book of the company rectified by striking out a resolution providing for the management of the business of the company by Caldwell, who was its president, and for his remuneration being 5 per cent. of the gross sales for the year; the repayment by Caldwell to the company of $18,700, alleged to have been illegally paid to him under the authority of that resolution; to set aside an agreement, dated the 8th April, 1912, by which Caldwell and Nicholson, trading under the name of the Caldwell Orchard Company, sold to the Wentworth Orchard Company Limited its assets, in consideration of the issue to them of $50,000 of the common stock of that company; and for a declaration that the stock was "irregularly issued."

*By the judgment of Sutherland, J., both actions were dismissed, but without costs. The learned Judge's reasons for judgment are briefly noted in 18 O.W.N. 427.

The other action is brought to have the name of the plaintiff removed from the register of shareholders of the defendant company as the holder of 36 shares of preference and 7 shares of common stock of the company and to recover from the company the amount paid for the shares, with interest.

The claim to recover from Caldwell the $18,700 is based on the allegation that the resolution which appears in the minutes was never passed, and that, even if it had been passed, it was not sufficient to justify the payment.

It is difficult to make out from the statement of claim the ground of the attack upon the agreement of the 8th April, 1912, between Caldwell and Nicholson and the Wentworth Orchard Company. That agreement is, I presume, the one referred to in para. 3, although it is not stated in that paragraph when the agreement was made. Upon the argument, it was contended that the agreement and the issue of the shares under it were *ultra vires* and the result of a fraudulent attempt to put off on the company a "practically worthless business" which was to be and was paid for from the proceeds of sales of preferred stock, of which the plaintiffs became the purchasers, paying for it at par and receiving as a bonus 20 per cent. of their subscriptions in shares of the common stock allotted to Caldwell and Nicholson.

The second action is based on the following allegations:—

1. That no prospectus was filed as required by the Companies Act.

2. That the company commenced business without having filed the declaration required by the Act.

3. That no by-law was passed allotting the shares to the plaintiff, and no notice of the allotment was sent to him.

4. That the number of directors was increased from 3 (the number mentioned in the letters patent) to 5, and that no by-law providing for the increase was passed by the directors and confirmed by the shareholders.

There is added in the statement of claim an allegation that no such resolution as is recorded in the minutes, as to the appointment of Caldwell and his remuneration, was ever passed. Why it was added it is difficult to understand, as it has nothing to do with the relief sought or the grounds on which it is claimed.

Caldwell and Nicholson were carrying on the apple business in partnership under the name of the Caldwell Orchard Company. They decided to form a company to take over the business, and the Wentworth Orchard Company was accordingly incorporated under the Ontario Companies Act by letters patent, dated the 12th March, 1912. The plan was to sell to the com-

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pany the stock-in-trade, leases, and options of the Caldwell company, as well as the goodwill of the business, in consideration of the issue to it of 500 shares of the 1,000 shares of $100 each into which the capital was divided, 200 of which were to be used as bonus shares to be given to subscribers for preference shares.

By the letters patent the following persons, Alonzo Campbell Caldwell, described as a manufacturer, Harry Clarence Clarke and Thomas Harrison Ralph, described as merchants, Walter Russell Booth, described as a bookkeeper, Harlan Stetler, described as a factory superintendent, Charles Carrie, described as a mill-hand, William Edward Sheridan Knowles, described as a barrister-at-law, Mary Ann Caldwell, described as a married woman, and George Edmond Nicholson, described as an exporter, and all others who had or might thereafter become subscribers to the memorandum of agreement of the company, were created and constituted a body corporate and politic by the name of the Wentworth Orchard Company Limited.

The purposes and objects of the company are stated to be:—

(*a*) to buy, sell, and export fruit and produce,

(*b*) to lease or purchase and cultivate fruit-bearing or agricultural lands,

(*c*) to carry on the business of fruit and vegetable evaporation and canners in all its branches, and

(*d*) to manufacture barrels, boxes, and other containers for the shipment of fruit.

The share capital is declared to be $100,000, divided into 1,000 shares of $100 each, of which 500 shares were to be preference shares.

The provisional directors named are Caldwell, Nicholson, and Clarke.

The preference shares are to have a first fixed preference annual dividend of 7 per cent. payable yearly, but not to have any priority as to repayment of capital, in the event of a dissolution or winding-up, over the ordinary or common stock, or to participate further in the profits until the aggregate amount "in per cent." of the dividends paid on account of the common stock shall equal the aggregate amount up to that time paid on the preferred stock. When that happens, the common stock and the preferred stock are to share ratably in any further profits. The right to preferred dividends "on such annual profits" is to cease at the end of each year's business, ending on the 1st April in each year, and the preferred stockholders are given the same right to vote as holders of common stock.

The memorandum of agreement and stock-book of the com-

patent, each of whom, on the 25th February, 1912, subscribed for one preference share.

The provisional directors met on the 26th March, 1912, all of them being present, and after transacting some formal business they resolved that a meeting of the shareholders should be called for the 8th April following.

The shareholders' meeting was called and held on that day. Caldwell, Nicholson, Clarke, Ralph, Booth, and Knowles were present, and Mary Ann Caldwell, Currie, and Stetler were represented by proxy.

At this meeting, the subscribers' agreement was produced, and Clarke, Ralph, and Booth were elected directors.

It was then resolved, on motion of Knowles, seconded by Ralph:—

"That the directors of the company be and they are hereby empowered to purchase from the Caldwell Orchard Co. Ltd. the goodwill and assets of the business carried on by them in Dundas, County of Wentworth, Province of Ontario, as fruit-growers and exporters, and all goods and chattels, leases and options, owned by the said company used in the carrying on of the said business, conforming to inventory made up by them now produced, and to pay for same as follows.

"The allotment of 500 fully paid-up shares of the common stock of the company.

"The stock certificates to be handed over to the members of the said company when directors are satisfied that the company has obtained delivery and proper transfers of said effects, leases, options, etc., and a good title thereto.

"The said Caldwell Orchard Co. Ltd. to deliver an undertaking that 200 shares of the common stock so paid to them will be given by them in the shape of a bonus to all purchasers of the preference stock of the company in proportion as the directors may direct."

On the same day an agreement between the Caldwell Orchard Company and the Wentworth company was executed.

The agreement recites that the Caldwell company is the owner of certain enumerated chattels and of certain enumerated leases, one of which was from Edward Lyons, one of the plaintiffs in the first action, and an option on a farm in West Flamboro, and that the Caldwell company had agreed to sell all these to the Wentworth company on the terms mentioned in the agreement, and the Caldwell company covenants with the Wentworth company to transfer them to the last named company in consideration of the "transfer" to the Caldwell company of 500 paid-up shares of the common stock of the Went-

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worth company on the condition that 200 of the shares are to be held in trust and are to be transferred from time to time "as bonuses on the sale of preference stock" of that company.

At a meeting of the directors, held on the same day, this agreement was "adopted, taken over and assumed by the company," and a by-law was passed in the following terms:—

"By-law No. 1.

"Whereas by agreement dated the 8th day of April, 1912, the Caldwell Orchard Company has agreed to sell to the Wentworth Orchard Company Limited all their goods, chattels and effects, options and goodwill, upon the terms and conditions in the said agreement contained, upon the issue to the said Caldwell Orchard Company of 500 shares of common stock in the Wentworth Orchard Company Limited, and subject to the trusts in the said agreement contained.

"Now therefore be it enacted that the said agreement hereinbefore recited be and the same is hereby approved of and the president and secretary are hereby authorised to do all acts necessary for the carrying out of the said agreement and the taking over of the said properties, and that the issue of 500 shares of the common stock of this company fully paid-up and non-assessable is hereby directed to be made to the said Caldwell Orchard Company or their nominees, and the said shares are hereby allotted as aforesaid."

On the same day Caldwell and Nicholson executed a bill of sale of the chattels, and two certificates, one for 200 and the other for 300 shares of the common stock, were issued to the Caldwell Orchard Company, the former expressed to be in trust and "subject to conditions expressed in by-law No. 1."

There does not appear to have been any formal transfer of the goodwill of the Caldwell Orchard Company or of the leases. Much was endeavoured to be made of this upon the argument, but in my opinion it is not of importance. Although no formal transfer was made, there was a good equitable assignment of it, and the same observation applies to the absence of a formal transfer of the leases; besides this the Wentworth company got the benefit of both goodwill and leases for whatever they were worth.

The 500 shares were transferred as follows:—

Of the 300, 100 to Nicholson, 195 to Caldwell, and 5 to H. C. Clarke, and of the 200, 2 shares to E. S. Lyons, 2 shares to E. J. Lyons, 2 shares to Edward Blagden, and one share each to W. D. Pepper and James E. Edgar, and for the remaining 192 shares a new certificate was issued to the Caldwell company in trust on the 13th March, 1913.

The two Lyons and Edgar are three of the plaintiffs in the first action, and Blagden is the plaintiff in the second action.

A second meeting of the shareholders was held on the 8th April, 1912, at which all the shareholders were present or represented by proxy. At this meeting Caldwell and Nicholson were elected directors in the place of Ralph and Booth, who had resigned.

G. Lynch-Staunton, K.C., and *J. L. Counsell*, for appellants.

W. M. McClemont, for respondents.

MEREDITH, C.J.O. (after setting out the facts as above):—I understand that the grounds on which the relief is sought on the first branch of the case are:—

1. That the agreement between the Caldwell company and the Wentworth company was the result of a fraudulent scheme designed to put off on the Wentworth company a worthless business.

2. That the issue of the shares was in effect an issue of them at a discount and therefore *ultra vires* the company.

I am unable to find anything in the case to warrant a finding that the agreement was a fraudulent one.

Much depends on whether or not what the Caldwell company was selling was of very little or no value.

A fair test for determining this is to be found in the result of the Wentworth company's operations.

The net profits of the Wentworth company were:—

1912-13	$4,557.76
1913-14	4,647.86
1914-15	1,945.55
1915-16	4,941.55
1916-17	3,450.56
1917-18	4,125.68
1918-19	6,084.28

And in addition there is a contingent account made up of undistributed profits amounting to $5,682.28.

The preference shares which have been subscribed are as follows:—

To March 31, 1913	5,700
To March 31, 1914	14,700
To Feb'y 28, 1915	23,800
To Feb'y 29, 1916	28,700
To Feb'y 28, 1917	36,200
To Feb'y 28, 1918	36,200
To Feb'y 28, 1919	36,200

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Dividends were declared and paid as follows:—

1913	.....	12 per cent.
1914	.....	9 per cent.
1915	.....	7 per cent.
1916	.....	8 per cent.
1917	.....	7 per cent.
1918	.....	7 per cent.
1919	.....	7 per cent.

The 12 per cent. dividend applied to both common and preferred, but the others to the unpreferred only.

It cannot be said that these profits were made out of the moneys paid in by the subscribers for preference shares, for the interest at 7 per cent. per annum on the amount paid in up to the 28th February, 1919 ($36,200), is only $2,520, and interest at that rate on the amount paid in in the first year is only $285.

Statements shewing the results of the company's business, certified by the company's auditors, were submitted in each year to the shareholders at their annual meeting.

In these statements, among the assets, is the following item: "Real estate and buildings, plant and equipment, goodwill, leases and options, $56,814.27;" and in each of the subsequent statements there was a similar item, the value increasing year by year until in the statement of 1919 it is shewn to be $84,306.10.

These statements also shew the amount of the capital stock issued, common and preference, and the amount issued in trust, and these appear as liabilities of the company.

It is manifest from these statements that, throughout, the goodwill of the business was reckoned as being worth at least the amount at which it has been estimated in the purchase.

How, in the face of these figures, can it be contended with any show of reason that the consideration given by the Caldwell Orchard Company for the shares allotted to it was of little or no value? It was said that that company had made no profits and that the goodwill of its business was valueless. It may be that no considerable profit was made, but the foundation had been laid for a profitable business, as was amply proved by the success of the Wentworth company's business, which was built on that foundation.

There was nothing concealed from the shareholders. In addition to the information afforded by these statements, in the book which the company is required by the Companies Act to keep, following the copy of the letters patent, there are set out by-laws Nos. 1 and 2, the first of which approves of the agreement between the Caldwell Orchard Company and the Wentworth company and authorises the carrying of it out; and the

recital to it shews that 500 shares of the common stock are to be issued to the Caldwell Orchard Company in consideration of the sale to the Wentworth company of the "goods, chattels and effects, leases, options, and goodwill."

In the minutes of the shareholders' meeting at which the directors were authorised to make the purchase the terms of it are fully set out. The agreement is again set out in the minutes of the directors' meeting at which by-law No. 1 was passed.

If I had come to the conclusion that the agreement was originally open to attack upon the ground of fraud, I would hold that the appellants are barred by their laches and acquiescence.

James E. Edgar, one of the plaintiffs, was elected a director on the 11th April, 1913, and continued to be a director until 1916, when he resigned on account of ill-health; Hood, another of the plaintiffs, was elected a director in 1916, and continued to be a director until the annual meeting in 1919; and McArthur, another of the plaintiffs, was a director for 1916, 1917, and 1918.

All of the statements to which I have referred were submitted to and approved by the directors. As the dividend to be declared depended on what they stated, it is at least to be assumed that the directors understood what they meant.

The shareholders too at each annual meeting, as I have mentioned, adopted the statements that were submitted, and it is, I think, idle to say that they did not know that the common stock had been allotted in payment for the Caldwell company's business and goodwill.

It was argued that the provision that on dissolution or winding-up of the company the preference shares are not to have any priority as to repayment of capital was an unusual and unfair provision. It is a sufficient answer to this that the provision is embodied in the letters patent, and that every one dealing with the company is deemed to have notice of it. The right of a preference shareholder is *primâ facie* confined to a preferential dividend, and the provision in the letters patent is the usual one, although preferential rights as to capital may be and often are attached.

What is seriously proposed by the appellants is that the preference shareholders shall be declared to be the owners of the business, the value of which they have declared to have been on the 28th February, 1919, upwards of $100,000 (the assets being $125,824.64 and the liabilities $25,463.95), to which they claim to have added $18,700 received by Caldwell as compensation for his services as salesman, and to exclude Caldwell from any share or interest in this large sum, notwithstanding that the business

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was acquired from him and Nicholson, and that the business that has been built up by the Wentworth company has been reared on the foundation laid by the Caldwell Orchard Company. It would be only by the application of a peculiar brand of equity that any such result could be reached, and I am ignorant of the existence of any such brand.

It seems to me that if matters are left as they stand the preference shareholders have made a very good investment. They have all along received interest at 7 per cent. per annum on the amount invested, and the amounts of the common stock and preference shares, excluding the common stock issued in trust, being nearly equal, have between them a half interest in property which they value at over $100,000—a pretty fair result to have been accomplished by men who proclaim themselves "quite unfamiliar with the Joint Stock Companies Act and . . inexperienced in company matters."

It is of no importance, if the view I have expressed is right, that the appellants have no *locus standi* to maintain an action to set aside the agreement on the ground of fraud. This action is not brought on behalf of all the shareholders, and, if it had been, it would have been open to the objection that the statement of claim contains no allegation that the company is controlled by those shareholders by whom the alleged fraud is said to have been committed.

I proceed now to the consideration of the question as to the issue of the shares to the Caldwell company being *ultra vires*. The contention that it was *ultra vires* is, and must be, based on the proposition that, though in form it was otherwise, the shares were in fact issued at a discount.

In considering this question care must be taken to distinguish between the cases decided before and after the enactment of sec. 25 of the English Companies Act, 1867.

Before the enactment of that section, it was settled law that a company might issue and take as the cash equivalent of payment for shares property worth in the market much less than the nominal amount of the shares; that, unless the contract is fraudulent or shews on the face of it that the consideration is illusory or is clearly not equivalent to the nominal value of the shares, the transaction, though an abuse of the Acts, cannot practically be upset; and that, while the contract stands, the Court will not inquire into the value of the consideration even at the instance of the liquidator. See Palmer's Company Law, 10th ed., p. 117, and cases there referred to.

I shall not go through the cases. They fully support Palmer's statement of the law. . .

I refer only to *Ooregum Gold Mining Co. of India* v. *Roper*, [1892] A.C. 125, and *In re Wragg Limited*, [1897] 1 Ch. 796.

[Quotations from the judgments in the *Ooregum* case, at pp. 136, 137, 140, and 148, and from the *Wragg* case, at pp. 816, 826, 827.]

It is not to be overlooked that what was said by Lord Watson in the *Ooregum* case had reference to sec. 25 of the Companies Act, which provided that any shares should be deemed to be issued and to be held subject to the payment of the whole amount in cash unless it should have been otherwise determined by a written contract filed with the registrar before the issue of the shares, and that the Ontario Companies Act of 1907 contained no such provision, and the law applicable in this Province would be that which obtained before sec. 25 was enacted, the object of which was pointed out by the Lord Chancellor at p. 135.

I do not think that the solution of the question to be decided is assisted by applying to the first shareholders, who ratified the agreement, the term "dummies."

I have no doubt that it was competent for these shareholders and the company to make the agreement.

[Reference to and quotations from the judgments of Giffard, L.J., in *In re Baglan Hall Colliery Co.* (1870), L.R. 5 Ch. 346, 356, 375.]

It is difficult to formulate any exact rule as to when the consideration will be held to be colourable or illusory. Each case will depend on its own facts.

[The learned Chief Justice then referred to *In re Eddystone Marine Insurance Co.*, [1893] 3 Ch. 9, and to *Hong Kong and China Gas Co.* v. *Glen*, [1914] 1 Ch. 527, and quoted from the judgment of Sargant, J., at p. 539.]

I am unable to follow the argument that the transaction was not a payment for the shares by the transfer of property of an estimated value equal to the nominal value of the shares. The Caldwell company had property which it was willing to turn over to the Wentworth company in return for the paid-up shares, and the Wentworth company was willing to purchase the property on these terms. It was surely not necessary to go through the form of the Caldwell company saying, "We will subscribe for the shares and pay for them by transferring to the company property which we estimate to be worth the nominal value of the shares." According to my recollection, no such contention was made by counsel for the appellants, and, in my opinion, if made, it is not well-founded.

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Meredith, C.J.O.

It is settled law that, if the contract cannot be set aside, the result of a finding that the consideration was colourable or illusory is not that the vendors are no' the owners of the shares, but is that they are liable to pay for the shares after deducting the value, if any, of that which was given as the consideration.

No case is made for relief on that footing and if made it could not be awarded. There is no obligation to pay unless and until calls have been made, and none have been made. Besides this, the action is not properly constituted for awarding such relief, even if the liability was to pay presently.

I am unable to see how the 200 shares allotted to the Caldwell company can be treated as standing on a different footing from the other shares issued to that company. The consideration that it was to receive for the transfer of the property was the 500 shares, but 200 of them they undertook to transfer to subscribers for preference shares, as "bonus" shares, as the Wentworth company might direct. They were in effect what are commonly termed "treasury" shares standing in the name of the Caldwell company as trustee. I doubt whether the Caldwell company has or ever had any beneficial interest in them or the right to vote in respect of them, but I see no reason why they should be treated as shares for which the Caldwell company must pay the par value.

There remains to be considered the question as to the salary paid to Caldwell.

According to the minutes, at a meeting of the directors held on the 4th May, 1915, a resolution was passed giving to Caldwell "complete charge of the business, his remuneration to be 5 per cent. of the gross sales for the year."

According to the minutes, this resolution was passed on motion of Borer and Blagden, the plaintiff in the second action.

Blagden testified that no such resolution was passed and that the resolution that was passed was that the remuneration was to be 5 per cent. of the profits. According to the minutes, the minutes of the meeting at which the resolution is recorded as having been passed were confirmed at a directors' meeting held on the 21st June, 1915, at which Borer and Blagden were present.

There was conflicting evidence as to what the resolution which was passed really was, and the trial Judge has found, and in my judgment rightly found, that the minute to which I have referred correctly states what was resolved.

If the payment of this remuneration was a payment to Caldwell *quâ* director or president, but was for services rendered apart from those which it was his duty as director or president

to perform, the cases of *Canada Bonded Attorney and Legal Directory Limited* v. *Leonard-Parmiter Limited*, 42 O.L.R. 141, 42 D.L.R. 342, and *Fullerton* v. *Crawford*, 59 Can. S.C.R. 314, 50 D.L.R. 457, shew that sanction by the shareholders of the payment is not necessary.

I do not think that the application of this doctrine is limited to cases in which the employment is of minor character, and I see no reason why it should not be applied to an employment such as that which was entrusted to Caldwell, namely, that of business manager. His duty as director or president did not extend to the performance of such duties. The duties of those offices would not occupy much of his time, but as business manager his duties would require him to give practically all his time to the performance of them.

The by-law of the company provided that, in addition to other duties, the president should "discharge all duties required of him by the law and amendments thereto under which the corporation is organised and by these by-laws." The by-laws do not require the president to act as business manager; on the contrary, provision was made for the appointment of a salaried managing director, who was, in addition to performing other duties, to "take over the active management of all branches of the business;" and these duties he was to perform under the direction of the president. I find no trace of any by-law imposing upon the president the duty of acting as business manager. His appointment was not made by by-law but by the directors.

Assuming, however, that the remuneration was for Caldwell's services as president, in my view the payments made to him were not made in contravention of sec. 92 of the Companies Act, R.S.O. 1914, ch. 178. That section provides that "No by-law for the payment of the president or of any director shall be valid or acted upon unless passed at a general meeting, or, if passed by the directors, until the same has been confirmed at a general meeting."

I see no reason for requiring that the by-law must fix the amount to be paid, nor any reason why the shareholders may not ordain that the president shall be remunerated for his services and leave it to the directors to fix the amount of the remuneration.

Such a by-law, in my opinion, conforms with the spirit as well as with the letter of the section. What I think the section means is that the president and directors shall not be paid for their services unless the shareholders at a general meeting otherwise direct or approve.

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Section 15 of by-law No. 2, passed by the directors on the 8th April, 1912, and confirmed by the shareholders at a meeting held on the same day, provides that "any director may, notwithstanding any rule of law or equity to the contrary, be appointed to any office under the directors with or without remuneration."

In my opinion, this by-law conferred upon the directors authority to do what they did by the resolution of the 4th May, 1915.

For these reasons, I would affirm the judgment in the first action, and dismiss the appeal from it with costs.

MACLAREN, J.A., agreed with MEREDITH, C.J.O.

MAGEE, J.A.:—It is manifest that from the first it was intended by the defendants Caldwell and Nicholson to place the so-called preference shares of the defendant company upon the market and induce other people to purchase them for cash. Before doing so, they took to themselves common shares to the amount of $50,000—or half the capital—in return for certain personal property. Though done nominally through a board of directors of which they were not for the moment members, it was really their own transaction, for the board made no investigation and exercised no independent discretion and obediently retired so soon as the only work for which they were appointed was done. But, by the arrangement thus arrived at, these two defendants agreed to hold $20,000 of the $50,000 in trust to be given as a bonus to the subscribers for the unsold preference shares—thus indicating a willingness to give away 40 per cent. of that which they received, and indicating too that the personal property given was well paid for by the remaining 60 per cent. It further indicated an intention, really under cover of this arrangement, to issue the preference shares at a discount, but these defendants doing for the company what the company could not itself do—that is, issue 6 shares when only 5 were paid for. If, as is alleged, the personal property assigned was not worth over $1,000, the result would have been, if all the preference shares were sold, that the company would have assets worth $51,000, of which these defendants, as holders of 30 per cent. of the capital, would virtually own $15,500, by contributing $1,000—while the new preference shareholders, who contributed $50,000, would have the satisfaction of owning $35,500 worth of the assets. If less than the whole of the preference shares were sold, the injustice would be greater—while, if the assets transferred to the company by the co-defendants were of greater value, the injustice

would be less. But it was apparently one of those frequent cases in which there was more money to be got out of the public than out of the property.

Had the transaction been promptly attacked, it could not have been justified, although ordinarily vendors are entitled to place their own value on their own property as against paid-up shares—and these defendants were not subscribing for unpaid shares, and then paying for them with illusory assets, as in *Society of Practical Knowledge* v. *Abbott*, 2 Beav. 559, but were buying paid-up shares with largely illusory assets. Those paid-up shares could only attain substantial value by the sale of other shares for cash to other people from whom it was thus planned to get money. But these plaintiffs in taking preference shares—and with them a bonus of common shares—must be presumed to have known that they were not getting the bonus from the company, which could not give it to them, and that they were getting them from the vendors to the company, and therefore that they must have been received by those vendors for less than their par value or they would not be given. With this knowledge, it does not lie in their mouths, after acquiescing for so long without inquiry and taking their chances of a profitable venture, now to attack the sale to the company—and the action in that respect should be dismissed. As to the amount paid for commission, that also having been originally authorised by resolution which is found to have been passed, and which I think was not limited to the current year, and having been assented to for so long, should not now be questioned. As to the right to receive the commission, in the recent case of *Brown and Green Limited* v. *Hays* (1920), 36 Times L.R. 330, the defendant had to repay moneys received as managing director, but it was shewn that he had not in fact been such.

I agree that the appeal as to these commissions should be dismissed.

HODGINS, J.A. (after a brief statement of the nature of the first action):—Upon a consideration of the evidence adduced in this case, I think it is quite evident that the agreement attacked was based upon a grossly inadequate consideration. The value of the business of Caldwell and Nicholson, the goodwill of which was sold together with the ladders, crates, and some leases of orchards, may be judged by the remark made by the defendant Caldwell, which I quote. He was asked: "Why did you want a company instead of your old partnership?" and he answered: "Well, I had to get out of the apple business."

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Its scope and prospects may also be estimated by the fact that Nicholson paid for a third interest in the business the sum of $1,800, and received out of the business only $600 a year and expenses.

The defendant Caldwell had gone into the apple business in 1905 and 1906, and the evidence, so far as it throws any light on the tangible assets of that business in 1912, would not lead any one to conclude that they were worth much more than $1,000, while the sum of $49,000 for its goodwill indicates pretty clearly what view the parties themselves had when the transfer was made.

It is eminently a case in which, if it were possible, the contract should be set aside. The difficulty in the way is that there was in fact some consideration in the transfer of the tangible assets of the business and any such goodwill as there was; and, while these combined were totally inadequate as compared with the par value of the shares, the question arises whether, taken together, they can be said to form what is known as an illusory consideration, or a consideration of which the law takes no notice. What is an illusory consideration has been dealt with in a number of cases. Lord Justice Cotton, in *In re Almada and Tirito Co.* (1888), 38 Ch. D. 415, at p. 422, gives his view of the mode of payment adopted by the English Companies Acts of 1862 and 1867, i.e., by a registered contract.

[The learned Judge then quoted the remarks of Cotton, L.J., in that case, at p.423; also what was said by Lord Watson in the *Ooregum* case, [1892] A.C. 125, at p. 136; *Chapman's Case*, [1895] 1 Ch. 771, *per* Vaughan Williams, J., at pp. 774 and 775; *In re Wragg Limited*, [1897] 1 Ch. 796, *per* Vaughan Williams, J., at pp. 812, 814, 816, and per Lindley, L.J., at p. 827; also *In re Innes & Co. Limited*, [1903] 2 Ch. 254, *per* Vaughan Williams, L.J., at p. 262.]

I draw from these decisions the rule that there must be a real and honest bargain, and not one which is so made that it is manifest that the form which it took was in reality a sham, or was intended to be and was a fraud. There may be overvaluation and yet an honest bargain. The test is honesty, and if that is present the Court will not inquire into the adequacy or inadequacy of the consideration. If the contract is impeached for fraud, an inquiry into the real value of the consideration is necessary and proper, as undervalue would be one of the *indicia* of fraud.

I do not think that in this case there was an honest intent in the transfer, but that what was done was to give the dwindling assets of a dying concern to a new company formed for the purpose of inducing others to subscribe for so-called preference shares, which were only so in name, in order that the promoters might be enabled to continue in business and yet prevent those who supplied the necessary capital from having any share in the direction of the company.

This conclusion, however, does not dispose of the case. The promoters were the vendors and controlled the directorate of the company, but all the then shareholders, such as they were, became fully aware of what the transaction meant, or did not care what it signified, and they were all present when the resolutions were put through which confirmed it. While there is no doubt that the object of the promoters was to secure control by acquiring a large block of stock in exchange for a business worth hardly anything when measured by the par value of the stock, the difficulty is that relief was not sought until the affairs of the company were radically changed. The company might,, as the intention clearly was to take in, in a double sense, the farmers of the neighbourhood, have set the transaction aside as soon as the new shareholders realised the situation, on the ground of a fraud upon them, had they acted promptly; yet the circumstances which have intervened seem to render it useless to enter into an inquiry as to the adequacy of the consideration. That inquiry would be valuable only in case fraud gave a ground for rescission, but it is futile to establish undervalue if the only object were to shew a failure of consideration so as to fix the promoters with a liability to pay for the shares upon that hypothesis. See Gore Brown on Joint Stock Companies, 34th ed., pp. 186-187. There is no money value of any part of the consideration ascertained in such a way as to enable the Court to say that anything beyond that ascertained value could not have been received by the company and therefore still remained unpaid upon the shares. This was the difficulty encountered in *Re North Bay Supply Co.* (1905), 6 O.W. R. 85, by Mr. Justice Anglin, who felt himself unable on that account to inquire into the money value of the consideration in kind received by the company. The difference between the English Act and our own is that in the former there is a distinct provision making a shareholder liable for the amount unpaid upon the stock, while in the latter it is only a creditor that can, in the event of liquidation, enforce that liability. Hence it is that where the consideration is wholly illusory or a mere gift, or the transaction is

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otherwise fraudulent the remedy is rescission, and not the establishment of a liability for the par value of the shares.

The transfer took place in 1912, and there has been a going business ever since, its turnover in the later years being comparatively large, rising from $13,387.58 in 1913 to $176,203.84 in 1917-18. Besides this, the plaintiffs have become subscribers for preference stock, and have paid in the neighbourhood of $36,000, that being the capital which has made possible whatever success the company has achieved. They have acted as directors and received dividends. If the agreement were set aside, the business that was originally handed over, which was practically worthless, could not be restored to Caldwell and Nicholson. It was a totally different business from the present one, which has prospered through the money put into it by the plaintiffs. If they were prepared to take their money back and were entitled, as a term of rescission, to get it, yet the parties could not be restored to their original position.

As I have mentioned, the claim of the plaintiffs in the action is limited to the setting aside of the agreement and a declaration that the common stock issued in consideration thereof was irregularly and improperly issued; and, while the plaintiffs assert that the issue of stock was illegal and was a mere sham and subterfuge to enable the defendants Caldwell and Nicholson to evade the provisions of the Companies Act, they did not offer to repay their dividends, nor did they express, on the argument, any desire for such relief as would entitle them to repayment of the amount they have invested in the company, if that were possible. Indeed their position seems to be that they wish to oust Caldwell from the management of the business and the control of the stock, but to retain the present business in their own control.

It is to be remembered that this action is brought by individual shareholders, and that the plaintiffs have not taken the position, except on the argument before us and then only if it was held to be necessary to their success, that they are willing to repay to the company the dividends they have received on their stock. The plaintiffs in their notice of appeal disclaim misrepresentation on the sale of the preferred stock, but they do allege that the issue of the $50,000 worth of common stock was a fraudulent issue because the defendants Caldwell and Nicholson failed to establish that the assets transferred to the company, in consideration therefor, were worth more than $3,000. This position, involving the retention of the preferred stock, and consequently a retention of the business, does away

with any question of rescission of the original agreement.

Although the individual shareholders in this case have shewn that the control of the company rests with Caldwell, including the control of the board of directors, and might well succeed in right of the company to some relief, yet that right is bounded by what would be in the real and true interests of the company, and the company cannot, I think, for the reasons I have already mentioned, be given a remedy in the direction now sought, that is, by declaring the issue of the common stock to be *ultra vires* and void, leaving the business still the property of the company.

It was proved, however, and practically not denied, and it is clear upon the documents before the Court, that $20,000 of the $50,000 common stock was not to be and remain the property of Caldwell and Nicholson, but was to be held by them for the purpose of being distributed as bonus stock to the farmers whom they induced to take preference stock. This issue of stock then, to the extent of $20,000, formed no part of the consideration for the transfer, and must be considered as having been unpaid stock and should be so declared. This was done in *Lindsay* v. *Imperial Steel and Wire Co.* (1910), 21 O.L.R. 375; see also *In re Alkaline Reduction Syndicate Limited* (1896), 45 W.R. 10. Whether or not the defendants Caldwell and Nicholson can be made liable by the company for the par value of this stock, which was issued to them as paid-up, is something which cannot be decided in this action, as it is not claimed in the pleadings. The position of the plaintiffs and that of the company, on this issue, are apparently opposed to one another.

The plaintiffs may be able to assert that in their hands, at all events, it must be considered as paid-up stock. That being so, and it being in the interest of the company to assert the contrary, both as to them and as to Caldwell and Nicholson, the liability, if any, for the amount unpaid upon that stock, or for the damages sustained by the company in its issue and transfer, must be left to be taken by the company itself in an action properly framed for that purpose. See *Re McGill Chair Co.* (1912), 26 O.L.R. 254, 5 D.L.R. 73. This should be reserved if the company or preference shareholders at any future time should desire to take action concerning it. The right of minority shareholders to maintain actions in their own names, to set aside transactions involving the interests of the company, and the circumstances under which that right will arise, are considered in *Dominion Cotton Mills Co. Limited* v. *Amyot*, [1912] A.C. 546, 4 D.L.R. 306.

My conclusion is that, notwithstanding the fact that it is established that the intention of the defendants Caldwell and

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Nicholson, or Caldwell alone, was to incorporate a company, retain control and hand over to it a dying business and obtain therefor a large amount of common stock and then induce the farmers of the neighbourhood to put in the money which would enable it to continue its operations, it is impossible, having in view the changes which have taken place in connection with the business, the creation and payment in of further capital, and the whole chain of circumstances up to the present time, to give the plaintiffs the relief to which under other circumstances they might have been entitled in right of the company.

It is to be much regretted that in a case of this kind, where the consideration is so small and the purpose of the transaction is such as to enable the stock to be issued at what is practically a discount, the law does not, without setting aside the contract itself, permit an inquiry into the adequacy and extent of the consideration so as to ascertain its amount and thus establish liability for the balance as still due upon the stock. Any legislation to that end would have to be carefully framed so as not to flood the Courts with inquiries into transactions long past and gone and into the value of what has either quite disappeared or has been so intermixed with other things as to be incapable of separation.

Upon the question of the right of the defendant Caldwell to retain the sum of $18,700 commission received by him during the years 1915, 1916, 1917, 1918, and 1919, I am of opinion that the company is entitled to be repaid this sum. It is unnecessary to go over the cases upon the subject, as they have been reviewed recently by my brother Riddell in *Canada Bonded Attorney and Legal Directory Limited* v. *Leonard-Parmiter Limited*, 42 D.L.R. 342, 42 O.L.R. 141.

[The learned Judge then referred to the Ontario Companies Act, R.S.O. 1914, ch. 178, sec. 92, and to *Mackenzie* v. *Maple Mountain Mining Co.*, 20 O.L.R. 170, 615.]

I think the present case differs from the *Maple Mountain* case and also from the *Canada Bonded* case.

The general by-law No. 15 of this company reads as follows:—

"Any director may, notwithstanding any rule or law or equity to the contrary, be appointed to any office under the directors with or without remuneration, but he shall not vote upon any question connected with the appointment or remuneration of such office."

After that by-law was passed, the action of the directors at a meeting held previously on the same day (recited in a resolution given below) was approved. That action was as follows:—

"Moved by H. C. Clarke seconded by W. R. Booth:—

"That it is expedient to appoint a manager-director of this company, whose duties shall be as follows" (setting them out) "and the said managing director shall receive a salary of $1,000 payable as follows: quarterly on the first days of April, July, October, and January. Carried."

The confirmation by the shareholders was as follows:—

"Moved by H. C. Clarke seconded by W. R. Booth, that the action of the directors with reference to the appointment of a managing director at a salary of $1,000 per year on the terms and conditions mentioned in minutes of the directors be and the same is hereby confirmed and approved of."

This created the office of managing director, detailed his duties, and fixed the salary. It was acted upon, Mr. Nicholson becoming managing director and remaining in that office until about the 4th May, 1915, when, at a general meeting of the directors on that day, the following appears on the minutes: "The question of providing for the management of the company was first taken up, and upon the motion of Messrs. Borer and Blagden, the president, A. C. Caldwell, was given complete charge of the management of the business, his remuneration to be 5 per cent. of the gross sales for the year. Carried."

This seems to me not to amount to the creation of a new office which the directors could create under by-law 16, but to be an addition to the duties of the president which, by the general by-law, in addition to presiding at meetings, etc., obliged him "*to discharge all duties required of him by the law and amendments thereto under which the company is organised* and of these by-laws." The action, therefore, of the directors was in effect the supersession of the managing director as a salaried officer and the addition to the president's duties by giving him, not merely an advisory position in regard to the managing director, but the actual direction and charge of the management of the business. As under the by-laws he already had authority to make contracts and engagements, and to draw, accept, and endorse bills of exchange, promissory notes, and cheques on behalf of the company, what he received as remuneration he received as president and not as managing director, which was a distinct office. He was not employed in a subordinate capacity or in any created office, and does not properly come within the description given in the *Canada Bonded* case, as I read it. His case falls directly within the terms of the statute, that any by-law for the payment of the president shall not be valid or acted upon until a general meeting has pronounced upon it. I think it is the payment of moneys that requires the sanction of a general

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meeting, and I am not aware of any case in which a general by-law delegating to the board of directors the right to fix the remuneration has been definitely held, without more, to be a valid compliance with the statute. Such a by-law does not fix or approve the payment when so fixed; and, in my judgment, that is essential before the money can be legally paid. The president of a company is its chief executive officer, and if he chooses, as such, to perform services which are not ordinarily within the duties of a president, but are put upon him by by-law prescribing his duties as president, that fact cannot, it seems to me, bring him within the definition in the *Canada Bonded* case as one in which he acts not as a director but as a clerk or subordinate officer. To apply the language of the Chief Justice of the Common Pleas in *Marks* v. *Rocsand Co.* (1921), 64 D.L.R. 254, 49 O.L.R. 137, the services might, in the peculiar circumstances of this case, be well described as "not more than it might reasonably be expected a large shareholder might do in the interests of his company, and so indirectly for his own benefit, without salary or other remuneration."

This case very clearly shews that to treat what was done as a confirmation in advance of what the directors might do as to salaries, would entirely defeat the purpose of the statute. The earlier by-laws were passed when the company had only Caldwell and Nicholson and their nominees as its shareholders. The purpose of these two was to control the directorate as well as the company itself, notwithstanding the fact that outsiders were intended to be brought in and their money used to finance the company, which, without them, would be a complete failure. So that, when in 1915 the remuneration of the president was fixed at 5 per cent. of the gross sales, the then shareholders were not given the opportunity of confirming it and knew nothing about it.

This seems a very easy way of evading the statute, and is, I think, an advance on any previous scheme for legalising payments intended to have behind them the sanction of a general meeting. It is bad enough to find that the transfer of such assets as were given for $30,000 worth of shares cannot be set aside because subsequent events render its rescission impossible. But, in my judgment, it is not necessary to hold that what was done in carrying out that initial fraud allows the promoters to tie the hands of those they induced to join the company and put their funds into its treasury and then to take the moneys of the company under the guise of salaries or percentages as if confirmed at a general meeting."

I am aware that in one case at least the inconvenience of sanctioning payments from time to time has been given as a reason for allowing compliance with the statute to be effected by antecedent authority under a general by-law legalising whatever the directors may subsequently do. But where a fraud has been perpetrated in the transaction by those who then controlled the company the argument of inconvenience has little weight and should not be given effect to. Fraud cuts through everything, and I do not consider that it stopped with the agreement to sell the assets to the company. It permeated all the organisation then accomplished, and was intended to give the promoters an advantage in reference to profits under the guise of salaries. This antecedent sanction preceded the issue of preference stock, and as such there is no reason why it should be pressed into service to perpetuate the wrong. No circumstances have intervened to render it inequitable to set its provisions aside.

I think the judgment should be varied by declaring that the $20,000 of shares was not paid-up when issued, and reserving to the company, or to the objecting shareholders for the benefit of the company, the right at any future time to take such action regarding it or any part of it as they may desire; and, subject thereto, that the plaintiffs' action on that branch should be dismissed without costs. The payment of $18,700 to Caldwell should be declared to be improper and illegal and he should be ordered to repay it to the company. The respondent Caldwell should pay the costs of that branch of the case, as well as one half of the costs of the appeal.

FERGUSON, J. A. (after briefly stating the nature of the first action and the findings of the trial Judge):—Having read the evidence and carefully considered the documents in the light of the oral testimony, and of the position and circumstances of the parties at the time the transaction was entered into, I am of opinion that the transaction disclosed in these documents should not be viewed or treated as a subscription by the Caldwell Orchard Company (Caldwell and Nicholson) for $50,000 worth of the common stock of the corporation, and the assumption by them of a liability to the company for the payment of $50,000, and the acceptance by the company of property in satisfaction of such liability. This is not a case wherein we are asked to inquire into the adequacy of the consideration paid for shares treated as having a par value of $50,000, which will not be done unless fraud be alleged and established: *Ooregum Gold Mining Co. of India* v. *Roper*, [1902] A.C. 125, 136-140; but is rather a case where we are called upon to consider the effect of the company dealing with its shares as if they were without a par value, and

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distributing these among its promoters on such basis: see *Society of Practical Knowledge* v. *Abbott*, 2 Beav. 559.

It is clear that the board of directors that represented the company were what is described in some of the cases as "dummies," who did what they were told to do by the vendors and the solicitor they employed to superintend and carry through for the promoters the incorporation and organisation of the corporation; that the only thought bestowed and judgment exercised upon or in reference to the incorporation, organisation, and the transaction attacked, was that given and exercised by the promoter-vendors acting by and with the advice of their solicitor. In fact, the then shareholders and directors of the company were, in all their actions, guided, dominated, and controlled by the defendant Caldwell. His was the master-mind. All the others who took part in the transaction were figureheads, moving and acting without pretending to or attempting to exercise any will or judgment of their own; and I am satisfied that not one of the then shareholders and directors held the view or belief that the law cast upon them any duty or obligation to protect the company or its future shareholders. In that it was intended that the common stock should be issued and exchanged without reference to its par value for property worth perhaps two cents on the dollar of its par value, and that the preferred stock which had no preference as regards capital should be issued and sold at par, what was done and intended was, I think, inequitable and in law a fraud upon the company and its future shareholders: *In re British Seamless Paper Box Co.*, 17 Ch. D. 467, at p. 476. I do not think that the persons who took part in the transaction may be accused of fraud in the sense of intentionally doing something that they knew to be wrong. They played their several parts, thinking that they were acting according to law, and not neglecting any legal duty to the corporation or its future shareholders; but see *Nocton* v. *Lord Ashburton*, [1914] A.C. 932 at p. 955.

Caldwell had had some experience in corporation transactions, and he consulted with a solicitor and considered how he might secure capital for the corporation without being obliged to file a prospectus and make disclosures necessary to the flotation and sale of the capital stock of a public company; he appears to have acted on the hypothesis that, so long as the number of shareholders of the company was kept under 10, over and above the number of the original subscribers for stock, the corporation need not file a prospectus, and was and would continue to be a private company, and one that could exchange its capital stock without reference to its par value, or could issue its

capital stock and accept in payment therefor property at any valuation he chose to put upon the property, so long as all the then shareholders knew what was being done and approved. See sec. 97 of the Ontario Companies Act, 7 Edw. VII. ch. 34, and Caldwell's evidence.

The question is, was Caldwell right? Does the law permit the doing of what was done and intended?

The defendant company was incorporated under the Ontario Companies Act. By its charter, each share was given a par value of $100. There is no provision in the Ontario Act, such as is found in the Dominion Companies Act, for the creation of a company having objects such as this company, with power to issue shares having no par value. See Mulvey's Dominion Company Law (1920), pp. 9 to 11.

At the date of this transaction, the company was, by sec. 97 of 7 Edw. VII. ch. 34, free from any obligation to file a prospectus, and in certain respects may still have similar rights and privileges to those enjoyed by a private company as defined in the Ontario Companies Act, passed subsequent to the transaction (see 2 Geo. V. ch. 31, sec. 2, R.S.O. 1914, ch. 178, sec. 2). Though at the time this company was incorporated, and at the date of the transaction, there was no provision in the Ontario Companies Act in reference to the formation of a private company (see 7 Edw. VII. ch. 34), the question remains: Was this a private company within the meaning of the English cases? If it was, there is much in *Salomon* v. *Salomon & Co.*, [1897] A.C. 22, and *Attorney-General for Canada* v. *Standard Trust Co. of New York*, [1911] A.C. 498, tending to support Caldwell's position; but, on a careful study of the cases, I do not think that they can be accepted as authority for the proposition that a company incorporated under the Ontario Companies Act, other than a mining company, may issue its shares at a discount, or may exchange its capital stock at any value other than its par value, or may accept, in payment for its capital stock, something other than what it has—not being misled or intending to mislead —agreed to accept as being worth the par value of the stock issued, particularly where it is intended that other persons shall join the company and become shareholders therein; for, on my reading of these cases, it appears to me that there may be a great and fundamental difference between what these cases call a private company and a private company as defined in our Ontario Companies Act. The term "private company," as used in these cases, was discussed in *In re British Seamless Paper Box Co.*, 17 Ch. D. 467, and appears to be a company that intends to carry on its

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business without calling in the public or issuing shares, except to shareholders who had signed the articles of incorporation, or were parties to the transaction, or at least shareholders at the time of the making of the transaction attacked; whereas a private company, as defined in the Ontario Companies Act, is a company which may call in the public to a limited extent and issue shares to new shareholders, and in the case of the defendant company it was always intended that additional shareholders should be sought, and, as they were, secured.

In both the *Salomon* and *Standard Trust Company* cases, it was not intended that persons other than those who took part in the transaction should become members of the company, and no others did become members. In neither case was the transaction an exchange of stock, on the basis that it had no par value, for property of nominal or little value. In both cases the transaction was entered into by persons understanding and believing the law to be that the capital stock of the company could not be issued at a discount, and with no intention that it should be, but with the intent and purpose that the capital stock should be issued at par and paid for by property which the then shareholders, not being misled or intending to mislead, agreed to accept as worth the par value of the stock. In the *Salomon* case the articles of association, and in the *Standard Trust Company* case the Act of incorporation, expressly authorised the transfer of the shares for the property accepted, and there was no prohibition against issuing shares at a discount; whereas, in this case, neither the charter nor the Act (sec. 25 of the present Companies Act was not then enacted) authorised an exchange or issue of stock for property, while secs. 100 and 136 (then secs. 96 and 139 of 7 Edw. VII. ch. 34), and the cases collected in Mitchell's Canadian Commercial Corporations, p. 256, seem to me to make it clear that the issue of stock at a discount is contrary to law.

There are many authorities dealing with the duties and obligations of directors when forming judgment upon the value of property taken in satisfaction of the liabilities of a promoter, incurred on a subscription for stock, and dealing with the duties and obligations of promoters to make full and fair disclosure to such directors, to enable them to form an opinion and exercise an independent judgment on the valuation of property which the promoters propose to transfer to the company in satisfaction of a liability: see Masten and Fraser's Company Law, 2nd ed., pp. 207-209; and there are many others discussing and determining what may amount to an affirmation of or an estoppel in respect of such a transaction; and, if this were a case requiring a find-

ing on whether or not there had been an affirmation or whether or not there were circumstances establishing acquiescence or estoppel, I should have difficulty in finding affirmation, acquiescence, or estoppel, for the questions would arise: What was the contract affirmed? Was it a purchase of the goodwill and property, or a purchase of the property only, and at what price? Did the shareholders know and understand the contract and their rights or should they have known? Did they intend to affirm? Are the rights of any innocent third party affected? Are the plaintiffs estopped not only from denying that they themselves are shareholders, but from denying that the company's dealings with promoters were illegal? See cases collected in Halsbury's Laws of England, vol. 13, pp. 164-174: *Denman* v. *Clover Bar Coal Co.* (1913), 48 Can. S.C.R. 318, 15 D.L.R. 241; *Farrell* v. *Manchester* (1908), 40 Can. S.C.R. 339. In the view I have taken of the transaction, and the meaning and effect of *Lindsay* v. *Imperial Steel and Wire Co.*, 21 O. L.R. 375, it is not necessary to consider these authorities. For, in my own opinion, Caldwell, his associate, and the board of directors entered into the transaction, believing and acting upon the assumption or conclusion that because the unissued capital stock of the company had not actual intrinsic money value, it had no value in the eyes of the law, and might be exchanged or issued without regard to its nominal par value. Neither he nor they considered that it was necessary to the lawful issue of the stock that the company should get $50,000 in money, or what he and they *bonâ fide* believed and agreed had a value equal to $50,000. The promoters Caldwell and Nicholson never intended to give or believed that they were giving $50,000 or its equivalent for the $50,000 worth of capital stock issued to them, and they never intended to enter into, and in my view never did enter into, a transaction with the company wherein they gave or were obliged to give the company $50,000, either in money or kind, and the directors of the company never for one moment believed that the vendors intended to do so, or had done so, or that they, the directors, were supposed to receive, had agreed to accept, or had received, $50,000 in money or kind. According to the real intent and purpose of all parties, and also according to the wording of the documents of agreement and transfer, the transaction was an exchange of capital stock, which all agreed was of no value, for property known to all to be worth only a small fraction of $50,000. All parties believed that the law permitted such a transaction, and they never intended to make or affirm any other.

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[The learned Judge set out the resolution authorising the transaction, as passed by the shareholders who incorporated the company at the organisation meeting of the company on the 27th March, 1912; the resolution passed by the directors on the 8th April, 1912; the agreement referred to in the directors' resolution; and the bill of sale carrying out the transaction.]

It is to be noted that, while the resolution passed by the shareholders on the 27th March, 1912, mentions the goodwill of the vendors' business, the agreement of purchase entered into by the directors does not mention it, and the bill of sale does not transfer it: yet, when the transaction is attacked, it is not to the assets and property mentioned and described in the agreement and bill of sale that the vendor-promoters turn for a justification, but they point to an intangible asset which, according to the document, was not transferred or agreed to be transferred, i.e., goodwill.

The evidence of the defendant Nicholson is that the chattels mentioned in the agreement and bill of sale were worth less than $1,000. Caldwell's evidence does not put them much, if any, higher; but at the trial he endeavoured to make out that the leases and options mentioned in the documents had a problematical or potential value, which, unfortunately for him, they did not realise, for we find in the auditor's report that the assets transferred realised only $1,000, and that goodwill is credited with $49,000. The item on p. 3 of the auditor's report reads:—

"Goodwill $49,000.

"Under an agreement dated 8th April, 1912, entered into between your company as purchaser and A. C. Caldwell and G. E. Nicholson as vendors, your company purchased certain goods, chattels and effects, the consideration being 500 shares of common stock, which were duly issued, and the following accounts were charged:—

"Plant, covering baskets, ladders, etc., as per inventory	$	1,000.00
"Goodwill		49,000.00
		"$50,000.00"

Though the goodwill was not transferred or agreed to be, let us consider the question: Is there anything in the evidence to lead one to a reasonable belief that the goodwill had, or that any one thought it had, any such value as $49,000? I think not. Actions speak louder than words. Nicholson's evidence is that

he had, within three years prior to March, 1912, bought from Caldwell a third interest in the partnership business, which was being transferred to the corporation for $1,800; that, during the time between his purchase and the transfer to the corporation, the partnership of Caldwell & Nicholson, carried on under the name Caldwell Orchard Company, had not made any profits, and that all he had received out of it was his salary of $600 per year. Caldwell's recollection was that Nicholson had paid him only $800 for the third interest, but he thought the partnership had made some profits, for he remembered dividing with Nicholson the sum of $500 obtained for a transfer to the Canadian Pacific Railway Company of the partnership's leasehold or option rights in an acre of orchard land, but that was the only sum he was able to recall as having been divided by the partnership of Caldwell & Nicholson as a result of their two or three years' business.

At the trial the defence sought to justify a valuation of $50,000, but to my way of thinking they failed to produce any evidence on which it can be found that the assets transferred, agreed to be transferred, or intended to be transferred, and in the latter I include the goodwill, ever had or could have a value approximating $50,000; and I am satisfied that, at the time the transaction was entered into, the value was not considered, and it was not agreed or intended to be agreed that the assets transferred had a value of $50,000; and that, had the promoters, shareholders, and directors then thought that the goodwill and assets transferred were supposed to be of such a value as $50,000, every one of them, including Caldwell, would have realised that the transaction was not honestly possible.

The term of the agreement providing that 200 shares of the capital stock, having a par value of $20,000, should be held in trust, to be used by the company on the sale of its preferred stock, is, I think, cogent evidence not only that the parties knew that the assets transferred were not worth $50,000, but that the shareholders and directors believed that the directors, acting for the company, could legally take for the company something known by them to be of value less than $50,000 for $50,000 of the capital stock, and could re-allot or transfer the stock thus issued as a bonus on the sale of the preferred stock. This view of the transaction is, I think, substantiated by the form of agreement used by the company in taking subscriptions for preference stock. (The agreement is set out in the statement of claim in the Blagden action tried with this action). And it is also substantiated by the fact that, although one or more dividends on the common stock were declared and

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paid, the trust stock, which had not been transferred to purchasers of preferred, was treated by the company as not outstanding, and no dividends were paid thereon.

Had it been intended that the beneficial title to that 200 shares of the common stock was to be vested in Caldwell and Nicholson, subject to an agreement of their part to transfer it to subscribers for preferred as they subscribed, Caldwell and Nicholson would have been entitled to dividends on such part of the trust stock as remained in their hands; yet, although the auditor's report shews that 127 of the 200 shares remained in the hands of Caldwell and Nicholson up to the time of the trial, and although the evidence is that both these persons were directors and managers of the company, when the dividends on common stock were declared and paid, they did not then, and did not at the trial, assert a claim to dividends on this 127 shares; all of which circumstances lead me to the conclusion that it was intended that these 200 shares, having a par value of $20,000, should be held by Caldwell and Nicholson in trust for the company, and that they were in fact so held, and that the transaction attacked must be held to be an attempt to issue the shares of the company at a discount, contrary to law and the statute, and was therefore, and also because of the other circumstance that the company purported and intended to exchange its capital stock, without reference to its par value, for property without agreeing on its value: a transaction which, as regards the company and its future shareholders, was inequitable, and in that sense fraudulent and illegal, entitling the company, or, in a class-action, those defrauded, unless barred by affirmation or estoppel, to have the transaction set aside: *Erlanger* v. *New Sombrero Phosphate Co.* (1878), 3 App. Cas. 1218, and cases collected in Masten's Company Law, pp. 207-209 and 520-526; Palmer's Company Precedents, 11th ed., part I., pp. 1357-1360; also *Fullerton* v. *Crawford*, 59 Can. S.C.R. 314, 50 D.L.R. 457.

If I be right in the opinion that what was done amounted to an agreement to issue the shares for something less than their par value, it seems clear that such an agreement was not merely a voidable agreement, but one which the company could neither make nor ratify; but it may not follow that, because the agreement to accept less than par for the shares was *ultra vires*, the agreement to issue and the issue of the shares are also *ultra vires* —the English cases appear to treat the agreement to take less than part as *ultra vires*, but yet to hold the share-issue as *infra*

vires, and, by sec. 25 of the Companies Act, to attach to the holder of such shares a liability to pay the par value thereof: Buckley's Companies Act, 9th ed., p. 214.

This brings us to a consideration of the questions: Does the Ontario Companies Act, except the circumstance set out in sec 74, cast upon the holder of unpaid shares a liability which he did not contract to assume—in other words, is the meaning and effect of the provisions of the Ontario Companies Act the same as that of the English Companies Act? And are the English cases applicable, or have our Courts interpreted the Ontario Act as not attaching to the holder of shares agreed to be and in fact issued at a discount any liability other than the liability assumed by contract?

On my reading of *Lindsay* v. *Imperial Steel and Wire Co.* (*supra*), this Court determined that shares issued under an *ultra vires* agreement, i.e., an agreement to issue shares as fully paid-up, without consideration, were illegally issued and should be set aside. This Court is bound by that decision, and it seems to me to follow that, while the judgment stands, we cannot declare the agreement *ultra vires*, but the share-issue valid.

The transaction differs a little from that in question in the *Lindsay* case, in that there the parties to the transaction knew and appreciated their difficulties, and the illegality of what they intended and attempted to do, and at the time of the transaction attempted to give it a false face, while in the case at bar the parties, not knowing and appreciating that there was any illegality in what they intended to do, expressed their intent in the documents and did not attempt to colour the facts, and in that way to fashion and put upon the transaction a false face.

I have not overlooked *Re Modern House Manufacturing Co.*, 29 O.L.R. 266, 14 D.L.R. 257, and the opinion of two of the members of this Court to the effect that the defendants, having accepted the shares and acted as shareholders, should be deemed to be shareholders, and to have assumed a liability to pay for their shares, and that the remedy is not to set aside the allotment, but to hold the allottees liable for what is unpaid; although that opinion was not the opinion of the Court, the reasoning of it has had my careful consideration; but I think, in the circumstances of the case, the line of authorities relied upon and referred to by these two Judges can have no application, because the company, although a party to the action, is not asserting a new contract with these shareholders, or, as against them, an estoppel such as was, on claim of a liquidator, made effective in *Re British Cattle Supply Co. Limited* (1919), 16 O.W.N. 62, 206.

All the parties to the action have submitted their rights to

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the Court, on the basis of the validity or invalidity of the original agreement, and in these circumstances I do not think that we can or should hold that the shares forming the subject-matter of this branch of the plaintiffs' claim were issued, allotted, and received, subject to any liability; to attach now such a liability would, I think, be to make a new contract for the parties and one which they never intended to enter into, adopt, or affirm, and one which is not now asserted by any party.

As stated by Meredith, C.J.O., in the *Modern House* case, 29 O.L.R. at pp. 268, 269, "the shares were issued as paid-up shares, and accepted as paid-up shares."

It is, I think, clear that such cases as *Welton* v. *Saffery*, [1897] A.C. 299, *Re British Cattle Supply Co. Limited* (*supra*), and *Re McGill Chair Co.*, 26 O.L.R. 254, 5 D.L.R. 73, fasten upon a shareholder a liability he never intended to assume or contracted to assume. The *Welton* case is based on sec. 25 of the English Companies Act, which provides that "every share shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash unless," etc., from which it seems to follow that, even if the company and shareholder contracted for the sale and purchase of the shares at a discount, yet by statute the purchaser takes and holds the shares subject to a liability to pay the difference between the contract price and the par value, and that the remedy in such case is not to set aside the issue of the shares but to order the shareholder to pay the difference.

In *Re McGill Chair Co.* (*supra*), Meredith, C.J.C.P. (now C.J.O.), was of opinion that, although there was no such express provision in our Ontario Companies Act, yet the meaning and effect of the Ontario Act and of the English Act, were the same, and that the English cases were applicable to Ontario companies. I am not prepared to say that we can or should make a new contract for the parties or fasten on the parties a liability not intended or contemplated in their contract unless authority to do so is expressly given by statute: *Anderson's Case* (1877), 7 Ch. D. 75, opinion of Jessel, M.R., at pp. 95 and 104: and, with respect, I am of opinion that the Ontario Companies Act does not contain any provision either requiring or permitting such to be done, except perhaps sec. 74, and then only against a shareholder on the register at the time of action brought for winding-up, and in favour of a creditor or a liquidator representing creditors, as was the case in *Re British Cattle Supply Co. Limited*. If I be wrong, and the meaning and effect of our Ontario Companies Act have been correctly declared and defined in the *McGill* case,

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it would seem to follow that the contract in question in this action between Caldwell and Nicholson and the company should be declared to be an *ultra vires* and illegal contract, but that the meaning and effect of the Ontario Companies Act is such that Caldwell and Nicholson must be deemed to have taken and held the stock subject to a liability to pay the par value thereof, and that, not having, within a reasonable time after the issue of the stock, taken active steps to set aside the issue on the ground of fraud or mistake, they cannot at this late date have that relief. See *First National Reinsurance Co. Limited* v. *Greenfield*, [1921] W.N. 11, [1921] 2 K.B. 260.

There are authorities for the statement that stock issued and intended to be issued at a discount is not, in the absence of express statutory declaration to that effect, void, but is voidable only. These are collected in Corpus Juris, vol. 14, p. 449, but this statement and the *McGill Chair Co.* case seem to me to be contrary to the holding in *Lindsay* v. *Imperial Wire and Steel Co.* (if not to that in the *Modern House* case), by which we are bound.

In any event, neither the vendors nor the company ever affirmed or intended to affirm the issue of the stock on the basis of there being a liability on the allottees to pay anything other than the consideration mentioned in the documents, and neither is seeking such a declaration or result, and this is not a case where the rights of creditors must be considered, as may be necessary in a winding-up, or in an action by a liquidator or creditor.

It has been argued that there are no merits in the claim of the plaintiffs, and that they made a profitable investment. I have studied the auditor's balance-sheet for 1919, and it seems to me to shew that, if these plaintiffs were not defrauded, they were clearly overreached, because, if the tangible assets of the company were realised and distributed on the basis of the 1919 balance-sheet, the common stock, which represents an actual investment of $1,000, would receive about $23,000, while the preferred shares, which represent an investment of $36,200, would receive about $17,000. That does not appeal to me as a profitable investment for the preferred shareholders.

I am of opinion that the company was not a private company within the meaning of the English cases, and that the transaction was an exchange of shares and property without reference and regard to the par value of the shares, on the hypothesis that there is, in law, no difference between shares declared to have no par value and those declared to have a par value, and without reference or regard to intrinsic value of the property,

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by which it was intended to issue shares for less than par, and to reserve to the company the beneficial title in 200 of the shares for the purpose of allowing the company to transfer them as a bonus on the sale of the preferred stock; also that the transaction is not severable, and that it must stand or fall as a whole.

For these reasons, I would allow this branch of the plaintiffs' appeal, and declare that the agreement of the 8th April, 1912, was *ultra vires*, illegal, and void, and that the stock purported to be issued by the company pursuant thereto was not legally issued, and that the certificates for such stock are void and of no effect, and should be delivered up to be cancelled, and that the stock-register of the company be amended accordingly.

This brings us to the consideration of the second branch of the plaintiffs' claim, which is to declare invalid the payments of salary made to the defendant Caldwell, and for the repayment of the same. This involves a sum of between $18,000 and $19,000, and on this branch of the appeal I am of opinion that the appellants fail, for the following reasons.

[The learned Judge referred to secs. 84, 88 (c), and 92 of the Companies Act, R.S.O. 1914, ch. 178, and to the by-law and resolution of the company (set out above) in regard to remuneration.]

It was argued on behalf of the appellants that, according to the true intent and meaning of sec. 100, the shareholders must pass upon the amount of the remuneration; also that the resolution of the directors appointing Caldwell manager at a salary was only for one year, and that at most Caldwell was entitled, under that resolution, to salary for one year only. I am opinion that neither of these contentions is tenable. Section 100 does not say that the amount of the remuneration shall be fixed by the shareholders.

By sec. 84 of the Act, the management of the company is given to the directors; by sec. 88 the appointment of officers is also given to the directors; and, to my way of thinking, these two sections give the directors not only the power of appointment but the power to fix salaries of their appointees.

While not entirely prohibiting, the rules of equity limit so as almost to prevent, persons in a fiduciary position, such as Caldwell, from contracting with their *cestuis que trust* or from making a profit out of the property and business committed to their charge: *Transvaal Lands Co.* v. *New Belgium (Transvaal) Land and Development Co.*, [1914] 2 Ch. 488, 502; and sec. 100 of the Act was inserted to permit a waiver of these rules, and to lay down how such a waiver should be made and evidenced.

By-law 15 is a shareholders' by-law. It not only waives the right to object to a director making a profitable contract with the company, but expressly authorises the making of contracts with directors and their employment as officers on a salary. True, sec. 100 is worded as a prohibitory provision, but means, I think, that a director shall not be employed at a salary, unless the payment of a salary be authorised by the shareholders, rather than that the amount of such salary shall be fixed or approved by the shareholders. The shareholders having, by by-law 15, expressly authorised Caldwell's employment on a salary basis, he would, I think, be clearly entitled to some remuneration, and the question is: May that remuneration be fixed by the directors or by the Court, or must it be fixed by the shareholders? The directors have fixed it; and, in the absence of fraud, I do not think that what they have done may be questioned: *Mackenzie* v. *Maple Mountain Mining Co.*, 20 O.L.R. 615; and certainly not by minority shareholders: Palmer's Company Precedents, 11th ed., part I., pp. 1357 to 1360.

Neither am I able to agree in the plaintiffs' second contention that the resolution applies only to the year in which it was passed. I am not clear that the real meaning and effect of the resolution as written was to confine the employment of Caldwell to one year; but, even if such be the true interpretation of the resolution, I would still hold to the opinion that the directors, having received authority from the shareholders to employ a director with remuneration, it was not necessary, each year, to pass a new resolution, but that the employment thus authorised and entered into might be continued indefinitely, and that the law would presume that it was continued on the same terms.

I would, for these reasons, dismiss this branch of the plaintiffs' appeal.

In the result, the plaintiffs have had substantial success in the action and the appeal, and are entitled to the general costs of the action and of the appeal, but not to the costs of the issue on which they have failed.

I think the defendants should have the costs occasioned or resulting from the claim to the salary.

In the second action, BLAGDEN v. WENTWORTH ORCHARD CO. LIMITED, FERGUSON, J.A., read the following judgment:—The plaintiff is one of the persons who purchased and paid for preferred shares—the prayer of his claim reads:—

"1. To have his name removed from the register of shareholders of the defendant as the holder of 36 shares of preference stock and 7 shares of common stock.

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"2. The repayment by the defendant to the plaintiff of the sum of $3,600 paid by the plaintiff to the defendant for said shares, together with interest from the dates the several sums were paid.

"3. His costs of this action."

The claim for relief is not based on fraud or misrepresentation, but upon allegations that the company was a public company and failed to file a prospectus and take the other steps necessary to be taken by such a company in connection with the sale and allotment of its capital stock and to obtain a certificate entitling it to commence business, and also on the ground that his shares were not allotted.

When the plaintiff first subscribed for stock, October, 1912, the number of shareholders was under 10, over and above the number of the original subscribers, and under sec. 97 of the Companies Act, 7 Edw. VII. ch. 34, it was not then necessary for this company to file a prospectus or to obtain a certificate entitling it to commence business.

From the date of his first subscription for stock in 1912, down to action brought in August, 1919, the plaintiff voted and acted as a shareholder; in the years 1913 and 1914 he subscribed for further shares; he acted as a director during the years 1913, 1914, 1915, 1916, and 1917, and each year was a party to declaring dividends on his stock, which dividends he received and retains, and has not offered to return. It is, I think, decided by this Court in *Morrisburgh and Ottawa Electric R.W. Co.* v. *O'Connor* (1915), 34 O.L.R. 161, 23 D.L.R. 748, that the right to complain of failure to comply with the requirements of the Companies Act, in respect of the matters alleged, will be lost if not exercised promptly.

And it seems clear to me that the plaintiff has not acted promptly, and for that reason, and because of his many acts as shareholder and director, that he is estopped from denying that he is a shareholder and debarred from claiming rescission.

It is to be noted that the contentions as to the constitution of the board of directors in the years 1913 to 1918, and the regularity of the elections of such boards and the validity of their acts, raised by paras. 10 and 11 of the plaintiff's claim in this action, are not raised or pleaded in *Hood* v. *Caldwell*, rendering it unnecessary in that action to consider the effect of irregularities such as are alleged in the action of the board of 1915 in employing Caldwell to act as manager at a salary.

I would dismiss the appeal with costs.

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MACLAREN, MAGEE and HODGINS, JJ.A., agred with FERGUSON, J.A.

MEREDITH, C.J.O.:—The *Blagden* case is a much simpler one than *Hood* v. *Caldwell*, and there can be no question as to the correctness of the decision of the learned trial Judge. None of the grounds on which relief is claimed are maintainable. As I have already mentioned, Blagden became a shareholder on the 20th June, 1912, and was a director of the company, elected to that office on the 11th April, 1913; and, judging by the minutes, was one of the most active members of the board. He was present when the shareholders decided to increase the number of directors to 5, and the omission to pass a by-law providing for the increase, if that was necessary, was the fault of Blagden as well as of the other directors; so too as to the failure to file a copy of the by-law with the Provincial Secretary, which was however not necessary to make the by-law effective.

Oddly enough, it was Blagden who insisted at the shareholders' meeting of the 19th March, 1919, on the number of the directors being 5, and assisted in successfully resisting a proposition to reduce the number to 4.

The Act of 1907 (7 Edw. VII. ch. 34) was in force until the 1st August, 1912, and the obligation to issue a prospectus did not exist when Blagden became a shareholder, because the number of shareholders was not then greater by 10 than the number of applicants for incorporation: sec. 97 (1).

There is nothing in the objection as to the allotment of the shares to Blagden: *Crawley's Case* (1869), L.R. 4 Ch. 322.

As to all of the objections raised by Blagden, he is estopped by his actions and conduct, even if they were otherwise tenable as most of them are not.

I trust that few directors are as remiss in the performance of their duties as Blagden in the 5th paragraph of his statement of claim says that he was.

I would dismiss his appeal with costs.

Appeals in both actions dismissed (HODGINS *and* FERGUSON, JJ.A., *dissenting in the first action*).

BISHINSKY v. APPLETON.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins and Ferguson, JJ.A. May 13, 1921.

SALE (§IIIA—52)—SUITS SOLD—GUARANTEE OF EXCLUSIVE STYLES—CONDITION BROKEN—RETURN OF PORTION OF GOODS—ACTION BY SELLER FOR THOSE DISPOSED OF—COUNTERCLAIM FOR DAMAGES—RIGHTS OF PARTIES.

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A buyer being given the option of pursuing instead of damages a substituted remedy such as the return of the goods, may avail himself of this, and in such case an action for damages is excluded. [See Annotation on Sale, 58 D.L.R. 188.]

THE following statement is taken from the judgment of HODGINS, J.A.:—

Appeal by the plaintiffs from a judgment entered by HEARN, Judge of the County Court of the County of Waterloo, after a trial before him with a jury, whereby the defendants, respondents, were given judgment for $479.52, with costs, for damages against the appellants. The action was brought in the County Court for the price of goods sold and delivered, and the defendants counterclaimed for damages.

I set out the answers of the jury to the questions submitted, and the discussion which followed, as they practically detail the contest between the parties:—

1. Did Mr. McQuarry, when taking the order in question, agree on behalf of the plaintiffs to confine styles to the defendants alone in Galt? A. Yes.

2. If so, did Mr. McQuarry have authority to confine the styles? A. He had.

3. What was meant by "styles" in that regard? A. General cut and make-up.

4. Did Mr. McQuarry agree with the defendants that if any styles sold by the plaintiffs to the defendants were sold to any other merchant in Galt, the defendants should be at liberty to return the goods on hand purchased from the plaintiffs? A. He did.

5. If so, did Mr. McQuarry have authority to make such an arrangement? A. He had.

6. Was it a condition upon which the defendants gave the order, that the styles sold to the defendants would be confined to them and not sold to any other merchant in Galt? A. Yes.

7. Did the defendants accept the goods in question? A. Yes.

8. If so, what constituted such acceptance on their part? A. The fact of offering the goods for sale constituted acceptance.

9. Was the defendants' store an exclusive store as regards Galt? A. It was.

10. If you find that the plaintiffs complied with their contract, what sum is due them for the goods? A. Bishinsky Bros. broke their contract with Appleton & Co.

11. If you find that the plaintiffs did not comply with their contract, did the defendants suffer any damages as a result? A. Yes.

12. If so, at what sum do you assess the defendants' damages? A. Damage to business character $200, damage for loss

of business $427.50, less cheque for amount of goods sold $147.98.

THE JUDGE: So that I take it the damages you assess will be $427.50, plus $200, making $627.50, less $147.98; net damages, $479.52.

Foreman of the Jury: Your Honour, the jury wanted the four dresses bought by defendants from plaintiffs and sold by defendants paid for, that is, the 4 suits. If the plaintiffs will be tendered that cheque for $147.98, then the defendants are to get $627.50.

THE JUDGE: In that case judgment would be entered for plaintiffs for $147.98, the amount of the cheque for goods sold; and judgment for defendants for $627.50. That would make it a question whether the plaintiffs should get costs for the amount of their goods sold.

Foreman: That $147.98 was for the goods returned. The jury thought that the plaintiffs were entitled to be paid for those goods. They agreed that there was nothing coming to the plaintiffs outside of those 4 dresses that were sold. They agreed on the 12 questions, and then it was brought up what should be done with the cheque that had not been cashed, and we were at a loss as to what should be done with it with respect to the verdict. We were not particular as to how they got it, but we agreed that Bishinsky Bros. were entitled to the amount of the cheque for goods sold by the defendants. It was the intention of the jury that Appleton & Co. would receive $627.50 clear damages, and the plaintiffs to pay all the costs; defendants to pay for goods sold by them.

Judgment was entered for the defendants in the County Court for $479.52 and costs.

R. Wherry, for appellants.

M. A. Secord, K.C., for respondents.

The judgment of the Court was read by

HODGINS, J.A. (after setting out the facts):—No question arises as to the $147.98, for which the appellants are entitled to judgment.

The damages are divided into two heads: loss of business character, $200; and loss of business, $427.50.

The goods, ready-made suits, were invoiced to the respondents at $621, so that the damages allowed by the jury exceed the purchase-price of the goods sold to the respondents.

As they returned all but $147.98 worth, the disparity between the value of the transaction and the damages which arose out of it is still more startling.

The evidence upon which the jury founded most of their conclusions is flimsy in the extreme and would need very care-

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ful scrutiny if, on the answers made, a result could not be arrived at without analysing it.

The case is the ordinary one of goods sold, delivered, and accepted, and some of them sold by retail. The only question, apart from damages, is the effect of the condition found by the jury in answer to Q. 6, that "the styles sold to the defendants would be confined to them and not sold to any other merchants in Galt." This condition is found to have been broken, but its effect as to damages is practically destroyed when applied to the facts.

It was a condition the performance of which or its breach would necessarily occur after the contract had been performed in part. It is comparable to the condition referred to in *Behn* v. *Burness* (1863), 32 L.J.Q.B. 204, at p. 206, by Williams, J., and must be construed in the same way. He there said:—

"But with respect to statements in a contract descriptive of the subject-matter of it, or of some material incident thereof, the true doctrine established by principle, as well as authority, appears to be, generally speaking, that if such descriptive statement was intended to be a substantive part of the contract it is to be regarded as a *warranty*, that is to say, a condition, on the failure or non-performance of which the other party may, if he be so minded, repudiate the contract *in toto*, and so be relieved from performing his part of it, provided it has not been partially executed in his favour. If, indeed, he has received the whole, or any substantial part, of the consideration for the promise on his part, the *warranty* loses the character of a *condition*, or, to speak more properly, perhaps, ceases to be available as a *condition*, and becomes a *warranty* in the narrow sense of the word, namely, a stipulation by way of agreement for the breach of which a compensation must be sought in damages."

See also Williams' Saunders, vol. 1, p. 554, note (*f*), cited and approved in *Heilbutt* v. *Hickson* (1872), L.R. 7 C.P. 438, at p. 450; *cf. Stanton* v. *Richardson* (1872), *ib.* 421, at p. 436, where Brett, J., said:—

"When the stipulation is that the ship shall be ready to load within a fixed time or a reasonable time, and the cargo is loaded and carried; though before loading this might be a condition precedent, inasmuch as the charterer has loaded and derived benefit from the charter, he cannot rely on it as a condition, but must treat it as a warranty."

Here, if there were nothing more, the only right left to the respondents, as they had accepted and sold some of the goods, was an action for breach of the condition found by the jury,

construed as a warranty. The damages recoverable for the breach would be the difference between the value of the goods delivered and what would have been their value if the condition had been faithfully performed: *Heilbutt* v. *Hickson*, L.R. 7 C.P. at p. 453.

The answer to Q. 4, however, seems to dispose of any question as to damages, as it finds that the appellants' agent agreed that on breach of the condition the respondents should be at liberty to return the goods, and they have acted upon that option.

If the buyer is given the option of pursuing, instead of damages, a substituted remedy, he may do so, but if he does an action for damages is excluded: Halsbury's Laws of England, vol. 25, para. 479; and, if the substituted remedy is the return of the goods, the buyer may return them, although they may not be in the same condition as when he received them, if the change is not caused by this act or default: *Head* v. *Tattersall* (1871), L.R. 7 Ex. 7; *Heilbutt* v. *Hickson*, L.R. 7 C.P. at p. 454.

No damages have been allowed for loss of profits upon the goods which were returned.

As to "damage to business character" $200, the evidence is of the most inadequate and ridiculous kind. Sums as large as $1,000 and $2,000 were mentioned by the husband and wife of the respondents as representing the damage their reputations had suffered. Narrowed down to its details, it appeared that they bought 14 garments in all, comprising 5 "styles," so that there were several of each style for sale at their own store. They claimed first to be entitled to a monopoly in any "style" of which they bought even one article, and asserted that the sale by a competitor of one of the same "style" would completely destroy their business reputation as an "exclusive store." On its being pointed out that to sell their own duplicates, of which there were 8 in 14 coats, was just as bad as if sold by a competitor, they took refuge in the declarations that they would not sell a duplicate in Galt, that it did not apply in black goods, and finally that exclusiveness was confined to articles worth more than $50 (Mr. Appleton says $60). The learned Judge points out in his charge that, judged by that standard, there were only 4 articles out of their whole purchase of 14 to which their own definition would apply. Upon this foundation the jury awarded $200. As to loss of business, no particulars of damage were given before the trial; particulars were intentionally withheld, although demanded, and the evidence on which the jury assumed to assess them at $427.50 is entirely wanting in cer-

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tainty or reasonableness. No claim is made for special damages, but merely for the breach of the agreement to confine styles to the respondents.

I think the damages allowed are too remote, and that they are not properly founded, even if recoverable. No customers were produced to shew that the respondents' statements were true as to their trade having been lost, and the damages depend for their support wholly on assertions of the husband and wife, some of them manifestly based on imagination and some on loose conversations. See *Seaforth Creamery Co.* v. *Rozell*, 19 O.W.N. 134.

I think this is a case in which the findings of the jury as to damages should be set aside, and a finding of no damage substituted therefor.

The appeal should be allowed with costs, and judgment directed to be entered for the appellants for $147.98 and interest, with costs of action and counterclaim.

Appeal allowed.

McQUILLAN v. RYAN.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Latchford, Middleton and Lennox, JJ. April 24, 1921.

NEGLIGENCE (§IC—38)—COLLAPSE OF PARTY WALL—AGREEMENT—DUTY OF DEFENDANT—ALLEGED FAULTY CONSTRUCTION—NEGLIGENCE—DAMAGES.

A wall built as a "party wall" between two properties must be properly constructed for the use it is to be put to; and damages resulting from its fall owing to faulty construction may be properly given against the parties responsible for its erection.

APPEAL by defendant from a judgment of Kelly, J., in an action for damages for the destruction of the plaintiff's building by the collapse of a wall of the adjoining building, caused as the plaintiff alleged by the negligence of George B. Ryan, deceased, the defendant's testator. Affirmed.

The judgment appealed from is as follows:—

"The defendants are the executors of the last will and testament of George B. Ryan, late of the city of Guelph, who died on the 12th June, 1920.

It is admitted in the pleadings that the plaintiff is the owner of certain lands on the easterly side of Wyndham street, in Guelph, immediately adjoining which, to the north, are lands which were the property in his lifetime of the said George B. Ryan.

The statement of claim contains the following allegations in respect of the said properties, all of which are admitted by the defendants:—

"5. Upon the said adjoining properties were situate store

buildings, the property of the said George Byron Ryan and the said plaintiff, such store buildings being separated only by a dividing wall, which wall was based half upon the property of each.

"6. The said store building of the said George Byron Ryan extended 150 feet more or less from said Wyndham street, and was three storeys in height throughout its depth.

"7. The said store building of the plaintiff extended 50 feet more or less from said Wyndham street, at the same height of 3 storeys, and an additional 40 feet more or less, at the height of one storey only.

"8. All of the said dividing wall, except that portion being used as a wall of the said building of the plaintiff, was erected by the said George Byron Ryan.

"9. On or about the 27th January, 1918, the said store property of the said George Byron Ryan was destroyed by fire, the walls only remaining."

Shortly before 4 o'clock on the morning of the 26th February, 1918, during a wind-storm, part of the southerly wall of the burnt building fell towards the south upon the one-storey portion of the plaintiff's building, and crushed it to the ground. The plaintiff sets up that the collapse of the wall was due to the negligence of George B. Ryan, "in its faulty construction and faulty binding and support, because of his negligence in narrowing a portion of the said wall after its erection, and because of his negligence in permitting the said wall to remain standing in a dangerous and insecure condition, after the said fire, without support."

The defendants plead that the dividing wall between the two properties throughout its entire length was and is a party wall —one-half upon each of the two properties—and was and is owned in common by these parties, and that if there was any negligence in its construction or maintenance, or in permitting it to remain in its condition after the fire, the plaintiff is equally responsible therefor with the defendants, and so is debarred from claiming damages. They also set up:—

(1) That the wall, when built, was of good material and workmanship and properly and safely constructed by and under the supervision of a competent architect and contractor, with the consent and approval of the plaintiff.

(2) That, if the plaintiff had any claim for negligence in construction, such claim is barred by the Statute of Limitations.

(3) That at the time of the collapse of the wall the said George B. Ryan was lessee of the plaintiff's said property, and that, on the allegation that the plaintiff's building was injured

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by fire and tempest, he was required by the terms of the lease to repair at his own expense.

(4) That the plaintiff has received from a fire insurance company sufficient to reimburse him for any loss he sustained through the falling of the wall.

(5) That the occurrence "was caused by the act of God," in that the wall was struck and blown down by a hurricane or cyclone of extraordinary and unprecedented violence and severity.

It is in evidence that many years ago these adjoining properties were each built upon at the street-line with stores, three storeys high, having a depth of about 60 feet with a one-storey extension easterly, the plaintiff's one-storey extension extending only about 40 feet, as already mentioned. The history of the dividing wall, so far as it appears from the documentary evidence at the trial, is that on the 1st August, 1874, the plaintiff's predecessor in title conveyed to the defendants' predecessor in title a strip of land 1 foot in width at Wyndham street, and 1 foot 1 inch in width at its easterly end, and having a depth of 153 feet on its northerly limit, and 153 feet 7 inches on its southerly limit, the said southerly limit being the centre-line of the stone wall erected between the stores of these 2 owners (the stores of the present parties); and the grantor therein granted to the grantee therein named, his heirs and assigns:—

"The right to use a strip of land 10 inches in width to the east of the said strip 1 foot, and immediately adjoining the same, on which the said stone wall has been erected by the said party of the second part" (the grantee), "the wall being 20 inches thick, namely, 10 inches on the last mentioned strip of land and 10 inches on the first mentioned strip of land; and the said party of the second part" (the grantee) "to have the right to use half of the said 20-inch wall; the said party of the first part to pay to the said party of the second part, therefor, according to the agreement drawn up by the architect, Victor Stewart."

The part of the wall which fell on the 26th February, 1918, was not on this land lastly described.

The evidence as to what then followed is not as definite as one would desire, perhaps due to an assumption that the Court is as well informed on the matter as the parties and their counsel; but it appears that Ryan erected a three-storey addition to his buildings, beginning about 110 feet easterly from Wyndham street and running easterly. On the 26th June, 1903, contemplating further building operations, he entered into an agreement with the plaintiff, wherein it is recited that the party thereto of the first part (plaintiff) is the owner of the south-

easterly part of lots numbers 56 and 'E' on the east side of Wyndham street, and the party of the second part (Ryan) is the owner of the north-westerly part of the said lots—evidently referring to the lands of these parties as already mentioned—and that Ryan was desirous of "extending the party wall now standing and erected between their respective properties to the rear of the said lot number 'E', so that the said wall when extended shall rest upon equal proportions of their said lands respectively;" and that "it is agreed that a space of about 10 inches in width off each of the parts of the said lots owned by the said parties of the first and second parts respectively will be required for the erection of the said extended wall." (This extended wall is not part of the wall which fell on the 26th February, 1918). The plaintiff, therefore, granted and assured to Ryan, his heirs and assigns, "the right and privilege of extending the party wall now existing and erected between their respective properties as aforesaid in a straight line to the rear of the said lot number 'E', and also the right and privilege of using, holding, and enjoying, for the purposes of the said party wall, a strip off the portion of the said lots numbers 56 and 'E' owned by the said party of the first part adjoining the portions of the said lots owned by the said party of the second part, 10 inches in width or the width of the present party wall. It is further agreed that the said party of the second part may build the said extension of the said party wall to any height desired by him for building purposes. It is further agreed that any wall built by virtue of this agreement shall be of good material and workmanship and when built shall be and remain a party wall. It is further agreed that the party of the first part, so long as he personally is the owner of the building adjoining that of the party of the second part, may, free of charge, make use of the said extension of the party wall for building an extension to his present building. It is further agreed that the party of the second part, his heirs, executors, administrators, and assigns, may rebuild the said extension of the party wall in case of the partial or total destruction thereof, and such wall or portion thereof when rebuilt shall be subject to all the covenants and conditions herein contained with respect to the said extension."

The relative positions of lots 56 and 'E' have not been made clear. A sketch from the survey or recognised plan would, had it been put in evidence, have made the situation materially more intelligible. It is manifest, however, that the extension so dealt with was not part of the wall which fell and damaged the plaintiff's property. I mention the terms of this agreement

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only because of the reference therein to the then existing wall as a party wall. The part of the wall which fell extended about 50 feet easterly from the easterly end of the dividing wall of stone between the original three-storey buildings of the parties, such easterly end of the dividing wall being about 60 feet from Wyndham street.

Prior to 1903, there existed on the adjoining properties and extending for the length of this 50 feet the one-storey extensions to the main buildings already referred to. In that year Ryan, in his building operations, built a brick wall 13 inches thick for the length of this 50 feet on top of the stone dividing wall between the one-storey extensions; the southerly face of this brick wall was the continuation upwards of the southerly face of this stone dividing wall. At a later time he built this 13-inch brick wall upwards to the height of an additional storey. These additional storeys and the brick wall so carried up were used exclusively by Ryan. The plaintiff never made use of them, his building at that point remaining as the original one-storey extension. The plaintiff's contention at the trial, and his evidence, was that the stone dividing wall between the one-storey extensions was originally 20 inches in thickness for its full length, and that Ryan, without his consent or knowledge, at or prior to the building of the 13-inch brick wall, cut away on his side of the stone wall so as to reduce it from the ground floor upwards to a thickness of 13 or 14 inches, and then built upon it the 13-inch brick wall. Notwithstanding that there is evidence in contradiction of this, I think there is much in what the plaintiff says, and not only is his evidence as to this happening corroborated by other witnesses, but it is supported by documentary evidence that this stone wall, standing partly on the property of each of the two adjoining owners, was originally from 20 to 24 inches in thickness. While this circumstance is not necessary to support the conclusion I have reached as to the defendants' liability, it is corroborative of other parts of the evidence relied upon to establish that liability. Read with the evidence that this reduction in the wall materially detracted from its strength, it is of importance.

On the 12th October, 1904, the plaintiff leased to G. B. Ryan & Co. his premises for a term of 10 years from the 1st December, 1904. The lease contained a provision that if the buildings should be destroyed or so much injured as to become unfit for occupation by tempest or fire without the default or neglect of the lessees, the lessor should, at his own expense, after notice and within a reasonable time (rents in arrear previously due being first paid by the lessees), repair said buildings as the case

may require, and in default thereof it should be lawful for the lessees to repair said buildings and to deduct the value of such repairs from the rents after such destruction or injury. On the 8th July, 1914, the lease was extended and renewed until the 1st December, 1919, with the privilege to the lessee of determining the term on the 1st December, 1917 (which however, was not exercised), at a different rate of rental, but otherwise in the terms of the original lease.

On the 27th January, 1918, a fire destroyed Ryan & Co.'s building, leaving only the stone and brick walls standing. The fire did trifling damage only, if any, to the plaintiff's building. Ryan & Co. were then the plaintiff's tenants in possession, and continued such possession after the fire. The plaintiff was not, after the fire, notified or called upon to repair or rebuild. There is nothing in the lease casting upon him, in the circumstances which happened, the obligation to do so. He did not otherwise assume that obligation.

The defendants place much reliance upon their allegation that this was a party wall, and that liability to maintain and repair it devolved upon the plaintiff, from which he was not relieved by anything that had happened between the adjoining owners down to the time of its collapse. The character of the wall—in so far as it was a party wall—was not that it was owned in common, but, just as stated in para. 5 of the defence, it was originally based half upon the property of each adjoining owner. A wall may be a party wall as to part of its length or part of its height, and otherwise as to the remainder of it. If the part of the wall which fell was then or at any time a party wall it was such only to the height of one storey. Above that it was built by Ryan, or Ryan & Co., independently and without any agreement or understanding or other circumstances implying that the portion so added should be a party wall. It may be that the defendants or their predecessors acquired an easement for the support or partial support of this part of the building by or from the plaintiff's building it. It is not necessary that I should, and I do not, determine that. But even that, if it were the case, did not cast upon the plaintiff any duty to rebuild or repair that part of the wall which was erected, not by him, but by Ryan or Ryan & Co., and was not used by him, and of which he was not in actual use and occupation, Ryan & Co. being the tenants of his property, to repair which he was not notified as contemplated by the lease.

The defence that the plaintiff has been reimbursed by fire insurance fails. The small sum he so received had no relation

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to the falling of the wall, but was for damage to other premises of his from the fire in January.

So, too, does the defence of the Statute of Limitations fail.

The defence most seriously relied upon is that the fall of the wall was due to "an act of God" and not to any negligence of Ryan. In addition to what has already been said of the manner and conditions in which this part of the wall was constructed, and its control and use by Ryan, there are other facts of importance which go to account for and explain its collapse and to demonstrate that it was so seriously damaged and weakened by the fire that originated in Ryan's premises as to render it unsafe if exposed to forces neither extraordinary nor unusual.

Previous to the fire, the wall was held in position partly by the joists, roofing, and other timbers and parts of the Ryan building, knit into and supporting it. This was a protection against the inefficient "tying" of it to the other walls up to which it was built. The destruction by fire of all these factors of support so weakened it as to make apparent the danger of its yielding to forces not unexpected. Impartial witnesses, whose evidence I accept, speak of its "bulging" several inches and of the cracks which were caused by the fire. With these conditions apparent, one wonders why it was left unprotected. Mr. Ryan, whether apprehensive of or through a desire to ascertain the probability of danger, had inspections made, which, though some of them were merely perfunctory, seemed to have satisfied him and left his mind at rest. That was not sufficient; the responsibility was his, and it was not shifted by any assurance so acquired of safety.

The plea that the occurrence was due to "the act of God" is not substantiated. That the wall collapsed during a wind-storm of great violence is established—a storm of such magnitude as to carry away the heavy roofs of substantial factory buildings a mile or so distant, and sufficient to stay the progress of pedestrians in the centre of the city. That the velocity of the wind was uniform in and around the city is questionable. The only definite record of velocity is from the hourly readings taken at the Agricultural College at the south of the city. These shew a high though not an exceptional velocity. If only the velocity there recorded had prevailed at the factory buildings it is doubtful if their roofs would have been carried away.

In connection with the violence of the storm in the vicinity of the defendants' building, there is the other factor to be considered—that this wall stood in the closely built section of the business portion of the city, and that no other damage is shewn to have occurred in the immediate neighbourhood, even to pro-

jecting objects or to walls and buildings more exposed than was this wall. It would be impossible for any one to say—indeed I am confident that such is not the fact—that this occurrence was due directly and exclusively to the violence of the wind. The inference from the evidence is that the weakened and unprotected condition of the wall exposed it to the danger of collapse on the application of even a moderate degree of force.

In *Nugent* v. *Smith* (1875), 1 C.P.D. 19, it was said (p. 34) that damage or loss may be said to have been occasioned by "the act of God" when it has been caused directly and exclusively by such a direct and violent and sudden and irresistible act of nature as could not by any amount of ability have been foreseen, or, if foreseen that it would happen, could not by any amount of care and skill be prevented. It lies upon the defendant to shew that the damage or loss for which he would otherwise be liable is brought within this condition. This was simply a case of a wall so weakened as to be in danger of collapse from even moderate forces, being left without protection and falling during a violent storm, but not necessarily because of that violence.

On the question of liability I find against the defendants.

The plaintiff's damage in necessary outlay in replacement is $2,086.70, to which should be added interest on the sum so expended from the time or times he paid it out. The dates of such payment are not in evidence. If the parties cannot agree upon the date or dates, I may be spoken to and evidence may be given thereon.

There will be judgment with costs."

W. S. Middlebro, K.C., for appellants.

J. R. Howitt, for respondent.

MEREDITH, C.J.C.P.:—Though very much ground was covered at the trial of this action and upon the argument of this appeal, it seems to me to be properly determinable upon very much narrower ground, and without requiring the consideration of any unusual, or difficult, question of law or fact.

The wall which fell, though a party wall in one sense, was wholly constructed by the defendants' testator for his own immediate use and benefit, and it had not been in any way made use of, or interfered with, by the plaintiff, though he had a legal right to make use of it whenever he might desire to do so; and more than half of it was on his land.

A good deal of evidence was adduced by the plaintiff to prove that the wall was not constructed as it should have been under the agreement between the parties respecting it, or indeed as it

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should have been if there had been no agreement between them respecting it. But really that has no direct bearing upon the question upon which the rights of the parties to this action depend: and, if it had, there would be this to be said against the plaintiff: he knew and saw how the wall was being built and made no kind of complaint about, or objection to, it.

Indirectly the manner of construction does affect the real question in issue, which is: Was the testator guilty of actionable negligence in allowing the naked wall to stand just as it was after the fire which burned down the testator's building, taking away the support it had from that structure?

Although the wall was somewhat of a patch-work one: comprising first the solid original stone party wall: then an addition of brick not built upon the party wall but built upon a narrower stone coping above it, a coping built only as a "fire wall," that is, a wall extending above the roof as a protection against fire running from one building to another: and then, some length of time after that addition was built, another was built upon the top of it again.

If the plaintiff had extended his building, making use of this wall, it should doubtless have answered the purpose well enough, being strengthened and protected, rather than weakened, by a building on each side of it: but that, as I have said, he did not, nor did he have any other use or benefit of it; although under the agreement respecting it he had the right to use it as a party wall, free of cost, as long as he owned his adjoining land.

After the fire, this bare wall was left standing just as it came out of the fire until it was blown down in midwinter about a month afterwards.

That it was negligent to leave such a wall so standing is well-proved, if indeed it does not prove it to state the mere fact of it having been so left without anything being done to strengthen or removing it.

That the testator, knowing the manner of its construction, was negligent, I cannot doubt.

But it is said: if so, so must the plaintiff have been, for it was a party wall; and if his negligence caused, or contributed to, his injury, he cannot recover in this action.

It may be that if he had used the wall there might be some force in this contention: it is not necessary to consider the question: and it is probable that, if he had built into it, it should not have fallen, though the building on the other side was burned away: but, not having used and not having in any way interfered with it, he was not under any obligation, as between him

and the testator, to take care of it: see *Beidler* v. *King* (1904), 209 Ill. 302; and *McChesney* v. *Davis* (1899), 86 Ill. App. 380.

It was also said that, even if the testator were negligent, his negligence was not the cause of the plaintiff's injury; the cause of it was *vis major*: which seems to me to be an inaccurate way of stating that the testator was not guilty of actionable negligence: that the wind which blew the wall down was one of such extraordinary and unusual violence that reasonable men should not have deemed it necessary to take any precautions against injury from such a cause.

The evidence, however, falls very far short of proof of anything more than a high wind, not even unusual, through the year, in this Province. The evidence is that at an observation point, not far from the building in question, the highest velocity of the wind was 38 miles an hour during the night that the wall fell; well down in the velocity of that which is called a "gale," and well below the lowest velocity of a "storm," not to speak of a hurricane. The observer spoke of the velocity being frequently 38 miles an hour: and instanced three occasions within a few months of the accident when velocities of 41 to 44, 44, and 40 were recorded; and said also that the average velocity, in the next month preceding that of the falling of the wall, was 20 miles an hour.

This ground of escape from liability plainly fails.

The appeal must be dismissed with the usual consequences.

MIDDLETON, J.:—The facts giving rise to this litigation need not be recapitulated, as they are carefully set forth in the judgment appealed from.

As far as I can see, the deed of 1874 has no material bearing upon the case. It relates to the original party wall, extending from the front to the rear of the premises which existed before 1903.

Under the agreement of 1903, the defendants' testator was permitted to erect a new wall for his own purposes, at his own expense, this wall to be partly upon the land of the plaintiff, and partly upon the land of the testator. From the fact that each party was to contribute 10 inches of land for the purposes of the party wall, and the fact that the original party wall was 20 inches in thickness, it may well be assumed that what was contemplated was a party wall 20 inches thick. In consideration of the plaintiff contributing his 10 inches, he was to be allowed, so long as he should be the owner personally of the building adjoining that of the testator, to make use of the extension of the party wall for the extension of his then present building, free of any charge.

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Middleton, J.

The agreement of 1903 did not give any details concerning the construction of the wall, but provided that the testator should build it of good materials and workmanship, and, when built, it should be and remain a party wall. The plaintiff has never exercised his right to use the party wall in any way, and until the happening of the fire it formed part of the testator's building.

The rear part of the party wall, constructed under the deed of 1874, was only one storey in height. The agreement of 1903 apparently contemplates the erection of a wall of any height immediately to the rear of this low wall. When the building took place, the low original wall was extended to the same height as the new wall constructed to the rear. I do not think that this, strictly speaking, comes under the agreement of 1903, and the evidence is far from clear concerning its construction. I am inclined to think that the proper finding of fact should be that, when the testator erected this wall on top of the pre-existing low wall, the plaintiff did not object, and that it must be taken that the agreement of 1903 was, by consent of the parties, taken to apply to this party wall. The defendants at any rate cannot complain of this inference, as the only other alternative is to find that this portion of the wall was built by their testator for his own use and purposes on the top of the old party wall, and this would impose a greater obligation upon them than the finding which I think should be made.

The main portion of the wall which fell was the part last referred to, and its fall probably was the cause of the falling of any other portion of the wall.

In either case the defendants are, I think, answerable for the injuries sustained by the plaintiff from the fall of the wall, for it should be found to be the direct result of the testator's negligence in its original construction. It is true that negligence did not result in any actual damage until the fire took place and the wall fell. In my view, upon the evidence, the wall was never properly constructed. It was not properly braced or tied; this made no difference so long as the joists and rafters were in place, and operated to hold the wall in position, and the roof prevented any strain from the wind; the wall did not fall, but it was quite inadequate to stand alone and unprotected as against any serious wind. The wind in question was not "an act of God," in any admissible sense of that term as it is used in the cases. No doubt the definition of this term as quoted from *Nugent* v. *Smith*, 1 C.P.D. 19, in the judgment under consideration, is much qualified by the judgment upon appeal, 1 C.P.D. 423. I do not think that a definition of "act of God" in

cases dealing with liability of a carrier should be accepted and applied here. I would rather take such a definition as that found in *Regina* v. *Commissioners of Sewers for Essex* (1885), 14 Q.B.D. 561, at p. 574; but, whatever definition is accepted, it must relate to an event which cannot be foreseen, or which if it can be foreseen cannot be guarded against. The wind, as shewn here, was undoubtedly severe, but it was not in any sense something that ought not to have been expected. It was just the kind of wind which was bound to occur, and to occur frequently, and builders must build safely and not rely upon a narrow factor of safety to escape liability. There is a wide difference between the situation of a mariner facing the perils of the sea, and a builder calculating how much he can skimp a building without compelling it to fall. What came to pass here is in no sense an inevitable accident, but just that which ought to have been expected and ought to have been guarded against.

The fact that this wall was called a party wall does not seem to me to advance the case in any way. The wall was built by the defendants' testator, and he was bound to build properly, and to see that all the care called for by the term "good workmanship" was used. There was a total absence of this quality, and the defendants ought to pay.

If necessary to discuss the matter, it may well be found that the wall was not that called for in the agreement, because the testator built almost altogether upon the plaintiff's land, instead of apportioning it equally between the land of both parties, as appears to have been contemplated by the agreement. As constructed, the wall appears to have been 10 inches on the plaintiff's land and only 4 upon the testator's land, instead of occupying the 20 inches contemplated by the agreement.

The appeal should be dismissed with costs.

RIDDELL and LATCHFORD, JJ., agreed with MIDDLETON, J.

LENNOX, J.:—This is a case of considerable importance and of a somewhat exceptional character, and I have given it very careful consideration; but, notwithstanding the very able argument of Mr. Middlebro, I cannot think that the judgment of the learned trial Judge ought to be disturbed. I have had the advantage of reading the judgments of the Chief Justice and my brother Middleton, and I cannot usefully add anything to the entirely convincing reasons they assign. I would dismiss the appeal.

Appeal dismissed with costs.

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FREEDMAN v. FRENCH.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee and Ferguson, JJ.A. May 13, 1921.

CONTRACTS (§IIA—125)—SALE OF LUMBER—SAMPLE SHIPMENT—TERMS—ALLEGED VARIATIONS — REFUSAL TO FILL ORDERS — BREACH—DAMAGES.

The question of repudiation must depend on the character of the contract. Whether the actions of one party are such that the other party is relieved from all further liability and does not need to perform his part.

[*Re Rubel Bronze and Metal Co. and Vos*, [1918] 1 K.B. 315, 322; *Dominion Radiator Co.* v. *Steel Co.* (1918), 44 D.L.R. 72, 43 O.L.R. 356; *Payza Ltd.* v. *Saunders*, [1919] 2 K.B. 581, referred to.]

APPEAL from the judgment of Kelly, J., in an action for the price of lumber sold by the plaintiff to the defendant; and a counterclaim by the defendant for an alleged breach of the contract of sale and purchase. Reversed.

The judgment appealed from is as follows:—

KELLY, J.:—The plaintiff says that he offered to sell to the defendant 200,000 feet of lumber 2 inch x 6 inch and upwards, and 6 feet and upwards in length, at $25 per 1,000 which the defendant refused; and that at a subsequent date he offered it at $20 per 1,000, which the defendant agreed to accept after he had visited the two plants at Renfrew known as the Energite and the O'Brien plants, where he (plaintiff) had material for sale. The substance of the dispute is that the plaintiff contends that the contract was for the material as above specified, while the defendant insists that what he purchased was lumber 2 inch x 4 inch and upwards, and later this was varied so as to include a quantity of shiplap, after the plaintiff had inquired from him if he could handle it, and he (defendant) had conferred with his customers and ascertained that they would purchase it. The defendant also contends that the purchase was not confined to lumber from the Energite plant.

The parties are at variance on many details of the transaction and of what followed upon the contract. I find that not only has the plaintiff failed to establish his position, but the defendant's contention and his evidence have been substantially borne out by the evidence of other witnesses. I find, too, that there was a considerable quantity of shiplap at the Energite plant, though the plaintiff has sought to shew that there was practically none whatever there. I also find that the order for what was referred to at the trial as the sample car of shiplap and 2 x 4 and upwards, which the defendant desired for his customers, was in pursuance of what finally he had contracted to buy and the plaintiff to sell. It is unnecessary to particularise the evidence on which I have reached these conclusions. The plaintiff's attitude and demeanour at the trial rendered it

unsafe, in my judgment, to rely upon many of his important statements. His evidence impressed me unfavourably; and, moreover, in more than one instance his statements were completely discredited by other evidence and incontrovertible circumstances. Some of the witnesses whom he called committed themselves to statements which at first appeared to corroborate his evidence, but, when analysed in the light of other evidence of unquestionable credibility, these are satisfactorily explained.

The fact seems to be that the market price of the class of material covered by the contract suddenly advanced to figures far exceeding what the defendant agreed to pay. The plaintiff admits that, soon after the contract, he was making sales of lumber of this same class at very much increased prices; and, if it were necessary to assign a reason for his refusal or reluctance to carry out the contract, one need not go beyond that fact.

The defendant, who had ascertained that his customers would purchase lumber 2 inch x 4 inch and shiplap, as well as other sizes he had contracted to purchase, contracted to sell to them accordingly. The plaintiff's refusal to deliver 2 inch x 4 inch and shiplap embarrassed the defendant in his obligations to his customers, and he was thus confronted with serious consequent loss. In an effort to minimise this prospective loss he proposed a compromise to the plaintiff, who, however, refused to accede to it; and, taking the position that, as the defendant had disputed his view of what he (the plaintiff) had sold and the defendant had purchased, he (the plaintiff) was entitled to cancel the contract. In his letter of the 1st October, 1919, he gave notice of cancellation and that the lumber would be disposed of to others. That position he continued to maintain.

The defendant's contract with his purchasers, D. J. Macdonell & C. H. Conyers Company of Ottawa, was for the sale of 100,000 feet, to include shiplap and 2 inch x 4 inch and upwards at $25 per thousand, with the option to the purchasers to take an additional 100,000 feet at the same price.. The sample car was shipped from the plaintiff's yards (the Renfrew plant already referred to), and was delivered to these purchasers, who then requisitioned the delivery of 4 other cars, the 5 car-lots together aggregating about 89,000 feet. The requisitions were passed on to the plaintiff, who refused delivery, and the Macdonell & Conyers Company sustained an unavoidable loss of $890 by the non-delivery of the 4 cars. This amount the defendant made good to them. They were informed of the plaintiff's refusal to deliver, and, because of the difficulty in which the defendant was thus placed, they did not insist on their option for the additional 100,000 feet or for any further deliveries

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than the 4 car-lots which they had so requisitioned. The defendant, by reason of the plaintiff's failure to deliver, not only sustained the loss of this $890, but also the loss of the substantial profit his purchase would have yielded him at the greatly enhanced prices which prevailed soon after his contract with the plaintiff, and which he would have been able to take advantage of if the plaintiff had fulfilled his part of the contract. The consequent damage, including the $890 referred to above, exceeds the $1,890 claimed by the counterclaim.

The item of $179.20 in the plaintiff's claim is not in dispute. Counsel so agree. The plaintiff is entitled to recover that sum and also $730.78 for the 2 car-lots of lumber at $20 per thousand which he delivered, and which are referred to in his claim set up in the record, making together $909.98. For one of these, the sample car, he has charged $30 per thousand; but he is entitled only to $20 per thousand. The defendant is entitled to $1,890 damages.

J. J. O'Meara, for appellant.

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

The judgment of the Court was read by

FERGUSON, J.A.:—Appeal by the plaintiff from a judgment of Kelly, J., whereby he directed that on the counterclaim the defendant recover against the plaintiff $1,890 damages for breach of contract to sell and deliver a quantity of lumber.

The plaintiff sued to recover $1,098.45 as the price of lumber sold and delivered to the defendant. His claim, as endorsed on the writ of summons, reads:—

"The plaintiff's claim is the sum of $1,098.45 for goods sold and delivered by the plaintiff to the defendant.

"The following are the particulars:—

1919.		
August 9th.	To 512 ties at .35c (C.P. 145764)	$179.20
Sept. 13th.	To 1 car lumber (C.P. 32874)	
	Shiplap lumber 2191 feet	
	2 x 4 lumber 1228 feet	
	2 x 6 lumber 2316 feet	
	2 x 10 lumber 6416 feet	
	2 x 8 lumber 6596 feet	
	18847 feet at $30.00	565.41
Sept. 13th.	To C. 1 car lumber (C.P. 334285)	
	17692 ft. 2" plank at $20.00	353.84
		$1,098.45

"which said goods constitute part of the consideration for a draft drawn by the plaintiff and accepted by the defendant, dated September 4th, 1919, payable 30 days after date, to the order of the plaintiff for the sum of $4,000, which said draft the plaintiff hereby brings into Court and offers to deliver up to the defendant."

The defendant filed an affidavit setting forth his defence and counterclaim, which reads:—

"I, Guy M. French, of the town of Renfrew, in the county of Renfrew and Province of Ontario, lumber-merchant, make oath and say:—

"1. That I am the above-named defendant.

"2. That I have a good defence to this action upon the merits.

"3. On the 4th day of September, 1919, the plaintiff made a verbal contract with me to sell to me, and I agreed to buy from the plaintiff, 200,000 feet of lumber at $20 per thousand, and in consideration thereof the plaintiff drew on me a draft for $4,000 mentioned in the writ of summons in this action, and I accepted the said draft.

"4. On the 13th day of September last, the plaintiff, pursuant to said contract, delivered to me a car-load of said lumber, containing 18,847 feet, but the price was $20 per thousand, and not $30 per thousand as claimed in said writ.

"5. On the same day the plaintiff delivered to me another car-load of said lumber, containing 17,692 feet, at the price of $20 per thousand, on account of said contract.

"6. The plaintiff has not yet delivered to me the balance of the lumber, amounting to 164,461 feet, purchased by me, and refused to make such delivery, although frequently requested by me so to do.

"7. Relying on said agreement, on or about the 10th day of September last, I contracted to sell to the firm of D. J. Macdonell & C. H. Conyers Co. of Ottawa said lumber or the greater part thereof, but owing to the plaintiff's breach of contract I was unable to make delivery thereof except the two cars hereinbefore mentioned, and the said firm is now claiming from me the sum of $890 damages for breach of contract.

"8. By reason of plaintiff's breach of his said contract, I have suffered greater damages than the amount of the plaintiff's claim herein against me. I, therefore, claim from the plaintiff, by way of counterclaim or set-off, the sum of $1,890."

The trial Judge awarded the plaintiff $909.98 on the causes of action set out in his claim, and awarded the defendant on his counterclaim $1,890.

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Ferguson, J.A.

The record on which the parties proceeded to trial consisted of the endorsement on the writ of summons and the affidavit of merits. These two documents do not fully and clearly raise the issues tried.

The plaintiff admits that on the 4th September, 1919, he made a verbal contract to sell the defendant 200,000 feet of lumber at $20 per thousand, also the receipt of the draft for $4,000 referred to in para. 4 of the defendant's affidavit, but he denies that he committed any breach of that contract. His assertion is that the defendant repudiated the contract that was made, and that he merely accepted such repudiation.

The parties differed as to what were the terms of the contract made on the 4th September, and as to whether or not that contract was subsequently amended, and in consequence of such dispute the plaintiff assumed that he was entitled to cancel the contract, and so notified the defendant. The defendant was not willing to cancel, and claims for breach, and this raises the question: Did the defendant misinterpret the contract made between the parties and refuse to carry out the contract unless his interpretation thereof was accepted, or conduct himself in such a way as entitled the plaintiff to treat what he did as a repudiation of the contract, or did the plaintiff wrongfully and without just cause refuse to perform the contract?

Both parties agree that they made a contract on the 4th September, and that it was for 200,000 feet of lumber at $20 a thousand, delivered f.o.b. cars. The plaintiff alleges the further terms that the specifications of the lumber were 2 x 6 inch and up, 6 feet in length, to be the run of the Energite yards. The defendant differs from the plaintiff; his statement is that the specifications of the lumber were to be 2 x 4 inch and up, 6 feet long, run of the Energite yard; but, if there was a deficiency in the Energite yards, then the deficiency was to be made up out of the O'Brien yards.

Neither party contends that at the time they entered into the contract, on the 4th September, anything was said about shiplap; and it is, I think, clear that the draft dated the 4th September for $4,000 was drawn and accepted under the contract made on the 4th September.

It is common ground that, some time between the 4th September and the 10th September, the plaintiff asked the defendant if he could handle any shiplap, and that the defendant asked the plaintiff to ship him a sample car containing some shiplap; that, in consequence of the defendant's request, the plaintiff loaded and shipped the two cars mentioned in the endorsement

on the writ, one of which included some shiplap, and both of which included some 2 x 4 lumber.

The defendant does not claim or state that he made any contract for shiplap until after the delivery of these two cars—which contained the only lumber that can be said to have been delivered pursuant to the contract claimed upon. Neither does the defendant say that the parties expressly agreed that their contract of the 4th September should be varied so as to include shiplap among the kinds of lumber therein specified. His statement is that, having received the sample car, and having found that he could resell it, he informed the plaintiff that he could handle shiplap; he appears to have assumed that the shiplap would form part of the 200,000 feet contracted for on the 4th September. The plaintiff contends that shiplap was something to be ordered and paid for as delivered, and not as part of the lumber previously contracted for; that there is no shiplap contract, and that there is no writing to evidence such a contract or a part performance of such a contract, and that such a contract or variation of the original contract cannot be established by parol evidence.

It is clear that there is neither a writing signed by the plaintiff, evidencing a contract covering shiplap, as is required by the Statute of Frauds, nor a part performance of such a contract, and that consequently the defendant must fail in his effort to establish either a variation of the original contract or a new contract, so as to entitle him to claim damages for failure to deliver shiplap: *Plevins* v. *Downing* (1876), 1 C.P.D. 220, 225; *Sicrichs* v. *Hughes* (1918), 43 D.L.R. 297, 42 O.L.R. 608. *Hartley* v. *Hymans*, [1920] 3 K.B. 475. But the fair effect of the evidence is that all lumber in the two cars delivered, other than shiplap, was shipped, delivered, and accepted under and as part performance of the contract of the 4th September, and that it was therefore competent for the trial Judge to determine what were the terms of the contract made on that date. This issue he has found in favour of the defendant, and I do not think his finding, made on contradictory evidence, can be disturbed; so that we have it established that on the 4th September, 1919, the plaintiff agreed to sell and the defendant agreed to purchase 200,000 feet of lumber at $20 a thousand, 2 x 4 and up, 6 feet in length, run of the Energite yards, any deficiency to be made up from and by reference to the run of the O'Brien yards, delivered f.o.b. cars; that the plaintiff partly performed that contract; and the question remains: Did the plaintiff commit a breach of contract, and what damages is the defendant entitled to by reason of that breach?

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The trouble between the parties arose upon four orders sent by the defendant to the plaintiff under date the 25th September. The parts of these orders material to this issue read:—

1st order: About 12,000 feet 1 x 8 and up 6/16 feet, good sound shiplap, balance car with 2 x 8—6/16, good sound lumber.

Load same stock as sample car.

2nd order: 1 car 2 x 4—5/16'. Good sound lumber.

Load same stock as sample car.

3rd order: 11 large car:

1 x 8 and up, 6/16'. Good sound shiplap.

Please be sure and lay out any pieces that are broken or that have not been sawn, to allow pipes, etc., to go through.

Load same stock as sample car.

4th order: ½ car 2 x 6—6/16'. Good sound lumber.

½ car 2 x 8—6/16'. Good sound lumber.

Load same stock as sample car.

The plaintiff contended that these orders were not according to the contract. The defendant maintained that they were, and it will be seen by reference to the orders that the defendant assumed to direct shipment without reference to the run of the yard, and also ordered both shiplap and 2 x 4 lumber. The plaintiff contended that neither 2 x 4 lumber nor shiplap was included in the contract.

In consequence of the dispute, the plaintiff, on the 1st October, wrote to the defendant a letter which reads:—

"With reference to our conversation of date, I take it for granted that you do not intend to accept lumber as per our agreement of sale to you of 200,000 ft. lumber of 2 x 6 up and from 6 ft. up in length, same to be loaded on cars as it run in our yards.

"And I therefore take the opportunity of notifying you that this sale is cancelled. And that lumber will be disposed of to other buyers."

This brought an answer from the defendant's solicitors, dated the 1st October, which reads:—

"Mr. G. M. French has consulted us in regard to his contract with you for lumber. He claims that you sold him 2 x 4 and up. His sample shipment would indicate that this was the contract, and that his contract also covers shiplap. You might call and see us at once about this matter, otherwise he will likely instruct us to issue a writ against you."

On the 7th October, the defendant wrote to the plaintiff a letter (exhibit 11) which reads:—

"We have made out, here in the office, a cheque and part renewal note covering your draft which is due to-day.

"We have made out agreement covering purchase of your lumber, so please call at the office and sign this, and we will let you have shipping instructions covering this stock."

The draft agreement referred to in exhibit 11 was not submitted to the plaintiff. It is exhibit 15, and reads:—

"Memorandum of agreement, made in duplicate at Renfrew, Ont., this the seventh day of October, A.D. 1919, between Wm. Freedman, of Ottawa, Ont., hereinafter called the seller, and G. M. French, of Renfrew, Ont., hereinafter called the buyer,

"For and in consideration of value received from the buyer by the seller, the seller covenants and agrees to sell to the buyer two hundred thousand feet (200,000') of 2 x 6—2 x 8—2 x 10—2 x 12—6' and longer lumber, and to contain a fair percentage of long lumber, at twenty dollars ($20.00) per thousand feet, f.o.b. cars at the Munition Plant, Renfrew, Ont. This lumber to come from the plant, and to be loaded when and as required by the buyer. Any pieces that are damaged or broken to be laid out and not included in the above lumber, as the buyer purchases only such material as can be used again in building.

"The buyer acknowledges receipt of two cars of lumber, thereby reducing the above amount by the quantity contained in these two cars.

"In consideration of the above, the buyer has accepted the seller's draft for the sum of four thousand dollars ($4,000.00) due to-day, and herewith hands the seller cheque for five hundred dollars ($500.00), together with note at 60 days for thirty-five hundred dollars ($3500.00), covering same."

This draft agreement, prepared by the defendant, seems to concede all the plaintiff had contended for, and it is unfortunate that the terms of this agreement were not disclosed to the plaintiff; but perhaps it would have made no difference, for the plaintiff seems to have taken the position that the contract was cancelled from and after his letter of the 1st October. The defendant's solicitors, on the 15th October, wrote the plaintiff (exhibit 6) what seems to me to be an offer on the part of the defendant to carry out the contract in the terms contended for by the plaintiff. This letter reads:—

"We have just 'phoned your office to make an appointment for you to meet Mr. French to-day and learned that you would be out of town all day until evening. Mr. French has instructed us to issue a writ unless some satisfactory settlement is come to within the next two or three days. Our Mr. Chown will be back Friday night and would like to see you Saturday, as otherwise we will have to issue a writ. Your own letter is an admis-

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sion that you sold Mr. French two hundred thousand feet of 2 x 6 and up, 6 feet long, and he gave you a note or accepted a draft for $4,000, being the purchase-price for the two thousand feet. It seems to us he has a very clear case against you and you will be liable for any damages he would suffer through your not carrying out your contract with him."

Yet the plaintiff maintained that he had properly cancelled as of the 1st October, and refused to compromise, and the question is: Was he right in law? The answer turns on whether or not what the defendant did, in contending that the orders of the 25th September, which included shiplap and 2 x 4 lumber, were within the terms of the contract made, amounted to a repudiation of the real contract. The question of what is a repudiation was discussed by Meredith, C.J.O., in *Dominion Radiator Co.* v. *Steel Co. of Canada* (1918), 44 D.L.R. 72, 43 O.L.R. 356, and the learned Chief Justice quoted and adopted a statement of the law by McCardie, J., in *In re Rubel Bronze and Metal Co. Limited and Vos*, [1918] 1 K.B. 315, 322, which reads:—

"In every case the question of repudiation must depend on the character of the contract, the number and weight of the wrongful acts or assertions, the intention indicated by such acts or words, the deliberation or otherwise with which they were committed or uttered, and on the general circumstances of the case."

The same question was later considered by McCardie, J., in *Payzu Limited* v. *Saunders*, [1919] 2 K.B. 581, at p. 583, where he restated the rule by adopting the words of Lord Selborne in *Mersey Steel and Iron Co.* v. *Naylor Benzon & Co.* (1884), 9 App. Cas. 434, at pp. 438, 439, reading as follows:—

"I am content to take the rule as stated by Lord Coleridge in *Freeth* v. *Burr* (1874), L.R. 9 C.P. 208, which is in substance, as I understand it, that you must look at the actual circumstances of the case in order to see whether the one party to the contract is relieved from its future performance by the conduct of the other; you must examine what that conduct is, so as to see whether it amounts to a renunciation, to an absolute refusal to perform the contract, such as would amount to a rescission if he had the power to rescind, and whether the other party may accept it as a reason for not performing his part."

Now let us restate and consider the facts in the light of the foregoing statements of the law. The parties were disputing as to what contract they had entered into—the plaintiff claiming that it did not include either shiplap or 2 x 4 lumber, the defendant

contending that it included both—the finding is that the plaintiff was wrong as to the 2 x 4 lumber and the defendant as to the shiplap—but it appears clear that the defendant was not intending to and did not in fact repudiate and refuse to carry out what was the real contract, whether it was as the plaintiff alleged or as found—on the contrary, his subsequent acts and correspondence indicate that if he could not do better he was ready and willing to carry out the contract on any one of the three contentions. It seems to follow that what he did in the circumstances, did not amount to a repudiation of the real contract so as to entitle the plaintiff to accept his repudiation. On the other hand, the evidence appears to establish that the plaintiff was looking for an excuse for relieving himself from performing even the contract as he alleged it to be, and was not ready and willing to carry out the contract as found.

Taking it, then, that the defendant did not repudiate the contract—and that the plaintiff was not entitled to terminate without giving the defendant a reasonable notice and opportunity to affirm and carry out the contract as found—the next question is: What is the proper measure of damages?

Ordinarily it would be the difference between the contract price and the market price of the lumber at the time and place fixed for delivery; the evidence seems to establish that difference to have been $5 per thousand, which, on 20,000 feet, would amount to $1,000; but the plaintiff delivered two cars which contained 36,539 feet, and that would reduce the $1,000 by $182.70, leaving a balance of $817.30. The trial Judge did not make the deduction of $182.70, but the respondent admits that this deduction should be allowed. In addition to the $817.30, the trial Judge awarded as special damages a further sum of $890, which the defendant paid as damages on his failure to perform contracts which he, relying on the plaintiff performing the contract in the terms alleged by the defendant, made with the Macdonell & Conyers Company.

I do not think the allowance of these special damages can be supported. The resale to the company was not made till after the contract between the plaintiff and defendant was an accomplished fact, and in making his contracts with the Macdonell & Conyers company, and in giving his shipping orders to the plaintiff, the defendant seems to me to have erroneously assumed that he was entitled to shiplap and to have the lumber sorted; and it seems to follow that, even if the parties contracted having in contemplation that the goods were for resale, yet the Macdonell contracts cannot, I think,

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be treated as a resale that was contemplated, within the meaning of the rule in *Hadley v. Baxendale* (1854), 9 Ex. 341, at p. 354: see Benjamin on Sale, 6th ed., p. 1115.

For these reasons, I am of the opinion that the award of $890 special damages cannot be supported, and that all the defendant was entitled to recover on his counterclaim was $817.30, which being deducted from the $909.98 admittedly due to the plaintiff leaves a balance due to the plaintiff of $92.68.

I would allow the appeal with costs, set aside the judgment appealed from, and direct judgment to be entered in accordance with these reasons.

The plaintiff should have the costs of the action, and the defendant the costs of the counterclaim.

Appeal allowed.

HAWLEY v. HAND.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee and Ferguson, JJ.A. May 13, 1921.

EVIDENCE (§IIB—105)—DEBT—DEATH OF DEBTOR—EXECUTION—PREVIOUS SALE OF SHARES TO WIFE FOR MONEYS ADVANCED—TESTIMONY OF WIFE—UNCORROBORATED EVIDENCE.

Suspicious circumstances coupled with relationship make a case of *res ipsa loquitur* which may be treated as a sufficient *primâ facie* case. But the question of the necessity of corroboration is strictly a question of fact.

[*Koop* v. *Smith* (1915), 25 D.L.R. 355, 51 Can. S.C.R. 554, followed; *Killips* v. *Porter* (1916), 26 D.L.R. 326, referred to.]

THE following statement is taken from the judgment of FERGUSON, J.A.:—

Appeal by the plaintiff from a judgment of LATCHFORD, J., dismissing with costs an action brought by the plaintiff, as an execution creditor of the estate of Havelock E. Hand, deceased, against his widow, Jessica H. Hand, to have it declared that certain transfers of stock made by Havelock E. Hand in his lifetime to his wife were fraudulent and void, as having been made without consideration, and with the effect of hindering, defeating, and delaying creditors, or, if for consideration, then as having been made and accepted with a fraudulent intent to defeat, hinder, and delay.

The plaintiff proved his judgment, and that it had been obtained in an action in which the claim was for rescission of the purchase of shares, repayment of the purchase-money, and damages for deceit.

The plaintiff established that the action for rescission had been commenced prior to the making of some of the transfers

now attacked. To prove the transfers and that they were made without consideration and in pursuance of an alleged fraudulent scheme and with an intent to defeat and defraud the creditors, the plaintiff relied on statements made by the defendant in her examination for discovery.

The learned trial Judge found as follows:—

"I have no reason to find that in 1915, at the time when the transfer of 46 shares in the preferred stock of Bowles Lunch Limited was made, from the husband to the wife, there were any creditors of Mr. Hand; much less can I find that there was any fraud intended on any person at that time.

"The second transaction was after an action had been instituted against Hand by the plaintiff. Now I think that case differs. The facts in this case do not bring it within the decision in *Hopkinson* v. *Westerman* (1919), 48 D.L.R. 597, 45 O.L.R. 208, which has been referred to and in which I concur. There the guarantor knew that the wrong done was done so openly that a substantial verdict against her husband in it was certain. Nothing of the kind has been shewn here. It has been shewn that this man had capital at that time, possibly nothing much more than was pledged to the bank, but his wife had, out of moneys which she received as dividends on stock transferred to her many years before, made advances from time to time to the husband. He apparently wished to repay her for those advances, and for that purpose, so far as the evidence goes, he did transfer these 78 shares of common stock in the Bowles Lunch Limited to her. Then, later in July of that year, he transferred 24 shares of preferred and 4 common. Not until more than a year after that time had the claim of the plaintiff been decided adversely to Mr. Hand, or to his wife, who, after his death, was continued as a defendant in the plaintiff's action.

"I cannot find that there was any fraud or guilty intent on the part of either Hand or his wife in connection with the two later transfers any more than in connection with the first one. The plaintiff was not then a creditor: he might never become a creditor. It is not like the *Hopkinson* case, where the prospects of an adverse decision amounted to a certainty.

"I think on the whole the plaintiff's case fails and should be dismissed with costs."

R. S. Robertson, for appellant.

A. J. Russell Snow, K.C., for respondent.

The judgment of the Court was read by FERGUSON, J.A. (after setting out the facts):—Mr. Robertson ar-

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gued that, while there was evidence that out of her income the defendant had from time to time advanced moneys to her husband, which had not been repaid, yet the presumption was that such advances were, as between husband and wife, gifts and not loans, and that the uncorroborated testimony was not in law sufficient to rebut such presumption, or at least that the circumstances were such that the onus was on the defendant to establish a consideration for the transfers by proving a debt, and that the learned trial Judge erred in law in accepting the defendant's uncorroborated testimony as sufficient; and for this proposition Mr. Robertson relied on *Rice* v. *Rice*, 31 O.R. 59, 27 A.R. 121.

Mr. Robertson contended further that, because it appeared that the transactions attacked were between near relatives, and had the effect of hindering and delaying, the proof of *bona fides* was cast upon the defendant, and that the uncorroborated testimony of the defendant, testifying in her own interests, could not be accepted as being sufficient proof of *bonâ fides*. This, he contended, was the meaning and effect of *MacKay* v. *Douglas*, L.R. 14 Eq. 106; *Merchants Bank* v. *Clarke*, 18 Gr. 594; *Morton* v. *Nihan*, 5 A.R. 20; and the recent case of *Anderson* v. *Bradley*, 20 O.W.N. 13. *

If the meaning of the authorities is that the Judge is not in law permitted to act on the uncorroborated testimony of the defendant, then there was not sufficient evidence. If, however, the law is that the trial Judge or a jury may act on such uncorroborated evidence, notwithstanding the fact that the transactions were between relatives, then the question is: is the weight of evidence such that we can say that the trial Judge was clearly wrong in his conclusion?

I have perused and considered the cases cited by counsel, also many others, including *Ex p. Mercer* (1886), 17 Q.B.D. 290, considered in *In re Holland*, [1902] 2 Ch. 360, and by Middleton, J., in *Hopkinson* v. *Westerman*, 48 D.L.R. 597, 45 O.L.R. 208; *Koop* v. *Smith* (1915), 51 Can. S.C.R. 554, 25 D.L.R. 355, considered by the Chief Justice of Alberta in *Killips* v. *Porter* (1916), 26 D.L.R. 326; also *In re Young, Young* v. *Young* (1913), 29 Times L.R. 391. I am of opinion that these authorities do not justify Mr. Robertson's contentions, which in effect are that the learned trial Judge, though he believed it, could not act upon the uncorroborated testimony of the defendant as sufficient to establish either a debt or a *bonâ fide* transaction. Whether

* The decision of ORDE, J., in *Anderson* v. *Bradley*, 20 O.W.N. 13, was affirmed by a Divisional Court on the 7th October, 1921. The reasons for judgment of ORDE, J., and of the Divisional Court, will be reported in due course.

the moneys advanced by the wife to the husband were a gift or a loan was, I think, a question of fact to be determined by the Judge or jury; so also was the question of intent a question of fact. The trial Judge has found both these facts in favour of the defendant, and the questions are: First, was there before the Court sufficient evidence to support his finding? Secondly, are we convinced, considering all the circumstances adduced in evidence, that the finding is wrong and should be reversed?

There is no statute or positive law requiring corroboration of witnesses testifying on their own behalf in support of a transaction attacked as being voluntary and fraudulent. Such as there is in this Province is in respect of the testimony of witnesses testifying in support of a claim against the estate of a deceased person (see sec. 12 of the Evidence Act, R.S.O. 1914, ch. 76); and, in my opinion, the real effect of the authorities relied upon by Mr. Robertson is to place the defendant in such a fraudulent conveyance action in about the same position as the English law places a person making a claim against the estate of a deceased person, which, as I understand it, is that the Court treats the evidence of such a person with suspicion, and if his testimony is not corroborated the Court may say that the claim is not made out; but, on the other hand, the Court, if it chooses to do so, may act on such uncorroborated testimony. See Taylor on Evidence, 11th ed., pp. 660, 661, where the effect of the cases dealing with claims against an estate is stated in these words:—

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

Also Phipson's Law of Evidence, 6th ed. (1921), p. 485, where the learned author, in my opinion, concisely states the effect of the cases cited by him, thus:—

"It is also a rule of *practice*, as distinguished from one of law, that Courts will not act upon the uncorroborated testimony of *claimants to the property of deceased persons*, unless convinced that such testimony is true."

Another like situation is found in the practice of advising a jury not to convict upon the uncorroborated testimony of an accomplice. This is an old and well-established practice, but it seems also well-established that, because no positive rule of

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law prohibits the jury, they may disregard the advice and warning of the trial Judge and if they please act upon the uncorroborated testimony of an accomplice: *Rex* v. *Tate*,]1908] 2 K.B. 680.

In *Anderson* v. *Bradley*, 20 O.W.N. 13, which was a fraudulent conveyance case, Mr. Justice Orde said:—

"Section 12 of the Evidence Act, R.S.O. 1914, ch. 76, requires corroboration in an action against the heirs, next of kin, executors, administrators, or assigns of a deceased person. This was not an action of that character, but the provisions of sec. 12 are in reality a declaration of the law and practice which had prevailed before the enactment of what is now sec. 12. There was some doubt in England, where the rule has not been made the subject of legislation, as it has been here, whether the rule was one of law or practice, but it now seems to be regarded as one of practice. Notwithstanding that this was not an action by or against the estate of a deceased person, the principle applicable in estimating the weight to be given to Luther Bradley's uncorroborated statement as to the advance or payment of $600 to the deceased, in a contest with the creditors of the deceased, ought to be precisely the same as if the claim were against the estate of the deceased; and the rule has been applied in cases of this character: *Merchants Bank* v. *Clarke*, 18 Gr. 594; *Morton* v. *Nihan*, 5 A.R. 20."

I am unable to agree in the opinion that the passing of the Evidence Act made no difference in the meaning and effect of the practice of requiring corroboration of the testimony of persons making claims against the estates of deceased persons; for, in my view, the statute changed what was a practice or a maxim of prudence established by experience to guide a court in weighing evidence, into an unyielding rule of law, preventing the court in the cases governed by the statute from acting on uncorroborated evidence; and it seems clear that, but for the statute, our law in reference to the corroboration of the testimony of persons claiming against the estates of deceased persons would be the same as the law of England is stated to be in the quotation I have taken from Taylor on Evidence.

The head-note to *Koop* v. *Smith*, as reported in 51 Can. S.C. R. 554, reads:—

"Where a bill of sale made between near relatives is impeached as being in fraud of creditors and the circumstances attending its execution are such as to arouse suspicion the court may, as a matter of prudence, exact corroborative evidence in support of the reality of the consideration of the *bona fides* of the transaction."

The same case is reported in 25 D.L.R. 355, under a head-note reading:—

"The principle of *res ispa loquitur* applies to assignments made between near relatives under suspicious circumstances, and when impeached by creditors the burden of proof is upon the defendant to establish by corroborative evidence, other than the testimony of interested parties, the *bona fides* of the transaction."

In *Killips* v. *Porter*, 26 D.L.R. 326, Chief Justice Harvey appears to have been of opinion that in *Koop* v. *Smith* the Supreme Court of Canada decided what the head-note to the report of the case in the Dominion Law Reports says was determined. I do not so read the judgments. In my view, the effect of the decision is more accurately stated in the Supreme Court Reports. At pp. 557 to 559 of that report, Mr. Justice Duff states his opinion in these words:—

"I think this appeal should be allowed and the judgment of the learned Chief Justice, who tried the action, restored. The majority of the Court of Appeal appear, if I may say so with respect, to have fallen into the error of treating the relationship of the parties to the impeached transaction as possessing no very material significance. The learned trial Judge, on the other hand, treated the relationship as decisive in this sense that it determined the point of view from which the evidence was to be considered and the all-important question of the onus of proof. The learned trial Judge indeed appears to have laid it down as a proposition of law that a transaction of this kind between two near relatives, carried out in circumstances in themselves sufficient to excite suspicion, can only be supported (in an action brought to impeach it by creditors) if the reality or the *bonâ fides* of it is established by evidence other than the testimony of the interested parties; and there is a series of authorities in the Ontario Courts which has been supposed to decide that, and it may be that it is the settled law of Ontario to-day.

"I do not think the proposition put thus absolutely is part of the English law or of the law of British Columbia; but I think it is a maxim of prudence based upon experience that in such cases a tribunal of fact may properly act upon, that, when suspicion touching the reality or the *bona fides* of a transaction between near relatives arises from the circumstances in which the transaction took place, then the fact of relationship itself is sufficient to put the burden of explanation upon the parties interested, and that, in such a case, the testimony of the parties must be scrutinised with care and suspicion; and it is very seldom that such evidence can safely be acted upon as in itself suffi-

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cient. In other words, I think the weight of the fact of relationship and the question of necessity of corroboration are primarily questions for the discretion of the trial Judge, subject, of course, to review; and that any trial Judge will in such cases have regard to the course of common experience as indicated by the pronouncements and practice of very able and experienced Judges such as Chief Justice Armour and Vice-Chancellor Mowat and will depart in practice only in very exceptional circumstances.

"I may add that I think it doubtful whether the Ontario decisions when properly read really do lay it down as a rule of law that the fact of relationship is sufficient in itself to shift the burden of establishing the proof in the strict sense. It may be that the proper construction of these cases is that the burden of giving evidence and not the burden of the issue is shifted. (As to this distinction see the admirable chapter IX., in Professor Thayer's 'Law of Evidence'). In my own view, as indicated above, even this would be putting the matter just a little too high; I think the true rule is that suspicious circumstances coupled with relationship make a case of *res ipsa loquitur* which the tribunal of fact may and will generally treat as a sufficient *primâ facie* case, but that it is not strictly in law bound to do so; and that the question of the necessity of corroboration is strictly a question of fact."

The other learned Judges do not appear to have differed from Mr. Justice Duff. Anglin, J., at p. 559, says:—

"The burden rested on the defendant of establishing the rectitude of her bill of sale. Whether this transaction was *bonâ fide* was eminently a question for the trial Judge."

The decision in *Rice* v. *Rice* was based upon *Caton* v. *Rideout* (1849), 1 Mac. & G. 599, which, with other authorities, is considered in *In re Young, Young* v. *Young*, 29 Times L.R. 391; and it seems to me that these are cases dealing with presumptions rather than with the necessity in law for corroboration, and that their meaning and effect is stated in the head-note to *In re Young*, reading:—

"Where husband and wife are living together in amity, and the husband, with the wife's consent, receives her separate income, he is, in the absence of an agreement express or to be inferred from the circumstances, taken to receive it in his capacity as head of the family and is entitled to deal with it as he pleases and is not liable to account for it to his wife or to repay any part of it to her. It is a question of fact whether an agreement has been arrived at which rebuts the presumption arising from the receipt of the wife's money by the husband."

See also Halsbury's Laws of England, vol. 16, p. 397.

For these reasons and on these authorities, I am of the opinion that the questions of debt, no debt, and intent were questions of fact for the trial Judge; that it was within the power of the trial Judge to act on the uncorroborated testimony of the defendant and to find that the deceased was at the date of the transfers indebted to the defendant, and further that the transfers were made without fraudulent intent. He might, considering all the surrounding circumstances which he discusses in his opinion, have refused to believe the testimony of the defendant, and had he done so I do not think this Court would have interfered with such a finding of fact.

It is not suggested that the trial Judge failed to appreciate the meaning and effect of the practice of the Court making corroboration desirable, or did not weigh and consider all the evidence and every circumstance that should have been taken into consideration by him when determining the questions, or in his consideration failed to recognise and weigh as a material circumstance the fact that the parties to the transactions were husband and wife living together in amity, and that the debt arose out of a transfer of the wife's income to her husband; and, on a careful reading of the evidence, I am unable to say that he arrived at an erroneous conclusion.

Appeal dismissed with costs.

MACFIE v. CATER.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee and Ferguson, JJ.A. May 13, 1921.

ASSIGNMENTS (§II—20)—GOODS HANDED TO CREDITOR FOR SALE—PAYMENT OUT OF PROCEEDS—ASSIGNMENT—ALLEGED PREFERENCE—QUESTION OF "MONEY PAYMENT."

The handing of goods to a creditor for sale, he to be paid out of the proceeds thereof, constitutes an equitable assignment under the statute, and is not a payment in cash within the meaning of the Act.

[*Field* v. *McGaw* (1869), L.R. 4 C.P. 660, referred to; *Brown* v. *Johnston* (1885), 12 A.R. (Ont.) 190, distinguished.]

APPEAL by defendant from the judgment of Meredith, C.J. C.P. (1920), 57 D.L.R. 736, 48 O.L.R. 487, in an action brought by the respondent as an assignee to recover a certain sum paid by the insolvent to the appellant the day before the assignment was made and which it is alleged constituted a fraudulent preference within the meaning of the Assignments and Preferences Act. Affirmed.

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Meredith, C.J.O.

J. M. McEvoy and *H. S. White*, for appellant.

D. L. McCarthy, K.C., for respondent.

MEREDITH, C.J.O.:—This is an appeal by the defendant from the judgment, dated the 21st December, 1920, which was directed to be entered by the Chief Justice of the Common Pleas, after the trial before him, sitting without a jury, at Toronto, on that day.

The action is brought by the respondent, as assignee for the benefit of creditors of Henry L. Cater, to recover $1,516.50, which was paid by the insolvent to the appellant on the 30th day of May, 1919, the day before the assignment was made, and which it is alleged constituted a fraudulent preference within the meaning of the Assignments and Preferences Act.

If the payment was a payment in cash within the meaning of the Act, it is not open to attack, and the question for decision is, was it such a payment? I am of opinion that it was not.

The facts are not in dispute. The insolvent owed the appellant about $6,000, and he was being pressed for payment of it. The insolvent had not the money to pay him, but he had on hand a large stock of cigars, and it was arranged between them that the appellant, who was a commercial traveller in another line, should endeavour to effect a sale of some of the cigars, and that if he succeeded in so doing the proceeds of the sale should be applied in payment *pro tanto* of his debt. The appellant succeeded in effecting a sale of cigars to McPhail Bros., for $1,516.50. The proceeds of the sale were not deposited in the insolvent's bank but in the Canadian Bank of Commerce at London. That bank held a promissory note for $500 made by the insolvent and endorsed by the appellant. The $1,516.50 was paid to the appellant by the insolvent's cheque, which bears date the 22nd May, 1919, but was not accepted until the 30th of that month.

The effect of this transaction was, in my opinion, to make an equitable assignment of the $1,516.50 to the appellant. It was in substance an agreement between the parties that the appellant should endeavour to effect a sale of the cigars, and that if he effected a sale he should be paid the sum realised on account of his debt. This is emphasised by the fact that the proceeds of the sale were deposited in a special account, and it is not without significance that in proving his claim the appellant credited the $1,516.50, marking it with the words "(McPhail a/c)."

Such cases as *Brown* v. *Johnston*, 12 A.R. 190, are distinguishable. In that case the distinction was pointed out

between an assignment of property to be acquired *in futuro* which is sought to be enforced against the assignor himself when the property has come into his hands or the title to it has accrued, and the case that was being dealt with. Hagarty, C.J.O., said (p. 194):—

"It may be quite true, . . . that Johnston did, or could as against himself, create a valid charge on the purchase-moneys or chattels expected to be paid to or received by him, if a negotiation then pending with third parties ripened into an executed contract. The assignee might quite possibly be able to enforce his equity to a charge against such money or chattels when received in payment."

And Osler, J. A., said (p. 198):—

"So far as the owner was concerned, I have no doubt he could have agreed to charge in his own hands anything he might afterwards receive on a sale of his property, whether it consisted of lands, or moneys, or goods taken in exchange, and as against him such an agreement would be enforced as one respecting property to be acquired *in futuro*, but that is a very different thing from restricting, as is sought to be done here, the right of a third person to acquire or deal with the property out of which such fund or future property might arise, where the former was not itself subject to any charge or trust in the hands of the owner."

If all that took place was that the insolvent promised the appellant that if he sold the cigars he would pay, no doubt that would not have constituted an equitable assignment of the proceeds of the sale, but the promise was not that, but a promise to pay him the proceeds of the sale if he succeeded in selling the cigars. The distinction between the two cases is pointed out in *Field* v. *Megaw* (1869), L.R. 4 C.P. 660.

I would affirm the judgment and dismiss the appeal with costs.

MACLAREN and MAGEE, JJ.A., agreed with MEREDITH, C.J.O.

FERGUSON, J.A. (dissenting:—Appeal by the defendant from the judgment of the Chief Justice of the Common Pleas, whereby he adjudged that the transaction attacked was a preferential transfer of property by a debtor to a creditor, and that the plaintiff was, under sec. 13 of the Assignments and Preferences Act, entitled to recover the proceeds of the sale of such property.

I am unable to agree in the conclusion of the learned trial Judge that the transaction disclosed in evidence was substantially an appropriation of cigars in part payment of the defendant's

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claim against the debtor, and, as such, void under sec. 13 of the Assignments and Preferences Act, R.S.O. 1914, ch. 134.

The only evidence before the Court is to the effect that no right, title, interest, or property in the goods or the proceeds thereof was transferred or assigned or agreed to be transferred to the defendant—that the goods and moneys were never in the possession, power, or control of the defendant until he received the payment complained of. In my opinion, on a fair reading of the evidence of both the plaintiff and the defendant, it is established that the payment attacked was a "payment of money to a creditor," within the meaning of sec. 6 of the Act, and as such exempt from the operation of the Act.

I would allow the appeal with costs, and dismiss the action with costs.

Appeal dismissed.

Re RAIKES.

Ontario Supreme Court, Masten, J. May 14, 1921.

COSTS (§I—2c)—MOTION FOR SECURITY FOR COSTS—DECISION OF MASTER—APPEAL IN ORIGINAL PROCEEDINGS.

It is established practice that the appellant, though defendant in the original proceeding, is the actor in the appeal, and may be compelled to give security when out of the jurisdiction; and the granting or refusing of the order rests in the discretion of the

[*Wightwick* v. *Pope*, [1902] 2 K.B. 99, and *J. H. Billington Ltd.* v. *Billington*, [1907] 2 K.B. 106, followed; *Boyle* v. *McCabe* (1911), 24 O.L.R. 313, and *Re Riddell* (1912), 3 D.L.R. 401, referred to.]

APPEAL by the administrator *de bonis non* of the estate of Walter Raikes, deceased, from an order of the Master in Chambers dismissing an application for an order requiring Constance Helen Day to furnish security for costs.

D. W. Saunders, K.C., for the appellant.

P. E. F. Smily, for Constance Helen Day, respondent.

W. Lawr, for the trustee under the marriage settlement of Amy Frances Day and George Raikes.

MASTEN, J.:—On the 29th March last, Middleton, J., gave judgment upon an application for the interpretation of the provisions of the marriage settlement of Amy Frances Raikes. His conclusions were in favour of the present appellant and against the present respondent, Constance Helen Day. See *Re Raikes* (1921), 20 O.W.N. 133. See also *Re Raikes* (1921), 21 O.W.N. 75.

Constance Helen Day, who resides out of Ontario, has

appealed to a Divisional Court from the order of Middleton, J., and thereupon the present appellant, the contesting respondent on that appeal, moved before the Master in Chambers for an order for security for costs, on the ground that Constance Helen Day is, in the circumstances, the actor moving the Court, and, being out of the jurisdiction, should give security for costs.

Contrary to the view which I entertained on the argument, I am of opinion that the granting or refusing of the order, in such circumstances, rests in the discretion of the Court, to be judicially exercised having regard to the decisions. I am not furnished with the reasons upon which the Master in Chambers founded his decision refusing the application, but I think that he was not at liberty, in view of the established practice, to exercise his discretion by refusing the order.

The cases of *Boyle* v. *McCabe* (1911), 24 O.L.R. 313, and *Re Riddell* (1912), 3 O.W.N. 1232, 3 D.L.R. 401, make it plain that, apart from the provisions of Rule 373, security may be ordered against either contestant on such an application as this. The case of *Forbes* v. *Forbes* (1911), 23 O.L.R. 518, is supportable on other grounds, and is inconsistent with the later decisions and with Rule 373 (*j*).*

Duffy v. *Donovan* (1891), 14 P.R. 159, proceeded on the ground that where the defendants are possessed of funds belonging to the plaintiff the discretion of the Court will be exercised against hampering the plaintiff by ordering security for costs. *Palmer* v. *Lovett* (1892), 14 P.R. 415, is superseded by the provisions of Rule 373.

The cases of *Wightwick* v. *Pope*, [1902] 2 K.B. 99, and *J. H. Billington Limited* v. *Billington*, [1907] 2 K.B. 106, shew it to be an established practice to regard an appellant, though defendant in the original proceeding, as the actor in the appeal and compellable to give security when out of the jurisdiction.

I have not omitted to consider the circumstance that the appeal to the Divisional Court involves little cost except the counsel fee, and that the motion before the Master and this appeal may involve nearly as much costs as will be incurred in the appeal to the Divisional Court. This should undoubtedly have an influence on the manner in which the discretion of the Court is to be exercised; but, after considering the judgment of my brother Middleton and all the circumstances of this case, I do not think that this argument is sufficient to prevent the applicant from asserting his right to security.

* 373. Security for costs may be ordered . . . (*j*) where either party to a garnishee, interpleader or other issue is an active claimant, and would if a plaintiff be liable to give security for costs.

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I have also considered whether Rule 373 forms a complete code, excluding all cases not covered by it, or whether the true view is that expressed in Holmested's Judicature Act of Ontario, 4th ed., p. 877, that the Rule does not limit the right to security for costs to the cases enumerated. I have found it unnecessary to express any opinion on that point, because I am of opinion that the word "issue" in para. (*j*) of Rule 373 is not to be interpreted as meaning a technical or formal issue, but is of wider import, and covers the contest now pending before the Divisional Court.

The order of the Master is reversed, and Constance Helen Day is ordered to give security for costs in the sum of $100 if money is paid into Court, or in $200 if given by bond—such security to be given within 6 weeks.

The costs of this appeal will be borne by Constance Helen Day in any event. The costs of the application before the Master will be costs in the appeal.

Re MARKS.

Ontario Supreme Court, Middleton, J. May 17, 1921.

WILLS (§IIIA—76)—ASSIGNMENT OF PART OF INSURANCE POLICY TO SON BEFORE DEATH—GIFT BY WILL OF LIKE AMOUNT—SATISFACTION—INTENTION OF TESTATOR.

The gift by a father to his son by will out of the proceeds of an insurance policy does not necessarily raise the presumption that the legacy is in satisfaction of an assignment of a part of the proceeds of this policy made by father to son before death.

[*Hudson* v. *Spencer*, [1910] 2 Ch. 285, followed; *Central Trust and Safe Deposit Co.* v. *Snider*, 25 D.L.R. 410, [1916] 1 A.C. 266, 35 O.L.R. 246, referred to.]

MOTION by the widow of John Marks for an order declaring that the legacy of $1,000 to J. W. Marks in the will of his father, John Marks, was given in satisfaction of a claim by J. W. Marks upon a policy of insurance upon the life of John Marks.

H. S. White, for the widow.

R. S. Robertson, for J. W. Marks.

MIDDLETON, J.:—John Marks was insured in the Star Life Assurance Society of London, England, in the sum of £500. Desiring to be relieved of the obligation to pay premiums upon this policy, he made an agreement with his son J. W. Marks, bearing date the 23rd April, 1912, by which J. W. Marks undertook to advance from time to time the moneys necessary to pay parts of the premiums due upon the policy, in consideration of an assignment to him of $1,000, a portion of the insurance money. Subsequently, on the 1st March, 1920, John Marks made his will by which he gave to his son J. W. Marks

$1,000 "out of the money payable at my death out of my life insurance policy in the Star Life Assurance Society, and also the promissory note that he gave me in 1890 for money lent to him then, and I forgive him these moneys." The residue of his estate, "including the rest of my life insurance," he gave to his wife, whom he made his executrix. The son claims that he takes $1,000 under the assignment and another $1,000 under the will. This claim is resisted by the wife.

The ground urged is that the doctrine of satisfaction applies. The definition of "satisfaction" given, or rather adopted, by White and Tudor, L.C. Eq., 8th ed., vol. 2, p. 382, in the notes to *Chancey's Case* (1717), 1 P.W. 408, has the high sanction of Lord Romilly in *Chichester* v. *Coventry* (1867), L.R. 2 H.L. 71, at p. 95, and is also quoted in Halsbury's Laws of England, vol. 13, p. 128:—

"Satisfaction may be defined to be the donation of a thing, with the intention, either expressed or implied, that it is to be taken, either wholly or in part, in extinguishment of some prior claim of the donee."

In a text-book of high authority, Encyc. of the Laws of England, vol. 13, p. 139, it is said: "It will be observed that the doctrine has no application to cases where the prior portion has actually been transferred or paid." As put by Lord Cranworth in the case in the Lords already referred to (L.R. 2 H.L. at p. 87), "The testator must be understood as saying, 'I give this in lieu of what I am already bound to give, if those to whom I am so bound will accept it.'"

This indicates the initial difficulty in the way of the wife. The right of J. W. Marks to the $1,000 arises from an absolute assignment to him. It was no longer an obligation on the part of his father. This $1,000 was his, and any benefit given him by the will could not be regarded as a satisfaction within the meaning of the doctrine.

This, however, does not determine the case in all aspects, for it would be possible to find a testamentary disposition which would put the son to his election. If the testator had in his provision for his widow indicated that by his will he was disposing not only of that portion of the money which remained his, but of the entire proceeds of the policy, then there would, I think, be made a case of election which would call upon the son to disclaim his interest under the assignment if he accepted the benefit conferred upon him by the will.

Looking at the will as it stands, it is entirely colourless. One may have a suspicion that the testator did not really intend his

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son to have $2,000, and his widow less than $500, but that is not enough. In this aspect of the case *Hudson* v. *Spencer*, [1910] 2 Ch. 285, is helpful. The testator there made a donation, *donatio mortis causâ*, of certain deposited notes, aggregating £2,000, to his housekeeper. Two days later he made a will by which he gave her a legacy of £2,000. She claimed both sums. Warrington, J., says (pp. 289, 290): "There is no authority to support the proposition that the mere fact of a legacy being given of the same amount as the donation raises the presumption that the legacy is a satisfaction of the donation. I do not see why it should be a satisfaction. The testator intends the donee to have the donation (whatever happens) in case he dies, unless he recalls it. If he subsequently gives the donee a legacy of the same amount, why is the Court to be driven to conclude that the testator intended the donee not to have both the donation and the legacy? The testator knows that he has made the *donatio mortis causâ*. Why should he not intend the donee to have both the legacy and the donation I can see no reason at all." Adopting this, I can see no reason why the father, who had transferred $1,000 of the insurance money to his son by an absolute assignment, should not have also intended to give him $1,000 by his will.

The decision I have quoted is from a case dealing with satisfaction. The principle is more strictly applied in the case of election, but fundamentally it is the same. The cases, however, point out that the leaning of the Court is against satisfaction of a debt by a legacy, and this has some analogy to the case in hand.

If the assignment had not been of a formal character sufficient in itself, but merely an informal document creating an equitable claim, the result might have been different: *Central Trust and Safe Deposit Co.* v. *Snider*, [1916] 1 A.C. 266, 25 D.L.R. 410.

The case is one in which each party ought to be left to bear its own costs.

Re THOMAS WATERHOUSE & Co., Ltd.

Ontario Supreme Court in Bankruptcy, Middleton, J. May 18, 1921.

BANKRUPTCY (§I—6)—AUTHORISED ASSIGNMENT MADE — MOTION FOR RECEIVING ORDER—ADMINISTRATION UNDER THE ACT—DISCRETION OF COURT.

There is no difference in the administration of an estate under an authorised assignment under the Bankruptcy Act, 1919 (Can.), ch. 36, and under a receiving order; and the Court will use its discretion in refusing a motion for a receiving order after an authorised assignment has been made.

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

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RE THOMAS WATERHOUSE & CO. LIMITED.

Middleton, J.

MOTION by a creditor of the company for a receiving order under the Bankruptcy Act, 1919.

J. A. Macintosh, for the authorised trustee.

MIDDLETON, J.:—Motion by a creditor for a receiving order under the Bankruptcy Act. The ground of insolvency alleged is that on the 18th March, 1921, the company made an authorised assignment of its property to an authorised trustee, this authorised trustee being a gentleman named in the petition as the trustee under the proposed receivership order.

As I was unable to ascertain from counsel any object in the filing of this petition or any useful purpose that can be served by it, I thought it better to retain the matter until I had an opportunity of discussing the situation with my brother Orde, who is at the present time acting as Judge in Bankruptcy, and for whom I was sitting in his absence from the city. He agrees with me in the view that I entertain.

The Bankruptcy Act appears to be unnecessarily complicated in some of its provisions. In the first place it defines acts of bankruptcy. By sec. 3* of the Act, an act of bankruptcy is the making of an assignment for the benefit of creditors. This is followed by the enumeration of many other acts which are all made to come under this general description.

By sec. 4 (1) of the Act, a creditor may present a petition for a receiving order whenever a debtor commits an act of bankruptcy. By sub-sec. 6 of sec. 4, the Court is empowered to dismiss the petition where an authorised assignment has been made, if satisfied that the estate could be best administered under the assignment.

I have gone through the Act with great care, and cannot find any difference in the administration of the estate under an assignment authorised by the Act and under a receiving order, and my brother tells me that he knows of none.

Under these circumstances, it appears to me that the motion is misconceived and entirely unnecessary. While the practice under this Act is still in the formative condition, I think it important that nothing should be done to encourage the making of unnecessary motions. There will be no order, and no costs, and this direction may be without prejudice to any application that may hereafter be made, either by way of substantive application or by way of renewal of this, if anything transpires which will go to shew that there is any necessity for the order sought.

* 3. A debtor commits an act of bankruptcy in each of the following cases:—

(*a*) If in Canada or elsewhere he makes an assignment of his property to a trustee . . . for the benefit of his creditors generally, whether it is an assignment authorised by this Act or not.

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LAPOINTE v. CHAMPAGNE.

Ontario Supreme Court, Orde, J. May 19, 1921.

DAMAGES (§IIIO—305)—MOTOR CAR DRIVEN NEGLIGENTLY—COLLISION BETWEEN BUGGY AND CAR—NERVOUS SHOCK—INJURY AT LATER DATE—DAMAGES.

Where there is negligence on the part of the driver of a motor car, and a buggy is struck, an occupant of that buggy, although not actually hit by the car, who suffers injury at a later date through nervous shock due to the impact, may recover damages.

[*Victorian Railways Commissioners* v. *Coultas* (1888), 13 App. Cas. 222, distinguished.]

ACTION by a married woman for damages resulting from a collision of the defendant's motor car with the buggy in which the plaintiff and her husband were riding.

O. Sauvé, for the plaintiff.

H. St. Jacques, for the defendant.

ORDE, J.:—The accident happened at night, and according to the findings of the jury was caused by the negligence of the defendant in driving without lights. The defendant was able to stop his car before doing any great damage to the buggy itself. The latter was not overturned, but, according to the evidence, some of the spokes of the wheels of the rear or left-hand side were split, and the box of the buggy slightly shifted. The plaintiff and her husband were able to proceed to their destination after the collision.

The plaintiff was not struck by the motor car and did not receive any outwardly apparent injury from the collision. But, when the motor car struck the buggy, she jumped down or descended from the buggy hurriedly, with the result, according to her evidence, that she had a miscarriage two weeks later. She was at the time about 5 or 6 weeks pregnant. She had already had 9 children, of whom the eldest was then 11 years of age and the youngest 3 months. She had never miscarried before. She says that from the time of the collision she was ill and in a nervous condition, and her evidence as to this is corroborated by her husband and others. The accident happened on the 22nd August, 1920. There was no apparent indication of the impending miscarriage until the 5th September, when she had a hæmorrhage. A physician was called in on the 8th. There was evidence that the plaintiff had gone about her daily work much as usual; that she had assisted her husband in getting in the crop of oats; and that she had assisted in preparing and serving meals for those engaged in the threshing. The physician said that it was very hard to say what had brought on the miscarriage. The collision might have been the cause, or the fright

from the collision might have caused it, even 15 days later.

Counsel for the defendant strenuously argued that there was no evidence upon which the jury could find that the plaintiff's miscarriage was a result of the accident; but I ruled that there was the evidence of the plaintiff herself, together with that of her husband, as to her condition immediately after the accident; and that, with that and the evidence of the physician, it was for the jury to determine whether or not the miscarriage was caused by the accident. The jury found that the plaintiff sustained the miscarriage as a result of the accident, and they assessed her damages at $250.

Notwithstanding the findings of the jury, I reserved my judgment in order to consider the point, raised by the defendant, that the miscarriage really resulted from the nervous shock or fright caused by the accident, and that on the principle laid down in *Victorian Railways Commissioners* v. *Coultas* (1888), 13 App. Cas. 222, *Henderson* v. *Canada Atlantic R.W. Co.* (1898), 25 A.R. 437, *Canada Atlantic R.W. Co. v. Henderson* (1899), 29 Can. S.C.R. 632, and *Geiger* v. *Grand Trunk R.W. Co.* (1905), 10 O.L.R. 511, the plaintiff could not recover.*

No useful purpose will be served by criticising the *Coultas* case. In so far as it is deemed to have laid down any principle, it has not been followed by the English Courts in later cases. See *Wilkinson* v. *Downton*, [1897] 2 Q.B. 57, and *Dulieu* v. *White & Sons*, [1901] 2 K.B. 669. But our Courts have held it to be binding in all cases which come within the scope of the decision. The *Coultas* case decides that "damages arising from mere sudden terror unaccompanied by any actual physical injury, but occasioning a nervous or mental shock, cannot . . . be considered a consequence which in the ordinary course of things, would flow from the negligence" of the defendant.

In the *Henderson* and *Geiger* cases, which followed the *Coultas* case, the question involved was whether or not damages for the nervous or mental shock itself were recoverable, and it was held that they were not. But here there is the actual physical injury, namely, the miscarriage. It would hardly be contended, if the plaintiff had been actually struck by the motor car and had miscarried immediately afterwards, that the miscarriage was not the natural consequence of the collision, as fully as if the collision had broken her arm. Or, if the plaintiff had jumped from the buggy either to avoid the collision or to avoid what she feared might be the consequences of the collision, and had broken a leg, the damage would be recoverable. If as a matter of fact, as the jury have found, the miscarriage did result from

* But see *Toms* v. *Toronto R.W. Co.* (1910), 22 O.L.R. 204.

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the collision, even though its direct cause may have been the nervous shock resulting from the collision, was not (to use the words of the Judicial Committee in the *Coultas* case) the terror accompanied by an actual physical injury, which at once distinguishes this case from that case and the *Henderson* and *Geiger* cases? The fact that the miscarriage did not take place until two weeks later is of no consequence if the collision was the real cause. There is no difference between a space of 5 seconds and one of 2 weeks if the cause is the same.

The *Coultas* case may perhaps be authority for the principle that, even if physical injury follows from the nervous shock and is not itself the direct result of the accident otherwise than through the medium of the nervous shock, the damages are too remote. In that case there was no impact. And it might be that, if in the present case the miscarriage had resulted from a nervous shock merely caused by the fear of a collision with the defendant's motor car which he was operating negligently, the fact that the shock was followed by the physical injury would not be sufficient to enable the plaintiff to recover. But here there was actual impact between the motor car and the buggy, which caused the plaintiff for her own safety to jump or descend hurriedly. There may well have been an actual, though undisclosed, physical injury which induced the miscarriage. But, even if there were not, I cannot think that the *Coultas* case goes the length of deciding, when there is an actual impact, either with the plaintiff or the vehicle occupied by the plaintiff, which results in a physical condition (call it "nervous shock" or what you will) which brings on a miscarriage, that the miscarriage is not the natural consequence of the impact, and therefore an injury caused by the defendant's negligence and entitling the plaintiff to damages.

For these reasons, I think the verdict of the jury must be upheld, and I direct judgment to be entered for the plaintiff for $250 damages, and costs on the lower scale, without any set-off.

CANADIAN ROOFING MANUFACTURING CO. v. CITY OF WINDSOR.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Latchford, Middleton, and Lennox, JJ. May 6, 1921.

MUNICIPAL CORPORATIONS (§IID—142)—AGREEMENTS—CONTRACTS WITH—QUESTION OF BONUS—ASSIGNMENT OF AGREEMENTS—RIGHTS THEREUNDER—SPECIAL ACT—7 ED. VII. CH. 97—POWERS THEREUNDER.

The right under an agreement between the municipality and other parties as regards the bonus to be granted to an industry cannot be assigned to third parties; as 7 Edw. VII. ch. 97 (Ont.) forbids any aid being granted by the Municipality to any person who does not enter into an agreement to that effect with the Municipality.

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CANADIAN ROOFING MANUFACTURING CO. v. CITY OF WINDSOR.

Meredith, C.J.C.P.

APPEAL by plaintiffs from the judgment of a Division Court dismissing an action for damages for breach of an agreement entered into with them or their predecessor and assignor, by the corporation defendant.

D. L. McCarthy, K.C., for appellants.

F. D. Davis, for respondents.

MEREDITH, C.J.C.P.: — This Division Court action was brought to recover damages for breach in part—a very small part—of an agreement made under a by-law of the defendants "granting aid by way of bonus for the promotion of manufactures within the limits of the municipality;" power so to aid being generally conferred upon the defendants by an enactment of the Provincial Legislature—7 Edw. VII. ch. 97, "An Act respecting the City of Windsor," sec. 1.

But the contract in question was not made with the plaintiffs, nor were they in any way parties to it: and so they failed at the trial: and should have failed here too upon the argument of this appeal: but it was suggested that the benefit of the agreement might have been assigned to the plaintiffs, or that they might in some other way have become entitled to its benefits; and, although that seemed improbable, as there was no attempt to prove anything of the sort at the trial, the appeal was retained in order to remove any possible doubt on the subject: and now it turns out, as was to have been expected, that the plaintiffs have not been able to strengthen their position in any respect in so far as the aid in question is affected. They are suing upon a contract in which they have no part. There is no pretence now for contending that there is in fact any contract of any kind between the parties to this action. Had the plaintiffs been able to prove an assignment to them from the person to whom the aid was given, and even if the assignment were assented to by the defendants, there might still be unsurmountable obstacles in the plaintiffs' way. There is nothing in the agreement, or in the by-law upon which it is based, directly or indirectly authorising any assignment of the aid: and it is a by-law which required the assent of the ratepayers of the municipality, as provided for in the enactment, before-mentioned: and that enactment provides expressly that the "aid shall be given only to such person or body corporate as shall enter into an agreement with the municipality" as therein provided.

Whatever legal rights—if any—any one else may have regarding the matters in question, the plaintiffs have none.

The appeal should, in my opinion, be dismissed.

LATCHFORD, J.:—I agree.

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Riddell, J.

RIDDELL, J.:—I would dismiss this appeal on the simple ground that the statute (1907) 7 Edw. VII. ch. 97, by sec. 4 expressly forbids aid being granted to any person or body corporate which does not "enter into an agreement with the municipality to employ at least 25 hands," etc. In my view, this section enables the municipality to exercise judgment in accepting the person or body corporate to be benefited.

In many contracts the main thing to be considered is the financial standing of the contractor—a rich rascal is to be preferred to a man "poor but honest." But in contracts by a manufacturer with a municipality to employ so many hands, it is not the financial standing of the manufacturer, but his honesty, his sense of justice and fair play, which may be most to be considered.

A mandatory injunction will not be granted to compel a recalcitrant contractor to carry out such an undertaking: *City of Kingston* v. *Kingston etc. R. W. Co.* (1898), 25 A.R. 462; and nominal damages are all that can generally be obtained.

In the case of *Village of Brighton* v. *Auston* (1892), 19 A.R. 305, there is a striking illustration. The Village of Brighton gave the Austons $1,000, they to employ 20 persons for 10 years: the Austons got the money and closed their factory after 6 years. They would not repay even a proportionate part of the $1,000, and the Courts would not compel them to do so. The village corporation got nominal damages only. Many thought that ordinary decency and fair play would induce the defendants to pay back part of the bonus, and many manufacturers would have done so.

It being the *personnel* of the beneficiary which is the all-important, I think the statute has made it not only possible but imperative that the municipality before giving away the people's money shall see to it that they have a person or body corporate that can be relied upon to carry out the obligations on the other side. In that view, I think the appeal should be dismissed.

MIDDLETON, J. (dissenting):—I find myself unable to agree with the conclusions arrived at by my Lord; and, as the matter involved is, in one aspect of it, of great importance, I think I should state my reasons.

Under the statute 7 Edw. VII. ch. 97, the Municipal Corporation of the City of Windsor are empowered to bonus new industries under certain conditions, not now material, by the way of granting land for manufacturing sites, and free municipal light and water, and exemption from taxation for a period not exceeding 10 years. By sec. 4 of the statute it is provided

that "such aid shall be given only to such person or body corporate as shall enter into an agreement with the municipality to employ at least 25 hands," etc., etc.

Pursuant to this statute, a by-law was passed on the 27th December, 1912, granting to one L. H. Cheeseman a bonus, by sale to him of certain lands owned by the municipality, at the nominal price of $800, and free light and water and exemption from taxation for the period of 10 years.

On the 1st March, 1913, a formal agreement was entered into between the municipal corporation and Cheeseman, reciting the by-law and that this agreement was intended to be executed as in compliance with the requirements of the by-law and the statute; and, in consideration of the granting of the privileges, rights, and exemptions to Cheeseman, he, for himself, his heirs, executors, administrators, and assigns, covenants with the municipality to observe and perform the conditions of the by-law and to employ workmen, etc., etc., as required by the by-law and the statute.

Subsequently, the municipality conveyed the lands in question to Cheeseman in pursuance of the agreement for sale contained in the by-law.

On the 21st August, 1913, the plaintiff company having been in the meantime incorporated, Cheeseman conveyed to the company these lands, the conveyance reciting that the bonus had been applied for in the name of Cheeseman, "he being in fact trustee for the Canadian Roofing and Manufacturing Company Limited," and that the lands were obtained for the purpose of establishing a manufacturing plant thereon by the plaintiffs. The only other evidence that can be found of the assignment from Cheeseman to the plaintiffs is that in the minutes of the council of the 7th July, 1913, it is recorded that a communication had been received from "Lester H. Cheeseman authorising a transfer of his bonus to the Canadian Roofing Company." This appears to have been referred to the committee of finance with power to employ a solicitor to attend to the matter.

The plaintiffs then established the factory, and, it is admitted, have fulfilled, both in the letter and the spirit, all the obligations required by the by-law and statute, and the municipality has carried out its part of the undertaking, save that for the year 1917 it failed to supply the stipulated electric lighting. This suit was brought in the Division Court to recover the cost of the lighting for that year.

Until relied upon as a defence in this action the municipality raised no question as to the right of the company to receive

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all the benefits granted Cheeseman by the by-law. The reason for the failure to pay the comparatively small amount owed for the year 1917 was that the council for that year failed or refused to pay it, and the council for succeeding years thought it unfair to place upon the ratepayers in the subsequent years an obligation that ought to have been borne in the earlier years. The councils for 1918, 1919, and 1920, raised no question as to the plaintiffs' rights in respect to the lighting to be supplied during these years.

The learned Division Court Judge dismissed the action upon the ground that the bonuses and privileges were granted to Cheeseman, and never had been transferred to the plaintiffs.

A contract with a municipality is, in my opinion, on the question of its assignability, in precisely the same position as a contract between individuals. Since *Tolhurst* v. *Associated Portland Cement Manufacturers Limited*, [1903] A.C. 414, the general question does not admit of further discussion. The question in each case must be the application to the facts of that case of the principle recognised by that judgment. I am not prepared to assert that in the case of bonus by-laws the contract may not be so personal as to preclude the assignment of the contract without the assent of the municipality; but I think the assent of the municipality to the assignment, if it is necessary, is sufficiently shewn by the conduct of the municipality. It ought to be implied from the recognition by the municipality of the assignee as the person intended to discharge the duties and to receive the benefits from the contract: Dillon on Municipal Corporations, 5th ed., sec. 832. Whatever trouble there is in this case arises from the way in which the case was presented at the hearing. I think enough was shewn by the papers produced at the hearing and by the other documents produced upon this appeal, to which I have already referred, to indicate that there was a transfer or assignment in some form by Cheeseman to the plaintiffs, and that the plaintiffs are entitled to the bonus in question, and that the municipality acquiesced in the substitution of the assignee for Cheeseman himself. The agreement, in my opinion, is sufficient to answer the requirements of the statute, and from its very terms it clearly indicates that the bonus may be earned not only by Cheeseman but by his assignees.

I think that the appeal should be allowed and judgment should be entered for the plaintiffs for the amount sued for.

LENNOX, J., agreed with MIDDLETON, J.

Appeal dismissed.

LAMB v. TORONTO AND YORK R. Co.

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Ontario Supreme Court, Orde, J. May 20, 1921.

DAMAGES (§IIII—188)—RAILWAY ACCIDENT—DEATH OF PLAINTIFF'S MOTHER—LONG ILLNESS—INJURY TO PLAINTIFF THROUGH CARE OF MOTHER—RIGHT OF RECOVERY—PERSONAL ACTION—MASTER AND SERVANT.

The daughter of a woman dying through injuries received in a railway accident cannot recover damages for loss occasioned and expenses put to during the illness of her mother, as the mother, though performing certain services for the daughter, was not in any sense her servant.

ACTION under the Fatal Accidents Act for damages for the death of the plaintiff's mother, which resulted, as alleged, from injuries sustained by her by the negligent starting of a car of the defendants. The plaintiff also claimed damages for the loss sustained and expenses incurred by her during the illness of her mother, consequent upon the injuries received.

A. W. Roebuck, for the plaintiff.

T. H. Lennox, K.C., for the defendants.

ORDE, J.:—According to the findings of the jury, Mrs. Wanton, the mother of the plaintiff, died from injuries which resulted from the negligent starting of a car of the defendants.

The accident took place on the 28th August, 1919, but Mrs. Wanton lived until the 18th May, 1920. In addition to the claim for damages, made by the plaintiff on behalf of herself and the other members of the deceased's family, under the Fatal Accidents Act, the plaintiff claimed damages for loss sustained and expenses incurred during the illness of the deceased. The defendants objected to the plaintiff's right to recover these additional damages, and it was agreed that the question of liability therefor, including the assessment thereof, should be dealt with by myself, and that the jury should deal only with the damages resulting from the death.

There was some doubt as to the age of the deceased, but she was from 65 to 75 years of age. She lived with her daughter, the plaintiff, who had a family of four young children, and a husband who was ill, and was in hospital at Gravenhurst. For two years prior to the accident, the plaintiff had worked in a millinery establishment, earning $13 per week, and her mother had taken her place in the home, looking after the children and doing the housework, mending, ironing, etc. The plaintiff paid her nothing for this, but the plaintiff and her brother saw that the mother was provided with clothing and other necessaries. After the accident happened, Mrs. Wanton was confined to her bed the greater part of the time until her death, and the plaintiff was obliged to give up her millinery work, in order to nurse

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her mother and look after her house. This continued until the mother died, and there is no doubt that the mother's incapacity following the accident made it necessary for the plaintiff to give up her employment at $13 per week, in order to attend to her own household.

The plaintiff's right to recover for the loss which she suffered as a result of the accident during her mother's lifetime, if it exists at all, is necessarily a right of action personal to herself. It must not be confused with the right of action given, by reason of her mother's death, by the Fatal Accidents Act, or with any right of action which the legal personal representative of the deceased might have for an injury to the estate of the deceased. So far as this accident is concerned, the legal personal representative of the deceased could have no cause of action for the damages sustained by the deceased during her lifetime, and any action begun by the deceased therefor would have died with her and could not be revived.

Could the plaintiff have maintained an action during her mother's lifetime for the damages which she sustained by reason of the injury to her mother? In my judgment, she could not. If recoverable at all, such damages could only be recovered upon a principle analogous to that of a master suing for the loss of services resulting from the injuries to his servant caused by the negligence of some third person, or of a husband suing under similar circumstances when his wife is injured. The right to recover in such cases is in many respects an anomaly in our law, and no case has been cited to me where the principle has been extended. Mrs. Wanton, though performing such services as a mother might be expected to perform for her daughter, was not in any sense a servant of the plaintiff. There was no contract of service, and the relationship might have been terminated at any time. It may have been a hardship that the plaintiff was obliged by the accident to give up her employment and remain at home to nurse her mother and look after her household, but the injury which the defendants caused was to Mrs. Wanton, and not to the plaintiff; and, the latter not having been deprived of the services of her mother within the principle upon which damages are sometimes allowed to a master for injuries of that character, I am unable to see upon what principle the plaintiff can recover for her loss.

The distribution among those entitled to the damages awarded by the jury, devolves upon me. I think any claim by the grandchildren can be eliminated. Alfred Stinson, a son of the deceased, while claiming that he had sustained some loss, said that he made no claim to any share in the moneys. Apart

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from such disclaimer, I do not think on the evidence that he established any right to share. The only member of the deceased's family who has suffered is the plaintiff herself, and I accordingly award all the damages to her, and direct judgment to be entered in her favour against the defendants for $1,200 and the costs of the action. The claim for damages sustained prior to Mrs. Wanton's death is dismissed without costs.

The defendants appealed from the judgment of ORDE, J., and the plaintiff cross-appealed.

October 6. The appeal and cross-appeal were heard by MEREDITH, C.J.C.P., RIDDELL, MIDDLETON, and LENNOX, JJ.

H. J. Scott, K.C., for the defendants.

A. W. Roebuck, for the plaintiff.

THE COURT dismissed both the appeal and the cross-appeal without costs.

Re REEVE DOBIE MINES, Ltd.

Ontario Supreme Court, Orde, J. May 23, 1921.

VENDOR AND PURCHASER (§IB—9)—SALE BY AGREEMENT—RIGHTS RESERVED BY VENDORS—DEFAULT BY PURCHASERS—LIEN CLAIM BY VENDORS ON CHATTELS—INTERPRETATION.

When goods and chattels are removed according to agreement the property therein clearly passes to the purchasers; and even though a portion of the proceeds of the income therefrom was supposed to be paid to the vendors, this does not give the vendors any lien on the said chattels.

[*Smith* v. *Bell* (1865), 11 Gr. 519, followed; *Wyatt* v. *Bank of Toronto* (1858), 8 U.C.C.P 104, referred to. See Annotations, 53 D.L.R. 135, 59 D.L.R. 1.]

MOTION by an authorised trustee under an assignment, pursuant to the Bankruptcy Act, 1919, for the advice, direction, and judgment, of the Court.

G. R. Munnoch, for E. G. Clarkson, the authorised trustee.

J. M. Bullen, for the claimants Christopherson and Skobba.

ORDE, J.:—Reeve-Dobie Mines Limited made an authorised assignment under the Bankruptcy Act to the trustee on the 7th September, 1920. Among the assets of the company was an agreement made on the 20th February, 1917, between S. Christopherson and A. J. Skobba, as vendors, and the members of a syndicate, as purchasers, whereby the vendors agree to sell to the purchasers the Reeve-Dobie silver mine for $450,000, of which $25,000 was to be paid on the 15th March, 1917, and $25,000 on

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the 1st July, 1917. The remaining $400,000 was to be paid out of the gross income from the ore which was mined and marketed during the life of the agreement, the proportion of such income so to be paid varying according to the cost of operation. The syndicate agreed that, "in order that these payments may be made in a reasonable length of time," they would, "barring labour strikes and other unusual and unavoidable accidents or delays . . . carry on continuous mining operations on the property—" etc. The agreement also provided that, in case of default on the part of the purchasers for 60 days, "then they will, upon proper notice and demand being made by the party of the first part (the vendors), peacefully surrender the properties herein described, together with everything thereunto appertaining, to the party of the first part." Apart from these provisions, the agreement is silent as to the rights of the vendors in any ore mined from the property by the purchasers during its currency, nor does the agreement provide for any other method of paying the $400,000. The rights and obligations of the purchasing syndicate under the agreement were subsequently transferred to and assumed by the company.

On the 27th October, 1920, the vendors, Christopherson and Skobba, notified the authorised trustee that default had been made by the purchasers under the agreement, and demanded the surrender of the mining properties "and everything thereunto appertaining."

Among the assets of the company was a quantity of silver ore concentrates, amounting to 20,890 pounds (wet weight), then in the hands of the sheriff under a writ of execution against the company, but afterwards relinquished by the sheriff to the trustee under the provisions of the Bankruptcy Act. The trustee took steps to realise upon the concentrates and had them refined and sold. The amount realised therefrom was $2,532.46, but the trustee paid out the sum of $50 for sampling and assaying and $669 for freight, leaving $1,813.46 in his hands as the net proceeds of the sale.

Christopherson and Skobba claimed to be entitled under the agreement of the 20th February, 1917, to one-third of the value of the concentrates; and, as their claim was also brought to the notice of the smelting company through which the concentrates were sold, it was arranged, without prejudice, that the cheques for the proceeds should be made payable to S. Christopherson and the trustee pending a determination of the rights of the parties.

Prior to the notice and demand of Christopherson and

Skobba of the 27th October, 1920, the trustee had offered the mining property for sale by tender, but no tender or offer for the property was made. There is a nominal equity in the property of $203,108.69, and the sum of $84,200.92 had been actually expended upon it.

The trustee now asks for the advice, direction, and judgment of the Court upon two points: first, whether or not Christopherson and Skobba have any lien in respect of the ore mined under the agreement; and, second, whether or not he should surrender the property to Christopherson and Skobba, and incidentally whether or not such surrender should include the machinery and chattels upon the property.

Upon the first point there is no provision in the agreement that the vendors shall retain any property or interest in the ore mined from time to time. On the contrary, the agreement clearly contemplates that the ore, when and as mined, shall become the property of the purchasers, the only obligation upon the purchasers in respect thereof being to pay to the vendors one-half or one-third (according to the cost of operation) of the gross income from the ore "mined and marketed." Under these circumstances, there would be no lien upon the ore.

In *Smith* v. *Bell* (1865), 11 Gr. 519, the plaintiff sold certain land upon which timber was growing, and it was agreed that if the defendant cut and removed the wood the plaintiff might demand payment therefor, the payment to be applied in reduction of the purchase-moneys. It was held that the vendor had no lien upon any wood which the purchaser had cut down under the agreement, notwithstanding that it was still on the land. because the trees had become chattels, and, having been lawfully cut down by the purchaser, had become his property.

In *Wyatt* v. *Bank of Toronto* (1858), 8 U.C.C.P. 104, it was held that the owner of land who had sold and conveyed the timber and cordwood thereon lost his lien upon any timber or cordwood which the purchaser had cut down under the terms of the agreement. This was on the ground that the property in the trees, when cut down, had passed to the purchaser, and that there could be no lien upon a chattel without possession.

In the present case the removal of the ore was authorised by the agreement, and the property in it, when mined, clearly passed to the purchasers. And the mere fact that the purchasers were to pay to the vendors, on account of the purchase-price, a proportion of the income, could not, upon any principle of which I am aware, entitle the vendors to a lien upon the chattels which

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produced that income. The case is substantially similar to that of *Smith* v. *Bell, supra.*

Then does the provision that upon default the purchasers are to surrender the properties, "together with everything thereunto appertaining," in any way enlarge the vendors' right in so far as the ore is concerned? The words "together with everything thereunto appertaining" mean no more, in my opinion, than "together with their appurtenances." The ore, having been lawfully removed from the realty, and having become chattel property, ceased to be an appurtenance of the lands, and is not covered by the provision for surrender of possession. The fact that the vendors claim only a proportion of the value of the ore shews the fallacy of the contention that the mined ore was an appurtenance. If it were, then all the mined ore would be subject to surrender on the theory that it still formed part of the realty.

I have examined all the cases to which Mr. Bullen referred on the argument. I do not think any of them apply. *Knights v. Wiffen* (1873), L.R. 5 Q.B. 660, simply dealt with the question whether or not the property in certain goods had passed from the vendor to the purchaser. In all the other cases there was some interest in the goods themselves vested in the claimant. Here the effect of the contract is to vest the whole property in the ore, when mined, in the purchasers.

Mr. Bullen further urged that upon the marketing of the ore the company held the share of the income to which the vendors became entitled in trust for the latter. But, in the absence of some legal or equitable interest as owners in the ore itself, I do not know upon what ground the company could be deemed trustees for the vendors of any part of the proceeds of the ore. It is true the moneys out of which the payments are to be made are earmarked, but the clause of the agreement which provides for this method of payment makes it clear that the moneys are deemed to be the moneys of the purchasers, and when paid are to be deemed a payment by the purchasers on account of the purchase-price due by the purchasers to the vendors. The later words in the clause, "the parties of the second part shall not be required to apply on the said payment," etc., are consistent only with the fact that the proceeds of the ore were to be the property of the purchasers, out of which they, the purchasers, were to make the payments. Had it been intended to vest the proceeds in the vendors, it would have been a simple matter to have declared that the ore and the proceeds thereof should remain the property of the ven-

dors, out of which they, as vendors, were to retain a certain proportion to be applied on account of the moneys due them, paying the balance to the purchasers.

For these reasons, I hold that Christopherson and Skobba have no lien upon the ores in question or upon the proceeds thereof, and I direct that the moneys representing the same be forthwith paid over to the authorised trustee.

There was no argument before me as to whether, in the event of my holding that the claimants have no lien, they might be entitled to rank as ordinary creditors for the share in the moneys which they claim. The claim of the vendors is in reality a claim for the balance of the purchase-money. The vendors might, if they had so elected, have filed a claim for the whole balance due, at the same time valuing their security, which consists of their lien as vendors upon the property itself. It might be that, had they done so, the proceeds of the ore might have to be dealt with upon some different principle than those which I have applied, because in working out the equities between the parties the trustee might be obliged to do equity by applying the moneys in accordance with the terms of the agreement. But the vendors have elected to determine the agreement and to demand the surrender of the properties. How can they at the same time rank as creditors for any part of the purchase-price? While payments completely made out of the proceeds of the ores mined may have been forfeited by reason of the purchaser's default (though the agreement makes no provision for such forfeiture), the vendors cannot, in my judgment, having demanded the surrender of the properties, at the same time rank in respect of a claim which is in reality a claim for part of the purchase-price.

As to the second matter: I do not think an order is necessary to approve of the proposed surrender of the properties. The power of the trustee to make any compromise with the approval of the inspectors, given by sec. 20 of the Bankruptcy Act, is absolute. The inspectors in this case have approved. If the trustee thinks that the approval of the Court affords him some additional protection, he may have it. As to the surrender of the machinery and chattels, only such as "appertain" to the freehold ought to be given up.

Under all the circumstances, I think that there should be no costs as between the parties to this application.

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Re REEVE DOBIE MINES, Ltd.
WAGE-EARNERS CLAIM.

Ontario Supreme Court in Bankruptcy, Orde, J. June 2, 1921.

BANKRUPTCY (§IV—39)—CLAIM OF WAGE-EARNERS—PREFERRED CLAIMS—DISALLOWED BY TRUSTEE—ALLEGED LIEN ON OTHER PROPERTY—APPEAL—LIABILITY OF COMPANY.

An insolvent company's liabilities to pay wages under the Bankruptcy Act remains the same notwithstanding any lien that the wage-earners might have upon the property of a third person.

MOTION by wage-earners having claims against the assets of an insolvent company for a direction to the authorised trustee to allow the claims.

J. Cowan, for the wage-earners.

G. R. Munnoch, for the authorised trustee.

ORDE, J.:—The determination of this matter depended largely upon my decision as to the delivering up of the mining property in question in *Re Reeve-Dobie Mines Limited*, which was given on May 23 last *ante*, p. 529.

The wage-earners have filed their claims with the authorised trustee, who admits that, as the wages were earned within 3 months prior to the date of the assignment, the wage-earners would be entitled to rank as preferred creditors, but he has disallowed the claims on the ground that, as they are entitled, under the Mining Act of Ontario, R.S.O. 1914, ch. 32, and the Mechanics and Wage-Earners Lien Act, R.S.O., 1914, ch. 140, to a lien upon the lands and property of the company, they are secured creditors and did not prove their claims as such in the manner provided by the Bankruptcy Act.

So far as the lands are concerned, they are no longer the property of the company, but have reverted to the original owners under the terms of the agreement for sale. The wage-earners may have a lien thereon, by virtue of their work done thereon, which may perhaps be enforceable against the original owners, but whether they have a lien or not is immaterial so far as the insolvent company is concerned, because the security afforded by the lien upon the lands is not a security upon the property of the insolvent company. See definition of "secured creditor" in sec. 2, para. (*gg*), of the Bankruptcy Act. The liability of the company to pay these wages remains the same, notwithstanding the lien upon the property of some third person, because, if the third person were obliged to pay the wages, he would be immediately entitled, upon the principle of subrogation, to stand in the wage-earners' shoes and enforce the claim against the company.

By sec. 183 of the Mining Act, the lien extends not only to

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the mining lands, but also to "any other property of the owner therein or thereon," so that the wage-earners here may be entitled to a lien upon the ore concentrates or the proceeds thereof dealt with in my previous judgment already mentioned. As to that they might be called upon to value their security; but, as the concentrates have been converted into cash, and as the wage-earners are entitled to priority apart from any lien, it is probable that their rights can be worked out without putting them to the expense and trouble of filing new proofs. If, however, there is any difficulty about this, then my order will provide that they may file new proofs of their respective claims; but, as the property consists of cash, and without a comparison of their respective claims the claimants cannot tell how far the cash will go to satisfy them, any valuation of their security is a mere formality, and is therefore dispensed with.

The costs of the wage-earners, which I fix at $30, ought to be paid out of the general assets of the estate (if there are any) in the hands of the trustee.

As the trustee admits the amount of the wage-earners' claims, there is no reason why he or the insolvent company should be continued as parties defendant in the mechanics' lien action now pending. As against them that action ought to be stayed, and the proceedings amended accordingly. The stay will be without prejudice to the rights of any other parties defendant in that action to claim by way of subrogation or otherwise against the insolvent estate.

Re FICE AND DEPARTMENT OF PUBLIC WORKS OF ONTARIO.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Latchford, Middleton and Lennox, JJ. May 5, 1921.

LANDLORD AND TENANT (§IID—30)—LEASE—TERM OF TWO YEARS BY VERBAL AGREEMENT—EXPROPRIATION—DAMAGES—ALLEGED RENEWAL AGREEMENT—UNCERTAINTY.

When the terms of a lease for two years are proved by verbal evidence, the tenants cannot claim a right to renew unless the alleged renewal agreement is certain enough for the Court to enforce.

[Review of authorities.]

APPEAL by the Minister of Public Works from an award of Snider, County Court J., in an arbitration, the following being taken from the judgment of RIDDELL, J.:—

Mrs. Pearson was the owner of a piece of land, 10¾ acres in extent, in East Flamborough. In February, 1919, the Fices, husband and wife (niece of Mrs. Pearson), made a bargain with the owner to rent the place. A little memorandum was given by the owner, apparently on the 20th March, 1919, as follows:—

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"Place and crop with horse and waggon, buggy and cutter, harness and implements, spray, hot-bed, lights, and cow, place clean and bushes and trees trimmed, at $500.00 per year, place to be left as found.

"Elizabeth Pearson."

The circumstances are detailed by Mrs. Fice (in her testimony given before an arbitrator) thus:—

"She told me about it and we came up and talked it over and they (i.e., Mr. and Mrs. Pearson) told us what they wanted. She told us what she wanted for it and wanted us to try it as a fruit-farm—we understood we were to take it, and my aunt came down and wrote to me and said she was coming down to make the arrangements. . . . She came down there and brought this paper with her, what our agreement was to be. I had my oldest girl make a copy of the paper she brought, and she signed her name to one paper and I signed my name to the other.

"Q. Before it was signed at all, what was said about how long. The paper does not say what time you rented the place for, it just says place, crop, horse and waggon, etc., $500 per year? A. We were a little afraid we would not be able to—

"Q. How long was it for? A. We were afraid we wouldn't be able to make good; never having worked a fruit-farm, we felt a little uneasy about it; she wanted us to come up and try fruit-farming for a year, and I told her it would not be worth breaking up our home for that, so she said, 'Try it for two years, and if you make good and like it all right stay on it.'

"Q. What did you say about that? A. I said, if it was agreeable to her, we would try it and see how we made out."

The husband says:—

"Q. So that when she (i.e., Mrs. Pearson) came down with you, you did arrive at a definite bargain that day? A. Yes.

"Q. I think you said that you were to take the place for two years? A. Two years.

"Q. It was a definite bargain that she agreed you should have the place? A. If we got along all right with the place we could have it as long as we wished.

"Q. At all events you were to have it for two years—that was definite? A. Yes, we were to take it for two years to try it, we did not know anything about the fruit business.

"Q. Then if you liked it and you liked the fruit business? A. And make good, we could go on with the place.

"Q. At the rental to be agreed upon—what was said about the rent? A. At a rent that was to be . . . . .

THE ARBITRATOR: Then you are trying to tell me that she agreed for a further term if you liked it or if she liked it, what was it? Let us hear definitely from you about that? A. The wife spoke up and she said we would not rent it by the year; my wife says, 'We are not going up there for one year, we wouldn't bother moving up from Oshawa to Hamilton for one year;' so she said, 'Take it for two years, and if you get along all right and like it you can go on and have it longer.' So there was nothing said about what the rent was to be after the two years."

The Fices went into possession and have paid rent to Mrs. Pearson.

The Department of Public Works, requiring land for public purposes, bought this land from Mrs. Pearson and took possession of it. The Fices demanded compensation but did not agree with the Department as to the amount. The matter was arbitrated before His Honour Judge Snider of Hamilton, who awarded the sum of $1,707.50 damages, of which $1,000 was "damages for the loss of the use of the premises for another year, the horse, cow, and all other chattels from March, 1921, to March, 1922."

The Minister of Public Works appeals as to this sum of $1,000 only.

J. L. Counsell, for appellant.

S. F. Washington, K.C., for respondents.

RIDDELL, J. (after setting out the facts as above):—The decision proceeds on the hypothesis that the Fices had "a yearly tenancy which could be terminated only at the end of the second year, and that by the lessees and not by the lessor. If the lessees paid the rent and found that they were successful in fruit-farming, they could have gone on for one year longer . . therefore they are entitled to have remuneration for the loss of this property—one more year, the year from the 7th March, 1921, to the 7th March, 1922."

We may in the present case leave out of consideration any question of potentialities outside of strict legal rights—such as came up for discussion in *Canadian Pacific R.W. Co.* v. *Alexander Brown Milling and Elevator Co.* (1909), 18 O.L.R. 85; *Alexander Brown Milling and Elevator Co.* v. *Canadian Pacific R.W. Co.* (1910), 42 Can. S.C.R. 600; *Re Cavanagh and Canada Atlantic R. W. Co.* (1907), 9 O.W.R. 842. Mrs. Pearson had the undoubted right to sell to the Department, and the Department to acquire, her interest in the land; the Department would not

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renew or extend the lease; and the Fices must depend upon their strict legal rights.

The learned arbitrator holds that the tenants had the strict legal right to possession for one year after the termination of the two years' period agreed upon; the appellant contends that the right to possession ceased without notice at the said termination.

The cases cited for the tenants, although confidently relied upon to support their contention, do not seem helpful.

In *Tress* v. *Savage*, 4 E. & B. 36, a written instrument not under seal, and consequently void as a lease under the English Act 8 & 9 Vict. ch. 106, was held to create a tenancy from year to year—in the present case our statute saves the oral leasing: Statute of Frauds, R.S.O. 1914, ch. 102, sec. 4.

In *Austin* v. *Newham*, [1906] 2 K.B. 167, a tenant entered into possession under an agreement of tenancy "for a period of 12 months with the option of a lease after the aforesaid time at the rental of £30 per annum"—he was held entitled to claim a lease for at least one year after the expiration of the 12 months, because he had "the option of a lease after the expiry of the first 12 months at a certain rental" (p. 169).

In *In re Searle*, [1912] 1 Ch. 610, a demise "for two years certain and thereafter from year to year," at a rental of £400, until either party gives notice, was considered to give a tenancy till the end of one year at least after the two years certain, against the will of the tenant. This case is an interpretation of a particular contract only.

In *Brewer* v. *Conger*, 27 A.R. 10, there was a lease for years with a covenant of renewal for 10 years at a rental of $50, if the lessee "should desire to take a further lease of said premises"—it was held that a desire was all that was necessary, not notice, request or demand.

In *Alexander* v. *Herman*, 3 O.W.N. 755, 2 D.L.R. 239, there was a lease for one year, with the provisions that the tenant should have the option of "renewing the said lease for a period of one year . . . at the same rental and on the same terms and conditions as the present lease," and "the lessee shall have the privilege of renewing the said lease from year to year at the expiration of any year, so long as he may care so to do:" the decision was that the latter clause was not so indefinite as to be set aside. The reason of course is that the covenant to renew means to renew on the same terms (except as to renewals in some cases): *Price* v. *Assheton* (1834), 1 Y. & C. Ex. 82; *Lewis* v. *Stephenson* (1898), 67 L.J.Q.B. 296.

Osborne v. *Earnshaw*, 12 U.C.C.P. 267, is not to the point and was probably cited in inadvertence by the learned counsel for the respondents.

The present is not a case of a lease for a term certain with an option of "renewal;" the word "renewal" is not used at all. It is simply the case of one relative saying to another, "If you succeed in running the farm, I will let you have it longer." Alderson, B., in *Price* v. *Assheton*, 1 Y. & C. Ex. 441, at p. 444, asks, "But how is the Court to execute an agreement in which no time and no rent are stipulated for?"

It is not such a case as *Gregory* v. *Mighell* (1811), 18 Ves. 328, where the rent was not specifically mentioned, but was easily ascertainable. *Id certum est quod reddi certum potest.*

Nor have we anything as to the length of the term—"You can go on and have it longer." "If you make good and like it all right stay on it." It is clear that to entitle to a lease the term to be granted must be stated clearly and unambiguously: *Bayley* v. *Fitzmaurice*, 8 E. & B. 664: *S.C., sub nom. Fitzmaurice* v. *Bayley* (1860), 9 H.C.L. 78; see especially pp. 101. 105; and *per* Lord Cranworth (p. 110): "It is essential . . . that there should be an agreement specifying the extent of the term for which the lease is to continue." It must be certain when the term is to begin and how long it is to continue, as well as the rent to be paid: *Clarke* v. *Fuller*, 16 C.B.N.S. 24, at p. 37; *Marshall* v. *Berridge*, 19 Ch. D. 233, at p. 239; *Baumann* v. *James* (1868), L.R. 3 Ch. 508, wherein, at p. 513, Selwyn, L. J., says: "The question is . . whether the term of years and the rent were agreed upon;" *Dolling* v. *Evans* (1867), 15 W.R. 394.

The alleged agreement is too uncertain to enforce: the tenancy was for two years certain only, and the appeal should be allowed with costs.

LATCHFORD AND MIDDLETON, JJ., agreed with RIDDELL, J.

LENNOX, J.:—The Fices, claimants, were tenants of land, required by the Department for public uses, for a definite term of two years expiring on the 20th March, 1921. The land-owner has been settled with, and the question to be decided upon appeal is, whether the rights of the tenants expired on the 20th March, or whether they had a right of possession for a further term—say for another year, as held by the learned arbitrator.

The concise and admirable memorandum put in by Mr. Counsell covers the ground, leaves little to be added, and, to my mind, nothing to be controverted.

The writing of itself does not constitute an enforceable con-

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tract. Upon the verbal evidence, however, it appears that there was a definite bargain for a two years' tenancy, and, the tenants obtaining possession in pursuance of this, all legal conditions were complied with as to a two years' term. Beyond this, all is unsettled and indefinite: and the possession cannot be called in aid of that which was not definitely and finally agreed to.

[The learned Judge then quoted a part of the evidence of Mrs. Fice before the arbitrator, as set out above.]

The husband's evidence is still more significant. Not only was there nothing mentioned as to the duration of the renewal term, but re-adjustment of rent was also evidently contemplated.

[Quotation from the evidence of the husband, as above.]

To entitle the claimants to compensation, they must have some estate, something they could convey: *In re Morgan and London and North Western R.W. Co.*, [1896] 2 Q.B. 469. They have lost nothing, for they had no interest and nothing to lose: *Stebbing* v. *Metropolitan Board of Works* (1870), L.R. 6 Q.B. 37. There must be an enforceable right, too, of renewal—not a mere possibility: *Canadian Pacific R.W.Co.* v. *Alexander Brown Milling and Elevator Co.*, 18 O.L.R. 85 (C.A.); *Alexander Brown Milling and Elevator Co.* v. *Canadian Pacific R.W. Co.*, 42 Can. S.C.R. 600. Upon the facts the claim set up is not at all like *Austin* v. *Newham*, [1906] 2 K.B. 167; *Brewer* v. *Conger*, 27 A.R. 10; or *In re Searle*, [1912] 1 Ch. 610; for in all of these there is a precise agreement as to duration and other terms.

As I have already said, the possession down to the 20th March, 1921, is referable only to the agreement for a two years' tenancy (*Hand* v. *Hall*, 2 Ex. D. 365), and the Statute of Frauds bars the way to specific performance against the lessor: *Sanderson* v. *Graves*, L.R. 10 Ex. 234; and there can be no higher rights against the appellant.

In the absence of a supplementary agreement, the tenants were bound to surrender possession, without notice, at the end of two years: *Osborne* v. *Earnshaw*, 12 U.C.C.P. 267; *Magee* v. *Gilmour* (1889-90), 17 O.R. 620, 17 A.R. 27.

The appeal should be allowed, and with costs if asked.

MEREDITH, C.J.C.P.:—I agree with my brothers Riddell and Lennox in the views which they have expressed, namely: that there was a term of two years; and that beyond that there was no term or agreement for a term: and I desire to add only this: that, if there had been an agreement of which specific performance otherwise might have been had, it should doubtless have been invalid as to the respondents under the provisions of the Registry Act.

Appeal allowed.

Re KARCH.

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Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Latchford, Middleton and Lennox, JJ. June 4, 1921.

WILLS (§IIIA—75)—TESTATOR'S WILL—AMENDMENT TO STATUTE AFTER EXECUTION—DEATH OF TESTATOR—INTERPRETATION OF CLAUSES OF WILL—EFFECT OF THE AMENDMENT.

An amendment to the Wills Act passed after the making of the testator's will but prior to his death, will have the effect of interpreting the will in the light of the amendment.

[*Hasluck* v. *Pedley* (1874), L.R. 19 Eq. 271; *Constable* v. *Constable* (1879), 11 Ch. D. 681; *In re Bridger*, [1894] 1 Ch. 297, referred to.]

APPEAL by the receiver of the share of Christian Karch from the judgment of LOGIE, J., in the Weekly Court, Toronto, construing the will of Henry William Karch and declaring that the bequest therein to Henrietta Striker took effect as if her death had happened immediately after the death of the testator, although she died before the enactment of what is now sec. 37 of the Wills Act, by sec. 15 of the Statute Law Amendment Act, 1919, 9 Geo. V., ch. 25, while the testator did not die until after the amending Act had been given the royal assent and had come into operation. Affirmed.

P. Kerwin, for appellant.

E. G. Long, for respondents.

MIDDLETON, J.: — The question raised upon this appeal is important and not free from difficulty. By the will of the late Henry William Karch he devised his property upon certain trusts, *inter alia* "to pay to my brother and two of my sisters, namely Christian Karch, Henrietta Striker, and Ernestine Edgar, each one-fifth of my residuary estate."

The will bears date the 4th October, 1912. Henrietta Striker died on the 9th March, 1919. The testator died on the 15th December, 1919. Between the death of Henrietta and the testator the Act 9 Geo. V. ch. 25, sec. 15, was passed, and came into effect. This repealed sec. 37 of the Wills Act, and re-enacted it with certain important amendments.

This section in its amended form provides that where a sister of a testator, to whom real or personal estate is devised, dies in the lifetime of the testator, either before or after the making of the will, and any issue of such person are living at the time of the death of the testator, such devise or bequest shall not lapse but shall take effect as if the death of such person had happened immediately after the death of the testator unless a contrary intention appears by the will. The former section made similar provision in the case of the death of a child or other issue of the testator. The amendment extends this so as to apply

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to the case of a brother or sister of the testator, and makes the provision applicable even when the death takes place before the making of the will.

If this section applies, the issue of Mrs. Striker takes the share she would have had if living. If the section is not applicable, then the gift to her lapses, and, as the share is in the residuary estate, there is an intestacy.

I quite agree with Mr.. Kerwin's contention that sec. 27 of the Wills Act is not applicable to the problem here presented. That section provides that every will shall be construed, with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appears by the will. It has often been erroneously said that a will speaks from the death of the testator, but it has been authoritatively determined that this is not the effect of the statute. The decision of the Court of Appeal in *In re Chapman*, [1904], 1 Ch. 431, is conclusive upon this point, confirming what was determined in *Bullock* v. *Bennett* (1855), 7 De G.M. & G. 283. It is singular that in Craies' Statute Law, in discussing the very question which is here raised, the learned author, at p. 384, erroneously states that the effect of the corresponding provision in the English statute is that "every will is now construed as taking effect as if it had been executed immediately before the death of the testator." The true rule is that *primâ facie* a will speaks from the date of its execution except as regards the property comprised in it, the statutory provision having only this limited effect.

This, however, is far from determining the real question. A will manifestly differs from almost every other document in that it becomes operative only upon the death of the testator. Two opposite views may exist as to the effect of this upon the situation. In *Jones* v. *Ogle* (1872), L.R. 8 Ch. 192, the question of the apparently retrospective effect of a new statute upon a will was discussed, but it was not necessary, in the view taken, to determine the point. Lord Selborne said: (p. 195): "If it were necessary to decide, I should have very great difficulty indeed in seeing my way to the conclusion that this Act of Parliament either was intended to alter, or has in this case had the effect of altering, the proper construction of words contained in a will made before the Act passed."

Notwithstanding this weighty dictum, when the question did arise in *Hasluck* v. *Pedley*, L.R. 19 Eq. 271, Jessel, M.R., felt no difficulty in deciding: "It is said that testators make their wills on the supposition that the state of the law will not be

altered; and it is contended that this will ought to be construed as it would have been under the old law. The answer to that is, that a testator who knows of an alteration in the law (as this testator must be presumed to have done), and does not choose to alter his will, must be taken to mean that his will will take effect according to the new law. . . . The Act does not affect the meaning of the will; it only alters its legal operation." (pp. 273, 274).

In *Constable* v. *Constable* (1879), 11 Ch. D. 681, Fry, J., adopted the reasoning of the Master of the Rolls in *Hasluck* v. *Pedley*, and stated (p. 685) that, in his opinion, "it would be a very narrow construction to hold that it" (the statute) "did not apply to every instrument coming into operation after the passing of the Act." It is true that he drew attention to two other arguments looking to the same conclusion in that case, not applicable here, namely, that there was a codicil after the Act, and that the Act there under consideration was one dealing with property which passed by the will, and therefore sec. 24 of the English Wills Act might be applicable. Lord Justice Davey also approved of the decision in these two cases in *In re Bridger*, [1894] 1 Ch. 297, where he had been expressly invited to follow the dictum of Lord Selborne in preference to the opposite view.

This at first sight appears to be in conflict with the decision in *In re March* (1884), 27 Ch. D. 166, where it was held that the wider powers conferred upon married women by the Married Women's Property Act did not apply to wills executed before the passage of the Act, but it must be borne in mind that what was there being considered was the power of disposition by the married woman of her property, and it seems reasonable to hold that the power of the testator must be measured at the date of the instrument executed.

There are many other cases dealing with the effect of amendments of the law upon the will of a living testator, but I have not found any of them which are of assistance. Some of the very early cases give no indication of the ground of decision, *e.g.*, *Ashburnham* v. *Bradshaw* (1740), 2 Atk. 36. Many others proceeded entirely on the intention of the Legislature, either expressed or gathered from the form of the enactment The enactment here affords no such assistance. . It is sufficient to say that, without straining the words of the statute, it may be made applicable to the case in hand.

Bearing in mind the provisions of the Interpretation Act, R.S.O. 1914, ch. 1, sec. 10, which requires all amendments to the law to be regarded as remedial, and having regard to the obviously remedial nature of this statute, I can see no good reason

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why full effect should not be given to a provision of the law intended to prevent testators dying intestate, a result which the law regards with the same abhorrence as that with which nature regards a vacuum. The fundamental principle is to give effect to the wishes of the testator, and it is far more likely that the testator would intend to benefit the children of his sister who died after his will, than to have the provision made for her lapse entirely. Before the statute this result could not be avoided, as in the events that happened he would in fact be intestate. The Legislature has affixed consequences to the words used which, upon principle as well as policy, ought, I think, to be given effect to when the remedial law is in force at the time when the words first became operative.

The appeal should be dismissed with costs.

RIDDELL, J.:—I agree and have nothing to add.

LATCHFORD, J.:—I agree.

LENNOX, J.:—I agree.

MEREDITH, C.J.C.P. (dissenting):—The single question involved in this appeal is whether the Ontario Legislature altered the will of Henry William Karch, a short time before he died.

By his will, made more than 7 years before he died, he gave to his brother and two sisters, naming them, each one-fifth of his residuary estate; the share now in question was in effect disposed of in these words: "to my sister Henrietta Striker one-fifth of my residuary estate:" that was his will, which came into effect when he died.

It is said, and has been decided in this case, that by an alteration in the Wills Act passed on the 24th day of April, 1919, and which came into force in 60 days thereafter, nearly 9 years after the will was made, and less than 6 months before the testator's death, the will has been changed.

If that enactment applies to this will, then the Legislature has altered the man's will without his consent, and, the chances are one hundred to one, without his knowledge, by, in effect, adding to it these words: and if my said sister Henrietta Striker dies before me, leaving issue, any issue, any of which shall be living at the time of my death, such issue shall take her share; though it may be that he had no desire to make any such gift, or indeed that it would have been repugnant to him, a thing that he might never under any circumstances have done.

Nothing is gained by saying that he is supposed to have known the law. Even if that were so of such a law and of the like continuous changes being made by the Legislature in the laws of this Province in such a manner that even the lawyers may be, and indeed not infrequently are obliged to admit that

they are, unaware of some of the changes; and any one may, with considerable confidence, question whether even a very large percentage of the doctors of laws are yet aware of the changes in the Wills Act upon which the rights of the parties to this appeal depend.

Nor will it do to assume that the law is as one may wish it to be and make claims based upon that assumption. There is no more right to say that the enactment altered the will in question, and that the testator should have known that, than to say that it did not alter his will and he knew that or should have known it. In my opinion, the latter is the true saying: for it is a sound rule of law, founded on sound common sense, that new laws are not to affect things that have been done, "*Ex post facto*," or 'retroactive," or "retrospective" laws, as they are generally called, are generally considered obnoxious laws. And so, in my opinion, if the testator had been obliged to consider the question, he should have best decided it in considering that his will was unaffected by the legislation in question, passed after the due making of his will with all the formalities required by law to give it effect.

Upon general principles, I should have thought it plain that the legislation in question did not affect the will in question: if it had been meant to have a retroactive effect, the Legislature should, and doubtless would, have said so, and have given reasonable notice and time so that its effect might be avoided by all who wished to avoid it: it seems to me to be impossible that they could have meant it to alter wills, the most solemn documents, in reality behind the backs of the testators.

And I can find nothing in the books to the contrary; but indeed much in favour of that view of the effect of such legislation.

The cases under the Apportionment Act, 1870, in England, cannot govern the question in this case, to which apportionment enactments have no relation. The question in this case arises independently, and entirely out of the amendment of the Wills Act, before mentioned.

The apportionment cases related entirely to the property willed, and so the will, by reason of the provisions of the Wills Act, spoke and took effect as if it had been executed immediately before the death of the testator, no contrary intention appearing in it: sec. 27 of the Wills Act * in force here; in this case the

*27 — (1) Every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appears by the will.

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change by legislation relates not to the property but to persons, and so the 27th section has no bearing upon the question: see *Bullock* v. *Bennett*, 7 DeG. M. & G. 283; and *In re Whorwood*, 34 Ch. D. 446.

The Apportionment Act, 1870, provided (sec. 7) that it should not extend to any case "in which it is or shall be expressly stipulated that no apportionment shall take place:" the word "is" pointing to cases existing when the Act was passed and the words "shall be" to future cases; whilst in the legislation in question there is nothing to take it out of the general rule against *ex post facto* legislation; as the words "died or shall die" or "died or dies" might: see *Lawrence* v. *Lawrence* (1884), 26 Ch. D. 795.

And in most of the cases under the apportionment legislation the wills had been confirmed in codicils made after the passing of the Act.

The somewhat catching mode of stating the argument, made in one of the apportionment cases: that the Apportionment Act does not affect the metaning of the will; it only alters its legal operation; that which the devisee gets has the same name, but there is less of it: may not appear to him who gets the less of it to be very consoling or substantial. Whether you call it "legal operation," or call it by any other name, part of that which the devisee was to get under the will is taken from him by legislation, and to that extent the will is altered. But, however the form may be prettily described, or the substance suffer, is of little importance compared with this: the legislation in question does affect the meaning of the will, it adds a new devisee or legatee, and it may be one whom the testator might least of all the persons in the world desire to take his property under his will.

On the other hand the case of *Wild* v. *Reynolds*, 5 N.C. Ecc. 1—a ruling of Sir H. Jenner Fust—upon which the appellant relies, is quite in point in his favour; and such cases as *Winter* v. *Winter* (1846), 5 Hare 306, and *Mower* v. *Orr* (1849), 7 Hare 473, all decided under the provisions of the Wills Act, shew plainly that if the wills had not been made, or confirmed, after the passing of the Act, the legislation should have been held to be inapplicable.

In the last named case the learned Vice-Chancellor put his decision on these grounds and in these words (p. 475): "It appeared to me, and I still think, that the words of the statute are large enough to take in all cases in which the issue intended to be benefited dies leaving issue, and any of the issue survive the testator, *if the will be made, and the party for whom the gift*

was intended, died after the Wills Act came into operation." I have italicised the words applicable to this case.

The case of *In re March*, 27 Ch. D. 166, seems to me not only to be helpful to the appellant, but to tend to make it plainer why the apportionment cases are altogether inapplicable to this case; the question under the will of Mrs. March affected her property, in a sense, but it also affected very materially the persons who were to take, and so the will did not speak and take effect at the time of the testator's death. It was not a question of what Blackacre comprised, but was, who were to take Blackacre under the will and in what shares; as it is in this case altogether who are to take, not what is to be taken.

In my opinion, the Legislature has not altered the will in question: I have no doubt effect should be given to it according to the intentions of the testator plainly expressed by him in it..

Appeal dismissed.

AMERICAN CHICLE Co. v. SOMERVILLE PAPER BOX Co. Ltd.

Ontario Supreme Court, Hodgins, J.A. June 6, 1921.

MORTGAGE (§V—68)—DEMAND FOR PAYMENT—LIABILITY ACKNOWLEDGED —MEDIUM OF PAYMENT—CURRENCY ACT—FINANCE ACT 1914— RIGHTS OF PARTIES.

Mortgagees demanding payment of mortgage moneys in current gold coin are bound by the provisions of the Currency Act, and also by the provisions of the Finance Act 1914, and payment in lawful money of Canada is deemed sufficient.

ACTION, by the assignees of a mortgage, for foreclosure, and upon the covenant for payment contained in the mortgage-deed which was made pursuant to the Short Forms of Mortgages Act, and dated the 1st October, 1910, executed by the defendants to the Sen Sen Chiclet Company, and by them assigned on the 29th July, 1914, to the plaintiffs.

M. H. Ludwig, K.C. for the plaintiffs.

I. F. Hellmuth, K.C., and *L. Ramsey*, for the defendants.

HODGINS, J.A.:—The mortgage recites that the mortgagors have applied to the mortgagees for a lien upon mortgage of the premises owned by the mortgagors, and that "in consideration of the sum of $75,000 of lawful money of Canada now paid," etc., the mortgagors do grant and mortgage the premises described to the mortgagees. The assignors were an entity owned by the present plaintiffs, so that no question arises out of the assignment.

On the 9th April, 1915, the then parties to the mortgage agreed to extend the time for payment of the mortgage-moneys,

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upon certain terms, all of which have been fulfilled except as to the final payment of $50,000, which is now unpaid upon the mortgage, having matured upon the 1st day of October, 1920. Interest at 6 per cent. from the 1st day of October, 1919, is also due, subject to the validity of the tenders made both of principal and interest, to which I will later refer. The mortgaged premises consist of a factory situate in London, Ontario, and it is admitted that both the plaintiffs and the defendants carry on business in New York City, U.S.A., though the defendants operate the factory in London. The question in the case arises upon the proviso for making the mortgage void, which reads as follows:—

"Provided this mortgage to be void on payment in current gold coin at the option of the mortgagees of $75,000 of lawful money of Canada with interest thereon as follows."

The covenant to pay is in these words:—

"The mortgagors covenant with the mortgagees that the mortgagors will pay the mortgage-money and interest, and observe the above proviso."

Subject to a question as to whether the interest was likewise to be paid in gold coin if demanded, which was not argued, and which, therefore, I have not considered, the sole point involved is whether the plaintiffs are entitled to exact gold coin in payment of the mortgage-moneys, or, in other words, payment of so much Canadian or American currency as would secure gold coin to the amount of $50,000 and interest. The evidence shews that, while gold coin is at present, and has been since the opening of the war, unprocurable in Canada, the defendants could acquire gold coin at the United States Treasury, in exchange for notes of the National Banks in the United States or American legal tenders, if they chose to buy them at the current rates of exchange. The war legislation of Canada as affecting its financial system has an important bearing upon the rights of the parties. The Act 9 and 10 Edw. VII. ch. 14 (Dom.), assented to on the 4th May, 1910, was the Currency Act before the war. By it, under sec. 10, it was enacted that until otherwise ordered by proclamation of the Governor-General in Council American gold coins should pass current and be a legal tender in Canada for their face value.

By the same statute, sec. 15, sub-sec. 3, it is provided that:—

"3. Every contract, sale, payment, bill, note, instrument and security for money, and every transaction, dealing, matter and thing whatever relating to money, or involving the payment of or the liability to pay any money, which is made, executed or entered into, done or had, shall be made, executed, entered into,

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done and had according to the coins made for circulation in Canada and which are current and legal tender in pursuance of this Act, unless the same be made, executed, entered into, done or had, according to the currency of Great Britain or of some British possession or some foreign state."

Section 4 says that:—

"Gold, silver and bronze coins, struck by the authority of the Crown for circulation in Canada . . . shall be equal to and pass current for the respective sums in the currency of Canada following, to wit:" (setting out the denominations of the various coins).

The effect of a legal tender in gold and silver, so far as it affects this case, is expressed in these words in sec. 8:—

"A tender of payment of money, if made in coins which have been made in accordance with the provisions of this Act . . . . shall be a legal tender.

"(*a*) in the case of gold coins, for a payment of any amount; * * * *

"(3) Nothing in this Act shall prevent any paper currency which under any Act or otherwise is a legal tender from being a legal tender."

Government action and the enactments consequent on the war, dealing with gold and currency in Canada, are as follows:—

The Minister of Finance at once gave notice that Dominion notes were not to be redeemed in specie, and this was approved by order in council on the 10th August, 1914. This was done in order to "preserve intact the gold reserve held by him under the provisions of the Dominion Notes Act." Previously, by order in council dated the 3rd August, 1914 (1914, 1st. Sess., 4 and 5 Geo. V., p. liv.), the recommendation of the Minister that chartered banks be authorised to make payment in bank notes instead of gold or Dominion notes, was approved. These orders in council were confirmed by the Finance Act, 1914, 5 Geo. V. ch. 3, which further provided (sec. 4) that the Governor in Council might by proclamation:—

"(*a*) in the case of gold coins, for a payment of any the bank notes issued by such banks instead of in gold or Dominion notes, but the total amount of the notes of any chartered bank in circulation at any time shall not exceed the amount of its notes issuable under the provisions of the Bank Act and of clause (*c*) of this sub-section."

"(*d*) Suspend the redemption in gold of Dominion notes."

It was provided by sub-sec. 3 that "a tender by a bank of its notes in payment of any of its liabilities, when a proclamation made under clause (*b*) of the first sub-section of this section is

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in force, shall be a sufficient and valid tender, and the payment at such time by a bank of any of its liabilities with its notes shall be as sufficient and valid a payment as if the same had been made in specie or Dominion notes:

Provided in either case the total amount of the notes of the bank in circulation at that time, including in the case of tender the amount tendered, does not exceed the amount of notes of the bank issuable under the provisions of the Bank Act and of clause (c) of said sub-section."

A proclamation pursuant thereto was duly issued on the 3rd September, 1914 (see Proclamations, 1915, p. 74). These measures were continued until two years after the conclusion of peace on the termination of the war, by 9 and 10 Geo. V. ch. 21. The export of gold was likewise, under its provisions, prohibited by order in council dated the 3rd June, 1918 (9 and 10 Geo. V. p. lxxxvii.), and has been continued until the 1st day of July, 1921, by order in council of the 30th June, 1920 (see Can. Gazette, vol. 54, p. 240).

The treaty of peace was not signed until the 28th June, 1919, and the ratifications were not exchanged until the 10th January, 1920 (see *Kotzias* v. *Tyser*, [1920] 2 K.B. 69), while the proclamation under the Imperial statute 8 and 9 Geo. V. ch. 59, naming the exact date for legal purposes of the end of the war against all belligerents, has not been issued, so far as I can learn. However, two years have not expired even since the 28th June, 1919, and the statute is still in force.

The construction of the proviso and of the covenant in the mortgage must be determined in accordance with the law of Canada at the time the mortgage was entered into, namely, on the 1st October, 1910. The continued stability of that law must have been, if intention is to be regarded, " the basis of the contract in the mind and intention of the contracting parties:" *Horlock* v. *Beal*, [1916] 1 A.C. 486. At that time, sec. 15 of 9 and 10 Edw. VII. ch. 14, was in force (4th May, 1910), and, by sub-sec. 3, already quoted, "every contract . . . instrument and security for money, and every transaction . . . involving the payment of or the liability to pay any money * * * shall be made, executed, entered into, done and had according to the coins *made for circulation in Canada*," unless expressed to be according to the currency of Great Britain, etc., or of some foreign state.

Consequently the proviso and covenant, in so far as it involves payment in gold coin, requires for its fulfilment payment in the gold coins made in Canada, and not those which are not so made, though passing legally current in the Dominion,

and notwithstanding that the words of the proviso are "current gold coin."

In the *Legal Tender Cases* (1870) 12 Wall (S.C. U.S.) 457, Mr. Justice Strong, at p. 548, in delivering the opinion of the Court, said:—

"But the *obligation* of a contract to pay money is to pay that which the law shall recognise as money when the payment is to be made. If there is anything settled by decision it is this, and we do not understand it to be controverted."

In those cases, arising out of legislation consequent upon the civil war, there was much discussion as to the right of the United States Government to make its notes legal tender in place of gold. Mr. Justice Bradley, who concurred with Mr. Justice Strong, uses language, at p. 565, which can very properly be applied to the legislation passed in Canada during the war. He says:—

"So with the power of government to borrow money, a power to be exercised by the consent of the lender, if possible, but to be exercised without his consent if necessary. And when exercised in the form of legal tender notes or bills of credit, it may operate for the time being to compel the creditor to receive the *credit of the government* in place of the gold which he expected to receive from his debtor. All these are fundamental political conditions on which life, property, and money are respectively held and enjoyed under our system of government, nay, under any system of government. There are times when the exigencies of the State rightly absorb all subordinate considerations of private interest, convenience, or feeling; and at such times, the temporary though compulsory acceptance by a private creditor of the government credit, in lieu of his debtor's obligation to pay, is one of the slightest forms in which the necessary burdens of society can be sustained.. Instead of being a violation of such obligation, it merely subjects it to one of those conditions under which it is held and enjoyed.

That decision was confirmed in several subsequent cases, notably in *Railroad Co.* v. *Johnston* (1872), 15 Wall (S.C.U.S.) 195, and enunciates principles applicable in our country as well as to the United States. It is only an extension of that principle to require a creditor to accept the notes of a chartered bank which derives its powers from Parliament if Parliament exercises its authority so as to make its notes legal tender in the place of coin. The result to my mind of the situation created by war exigencies is this, and the evidence before me bears it out: that gold coin made in Canada, and indeed any other gold coin, is not and was not at the maturity of this mortgage procurable

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in Canada, but is and was being held as a national security behind the Dominion notes and ultimately behind those of the chartered banks, so that it has become legally impossible for a debtor to discharge his obligation in Canada in gold coin made in Canada or to procure it for the purpose of exportation to the United States in payment of a debt which under the circumstances of the case may become payable in that country. Indeed my view of the legislation and the orders in council pursuant thereto is, that they nullify or suspend for the time being the benefit of the exercise of the option given to this mortgagee (*Hadley* v. *Clarke* (1799), 8 T.R. 259), or rather prevent the debtor from complying with it and enable him to discharge his debt in money which is legal tender in this country.

But it is said that, as gold is procurable in the United States in the way I have mentioned, it is the debtor's duty to procure it, although he cannot do so except by paying the exchange now prevalent between the two countries, and this argument is reinforced by the contention that, as it is the duty of the debtor to seek out his creditor, and as the creditor in this case carries on business in the United States, the payment to him must be made in American currency. While I agree that it is the duty of the debtor to seek out his creditor in order to discharge his obligation, I am unable to see that that carries with it the right to demand payment in currency other than that in which the debtor has agreed to pay his debt. In the case of *Niagara Bridge Co.* v. *Great Western R.W. Co.* (1863), 22 U.C.R. 592, in Trinity Term, Chief Justice Draper, in delivering the judgment of the Court, said (p. 596):—

"The contract" (to pay rent), "being made in Canada, and mentioning no place where the stipulated payments are to be made, is to be governed in its construction by the laws of Canada, and not of any foreign country. The Court must intend from the declaration that the rent was payable in current money of Canada, though it is not in words so set forth."

The Court there held that a tender would be properly made at the domicile of the plaintiffs, both of whom were domiciled in the United States, or to one of them, but that the money must be paid in Canadian currency, and that a tender made of an equivalent number of dollars in American currency, which at that time was at a discount, was not valid.

In the case in hand, no place of payment is mentioned, and the contract was made in Canada, and payment is stipulated to be made in Canadian currency both as to coin (by force of the statute) and of bank or Dominion notes; so that, if the debtor did have to seek out his creditor, his obligation is to pay him

only the sum of $50,000 in Canadian coin or currency, and he can discharge that liability by paying an equivalent of that sum in American currency, namely, the amount in either American gold or legal tenders which $50,000 of Canadian currency will purchase. Any other construction placed upon the proviso and covenant would seem to me to be contrary to the terms of the mortgage itself, and would place an unjust burden on the debtors, in that, before obtaining a discharge of their mortgage, they would be required to pay not only $50,000 of lawful money of Canada, but a sum which would to-day at the current exchange amount to $6,000. No contract should be construed so as to have that effect if the language does not compel it. The fair meaning of it, having regard to the currency law in force when it was entered into, is that the words "lawful money of Canada" govern the entire proviso and covenant, and only permit the mortgagees to exercise an option to call for gold coins made in Canada, and that they cannot require the mortgagors to supply them with any other or foreign coinage. The following cases illustrate this.

In *Morrell* v. *Ward* (1863), 10 Gr. 231, the mortgage sued upon comprised lands situate in Ottawa, but was made in the United States,, where both parties resided, and it was payable in the currency of the United States of America. VanKoughnet, C., in that case said (p. 233):—

"It was contended before me for the mortgagee that he was entitled to be paid in Canadian currency, or in other words, to receive a dollar in silver or gold, according to the denominational value of such coin, for every dollar in amount of or in the mortgage. This, I think, is not the contract of the parties, and that the mortgagee has no right to go to this extent; but short of this, he has the right or option, as indicated, which I do not see, if he desires to employ it, can be worked out at present, on any material before me."

That option was to accept payment in Canadian currency equivalent in value to the currency of the United States of America when paid or tendered, which currency, as I have pointed out in referring to the *Niagara Bridge Company* case, was then at a discount.

In *Massachusetts Hospital* v. *Provincial Insurance Co.* (1866), 25 U.C.R. 613, the defendants, in Toronto, covenanted to pay $516 in New York on the 20th August, 1858, which they failed to do. At that time the dollar in New York and Canada was of the same value. When sued here in 1865, they claimed to pay the $516 in depreciated American currency. Mr. Justice Hagarty, in delivering the judgment of the Court, said (pp. 615, 616):—

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"Assuming, as we do, that the delay in payment was the fault of the defendants, we cannot understand why the plaintiffs are now to lose one-third of their claim because their own currency has become depreciated in value. The defendants, on the other hand, have only to pay what they originally contracted to pay, viz., the same amount (apart from interest), which on the 20th August, 1858, would have satisfied their covenant."

I cannot see that the doctrine of frustration, which was invoked during the argument, can be applied to a case where the contract involves or is based upon a pledge for its repayment, or an estate is created as part of or by virtue of the agreement. But, although it may become during a shorter or longer period of time, depending upon the exigencies of the State, impossible for a debtor to comply with a contract to pay his debt in the way in which his creditor desires, then, provided he can do so in another way permitted by the law of his country, his property cannot be held in pledge or forfeited because of that impossibility. And, if the difficulty be caused by an act of State required for the national security, the debtor is relieved, while the law operates, from the abnormal demand, and if sued is enabled to discharge his debt in the currency then made legal tender by his country's laws. The creditor here has resorted to the Courts of this country to enforce his demand, and, as I point out later, he must submit to the *lex fori* as to his remedy.

Another point of view may be adverted to. If the proviso is read as requiring gold coin, as defined by the Act already referred to, in the sense of money, then its non-payment differs in no way from default in payment of money when due. In that case damages would be limited to the interest on it, which would not be allowed in case the debtor had tendered performance in the ordinary currency of Canada. If, on the other hand, the election to require gold coin involves treating it as a special species of money, and it appears that that species cannot be procured in Canada and must be obtained at great expense elsewhere, a bargain to pay in that particular form would be a harsh and unconscionable one. While there are no usury laws in Canada, the Ontario Money-Lenders Act, 2 Geo. V. ch. 30, gives power to the Courts to inquire into and revise any such contract.

The original mortgage-covenant is, however, not within its scope, as it was entered into before that Act was passed in 1912; but the agreement for extension in 1915, which applies in all its rigour the original obligation, is subject to its provisions. See sec. 7. Having regard to the risk and to all the circumstances, the bargain should, in the view I have propounded, be

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deemed to be harsh and unconscionable in imposing on the mortgagor the necessity of procuring, at an expense of $6,000, the money necessary to discharge a loan originally made in lawful money of Canada. It is probably unnecessary to have recourse to this Act, for the Court has power, under its equitable jurisdiction and by virtue of sec. 16 (*h*) of the Judicature Act, to impose such reasonable terms and conditions as it shall deem just in affording the plaintiffs their remedy.

What this involves in cases of money lent on mortgage may be seen in the case of *Kreglinger* v. *New Patagonia Meat and Cold Storage Co. Limited*, [1914] A.C. 25, at p. 54, and it undoubtedly makes it possible to grant relief by way of redemption upon equitable terms, notwithstanding the force of the contractual terms. See also *Samuel* v. *Newbold*, [1906] A.C. 461. Hodgins, J.A.

It would appear to me that the defendants may well apply to this jurisdiction for relief against being compelled to pay the mortgagee $6,000 more than was originally lent. If that amount is considered either as an addition to the principal, or as an amount recoverable as interest, the right of foreclosure ought to be denied except upon terms that the mortgagee should accept such lawful money of Canada as can be procured here or its equivalent in currency of the United States if the mortgagee desires to be paid there.

I therefore hold that, both by the presumed intention of the parties and by force of the Currency Act, the right of the mortgagee is limited to requiring payment in gold coins made in Canada for currency purposes; that the defendants are, while the Finance Act, 1914, and the proclamations under it remain in force, unable to procure such gold coins, and that their contract to pay it is suspended while that state of affairs exists; that, whether I am right in these views or not, the plaintiffs, having come to the Supreme Court of this Province to enforce their demand, are subject to its powers; that the contract embodied in the renewal agreement, if construed as they require, is harsh and unconscionable and may be inquired into, revised, and altered in an action for the recovery of the money; that the enforcement of their mortgage in this action can be made subject to such reasonable terms and conditions as may be imposed by the Court; and that, the defendants having offered before action to pay the claim in lawful money of Canada, the plaintiffs can only at present obtain judgment for the enforcement of their security upon the term that they accept such payment.

The sole question between the parties was as to the medium in which the money was to be paid. The defendants have never contested their liability, and have offered to pay in Canadian

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currency, in which, I think, they were entitled to pay. That was refused by the plaintiffs, and this action has resulted. Formal tender was waived before action was begun, on the 25th November, 1920.

The plaintiffs have therefore entirely failed in their contention, and, as a tender before action was waived, they must pay the defendants' costs of action. While any Court might well disapprove of an attempt on the part of the plaintiffs to exact payment in gold coin at a time when it was common knowledge that, for reasons of state, it was not procurable here, I am glad to observe that their solicitors, while leaving nothing undone in their clients' interests, have conducted the case in a way calculated to cause the least inconvenience to the defendants.

Judgment may be entered dismissing the action and directing the plaintiffs to pay the defendants their costs of the action, unless the plaintiffs file with the Registrar, within 15 days, a consent to pay the costs and to accept payment of their mortgage-moneys in lawful money of Canada, in which case, and upon payment of the costs of the action, and if the mortgage-moneys are not so paid within 15 days thereafter, judgment may be entered in their favour for $758.63, without interest thereon, being the gale of interest due on the 1st June, 1920, and for $50,000 with interest at 6 per cent. from the 1st June, 1920, as agreed, until payment, together with the usual foreclosure decree.

CUDMORE v. CUDMORE.

Ontario Supreme Court, Masten, J. May 31, 1921.

DIVORCE AND SEPARATION (§VC—59A)—ALIMONY ACTION—NEGLECT OF COURT ORDER—MOTION FOR WRIT OF SEQUESTRATION—PRACTICE.

The Court may, according to its discretion, order a writ of sequestration under Rule 549, but such writ will not issue except as a last resource, and when it is clearly shewn that it will procure some advantage for the creditor.

[*Nelson* v. *Nelson* (1874), 6 P.R. (Ont.) 194, referred to; *Hubert* v. *Cathcart*, [1896] A.C. 470, distinguished.]

MOTION by the plaintiff for an order for the issue of a writ of sequestration against the property of the defendant.

R. S. Hays, for the plaintiff.

J. L. Killoran, for the defendant.

MASTEN, J.:—This is an action for alimony. The action has not been tried, but an interim order for disbursements and interim alimony has been made. Under this order, the defendant has been ordered to pay the plaintiff's disbursements of trial, fixed at $50. With respect to interim alimony the order provides as follows:—

"1. It is ordered that the defendant do pay to the plaintiff the sum of $50 as and for arrears of interim alimony since the date of the service of the writ of summons herein upon the defendant up to the date hereof.

"2. It is further ordered that the said defendant do, on Tuesday the 18th day of January, 1921, and on each succeeding Tuesday until the trial or other termination of this action, pay to the plaintiff's solicitor, at his office, in the town of Seaforth, the weekly sum of $3 as and for interim alimony up to the trial of this action or the judgment or other adjudication thereon.

"3. And it is further ordered that the defendant do forthwith pay to the plaintiff the sum of $50 as and for her interim disbursements."

The disbursements have been paid, but no payment has been made on account of the interim alimony. Rule 549 is as follows:—

"549. If a person who is ordered to pay money, neglects to obey the judgment, the Court may, upon the application of the party prosecuting the same, at the expiration of the time limited for performance, make an order for a writ of sequestration."

I am of opinion that, as a definite time is by the order fixed for the payment of the interim alimony, and considering the nature and purpose of interim alimony and the terms of Rule 549, which differs substantially from the English Rule, a case has here arisen in which the Court has jurisdiction to award a writ of sequestration, if, in the opinion of the Court exercising a judicial discretion, the writ ought to issue.

In considering how the discretion should be exercised in the present case, two considerations have presented themselves to me as being of outstanding importance.

It is a settled rule of our practice that the writ of sequestration is an extraordinary remedy, only to be employed as a last resource, and it is a condition precedent to its issue that the applicant should shew that the ordinary procedure for recovery of a money demand, viz., a writ of *fi. fa.*, or an attachment of debts, is unavailing: *Nelson* v. *Nelson* (1874), 6 P.R. 194. No such evidence is here adduced by the applicant.

2nd. If it appears that the sequestration will be a mere idle and futile proceeding, adding to the costs and securing no advantage to the creditor, that will be a reason to be considered by the Court bearing against the issue of the writ. In considering this point, I have not overlooked the case of *Hulbert* v. *Cathcart*, [1896] A.C. 470, but the facts of that case appear to me to differ essentially from those of the present case.

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In the present case, the facts are not made entirely plain on the affidavits, but it did appear plainly from the argument that all the defendant has or is expected to have is the weekly wage which he receives from his work as a labourer, amounting to from $9 to $16 per week. But wages for services still being rendered or which may be required in *futuro* cannot be sequestered: *Fenton* v. *Lowther* (1787), 1 Cox Eq. 315; *McCarthy* v. *Goold* (1810), 1 Ba. & B. 387.

For these reasons, I conclude that my discretion must be exercised by refusing the application. Costs to be costs in the cause.

In the course of the discussion before me, it transpired that the defendant complains that the plaintiff is in fault for failure to bring the case to trial at this Court, and consequently that the action should be dismissed. That motion is not before me, and I only advert to the point in order to draw the attention of the parties to the recent case of *Leavis* v. *Leavis*, decided by Mr. Justice Hill on the 21st March last, and reported in [1921] P. 299.

McLENNAN v. FULTON.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins and Ferguson, JJ.A. June 14, 1921.

PARTNERSHIP (§II—8)—JUDGMENT AGAINST PARTNER—SALE OF PARTNER'S INTEREST IN FIRM—VENDOR'S INTEREST—RIGHTS OF CREDITORS—BULK SALES ACT (1917), 7 Geo. V. CH. 33, SEC. 7.

The share of a partner is his proportion of the partnership assets after they are realised upon and all liabilities paid. A partner's share in a partnership is not a vendor's interest under the Bulk Sales Act.

APPEAL by plaintiff in an action in which the plaintiff, suing on behalf of himself and all other creditors of the defendant A. G. Fulton, sought a declaration that a sale by Fulton of all his interests in the assets of a firm of which he was a member was fraudulent and void as against creditors, both by virtue of the Bulk Sales Act, 1917, 7 Geo. V., ch. 33, and apart from that Act.

The judgment appealed from is as follows:—

"At the trial I stated my opinion that actual fraud was not proved, and that, apart from the Bulk Sales Act, the claim must fail; what has to be dealt with is the claim based upon that Act; and the first question to be considered is, whether the action was begun within the time limited.

By sec. 9 of the Act, it is enacted that no action shall be brought to set aside or have declared void any sale for failure to comply with the provisions of the Act, unless such action is brought within 60 days from the date of such sale or within 60

days from the date when the creditor attacking such sale first received notice thereof. The present action was not brought within 60 days from the date of the sale; and the question is, whether it was brought within 60 days from the date when the notice came to the plaintiff, or—which, in the circumstances of this case, is the same thing—to his solicitor.

After the plaintiff had recovered his judgment against A. G. Fulton, and more than 60 days before this action was brought, the plaintiff's solicitor had an interview with Fulton's solicitor, the plaintiff's solicitor seeking—and obtaining—information about Fulton's dealings with certain interests which he had in a timber company; and Fulton's solicitor asserts, and the plaintiff's solicitor denies, that, in the course of the interview, the matter of the sale here in question came up, and the *bona fides* of it were discussed. There is not in my mind the slightest doubt that each of the solicitors is perfectly sincere in his statement as to his recollection of what was said at the interview; there is then, the case of two witnesses of equal credibility, the one saying positively that certain words were said, and the other as positively denying it, and the rule mentioned in *Lane* v. *Jackson* (1855), 20 Beav. 535, *Lefeuntum* v. *Beaudoin* (1897), 28 Can. S.C.R. 89, at p. 94, *Kastor Advertising Co.* v. *Coleman* (1905), 11 O.L.R. 262, at p. 267, *Rex* v. *Stewart* (1902), 32 Can. S.C.R. 483, at p. 501, and other cases, is to be applied—it is to be found that the statement was made, and that he who denies it has forgotten it—unless there is something else in the evidence which justifies the opposite conclusion.

The evidence of the plaintiff's solicitor is said to be corroborated by the fact that he made a memorandum of some of the things told him about the timber, and that nothing about the sale here in question appears in that memorandum, and by the further fact that he commenced this action soon after he had examined A. G. Fulton as a judgment debtor, and had obtained information—I do not know how full—about the sale of the interest in the partnership assets. Against these facts, however, is to be set the fact that the plaintiff's solicitor says that, at the time when he recovered his judgment and afterwards, he did not suppose that A. G. Fulton—who managed the business of the firm, which traded under the name of the Fulton Hardware Company—had any real interest in that business. If he did not attach any importance to A. G. Fulton's connection with the firm, it is quite possible that a statement concerning the sale of his interest, and even some conversation about the good faith of the transaction, made and occurring in the course of an interview concerning a matter to which he did attach importance,

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would neither fix itself in his memory nor be noted in the memorandum which he made as to the matters about which he was particularly inquiring. This consideration seems to me to balance, if it does not outweigh, the effect of the other matters which I have mentioned; and I think it is a case for the application of the rule to which I have referred. It may also be observed, although, perhaps, it is not very important, that the words of the statute seem to cast upon the plaintiff the burden of proving that he began his action within 60 days after he received notice of the sale.

I have considered and have reached a conclusion upon the point to which the greater part of the argument was directed, viz., whether the Bulk Sales Act applies to a sale such as the one here attacked; but, as that point is one upon which the opinions might differ, and as the view which I take as to the objection that the action was not begun in time renders a decision of it unnecessary, I say nothing about it.

The action will be dismissed with costs."

I. F. Hellmuth, K.C., for appellant.

R. McKay, K.C., for respondent.

HODGINS, J.A.: — Appeal from the judgment of Rose, J., after the trial, dismissing the action which he held had not been brought within 60 days after notice of the impeached transactions, as required by the Bulk Sales Act, 1917, 7 Geo. V., ch. 33.

The transactions attacked were (1) a transfer of his interest in the Fulton Hardware Company, a partnership carrying on a hardware business by A. G. Fulton to his brother, R. C. Fulton, and (2) a subsequent transfer of that interest to the Fulton Hardware Company Limited, an incorporated company.

The learned Judge decided that notice was proved to have been received by the appellant's solicitor more than 60 days before the action, and that the action therefore failed. He based his finding upon a rule to which I shall afterwards refer.

But, before discussing its effect on the issues in this case, it is necessary to ascertain whether a transfer of an interest in a partnership falls within the Bulk Sales Act, the learned trial Judge having held that no fraud was shewn, and that it was not otherwise open to question under any other statute.

The Bulk Sales Act is rather a sweeping and drastic statute and purports to render void all transfers of stock in bulk unless certain definite formalities are complied with.

"Stock" is defined (sec. 2 (*c*)) thus:—

"(*i*) Stock of goods, wares, merchandise and chattels, ordinarily the subject of trade and commerce;

(*ii*) The goods, wares, merchandise or chattels in which any person trades, or which he produces or which are outputs of, or with which he carries on any business, trade or occupation."

"Vendor" is also defined:—

"(*e*) 'Vendor' shall mean and include each and every person, firm or corporation owning or claiming to own the stock or any individual share or interest therein."

Section 7 reads in this way:—

"Any sale or transfer of stock, or part thereof, out of the usual course of business or trade of the vendor, or whenever substantially the entire stock of the vendor is sold or conveyed, or whenever an interest in the business or trade of the vendor is sold or conveyed, such sale, transfer or conveyance shall be deemed 'a sale in bulk' within the meaning of this Act; provided, however, that if the vendor produces and delivers to the vendee a written waiver of the provision of the Act from his creditors having claims of $50 and over, representing 60 per centum in number and value of the claims of $50 and over as shewn by the said statutory declaration, then the provisions of this Act shall not apply."

What the vendor in this case sold was his share or interest, as one of three partners, in the partnership assets. That interest is thus defined in Lindley on Partnership, 8th ed., p. 402:—

"In the absence of a special agreement to that effect, all the members of an ordinary partnership are interested in the whole of the partnership property, but it is not quite clear whether they are interested therein as tenants in common, or as joint tenants without benefit of survivorship, if indeed there is any difference between the two. It follows from this community of interest, that no partner has a right to take any portion of the partnership property and to say that it is his exclusively. No partner has any such right, either during the existence of the partnership or after it has been dissolved.

"What is meant by the share of a partner is his proportion of the partnership assets after they have been all realised and converted into money, and all the partnership debts and liabilities have been paid and discharged. This it is, and this only, which on the death of a partner passes to his representatives, or to a legatee of his share; which under the old law was considered as *bona notabilia;* and which on his bankruptcy passes to his trustee."

This interest then, is not "stock" within the statutory definitions (*i*) or (*ii*). The wording of sec. 7 "whenever an interest in the business or trade of the vendor is sold or conveyed,"

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would seem at first glance as intended to cover it, but this is nullified by the definition of "vendor" in sec. 2.

The vendor here was A. G. Fulton, not the firm, and it cannot be said that *an interest in his business or trade* was sold because it was his whole share that was dealt with. True it is that his share constituted an interest in the business of the firm, but the firm did not sell out.

This appears to be the proper construction of the words used. It is aided by considering how sec. 3 could be worked out, if the sale of an undivided interest in a partnership carrying on business was included in the term "a sale in bulk."

Can it be said that the creditors mentioned in sec. 3 are all the partnership creditors or merely the separate creditors of the selling-out partner. If the latter, then the Act would be useless; if the former it would require payment of partnership liabilities without the partnership assets being immediately available to pay them. Many partners sell out, with an indemnity against partnership debts, but this would not now be possible if the share sold were held to be a "sale in bulk."

The aim of the Act is to prevent a person, partnership, or company disposing of their assets in bulk, and pocketing the money, leaving their creditors in the lurch. But the creditors lose nothing by a transaction such as this. The partnership assets can still be sold for the partnership debts, and they remain unaffected by the transfer of an interest which is in effect only of the surplus after payment of debts. This is in itself an effective answer to the argument that such an interest is within the Act. Why should it be forbidden, if it only results in an incoming partner acquiring a share of what is left after the debts are paid?

This is sufficient to dispose of the case; but, as the decision of the learned trial Judge turned upon the question whether notice had actually been received by the plaintiff's solicitor on a certain date, and as he decided the point wholly by the application to it of a so-called rule of evidence, I should like to make an observation upon that rule. My brother Rose, at the trial, had before him two witnesses of equal credibility, the one saying positively that certain words, involving notice, were said, and the other as positively denying it. He adopted, as conclusive in deciding the case, a rule, or, as it may otherwise, and as I think more properly, be called, the practice, of an eminent English Judge, which is to be found in the case of *Lane* v. *Jackson*, 20 Beav. 535. Lord Romilly, M.R., there (pp. 539, 540) stated as his view and practice that it should be decided, under the circumstances before my learned brother, that the statement was in

fact made, and that he who denied it had forgotten it, thus giving equal credit to each witness.

It is true that Lord Romilly did there say that that method of solving a question, which is really one of the weight of evidence, was frequently adopted by him, though he did not actually decide in that case, anything upon that formula. *Lane* v. *Jackson* is cited occasionally on another point, but not by any text-writers on evidence. This practice seems to have appealed twice to Taschereau, J.; once in *Lefeunteum* v. *Beaudoin*, 28 Can. S.C.R. 89, and again in *Rex* v. *Stewart*, 32 Can. S.C.R. 483, in his dissenting judgment at p. 501, as a "most rational rule," to the late Chancellor Boyd in a Divisional Court in *Kastor Advertising Co.* v. *Coleman*, 11 O.L.R. 262, as "partly reconciling" the contradiction of the witnesses; and by Mowat, V.-C., in *Wright* v. *Rankin* (1871), 18 Gr. 625.

As against these opinions of single Judges, must be placed the fact that Best, Taylor, Phipson, Stephen, Powell, Thayer, Greenleaf, and Wigmore make no mention of such a rule as affording a presumption of law, nor do they cite the case of *Lane* v. *Jackson* itself in any connection. I mention this because, while the rule may recommend itself to some minds, it may look to others as if it should be treated as an argument rather than a precept. At all events it does not seem to have secured for itself any lodgment in England or in the United States among those who have studied the law of evidence, and to my mind should not be approved as an existing rule binding on the Bench.

The danger of establishing it as a rule of evidence is apparent, and would lead to parties preparing their case relying upon their ability to produce positive statements as outweighing denials, no matter how complete and definite.

The appeal should be dismissed.

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

MEREDITH, C.J.O.:—I agree with the reasons for judgment of my brother Hodgins, and have only a few words to add as to the "so-called rule of evidence" which he discusses.

I agree that the "so-called rule" is not part of the law of evidence; it is rather a practice adopted by Judges in solving the difficult question as to the conclusion to be reached where on the one side there is the positive evidence of a credible witness as to something having been done by him and on the other side the equally positive evidence of a like witness that it was not done. It is, in my judgment, a safe general practice, but, like all general rules, there may be exceptions to it, and cases may be imagined in which it would not be safe to apply it.

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In my view, it was properly applied by my brother Rose in the case at bar.

MAGEE, J.A.:—I agree that this appeal should be dismissed on the ground that the transaction was not attacked within the 60 days prescribed by sec. 9 of the Bulk Sales Act, 1917. I am inclined, however, to the view that that Act would apply to such a transfer, in view of the interpretation given in sec. 2 (*e*) to the word "vendor" as including a person claiming to own the stock or any individual share or interest therein, and in view of sec. 7 expressly stating that "whenever an interest in the business or trade of the vendor is sold or conveyed, such sale, transfer or conveyance shall be deemed 'a sale in bulk' within the meaning of this Act." I agree with the propriety of dealing with the contradictory evidence as to notice in this case on the basis on which my brother Rose decided, although I hardly think it should be dignified with being called a rule either of evidence or practice, as its application must vary with the men and the circumstances. *Appeal dismissed.*

MAGUIRE v. MAGUIRE.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee and Ferguson, JJ.A. June 14, 1921.

HUSBAND AND WIFE (§IIIA—144)—CRIMINAL CONVERSATION—ALIENATION OF AFFECTIONS—LOSS OF CONSORTIUM—DAMAGES.

In an action for alienation of affections and criminal conversation, damages may be properly given by the jury for alienation and for criminal conversation separately.

[Review of authorities.]

Appeal by the defendant from a judgment of ROSE, J., entered on the verdict of a jury, whereby he directed that the plaintiff recover against the defendant $15,000 damages on a claim for alienation of the affections of the plaintiff's wife and for criminal conversation. Affirmed.

The jury awarded the plaintiff $15,000 damages, dividing it into $5,000 for alienation and $10,000 for adultery.

The grounds of appeal are:—

(1) The verdict is against the weight of evidence.

(2) Improper admission of evidence.

(3) The damages are excessive.

Peter White, K.C., for appellant.

A. B. Cunningham, for respondent.

The judgment of the Court was delivered by

FERGUSON, J.A.:—I have carefully read the evidence, and am of opinion that there was evidence on which the jury could reasonably arrive at the conclusion that the defendant had alienated the affections of the plaintiff's wife

and had been guilty of criminal conversation. I am also of opinion that the objection as to the improper admission of evidence cannot be sustained. It is based on the proposition that the plaintiff improperly gave evidence of the defendant's financial position, without alleging or endeavouring to prove that the defendant had used his fortune as a means to the accomplishment of the debauchment of the plaintiff's wife. This, on the authority of *Butterworth* v. *Butterworth*, [1920] P. 126, it is argued, was improper.

The evidence objected to is found at pp. 96 and 97 of the transcript of the proceedings.

This evidence was not submitted or admitted for the purpose of disclosing to the jury the financial circumstances of the defendant, but for the purpose of explaining prior litigation referred to by the defendant's counsel in his cross-examination of the plaintiff at pp. 50 to 52, and when the defendant's counsel pointed out that the effect of the plaintiff's counsel pursuing this line of questions would be improperly to disclose the defendant's financial position and objected, the plaintiff's counsel desisted. I am of the opinion that the questions were properly asked for the purpose of explaining the plaintiff's motive in the prior litigation between the parties, and that if the manner of questioning and the nature of the answers had the effect or tended to have the effect now stated by the defendant's counsel, it was the duty of the defendant's counsel to have objected earlier, and that it is now too late to complain.

This brings us to the third objection, *i.e.*, the verdict is excessive.

Paragraph 15 of the statement of claim reads:—

"After the arrival of the plaintiff's wife at Kingston in February, 1919, the defendant set himself to work to alienate from the plaintiff the affections of the plaintiff's wife, and succeeded in his attempt, and during the years 1919 and 1920 not only continued the said alienation, but during the period held criminal conversations with the plaintiff's wife and committed adultery with her on several occasions, whereby the plaintiff's home was finally broken up and destroyed, and whereby the enjoyment of the society, affection, comfort, and services of his said wife were forever lost to the plaintiff."

Mr. White, for the appellant, contends that, while there might be two wrongs done to the plaintiff, (1) by alienation, (2) by adultery, the loss resulting from both wrongs was the same, *i.e.*, loss of consortion; that the amount of damages awarded for such loss might be increased or decreased, according to the circumstances; increased by evidence of the means used and resorted to by the defendant to bring about the loss of

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consortion; decreased by shewing the character and conduct of the plaintiff, and of his wife, and by other circumstances tending to shew that the consortion, the loss of which is complained of, was of little or no value to the plaintiff, but that there could not be two sets of damages, and that the trial Judge and jury misconceived the basis on which damages should be assessed; that there should be a reduction of damages, or a new trial.

In *Bannister* v. *Thompson*, 32 O.L.R. 34, 20 D.L.R. 512, this Court held that the gist of the claims for (1) inducing and harbouring, (2) alienating, were identical, i.e., loss of consortion, and that there could be only one assessment. Mr. White contends that the *Butterworth* case and the authorities therein considered and reviewed support his proposition that the gist of the action in the three claims, inducing and harbouring, alienation, and criminal conversation, is loss of consortion.

Mr. Cunningham, for the respondent, contends that the gist of the action of criminal conversation is not merely loss of society, affection, comfort, and services of the wife, but is the invasion of the plaintiff's exclusive right of intercourse, entitling him to additional compensation for the insult to which he has been submitted by the corruption of his wife, and he relies for this proposition on the cases of *Bailey* v. *King*, 27 A.R. 703, at pp. 712 and 714, and in appeal *King* v. *Bailey* (1901), 31 Can. S.C.R. 338; and on *C.* v. *D.*, 8 O.L.R. 308, at p. 316, in appeal, 12 O.L.R. 24.

The precise point raised here was not, I think, raised in any of these cases, but a perusal of the opinions in these and the *Butterworth* case will shew that there has been much difference of judicial opinion, and that the law is not as clear and well-settled as it might be. In the *Bailey* case, Moss, J.A., in 27 A.R. at p. 712, says:—

"It has long been the law that if a wife is separated from her husband without his consent, and while separate is guilty of adultery, the adulterer is liable to the husband. This is upon the ground that the action does not rest upon the deprivation of the wife's affections, society, and services, though this may properly be shewn in aggravation of the damages, but upon the injury done to the husband by the defilement of his wife, the invasion of his exclusive right to marital intercourse, and the consequences resulting therefrom."

While Armour, C.J.O., at p. 713, says:—

"The cause of action for enticing away a wife is essentially different from the cause of action for criminal conversation with a wife. The former is brought, on the assumption of the wife's innocence, for the purpose of procuring her return to her husband, and for damages for his *temporary* loss of *consortium*, and

every day she is procured by her enticer to remain away from her husband a new tort is committed by the enticer."

In *C.* v. *D.*, MEREDITH, C. J., (now C.J.O.), reviewed the authorities, including the *King* case, and on 8 O.L.R. at p. 316 says:—

"It is apparent from these observations, I think, that the view of the learned President was that the gist of the action of criminal conversation is not merely the loss of the society, comfort, and assistance, of the wife, but that it includes also the wrong done by the intolerable insult to which he has been subjected by the corruption of his wife."

The question in the *King* case was, whether or not the Statute of Limitations applied, and the Court held that each act of adultery was a new wrong, and afforded a new cause of action.

In the *C.* v. *D.* case the Court held that, although the plaintiff's wife had left him and had been for 10 years separated from him, during which time she had obtained a divorce in the United States, which the Court held to be invalid, and had married the defendant, yet, because the plaintiff had not abandoned her, and had not relinquished his right of consortion, the plaintiff had a good cause of action; but in neither judgment was it, I think, necessary for the decision, nor was it expressly decided that the gist of the plaintiff's action was not loss of consortion.

In the *C.v.D.* case, the trial Judge, Anglin, J., told the jury that if they came to the conclusion that before the adulterous intercourse the plaintiff had totally and permanently given up all the advantages to be derived from the society of his wife, he was not entitled to recover, and the Divisional Court were of the opinion that this direction was right.

This direction would indicate that the basis of the plaintiff's loss was consortion, and not invasion of the plaintiff's exclusive rights or injury to his dignity and feelings, and that, I think, is the view expressed by McCardie, J., in *Butterworth* v. *Butterworth*.

As I read that case, the learned Judge was of the opinion that alienation involves a loss and damage, but that proof of adultery may not be proof of loss, because it is not an action in trespass, but an action of trespass on the case, requiring proof of actual loss, and that it is necessary to the proof of actual loss to prove loss or injury to consortion, but he points out that there are two elements of damage, (1) the actual value of the wife to the husband, and (2) proper compensation to the husband for the injury to his feelings, the blow to his marital honour, and the serious hurt to his matrimonial and family life.

In the case at bar, the learned trial Judge instructed the jury as follows:—

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"Well, gentlemen, I think perhaps I was a little wrong in the way I put to you the question of the amount of the damages. I rather indicated—or, if I did indicate, I was wrong in so indicating—that you could give damages by way of punishing the defendants. You do not do it for punishment. What is said is that the grounds on which you give damages are, the actual value of the loss of the wife; that is one thing, if you can fix it in money. As I say, it is very difficult to do that. Two, compensation to the husband for the injury to his feelings, the blow to his honour, and the hurt to his family life. Those are the things that I said you could not measure in money; at least, I said you could not measure in money the love, services, and society of a wife. However, it has been recently stated by a very eminent Judge that you may take into consideration the compensation to the husband for the injury to his feelings, the blow to his honour, and the hurt to his family life. How you get at it I do not know; nobody can tell, but you get at it the best way you can."

And the jury's verdict reads:—

"Juror: The jury find in favour of the plaintiff on both counts, $15,000; $5,000 for alienating the wife's affections, and for criminal conversation, $10,000.

The Registrar: Gentlemen of the jury, hearken to your verdict as the Court records it. Verdict for the plaintiff with $15,000 damages, of which $5,000 is for alienation of the affections of the plaintiff's wife, and $10,000 is for criminal conversation, and so say you all."

"Jurors: Yes."

To my mind, in this case, it makes no difference what the gist of the action is. The real question is: Have the jury assessed the damages, for the wrong done, on the proper basis?

On this point, the instruction of the trial Judge seems to me to be in accord with the opinions of the learned Judges in both the Canadian and the English authorities; and, while the whole damages might have been awarded as resulting from the adultery, the whole could not have been awarded as resulting from alienation. To accede to the appellant's contention would be to assume that the jury awarded damages for the alienation twice. This, I think, is not the meaning of the verdict.

Reading the verdict along with the charge, I am of the opinion that the jury intended to award $5,000 for the alienation and necessary loss of consortion, and $10,000 compensation for the husband for the injury to his feelings, the blow to his marital honour, and the serious hurt to his matrimonial and family life.

I would dismiss the appeal with costs.

Appeal dismissed.

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Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins and Ferguson, JJ.A. June 14, 1921.

INSURANCE (§IIB—36)—MUNICIPAL BY-LAW—LIVES OF SOLDIERS—ACTION OF BOARD OF CONTROL—PARTIES "IN LOCO PARENTIS"—RIGHTS.

Persons *in loco parentis* to a deceased soldier are not entitled to claim insurance placed on his life by a municipality unless they are within the class intended to be benefited by the by-law granting the aid or designated by the board of control.

AN appeal by the plaintiffs from the judgment of WIDDIFIELD, JUN. CO. C.J., dismissing an action brought in the County Court of the County of York, to recover from the defendant city corporation $1,000 insurance on the life of Walter James Middleton, who was killed in France on the 15th June,, 1917, while on active service in the war.

The plaintiffs claimed to stand *in loco parentis* of the deceased and so to come within the terms of the Ontario Statute of 1915, 5 Geo. V., ch. 37, sec. 1 (*f*), "An Act to Authorise and Confirm Grants by Municipal Corporations for Patriotic Purposes," as amended in 1917 by Geo. V., ch. 41, sec. 2.

G. T. Walsh, for the appellants.

H. H. Johnstone, for the defendants, respondents.

MEREDITH, C.J.O.: — This is an appeal by the plaintiffs from the judgment dated the 24th April, 1920, which was directed to be entered by His Honour Judge Widdifield after the trial before him, sitting without a jury, on the 18th and 19th days of the previous month.

The appellants' claim is based on the proposition that they were dependents of a deceased soldier, Walter James Middleton, who was killed in action in France while serving in the Canadian military forces, and as such dependents are entitled under the provisions of a by-law passed by the respondent's Council to receive from the respondent $1,000.

The by-law was passed on the 9th August, 1915, and it is recited in it that:—

"By an Act passed by the Legislative Assembly of the Province of Ontario in the fifth year of the reign of His Majesty King George the Fifth, chapter 37, municipal corporations are authorised to pass by-laws for granting aid to insure the lives for the benefit of dependents of officers and men residents of the municipality who during the present war may be on active service with the naval and military forces of the British Empire and Great Britain's Allies."

And that:—

"It is expedient to grant aid to insure the lives of all residents of the City of Toronto on active military service as aforesaid for the benefit of their dependents."

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Sections 1 and 2 of the by-law read as follows:—

1. That a grant of $1,000 each be made for the benefit of the dependents of every resident of the City of Toronto who may be killed or die while on active overseas service with any of the military forces of the British Empire or Great Britain's allies during the present war.

"2. That the board of control, upon satisfactory proof of the death while on active service as aforesaid of any resident of the municipality may determine to what dependent or dependents of such resident the said sum of $1,000 shall be paid and may authorise the city treasurer to make payment accordingly."

The authority to pass by-laws for the purpose mentioned in the recital of this by-law was conferred by clause (*b*) of sec. 1 of the Act, and was conferred in the terms mentioned in the recital.

The objects for which grants might be made were extended by 6 Geo. V., ch. 40, and were again extended by 7 Geo. V. ch. 41 and by 8 Geo. V. ch. 34.

By 7 Geo. V. ch. 41, sec. 2, clause (*f*) of sec. 1 of 5 Geo. V. ch. 37 was amended by substituting for the word "dependents" the words "parents, widows, children, sisters or brothers, or any person acting *in loco parentis*.

By the same Act (sec. 8) it is provided that "this Act shall be deemed to have been in force since the 4th day of August, 1914, and any grants heretofore made for any of the foregoing purposes are confirmed and declared to be legal, valid, and binding."

It is, I think, clear that under the by-law, assuming it to be a valid by-law, only dependents of the deceased soldier are entitled to the benefit for which it provides. Although by subsequent legislation the persons for whom benefits may be provided are no longer "dependents" but are "parents, widows, children, sisters or brothers, or any person acting *in loco parentis*," the effect of the legislation is not to make the same substitution in the by-law. The council has not availed itself of the provisions of the Act by passing a by-law in conformity with the amending Act.

Section 8 does no more than validate by-laws that have been passed for the purposes mentioned in the Act. I say "by-laws" because it was only by by-law that a grant could be made, and, as I have said, the council has not exercised its powers to make the persons mentioned in the amended clause objects of its bounty. It is, therefore unnecessary to consider whether the appellants were persons acting *in loco parentis* to the deceased soldier.

I doubt whether it has been shewn that the appellants were dependents of the deceased soldier, but it is unnecessary to

decide that question because until the Board of Control has acted as required by sec. 2 of the by-law the appellants, if dependants, had no right of action.

I have serious doubts as to the validity of the by-law. The power conferred is not a power to insure but a power to aid to insure, and what I think is meant is that aid may be given by paying wholly or in part the premiums for affecting insurance by persons or bodies having power to insure. An examination of the clauses of which clause (*f*) is one throws light upon the meaning of that clause. If it had been intended that the power to insure should be conferred one would have expected language to have been used such as is used in clauses (*e*), (*h*), (*i*), (*k*), (*l*).

Section 6a of 5 Geo. V., ch. 37 as enacted by 8 Geo. V. ch. 34, sec. 5, indicates that the view I am expressing is in accordance with the intention of the Legislature. That section provides that:—

"6a.—(1) Where insurance has been effected pursuant to the provisions of section 1 by any municipal corporation any policy issued to the corporation whether the same is made payable to the municipal corporation or to the treasurer of the corporation or otherwise, howsoever, may notwithstanding the time for which the premium on said policy has been paid has not expired, be assigned by the municipal corporation to the insured on such terms as may be agreed upon, and the insured shall thereupon have the same rights as to transferring the said policy, designating the beneficiaries thereunder and otherwise dealing therewith as though the policy had originally been issued to the insured and made payable to his estate.

"(2) The provisions of sub-section 1 shall take effect and be deemed to have been in force as from 8th day of April, 1915."

I do not see how the by-law can be supported as being authorised by what is now clause (*m*) of sec. 1 of the Act of 1915 (as enacted by 7 Geo. V. ch. 41 sec. 4). The power conferred by that clause is to grant aid to "any fund established" for the purposes mentioned in the clause, and that is not what the by-law does, and there is not any evidence that such a fund had been established. Sec. 5a. of 5 Geo. V. ch. 37, as enacted by 9 Geo. V. ch. 25 sec. 33, does not, I think, operate to validate the by-law. What it validates is "a grant by a municipal corporation to any fund, organisation or body," for the purposes mentioned in the section.

I should not have discussed the question as to the validity of by-law had I not entertained serious doubts as to its validity and in the hope that legislation validating it may be obtained.

I would dismiss the appeal without costs.

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MACLAREN and MAGEE, JJ.A. agreed with MEREDITH, C.J.O.

HODGINS, J. A.:—Action to recover $1,000, claimed under a by-law of the respondent, by the appellants, husband and wife, as dependents of Walter James Middleton, a resident of Toronto, who was killed while on active service overseas on the 15th June, 1917. Widdifield, J., dismissed the action without costs, on the ground that the statutory authority to make a grant such as is in question did not permit the inclusion of the plaintiffs' who, he thought did not stand *in loco parentis to the soldier*. The plaintiffs appeal from that decision.

[The learned Judge then set out the by-law of the 9th August, 1915, as above.]

On the 15th November, 1917, the council adopted a report of the Board of Control, No. 27, recommending, as amended in council, the following policy in reference to the payment of soldiers' insurance:—

"Insurance shall be paid only:—

(1) To parents and persons acting *in loco parentis* who resided in Toronto at the date of the enlistment of the soldier.

(2) To widows and children, no matter where resident."

On the 5th December, 1918, report No. 28 of the Board of Control was adopted by Council as follows:—

"The board recommend that the conditions set forth in Report No. 27 of the board of control of last year, as adopted by the council, restricting the payment of soldiers' insurance to widow and children, no matter where resident, and to parents and persons acting *in loco parentis* residing in the City of Toronto at the date of enlistment of the soldier, be rescinded and the following substituted therefor:—

"Insurance shall be paid only:—

"(1) To widows and children.

"(2) To parents or persons acting *in loco parentis* resident in Toronto at the time of the enlistment of the soldier.

"(3) To brothers, and sisters and non-resident parents or persons acting *in loco parentis*, who can prove to the satisfaction of the insurance committee that they were dependent on the deceased soldier."

The legislation under which this by-law and these reports were intended to be authorised is to be found in 5 Geo. V. ch. 37, and 7 Geo. V. ch. 41.

By the earlier of these statutes, passed on the 8th April, 1915, power was granted to any municipal corporation to pass by-laws for granting aid (among other things) to "(*f*) insure the lives for the benefit of dependents of officers and men, residents of the municipality, who during the present war may be on active service with the naval and military forces of the British Empire and Great Britain's allies. (*g*) Any fund established for the

assistance in case of need of . . . dependent relatives of officers and men, residents of the municipality who during the present war" (as above).

Section 5 provided for the approval by the Lieutenant-Governor in Council of any by-law heretofore or hereafter passed for these purposes, which then became legal, valid, and binding.

The later statute, passed on the 12th April, 1917, substituted for the word "dependents" in clause (*f*) above, the words "parents, widows, children, sisters or brothers, or any person acting *in loco parentis.*"

By sec. 7 it is provided that "moneys appropriated" under clauses (*f*) and (*g*) of sec. 1 of 5 Geo. V. ch. 27 shall not be liable to attachment.

Section 8 enacts that "this Act shall be deemed to have been in force since the 4th day of August, 1914, and any grants heretofore made for any of the foregoing purposes are confirmed and declared to be legal, valid and binding."

The claim in this action is not upon "any fund established for providing allowances," but is made under clause (*f*) of sec. 1 of 5 Geo. V. ch. 37, as amended by 7 Geo. V. ch. 41, which permits aid to be granted to insure the life of a soldier coming within its provisions.

There is undoubtedly some difficulty in fitting in that which the respondents actually did, with the words used in the statute. The intention was to enlarge its corporate powers in order to enable it to give effect to the then popular desire, which was to provide amply for those the Army had left behind them. The by-law of 1915 reciting the statute, then in force, proceeded to enact "that a grant of $1,000 each be made for the benefit of the dependents of every resident of the City of Toronto who may be killed or die while on active service in any of the military forces of Great Britain or Great Britain's allies during the present war." The statute in giving power to pass by-laws had used the words "for granting aid to insure the lives for the benefits of dependents of officers and men resident in the municipality, etc. The question has been raised, did this mean that the municipality could itself practically insure the lives by guaranteeing to make a grant of $1,000 in each case, or was the power limited to giving assistance by way of paying premiums to insurance companies and setting aside a sum sufficient to do this? Undoubtedly this latter course was included in the powers given, and the corporation had insured some lives in certain insurance companies, but there is nothing to shew that that excluded other plans or methods. The language is not happily chosen, it is true, and it is equally true that the city corporation is not shewn to have paid any premium nor to have effected any contracts of in-

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surance covering this case.

I think, however, having regard to the Interpretation Act, R.S.O. 1914, ch. 1, sec. 10, which directs the giving of such fair, large and liberal construction as will best ensure the attainment of the object of the Act, according to the true intent, meaning, and spirit thereof, that the words I have referred to may, without unduly straining them, cover what was done. The purpose of the Act is plain upon its face, and its many provisions, added to year by year, display a desire to enable municipalities to aid and assist in every way those at the front and to take care of their dependents at home. Insuring the lives of the soldiers was one of the first expedients to be thought of. There were many other projects, some of which could best be helped by joining with different organisations, while others required money to be provided and expended directly by the corporation.

The words empowering the corporation to deal with these various patriotic efforts are, as I have said, "for granting aid to" many objects. The Patriotic Fund, the Red Cross Fund, and other funds needed substantial contributions to increase the total raised by individual subscription. But such objects as providing military outfit and equipment, purchasing and forwarding food and clothing, providing building as quarters and armories, furnishing musical instruments and equipment and machine guns, which are also expressly provided for, do not in any way lend themselves to the idea that the municipality was limited to aiding and assisting other people in these directions. I also think the expression "for granting aid to insure the lives," etc., is capable of a reasonable construction even apart from the above consideration. "Granting aid" means, according to the dictionaries, granting anything helpful, a means or material source of help." (Murray), and also granting "that which aids or yields assistance." (Century), and "the thing that aids or yields succour" (Imperial). So that the words may well be paraphrased as "granting the thing which aids, the material source of help, that is, the money to insure." This still leaves the question whether "to insure" means merely to pay the premiums to insurance companies or as a corporation to undertake the risk. Here again definitions may assist, for what the by-law enacted was in form an undertaking that a grant of $1,000 in each case would be made by the Corporation where the individual soldier died in the service of his country. The Century Dictionary defines "insure" as meaning: "To guarantee or secure indemnity for future loss or damage (as to a building from a fire and to a person from accident or death) on certain stipulated conditions."

The Imperial Dictionary, gives the meaning as: "To contract or covenant for a consideration to secure a person against loss."

Bearing in mind that the statute made the consideration for insurance the fact that the insured should have actually served in the Great War with the naval or military forces of the British Empire, it is not pressing the enabling words unduly to hold that they may, as I have indicated, be given such a meaning as would empower municipalities to pass by-laws granting material aid in the shape of money to provide insurance for the dependents of these soldiers, in any way they saw fit, whether that took the form of a contract of insurance issued by an insurance company or of a guarantee, contract, or covenant by the municipality itself to pay such sum of money as it might determine, when the event happened.

In view of the fact that the deceased soldier enlisted after the passing of the by-law now in question, and therefore presumably with knowledge of it, it is satisfactory to be able to reach the conclusion that this provision is not necessarily an illusory one. The consequence of a contrary holding would require the municipality to refuse aid in any present case and invalidate all their payments made in the past on the faith of the powers which they thought it was intended they should possess.

The first by-law passed by Council of the City of Toronto stipulated that the beneficiaries should be dependents in the terms authorised by the then existing statute.

The succeeding Parliamentary legislation is rather curious, because by it the later Act is to be deemed to have been in force from the 4th August, 1914, or for three years before it was passed. It amends a clause in the earlier Act and makes it operate at a time anterior to the passing of that Act in 1915 and thus it presents very novel features. But the effect of sec. 8 seems to be that the wording of clause (*f*) has to be read as if it always contained the substituted words, and upon the hypothesis that the Acts of 1915 and 1917, read together authorised municipal patriotic grants from a date earlier than that of their passage, namely, as if they had come into force on the 4th August, 1914. There is another enactment found in sec. 33 of ch. 25 of 9 Geo. V. (1919) which should be noted.

The death of the soldier, who had enlisted on the 14th February, 1916, occurred in France on the 15th June, 1917, after the coming into force of the Act of 1917, which was on the 12th April 1917. The provision in the by-law of 1915 for the benefit of dependents could only, by virtue of sec. 8, validly authorise grants for the benefit of those who could be comprised in the designations of "parents, widows, children, sisters and brothers or any person acting *in loco parentis*." This much is clear, I think, in this puzzling legislation, that those enumerated in the Act of 1917 are covered by the statutory authority, and that the

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action of the board of control and council as set forth above have described the qualifications, if any, which each must possess.

There is no direct evidence as to when the proper proofs of death while on active service were laid before the board of control, but it was apparently some time in 1920. The official death certificate produced bears date the 25th June, 1919.

The board of control were charged by the by-law with the duty of determining to what dependent or dependents the moneys granted were to be paid, and they appear, after the statute of 1917 was passed, to have determined who were entitled in a general way only, and not in this particular case.

The meaning of the expression "*in loco parentis*," is dealt with in the judgment appealed from. It is summed up by Jessel, M.R., in *Bennet* v. *Bennet* (1879), 10 Ch. D. 474, 477, where he says: "A person *in loco parentis* means a person taking upon himself the duty of a father of a child to make provision for that child," and he points out (p. 478) that, while in the case of a father this obligation is part of his parental duty, in the case of one *in loco parentis* "you must prove that he took upon himself the obligation, "namely, to provide for the child. See also Eversley on Domestic Relations, 3rd ed., p. 665. But while I agree that that is the proper legal definition, I do not think the statute or the reports of the board of control use it in that sense.

If the matter is looked at as if *in loco parentis* referred not so much to the legal status described by the words as to the actual relationship of the deceased soldier to the appellants, the matter stands thus: The boy was a nephew who came to live with the appellants in 1914. The aunt looked after him as a son, mothered him in fact, and he treated her as a mother, and so expressed himself in his letter from abroad, dated the 24th December, 1916. He paid $4 a week board and $10 a month for washing, etc., and helped in the house. His payments to them assisted in the upkeep of the home, and when he enlisted he gave his aunt his assigned pay and made his will in her favour, and she was beneficiary in a small insurance policy which he carried. The appellants are in receipt of a pension from the Dominion Government due to his death. His immediate relatives are a crippled sister and two brothers. If the words can be construed as if they meant foster-parents, "then it would be the duty of the board of control to determine to whom among the designated beneficiaries, who appear to include the appellants, this $1,000 would be payable. There seems no reason why brothers should be eligible and foster-parents be excluded.

Looking over the legislation passed both by the Legislative Assembly and by the municipality, and bearing in mind the pur-

pose of these enactments, as well as the fact that they were dealing with insurance and not with specific funds which were designed to care annually or in case of need for those left behind, or bereaved during the war, I have come to the conclusion that the term *"acting in loco parentis"* is not intended to denote only a person coming within the strict legal definition as one having assumed the duty of providing for a minor, but includes as well one who is acting in the capacity of a parent in the other relations of family life exemplified in the position of foster-parents. The use of the phrase "acting *in loco parentis*" indicates that the draughtsman was not thinking in a dead language, but used the Latin expression in the sense of its exact English translation, and prefixed the word "acting" to express this idea.

I am justified in my opinion of the meaning of these words by the fact that, if it is only those strictly *in loco parentis* as understood in the cases referred to who are entitled to any benefit, then the provision requiring persons acting *in loco parentis* to prove that they are dependents while their legal status depends upon their occupying a position just the reverse of that, involves a confusion of ideas and a contradiction of the judicial definition of such persons.

Upon the whole I am of the opinion that in considering the claims of any of those enumerated in the report of 1918, the board may include those acting *in loco parentis* in the sense I have indicated. The board may also, under the by-law and statute, select any one or more beneficiary, provided always they keep within those entitled under the statute of 1917.

But the appellants cannot succeed in reversing the judgment appealed from because their rights, if they ever arise, must do so because (1) they come within the class intended to be benefited and (2) because the board of control has selected them for benefit. The board has never dealt with this case so far as appears, and so, even if the appellants were among the class entitled to be considered, they fail to shew that their rights have been vested by a decision of the board.

The appeal will be dismissed without costs, as, although the appellants fail for want of a designation in their favour by the board of control, the respondents get, as they desire, a construction of the rather difficult legislation under which they are obliged to act.

FERGUSON, J.A., agreed with HODGINS, J.A.

Appeal dismissed without costs.

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CLARKSON v. DAVIES.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins and Ferguson, JJ.A. June 14, 1921.

COMPANIES (§VID—335)—INSOLVENCY—ACTION BY LIQUIDATOR—PURCHASE OF ASSETS OF ANOTHER COMPANY — SECRET PROFITS BY DIRECTORS—LAPSE OF TIME—STATUTE OF LIMITATIONS.

The shareholders of a company having all surrendered their shares, the company has practically ceased to exist, and there being no shareholders, a plaintiff suing on behalf of himself and all other shareholders has no standing. The directors of the company who sell its assets to another are constructive trustees only, and a claim against them is barred by the Statute of Limitations. Even if the company were in existence its claim would be barred, over fifteen years having elapsed since it had knowledge of the payment.

[*Metropolitan Bank* v. *Heiron* (1880), 5 Ex. D. 319; *Taylor* v. *Davies*, 51 D.L.R. 75, [1920] A.C. 636, referred to.]

APPEALS by defendants, other than defendant Davies, from the judgment of Lennox, J., in actions brought for the purposes and for the relief mentioned in the judgments.

The judgment appealed from is as follows:—

These are two actions, and part of the evidence in the first was heard before the second action was instituted. In the second action, John R. Young, suing on behalf of himself and all other shareholders of the Provincial Building and Loan Association, is substituted for Kathleen A. Hancock, who set up similar rights in the first action. There are other differences. In the first action Mr. Clarkson sued simply as liquidator of the Dominion Permanent Loan Company, in the second he and the company, as well as Mr. Young, "sue on behalf of itself and all other shareholders of the Provincial Building and Loan Association."

It was ultimately arranged, after a great deal of discussion, that the evidence in the first action would apply to both, and consideration of Mr. McMaster's objection that Mr. Clarkson should not be retained as a party plaintiff in the first action was deferred.

As I intimated might happen, it turns out to be unnecessary to determine whether this objection was well taken or not, as I shall dismiss the first action and adjust its costs after I have dealt with the second upon the merits.

I am of opinion, notwithstanding all that has been urged to the contrary, that the plaintiffs in the second action have a legal status to maintain it, but—although I usually state pretty fully the reasons that occur to me in support of my conclusions—I think it would be idle to elaborate them upon this occasion. The case was very fully argued; everything that could be said, pro

and con, as to the status of the liquidator, the Dominion Permanent Company, the Provincial Building Association, and the plaintiff Young, has been said, and no doubt be repeated, whatever my decision may be.

In 1902 the defendants Davies, Deacon, Dunn, and Crawford, and the Reverend William Galbraith, now deceased, were the directors of the Provincial Building and Loan Association, and negotiated and consummated the sale and transfer of the assets of the association to the plaintiff company. The consideration stated in the deed of transfer was not the full or true consideration for the sale and transfer of the assets and rights of the association and its shareholders; there was an additional consideration of $30,000 secretly bargained for and obtained by these five directors. Knowledge of the true consideration was intentionally and studiously concealed from the shareholders of the association, and the approval of the shareholders—other than these five accredited agents—and the sanction of the Attorney-General for the Province were obtained by the false and fraudulent representation of these directors as to the nature and character of the transaction. The directors were thereby enabled to obtain and did secretly obtain and appropriate to themselves $30,000, the property of the shareholders of the association. There is no shadow of doubt about the facts, and the facts establish a plain, vulgar case of false representation, followed by misappropriation. It was not merely a failure to disclose the truth; the defendants were careful to prevent the shareholders from knowing the terms upon which the transaction was actually being carried out. Of course gentlemen representing the Dominion Permanent joined in the conspiracy—for it was a conspiracy—but this perhaps matters little now; two of the chief actors for the purchasers are dead.

The defendant Davies in his evidence said:—

',We had several meetings of the directors and agreed to divide it" (this is, the $30,000). "Three or four meetings, anyway. This was before the sale was actually approved by the shareholders. . . . All the directors were present . . . They were all present, they were all highly interested.

"Q. Were there any minutes of those meetings? A. No; that is the peculiarity of the whole business; there were no minutes made in regard to that $30,000 in any shape or way . . .

"Q. Was this matter mentioned to the shareholders of the Provincial Loan Company—this payment of the $30,000? A. Not in any shape or way . . .

"Q. Did the notice (of the meeting of shareholders) mention anything about the $30,000? A. Not in any shape or way at any time . . . .

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"Q. What was it (the $30,000) paid to you for? A. As something to influence the amalgamation, I suppose.

"Q. Was it something paid to you and the other directors to influence the amalgamation or sale A. Yes; that is undoubtedly the fact."

There is no reason for questioning the substantial accuracy of this evidence, even if it stood alone. It does not stand alone, it is strongly corroborated by other *viva voce* evidence and by documents. There was practically no attempt made to question the facts, by cross-examination or otherwise. I shall refer later on to the lack of statutory corroboration covering actual payment of a share to Mr. Galbraith, urged by Mr. Maclennan.

The argument for the defence bristled with alleged legal bars to recovery—this and nothing else.

The actors in this matter were all prominent men, men of high business and social standing, I presume—reputably honest, and probably not consciously very dishonest. I am sure their breach of duty to their principals—their associate shareholders—did not appear to them, at the time, as it does to me now sitting in review; but, all the same, it is my duty to express quite clearly the impression made upon my mind by the evidence; and the conclusion of fact I come to on the evidence is that in entering upon and carrying out the transaction referred to, the directors conspired together wrongfully and secretly to divert and appropriate to themselves, and did in fact and in law, and in breach of their duty as agents of the association, wrongfully appropriate, the entire cash consideration paid by the Dominion Permanent for the transfer spoken of, to wit, the sum of $30,000.

There are unfortunately many, many, many qualifications of the phrase "For every wrong there is a remedy," and the burden of the defence here was to create another exception.

Mr. Maclennan, on behalf of the executors, submits that there is a lack of corroboration as to the actual receipt by Mr. Galbraith of his share of the money. Possibly it may be so, but if Mr. Galbraith united with his co-directors in a scheme to defraud the shareholders, and of this I think there is undoubted corroboration within the statute, they became joint tort-feasors, and it matters not who got the money; the consummated agreement—wrongfully to divert, not the division, is the matter of consequence. I am not sure how far the settlement of previous actions, relied upon as establishing *res adjudicata*, might be taken as corroboration if this director or his estate joined in the settlement, as to which, however, I do not pause to inquire.

As to this branch of the defence I may as well say now that I do not think I should be right in giving effect to it in any

event. This action is on behalf of a class. If the others were not class-actions, there was no adjudication—it was a compromise individual settlement. In each case the plaintiff got what he wanted or what he could, and dropped out. When a man sues on behalf of himself and others of the same class, it would lead to flagrant injustice if he, intending to shield the defendant, and perhaps suing with that design, could, without the intervention, consideration, or approval of a court of competent jurisdiction, bar the rights of all others of the same class, not one of whom perhaps ever heard of his action. I intimated at the trial the course I proposed to follow, subject, as I said, to the citation of authority to the contrary. I have not been referred to any decision, and as none intrude themselves upon my memory, I adhere to the opinion that the actions referred to do not bar this action..

There was a good deal of argument to the effect that the Provincial Building and Loan Association has ceased to exist. Nothing, in my opinion, turns upon this point that can benefit the defence. A company does not become dissolved or cease to be a legal entity, nor can it be said to be "wound-up," by going out of business, or by contract or otherwise losing or surrendering the right to carry on business, or by transferring or losing its assets. However, be that as it may, all the credits, rights of action, etc., that the association and its shareholders had when the transfer was consumated, the Dominion Permanent and its liquidator and the shareholders who were of the Provincial Association up to that time have now; and the rights in question, in my opinion, can be enforced in this action.

The defendants, or some of the defendants, rely upon the Limitations Act, R.S.O. 1914, ch. 75, and Mr. McMaster urges that the judgment of the Privy Council in *Taylor* v. *Davies*, [1920] A.C. 636, 51 D.L.R. 75, is conclusive that the shareholders had lost their rights, if any, before the commencement of this action—an action in which my judgment for the plaintiffs was reversed by the Appellate Division of the Supreme Court of Ontario, the latter judgment being affirmed upon appeal to the Privy Council. Mr. McMaster did not refer to the at least equally pertinent decision in *McGregor* v. *Curry* (1914), 31 O.L.R. 261, 20 D.L.R. 706, a judgment of the same Canadian Courts, reviewed and sustained in the Privy Council (*Curry* v. McGregor (1915, 25 D.L.R. 771) before Taylor v. Davies, an action in which the defendants' testator was undoubtedly a trustee, express or implied, and nothing else, and had not committed a fraud; and the plea of the Limitations Act failed. The whole argument is based upon the assumption, I think an erroneous presumption, that the liability of the directors is to be deter-

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mined upon the question of trusteeship alone. Undoubtedly the directors of a company occupy a fiduciary position with regard to the company and its shareholders, and, aside from any statute, scrupulous honesty and undeviating good faith is of course expected of them in all that they do in their official capacity.

Well, taking it that the statute applies, and following the argument for a moment only: Part II. of the Limitations Act applies to trusts and trustees, and "trustee" (by sec. 47 (1)) includes a trustee whose trust "arises by construction or implication of law as well as an express trustee" and also a joint trustee;" but, although under para. (*a*) of sub-section 2 of sec. 47, "all rights and privileges conferred by any statute of limitations shall be enjoyed in the like manner and to the like extent as they would have been enjoyed in such action if the trustee or person claiming through him had not been a trustee or person claiming through a trustee," yet the provision just quoted does not apply "where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property or the proceeds thereof, still retained by the trustee, or previously received by the trustee and converted to his use." (sub-sec. 2.). I cannot see that the statute helps the defendants..

It would be a mistake, however, to regard these directors as trustees only in the ordinary sense of that term; they were the elected and statutory stewards and agents of the association, and it is, I think, by keeping in mind the relationship of principal and agent, and the right a principal has to get back his property fraudulently appropriated by his agent, that the rights and obligations of the parties to this action are to be most satisfactorily determined. The arm of the Court is still as powerful to compel a fraudulent conniving agent to disgorge his secret ill-gotten gains as it was three-quarters of a century ago, when Lord Campbell in *Charter* v. *Trevelyan* (1844), 11 Cl. & F. 714, 740, 741, quoted the language of Lord Cottenham, M. R., used in the same case at an earlier stage:—

"It does indeed become the duty of the Court, when transactions of long standing are brought before it, most anxiously to weigh all the circumstances of the case, and to consider what evidence there may have been, which from lapse of time may be lost. But beyond this, in cases of fraud, I think time has no effect. Were it otherwise, the jurisdiction of the Court would be defeated, not because the case was not one for its interference, but because the author of the fraud had been enabled to continue his deception till such a time had elapsed as to prevent the interference of the Court. Such fortunately is not the law; and those

who may be disposed fraudulently to appropriate to themselves the property of others, may be assured that no time will secure them in the enjoyment of their plunder, but that their children's children will be compelled by this Court to restore it to those from whom it has been fraudulently abstracted."

Even if these directors are to be regarded as trustees and nothing more, and whether express or by construction or implication of law, sec. 47 of the Limitations Act recognises the continuance of the principles so forcibly enunciated by Lord Cottenham and expressly excepts (sub-sec. 2) all cases of fraudulent breach of trust. Call them what you will, it can hardly be argued that these men did not betray the confidence reposed in them or that the claim set up is not founded upon any fraud or breach of trust by the 5 men who represented the shareholders of the Provincial Building and Loan Association when its assets were disposed of in 1902. It may be that even yet the action is not technically well-framed; it may be that some of plaintiffs are not necessary parties to the action; but I am satisfied that all necessary parties are before the Court, and indeed I do not recall that it was argued otherwise. The evidence would be the same as it is in whatever name the claim was set up. The plaintiffs are entitled to judgment. The prayer is for "judgment against the defendants jointly and severally," and I inferred, although perhaps I was mistaken as to this, that Mr. Bain felt more confident of his clients' right to judgment against the parties severally for the sums they respectively received than to a judgment against them jointly; and, although this was also the alternative proposition taken by counsel for the several defendants, I am, with respect, of a different opinion.

In what these men did, both by statute and the well-established law governing companies, and presumably under the terms of the by-laws, if any there were, they then were acting as a board of directors, and they did in fact act in concert. What is complained of, including the concealment, was discussed and unanimously agreed to by all of them at duly convened meetings of the board. They were joint wrongdoers and consequently each became responsible for himself and his associates. There is no right to judgment against them separately in addition to the ordinary judgment against men joining in a tort. The rights of the parties in reference to costs can be better adjusted by specific directions than by leaving them to be apportioned on taxation. There will be judgment in the second action against the defendants for $30,000 with interest upon the several instalments thereof at 5 per cent. from the dates of payment of the instalments to Davies and the costs of this action, including the evidence of

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witnesses called in the first action (subsequently made to apply in both actions), except that there will be nothing added in respect of the attendance of Miss Hancock prior to the 21st June, 1920, and the plaintiffs will not tax counsel fees for the hearing prior to that date. Subject to any specific directions as to costs, if any were given on interlocutory motions, the costs will be taxed as if this were the only one action.

As to the first action, I need not consider whether it could have succeeded if the second had not been brought. They cover the same ground, and both cannot succeed. The evidence was neither increased nor diminished by there being two actions instead of one. The same is to be said as to the conduct of the trial by counsel. I have not allowed the plaintiffs counsel fees prior to the 21st June, although the evidence previously taken, by agreement became effective for both parties as if it had been taken in both actions. The first action will be dismissed with costs of all proceedings therein, and including the fees, if any, paid witnesses necessary to the defence throughout and with counsel fees to the close of the hearing on the 21st March. These costs, too, are to be taxed as if there were only one action.

All the amendments, if asked for, in either action are allowed and the parties concerned should see that they are properly included in the record. I will endorse the records in the order, as to time, in which I have disposed of the actions respectively, and to preclude a further issue of *res adjudicata* arising through an act of mine, and although the Courts do not generally take account of a fraction of a day, the hour as well as the day of endorsement will be stated in each case.

A. C. McMaster, for appellants, Crawford and Dunn.

J. M. Godfrey, for appellant Deacon.

J. J. Maclennan, for defendants the executors of William Galbraith.

M. L. Gordon, for respondents.

The judgment of the Court was read by

MEREDITH, C.J.O. :—These appeals are by the defendants, other than the defendant Davies, against whom judgment has been entered by default, from the judgment, dated the 9th October, 1920, which was directed to be entered by Lennox, J., after the trial before him, sitting without a jury, on the 15th March and 21st and 22nd June 1920.

The action is brought by Clarkson, as liquidator of the Dominion Permanent Loan Company, which I shall afterwards refer to as "the Dominion company," and that company, suing

on behalf of itself and all other shareholders of the Provincial Building and Loan Association, which I shall afterwards refer to as 'the Provincial company,'' and John R. Young, ''suing on behalf of himself and all other shareholders of the Provincial Building and Loan Association who were shareholders of the Provincial Building and Loan Association prior to the 29th day of June, 1902, and who transferred their shares in the said Provincial Building and Loan Association pursuant to an agreement entered into on the said date,'' against the defendants who were directors of that company when the agreement was entered into and the executors of a deceased director.

The Dominion company was incorporated under the Ontario Loan Corporations Act, R.S.O. 1897, ch. 205, and the Provincial company under the Act respecting Building Societies, R.S.O. 1887, ch. 169, and on the 2nd April, 1902, the Dominion company purchased from the Provincial company all the assets of that company and an agreement was entered into embodying the terms of the arrangement between them.

The agreement provides that it ''shall not be deemed to be an agreement for the union, merger or amalgamation of the said two companies, but it shall be deemed to be an agreement for the purchase and acquisition by the 'purchasing company' of the assets and undertaking of the 'vendor company.' ''

The agreement further provides for the sale as a going concern by the vendor company and the purchase by the other company of ''all and singular the assets, undertaking, good-will and business and the lands, buildings, hereditaments, and all mortgages, charges, liens, rights, privileges, and franchises, leases and licenses, goods, chattels and effects, moneys, credits, debts, stock and stock subscriptions, books, records, title-deeds, papers and documents, and all bills, notes, things in action, contracts, agreements, securities, and all other property and assets, real, personal, or mixed, and all rights and incidents appurtenant thereto whatsoever of or belonging to the 'vendor company,' '' the consideration for this being the allotment and issue to the shareholders of the vendor company of permanent stock of tthe purchasing company at par as fully paid-up and non-assessable for an amount exactly equal to the net value of the assets of the 'vendor company' . . . as the same shall be valued and ascertained as . . . hereinafter mentioned, less the amount of all debts, liabilities, and obligations of the 'vendor company,' '' and the assumption by the purchasing company of the debts, liabilities, and obligations of the vendor company.

The agreement further provides for the mode of allotment and issue of the shares in the purchasing company and of valu-

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ing the assets, which was that it should be made by two valuers, one to be appointed by each company, and also that the vendor company should pay $5,000 "in full of its share of the costs, charges, and expenses of carrying out the objects and purposes of this agreement to completion," and that that sum together with the debts "shall be deducted from the purchase-price aforesaid, and the purchasing company shall bear and pay all such costs, charges, and expenses over and above the said sum of $5,000."

One other provision of the agreement needs to be referred to; it is, that from the time of the assent of the Lieutenant-Governor in Council to the agreement each holder of shares in the vendor company "shall be deemed by virtue of the said assent *ipso facto* to have surrendered the said shares and to have accepted and to hold substituted shares of the stock of the purchasing company to the extent and in the manner provided by this agreement."

The agreement was assented to by the Lieutenant-Governor in Council on the 25th June, 1902, having been first ratified by the shareholders of each company, and it took effect on, from, and after that day.

The valuation was made and the stock allotted and issued, and the purchasing company took over the assets of the vendor company, in accordance with the terms of the agreement.

The authority for this transaction is contained in R.S.O. 1897, ch. 205, secs. 41, 42, 43, and 44, and when the assent of the Lieutenant-Governor in Council to the agreement was given the assets of the vendor company became absolutely vested in the purchasing company without further conveyance.

When the agreement was entered into, the appellant Crawford was the president of the Provincial company, the appellant Dunn was its vice-president, the defendant Davies its managing director, and William Galbraith, deceased, was a director. J. R. Stratton was then the president of the Dominion company, T. P. Coffee was its vice-president, and C. Kloepfer, D. W. Karn, F. M. Holland, and R. R. Hall were its directors, Holland being also its general manager, and the agreement bears the signatures of all these persons and is sealed with the common seals of the two companies.

The respondents base their claim upon the allegation that the directors of the Dominion company, "without the knowledge of the company" prior to the entering into of the agreement, agreed to pay to the directors of the Provincial company $30,000 as a bribe for approving of the sale and for the purpose of influencing them in approving of the agreement, and that this payment was *ultra vires* and an unlawful and fraudulent use of the money of the Dominion company, and was wrongfully and fraudulently

received by the directors of the Provincial company as a bribe and a secret profit and in breach of their fiduciary relations to that company and its shareholders; and it is also alleged that this payment was concealed by the directors of the Dominion company and by the Provincial company from the shareholders of both companies until the Dominion company was wound-up by order of the Court.

It is to be observed that this attack was not made in this action until after the death of Galbraith and the death of all the directors of the Dominion company except Hall, but including Holland, who took an active and principal part in the negotiations which led up to the making of the agreement.

It should be mentioned here that a previous action was commenced on the 6th August, 1919, by Clarkson as liquidator and Kathleen A. Hancock, suing on behalf of herself and all other shareholders of the Provincial company, against the appellants for the same cause of action; that action came on for trial before my brother Lennox on the 12th February, 1920, when some evidence was taken and the trial was adjourned until the 15th March following. The trial was resumed on that day when the evidence was completed and the case was argued and judgment was reserved. At the trial objection was taken that Kathleen A. Hancock was disqualified to bring a class-action on behalf of the shareholders of the Provincial company; upon this objection being taken, counsel for the plaintiffs asked leave to substitute another shareholder for her; this was strenuously opposed by the defendants' counsel, who asked for a dismissal of the action; counsel for the plaintiffs then applied to add J. R. Young, a shareholder, as a plaintiff; this was objected to; but the learned Judge asked if in any of the cases referred to by counsel for the defendants it had been suggested to issue a writ *nunc pro tunc* and to combine the actions; counsel for the plaintiffs decided to issue the writ in the present action, and the writ was issued on the same day, and an order was made for the consolidation of the two actions. The trial then proceeded and after some further evidence had been taken it was adjourned until the 21st June, and on that day the trial of the consolidated actions was resumed and it was completed on the following day.

Judgment was given on the 9th October following dismissing the Hancock action and directing that judgment should be entered for the respondents against the appellants for $30,000, "with interest at 5 per cent. on the several instalments paid to Davies from the time the instalments were respectively paid until judgment."

The defence of the appellants, besides a denial of the allegations of the statement of claim, is:—

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(1) That an action was brought on the 14th February, 1903, by A.B. Cunningham against the two companies, the appellants Crawford, Dunn, Deacon and Davies and Galbraith, in respect of the matters in issue in the present action and that a binding compromise and accord and satisfaction of these matters was made with the assent of the two companies and payment of $14,000, by the defendants in the action to the Provincial company or to Cunningham as trustee for its shareholders and that the action was by consent dismissed.

(2) That another action was brought on the 20th December, 1904, by Samuel Saulton, suing on his own behalf and on behalf of all shareholders of the Provincial company, against the same defendants as were defendants in the Cunningham action and a binding compromise of this action was effected.

(3) That by reason of these proceedings the matters in question are *res adjudicata*.

(4) Laches and acquiescence.

(5) That the Provincial company is now non-existent.

(6) The Statute of Limitations.

(7) That the Dominion company and its liquidator cannot maintain the action to recover money paid by it as a bribe.

(8) That the respondents, having taken judgment by default against the defendant Davies in the Hancock action, cannot maintain this action against the appellants.

Before dealing with the questions of law it will be well to ascertain what the facts are and whether anything in the nature of a bribe was paid to the appellants or to Davies.

According to the testimony of Davies, who was called as a witness by the respondents, and who is now dead, it was part of the arrangement for the sale to the Dominion company that that company was to take over the office staff of the Provincial company and that that was done, and that the payment of $30,000 was made to him by Holland, the managing director of the Dominion company; that he gave out of it $6,000 to Crawford, $3,000 to Dunn and $1,500 each to Deacon and Galbraith, and kept for himself the remaining $18,000 except $1,000 which he gave to the Provincial company's auditor.

Davies as managing director was in receipt of a salary of $3,000 a year and a commission on the business that was done in selling stock; Crawford, as president, was in receipt of a salary of $1,500 a year. I have not been able to find in the evidence any statement as to whether Dunn received a salary as vice-president, but all of the directors were in receipt of fees for their attendances at board meetings.

Davies and the other of these gentlemen lost their offices as

a result of the sale, and it was reasonable for them to ask for and to receive compensation for the loss of their positions, and it was on this basis that the money they received from Davies was paid to them. I venture to think that the usual course in such a transaction as was entered into, is to compensate officers who are deprived of their positions as the result of it, and in my view the amounts allowed as compensation in this case were reasonable.

There is nothing in the testimony of Davies, properly understood, to warrant the conclusion that what was paid was or was intended to be a bribe to induce the persons who received the money to agree to the sale. Reliance was placed on what was said by Davies (p. 14) in answer to the question why the money was paid to him; in reply to that question he said, "As something to influence the amalgamation I suppose." That, in my judgment, does not mean that it was paid as a bribe to influence the amalgamation, but what it means is, I think, that Davies, who, I should judge, controlled many votes, would not agree to the sale unless the buying company made provision for compensating him and possibly the directors for the loss of their positions.

There is nothing to shew that the sale was not an advantageous one for the Provincial company; and it is difficult, if not impossible, for one to imagine that the shareholders did not know that it would be necessary to provide this compensation.

I venture to think that a term of the agreement which I have quoted was overlooked by the learned trial Judge. I refer to the provision that "the vendor company shall pay the sum of $5,000 in full of its share of the costs, charges, and expenses of carrying out the objects and purposes of this agreement to completion, which sum together with the debts aforesaid shall be deducted from the purchase-price aforesaid, and the purchasing company shall bear and pay all such costs, charges, and expenses over and above the said sum of $5,000."

I apprehend that this provision was intended to cover such things as the payment of compensation to the officers of the vendor company for the loss of their positions, and in my judgment it is wide enough to cover such payments.

One of the matters that it would be necessary to deal with was the action to be taken with regard to the officers of the vendor company. The business was sold as a going concern, and there would necessarily, I think, have to be arrangements made either for taking over these officers or if they or some of them were not taken over for treating fairly those who were not taken over.

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If I had come to the conclusion that what was paid by the Dominion company was a bribe to those to whom it was paid, it is clear, I think, that the maxim *ex turpi causâ non oritur actio* applies, and that neither that company nor its shareholders can maintain an action to get back the money whatever remedy the shareholders may have against their directors, as to which it is unnecessary to express an opinion.

Nor can the Dominion company claim any right as shareholders in the Provincial company; they are not shareholders in it; the agreement, as has already been mentioned, provides that "from the date of the assent hereto of the Lieutenant-Governor in Council each holder of shares . . shall be deemed by virtue of the said assent *ipso facto* to have surrendered the said shares. . . ."

I am also of opinion that if the Provincial company had a cause of action, and if it were still an existing company, its claim would be barred by the Statute of Limitations. It is clear, upon the evidence, that the fact that the payments had been made came to the knowledge of the company and its shareholders more than 15 years ago, and the case of *Metropolitan Bank* v. *Heiron*, 5 Ex D. 319, is authority for holding in these circumstances the cause of action is barred by the statute.

I am also of opinion that the cause of action is barred by sec. 47 of the Limitations Act, the appellants being as to that company constructive trustees only: *Taylor* v. *Davies*, [1920] A.C. 636, 51 D.L.R. 75.

The defence of laches and acquiescence is also, I think, made out.

All the shareholders in the Provincial company having surrendered their shares, that company has practically ceased to exist, and no action can be maintained by it, and there are no shareholders and therefore Young has no *locus standi* to maintain the action.

A lease to a corporation determines if the corporation is dissolved, and with it determines the liability of sureties for the payment of the rent: *Hastings Corporation* v. *Letton*, [1908] 1 K.B. 378. See also *Lindsay Petroleum Co.* v. *Hurd* (1874), L.R. 5 P.C. 221, 245; *Coxon* v. *Gorst*, [1891] 2 Ch. 73.

While the Provincial company has not been dissolved in the technical sense of the word, it has no shareholders and no assets, and it has divested itself of its franchise, which I take to mean its corporate status and powers, and is now a defunct company. There is no one for whose benefit a judgment could be recovered. The company is but a mere name.

One of the ways in which a corporate body may be dissolved is as stated in Grant on Corporations (1850), p. 303: "By the

total loss of all its members." See also *Ib.*, p. 304, where the subject is discussed.

In *Chappell's Case*, L.R. 6 Ch. 902, 907, Sir W. M. James, L.J., said:—

"All the shareholders had agreed to an arrangement by which all the property of the concern, capital, assets of every kind, and the business were transferred to a new corporation, and all the shareholders accepted, in exchange for their shares, shares in the new company. I was of opinion that the result of that was, that there was a virtual dissolution of the company; that is to say, that the thing itself had ceased to exist as a thing in which there could be shares . . ."

I now come to the question of estoppel.

It was said by the Master of the Rolls (Jessel) in *Commissioners of Sewers of the City of London* v. *Gellatly* (1876), 3 Ch. D. 610, that the defendant was as much bound as he would have been in a suit by a shareholder who filed a bill to have the rights of the shareholders declared, as in *Henry* v. *Great Northern R.W. Co.* (1857), 1 DeG & J. 606.: 118 R.R. 255, though the plaintiff in that case was only a single shareholder, adding: "But if Mr. Gellatly could shew fraud or collusion, or anything of that sort, or shew that the Court was cheated into believing that the case was fairly fought or fairly represented, when in point of fact it was not, then he was entitled to the same benefit of such a defence as anybody else in a similar case" (p. 616).

These observations of the Master of the Rolls were referred to with approval by Lord Lindley in *Taff Vale R.W. Co.* v. *Amalgamated Society of Railway Servants*, [1901] A.C. 426, 443.

That I take to be the law, and it is also, I think, the law that a defendant who desires to attack such a judgment or any of the grounds mentioned by the Master of the Rolls must do so by his pleading: *Commissioners of Sewers of the City of London* v. *Gellatly*, 3 Ch. D. at p. 617; and that the respondents have not done.

In my view, the defence of estoppel is not made out. The Cunningham action was not a class-action, but was brought on his own behalf; and, as I understand the evidence, there was no compromise of the question raised in this action, but the defendants or some of them bought the shares which Cunningham claimed to own. Saultor's action was put an end to in the same way.

In neither case was there an adjudication by the Court of the matters that are in issue, nor was there any compromise of those matters by a plaintiff suing on behalf of the shareholders of the Provincial company.

There remains to be considered the effect of the plaintiffs having obtained judgment by default against Davies in this ac-

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tion and in the Hancock action. It is argued that it is a bar to their recovering against the appellants. I am of opinion that it is not.

It is true that a recovery against one of several tort-feasors is a bar to an action against the others, although the plaintiff has not got the fruits of his judgment: *Longmore* v. *J. D. McArthur Co.*, 43 Can. S.C.R. 640; *Goldrei Foucard & Son* v. *Sinclair and Russian Chamber of Commerce in London*, [1918] 1 K.B. 180; but the judgments by default against Davies were practically interlocutory, and the respondents were entitled to note the pleadings closed as against him and to proceed to the assessment of the damages and the trial of the issues between them and the appellants.

For the reasons I have given, I would allow the appeals, with costs and dismiss the action with costs.

Appeal allowed.

McGLADE v. PASHNITZKY AND MACEY SIGN Co. Ltd.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee and Ferguson, JJ.A. June 14, 1921.

PARTIES (§III—124)—THIRD PARTY PROCEDURE—DAMAGES TO PROPERTY OF LESSORS—ERECTION OF SIGNS WITHOUT AUTHORITY—RELIEF OVER—APPEAL—RIGHTS OF PARTIES.

There is no contribution between wrong-doers, and third party procedure is only applicable where the defendant is, if liable to the plaintiff, entitled to recover against the third party the very damages which the plaintiff seeks to recover against him.

[*Wilson* v. *Boulter* (1898), 18 P.R. 107; *Miller* v. *Sarnia Gas Co.* (1900), 2 O.L.R. 546, followed. *Swale* v. *C.P.R.* (1912), 1 D.L.R. 501, 2 D.L.R. 84, 25 O.L.R. 492, 500, referred to.]

APPEAL by third parties Rotenberg and Rotenbergs Limited from the judgment of Lennox, J., in favour of the Macey Sign Co. in an action to compel the defendants to remove a sign-board from a building in the city of Toronto and for damages, and a claim by defendant company against the third parties. Reversed.

The judgment appealed from is as follows:—

"The Macey Sign Company served a third party notice upon the defendant Pashnitzky, Rotenberg Limited, and Louis Rotenberg, and they appeared and pleaded. The defendant Pashnitzky served a like notice upon the Rotenbergs, and they appeared and pleaded to this claim also. There is a good deal of complication, a lot of litigants, but not much evidence of honesty in the transactions attacked. The lease under which Pashnitzky holds expressly prohibits him from assigning, subletting, or altering the property let by the plaintiffs; and he knew this. He quite realised, too, that the purpose to which the property was put weakened and endangered the building, as, in

effect, he says in his statement of defence. H entered into a dishonest bargain to confer upon the Rotenbergs a colourable right to put the property to an unauthorised use, obtained $100 that he was not entitled to, and set up a false story when he found himself in difficulty. I never even began to believe his story; the evidence of Rotenbergs' clerk was not necessary to convince me that the substance of what he related was a fabrication. So far this is favourable to Louis Rotenberg, but it does not clear his skirts. Mr. Grant appeared to think it quite impossible to believe that Rotenberg was dishonest or even guilty of bad faith. Perhaps so, for his counsel—I have found no difficulty upon this score. *Bain* v. *Fothergill* (1874), L.R. 7 H.L. 158, and other cases limiting the damage liability of the honest vendor to preliminary outlay for searches and the like, need not be weighed in determining the issues in this action. I find no trace of honesty, mistake, or good faith from the time I leave the plaintiffs until I reach the other end of the chain, the Macey Sign Company. Mr. Macey should have gone to the land-owners. He was very imprudent—he may have been honest. How can I find that Louis Rotenberg was mistaken, but honest? As between these two meddling intermediaries, Pashnitzky and Rotenberg, if there is a difference in the degrees of dishonesty, but I hardly think there is, the honours are with Rotenberg, for Miss Tracey gave him clearly to understand, as I find, that the owners would not consent to any interference with the property or any modification of the lease. All that is complained of in this action, the wrongful entry upon the property and the outlay incident to it, the payment of the $200 by the Macey Sign Company, the permanent injury to the property, and the expense of removing the erections and restoring the property, as far as can be done, to its former condition, is the direct consequence of their joint wrongful act, the fraudulent agreement entered into by Pashnitzky and the Rotenbergs—conspiring together; and they must remain together until the wrongs they initiated and set in motion have been righted. When Pashnitzky executed his fictitious assignment or lease, he meant it to be acted upon; he sent the Rotenbergs out to recoup themselves (if the $100 still in the solicitors' hands was a *bonâ fide* payment at all) and to gather in their share of the gains. The delay in clerically amending the statement of claim occasioned no loss or inconvenience. Pashnitzky offered no evidence in support of his third party notice, but incidentally I have disposed of its allegations in dealing with the other issues. When all that can be done has been done, this old building will be weaker than it was before the trespasses were committed; it has been permanently injured. The plaintiffs are

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seeking for the protection of their property rather than damages. Mr. Hughes was very moderate and candid in what he said as to this.

There will be judgment for the plaintiffs against the defendants for $500 damages and costs of the action. If the sign and its supports, braces, and adjuncts of every description (except beams, supports, or braces within the building, and these too if the plaintiffs desire it) are removed, the roof thoroughly repaired, including injured sheeting, and the whole roof is recovered with the same character of paroid or other roofing as it was covered with before the erection of the sign, within one month or such further time as I may allow by reason of adverse weather conditions, the damages will be reduced to $150. There will be judgment over for the defendant the Macey Sign Company against the defendant Pashnitzky and Louis Rotenberg and Rotenbergs Limited for indemnity, the $200 paid with interest from the date of payment, the expense of erecting the sign, fixed at $35, expense of removal and repairs and re-roofing $125 (Mr. Macey put it at this very moderate sum and cannot be allowed to exceed it), with its costs of defence and third party proceedings. It is true that there was no evidence as to the cost of erection. If Mr. Macey had not put so low a figure upon the removal and restoration, I should not have arrived at so low a figure. The plaintiffs can have an order directing the execution of this work if it is not proceeded with promptly. It is in the interest of the Macey Sign Company that it should be allowed to do this work, and it should give notice of what it intends to do. If this is not done, the other parties interested in securing the reduction of the primary assessment may apply for directions so as to protect themselves."

R. McKay, K.C., and *G. W. Adams*, for the Rotenbergs.

F. Arnoldi, K.C., for the Macey Sign Co.

T. J. Agar, for plaintiffs.

The judgment of the Court was read by

MEREDITH, C.J.O.:—Louis Rotenberg and Rotenbergs Limited, who are third parties against whom the Macey Sign Company claim relief over, appeal from the judgment of Lennox, J., dated 22nd January, 1921, by which the Macey Sign Company recovered against them (the Rotenbergs) $634, together with the costs payable by that company to the plaintiffs and its costs of its defence and third party proceedings.

When the appeal came on to be heard, objection was taken on the ground that, there being no appeal by the third parties against the judgment in favour of the plaintiffs, their appeal must fail, and an order was then made enabling them to appeal

from that judgment, and leave was also given to the Macey Sign Company to appeal; and, these appeals having been made, the case came on again to be heard.

The plaintiffs are the executrices of Edward Hodgkinson and administrators with the will annexed of Margaret Hodgkinson, and the plaintiff Mary Jane McGlade is the devisee of the property in respect of which the action is brought, deriving title under the wills of the Hodgkinsons.

The action is brought to recover from the Macey Sign Company and Frank Pashnitzky damages for having wrongfully entered upon the roof and other parts of a building on the south-west corner of Queen and York streets, owned by the plaintiffs, and cut away parts of the building and roof, cutting large openings in the roof, inserting beams and wood and metal work in it, penetrating the roof and other parts of the building by nails, bolts, and other materials, and erecting on the roof a very large, heavy, and unsightly sign of wood or metal, or of partly wood and metal, stretching across or almost across the whole roof.

It is clear that if all that was done and the doing of it cannot be justified, the doers of it are answerable in damages.

Nicholas Wishovati Zubic was tenant of the property, having a lease of it from the plaintiffs. The lease is dated the 20th March, 1918, is for the term of three years (*sic*), to commence from the first day of April, 1918, and to end on the 30th April, 1921, and it contains covenants on the part of the lessee not to assign or sublet, not to make alterations, not to injure the plaster or woodwork or "deface the walls, glass or woodwork of the said premises with signs, lettering or otherwise or do or suffer to be done any damage whatever to the said premises or any part thereof."

Zubic is said by Pashnitzky to have been his partner, and Pashnitzky appears to have been in possession of the premises, and on the 12th August, 1918, he executed an instrument by which he granted and leased to Rotenbergs Limited all available space over the roof of the building—the roof to be used for erecting such sign or signs for advertising purposes as Rotenbergs Limited, their successors or assigns, might desire.

On the 1st September, 1918, Rotenbergs Limited by an instrument in writing agreed to transfer and assign to the Macey Sign Company "all its (Rotenbergs Limited) interest in the agreement with Pashnitzky" for the consideration of $1,080. This instrument recites the grant and lease by Pashnitzky and what was granted and leased by it.

The sign was then erected by the Macey Sign Company, and in erecting it the building was damaged.

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There was much discussion upon the argument as to whether the provision as to defacing with signs in the lease to Zubic extended to the erecting of a sign on the roof, but that question is unimportant, though if the action were for a breach of the covenant it would arise.

No justification has been shewn for what has been done of which the plaintiffs complain. Even if Pashnitzky had been lawfully in possession under the lease to Zubic, of which there is no evidence, in altering the building as it was altered, those who did it were wrongdoers and answerable for the damages occasioned by their acts.

There remains to be considered the question of the right of the Macey Sign Company to recover against the third parties.

If the Macey Sign Company and Rotenbergs Limited as to be treated as joint tort-feasors, the claim against the third parties must fail because there is no contribution between wrongdoers.

The only remedy, if any, to which the Macey Sign Company is entitled is by an action of deceit; and that, in my opinion, cannot be obtained by third party proceedings.

In *Miller* v. *Sarnia Gas Co.* (1900), 2 O.L.R. 546, it was held by Street, J., that "the third party procedure is only applicable where the defendant is, if liable to the plaintiff, entitled to recover against the third party the very damages which the plaintiff seeks to recover against him," and the learned Judge said: "Here . . . the damages which may be recovered by the plaintiff against the defendants are not the measure of the damages, if any, which may be recovered by the defendants against the third parties for the alleged tort of the third parties."

If the construction thus placed on the rule is right, it is clear that the claim of the Macey Sign Company against the third parties is not a claim which can properly be made by third party proceedings. The claim is to recover not only the damages that may be awarded to the plaintiffs, but also the expense incurred in putting up the sign and consequent upon its removal, as well as a return of that part of the consideration-money that had been paid to Rotenbergs Limited.

It is true that in the later case of *Swale* v. *Canadian Pacific R. W. Co.*, 25 O.L.R. 492, 500, 1 D.L.R. 501, 2 D.L.R. 84, Riddell, J., expressed the opinion that the Rule has "been given quite too narrow an application," but in that case he held that, according to the two tests laid down by Teetzel, J., in *Gagne* v. *Rainy River Lumber Co.* (1910), 20 O.L.R. 433, the claim of the defendant was properly the subject of a third party proceeding. These tests were that the damages recoverable by the plaintiff were the

measure of the damages recoverable by the defendant from the third party, and that the right to relief arose in consequence of a breach of contract, express or implied, between the defendant and the third party, or was given by statute. Many cases were referred to by my brother Riddell, but the current of authority is in accord with the view of Street, J. An appeal was taken from the judgment of Riddell, J., to a Divisional Court composed of the Chancellor and Latchford and Middleton, JJ. Stating his opinion, the Chancellor said that he saw "no reason to disagree with the carefully considered judgment of Riddell, J. Latchford, J., agreed, and Middleton, J., expressed his opinion in substantially the same terms as Street, J., had expressed it in *Miller* v. *Sarnia Gas Co.* It is difficult to suppose that the Chancellor meant that this test was not the true test, because he had himself applied it in *Wilson* v. *Boulter* (1898), 18 P.R. 107.

More than 9 years have elapsed since my brother Riddell expressed the opinion I have quoted, and added the hope that the question would receive full consideration in an Appellate Court; but, as far as I have been able to discover, no one has ventured by an appeal to challenge the correctness of the decisions which my brother Riddell questioned.

My own view accords with the view of Street, J., and Middleton, J., and with that expressed by the Chancellor in *Wilson* v. *Boulter*.

It is well-settled that an Appellate Court ought not to overrule decisions on matters of practice where the practice held by them to be proper has prevailed for a long time, even though if the question be *res integra* the appellate Court would have reached a different conclusion.

In my opinion, the appeals of the third parties and the Macey Sign Company against the plaintiffs' judgment should be dismissed, the latter without costs and the former with costs. The Macey Sign Company was content to let the plaintiffs' judgment stand, and appealed only because of the appeal by the third parties, and little if any additional costs have been occasioned to the plaintiffs by its appeal.

I would allow the appeal of the third parties from the judgment of the Macey Sign Company against them and dismiss the claim against them without prejudice to the right, if any, of the Macey Sign Company to recover the damages that were awarded to it.

There should be, I think, no costs to the third parties' appeal to them or to the Macey Sign Company. I so think because the third parties have succeeded only on the question of practice, which should have been raised at an earlier stage.

Judgment accordingly.

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Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins and Ferguson, JJ.A. June 14, 1921.

GIFT (§I—7)—EXECUTOR'S ACCOUNTS—GIFTS "INTER VIVOS"—DEPOSIT OF MONEY IN BANK—JOINT ACCOUNT—TITLE BY SURVIVORSHIP.

The deposit of money in a bank to joint account is a gift of a joint interest and effective from the time of deposit, and carries with it the legal right to title by survivorship.

[*In re Korvine's Trust*, [1921] 1 Ch. 343; *Central Trust and Safe Deposit Co v. Snider*, 25 D.L.R. 410, [1916] 1 A.C. 266, 35 O.L.R. 246, referred to.]

AN appeal by the executors of the will of R. H. Reid, deceased from the order of a Surrogate Court Judge upon the barring of the appellants' accounts.

By the order the executors were charged with sums of money which came to their hands before the death of the testator, and which were said to be gifts. The executors were the father and brother of the testator.

The appeal was heard by

LATCHFORD, J.:—When this appeal was before me, I suggusted that counsel for widow of the testator should consider the advisability of bringing an action to determine the validity of the gifts alleged to have been made by the testator to his father, and stated that I would withhold judgment on the motion until it was decided that no action would be brought, or that an action had been tried. I am in receipt to-day of a letter from the solicitors for Mrs. Reid, stating that it is not her intention to institute proceedings.

Considering the motion upon the material adduced, I am of the opinion that the gifts made by the deceased to his father of $600 and $2,690—however improvident they may have been—are not chargeable against the executors.

The appeal is therefore allowed, but in the circumstances without costs other than those of the Official Guardian, which should be paid out of the estate of the testator.

The widow of the testator, at the request of the Official Guardian, appealed from the order of Latchford, J., varying the order of the Surrogate Court made on the passing of the accounts of the estate.

Butler, for the appellant.

Mikel, K.C., for the executors, respondents.

L. Ramsey, for the Official Guardian.

MEREDITH, C.J.O.:—The question that has arisen is as to the obligation of the respondent Andrew Reid, who is one of the executors to account for two sums of $600 and $2,690, which the

appellant claims to form part of the assets of the estate and which the respondent Andrew Reid claims to be his own, and the solution of the question depends on whether or not there was a gift of these sums by the testator, who was his son, to the respondent.

The facts as to the $2,690 are not in dispute. The son, having made up his mind to give to his father that sum, to come into his possession after the son's death, drew a cheque for it on the bank in which he had money on deposit, payable to his father at his (the son's) death. He went to his solicitors, shewed him the cheque, and asked if it was all right. The solicitor told him that that would not answer his purpose; that, if the banker learned of his death, the cheque would not be honoured, and that his best course would be to give the money to his father outright; the son then went to the bank and drew from it $2,690, which he placed on deposit to the credit of a joint account in his own name and that of his father. It was understood between them that the father was not to draw the money during the son's lifetime, and that the son, if he needed the money for himself, should be at liberty to draw what he required. The son was then ill of the disease of which he died about three weeks after, and there was little probability that the son would need to use any of the money.

It is settled law that if a man deposits money to the joint credit of himself and another who is neither his child, adopted child, nor wife, there is *primâ facie* no gift, but a resulting trust for the person making the deposit; but this presumption may be rebutted, and it is clearly rebutted in the case at bar.

It is argued, however, that because of the understanding between the son and his father which I have mentioned, the gift was not complete; but I am not of that opinion.

The principle of the decision of the Court of Appeal in *Standing* v. *Bowring*, (1885), 31 Ch. D. 282, is, in my opinion, applicable. In that case, the plaintiff, a widow, caused $6,000 consols to be transferred into the joint names of herself and the defendant, who was her godson. She did this with the express intention that the defendant in the event of his surviving her should have the consols for his own benefit, but that she should have the dividends during her life. The plaintiff afterwards changed her mind and sought to have the stock retransferred to her, and brought a suit to compel the defendant to retransfer it. It was held that the legal title of the defendant was as a joint tenant of the stock, and that the plaintiff could not claim a retransfer on equitable grounds, the evidence clearly shewing that she did not when she made the transfer intend to make the

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defendant a mere trustee for her except as to the dividends. Stating his opinion, Cotton, L.J., said, (p. 287):—

"The rule is well settled that where there is a transfer by a person into his own name jointly with that of a person who is not his child, or his adopted child, then there is *primâ facie* a resulting trust for the transferer. But that is a presumption capable of being rebutted by shewing that at the time the transferor intended a benefit to the transferee, and in the present case there is ample evidence that at the time of the transfer, and for some time previously, the plaintiff intended to confer a benefit by this transfer on her late husband's godson . . . That being so, the presumption that there would be a resulting trust for her is entirely rebutted, and it must be taken here, that although she did not intend Bowring to have any right to the dividends during her lifetime, she intended to give him a beneficial interest in the stock, and that on her death, as he survived her, the legal right must prevail, and he must take the property for his own benefit."

I refer also, without quoting it, to what was said by Lindley, L.J., in the same case. See also *Toronto General Trusts Corporation* v. *Keyes* (1907) 15 O.L.R. 30, 35, 36.

I see no difference in principle between the retention by the donor of the dividends on the consols and the retention by the son of the right to draw from the fund what, if anything, he might require to use.

The *raison d'être* of the rule of law applied in *Standing* v. *Bowring* is that the right which was asserted was an equitable right, and that it could be set up against the legal right of the defendant, because the evidence established that the intention of the plaintiff was that the fund should be the godson's at her death.

In *Central Trust and Safe Deposit Co.* v. *Snider*, [1916] 1 A.C. 266, 35 O.L.R. 246, 25 D.L.R. 410, a somewhat similar principle was applied.

The short ground upon which I rest my judgment is that upon the death of the son the legal right to the fund became vested in the father, and that there is no ground for enforcing the equitable right which the appellant sets up, it being clear that the son's intention was that at his death the fund, or what remained of it, should belong to his father.

As to the $600 there is no question as to the right to it of the father. There was a complete gift of it.

The widow having died, there is no reason why the infants represented by Mr. Ramsey should not be substituted for her as appellants.

I would affirm the judgment of my brother Latchford and dismiss the appeal with costs.

MACLAREN and MAGEE, JJ.A., agreed with MEREDITH, C.J.O.

HODGINS, J.A. (dissenting in part):—Appeal from the order of Latchford, J., reversing the judgment of the Surrogate Court of the County of Hastings and holding that the executors were not chargeable with the sums of $600 and $2,690 as part of the assets of this estate. These two sums were claimed by Andrew Reid, an executor and the father of the deceased, as having been given to him by the son before his death.

Objection was taken that no appeal lies from the judgment in question, and that the Surrogate Court had no jurisdiction to determine the right of Andrew Reid to the money nor to hold the executors as such liable therefor.

I think the objection is not well-founded. The appeal by the executors is limited to these two sums charged to them in the taking of their accounts. The "order, decision or determination of a Judge of a Surrogate Court, on the taking of accounts," is by sec. 34, sub-sec. 5, of the Surrogate Courts Act, R.S.O. 1914, ch. 62, appealable in like manner as from the report of a Master under a reference directed by the Supreme Court. This would be to a single Judge. Rules 205 and 503.

The respondents in that appeal are entitled, by the terms of the Judicature Act, R.S.O. 1914, ch. 56, sec. 26, to appeal against it to a Divisional Court as in the present instance. Sub-sec. 1 of sec. 34 of the Surrogate Courts Act, giving a direct appeal to a Divisional Court, deals with orders and judgments of the Surrogate Court which are not made on the taking of accounts but arise in the exercise of its general jurisdiction—as, for example, that in *Re Haun* (1921), 64 D.L.R. 305, 50 O.L.R. 175, recently before this Court.

The objection that the Surrogate Court Judge could not inquire into and charge the executors with the assets said by them not to belong to the estate, is founded on the case of *Re Russell* (1904), 8 O.L.R. 481.

Since that decision the Surrogate Courts Act has been amended (see sec. 71, sub-sec. 3), and the effect of that sub-sec. is to give jurisdiction to the Surrogate Judge to deal with matters before him on the passing of accounts in as full and ample a manner as may be done by a Master under an administration order.

These powers are found in Rule 611 of the Supreme Court, and are comprehensive enough to cover the point in question.

A further difficulty was suggested on the argument before this Court, in that the widow who appealed had no interest under the will in the personal estate. She is, however, the statutory

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guardian of the infants, (the Infants' Act, R.S.O. 1914, ch. 153, sec. 28), and since the argument the Official Guardian has filed a consent to join in the pending appeal. The notice of motion may be amended accordingly.

The learned Judge whose judgment is appealed from gives no detailed reasons, merely saying, "I am of opinion that the gifts made by the deceased to his father of $600 and $2,690—however improvident they may have been—are not chargeable against the executors."

The Surrogate Court Judge, who took an opposite view, states his finding in these words:—

"The joint account in the Standard Bank at the date of the death of Robert Hiram Reid, the 27th June, 1917, was his property and as such forms part of his estate and was placed in the bank in that position as a joint account and as a matter of convenience for the purpose of withdrawal and not as a gift. It certainly was not a gift *inter vivos*, as the stipulation was for the father not to draw it. It was not a *donatio mortis causâ* because it was not given absolutely, and thus the best interpretation is that it was intended to be a gift testamentary. The conditions or requirements by law of such a gift are entirely absent, and thus the property is that of the estate; and, as it has been in the hands of the executors from the time of the decease of the said Robert Hiram Reid, the 27th June, 1917, to the present time, they are required to account for said amount and interest thereon at the rate of 3 per cent. per annum payable half yearly from that date, and thus, treating them in the most favourable way as if it had remained upon deposit in the savings department of the Standard Bank. The executor, Andrew Reid, also obtained from the deceased $600 on the 31st May, 1917. There was no consideration whatever for this sum given by the said Andrew Reid to his son, and if payed it would appear to me a very improvident act; it appears quite improbable that at that moment the son knew what he was doing, and the said Andrew Reid should account for this amount and interest thereon at 3 per cent. as upon the other sum as if it were on deposit the whole time in the savings department of a bank."

In the formal order both the $600 and the $2,690 and interest are found to be in the hands of the executors Andrew Reid, the father, and Philip Clayton Reid, a brother, and are to be accounted for by them as part of the deceased's estate. As a matter of fact these moneys are partly in the hands of either one or other or have been invested by them.

The son died on the 27th June, 1917, and his will was made on the 4th June, 1917. By it the income of his estate was to be

used by his executors for the support, maintenance, and education of his two children in equal portions in such manner as his executors deemed to be in the best interests of his children. The residue was given to the children on attaining 21 or to the survivor of them. The wife was given the Belleville real estate and its contents, and each child received a devise of a half section in Manitoba, when each attained the age of 21, with a devise over to the survivor in case of the death of either before attaining that age.

The personal estate consists of $4,216.68 in money over and above the two sums in question, and against this amount has been charged $2,485.16. The assets are, apart from the Belleville property devised to the widow, $10,907.99, of which $9,000 is put in as the value of the Manitoba properties, one of which is rented on shares and in 1919 produced $981.30.

Andrew Reid in his evidence, given on the first day on the hearing before the Surrogate Judge, says as to the $2,690: "It was to be mine . . . at the end—at his death it was to be mine. . . . he said so," and to the question, "On the 23rd June, 1917, he told you it was yours?" he answered "yes."

Mr. Elliott, manager of the Standard Bank, states that the father and son came to him and gave him a cheque signed by the son on a western bank to transfer the money to Belleville, and when the proceeds came back they came again and said they wanted it put in a joint account. The son signed the printed form sitting in a buggy outside. The joint account was closed by the drawing out of $300 by Andrew Reid on the day the son died and by the transfer of the balance on the 30th June to the credit of Clayton Reid, the other executor, by cheques signed by the father.

Andrew Reid, called later on in the proceedings, says that his son, before the will was drawn, suggested giving him this money in a joint account, and asked him if he would draw it while he was alive, and that he answered "no," and that the son then said, "It will be yours after I am dead." To this, later on, he adds that his son rejoined, "I would be a fool to give it to you if you would use it because I would not know how long I would want it." They were out driving and then went to the bank and signed the paper, which the bank manager got and brought out to him, the deceased, after which the father signed it. Andrew Reid deposes to a previous conversation and the drawing of a cheque in his favour before the will was made. This cheque was taken to Mr. Shorey, the solicitor, to whom the deceased said that he was giving his father the cheque for $2,600 odd to draw after he was dead. Mr. Shorey's recollection is that the cheque

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on its face was so payable. Mr. Shorey told the deceased that the father couldn't draw the money after he was dead, and so the cheque was torn up and the will drawn. Between that time and the opening of the joint account Andrew Reid says he had no conversation with his son on the subject.

The terms on which the joint account was opened are as follows:—

"The Standard Bank of Canada, Belleville, Ont.

"A/C No. 2133, June 23, 1917.

"All moneys deposited or that may be deposited by us and each of us to the credit of this account are for joint property, but they may be withdrawn by cheques made by either of us or the survivor of us.

"43 Gordon St., Belleville. R. H. Reid,

"Mt. View. Andrew Reid."

As to the $600 Andrew Reid says that his son gave it to him in cash out of his pocket on or about the 31st May, after his step-mother died, and after the conversation about the joint account had taken place, merely saying, "Dad, this is for you," or, "Here is $600, take it." This is corroborated.

There is much contradictory evidence as to the regard which the deceased had for his father and his intention as to leaving him anything. It discloses dislike and announcements that the father would get nothing, as well as affection and promises to provide for him. This may be accounted for and so may his desire to cut the provision for his wife down to the smallest possible portion by his disposition. However, he seemed, as his life came to its close to draw nearer to his father. How far his father may have influenced him in the making of his will and in the gifts of money does not appear, and the rights of those interested must be decided upon the meagre evidence supplied by Andrew Reid, supplemented by that to which I have referred, supplied by friends and relatives to whom in the later months of his illness he spoke of his affairs.

It is settled by *Kendrick* v. *Dominion Bank and Bowmas* (1920), 48 O.L.R. 539, 58 D.L.R. 309, and the cases cited in it, that a good *donatio mortis causâ* is created by a gift in contemplation of death, without it being expressed that it is to be retained only in the event of death. And a joint account may, if its terms are adequate, come within that definition. The test is whether the joint account is a matter of convenience only, in the sense that the donor retains his dominion over it and that the right of the other party is merely to draw against it for the donor's purposes.

I have in *Sproule* v. *Murray* (1919), 45 O.L.R. 326, 48 D.L.R.

368 reviewed the cases bearing on this aspect of the subject and need not repeat them here. In the case of *Daly* v. *Brown* (1907), 39 Can. S.C.R. 122, Mr. Justice Maclennan, at pp. 148 and 149, says as follows:—

"In a case of joint tenancy neither party is exclusive owner of the whole. Neither can appropriate the whole to himself. Here, however, the father did not lose his right to take the whole, by authorising his daughter also to draw. He could still draw the whole whenever he pleased, up to the day of his death, and, if he did it would be all his own money. Could his daughter have done that? I do not think so. She could as against the bank have drawn it all, and a payment to her would have discharged the bank; but the money would still have been the father's money in her hands. She would have been accountable to him for it all."

One of the terms on which the joint account here was created was that the moneys "are our joint property," and to this is added, according to the evidence of Andrew Reid, the condition that during the lifetime of the deceased the father was not to draw the money out, emphasised by the remark of the son that he would be a fool to give it to him, if he would use it, "because I wouldn't know how long I would want it."

In *Hill v. Hill* (1904), 8 O.L.R. 710, a decision of Mr. Justice Anglin, the understanding was that "the money should remain subject to the father's control and disposition while living, and that whatever should be left at his death should then belong to the son." Mr. Justice Anglin says, (p. 711): "But, upon the plaintiff's own evidence, I find myself driven to the conclusion that the purpose of William Hill, deceased, was by this means to make a gift to his son, the plaintiff, in its nature testamentary. As such it could only be made effectually by an instrument duly executed as a will. The father retaining exclusive control and disposing power over the $400 during his lifetime, the rights of the son were intended to arise only upon and after his father's death. This is, in substance and in fact, a testamentary disposition of the money, and, as such, ineffectual."

Falconbridge, C.J., in a case rather like the present followed this case. See *Smith* v. *Gosnell* (1918), 43 O.L.R. 123.

I think the restriction clearly imposed by the son involved the retention by him of the control and disposition of the moneys deposited during his lifetime, and that the principle enunciated in the decisions above cited should govern in this case as to the $2,690. In the evdence which I have quoted it appears that the son expressly said on each occasion that the money was to be his father's, not then, but "at the end," "at his death," "it will

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be yours after I am dead." His statement that he would be a fool to give it him, if he would use it because the son did not know how long he would want it, is also quite inconsistent with a present gift and contrary to the idea that the son then and there parted with his dominion over it.

The joint account carries the matter no farther, and the evidence leaves it in the same position as in the case of *Everly* v. *Dunkley* (1912), 27 O.L.R. 414, 8 D.L.R. 839, (see *per* Riddell, J., at p. 430), and gives no warrant for the application of the doctrine laid down by the late Chancellor Boyd in *Weese* v. *Weese* (1916), 37 O.L.R. 649, or by Riddell, J., in *Schwent* v. *Roetter* (1910), 21 O.L.R. 112.

The case of *In re Korvine's Trust*, [1921] 1 Ch. 343, to which my brother Ferguson refers me, does not decide anything new as to *donatio mortis causâ*. The money which was there placed in a joint account of the donor and Commander Block was held to be a good *donatio*, as coming within the rules laid down in White and Tudor's Leading Cases in Equity, 8th ed., vol. 1, p. 427, in the notes to the case of *Ward* v. *Turner* (1752), 2 Ves. Sr. 431. These rules are:—

(1) It must be made by the donor in contemplation of the approach of death;

(2) It must be intended to take complete effect only after the donor's decease; and

(3) There must be a delivery of the subject of the gift to the donee *for his own use* or upon trust for another person or for a particular purpose.

The case (*In re Korvine's Trust*) is valuable only upon the point that where a trust of money is declared it may be of the residue after certain payments are made thereout by the trustee. The observations of Eve, J., refer entirely to the chattels disposed of by *donatio*, as to which it is held that the law of the country in which the chattels are situate must be applied and that that law did not require it to be treated as a testamentary disposition. This was because there was a complete delivery to a trustee for the donee subject only to revocation by the donor himself or by his recovery from his illness. This is an element in all cases of *donatio mortis causâ*, "inasmuch as it is ambulatory and incomplete during the life of the donor, and may be revoked by him at any time before death—" and "it must be made so as to take complete effect on the donor's death:" White and Tudor, 8th ed., vol. 1, p. 425. "If, however, it appears * * * * that the donor intended to make an immediate or irrevocable gift, it will not be a good *donatio mortis causâ*, (p. 427). "Even if there be a delivery to the donee or to some one for him,

it will not be good, unless the donor (subject of course to the ordinary condition making void the gift, which is always either expressed or implied in case of his recovery) *parts with the dominion* over the thing given" (p. 430).

In the case of *Solicitor to the Treasurer* v. *Lewis*, [1900] 2 Ch. 812, Stirling, J., considered that where the donor intended to deal with the subject of the gift as part of that which she meant to dispose of as from her death and over which she shewed her intention to reserve dominion during her life there was not a good *donatio*.

Since writing the above I have seen the judgment of my Lord the Chief Justice of Ontario in this case and of my brother Middleton in *Re Hodgson* (1921), 20 O.W.N. 391. My Lord deals with the case in hand as disclosing a "voluntary bestowment in joint tenancy" and not a *donatio mortis causâ*, and founds his judgment on *Standing* v. *Bowring* 31 Ch. D. 283, a decision which, if applicable, would settle the matter. With great respect, I think the cases differ radically in this respect—that in *Standing* v. *Bowring* there was on the evidence a complete gift with the express intention that on the donor's death the donee should have all the principal, the donor having only the dividends for life—while here there is a retention, not of income, but of the right to use during lifetime the substance of the gift itself. This dominion over the subject, said to be "given" with the intention that on the death all or what is left shall go to the donee, seems indistinguishable from that incident to a testamentary gift, which does not change the ownership but takes effect only on death.

Re Hodgson was a case of the same nature as *Standing* v. *Bowring*—and the extract quoted in it from the judgment of Boyd, C., makes it quite clear that, in the opinion of that great Equity Judge, a great difference exists between a "voluntary bestowment in joint tenancy" and a case such as this.

With regard to the $600, I agree with what is said in the judgment appealed from, that it is not chargeable against the executors.

I would allow the appeal as to the $2,690 and interest and restore the judgment of the Surrogate Court Judge and dismiss it as to the $600. There should be no costs except to the Official Guardian, who should be paid his costs out of the estate.

FERGUSON, J.A.:—I agree with my brother Hodgins that the appeal fails as to the gift of $600, but differ from him as to the gift of $2,690.

It is clear that the deceased intended that on his death the defendant would be absolute owner of the $2,690.

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Having been advised by a solicitor that this purpose could not be carried into effect by a cheque payable after the death of the donor,—the donor and donee, with the intention of doing such an act as would be effective to reach the desired end, went to the bank and deposited the money of the donor in the bank to the joint credit of the donor and donee; by the terms of the deposit, either could draw against the deposit, and what remained of it passed to the survivor.

In this state of facts, it seems to me that there was, at the time of and by virtue of the deposit, a complete and perfect gift of a joint title or interest in the money which, by operation of law as well as by expressed intention and agreement, carried with it a right to title by survivorship—to my way of thinking, the title of the defendant and the gift as a gift was complete when and as soon as the deposit was made; from that time on the donee's joint title was complete and perfect.

But the donee admitted that he promised the donor that he would not, during the life of the donor, exercise his right to draw against the account, and agreed that the donee only might draw and use the fund during that period, and it is argued that the effect of such a promise and agreement was to leave the dominion and control of the fund in the donor, so that he had power to and might revoke the gift; that therefore the gift was not in any sense a complete and perfect one.

I cannot bring myself to such a view. To my mind, the gift was complete and perfect, and the promise and agreement deposed to should, according to the true intent and meaning of the parties, be viewed as a collateral agreement whereby the donor was not given a right of revocation, but a right and power to defeat in whole or in part the purpose of the gift. The gift of the joint interest was, I think, intended to be effective from the moment of the deposit, so as to carry with it the legal right to title by survivorship; that the promise and agreement in reference to drawing were not intended to, and did not, prevent the vesting of a title to the joint interest, as to which there was, I think, a complete and perfect gift *inter vivos*. I cannot see how the evidence may be read so as to deprive the donee of a joint title from the date of the deposit, or to conclude from the evidence that it was the intention that the donee should have no title in or to the moneys until the death of the donor—and thus require the gift to be evidenced as a testamentary gift, or the subject of the gift to be freed from dominion and control, as, it is urged, is necessary to a good *donatio mortis causâ*. If there was a present gift of a joint interest, is seems clear that it was neither a testamentary gift nor a *donatio mortis causâ*, because it is an

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essential of both that no title vests until the death of the donor: White & Tudor's L.C. 8th ed., p. 425. The title in right of survivorship was an incident of the joint ownership, an accretion to a title already vested—the donee's absolute title to the fund arose by operation of law, and not, I think, by reason of two separate gifts, *i.e.*, first, a gift of the joint interest, and, second, a gift of a complete and absolute ownership effective only and on and after the death of the donor.

In the recent case of *In re Korvine's Trust*, [1921] 1 Ch. 343, it was held that a somewhat similar transaction was a good *donatio mortis causâ*—the reasoning of that case would seem to support this gift as a *donatio mortis causâ*—but I prefer to rest my judgment on my reading of the documents and evidence as meaning and establishing a gift *inter vivos* of a joint interest, and treating the absolute title as an accretion to such gift by operation of law, and by the terms of the document evidencing the deposit.

I would dismiss the appeal. *Appeal dismissed.*

LEONARD v. WHARTON.

Ontario Supreme Court, Middleton, J. June 18, 1921.

EXECUTION (§I—11)—JUDGMENTS IN TWO ACTIONS—SET OFF IN COSTS—STAY OF EXECUTION IN ONE ACTION ASKED FOR UNTIL REFERENCE IN THE OTHER—PRACTICE.

A tort feasor cannot escape payment of a judgment or postpone execution on the same by alleging that in the future he will obtain a judgment in another action against the plaintiff for his tort, and that the same will be applied in satisfaction of the plaintiff's claim.

MOTION by the defendants to compel set-off *pro tanto* of costs already awarded in another action between the same parties against the judgment and costs in this action; and, secondly, for an order staying the execution for the balance until after the completion of a reference in the other action, under which damages are expected to be awarded in favour of the defendants herein against the plaintiffs herein.

G. M. Willoughby, for the defendants.

J. P. MacGregor, for the plaintiffs.

MIDDLETON, J.:—The first branch of the motion is based upon a misconception of the situation, as the execution creditor here had requested the sheriff to credit upon the execution the amount of cross-executions in his hands; so the parties are so far *ad idem*.

The real question discussed was the second.

I do not think that I have any jurisdiction to make the order

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sought. The case appears to me to be entirely governed by the provisions of our Rules. Rule 538 gives to a judgment creditor an unconditional and unqualified right to enforce his judgment by way of execution. Once there is a final judgment in the case, I do not think the Court has any power to interpose any restriction upon this right.

There are two provisions in the Rules which to a certain extent qualify the situation, but neither of these has any application, nor does either in reality indicate the existence of any such right as that suggested. The Judge at the trial may stay the entry of judgment or the issue of execution for a period not exceeding 30 days: Rule 495. This limited and qualified right emphasises the absolute nature of the right of the judgment creditor otherwise given.

Another apparent exception to the generality of the Rule first referred to is the right which is given to stay proceedings pending an appeal: Rules 495 *et seq.* This is not in truth a qualification of the general right, but only a recognition of the fact that a judgment, until the right of appeal is exhausted, does not possess the element of absolute finality. It is in a sense interlocutory, and the Court, recognising this principle, expounded in *Polini* v. *Gray* (1879), 12 Ch. D. 438, controls the action in such a way as to enable justice to be done in accordance with the view that may be expressed by the final judgment of the Court of ultimate resort.

Where the case is one of claim and counterclaim, the proceedings are all in one action, and the Court controls the situation as it sees fit so that in the end justice may be done. The Court is not bound to give judgment upon a claim before it deals with the counterclaim, and is master of the situation while the litigation is pending; and, where there might otherwise be, under the Rules, an absolute right to sign judgment upon either the claim or counterclaim, Rule 117 confers a jurisdiction upon the Court to stay all proceedings upon an undisputed claim or counterclaim until the disputed cross-claim has been adjudicated upon.

It is obvious that there is not here any right to a set-off. The plaintiffs' claim, founded upon tort, is now reduced to a judgment. The defendants seek to prevent a realisation of that judgment, at the present time at any rate, by alleging that they have an unliquidated claim which they have reason to believe they may ultimately succeed in reducing to the form of a judgment, this claim being likewise founded upon tort. There is no machinery known to the law by which a tort-feasor can claim to escape payment of a judgment for his tort by alleging a hope

and expectation that he will obtain in another action a judgment against the plaintiff for his tort, nor is there any way in which the proceeds of one judgment can be impounded so that they may be reached in satisfaction of an execution to be obtained in some indefinite time in the future upon the defendant's claim.

Had the proceedings been by way of claim and counterclaim in the one action, as already intimated, there might be jurisdiction, but it would then be a question of discretion.

I do not overlook the fact that in the other action there is a judgment directing payment of damages to be ascertained by the Master. That fact does not change the situation; there cannot be said to be a judgment for any definite sum which can be set-off until that assessment is made.

The motion must be dismissed so far as this branch of the case is concerned, and under the circumstances the costs should follow the event. If there is any necessity for an order directing the set-off acceded to, and for the return of the execution against the plaintiff satisfied, that may be embodied in this order; but, as this was not the subject of controversy, it should not affect the disposition of costs.

McCONKEY v. TORONTO GENERAL TRUSTS CORP'N.

Ontario Supreme Court, Middleton, J. June 28, 1921.

LANDLORD AND TENANT (§IIC—24)—EXPIRY OF LEASE—ARBITRATION AS TO BUILDINGS — RENEWAL PENDING AWARD — TERMS—DATE OF AWARD—INTEREST.

The award as to value of tenant's buildings dates as of the expiry of the lease, to which interest is added to the date of payment, and tenant must be bound by the terms of a lease made pending the delivery of the award.

[*MacDonell* v. *Davies* (1915), 8 O.W.N. 315, distinguished.]

MOTION by the plaintiff for judgment upon admitted facts in an action to recover the unpaid balance of the amount of an award.

A. W. Ballantyne, for the plaintiff.

E. T. Malone, K.C., for the defendants.

MIDDLETON, J.:—On the 1st November, 1896, Richardson, under whom the defendants claim, leased the property in question to Wilson, under whom the plaintiff claims, for a term of 21 years, from the 1st November, 1896, the lease containing a provision that in the event of the lessor being unwilling to renew he would within three months of the expiration of the term pay to the lessee the value of the building and improvements erected and made by the tenant, the value to be fixed by arbitrators. The term expired on the 1st November, 1917, and prior to this the defendants notified the plaintiff that they would

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not renew, and an arbitration was therefore had to fix the value of the buildings. This arbitration involved questions of considerable difficulty, and several applications to the Court, and the litigation has only recently terminated.

Although the defendants would not renew the lease in accordance with its terms, an arrangement was made, in August 1917, embodied in two letters, which are admitted, by which upon the termination of the lease Mr. McConkey was to remain as tenant for 5 years at an annual rental computed to be on a basis of 4 per cent. upon the value of the land, fixed at $2,500 per foot, and 7 per cent. upon the value of the buildings and improvements as ascertained by the arbitrators.

The amount awarded as payable by the landlord to the tenant was $51,673.45, and this amount, with interest at 5 per cent. from the 1st November, 1917, the defendants are ready to account for. The defendants claim, however, that there should be allowed against this the rental computed upon the basis indicated, together with interest at 5 per cent. upon the overdue payments.

The plaintiff, on the other hand, contends that he is now entitled to receive the amount awarded without interest, and that all he is liable to have deducted is the ground rental, computed as provided, together with interest at 5 per cent. upon the arrears of such ground rental—his theory being that so far as the buildings and improvements are concerned, until the amount of the award is paid they remain his, and he is not chargeable with any rental in respect of them. The difference between these two theories amounts to almost $4,000. In substance it represents the difference between 5 and 7 per cent. upon the amount awarded for the period of time between the expiry of the original lease and the payment by the defendants after the award had been finally confirmed by the appellate Court.

The plaintiff's contention is largely based upon the decision in *MacDonell* v. *Davies* (1915), 8 O.W.N. 315, in which case the Court was called upon to fix the amount payable for use and occupation where a tenant, under a lease indistinguishable from the present, held over after the expiry of the lease until an award was made ascertaining the value of the buildings. The Court there decided that upon paymant of the award the buildings became the landlord's, but there was no ground, upon principle or authority, for the proposition that the payment had a retroactive effect. Until payment the buildings were the tenant's, and he could not be charged for the use and occupation of his own property. He was merely liable for use and occupation of the landlord's land.

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On careful consideration, and after discussion of the case with one of the members of the Court that decided it, I do not think it in any way touches the problem here presented. Here the whole difficulty arises from a confusion of thought respecting entirely separate rights of the tenant. Under the original lease he had a right to be paid at the expiry of the lease, and the making of the award, which was to take place within 3 months. His right and obligations under the arrangement of August, 1917, depend entirely upon the terms of that arrangement. When the award was not made in accordance with the contemplation of the original contract, the law measures the compensation for delay by the payment of interest. The obligation under the agreement of August, 1917, is quite independent, and in my view must be carried out notwithstanding the failure of the landlord to pay the compensation within the time stipulated.

The true situation is that *quoad* the buildings, the tenant became vendor and the landlord purchaser at a price to be ascertained. In equity the landlord became owner subject to the obligation to pay. Under the arrangement made in August the tenant acknowledged the situation, treated the landlord as the real owner, and agreed to rent the buildings from him, and upon the basis stipulated.

Looking at the matter in a broader way, the tenant has nothing to complain of. The rental fixed at 7 per cent. may well be taken as being 5 per cent. as the price of the moneys, and 2 per cent. as covering depreciation. The value of the buildings was fixed as at the date of the termination of the lease. There is no reason why the landlord should not receive the compensation agreed to be paid as covering the depreciation. The tenant has had the use of the buildings, and the full advantage stipulated for by his new lease.

The rights of the parties may be tested by assuming that the arrangement of August, 1917, had been made with a stranger. Could the plaintiff have claimed that the rental paid by the stranger was money received to his use?

For these reasons, I think the motion fails and should be dismissed.

LAROCQUE v. LANDRY.

Ontario Supreme Court, Orde J. July 4, 1921.

WILLS (§IE—43)—EXECUTION OF WILL BY TESTATOR — TESTAMENTARY CAPACITY—ACTION TO SET ASIDE—BURDEN OF PROOF.

The burden of proving a will the voluntary and conscious act of the testator rests on the person propounding the will, and in any doubtful case application in solemn form should be made for probate.

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[*Perera* v. *Perera*, [1901] A.C. 354; *Murphy* v. *Lamphier* (1914), 31 O.L.R. 287, referred to; *Faulkner* v. *Faulkner* (1919-20), 49 D.L.R. 504, 60 Can. S.C.R. 386, 44 O.L.R. 634, 46 O.L.R. 69, distinguished.]

ACTION to set aside a will and a conveyance made by the executors of the will.

T. D'Arcy McGee, for the plaintiffs.

J. R. Osborne, for the defendants and executors.

O. Sauvé, for the defendants Leo and Joseph Daoust.

ORDE, J.:—This action is brought by Delina Larocque and Florida Grenier, the daughters of the late Joseph Daoust, to set aside the latter's will, the original defendants being the surviving executors. The plaintiffs also seek to set aside a conveyance made by the executors to the two sons of the testator, Leo Daoust and Joseph Daoust. At the opening of the trial I pointed out that the sons ought to have been made parties to the action, and it was, therefore, arranged with their consent that they be added as parties defendant and that the necessary amendments to the pleadings might be made, and the trial proceeded accordingly.

The late Joseph Daoust died on the 23rd March, 1905, leaving what purported to be his last will and testament, dated the 18th March, 1905. By the will his whole estate was given to his wife Mary Daoust (spelled "Dault" in the will), and after her death to his two sons Leo and Joseph respectively. He appointed his wife, one Theophile Landry, who was a cousin, and one John Dagenais, a friend, as his executors, and empowered them to carry on his business for as long as they should deem it wise. At his death, the testator's family, in addition to his wife, consisted of his two daughters, who are the plaintiffs, and the two sons above mentioned. The will made no provision whatever for the daughters. Florida was then 24 years of age and unmarried. Delina was 22 and had been married for about two years, Leo was 13, and Joseph 9. Florida and the two sons were living at home. Delina had at one time lived with her husband at the testator's house, but at the time of his death she was living elsewhere, though frequently at her father's home.

The testator had carried on an ice business, his ice-house being in the rear of his dwelling house, and after his death the executors continued the business. Probate was duly granted to the three executors on the 26th April, 1905. Shortly after Daoust's death, Delina Larocque with her husband and child came to live with the widow, and until the latter died in 1915, all the testator's children lived with their mother. The estate consisted almost wholly of the lands upon which the dwelling

house and ice-house stood and of the plant and good-will of the ice business.

Although they admit that they knew that their father had made a will, the daughters say that they never knew until after his death that they were excluded from all share in the estate. They are contradicted in this respect by Dagenais, who says that within a year after their father's death he told them that the will left everything to the sons after their mother's death.

The circumstances under which the will was executed were quite unusual. There was a good deal of contradiction as to the state of his health during a period of about six months preceding his last illness. His daughters say that he had been struck on the head by a pulley in the ice-house some time before, and that he had never been the same afterwards, acting and talking foolishly at times. There is no corroboration of their evidence in this respect, and witnesses for the defence say that the injury from the pulley, while causing a severe scalp wound at the time did not affect Daoust's condition either mentally or physically, and that he conducted his business as usual up to the time when he became seriously ill.

Just when Daoust's illness actually began was not made clear. He was not well for some days before he took to his bed. One of the daughters says that for some time previous to this he would wake up at night with the idea that he was not at home, and expressing the desire to leave the house and "go home." But there seems to be no doubt that up till the time he took to his bed he transacted some business and was able to speak coherently to his family and friends. The physician who had attended him could not be called as a witness, and the only medical evidence was that of Dr. Chevrier, who was called in a few days before Daoust died. Dr. Chevrier was unable to give the exact date of his visit, and it was not quite clear whether it was before or after the making of the will. When he arrived he found Daoust suffering from severe brain trouble, which so far as he could determine was due either to a hæmorrhage or to an embolism. Although only 52 years of age, Daoust had the appearance of a much older man, and was suffering from arteriosclerosis. He had great difficulty in speaking, and it was impossible to discuss his condition with him. He was unable to move and seemed to be mentally deranged. Dr. Chevrier said it was impossible to do anything for him, that he considered the case hopeless, and did not prescribe. He understood that Daoust had had a paralytic stroke before, and that this was a renewal of the trouble. He did not consider that Daoust was then fit to transact business, or was capable of making a will, but he admitted that his condition

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might possibly improve. He said that some of Daoust's answers were coherent, others incoherent, but that in his opinion it would have been improper to have obtained a will from him at that time.

Daoust took to his bed about 9 days before his death, that is, about the 13th or 14th March. All the witnesses are in substantial agreement that from that time onwards his power of speech was almost wholly gone.

But for Dr. Chevrier's statement that some of the things he said were coherent, I should have concluded that during that period of 9 days the paralytic stroke had completely deprived him of the power of speech, and it may be that Dr. Chevrier's recollection as to coherent speech was at fault. If there was any, it must have been very slight.

Daoust was nursed day and night during this period by his wife and his two daughters, with the assistance of his sister and other friends and neighbours. According to the daughters, he could not eat, and his sole nourishment was milk and water, given to him by a spoon and occasionally merely wetting his lips. The daughters say he knew no one, and made no answer or sign of recognition when spoken to, and their evidence is corroborated by other witnesses. He was attended almost daily by the parish priest, who unfortunately was himself too ill at the time of the trial to be called as a witness.

On the 18th March, Daoust's wife telephones to the defendant Landry to come to the house, ,and upon his arrival she said that Daoust wished to make his will. Landry was a first cousin of Daoust's, and they had been friends and neighbours since childhood, so that it was natural that Madame Daoust, whose two sons were very young, should turn to Landry for advice and assistance. Landry says that on learning what was wanted he asked Madame Daoust if she had a lawyer, and she told him that Mr. J. U. Vincent had done some legal business for her husband. Landry thereupon telephoned to Mr. Vincent telling him that he was wanted to draw a will, and Mr. Vincent came to the house, bringing with him a printed form of will. After his arrival Mr. Vincent suggested the advisability of another witness, and the defendant Dagenais, who carried on a grocery business a few doors away, and who was a friend of Daoust's and had had frequent business dealings with him, was sent for. Each one went up to Daoust's bedroom on his arrival, Madame Daoust being already there. There was some disagreement among the witnesses as to whether or not the two daughters were in the house at the time. They say they were, and Mr. Vincent says a young lady let him in. But the daughters were not in

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the bedroom while the will was drawn and executed, the only ones present, besides Daoust, being his wife, Mr. Vincent, Landry and Dagenais.

According to the evidence of the surviving witnesses, and particularly that of Mr. Vincent, what then happened was substantially as follows. Daoust being unable to speak, Mr. Vincent asked Landry if he knew what Daoust wanted, and Landry said that about a year before Daoust had discussed the making of a will with him, and had told him what he intended to do with his property. Mr. Vincent says that, although Daoust could not speak, he, Vincent, was careful to find out that Daoust understood what he was doing. Landry told him what he understood to be Daoust's wishes, namely, that the property was to go to his wife for life and afterwards to his two sons. Vincent and Dagenais then took hold of one of Daoust's hands and Landry took hold of the other, and Vincent proceeded to ask Daoust a series of questions, telling him to squeeze their hands if the answer was in the affirmative. He was asked specifically if he desired to leave his property to his wife for life, and after her death to his two sons, and he answered affirmatively by squeezing the hands of the three men. He was asked if he wished to leave anything to his daughters, and to this he made no response. He also assented in the same way to the appointment of his executors. Mr. Vincent then sat down and wrote out the will in English, and then taking Daoust's hand explained to him that he was going to read the will, and told him that if there was anything wrong in the will he was to press Vincent's hand and the latter would stop. Vincent then read the will in English and then in French without any apparent dissent from Daoust. He then asked him if the will expressed his intentions, and Daoust squeezed his hand, indicating an affirmative answer. A small table was standing beside the bed within Daoust's full view, and Vincent put a pen between Daoust's fingers and held his hand while the pen was touched to the paper, and Daoust's mark made. Then Vincent, Landry, and Dagenais signed as witnesses, all in full view of Daoust. Mrs. Daoust was present and apparently approved of all that was done.

Mrs. Grenier, one of the daughters, swore that when Vincent and Landry came out of the room, and were descending the stairs, she heard Vincent say to Landry in French, "I cannot say that it was Mr. Daoust who made that will," and that Landry had replied with a vulgar French expression meaning, "Shut your mouth." Both Vincent and Landry deny that any such conversation took place, and both say that the French expression

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which Landry is said to have used was one which he was not likely to have used.

It is unfortunate that the attack upon the validity of the will comes at this late date, 16 years after the testator's death. The delay is partly due to the fact that the daughters may not have been aware until some time after their mother's death in 1915 that they had been excluded from all share in the estate. It is true that Dagenais says that they knew their father had left them nothing, but they deny this, and I am not prepared to accept his statement in the face of their denial.

There was no evidence as to what solicitor had applied for probate of the will. No solicitor knowing the circumstances under which this will was executed should have applied for probate otherwise than in solemn form, so that all parties interested might have an opportunity to be heard, and the Surrogate Court Judge might be enabled to determine, upon *vivâ voce* evidence, the doubtful question as to the validity of the will. Had this been done, the evidence of the attending physician, of the parish priest, and of the testator's wife might have been obtained. Now that is impossible. But the fact that it is impossible to have their evidence ought not to militate against the plaintiffs. Apart from the effect of laches, if any, on their part, the burden of establishing the invalidity of the will cannot be imposed upon them. The will having been admittedly executed under most unusual circumstances, the burden of establishing its validity, even at this late date, falls just as strongly upon the executors as when the will was propounded for probate. If by reason of their failure to appreciate the importance of establishing its validity by applying in solemn form for probate, they now find themselves handicapped by the death or absence of material witnesses, the fault is theirs or that of their legal adviser. An executor who sees fit in a doubtful case to apply for probate in common form always runs the risk of being called upon at some later date to prove the will in solemn form, and the burden of doing so still rests upon him. See Williams on Executors, 9th ed., p. 275 *et seq.*, and the cases cited in Weir's Law of Probate, p. 311 *et seq.* The advantage of proving the will in solemn form in such a case is that the grant of probate is then binding on all parties, and the validity of the execution of the will cannot afterwards be questioned: *Lister* v. *Smith* (1862), 3 Sw. & Tr. 53, at p. 55.

The burden of establishing the validity of the will now rests upon the surviving executors as fully as if they were now for the first time propounding it. And this burden does not merely call for proof of the execution of the will by signing in the presence

of the requisite number of witnesses in accordance with the provisions of the Wills Act, but extends to the testamentary capacity of the testator. It is essential to the validity of a will that at the time of its execution the testator should know and approve of its contents. "And whenever any ground for suspicion exists, the burden of proving that the will was the voluntary and conscious act of the testator lies on him who propounds the will:" Williams on Executors, 9th ed., p. 30, and cases there cited.

The circumstances under which the testator executed the alleged will here were so unusual as to require, in my judgment, the most convincing evidence that the document really embodies the last wishes of the testator, before it can be admitted as his will. He was presumably unable to read the will himself. At all events it is clear that he did not do so. It was read to him, and the only evidence that he understood its contents is that he indicated his approval or otherwise by certain prearranged signals conveyed by the pressure of the hand. Had these signals been arranged at a time when he was in the possession of all his faculties, the danger of misunderstanding when his vital powers were waning, and his power of speech completely gone, would be obvious, but the signals were arranged and agreed upon merely upon Mr. Vincent's statement as to what he was to do to explain his approval or disapproval and by his apparent acquiescence in them. But that he really understood what the arrangement was can only be a matter of conjecture. There were no previous instructions given at a time when he might have given his instructions voluntarily and clearly. Instead of that, it is presumed, from a casual conversaton had with Landry a year before, that he intended to exclude his daughters from any share in his estate, and with that in mind it is suggested to the testator what his wishes are supposed to be.

Counsel for the defendants relied upon the recent case of *Faulkner* v. *Faulkner* (1919-20), 44 O.L.R. 634, 46 O.L.R. 69, 60 Can. S.C.R. 386, 49 D.L.R. 504. Had there been in the present case clear and definite instructions as to his will given by the deceased at a time when he was clearly competent to give such instructions, then the execution of a will drawn and presented to him for signature in accordance with such instructions, might be supported even under the circumstances in which the document was signed here. Cases like the *Faulkner* case rest upon the principle that a testator may be sufficiently competent to recognise that the document presented to him for signature has carried out his instructions, though if he were called upon at that moment to deal with the problem of disposing of his estate he might be quite incapable of doing so. Such a task might be

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beyond his mental or physical strength or both. The judgment of Sir James Hannan in *Parker* v. *Felgate* (1883), 8 P.D. 171, quoted with approval by Lord Macnaghten in *Perera* v. *Perera*, [1901] A.C. 354, at p. 361, makes that quite clear. But there were no instructions whatever in this case beyond those received in the same imperfect manner as that in which the approval of the written document itself was alleged to have been given. It is, of course, conceivable that the testator understood perfectly what was said to him and that he did in fact convey his wishes in the manner related by the witnesses, but that he did really understand is merely a matter of conjecture upon the part of the witnesses and must necessarily be so on the part of the Court. The late Chancellor in *Murphy* v. *Lamphier* (1914), 31 O.L.R. 287, has so exhaustively stated the principles which should govern those who attend upon the execution of wills by persons *in extremis*, and the Court in dealing with their validity, that I need not repeat them here. In my opinion, the defendants have failed to establish that the deceased knew and approved of the contents of the alleged will, or that it was his voluntary and conscious act when he signed it.

There will, therefore, be judgment declaring the will to be invalid and revoking the probate thereof. There was no evidence that the deceased had ever made any earlier will, and I therefore declare that he died intestate, and direct that letters of administration issue to such person or company as the Surrogate Court Judge for the County of Carleton may determine. The conveyance to the sons, who were added as defendants, must be set aside, subject however to any incumbrances thereon taken in good faith, and the registration of such deed, except as to such incumbrances, vacated. If, as a result of this judgment, it becomes necessary for the sons or the executors to account, there may be a reference to the Local Master at Ottawa for such purpose. Further directions are reserved.

I thing the executors have acted in good faith, though perhaps wrongly advised. For this reason, I think the costs of all parties, the defendants as well as the plaintiffs, ought to be paid out of the estate.

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Ontario Supreme Court, Orde, J. July 5, 1921.

DIVORCE AND SEPARATION (§VA—46)—SUIT FOR ALIMONY—EXCLUSION FROM THE HOUSE—OFFER TO COME BACK—MATRIMONIAL OFFENCE —EFFECT OF ON EARLIER OFFENCES.

The exclusion of the wife from the matrimonial home is not of itself sufficient to entitle the wife to alimony where the husband has expressed a willingness to receive her back. The offence is not such as would have the effect of reviving earlier matrimonial offences which would entitle her to alimony.

[*Aldrich* v. *Aldrich* (1891), 21 O.R. 447, referred to.]

ACTION for alimony.

T. H. Lennox, K.C., for the plaintiff.

D. H. Chisholm, for the defendant.

ORDE, J.: — I consider it unnecessary to recount all the facts upon which the plaintiff founds her claim to alimony, because her right, if any, depends wholly upon the effect of the final act of the husband which she says excluded her from the house, and of his subsequent willingness that she should return. The parties had been married for 13 years and had three children, a boy of 12, and two girls of 9 and 6 years of age respectively. The husband and wife were entirely unsuited to each other, and neither seems capable of making allowance for the desires and tastes of the other. The husband apparently plays no games, dislikes dancing and will not go out in the evening, but prefers to stay at home. The wife, on the other hand, seems inordinately fond of dancing, cards, and gaiety in general, and likes to remain out until the early hours of the morning. She sees nothing out of the ordinary in dancing at a public hall or playing cards until 2.30 a.m., and then going to a friend's house for supper afterwards, and considers it a hardship that her husband declines to accompany her, and this not as an occasional form of recreation but as a more or less constant and regular habit. As a result of this and of the defendant's drinking habits, there were frequent disagreements, and on several occasions the defendant struck his wife, once chasing her from the house in the winter when she was in her nightgown and bare feet. His treatment of her on several of these occasions was probably sufficient to have justified her in leaving him and claiming alimony. And there was also an admitted act of adultery on his part, and the communication to her of a venereal disease which would also have justified her in leaving him. On one or two occasions she did leave him, going to Detroit at one time and remaining there for a year, but they came together again, so that all the previous acts of cruelty and adultery were condoned, and on the night of the 10th February, 1921, or the morning of the 11th February,

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when he excluded her from the house, there was no ground upon which she could recover alimony from him unless he was then guilty of some act which in itself furnished a ground or had the effect of reviving the previous acts of cruelty and adultery.

On the night of the 10th February last, the plaintiff was going to a card party to which she had been invited by some friends. Her husband would not accompany her and told her that if she was not in by midnight he would lock her out. He had made similar threats before but had not carried them out. On this occasion she found she could not return before midnight, and because of her husband's threat, as she says, she did not return that night but stayed with a neighbour. She made no effort to find out whether or not her husbabnd had in fact locked her out at midnight. He says he did not lock the door then and that she could have entered the house at any time during the night, but that, finding in the morning that she had not returned, he closed up the house and barred the doors before leaving for his town store. He did this, he says, so that when she should return to the house later she would be unable to get in and would, as he believed, come to see him at his store, where he hoped they would be able to thrash the matter out and come to some agreement. When she went to the house later in the day she was unable to get in. She did not go to see her husband and made no attempt to communicate with him, but, finding the house closed to her, took him at his word and decided not to return. She remained in Port Hope for some days, during which neither she nor her husband made any effort to see or to communicate with the other. She then procured a key from a previous occupant of the house and went in for her clothes. She stayed on in Port Hope for a few days more and then went to Toronto, where she consulted a solicitor, who wrote a letter demanding alimony. On receipt of this letter the defendant immediately expressed his willingness to receive his wife back into his home, but she declined the offer and commenced this action.

If a husband excludes his wife from the matrimonial home and refuses to take her back, then he has no defence to her action for alimony, unless he can establish either cruelty or adultery on her part: *Nelligan* v. *Nelligan* (1894), 26 O.R. 8. But, unless the act of exclusion is in itself an act of cruelty and of such a character as to endanger her life or health, then, if the husband at any time before judgment expresses his willingness to take his wife back, I know of no principle which entitles her to refuse to return and at the same time to recover alimony.

The jurisdiction to award alimony was conferred upon the Courts of this Province on the 10th June, 1857, by 20 Vict.

ch. 56, sec. 2. This provision is now contained in sec. 34 of the Ontario Judicature Act of 1897 (R.S.O. 1897, ch. 51 and is still in force by virtue of sec. 3 of the present Judicature Act (R.S.O. 1914, ch. 56). The grounds upon which alimony is granted when the husband is living separately from the wife and refuses to receive her back are quite distinct from those of cruelty or adultery. They are such as would have entitled her "by the law of England" as it stood on the 10th June, 1857, "to a decree for restitution of conjugal rights." Such a decree was not a decree for alimony but a decree that the party who was living separately from the other should return. If in the present case the sole cause for the plaintiff's action was the exclusion from the house then his offer to take her back would be a complete defence. The cause of her complaint is gone and she is restored to her conjugal rights by the defendant's offer: *McKay* v. *McKay* (1858), 6 Gr. 380; *Edwards* v. *Edwards* (1873), 20 Gr. 392.

Counsel for the plaintiff urges, however, that the effect of the exclusion was to revive all the previous matrimonial offences and so justify the plaintiff in her refusal to return. It is, of course, a well-established principle that, while condonation of the husband's cruelty or adultery will preclude the wife from setting up the condoned acts as grounds for alimony, yet, if any matrimonial offence is committed which justifies the wife in leaving her husband, the earlier acts are revived and evidence of them may be given in support of the wife's claim. And it is not necessary that the final act which brings about the separation shall be of the same character as the condoned acts. An act of adultery will revive condoned acts of cruelty and *vice versâ*: Boyd, C., in *Aldrich* v. *Aldrich* (1891), 21 O.R. 447, at p. 449.

The exclusion from the matrimonial home not being sufficient in itself, because of the defendant's offer to receive the plaintiff back, to entitle the plaintiff to alimony, it cannot, in my judgment, be relied upon as a matrimonial offence which has the effect of reviving the earlier offences.

No authority was cited for the proposition that the mere act of exclusion was sufficient to revive all the previous matrimonial offences, and there is no logical reason why it should. It may be that, where there has been a long series of cruelties which have been condoned from time to time, a wife may leave her husband because of an act of cruelty, perhaps trifling in itself, if that final act of cruelty is of such a character as, coupled with the previous treatment, to give rise to a reasonable apprehension or to probable danger of personal violence. As stated in the headnote in *Bramwell* v. *Bramwell* (1831), 3 Hagg. Ecc. 618, 635,

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"Less cruelty is necessary to revive condoned adultery, than to found an original suit." But I am unable to see how a mere act of exclusion, not in itself amounting under the circumstances of this case to cruelty, can have the effect of reviving the earlier matrimonial offences. The wife's right to recover because of exclusion is, as I have said, based upon quite a different principle from that of adultery or cruelty. The effect of the exclusion having been removed by the husband's offer to take his wife back, her case really becomes that of a wife who, having condoned all her husband's matrimonial offences, chooses to leave him for no real cause whatever. Under these circumstances her action fails.

It may be desirable to add a few words as to the reality of the alleged exclusion. The fact that the plaintiff was able to gain access to the house by means of a borrowed key and thereby to get her clothes somewhat weakens her position. Having got into the house, there was no reason why she should not have remained until her husband returned, in order to see what would happen. She was fairly well able to take care of herself. Their height was about the same, 5 feet 10 or 11 inches, and she weighed 198 pounds to his 124. In addition to this, there was the fact that the house was hers, and she might have entered by force and taken and retained possession of her own house, had she chosen to do so.

The action will be dismissed. If the plaintiff's disbursements have exceeded those covered by the order made by the Master in Chambers, then the defendant ought to pay any such excess.

SHEPPARD v. BRADSHAW.

Ontario Supreme Court, Orde, J. July 6, 1921.

CHARITIES (§IIB—45)—"TAG DAY" — FUNDS FOR ENTERTAINMENT OF SOLDIERS—"ORIGINAL FIRSTS"—MONEY NEVER USED—APPLICATION OF SAME.

When a fund collected for a particular purpose is not used for that purpose owing to unforeseen circumstances, the Court may, upon application as to the disposition thereof, apply the cy-près doctrine in order to carry out the general intention.

ACTION for a declaration as to the proper disposition of a fund.

N. S. Macdonnell, for the plaintiffs.

C. M. Colquhoun, for the defendant.

Edward Bayly, K.C., for the Attorney-General for Ontario.

ORDE, J.:—I am called upon to determine what shall be done with certain moneys collected from the public in the city of Toronto, by means of what is called a "tag-day collection" on St. Julien day, the 22nd April, 1918.

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In the spring of 1918, many of the original first contingent who left the camp at Valcartier in September, 1914, and who fought at the battle of St. Julien, or the second battle of Ypres, in April, 1915, and who were colloquially known as "Originals" or "Original Firsts," returned to Canada on furlough. Many of these men were in Toronto, and a movement to do something for their entertainment was started. At a meeting of the city council on the 22nd March, 1918, it was decided that a reunion of all returned soldiers should be held, and that the police commissioners should be asked to permit a "tag-day" to provide funds for the purpose, and a sub-committee was appointed to draft a programme. At a subsequent meeting of this committee it was decided to hold a reception for all returned soldiers at the exhibition grounds on the 4th May, with a programme of sports, and that a committee of ladies should be asked to undertake the collecting of the funds. The defendant, who was then the city commissioner of finance, was appointed the treasurer of any funds which might be collected. The mayor and the secretary of the committee thereupon notified certain ladies of the intended reception, and asked their co-operation in collecting the funds on St. Julien day. This notification was by letter, and the terms of the letter make it clear that the Toronto men of the first contingent who were then at home on furlough were to be the immediate objects of the reception, though the fund was to be "not only for this public reception, but for the entertainment of similar men who will arrive during the summer."

The tag-day collection was duly held, resulting in the collection of a sum which, after deducting certain expenses, amounted to $18,477.84, which, with interest, is now in the hands of the defendant.

After the moneys had been collected, it was found for certain reasons, impossible to hold the reception, so that the moneys were never used and could not be used for the purpose for which they were collected.

This action has been brought by the plaintiffs, all of whom are ladies who took an active part in collecting the fund, for a judgment declaring what shall be done with it.

Strictly speaking, the trust for which the moneys were collected having failed, those who contributed to it might be entitled to a return of their contributions. A contributor who had given a cheque for $20 did in fact get her subscription back, but it would clearly be impossible, or if possible impracticable by reason of the expense, to trace all those who by means of contributions of small sums in the streets made up the total fund. In order that the question whether or not the moneys might be

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found to be *bona vacantia*, and so the property of the Crown, should not be overlooked, the Attorney-General for Ontario was represented at the trial.

The statement of claim alleges and it was duly proved that by letters patent under the Ontario Companies Act a corporation called "The Originals Club" was incorporated without share capital, to be conducted as a social club for the members of the original Canadian expeditionary force, and for the relief of suffering or distress of such members, and it is suggested that the objects of this club come sufficiently within the objects of the fund to justify the Court in applying the fund for the benefit of the club under the *cy-près* doctrine. The club has now 620 members, with a club-house which cost $25,000, and upon which $6,000 has been paid, the balance being secured by mortgage. The club-house is open for use for social purposes to all the members, but it is in fact used by a comparatively small number, and it seems reasonably certain that as time goes on the number of "original firsts" who will make use of the club will diminish. Notwithstanding this, having in view the fact that the original purpose of the tag-day collection on St. Julien day, 1918, if carried out, would have exhausted the fund in entertaining the men on furlough, it would seem a fitting purpose to which to put the fund, to apply it for the benefit of the "original firsts" in the way suggested, if it is open to the Court so to deal with it.

Mr. Bayly, on behalf of the Crown, admitted that he could not contend that the moneys were *bona vacantia*, and that consequently the Crown could lay no claim to them.

Mr. Macdonnell urged that the purpose for which the moneys were contributed was a charitable one within the meaning of 43 Eliz. ch. 4, sec. 1, and of para. (*d*) of sub-sec. 2 of sec. 2 of the Mortmain and Charitable Uses Act of Ontario (R.S.O. 1914, ch. 103), as being for a "purpose beneficial to the community." But, while it is well-established that the benefit need not extend to the whole community but may be limited to a section of it (Halsbury's Laws of England, vol. 4, p. 115), yet it is equally well-established that gifts for the benefit of particular individuals or a fluctuating body of particular individuals are not charitable (Halsbury, vol. 4, p. 117). If the fund here had been bequeathed by will for the purpose of entertaining the members of the original first contingent coming home on leave, in the way proposed by the circular letter of the 3rd April, 1918, and that purpose had not been carried out, there might have been some doubt as to whether, in a contest with the residuary legatees, the Court would have regarded the gift as a charitable one. There is of course the expression of a general charitable intention to be

carried out in a particular way, which has failed. But I do not think it is absolutely necessary to determine that the purpose here is a charitable one with the same strictness as if the trust were created by will. The *cy-près* doctrine, as I understand it, is not confined in its operation to cases of charitable trusts, though it is true that such cases furnish the great majority of instances in which the Court applies the doctrine. That doctrine is, speaking broadly, one which enables the Court to carry out the general intention of the donor or settler of a fund when the particular method of carrying it out, which is indicated by the instrument, fails, or the instrument fails to, or does not fully, indicate the method of fulfilling the general intention. And the doctrine has not been confined in its application to charitable bequests, but has been extended, for example, to cases where a gift might otherwise fail because of some breach of the rule against perpetuities. In such cases the Court moulds the trust as nearly as possible to the in ntion of the settler. See, for example, *Humberston* v. *Humberston* (1716), 1 P. Wms. 332; Sugden on Powers, 8th ed., p. 499 *et seq.*

So that if in the present case the circumstances are such as to indicate a general intention to benefit the members of the original first contingent on the part of those who contributed to the fund, then I see no reason why the cy-près doctrine should not be applied to carry out that intention, when the particular method in the mind of the donors at the time has failed or become impossible, whether the gift is, strictly speaking, charitable or not. I think I can assume and find as a fact that there was not any intention on the part of the great majority of those who contributed to the fund that the contributions should be returned to them if the particular method of carrying out the intention should be found impracticable. So that, whether the gift is strictly charitable or not, I am of the opinion that the Court can in such cases as this apply the cy-près doctrine for the purpose of carrying out the general intention into effect.

It therefore devolves upon the Court to determine in what way the intention of the contributors to benefit the men of the original first contingent of September, 1914, can be carried out. No better method than that afforded by the medium of "The Originals Club" has been suggested, and I am willing to accede to that suggestion. It is of course inevitable that this club will some day cease to serve its orignal purpose, and in that event the fund may have to be dealt with in some other way. For this reason, it would not be proper to hand the fund over absolutely to the club. The best use that can be made of it will be to apply it in payment of or reduction of the present mortgage.

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This had better be done by means of a loan of the moneys to the club without interest, the loan to be secured by a mortgage either to the Accountant of the Supreme Court, or, if that is not practicable, to the Public Trustee, upon the club's property. The costs of all persons should be first paid out of the fund, and I shall be glad to fix them if the parties will appear before me for the purpose and at the same time to discuss and dispose of any matters of detail arising out of this judgment.

RE PATHE FRERES PHONOGRAPH CO. OF CANADA LTD.

Ontario Supreme Court in Bankruptcy, Orde, J. July 12, 1921.

BANKRUPTCY (§IV—36)—ASSIGNMENT—BOND GIVEN TO CROWN FOR PAYMENT OF DUTIES—PAYMENT THEREON—RIGHTS OF CROWN SUBROGATED TO BONDING COMPANY.

In bankruptcy the surety which pays the indebtedness of the principal debtor to the Crown is entitled to stand in the same position as the Crown with reference to the preference of the claim and the recovery of the debt.

[*Rex* v. *Bennett* (1810) Wight 1; *In re Lord Churchill, Mainsty* v. *Churchill* (1888), 39 Ch. D. 174, referred to. See Annotations, 53 D.L.R. 135, 59 D.L.R. 1.]

MOTION by the United States Fidelity and Guaranty Company, claimants, for an order determining the validity of a claim made upon the trustee in bankruptcy of the phonograph company.

L. B. Campbell, for the claimants.

G. M. Jarvis, for the trustee.

ORDE, J.:—This motion involves the same question as that already disposed of by me in *Re F. E. West & Co.*, 62 D.L.R. 207, in which I have decided that the Crown is entitled, by virtue of sub-sec. 6 of sec. 51 of the Bankruptcy Act, to priority for sums due for sales taxes under the provisions of the Special War Revenue Acts of 1915 and 1920, with this distinction: in that case the claim is made by the United States Fidelity and Guaranty Company, which have paid to the Crown the sum of $1,905.09 under a bond given by them to His Majesty in the sum of $6,000 to secure the payment of any duties or penalties which the Pathe Freres company might be liable to pay under the Special War Revenue Act, 1915, and the amendments thereto. The latter company, as manufacturers of gramophones, became liable to pay the sum of $1,905.09 by way of excise tax on gramophones manufactured by them prior to the 23rd July, 1920, on which date they made an assignment under the Bankruptcy Act.

The guaranty company claim to be entitled to be subrogated in the rights of the Crown, not only as creditors in respect of

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the moneys which as surety, they have paid to the Crown, but also in respect of the Crown's prerogative right to priority over the other unsecured creditors. The trustee opposes the claim of the surety to exercise the Crown's prerogative. That one who as surety has paid the indebtedness of the principal debtor to the Crown is entitled to stand in the same position as the Crown and to exercise the Crown's remedies for the recovery of the debt has been long settled: *Rex* v. *Bennett* (1810), Wight. 1; *In re Lord Churchill, Mainsty* v. *Churchill* (1888), 39 Ch. D. 174; Manning's Exchequer Practice (1827), pp. 71 *et seq.*

I see no reason for depriving the surety of the benefit of this principle under the Bankruptcy Act. It can be only in cases of insolvency that the exercise of the right can be of any real value, and there is nothing in sub-sec. 6 of sec. 51 which militates against the exercise of the right by the surety. It was urged that, as the Crown's prerogative is designed to protect the revenues of the Government in the interest of the whole community, that protetion has been sufficiently afforded by the due payment of the taxes to the Government by the surety, and that the interest of the community does not require that the surety shall be placed in any better position than any other creditor. There may be some force in this as a matter of abstract reasoning, but it was just as applicable a century ago to the cases cited in Manning as it is today. The law is too well-settled on this point to be disturbed otherwise than by legislation.

The, United States Fidelity and Guaranty Company will therefore, be entitled to priority over the unsecured creditors in respect of the $1,905.09 in question.

The company also claim $45 due by way of premium on the bond.

This is of course an ordinary unsecured debt, and there can be no priority or preference in respect of it.

The guaranty company will also be entitled to be paid their costs of this motion out of the assets in the hands of the trustee.

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*REX v. BARRY.

Ontario Supreme Court, Kelly, J. July 13, 1921.

INTOXICATING LIQUORS (§IIIJ—91)—ORDER UNDER SEC. 7—EVIDENCE—ONUS OF PROOF—WEIGHT OF EVIDENCE—APPLICATION TO QUASH.

The ordinary rule as to the quashing of convictions under the Act is that they should be set aside when there is no reasonable evidence to support them, and the fact that the onus may be on one side or the other cannot make any difference.

***This decision was reversed by the Appellate Division of the Supreme Court of Ontario, and is to be published in 67 D.L.R.**

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REX v. BARRY.

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[*Rex* v. *Lemaire* (1920), 57 D.L.R. 631, 34 Can. Cr. Cas. 254, 48 O.L.R. 475, followed; *Rex* v. *Mooney* (1921), 58 D.L.R. 524, 36 Can. Cr. Cas. 165, 49 O.L.R. 274, referred to.]

MOTION by the defendant to quash an order made by a magistrate directing the forfeiture of a quantity of intoxicating liquor seized in transit.

Section 71 of the Ontario Temperance Act, 6 Geo. V. ch. 50, as amended by 7 Geo. V. ch. 50, sec. 26, provides:—

(1) Where an inspector . . . or officer finds liquor in transit or in course of delivery upon the premises of any railway company, or at any wharf, railway station . . . or other place, and believes that such liquor is to be sold or kept for sale or otherwise in contravention of this Act, he may forthwith seize and reserve the same together with the package or packages in which such liquor is contained.

* * * * * * *

(3) Where liquor has been seized under such section 1 . . . the person seizing the same shall give information under oath before a Justice of the Peace, who shall thereupon issue his summons directed to the shipper, consignee or owner of the liquor, if known, calling on him to appear at a time and place named in the summons, and shew cause why the liquor should not be destroyed or otherwise dealt with as provided by this Act.. . .

* * * * * * *

(9) If it appears to the Justice that such liquor or any part thereof was consigned to some person in a fictitious name or was shipped as other goods, or was covered and concealed in such a manner as would probably render discovery of the nature of the contents of the vessel . . . in which the same was contained more difficult, it shall be *primâ facie* evidence that the liquor was intended to be sold or kept for sale in contravention of this Act.

James Haverson, K.C., and *R. H. Greer*, for the defendant.

F. P. Brennan, for the magistrate.

KELLY, J.:—This application is for an order "quashing or setting aside" an order made by the Senior Police Magistrate for the City of Toronto whereby he adjudged that a quanity of liquor in transit seized in pursuance of sec. 70 of the Ontario Temperance Act, on the 28th December, 1920, at Parkdale station, Toronto, of which the Rideau Lumber Company appeared to be the consignee or owner, was intended to be sold or kept for sale in contravention of the Act, and whereby he declared the said liquor and the vessels in which the same was kept forfeited "to His Majesty to be dealt with in such manner as the Minister may direct."

It was admitted by counsel for Barry, the claimant, that this liquor was consigned in a fictitious name, and that it was so covered or concealed as probably to render discovery of the nature of the contents of the car more difficult, thus creating a situation within the provisions of subsec. 9 of sec. 70, affording *primâ facie* evidence that the liquor was intended to be sold or kept for sale in contravention of the Act.

The evidence of Barry, because of the deceit he practised in so shipping the liquor, was discredited by the magistrate; if that had been the only evidence on his behalf, it and the admissions made by his counsel would conclusively have warranted the magistrate's finding and order. But the magistrate though most sweeping in his denunciation of Barry's evidence, clearly has not taken into account the evidence supplied by the bills of lading and other documents, which not only speak for themselves but are not contradicted in any essential detail, and corroborate vital parts of Barry's evidence. Nor has he given consideration to the important evidence of the witness McKeown, the chief billing clerk of the Canadian Pacific Railway Company, whom he said he believed. Part of McKeown's evidence is—and I refer to it now only because the magistrate believed him, and the uncontradicted evidence of the documents is to the same effect—that the car and its contents were being shipped to Cleveland. The evidence of its progress to Toronto is that it was shipped from Mile End, at or near Montreal, on the 24th December, and was seized in Toronto on the 28th December, Christmas Day and Sunday having intervened between the date of shipment and the date of seizure; so that, after its arrival in Toronto, there was little delay in arranging for its re-shipment out of the Province. The officer who made the seizure—the only witness called by the prosecution—has not sworn to any knowledge he had of its destination out of Toronto or of what disposal was to be made of it, except that, on inquiry, he learned that it was to be reshipped to Cleveland. So that even the evidence for the prosecution contains a denial of the *primâ facie* evidence arising from the use of the fictitious name and the concealment of the liquor in the car.

The documents in evidence speak only of a shipping in from Montreal and a reshipment from Toronto to Cleveland, and no witness has cast doubt on their correctness. If it were possible to find in other parts of the evidence anything to justify the discredit cast by the magistrate upon Barry's evidence, one would hesitate to disturb the order appealed against. The other evidence, however, supports rather than contradicts it.

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To arrive at a conclusion as to the proper disposition of this application, having regard to the record of the evidence and the proceedings before the magistrate, it is unnecessary to go further than follow the declaration in *Rex* v. *Lemaire* (1920), 57 D.L.R. 631, 34 Can. Cr. Cas. 254, 48 O.L.R. 475, that the fact that the onus may have been upon one side or the other cannot make any difference, if, upon the whole evidence, reasonable men could not have come to the conclusion to which the magistrate has given effect; or for the further statement of the intention of the Legislature in framing and passing sec. 102 of the Ontario Temperance Act, that the ordinary rule as to quashing convictions should prevail—that they should be set aside when there is no reasonable evidence to support them. *Rex* v. *Mooney* (1921), 58 D.L.R. 524, 36 Can. Cr. Cas. 165, 49 O.L.R. 274, explains the meaning and effect of sec. 88 of the Act, which applies to *prosecutions* of persons charged as there mentioned. That section is not to be invoked in cases which arise solely from seizure under sec. 70, which is concerned only with seizure and forfeiture. Sub-sec. 9 of that section applies only to cases so arising under that section. That which constitutes *primâ facie* evidence under sub-sec. 9 cannot be, and is not, more rigid in its conclusiveness than the evidence of the same character mentioned in sec. 88. The remarks of Mr. Justice Middleton in *Rex* v. *Mooney*, as to the effect of the latter in cases in appeal must apply as well to sec. 70, sub-sec. 9.

Leaving out of consideration altogether Barry's evidence, except where it is in accordance with or corroborated by other evidence which the magistrate has accepted, I cannot conceive it possible for reasonable men to come to a conclusion adverse to the claimant's claim. For the reasons indicated, the motion should succeed.

If further support were needed for this conclusion, there are additional circumstances in the case which should not be overlooked. The record of the proceedings at the hearing before the magistrate shews that before any witness had given evidence the magistrate entertained a strong belief respecting the ownership or want of ownership of the liquor, and at other times expressed opinions outside of the evidence which excited the alarm of the prosecuting counsel, who evidently appreciated the effect of this upon the merits of the decision. Had there been a more deliberate and calmer consideration of the evidence, vital parts of it would not have been disregarded, and there would not have been ground for complaint that stubborn adherence, against protest to

opinions formed without evidence or not supported by reasonable evidence prevented a proper conclusion being reached.

Further, if Barry's proposed method of conveying the liquor into the United States was in violation of the laws of that country, and such was suggested during the hearing and it seemed to have impressed the magistrate, that had nothing to do with the merits of the case. We are not here administering the laws of that country or imposing penalties or restrictions for infractions or attempted infractions of foreign laws.

The application is granted without costs, but with protection to the magistrate.

RE WEBB.

Ontario Supreme Court in Bankruptcy, Orde, J. July 14, 1921.

BANKRUPTCY (§II—15)—CREDITOR—ASSIGNMENT OF BOOK DEBTS—ONE MONTH PRIOR TO BANKRUPTCY — APPLICATION TO SET ASIDE—KNOWLEDGE OF CREDITOR—GOOD FAITH.

If a creditor takes an assignment of book debts from a debtor in good faith and without knowledge of the debtor's insolvent condition the transaction will not be set aside.

[*Stephens* v. *McArthur* (1891), 19 Can. S.C.R. 446; *Gibbons* v. *McDonald* (1892), 20 Can. S.C.R. 587; *Benallack* v. *Bank of B.N.A.* (1905), 36 Can. S.C.R. 120, referred to. See Annotations, 53 D.L.R. 135, 59 D.L.R. 1.]

MOTION by the trustee, an authorised trustee to whom E. O. Webb, an insolvent debtor, had made an authorised assignment under the Bankruptcy Act, to set aside an assignment of a book debt made by the insolvent to James Lloyd & Son.

L. E. Dancey, for the trustee.

William Proudfoot, jun., for James Lloyd & Son.

ORDE, J.:—The trustee moves to set aside an assignment of a book-debt made by the insolvent to James Lloyd & Son. The motion came on summarily under the provisions of Bankruptcy Rule 120. The affidavit evidence was supplemented by the cross-examination of one of the deponents and by the examination for discovery of Roy L. Lloyd, taken before a special examiner at Goderich.

The alleged assignment of the book-debt took place on the 6th November, 1920. The authorised assignment under the Bankruptcy Act was made on the 8th December, 1920.

Webb carried on a grocery business at Goderich, which he had purchased in August, 1919, giving a chattel mortgage to the vendor to secure part of the purchase-money. James Lloyd & Son were fruit and general commission merchants in Goderich and had done business with the man from whom Webb purchased his business and continued to sell to Webb afterwards.

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On the 20th October, 1920, Webb was indebted to James Lloyd & Son in the sum of $490.51, and on that date Lloyds drew on him at sight for that amount. The draft was accepted by Webb on the 28th October, but was not paid when it fell due on the 1st November. On the 23rd and 26th October, Lloyds sold to Webb two small quantities of merchandise amounting to $21.74 in all. In the statement filed by Lloyds with the trustee credit is given as of the 3rd November, 1920, for a "contra-account" of $115.93. R. L. Lloyd on his examination explains that this was his house-account (by which I assume he means his personal house-account), and that he dealt at Webb's all the time. He says Webb's account for this had been rendered, but whether it was credited to Lloyd's firm as a matter of course, or as a result of the interview about to be mentioned, is not clear.

On the 4th November, 1920, R. L. Lloyd called to see Webb, but Webb was not in. Lloyd mentions this visit specially, but, according to Macaulay, Webb's chief clerk, Lloyd had been coming in almost every day to see Webb about his indebtedness and about the failure to pay earlier acceptances. Lloyd says he saw Webb on the 5th November, 1920, and asked him about the unpaid draft for $490.51. Webb told him that he had cheques coming in from the steamship companies and that there was approximately $5,000 owing him on his books, and it was making him hard up at the time. Lloyd examined Webb's books and satisfied himself that Webb had that amount owing him. He made no further investigation. Webb wanted some more goods, and Lloyd asked him what security he would give and suggested that he should assign one of the book-accounts "and then I can advance you some more credit." Webb then picked out one of the book-accounts, that against the Algoma Central Steamship Company for $541.18, which Lloyd said would about balance his account at that time. This was correct if the $115.93 credit was not taken into account. Webb told Lloyd he could give him the Algoma Central account, and then asked Lloyd for an advance of $200 to pull him through his difficulty. On the 6th November, 1920, Webb signed the following document:—

The undersigned, for valuable consideration, hereby agree to assign and transfer to James Lloyd & Son the entire account held by him against the Algoma Steamship Company, amount $541.18. The undersigned also certifies the account absolutely correct, and has not been previously attached or assigned to any other person or firm."

On the 9th November, Lloyds gave Webb a cheque for the $200, and this appears as a debit item in the account, and they also sold him on the 16th and 17th November and the 2nd

December some small quantities of merchandise amounting in all to $33.82, and they gave him credit for a cash payment of $12.40 and for two small further contra-accounts amounting to $29.20.

On the 8th November, 1920, Lloyds notified the Algoma Central of the assignment, and on the same day received $292.38 from that company on account of the $541.38. This left, at the time of Webb's assignment on the 8th December, $296.16 due by Webb to Lloyds, against which Lloyds held the security of the book-debt assignment in respect of the balance due from the Algoma Central of $248.80.

The trustee contends that the assignment of the Algoma Central account to Lloyds was fraudulent and void and should be set aside. Counsel for the trustee stated on the argument that he was not claiming a refund of the $292.38 which the Algoma Central had paid. It was suggested that this sum had been in fact paid by the Algoma Central by cheque to Webb and that the latter endorsed it over to Lloyds.

Section 30 of the Bankruptcy Act has no application here, as this case comes within the proviso at the end of sub-sec. 1, which excepts an assignment of a book-debt due at the date of the assignment from a specified debtor. If the assignment is void it must be so by virtue of the provisions of sec. 31 as enacted by sec. 8 of the amending Act of 1920. "Things in action" are "property" under para. (*dd*) of sec. 2, and are therefore covered by sec. 31.

The assignment of the book-debt having been made within 3 months preceding the authorised assignment, the burden of establishing that it was not made with a view of giving James Lloyd & Son a preference over the other creditors is cast upon them, and evidence of pressure cannot avail to support the transaction: sec. 31, sub-sec. 2.

That Webb was at the time an "insolvent person" within sec. 31 is clear from the definition of those words in para. (*t*) of sec. 2. He had for some time "been unable to meet his obligations as they became due," and had "ceased paying his current obligations in the ordinary course of business." But, under the authorities, the transaction will not be preferential if James Lloyd & Son took the assignment in good faith and without any knowledge of Webb's insolvent condition. The Supreme Court of Canada in *Stephens* v. *McArthur* (1891), 19 Can. S.C.R. 446, decided that the word "preference" *per se* meant a voluntary preference, and that the instruments to be avoided as having the effect of a preference were only those which were the spontaneous

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acts of the debtor, and that consequently pressure by the creditor deprived the transaction of any voluntary character.

The meaning given to the word "preference" by the judgment in *Stephens* v. *McArthur* and by the judgment of the same court in the earlier case of *Molsons Bank* v. *Halter* (1890), 18 Can. S.C.R. 88, might perhaps indicate that, in order to constitute a preference at all, the act must of necessity be a voluntary one on the part of the debtor. But the provisions of sub-sec. 2 of sec. 31 (which follow substantially the corresponding provisions of sec. 5 of the Ontario Assignments and Preferences Act, R.S.O. 1914, ch. 134, and of similar Acts in other Provinces), make it clear that a transaction may be preferential, even if voluntary, so that its preferential character is to be determined not by the state of mind of the debtor when he entered into it, but by its effect in giving to the creditor preferential treatment over the other creditors of his debtor. But it seems still to be necessary, in order that the transaction may be held to have been entered into "with a view of giving such creditor a preference," that the creditor was aware of the insolvent condition of the debtor. There must still, as held in *Gibbons* v. *McDonald* (1892), 20 Can. S.C.R. 587, 589, and in *Benallack* v. *Bank of British North America* (1905), 36 Can. S.C.R. 120, 129, "be a concurrence of intent on the one side to give and on the other to accept a preference over other creditors," And see *Dana* v. *McLean* (1901), 2 O.L.R. 466.

What was Lloyd's knowledge on the 5th November, 1920, when he made the arrangement with Webb? He admits that earlier drafts for smaller amounts which Webb had accepted had been returned unpaid, and these had apparently not been met when the draft for $490.50 was drawn to cover the amount of Webb's indebtedness at that time. He says he did not know Webb was financially embarrassed; that Webb had been paying him up "first class until the last month and a half." But his statement that he did not know Webb was financially embarrassed (those are his exact words—see questions 93 and 94 of his examination) is rather surprising in view of the following paragraph in his letter to the Algoma Central of the 8th November, 1920, giving notice of the assignment of the account: "Beg to state that Mr. Webb has through unforeseen events been confronted with heavy obligations to meet immediately, and this course of procedure is forced on him to relieve financial embarrassment," etc. And he admits that he was aware that Bissett, another creditor, was "bothering Webb every day," and that Webb wanted the $200 to pay Bissett off. It is rather significant as to this alleged advance that Lloyds received the $292.38 from

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the Algoma Central on the 8th November and that the $200 was not paid to Webb until the 9th November. In addition to the $292.38, there was also the $115.93, Lloyd's house-account, which had been credited, so that when Lloyds advanced the $200 the indebtedness had been reduced by $408.31. According to McAuley, Webb's clerk, the proposal to advance the $200 was made to Lloyd, who appeared to be anxious to get some security for the existing indebtedness.

While the evidence is not wholly satisfactory, I have come to the conclusion upon it that Lloyd was not really aware of Webb's insolvent condition when he took the assignment. The mere fact that a man is financially embarrassed is not of itself evidence of insolvency, and there is nothing improper in a creditor's pressing for payment of an overdue account, or failing to get payment, pressing for and obtaining some security therefor. That a creditor presses for and takes security to protect himself in the event of a possible insolvency goes without saying; all security is really given for that purpose. To hold that a creditor cannot take any steps to secure himself under such circumstances would mean that the creditor would be fastened with knowledge of the debtor's insolvency upon its being shewn that such insolvency actually existed, whether the creditor actually knew it or not, such knowledge being imputed to him because of the mere fact that he took a security because the debtor's financial embarrassment prevented immediate payment.

The motion of the trustee will therefore be dismissed with costs, and James Lloyd & Son will be entitled to hold the balance due from the Algoma Central as security for their claim against the insolvent estate. The trustee's costs will be paid out of the estate.

RE LAING.

Ontario Supreme Court in Bankruptcy, Orde, J. July 16, 1921.

BANKRUPTCY (§IV—36)—ASSIGNMENT — CLAIM OF WIFE — TERMS OF MARRIAGE SETTLEMENT—DISALLOWANCE BY TRUSTEE—APPEAL—PROOF OF CLAIM.

A covenant in a marriage settlement that a sum of money will be paid to the wife at or within a definite period after the husband's death in case she survives him is a debt payable on a contingency which is provable in bankruptcy, but a claim to rank for this full amount on insolvency by reason of another covenant in the marriage settlement cannot stand.

[*Ex parte Tindal* (1832), 8 Bing, 402; *In re Brewer's Settlement* [1896] 2 Ch. 503, referred to. See Annotations, 53 D.L.R. 135, 59 D.L.R. 1.]

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AN appeal by Mabel L. Laing from the disallowance by the trustee in bankruptcy of the estate of A. R. Laing, the appellant's husband, an insolvent, of her claim to rank as a creditor of the estate of the insolvent, under the provisions of a marriage settlement.

S. H. Bradford, K.C., for Mabel L. Laing.

J. M. Bullen, for the trustee.

ORDE, J.:—The marriage settlement was made on the 15th April, 1909, before a notary in Montreal. At that time the domicile of the intended husband was in the Province of Quebec, while that of the intended wife was in the Province of Ontario. The marriage took place in Ontario on the 12th June, 1909. The husband subsequently changed his domicile to Ontario, and in February, 1920, commenced business in Brantford. The business did not succeed, and on the 27th December, 1920, Laing made an authorised assignment under the Bankruptcy Act. Among the claims filed is one by his wife of $10,000, under the marriage settlement already mentioned.

The marriage settlement, after reciting the intended marriage contains several provisions which usually appear in marriage contracts in the Province of Quebec, such as that there shall be no community of property, as to the wife's jewelry, wearing apparel, etc., as to the husband's obligation to maintain the household, and that the wife shall have no dower. Then follows a provision whereby the intended husband, "in consideration of the foregoing stipulations and of love and affection," purports to "give by way of donation *inter vivos* unto the said future wife:"

First, the sum of $3,000, to be spent in the acquisition of household furniture, ornaments, etc., which are to belong to the future wife as her absolute property, but are to be subject to the joint use of the future consorts during their joint lives, and, in the event of her predeceasing him, are to revert to him and become his absolute property.

"Second, the sum of $10,000, which he binds and obliges himself, his heirs and representatives, to pay to the future wife within 3 months after his death, with the right to him to make payments on account during his lifetime, either by investments in the name of the said future wife, by mortgage or hypothec upon or the purchase of immovable property, or in any other way.

"The revenues to be derived from the said sum of $10,000, or from any payment so made on account thereof, shall during the lifetime of the future husband be contributed to the general

expenses of the household, and be administered by him and be as an alimentary provision for his wife.

"In the event of the future husband becoming insolvent during the said marriage, the said sum of $10,000, or so much thereof as may then remain unpaid, shall forthwith become due and exigible, and the future husband will lose and forfeit the benefit of the term hereinbefore stipulated in his favour for the payment thereof.

"But it is further agreed that in the event of the future wife predeceasing the future husband the said sum of $10,000 or any investments or payments which may have been made on account thereof, and also all insurances on his life effected for her benefit or payable to her, shall return to and be the property of the future husband, without the heirs of the future wife having any right therein or claim thereto."

No sums have been paid by the husband to the wife on account of the $10,000, and she now claims by virtue of his insolvency to be entitled to rank against his estate in respect thereof.

The purported settlement of $10,000 upon the wife, though expressed to be a gift to her based upon the consideration of the marriage and the other considerations involved in the provisions as to community, etc., is really a covenant by the husband to pay that sum to his wife in certain events. This covenant calls for payment to her within 3 months after his death, but this obligation is necessarily dependent, by reason of the last paragraph of the clause, upon her surviving him. Consequently the gift is contingent upon her survivorship. Even payments made during the husband's lifetime on account of the $10,000 give her no immediate benefit, because the income therefrom is to be administered by him for the general expenses of the household and an an alimentary provision for the wife, all of which he is already bound to provide under one of the earlier covenants of the agreement; and in the event of her predeceasing him any moneys so paid on account revert to him. Then there is the provision whereby this contingent payment is to be accelerated in the event of the husband becoming insolvent, in which event the same "shall forthwith become due and exigible."

The wife claims that under this last mentioned provision of the agreement, by reason of her husband's insolvency, the $10,000 is now due and exigible, and that she is entitled to rank as a creditor therefor, and in the alternative that she is entitled to have her claim, based upon the contingency of her surviving her husband, valued and to rank as a creditor of such value.

The claim to rank for the full $10,000, as having become due because of the husband's insolvency, cannot stand. It is a well-

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recognised principle of bankruptcy law that, in a settlement by the husband of his own property whereby he retains a life-interest, a provision that his life-interest shall cease upon bankruptcy or insolvency is void as being a fraud upon the bankrupt law: *Higinbotham* v. *Holme* (1812), 19 Ves. 88; *Whitmore* v. *Mason* (1861), 2 J. & H. 204; *In re Detmold* (1889), 40 Ch. D. 585, at pp. 587-8; *In re Brewer's Settlement*, [1896] 2 Ch. 503. And, if this is so where there is an actual settlement of the settler's property in favour of trustees for the settlement, *â fortiori* is it so where the settlement is nothing more than a covenant to pay at the death of the settler.

If the covenant that the amount shall become due upon insolvency is treated as an independent covenant to pay upon the covenantor becoming insolvent, then, quite apart from the principle that such a covenant is a fraud upon the bankrupt law, there is in fact no debt due by the covenantor up to the moment of his insolvency. As Lord Redesdale says in *In re Murphy* (1803), 1 Sch. & Lef. 44, at pp. 49 and 50: "Nor really can anything where the contingency is an act of bankruptcy, and where the demand does not arise till an act of bankruptcy committed, be provable under it, because it did not exist before it." And see *In re Hoskins* (1877), 1 A.R. 379; *Ex p. Mackay* (1873), L.R. 8 Ch. 643. It might perhaps be argued here that "insolvency" within the meaniing of the marriage settlement might take place without an act of bankruptcy having been committed, so as to entitle the wife to payment before the settler came under the operation of the Bankruptcy Act. But whether this might be possible or not is really immaterial. The authorities I have cited make it clear that the covenant that the money shall become payable on insolvency is fraudulent and void as against the creditors of the husband.

It is clear from the provisions of sec. 44 of the Bankruptcy Act and from authority that a debt payable at a future time or upon a contingency may be the subject of proof, but it must be valued. A covenant in a marriage settlement that a sum of money will be paid to the wife at or within a definite period after the husband's death in case she survives him is a debt payable on a contingency which is provable in bankruptcy: *Ex p. Tindal* (1832), 8 Bing, 402.

That case is clearly in point here, and I accordingly hold that Mabel L. Laing is entitled to prove her claim for the value of her husband's covenant to pay her $10,000 within 3 months after his death if she should survive him.

It was suggested that I might value her claim in the manner indicated in *Ex p. Tindal, supra*. But Bankruptcy Rule 119

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lays down the procedure to be adopted in valuing contingent claims. The trustee will therefore take the necessary steps to settle the value, first by compromise or arrangement with the claimant, and failing that by application to the Court. Upon that application all the necessary material, especially actuarial evidence as to the probable length of the life of each, and the probability of her survivorship, must be given.

The proof as filed in addition claimed a preference over other creditors. There is no ground for this. The wife must rank as an ordinary unsecured creditor and not otherwise.

Success on this appeal having been equally divided, there will be no order as to costs.

GODIN v. MURDOCH AND SILVERSIN.

Ontario Supreme Court, Orde, J. July 18, 1921.

FALSE IMPRISONMENT (§III—15)—ARREST OF PLAINTIFF—ALLEGED OFFENCE—ACQUITTAL—ACTION FOR FALSE IMPRISONMENT—MALICE—CAUSE—RIGHTS OF PARTIES.

If there is ample evidence of reasonable and probable cause for arrest, and no malice is proved, an action for false imprisonment against a Justice of the Peace issuing the warrant will fail, even though in the discharge of his duty he might act "irregularly or erroneously."

[*Kelly* v. *Barton* (1895), 26 O.R. 608. 22 A.R. (Ont.) 522; R.S.O. 1914, ch. 89, sec. 3, referred to.]

AN action for false imprisonment.

C. R. Fitch, for the plaintiff.

F. M. Burbidge, for the defendant Murdoch.

G. S. Bowie, for the defendant Silverson.

ORDE, J.:—This was an action for false imprisonment, arising out of the plaintiff's arrest upon a warrant issued by the defendant Murdoch as a Justice of the Peace by virtue of his occupancy of the office of Mayor of the Town of Rainy River, and executed by the defendant Silverson, a constable. The offence charged was a breach of the Ontario Temperance Act. The plaintiff was acquitted of the offence charged.

There was ample evidence of reasonable and probable cause, and the only questions submitted to the jury were as to the malice of the defendants and the questions of damages.

The jury found that neither defendant was actuated by malice, and I accordingly dismissed the action with costs, first saying to counsel, in effect, that the verdict left no opening for

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any other judgment. On the following day, counsel for the plaintiff, in the absence of counsel for the defendants, raised the point that, upon the facts, the defendants, and particularly the defendant Murdoch, could not escape liability even in the absence of malice, because, as the plaintiff contended, the defendant Murdoch had no jurisdiction whatever to issue the warrant, there being at the time a Police Magistrate for the Town of Rainy River, who was then in the town, and further that, even if he had jurisdiction to issue the warrant, he had no power to issue a warrant returnable otherwise than before such Police Magistrate.

I thereupon gave the plaintiff leave to notify the defendants that I would consider an application to reopen the matter on these points, and that I desired a written argument upon them from counsel.

At the time the warrant was issued the defendant Murdoch was duly qualified by virtue of his office of Mayor to act as a Justice of the Peace in and for the Town of Rainy River, but there was at that time a Police Magistrate for that town, so that, by sec. 18 of the Police Magistrates Act, R.S.O. 1914, ch. 88, the jurisdiction of the defendant to act as a Justice of the Peace was limited. And it is contended that, having as alleged acted in excess of his jurisdiction, he is not entitled to the benefit of sec. 3 of the Public Authorities Protection Act, R.S.O. 1914, ch. 89, but is liable under sec. 4 of that Act, without proof that he acted maliciously and without reasonable and probable cause.

Mr. Fitch contends that the provisions of sub-sec. 1 of sec. 18 of the Police Magistrates Act prevent a Justice of the Peace from issuing either a summons or a warrant unless the Police Magistrate is ill or absent or has requested the Justice of the Peace to act. But, quite apart from the provisions of sub-sec. 3 of that section, it seems clear that sub-sec. 1 deals only with matters arising after the issue of the summons or the arrest under the warrant. The Justice of the Peace must not "admit to bail or discharge a prisoner or adjudicate upon or otherwise act," all indicating proceedings subsequent to the summons or arrest. This *ejusdem generis* rule limits the word "otherwise" to acts of the same character as those mentioned, because if not so limited the word "act" would cover everything which the Justice of the Peace could do and there would be no necessity for mentioning any particular acts. Sub-sec. 3 has been inserted *ex abundanti cautelâ*, but I do not think it can be relied on as extending the meaning of the two earlier sub-sections. The defendant Murdoch had therefore jurisdiction to issue the warrant, but having done so his jurisdiction ceased.

The warrant, which purports to be taken before "the undersigned Alexander C. Murdoch, a Justice of the Peace in and for the Town of Rainy River," and is signed "A. C. Murdoch, J.P." directs the constables to whom it is addressed to bring the plaintiff "before me or some other Justice of the Peace in and for the said District of Rainy River." I note in passing that Mr. Fitch in his written argument says that Murdoch did not add the initials "J.P." after his signature. This statement is not correct.

Had the plaintiff been brought before Murdoch, and had the latter acted in any way other than to direct that the plaintiff be brought before the Police Magistrate, Murdoch would clearly have exceeded his jurisdiction. But the plaintiff was brought before the Police Magistrate, who admitted him to bail, so that nothing was in fact done by Murdoch in excess of his powers, unless the mere fact that the warrant was made returnable "before me or some other Justice of the Peace," etc., instead of "before the Police Magistrate in and for the Town of Rainy River," constitutes an act in excess of his jurisdiction disentitling him to protection.

I do not think it necessary to determine whether or not subsec. 3 of sec. 18 makes it necessary that the warrant issued by a Justice of the Peace under such circumstances should be made on its face returnable before the Police Magistrate. It would doubtless be safer and therefore preferable to do so in all such cases; but, even assuming that the Act requires that the warrant shall on its face be made returnable before the Police Magistrate, the failure to make it so returnable, if the warrant was not improperly acted upon, did not amount to the exercise of any act in excess of Murdoch's jurisdiction, but was at most an irregularity. The case was simply one where an "officer in discharge of a public duty acts irregularly or erroneously," and so is "entitled to the qualified protection of the statute:" Boyd, C., in *Kelly* v. *Barton* (1895), 26 O.R. 608, at p. 621, affirmed in appeal, 22 A.R. 522. Murdoch is therefore entitled to the protection of sec. 3 of R.S.O. 1914, ch. 89; and, the jury having negatived malice, the action against him and the constable must be dismissed.

The judgment which I pronounced at the trial dismissing the action with costs will therefore stand, but there should be a stay until the 15th September next, to enable the plaintiff to appeal if so advised.

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Re ROCKLAND COCOA AND CHOCOLATE Co. Ltd.

Ontario Supreme Court, Orde, J. July 26, 1921.

BANKRUPTCY (§IV—36)—ASSIGNMENT—LOSS—CONTRACT WITH ASSIGNOR—BREACH—DAMAGES—ALLOWANCE OF CLAIM.

Where the breach of contract between parties is as much the fault of one party as the other, the damages claimed by one party will not be allowed in bankruptcy proceedings as against the estate of the other.

[*Doner* v. *Western Canada Flour Mills Co. Ltd.* (1917), 41 D.L.R. 476, 41 O.L.R. 503, applied. See Annotations, 53 D.L.R. 135, 59 D.L.R. 1.]

APPEAL by the Dominion Sugar Company Limited from the disallowance by the trustee under the Bankruptcy Act of the insolvent estate of the Rockland company, of the sugar company's claim of $20,183.67 for damages for alleged breach of contract. Affirmed.

J. M. Pike, K.C., for the sugar company.

M. L. Gordon, for the trustee.

ORDE, J.:—On the 7th October, 1919, the Rockland company agreed to buy from the sugar company 3,000 barrels of sugar, "to be distributed for year 1920 at the rate of about 3 cars per month; price to be the market price on the day each care is delivered." In August, 1920, there was a dispute between the two companies arising out of an alleged shortage in the deliveries to which the purchasers were entitled under the contract, which was adjusted as set forth in a letter from the Rockland company to the sugar company of the 26th August, 1920. By this adjustment, the sugar company were to allow the Rockland company a credit of $7,007 and to deliver 224,420 lbs. of sugar, which was the extent of the shortage, within 15 days, at a fixed price; and it was further provided that "deliveries under above contract, dated October 7th, 1919, for the month of July, to be taken at the prices already invoiced and for the successive months at the current market price ruling on the date of delivery."

At the date of this adjustment, there was owing by the Rockland company to the sugar company about $33,000, and Mr. McGregor, of the sugar company, says that, while on that date the sugar company were ready to deliver the 224,420 lbs. of sugar, his company expected immediate payment of the amount then due. Not receiving payment, the sugar company telegraphed from their head office at Chatham on the 28th August: "Very badly disappointed not receiving settlement old account. Trust have remittance Monday without fail." On the 31st August the

sugar company delivered 50,000 lbs. of the 224,420, and on the 2nd September, 1920, wrote to the Rockland company as follows:—

"Following up our agreement of August 26th, 1920, wherein we agree to deliver 224, 420 pounds of granulated sugar, within 15 days from that date, we now advise we are in a position to deliver the balance, 174,420 pounds. Will you arrange a settlement of your account, as arranged by you, so we may make delivery of the above quantity of sugar within the specified time?"

The Rockland company had, on the 31st August, paid $16,000 on account, but they still owed, including the price of the 50,000 lbs. delivered that day, about $24,000. As a result of the letter of the 2nd September, Mr. Kendall, of the Rockland company, telephoned to the sugar company, and he says he was told that they could get no sugar until the account was paid. He then went to Chatham and arranged for an extension of time for the payment of the arrears. The sugar company then continued to ship sugar, and by the 4th September had, with the 50,000 lbs. delivered on the 31st August, delivered 224,413 lbs. to make up the shortage of 224,420 lbs. mentioned in the letter of the 26th August, 1920. The Rockland company had made some further payments between the 31st August and the 14th September, amounting in all to $17,022.87, but by reason of the further deliveries they were still indebted to the sugar company to the extent of $38,000.

The sugar company's claim for damages rests upon the failure of the Rockland company to call for and take during the 5 months between the 31st July, 1920, and the 1st January, 1921, the balance of the sugar contracted for on the 7th October, 1919, and referred to in the concluding paragraph of the letter of the 26th August, 1920. They say they had this sugar ready for delivery, and that they sold it at prices which, when compared with those prevailing from time to time during those 5 months, resulted in a loss of $20,183.67, for which they now claim to rank. The sugar company say that it was the duty of the Rockland company to call for monthly deliveries under the contract, and, not having done so, they are liable in damages. There was some contradictory evidence as to an arrangement that these further shipments were not to be made until after the New Year, but I am unable to find that there was any such arrangement. It was incumbent upon the Rockland company under the contract to call for deliveries each month. They say they did not do so because the sugar company had intimated that there would be no more deliveries until the outstanding account was settled.

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Both parties lay by and did nothing, the Rockland company making no demand for deliveries and the sugar company making no tender. The situation is to all intents the same as that in *Doner* v. *Western Canada Flour Mills Co., Limited* (1917), 41 O.L.R. 503, 41 D.L.R. 476. Without going the length of holding that there was a tacit abandonment or relinquishment on both sides of the balance of the contract, as suggested there by Hodgins, J.A., it seems to me that the sugar company cannot be permitted to lie by until the whole period of the contract is up and then claim damages for the failure to call for delivery during each of the preceding 5 months. The principles applied in the *Doner* case are applicable here, and I think required the Rockland company to call for deliveries each month, and disentitled them to call for them in subsequent months. But the obligation on the part of the vendors to deliver the month's instalments, ceasing at the end of the month, surely entailed a corresponding duty immediately to tender the goods and to sell the released quantity at the best market price. Each instalment must in this respect be treated as if it was the subject of a separate contract. If the failure to order during any one month constituted such a breach as, on the authority of the *Doner* case, entitled the vendors to refuse to make up that delivery in any subsequent month, then, if the vendors intend to hold the purchasers liable for the breach, the damages must surely be those which they sustained when the breach occurred. In their letter to the Rockland company, on the 15th December, 1920, the sugar company ask for orders for delivery before the end of the year. I cannot see that this improves their position. I think it was too late then for the sugar company to expect to hold the Rockland company for the higher prices prevailing during the earlier months and to claim damages on that footing. Sub-sec. 3 of sec. 49 of the Sale of Goods Act, (10 and 11 Geo. V. ch. 40), dealing with the case where the buyer wrongfully neglects or refuses to accept and pay for the goods, provides that, "where there is an available market for the goods in question, the measure of damages is *primâ facie* to be ascertained by the difference between the contract price and the market or current price *at the time or times when the goods ought to have been accepted.*" Even without the words "or times," this would apply, I think, to an instalment contract. But the expression "at the time or times" makes it clear that the section is applicable to a contract calling for deliveries at different times. And there is nothing in sec. 31 to affect this. On the contrary, the expression "whether it is a severable breach giving rise to a claim for compensation"

strengthens the view that the compensation is to be calculated as of the date of the breach.

If I am correct in these conclusions, then the sugar company failed to take the necessary steps to protect themselves as the Rockland company made default from time to time, and cannot, in my judgment, be entitled to any damages for the alleged breach of contract by the Rockland company. As the price which the Rockland company were to pay was the market price prevailing at the time of delivery, it is obvious that unless there was a sudden drop in price immediately after the end of each month, or the sugar company were unable to get a purchaser at all by reason of there being no market (a situation hardly possible under the circumstances) the damages for the breach would be only nominal.

The appeal from the decision of the trustee will, therefore, be dismissed with costs.

FIDELITY TRUST Co. v. FENWICK.

Ontario Supreme Court, Orde, J. July 27, 1921.

INSURANCE (§IVA—162)—POLICIES ON LIFE OF HUSBAND—PAYABLE TO WIFE—ONE ABSOLUTELY ASSIGNED TO HER—DEATH OF WIFE—CLAIM OF HER ESTATE.

The estate of a wife predeceasing her husband is entitled to the proceeds of an insurance policy absolutely assigned to the wife before her death, but is not entitled to the premiums paid by the wife on other policies not assigned to her, unless it can be shewn that by some agreement with the husband she would have a lien on the policies for the same.

[*In re Leslie* (1883), 23 Ch. D. 552; *Falcke* v. *Scottish Imperial Ins. Co.* (1886), 34 Ch. D. 234, referred to.]

ACTION to determine the validity of conflicting claims to the proceeds of certain policies of insurance upon the life of Robert H. Fenwick, deceased; and counterclaim by the defendant for a declaration that Alice E. Fenwick, the wife of Robert H. Fenwick, converted her husband's properties to her own use and for an account.

W. J. Elliott, for the plaintiffs.

A. L. Fleming and *A. L. Smoke*, for the defendant.

ORDE, J.:—By an order made by Mr. Justice Kelly on the 10th September, 1919, under the provisions of the Ontario Insurance Act and of the Trustee Act, the proceeds of 5 policies of insurance upon the life of the late Robert H. Fenwick were

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directed to be paid into Court, and it was ordered that an action should be brought to determine the validity of the conflicting claims which had been made to the insurance moneys.

Pursuant to that order, this action is brought by the Fidelity Trust Company of Newark, New Jersey, U.S.A., as executor of the late Alice E. Fenwick (the wife of the late Robert H. Fenwick), and by Carrie Louise Lumsden (a sister of Alice E. Fenwick), against Edward J. Fenwick, the administrator of the estate of the late Robert H. Fenwick, for payment of the insurance moneys or some part thereof. The defendant denies the right of the plaintiffs to the moneys, and by way of counterclaim alleges the conversion by the late Alice Fenwick to her own use of certain moneys, securities, and chattels belonging to her late husband, and asks for an account thereof and for payment of the amount found due to his estate.

Robert H. Fenwick married Alice E. Fenwick in Buffalo, U.S.A., in 1888. He had been a broker carrying on business in Belleville, but at the time of his marriage appears to have had no definite home. After the marriage, Mr. and Mrs. Fenwick lived in Buffalo and Toronto for a time, and then moved to Belleville, where he again took up his brokerage business. Some time before August, 1906, Fenwick had a nervous breakdown and began to shew signs of mental trouble, and in this month he was admitted to the Toronto Asylum for the Insane. He was then about 45 years of age. He remained in the asylum off and on for some years, at times being released because of some improvement in his condition and then being re-admitted when he became worse again. On one occasion he escaped and was recaptured. During most of the times when he was out of the asylum, he was maintained at different sanitaria. He finally left the asylum in July, 1918, going to some sanitarium where he died on the 26th September, 1918, intestate.

Shortly after his admission to the asylum, his wife left Belleville and went to live with Mrs. McArthur, another sister, in Buffalo. In 1910 she went to East Orange, New Jersey, to live with Mrs. Lumsden, and died there on the 9th December, 1917. By her will she appointed the Fidelity Trust Company, a New Jersey corporation, her executors, and bequeathed to them $3,000 in trust to pay out of principal and income $30 per month for the support of her husband. With the exception of a small legacy of $300 to her sister Eleanor, she left all the residue of her estate to her sister Carrie Louise Lumsden. Probate of the will was duly obtained by the Fidelity Trust Company in New Jersey, but no probate has yet been granted in Ontario.

Letters of administration of the estate of Robert H. Fenwick

were duly granted to his brother, Edward J. Fenwick, the defendant, by the Surrogate Court of the County of York, on the 15th November, 1918.

The plaintiffs' claim to each of the 5 insurance policies do not rest upon the same grounds, so that it is necessary to refer to them with some detail.

Policy No. 8265 in the Sun Mutual Life Insurance Company (afterwards the Sun Life Assurance Company) was issued on the 18th January, 1882, for $1,000, and was payable to the assured's assignees or legal representatives." On the 28th January, 1890, Fenwick executed an absolute assignment of the policy to his wife, and lodged the assignment with the insurance company. The assignment is expressed to be "for value received," and no later assignment or any instrument purporting to revoke or vary it was ever executed by him, except that in August, 1906, shortly before going to the asylum, he executed a declaration under the Insurance Act in his wife's favour. This was doubtless made forgetting that the policy had already been absolutely assigned to her. The policy ultimately became fully paid-up. On the 24th April, 1915, during a lucid interval, Fenwick and his wife borrowed $600 on the security of the policy from the insurance company. Upon his death, after deducting what was due in respect of this loan, the insurance company paid into Court the sum of $730.33.

The Ontario Mutual Life Assurance Company (now the Mutual Life Assurance Company of Canada) issued two policies on Fenwick's life; one, No. 32248, on the 24th June, 1895, for $3,000, payable on its face to "Alice E., wife of the assured;" and the other, No. 34458, on the 7th October, 1896, for $2,000, payable on its face "to the executors, administrators, or assigns of the assured." On the 6th July, 1906, shortly before he went to the insane asylum, Fenwick signed a declaration under the provisions of the Ontario Insurance Act that the policy should thenceforth be "for the benefit of my wife Alice E. Fenwick." After his admission to the asylum, the premiums on these policies were paid until 1912 by his wife, and afterwards, as the plaintiffs allege, by Mrs. Lumsden, until Fenwick's death.

The remaining two policies were in the Ancient Order of United Workmen, No. 35920 for $2,000, dated 25th January, 1895, and the Canadian Order Foresters, No. 41229 for $1,000, dated 20th March, 1898, each payable on its face to Alice E. Fenwick, the wife of the insured. After Fenwick went to the asylum in 1906, the premiums were kept up for some time by Mrs. Fenwick, and then, until his death, by Mrs. Lumsden.

While the plaintiff company, as the executors of Mrs. Fen-

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wick's will, claim to be entitled to all the insurance moneys under the Sun Life policy, by reason of the absolute assignment to Mrs. Fenwick, the claims of the plaintiffs to the insurance moneys payable under the 4 other policies are limited to the amounts which the late Mrs. Fenwick and Mrs. Lumsden respectively paid by way of premiums thereon.

Dealing first with the claim by the estate of Mrs. Fenwick to the proceeds of the Sun Life policy, the defendant takes the ground that the assignment in favour of the wife of the insured stands in no different position from a declaration, either in the policy or by separate instrument, that the wife shall be the beneficiary, and is subject to be varied in favour of other members of the class of preferred beneficiaries under the Ontario Insurance Act, R.S.O. 1914, ch. 183, and is of no avail under sub-sec. 7 of sec. 178 of the Act if the wife should predecease the husband. The assignment to Alice E. Fenwick reads as follows:

"For value received, I hereby assign, transfer, appropriate, and set over all my right, title, and interest in policy number 8265 issued on the life of myself of Belleville by the Sun Life Assurance Company of Canada, to my wife Alice E. Fenwick, of Belleville.

"Dated at Toronto, this 28th day of January, 1890.

"R. H. FENWICK."

And it bears the stamp "Sun Life Assurance Co. of Canada, Jan. 29, 1890," indicating its receipt by the company the day after its execution.

Section 171 of the Insurance Act, which deals with the insurable interest which a man has in his own life, also provides for the designation of beneficiaries either by the contract of insurance or by separate instrument in writing, for the alteration or revocation of the benefits, except in cases of beneficiaries for value and of "preferred beneficiaries" (sub-sec. 3), and sub-sec. 8 provides that, "nothing in this Act shall restrict or interfere with the right to effect or assign a policy in any other manner allowed by law." That the insured cannot revoke or alter an assignment for value to one who does not belong to those who by section 178 are constituted a class of "preferred beneficiaries" may be taken for granted. And where value has in fact been given, the Courts will not look for defects in the instrument whereby the assignment is made, if it can be construed as giving an equitable right as against the estate of the insured or his creditors: *Thomson & Avery* v. *Macdonnell* (1906), 13 O.L.R. 653. And the mere fact that the assignee for value belongs to the preferred class does not affect the assignee's position, or enable the insured to transfer the benefit of the insurance to some

other member of the preferred class. The assignee in such case comes under the provisions of sec. 171 and not of sec. 178: *Book* v. *Book* (1901), 1 O.L.R. 86. I do not think that the provision of sub-sec. 7 of sec. 171, that "a beneficiary shall be deemed to be a beneficiary for value only when he is expressly stated to be so in the contract or in an endorsement thereon signed by the assured," can apply to the case of an absolute assignment of the policy for value, in view of sub-sec. 8. It may even be that an insured can by an absolute assignment vest the policy by way of gift to another person, and so deprive himself of all power to revoke or vary the assignment; and, if so, it would seem to be immaterial whether the donee of the policy is a stranger having no insurable interest in the life of the insured, or is a member of preferred class. See *Fortescue* v. *Barnett* (1834), 3 My. & K. 36; *In re Williams*, [1917] 1 Ch. 1. But it is not necessary, in my view, to decide this last point here, if the assignment to Mrs. Fenwick can be regarded as having been made for value.

Mr. Fleming argues that the words "for value received" really mean nothing, and that the assignment must be regarded as a voluntary act, and so be treated merely as a declaration in favour of the wife under sec. 178. Without admitting that, even if voluntary, an absolute assignment of a policy by way of gift may not, as already suggested, deprive the insured of all further power to deal with the policy, I am unable to agree with Mr. Fleming's contention that the words "for value received" are to be ignored merely because the assignment is in favour of the wife. In a contest with creditors seeking to set aside such an assignment as voluntary, it might perhaps be necessary to shew that value had in fact been given; but when the issue is between the assignee and the estate of the insured, the estate must be bound by the language which the insured himself used. Whether or not evidence would be admitted at the instance of the estate to shew that no value was in fact given by the wife, I do not decide. In the absence of any such evidence, the proper inference to be drawn is that the words used by the insured mean what they say and are not to be treated as of no effect whatever. I hold therefore that Mrs. Fenwick was an assignee for value of the Sun Life policy, and that upon her death, even during her husband's lifetime, her title to the policy passed to her legal personal representatives as part of her estate.

The next issues to be dealt with are those arising upon the claims of the plaintiffs to recover the insurance premiums. These claims are founded upon an alleged lien or charge upon the policies and their proceeds, arising out of the circumstances under which the payments were made. If in fact the payments were

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made with the moneys of Mrs. Fenwick and of Mrs. Lumsden respectively, and those payments kept the policies alive for the benefit of Fenwick's estate, then it might seem at first blush that upon some principle of equity they should be entitled to repayment. This view will, however, when examined, be found to be grounded upon some principle of salvage, analogous to that of salvage in maritime law, but it is clear on authority that no such principle is applicable under English law where a mere stranger chooses to keep alive an insurance policy by paying premiums out of his own pocket. "The general principle is, beyond all question, that work and labour done or money expended by one man to preserve or benefit the property of another do not according to English law create any lien upon the property saver or benefited, nor, even if standing alone, create any obligation to repay the expenditure. Liabilities are not to be enforced upon people behind their backs any more than you can confer a benefit upon a man against his will;" Bowen, L.J., in *Falcke*, v. *Scottish Imperial Insurance Co.* (1886), 34 Ch. D. 234, at p. 248. That case and the earlier one of *In re Leslie* (1883), 23 Ch. D. 552, contain a very full exposition of the law governing this question, and in the *Leslie* case, Fry, L.J., gives four cases in which a person who is not the beneficial owner, but who pays the premiums to keep up a policy of life insurance, is entitled to a lien: (1) by contract with the beneficial owner; (2) by reason of the right of trustees to an indemnity out of their trust property for money expended by them in its preservation; (3) by subrogation to their right of some person who, at the request of trustees, has advanced money for the preservation of the property; (4) by reason of the right of a mortgagee to add to his charge any money paid by him to preserve the property; and it was further held in that case that in no other cases can a lien on a policy for premiums paid be acquired either by a stranger or by a part owner of the policy. These cases were followed in *In re Earl of Winchelsea's Policy Trusts* (1888), 39 Ch. D. 168; but in *Strutt* v. *Tippett* (1890), 62 L.T.R. 475, Lindley, L.J., said that he was doubtful if the propositions of Fry, L.J., in the *Leslie* case were exhaustive, and suggested that there might be a lien where the owner of an onerous property (such as a policy of life insurance which requires the payment of premiums to keep it alive), who has agreed with another to pay the premiums, makes default, and the other person pays them. In *Re Walker*, (1893), 68 L.T. 517, Kekewich, J., upheld a lien upon equitable grounds which border very closely upon the principle of salvage, though he puts it upon the ground that the person making the payments was the agent of the insured.

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One of the difficulties in the present case is that Mrs. Fenwick is dead, so that whatever evidence which she might have been able to give of any agreement or arrangement between her husband and herself as to the payment of the premiums, is lost. Mrs. Lumsden says, however, that in the letters which Mrs. Fenwick received from her husband from time to time, and which Mrs. Fenwick shewed her, he frequently told his wife not to neglect his insurance premiums. These letters were not produced, having doubtless long since disappeared or been destroyed. But I see no reason to doubt Mrs. Lumsden's statement. Her husband, Thomas H. Lumsden, also swears that Mrs. Fenwick shewed him many of Fenwick's letters, and that in them he insisted upon her keeping up the policies, and that this was reiterated.

I desire for the present to disregard the contention of the defendant that the moneys paid by Mrs. Fenwick were not her own but really those of her husband. Assuming that the payments were made with her own money, were the circumstances such as to entitle her to a lien upon the policies? The policies were in her possession, and she, being the sole beneficiary, would become entitled to the insurance moneys if she should survive her husband and he should not have revoked or varied the declations already existing in her favour. She had therefore an interest in keeping the policies in force. The interest was of course only a contingent one, because she might not survive her husband, or he might deprive her of all benefit by revoking or varying the declaration. The mere fact that a man insures his life for his wife's benefit, in the absence of some other obligation to her to do so, does not involve any obligation on his part to keep the insurance alive. If the beneficiary sees fit to continue the payments of the premiums upon his failure to do so, her act must, under the authorities, be regarded as a purely voluntary one, intended either to protect her own interest in the policy, or even perhaps to protect her husband's. Logically there is no reason why the voluntary payment by a wife of premiums upon a policy of insurance upon a husband's life should not be assumed to be for the benefit of his estate. Nor if, under such circumstances, she is to be given a lien upon the insurances moneys for the premiums paid by her, would there seem to be any reason why, if the husband pays the premiums upon insurance for his wife's benefit, and she survives him, his estate should not be entitled to claim a lien upon the insurance moneys for the premiums which he had paid. I think the cases to which I have already referred, and especially *In re Leslie*, 23 Ch. D. 552, at

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p. 563, make it clear that one who has an interest in the policy is in no higher position than a stranger who pays the premiums. The fact that she has an interest ought really to place her in a lower position, for in her case the payments, if voluntary, are presumably to protect her own interest.

Now the only ground upon which Mrs. Fenwick could possibly be entitled to a lien for the premiums which she paid would be the first one given by Fry, L.J., in the *Leslie* case, namely, by contract with the beneficial owner of the policy. The term "beneficial owner" used in the *Leslie* case might perhaps be confused with the term "beneficiary" which the Legislature uses to describe a person to whom the insurance moneys are made payable, but they are not to be confused. The "beneficial owner" is he who "owns" the policy, the one with whom the insurer has contracted, or his assignee, and to whose legal personal representatives passes the right to enforce the contract. Mrs. Fenwick was not the beneficial owner in any such sense as that. In the *Leslie* case the claim to a lien was set up by the executor of the husband who had predeceased the wife, on the ground that he was jointly interested with her in a policy upon her life, which would have enured to his benefit had he survived her. There is no substantial difference between the *Leslie* case and this in that respect, and there the claims for a lien was not upheld by the Court.

Unless, therefore, it can be established that Mrs. Fenwick paid the premiums by some agreement with her husband entitling her to a lien, her estate cannot succeed. The only foundation for holding that there was such an agreement is the evidence that he had requested her to see that the premiums were paid, or, as Mr. Lumsden put it, had insisted that they be paid, and it is argued that such a request or demand, when acted upon, constitutes a contract. But, if so, what is the contract? Can it amount to more than an obligation to repay the money, as having been paid at the request and on behalf of the other, that is, for moneys paid for the use of another? I cannot see how, without more, such an obligation carries with it any lien in respect of the subject-matter of the payment. No one would seriously suggest that if at the request of a tenant I pay an instalment of rent for him, though I may be entitled to sue him for the recovery of the money paid, I acquire any lien upon his leasehold interest. It may be that very slight circumstances would be seized upon by the Court as sufficient to infer as a term of the agreement a right to assert a lien by the person paying the premiums; but, as I read the authorities, the agreement referred to by Fry, L.J., in the *Leslie* case must be not merely an

agreement involving an obligation to repay the moneys but an agreement to create or give the lien. It is true there are some expressions in the judgments in *Falcke* v. *Scottish Imperial Insurance Co.*, 34 Ch. D. 234, which might indicate that a lien might arise as an incident of the mere contract to repay, but I can find no authority for any such general principle. Cases where the expenditure of money to preserve something at the request of another has given rise to a lien upon the thing preserved, will be found to depend, I think, largely upon the possession by the person asserting the lien of the thing benefited, and it may be that the request by the insured to a stranger, who at the time had the policies in his possession, to pay the premiums, might, by inference, entitle the other to a lien.

In the present case, I cannot, in view of the relationship of the parties, regard the requests which Fenwick made to his wife to see that the premiums were paid as in reality made with any idea of contract in his mind. They were the natural requests made by a man in his condition of health, to his wife, to see that the policies were kept up for her own protection. And I can hardly regard her payments as having been made with any other view in her mind. Nor do I think that the possession of the policies under such circumstances really improved her position. Mere possession of the policies could not make what took place a contract, if there was no contract. I am therefore driven to the conclusion that there was no agreement between them, and that consequently her executors have not established any lien for the moneys paid by her or any right to recover them out of his estate.

In this connection, I think it proper to point out that, while unable to assert any lien upon the insurance moneys or to recover the premiums paid, by way of any direct claim against the estate or the proceeds of the policies, yet if Mrs. Fenwick or her estate were required to account to her husband or his estate for moneys or property of his in her hands, she or her estate might perhaps on some such principle as is set forth by Lord Macnaghten in *Peruvian Guano Co.* v. *Dreyfus Bros & Co.* (1887), reported in a foot-note to a later decision in the same case, [1892] A.C. 166, 170, at p. 174, be entitled to bring the payments into account and deduct them from any sums otherwise owing to him or his estate. That judgment raises a very interesting question, and it may be that the right to deduct the moneys expended, if it exists at all, would be limited to the particular subject-matters for which an accounting had to be made, which in the present case would exclude the moneys expended for premiums.

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Then, is the claim of Mrs. Lumsden in any different position from that of Mrs. Fenwick? Mrs. Lumsden says that, when Mrs. Fenwick was no longer able to pay the premiums, about the year 1912, Mrs. Fenwick asked her to continue the payments. At first these payments were made through Mrs. Fenwick, that is, Mrs. Fenwick would shew her the notices which came in from the insurance companies and she would then hand Mrs. Fenwick the money with which to make the payments. Later Mrs. Fenwick had a paralytic stroke, and Mrs. Lumsden then sent the moneys to the companies direct. She admitted that by keeping up the payments she expected to get the benefit of the policies. Mr. Lumsden says that frequently when the moneys were advanced for the payment of premiums, Mrs. Fenwick would hand him the policies as security, but he admits that they were returned to her from time to time, so that the security, if any, which the delivery of the policies afforded was not very substantial. During the whole time that Mrs. Fenwick lived with them, from about 1910 until her death in 1917, her slender means were not sufficient, after providing for her husband's maintenance, to provide for her wants, and Mr. and Mrs. Lumsden spent several thousand dollars in maintaining her in their house. It was natural that any documents or securities which Mrs. Fenwick had should have been placed in Mr. Lumsden's safe, and I cannot believe that the pledging of the policies by Mrs. Fenwick was very real. But, assuming that there was a deliberate pledging of the policies as security for the moneys advanced to pay the premiums, Mrs. Lumsden cannot stand in any higher position than Mrs. Fenwick herself. The claim is not based upon any alleged agency of Mrs. Fenwick for her husband, and, if it were, there is no evidence to establish that she was borrowing the money on his behalf. The moneys were really lent to her or paid on her behalf, and if I am right in holding that she acquired no lien for the premiums which she paid herself, then it follows that she could not by borrowing money for the purpose place the lender in any better position than her own, even by a deliberate pledging of the policies. The pledge would be, at most, a pledge of her own contingent interest.

The advances which Mrs. Lumsden made on her sister's behalf for the payment of premiums do not differ from any other advances made to her on her account. They were either gifts or loans made to assist her. I must hold, therefore, that Mrs. Lumsden's claim to recover the premiums cannot be sustained.

The defendant by way of counterclaim asks for a declaration that Mrs. Fenwick converted her husband's properties to

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her own use and for an account. Mr. and Mrs. Fenwick are both dead, and it is obvious that it is practically impossible under the circumstances to get the true state of facts as to the ownership of the assets in question. There are, however, certain outstanding facts which are of some assistance. Fenwick was without means when he married, and all through his life seems to have been in financial difficulties. His wife received some money, said to have been about $5,000, from her first husband, from whom she had procured a divorce. She also came into a few thousand dollars from her father's estate. The house in Belleville, when purchased, was placed in her name. Shortly before Mr. Fenwick went into the asylum, he had a margin account with a firm of brokers in Toronto, who were carrying certain shares for him. On his instructions this account was transferred to her, she assuming all the liabilities connected with it. All his insurance policies either already belonged or were payable to her. He seems to have divested himself of everything in her favour, though there is no direct evidence as to the furniture and some of his jewellery and other similar things. It is argued, and it may possibly have been the fact, that the transfer of his assets to her was really in her trust, to enable her the more easily to deal with them by reason of his condition; but it is just as reasonable to infer that he intended to give her everything so that in the event of his death it would be hers, he trusting that she would see to his maintenance in the asylum. There was a great deal of evidence, given with much detail, as to what had been done with the assets which he had transferred to her. She had sold the house and furniture and had realised upon the securities which had been transferred to her. To analyse that evidence is, in my judgment, useless. The burden is on the defendant to establish that the assets in question were not Mrs. Fenwick's. The evidence convinces me that they were hers, either as having been originally purchased with her money or as having been given her by her husband, and the defendant therefore fails upon his counterclaim.

At the opening of the case, I questioned the right of the plaintiff company, as the foreign executor of Mrs. Fenwick, to maintain an action in this Province without first obtaining probate of her will here. It was then agreed that the trial should proceed, and that, if necessary, this defect in the plaintiff company's status might be remedied before the entry of any judgment which might be pronounced in their favour.

That a foreign executor cannot come into Ontario and sue for the recovery of moneys due the testator's estate without first obtaining probate here is too well-established for argument. See

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Whyte v. *Rose* (1842), 3 Q.B. 493, at p. 509; *New York Breweries Co. Limited* v. *Attorney-General*, [1899] A.C. 62. There are certain statutory exceptions to this rule: see, for example, secs. 51 and 97 of the (Dominion of Canada) Bank Act, 3 and 4 Geo. V. ch. 9. The provisions of sec. 177 of the Ontario Insurance Act, which make it lawful in certain cases to pay the insurance moneys to a foreign executor or administrator, might at first seem applicable to cases where the insurance money is payable to the representatives of a person to whom the insured has assigned the policy. But a careful consideration of the section and of the usual wording of insurance policies will make it clear, I think, that the section refers only to the legal personal representatives of the insured himself and not of other persons. Policies frequently provide for payment on the death of the insured to his legal personal representatives. The insurance moneys become payable to the legal personal representatives by virtue of the contract of insurance itself; and, while the moneys come to them as part of the estate, their right to recover the insurance money, while in one sense a representative one, is in another sense given to them by the contract, and there is consequently, a logical foundation for legislative recognition of the claim of a foreign executor or administrator of an insured who dies domiciled abroad to be paid without first obtaining probate or letters of administration here. But while a policy may provide for payment, or be assigned, to some person other than the insured, or to such person's legal representatives, the addition of this last mentioned alternative is really mere surplusage. The words are really words of limitation added to make more certain the completeness of the absolute gift or assignment. In such cases the legal personal representative becomes entitled in a representative capacity solely. In my opinion, sec. 177 has no application in such a case and does not warrant payment to a foreign executor. Nor does the fact that the moneys are in Court justify the Court in ordering payment out to a foreign executor, who could not otherwise obtain payment without first proving the will here. It will therefore be necessary for the Fidelity Trust Company to obtain probate in Ontario before this judgment can be entered. If, in applying for probate here, it becomes necessary or more convenient to obtain a grant of administration with the will annexed to some other person or corporation, there will be leave to amend by the substitution or addition of the Ontario administrator.

There will therefore be judgment:—

(1) Declaring that the estate of the late Alice E. Fenwick is entitled to be paid the proceeds of the Sun Life policy, now in

Court, amounting to $730.33, with the Court interest thereon, and to recover against the defendant their costs of this action, including the costs of the motion before Mr. Justice Kelly pursuant to his order of the 26th September, 1919.

(2) Declaring that the plaintiffs have failed to establish any lien upon the insurance moneys for the premiums paid by the late Alice E. Fenwick or by the plaintiff Carrie Louise Lumsden, or any right to recover against the estate of the late Robert H. Fenwick in respect thereof.

(3) Dismissing the counterclaim with costs.

(4) The defendant will be entitled to indemnify himself out of Robert H. Fenwick's estate for the costs which he is by this judgment called upon to pay, and also to be paid his own costs as between solicitor and client out of the estate.

This judgment is not to be entered until the probate of Alice E. Fenwick's will, or letters of administration with the said will annexed, have been obtained in this Province; the plaintiffs to be at liberty to amend, if necessary, by adding or substituting the Ontario executor or administrator as a plaintiff in this action, and by inserting the proper allegations in that regard in the statement of claim.

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*HARRIS v. GARSON.

Ontario Supreme Court, Meredith, C.J.C.P. August 4, 1921.

JUDGMENT ($VIIC—280)—JUDGMENT IN ONTARIO—ACTION DEFENDED, BUT NO DEFENCE AT TRIAL—SUIT IN NEW BRUNSWICK—DISMISSAL—MOTION UNDER RULE 523.

A judgment in a case defended, though not at trial, when the judgment is given, will not be set aside under Rule 523, merely because proceedings in another Province to realize on the judgment have been unsuccessful.

MOTION by the defendants, under Rule 523, to set aside a judgment entered after a trial by a Judge without a jury, at which the defendants did not attend and were not represented. The judgment was in favour of the plaintiffs for the recovery of a money demand.

Rule 523 reads as follows:—

'A party entitled to maintain an action for the reversal or variation of a judgment or order, upon the ground of matter arising subsequent to the making thereof, or subsequently discovered, or to impeach a judgment or order on the ground of fraud, or to suspend the operation of a judgment or order, or to carry a judgment or order into operation, or to any further or other relief than that originally awarded may move in the action for the relief claimed."

*Affirmed by the Appellate Division of the Supreme Court of Ontario; decision to be published in 67 D.L.R.

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W. A. Skeans, for the defendants.

W. R. Meredith, for the plaintiffs.

MEREDITH, C.J.C.P.:—This case is a striking instance of one of the few inconsistencies, if I may not say eccentricities, of the law, or of its administration.

The defendants, apparently a co-partnership firm, were sued as such, in this Court, in May, 1918. The business of the firm in respect of the matters in question in the action, were carried on at Montreal. The proceedings in the action seem to have been quite regular in all respects. The defendants were served with the writ at Montreal: and in due course entered an appearance to the writ by their solicitors: the plaintiffs' statement of claim was delivered, as was the defendants' statement of defence; and a joinder of issue was added and notice of trial given—admission of service of it by the defendants' solicitors in writing being endorsed upon it.

The action then came regularly on for trial, but the defendants did not attend, and the trial took place in the usual and regular way before a capable and careful Judge, who, upon the evidence adduced before him, directed that judgment be entered for the plaintiffs and $2,275, and interest at 5 per cent. from the 14th day of May, 1918, damages, with costs of action: and soon afterwards judgment was duly entered accordingly.

It was said, during the argument of this motion, than an application for a new trial was made by the defendants, and that, as I understood the statement, a new trial was granted on terms which the defendants would not comply with, and so the judgment stood and still stands in full force and virtue. Evidence of these things was requested, but has not been furnished: the industry of the solicitors may perhaps have been affected by the inclemency of the weather. It would have been better to have had that evidence, and a good deal more, as to other circumstances, that has not been furnished; but it is not essential; and, the parties having had ample time to furnish it, the motion shall not be longer delayed on that account.

The plaintiffs being unable to realise upon the judgment, because the defendants apparently had no exigible property in this Province, steps were taken with a view to enforcing it in the Province of New Brunswick, where, it is said, the defendants have such property.

An action, upon the Ontario judgment, was brought in the Supreme Court of New Brunswick, apparently several years after the judgment in Ontario was obtained, but none of the papers before me shew directly or inferentially when: the only information supplied, as to the proceedings in New Brunswick,

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is that which the reasons for judgment in the Court of Appeal of that Province, in the action upon the judgment, afford.

The case there is said to have been tried, with a jury, in March, 1920; and it is said that upon that trial the jury found that the market price of the goods sold to the defendants by the plaintiff was, at the time when the defendants should have taken delivery of them, the same as the price at which they had agreed to buy. That seems to have been the only question of fact which was tried: and upon that finding the trial Judge seems to have considered that the plaintiffs could not recover upon the contract, but he gave judgment for them in the amount of the costs awarded to them in the Ontario judgment.

Why the plaintiffs could recover nothing, for the defendants apparently admitted breach of contract, does not appear. There must have been nominal damages; and there must have been actual damages by reason of the delay and of the plaintiffs being obliged to go into the market again and sell and again make preparations for delivery.

The plaintiffs do not appear to have appealed or cross-appealed against the judgment upon this trial; but the defendants appealed against that part of it which awarded to the plaintiffs the costs of the Ontario action.

The defendants succeeded upon that appeal.

The learned Chief Justice of the King's Bench, a member of the New Brunswick Court of Appeal, in stating the reasons for the judgment of that Court, went at length into many circumstances more or less bearing upon the question that Court had to consider; and I am much more indebted to him, than to the solicitors in this application, for such information as I have material upon this motion.

From those reasons I gather that, although the writ of summons in the Ontario action was served upon the defendants at that firm's place of business in Montreal; and although it at once came to the hands of Harry I. Garson, who seems to be the firm or the major part of it, as he is described by the Chief Justice as the appellant in the appeal in the New Brunswick Court; and although he retained Ontario solicitors to defend the Ontario action; and although they duly entered an appearance in that action for the defendants; and although they were parties to bringing the action duly down to trial; the Ontario judgment was not binding in New Brunswick because the defendants—a co-partnership firm—had not been "personally served" with the writ.

Although that learned Judge fell into the error of saying that the Ontario action "came to trial as an undefended action;"

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when in truth it was brought on for trial, and was tried, as a defended action; due notice of trial having been given and accepted: and although that mistake is accentuated by a subsequent statement of the Chief Justice that this case and a case in England of *Gavin Gibson & Co. Limited* v. *Gibson*, [1913] 3 K.B. 379, were in all material particulars identical, though in that case there was no acknowledgment of jurisdiction and there was a complete ignoring of the Victoria Court's process and proceedings, whilst there was in this case the fullest acknowledgment of jurisdiction and compliance with and taking part in the process and proceedings of the Ontario Court, so that if there had been no jurisdiction originally there was complete attornment to the jurisdiction: it must be taken as the law of New Brunswick that no such judgment as that of this Court has any weight or recognition in that Province: and that being so it cannot be out of place to suggest to those who make the laws of New Brunswick that its law in this respect may need reconsideration.

For look at that which it may lead to: a defendant personally served—whatever may be meant by that, and I may add that it does seem to me that where the writ comes to the hands of the defendant and he reads and understands and retains a solicitor to defend the action of which it is the commencement, a pretty effectual personal service has been effected—is bound though he ignore the proceedings altogether; but is not bound, if not "personally served," though he defend the action and even carry it to the Supreme Court of Canada and have it there decided against him: and may, when sued in New Brunswick, defend upon the merits and not only win there but win in the Supreme Court of Canada if the case be carried there by his opponent or by him; and so have that Court stultify itself.

That which I am asked to do on this motion is: set aside the judgment in the Ontario action and dismiss that action, because, and solely because, a jury in a New Brunswick case reached a conclusion different from that reached by a Supreme Court Judge of this Province on probably different evidence: because, and solely because, a New Brunswick jury found that the market price of the goods sold was the same at the time of the breach as the price agreed to be paid, and a single Judge at *nisi prius* in New Brunswick considered that that finding precluded a recovery of damages for the breach of the contract.

It may be that, even sitting here, I have power to make the order asked for—reverse the judgment in question and dismiss the action upon grounds arising subsequent to it: see Rule 523: but I can perceive no good ground upon which that can be done.

Giving the fullest weight to the proceedings in the New Brunswick Courts, why should the conclusion reached there be preferred to that reached here? The trial there was long after the breach of the contract: the trial here was soon after: the evidence adduced at the trial here may have been, and probably was, very different, in the plaintiff's behalf, from that adduced at the trial there years after the making and breach of the contract; and hundreds of miles away from the place where the plaintiffs reside and from the place where the contract was made.

The defendants' absence from the trial here after taking a defendant's full part in bringing the case down to trial here, was his own doing, and ought not now to be treated as something worthy of a reward—a dismissal of the action and a nullification of the judgment of this Court which stands, and has so long stood, against him.

The motion is dismissed: under ordinary circumstances it should be dismissed with costs: but, as it has been presented, on both sides, in such a naked manner as ought to meet with some disapproval, notwithstanding the heat of the weather, it will be dismissed with costs fixed at $20.

CANADIAN BANK OF COMMERCE v. PATRICIA SYNDICATE.

Ontario Supreme Court, Rose, J. August 9, 1921.

PARTNERSHIP (§I—3)—MINING CLAIMS—SYNDICATE—ADVANCE OF MONEYS BY BANK—PARTNERS—NOTES—LIABILITY OF MEMBER THEREON TO BANK.

Where there is sufficient evidence in the dealings of a "Syndicate" to shew partnership assets and partnership liabilities the members are liable for notes made by the syndicate on account of syndicate business.

[*Pooley* v. *Driver* (1876), 5 Ch. D. 458; *Ex parte Tennant* (1877), 6 Ch. D. 303, referred to.]

ACTION against the Patricia Syndicate and Sir Charles Ross, Bart., upon certain promissory notes, judgment having been entered by the plaintiffs against the Patricia Syndicate upon default of appearance.

Glyn Osler and *T. M. Mulligan*, for the plaintiffs.

I. F. Hellmuth, K.C., and *A. G. Hill*, for the defendant Ross.

ROSE, J.:—The question for determination in this case is whether Sir Charles Ross, Bart., is liable to the plaintiff bank upon certain promissory notes signed "C. A. O'Connell, trustee Patricia Syndicate," and discounted by the bank. The contention of the bank is, that "Patricia Syndicate" was the name of a partnership, of which the partners were Sir Charles Ross and Mr. O'Connell. Judgment has gone against the "Syn-

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dicate" by default: Mr. O'Connell died before the action was commenced.

By an agreement, dated the 20th July, 1917(and made between the owners of certain mining claims and Mr. O'Connell), the owners granted to Mr. O'Connell the option of acquiring the claims upon the terms set forth in the agreement, which were, shortly, that O'Connell should pay, for an undivided five-sixths interest in the claims, the sum of $125,000, of which $2,000 was to be paid forthwith and the remainder in instalments, the last instalment being payable on or before the 20th August, 1919; that he should, not later than the 15th August, 1917, commence mining operations upon the claims, and should in those operations spend not less that $1,500 a month during the currency of the option; that, if he acquired the five-sixths interest, he should incorporate a company having an authorised capital stock of $2,000,000, and should turn over the properties to the company for $1,250,000 in shares at par (leaving in the treasury of the company shares of the par value of $750,000), and should out of the $1,250,000 in shares, transfer to the owners of the claims, for the remaining one-sixth interest, shares of the par value of $208,333; that he should have the right to immediate possession of the claims and to ship and sell ore, but the proceeds of the sales of ore, after deducting the costs of freight, treatment and smelting, were to be paid from time to time to the owners of the claims on account of the purchase-price of the five-sixths interest; that time should be the essence of the agreement; that the making of any one payment or the commencing of operations should not obligate O'Connell to make further payments; that failure to pay any instalment or to spend the stipulated amounts in development work should put an end to the option; and that upon the termination of the option all moneys theretofore paid to the owners should belong to them as the consideration for the giving of the option.

Mr. O'Connell was on very friendly terms with Sir Charles Ross, and telegraphed to the latter, telling him that he had a mining proposition that looked very attractive, and asking whether he would put up $2,000 to "tie things up." Sir Charles Ross telegraphed that he would do so; and he did give O'Connell the $2,000. Then the two met, and O'Connell shewed the option to Sir Charles, and asked him whether he would join him in the venture, and take a certain interest in the property, informing him that possibly there would be needed for development work and for payment of the instalments, before money was available from the proceeds of the ore shipped, about $100,000. Sir

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Charles Ross said that he would put up $100,000 (which was to include the $2,000 already paid).

This interview apparently took place about the 14th August, 1917, and on that day Mr. O'Connell gave a receipt for $27,000 "on account of Boston Hollinger mining claims operation," saying that this sum was made up of $2,000 paid on the 20th July, and $25,000 paid on the 14th August. (Boston Hollinger was the name by which the mining claims were known).

It was understood that a document should be prepared setting forth the agreement between Sir Charles Ross and Mr. O'Connell, but the document was not prepared for some time thereafter, the delay, apparently, having been on the part rather of Sir Charles Ross's solicitor in Quebec than on the part of either of the parties to the agreement. When the document was finally prepared by an attorney in New York, it did not seem to Sir Charles Ross to set forth the agreement correctly. It was, however, executed; but a short time afterwards, and after the attorney had seen the papers and correspondence, a new agreement was drawn and executed. These two agreements will be referred to more particularly later on.

I think that, in general outline, Sir Charles Ross's plan was to venture such moneys as might be needed up to $100,000 for the purposes mentioned, and, if the venture proved a success, to take the major part of the shares that would remain out of the shares of the par value of $1,230,000 to be issued by the proposed company as the consideration for the transfer to it of the property, after deducting the $208,333 in shares which were to go to the owners of the property. If the venture did not turn out successfully and if the company was not formed, or if the company was formed and the shares proved worthless, the $100,000 would be lost, but if things turned out as it was hoped they would Sir Charles Ross would have his shares and would make whatever he could make by holding or selling them. I do not think that it occurred to him that the relationship between himself and Mr. O'Connell could be the relationship of partnership or such a relationship as would make him responsible for obligations which might be incurred by Mr. O'Connell in the mining operations; but, after a lengthy consideration of the documents the correspondence, and the evidence of Sir Charles Ross, I have come to the conclusion that for such acts of Mr. O'Connell as are in question in this action Sir Charles is responsible.

Immediately after he had received the $25,000 which has been mentioned, Mr. O'Connell proceeded to commence operations. On the 24th August, 1917, he wrote to Sir Charles Ross that upon his arrival at Cobalt he had opened an account with the Canadian

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Bank of Commerce in the name of Patricia Syndicate, C. A. O'Connell manager, and had told the local manager of the bank that advances might be wanted on ore shipped to smelters.

From that time on, Mr. O'Connell continued to report regularly to Sir Charles Ross as to the progress that he was making and as to the prospects of success. Once or twice he asked whether the agreement had been got ready for signature. When he needed money he asked Sir Charles Ross for it, and it was supplied, and—notably on the 30th November, 1917—he informed Sir Charles Ross that a cheque received from him had been deposited in the Canadian Bank of Commerce to the credit of the Patricia Syndicate. On the 8th January, 1918, he wrote referring to an interview that he and Sir Charles Ross had had with the President of the Bank of Commerce at Toronto, but there is no evidence as to what had gone on at that interview.

On the 18th January, 1918, Sir Charles Ross wrote one of the few letters written by him which are in evidence. In it he said: "The only policy to pursue is to get our ore above ground. Under existing conditions this appears to be the only wise and sound policy." I may pause here to remark that upon the argument a great deal of stress was laid upon expressions in letters—for instance, the expression "our ore," in the letter last referred to, and expressions in Mr. O'Connell's letters, such as that he had said to the banker. "*We* may want advances"—as indicating that the operations were the operations of himself and Sir Charles Ross, rather than his own individual operations, but that I do not attach much importance to these expressions, whether they are used by Mr. O'Connell or by Sir Charles Ross himself. I think that for the reasons stated by Lord Justice Cotton in *Badeley* v. *Consolidated Bank* (1888), 38 Ch. D. 238, at pp. 252-3, it would be unsafe to deduce from these expressions, standing alone, anything as to the real relationship of the parties. In this connection, reference may be made to a letter of the 13th June, 1918, in which there is a statement that the security to the bank for certain advances was to be "our" note, but in which there is also the statement. "*We* started the mill yesterday." It appears to me that this is one of several instances in which Mr. O'Connell used expressions indicative of joint action which were really meant to be statements of his individual action; and I think that there is not very much to be deduced from the fact that Sir Charles Ross did not, in any letter produced, complain of Mr. O'Connell's manner of expressing himself.

On the 18th January, 1918, Mr. O'Connell wrote: "I told him (the bank manager) that we intended stoping our ore and

putting it in a stock pile on the surface and that we might make an application to the bank for a loan on this lot of ore before it was milled. . . . He is very keen to hold our business and I am sure that we can get what accommodation we will require." To digress again, I may observe that both Sir Charles Ross and Mr. O'Connell and the gentleman who drew the agreement between them seem to have somewhat lost sight of the fact that the ownership of the mining properties had not passed to O'Connell and that, while under the agreement with the owners he was at liberty to get out ore and sell it, the proceeds of sales, less the costs of freight, treatment and smelting,, were to go to the owners on account of the payments under the option, and that it was at least doubtful whether O'Connell could give title to the bank to any ore which he purported to pledge as security for advances.

The last mentioned letter was answered by Sir Charles Ross on the 21st January, 1918, he saying, "The big idea is to get the ore above ground and know what its worth is and how much we can cash in on it;" and on the 29th January, 1918, when he was sending another cheque for $25,000, he said: "Try and let me have some figures . . . which will give me a good working basis of the value of the ore developed and the probable extent of it. . . . . What I want to get and keep up to date is how we are coming out financially on uncovering values which can be converted into cash."

On the 4th February, 1918, Mr. O'Connell wrote that he had had a talk with the President of the Bank of Commerce which had been very satisfactory, and he said, "I feel that we will be well treated by the bank . . . if we will need any assistance from them to carry out our plans."

In March he sent what was called a trial balance as at the 1st March, 1918. In this he shewed as a debit "Syndicate $75,000," which amount was apparently the amount that Sir Charles Ross had furnished up to that time.

The formal agreement first drawn bears date the 9th April, 1918, and was apparently executed at Ottawa on or about the day of its date. It recites that Mr. O'Connell is the recorded owner of an option upon certain mining properties "being operated in the name of Patricia Syndicate;" that he has been engaged in the development of the properties "with moneys advanced by the said Sir Charles Ross;" that the development and advancement of moneys has been under a verbal agreement and understanding as to the present and future proportionate ownership of the said properties; that it was understood and agreed under the said verbal agreement that a corporation should be formed for the development and operation of the properties

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(which agreement may be impossible of performance because of certain restrictions which have been placed upon the flotation of companies during the war); and it goes on to witness: (1) that Sir Charles Ross, having already advanced $75,000, will advance a further sum of $25,000 as and when requested by O'Connell; (2) that O'Connell will and does hereby assign, set over, and transfer to the said Sir Charles Ross, 50 per cent. of all the interest which O'Connell has or may have in and to the said option and in and to all rights he has or may have in the business to conducted in the name of the Patricia Syndicate; (3) that, should Sir Charles Ross advance moneys in excess of the $100,000, the advance shall be "in the form of a loan to the business known as the Patricia Syndicate, and shall be repaid or secured before either of the parties draws from the said business any other sums as profits, or by way of purchase of said treasury stock, as is hereinafter provided for;" and (4) that in case a corporation shall be formed for the carying on of the said business both of the parties shall assign "their total interests in the said Patricia Syndicate, the option, or the mining properties to the said corporation;" that the shares to be issued by the proposed company shall be held in certain proportions (the gentleman who drew the agreement seems to have lost sight of the provision in the contract between the owners of the property and Mr. O'Connell by which $750,000 of shares were to be left in the treasury of the company). The last clause of the agreement is as follows: "(5) The purpose and intent of this agreement is to make definite the terms and conditions under which the parties hereto have been carrying on the above described business, and to carry into effect the verbal agreement to which reference has been heretofore made."

On the 13th April, 1918, Mr. O'Connell wrote reporting an interview which, upon his return to the mine, he had had with the local manager of the bank, and he said, "I told him that we might want a line of credit of $10,000 to $15,000 for a short time in June or July and we could give him the note of the syndicate." He also said that there were some heavy payments for machinery and supplies to be made, and that he would like the remaining $25,000 which Sir Charles Ross was to put up, and he added, "I trust I will not have to call on you for any further funds."

The new agreement which was to take the place of the one dated the 9th April, 1918, is dated the 2nd May, 1918, but I think there is no evidence as to exactly when it was executed. As regards the matters in question in this action, it does not seem to be very different from the agreement of the 9th April. Its recitals as to the agreement with the owners of the property are

somewhat longer than, but not materially different from the recitals in the first agreement, and it contains a recital that O'Connell has actually commenced operations on the mining claims and "is carrying on the said business under the name of the 'Patricia Syndicate,' and for that purpose has required and will require, amongst other matters and things, tools and appliances, and in order to help him in purchasing same, and in paying off the purchase of the said mining claims has requested the party of the second part (Sir Charles Ross) to make advances to the extent of $100,000;" and that Sir Charles Ross has made the advances, and that O'Connell, "according to the verbal agreement made when said amount was so advanced, desires to provide proper security and give reasonable remuneration to him in consideration of such advances," and it witnesses: (1) that O'Connell "will and does coincident herewith assign, set over, and transfer to the said Sir Charles Ross 50 per cent. of all the interest which the said Charles A. O'Connell has or may have in and to the said option and in and to all rights he has or may have in the business connected with the said option and the mine operated thereupon, and to all of the assets of every kind connected with the said option, the said mine, or the said business;" (2) that, should Sir Charles Ross advance any further moneys, the advance "shall be in the form of a loan to the said business and shall be repaid or secured before either of the parties hereto draw from the said business any other sums as profits, or by way of the purchase of the balance of the treasury stock as is hereinafter provided for" (which is the same thing as the corresponding clause in the former agreement, except that the words "a loan to the said business" are substituted for the words "a loan to the business known as the Patricia Syndicate"); (3) that in case the company is formed, the shares shall be divided in a certain way. (This is a confused clause, and the right of the owners of the properties to have $75,000 in shares kept in the treasury of the company seems to have been again lost sight of). The clause contains these words: "The said Charles A. O'Connell and the said Sir Charles Ross shall both transfer to the said corporation all of their rights, title, and interest in and to the said option or to the mine, machinery, equipment, and assets connected therewith . . . The said Sir Charles Ross shall transfer his said one-half interest in the above described properties, together with the option, to the said corporation . . . for which transfer so made (subject to a certain lien) the said Sir Charles Ross shall receive" certain shares; and there is repeated the statement contained in the agreement of the 9th April, that (4) "the purpose and intent of this agreement is to make definite the terms

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and conditions under which the parties hereto have been carrying on the above described business, and to carry into effect a verbal agreement to which reference has been heretofore made."

On the 18th May, 1918, Mr. O'Connell wrote that he had arranged an extension for a month of a payment under the option, which was to fall due on the 20th May, and that to complete that payment he had arranged with the Bank of Commerce to pay $10,000 to the owners of the property, and he said "The Bank of Commerce will give us any fair amount of credit on my personal guarantee, and your name has not been brought into the transaction." On the 23rd May, he wrote: "The manager of the Bank of Commerce is very friendly, and as he is most anxious to keep our account I am relying on him to give us such accommodation as we will require to carry us 'over the top.' This, I feel sure, he will do, and my friends from whom I am purchasing supplies, etc., have told me that we can have any reasonable time on our supplies as we will require." He also asked Sir Charles to see whether he could do anything with a certain company which had been refusing to give credit on explosives.

On the 10th June, 1918, Mr. O'Connell wrote that he was getting advances from the bank, and might have "to give the note or other security of the syndicate as security." He also said: "As I told you in Ottawa, I have not yet made known that you are the principal shareholder of the syndicate, and, provided the manager wishes to know who my partners are, may I have your permission to reveal your connection? If you consent to this, will you please wire me" (in certain words) "this only if it is asked for by the bank manager. I do this for I know full well your very large interests and their critical stage."

On the 13th June, 1918, Sir Charles Ross telegraphed giving the required authority to reveal his connection, but on the same day Mr. O'Connell telegraphed and wrote, saying that it had not been necessary to disclose Sir Charles Ross's connection. He said: "The arrangement made with the manager of the Canadian Bank of Commerce is that we are to have a line of credit of from $20,000 to $30,000 on a 7 per cent. basis, the security being our note, backed by the bullion, concentrates and ore on the dump. We are to adjust every month . . ." (This is the letter to which I have already referred in which Mr. O'Connell also says, "*We* started the mill.").

The evidence of the manager of the bank does not quite accord with the statements made by Mr. O'Connell in the last mentioned letter, because the manager says that as soon as O'Connell began to borrow he (the manager) asked for information as to who his

associates were, and that thereupon O'Connell lodged with him the agreements of the 9th April and the 2nd May, 1918, from which agreements he inferred that Sir Charles Ross and Mr. O'Connell were partners. I do not know, however, that anything really turns upon this discrepancy. The case made by the bank is not a case of acting upon any holding out by Sir Charles Ross of O'Connell as having any authority other than the authority which he actually had, and it seems to me that it does not make much difference whether the bank knew or did not know what was the real relationship between the two supposed partners. Sir Charles Ross's telegram authorised O'Connell to make known the true relationship, and there would be no more natural way of making that relationship known than by exhibiting the documents; but, whether the documents were or were not exhibited, it is the true relationship which must be ascertained, and which, when ascertained, will govern the case. It was argued that from the request to be allowed to make known the relationship, and from the permission granted to make it known, it must be inferred that the relationship to be made known was a relationship which would involve Sir Charles Ross in liability for the acts of O'Connell; but I do not think that that inference must necessarily be drawn. The bank, having under consideration the making of advances, would, of course, desire to know who were interested with O'Connell in the properties, and knowledge that Sir Charles Ross was interested to the extent of $100,000 which he had put into the venture would be of importance to them, as indicating the probability that, rather than see the undertaking fail, he would, if necessary, put in further money to protect what he had in it already. This fact would be taken into consideration by the bank, and the fact that O'Connell asked permission to make known Sir Charles Ross's relationship to the venture does not seem to me to indicate necessarily that he was asking permission to pledge Sir Charles Ross's credit in any way. See *Dean* v. *Harris* (1875), 33 L.T.R. 639.

On the 13th June, Sir Charles Ross wrote confirming his telegram and saying that he had not been able to come to the mine, and also that he was going away for a holiday and was going to send to Mr. O'Connell a man who had been in his employ and whom O'Connell would find useful at the mine; he said that for various reasons he wanted to keep this man in his employ, and that, without employment at the mine, had not enough for him to do. Mr. O'Connell, in a later letter, expressed his willingness to have the man come. On the argument, stress was laid upon this as being an evidence of Sir Charles Ross having exercised control over the business, but it does not strike me as being very

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important. With the amount of money which he had in the venture, it is quite natural that he should insist upon reports, and that he should tender advice and even give instructions, and that an arrangement such as the one under discussion should be made; and, while all these things are to be taken into consideration, it seems to me that not very much weight is to be given to any one of them.

On the 18th June, 1918, Mr. O'Connell wrote repeating that he had not been asked by the manager of the bank for the names of his partners, and saying, "The accommodation was granted us on the note or notes of the syndicate with ore on the dump and in process in the mill, bullion to be produced, as well as concentrates, as security."

On the 22nd June, he wrote to the bank saying: "For your further information I have to advise you that the majority of the stock of the Patricia Syndicate is owned by Sir Charles Ross, Bart., of Quebec, and as he has had large business dealings with your bank, your head office is no doubt informed as to his financial standing."

On the 8th July, 1918, he wrote to Sir Charles Ross that he was short of funds, but he said: "If needs be we can use some of the funds at credit in the Powell township account until such time as we can get further gold from the mill. I am using every endeavour to restrict the operation so that it will be able to finance our needs and hope to be able to carry out this scheme." (The Powell township account seems to have been an account kept in the bank in connection with some venture which Mr. O'Connell and Sir Charles Ross had in that township).

On the 27th July, 1918, Mr. O'Connell wrote: "We have met the payrolls and pressing bills and to do this we have borrowed $600 from the Powell township account, and I have made a loan of $1,600 to the syndicate. To pay off our obligations to merchants, mill equipment, etc., we will need further funds. If you could make the syndicate a loan of $15,000 to carry us over the crisis we will be able to carry on until such time as we can get on our feet. The Bank of Commerce have advanced us $20,000 in two loans of $15,000 and $5,000, and under agreement with them we must at all times have a credit balance with them." On the 31st July, 1918, Sir Charles Ross, answering this letter, said: "I am afraid your letters do not make it quite clear to me as to just where we stand financially in respect to the returns we are getting from the ore. Will you, therefore, put all your information together and meet me in Montreal on Monday morning?" (Apparently the meeting in Montreal did not take place).

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On the 1st August, 1918, Sir Charles Ross sent the $15,000 asked for; and, treating this as one of the further advances provided for by the agreement of the 2nd May, 1918, he sent with the cheque a form of promissory note which he had prepared and which he said "should be signed by the Patricia Syndicate—by yourself." The note is:—

"On demand after date, the Patricia Syndicate promises to pay Sir Charles Ross, Bart., or order, fifteen thousand ($15,000) dollars with interest at the rate of ....%. Whether or not demand is made, this note shall be paid before any dividends are declared or any moneys paid either to C. A. O'Connell or Sir Charles Ross, Bart., on account of any stock interest they or either of them may have."

The notes upon which the bank sues are seven in number, the first of them being dated the 13th June, 1918, and the last the 20th December, 1918. Before the later advances were made, the bank asked Mr. O'Connell to get some guarantee from Sir Charles Ross, who was then in England, and some cablegrams passed; but on the 18th November, 1918, Sir Charles Ross cabled to O'Connell saying definitely, "I will not increase my investment." After that date there was one advance of $3,000.

In no case which was cited by counsel, and in no reported case that I have been able to find, were the facts very much like the facts which have to be considered here. On the one hand, the cases relied upon by Mr. Hellmuth were, in the main, cases in which the supposed partner was really a lender—he had lent money to the trader which the trader was bound to repay—and if he participated in profits it was as a consideration for having made the loan; and stipulations in the agreement between him and the trader which resembled some of the stipulations frequently found in partnership articles were in reality inserted for the purpose of giving him, as lender, some more ample security for his money. I refer to such cases as *Mollwo March & Co.* v. *Court of Wards* (1872), L.R. 4 C.P. 419; *Dean* v. *Harris*, 33 L.T.R. 639; *Bradley* v. *Consolidated Bank*, 38 Ch. D. 238; *Hollom* v. *Whichelow* (1895), 64 L.J.Q.B. 170; *In re Young* [1896] 2 Q.B. 484; with which may also be considered *Kelly* v. *Scotto* (1880), 42 L.T.R. 827. But the present case is not a case of the same class, for here there was no loan; there was no obligation on the part of O'Connell to repay the $100,000 or any part of it; what Sir Charles Ross got for the $100,000 was one-half of all O'Connell's interest in and to the option and in and to all rights he had or might have in the business connected with the option and the mine operated thereupon, and to all of the assets of every kind connected with the said option, the said mine, or the said

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business, together with a right to very much more than one-half of the shares that were to come to O'Connell from the company if the company was formed and the property was transferred to it.

On the other hand, the cases cited by counsel for the plaintiffs, for instance *Ex p. Delhasse* (1878), 7 Ch. D. 511, are, generally speaking, cases in which stress was laid upon the fact that the person found to be a partner was to participate in the profits of the business carried on by the ostensible trader, and these cases in turn seem to differ from the present case in that in this case Sir Charles Ross was not to participate in profits properly so called, *i.e.*, in the "net" profits: see Lindley on Partnership, 8th ed., pp. 40, 41, and *Mollwo, March & Co.* v. *Court of Wards*, L.R. 4 C.P., at p. 433. What he was to have was a large part of the gross returns, *i.e.*, of the shares to be issued by the proposed company. No matter what might be expended by O'Connell or by the "syndicate" in developing the mine and in acquiring the title, the property was to be turned over to the proposed company for a fixed number of shares, and Sir Charles Ross was to have certain of those shares for his interest in the property turned over, so that there was not to be what is usual in a partnership business, and what was treated as one of the determining factors in most of the cases cited by counsel for the plaintiffs, namely, an ascertainment of the balance of receipts over expenditures and a division of that balance. In the same way there was not to be a sharing of losses. Sir Charles Ross was to put in his $100,000. If the option was exercised, and if the mine was turned over to the proposed company, and if he got his agreed number of shares, well and good; but if the option was not exercised he simply lost his $100,000 and—so far as any express agreement goes—he was not to be bound to pay more.

The case, then, being distinguishable in its facts from the cases relied upon by counsel for the parties respectively, I take it that what has to be done is to ascertain what, upon the formal contracts, the correspondence, and the evidence of the witnesses, was the real relationship between the parties, not taking any one circumstance and saying that it, by itself, raises a presumption for or against a partnership, and then asking whether there is anything to rebut that presumption, but taking everything that is available and ascertaining, if possible, what the true relationship was: see per Lord Justice Bowen in *Badeley* v. *Consolidated Bank*, 38 Ch. D. at p. 262. I shall proceed in the way indicated, and shall state what seems to me to be the result of the inquiry.

I thing that, as it first presented itself to Sir Charles Ross, the scheme, in its general outline, was that he, for his $100,000,

should have a half interest in the rights conferred by the option: that O'Connell should do the requisite work, and, if the mine made good and ore to a sufficient value was obtained, should take up the option and turn the mine over to a company to be formed; and that the two of them should own, in certain proportions, the shares issued by the company as the purchase-price of the mine (less the shares going to the vendors pursuant to the option agreement), Sir Charles Ross's proportion being such as to give him control of the company; and that if, before the mine was turned over to the company, he had to provide any money additional to the $100,000, he should do so by way of loan. I think that the real relationship was from the beginning, or soon became, something different from what he had, somewhat loosely, thought it would be. As soon as he had put up the first instalment of his $100,000—the $27,000 mentioned in the receipt of the 14th August, 1917—he became (as was evidenced, later on, by the formal document) a co-owner with O'Connell in whatever rights O'Connell had under the option agreement. O'Connell then, with his knowledge and sanction, proceeded, in the name of Patricia Syndicate, to develop the property, with a view to getting out ore, from the proceeds of the sale of which the purchase price of the property was to be paid, and, as incidental to the main object, proceeded to open an account with the bank in the same name, to deposit to the credit of that account all moneys furnished by Sir Charles Ross, to borrow money in the name of the syndicate, to pledge, or agree to pledge, as security for that money, ore in which the two were jointly interested, and to acquire goods in the name of the syndicate on credit.

By the agreement of the 2nd May, 1918, Mr. O'Connell, pursuant to the original parol agreement, formally assigned to Sir Charles Ross, not only a half interest in his rights under the option, but also a half interest in all rights which he had or might have "in the business connected with the said option" (which, as interpreted by the recitals, meant "the business carried on under the name of the Patricia Syndicate") and in "all of the assets of every kind connected with . . . the said business." This "business," or the "Patricia Syndicate," was treated, in the formal agreement, as something other than a mere alias for "O'Connell;" it was treated as an entity of some sort to which a loan might be made, and which was to earn profits; and when, on the 1st August, 1918, Sir Charles Ross put up

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$15,000, additional to the $100,000 he acted upon the assumption that there was some entity called Patricia Syndicate which could give him a promissory note—an entity in which he and O'Connell had such interests as would entitle them to divide between them such profits as that entity might make in the operations which it was carrying on. There may have been in Sir Charles Ross's mind, as well as in the mind of the gentlemen who drew the agreement, some confusion as to the precise position of the "syndicate"—it may be that, as Sir Charles Ross and Mr. O'Connell agreed together that each would turn over to the company all his interest in the mine, and that they would divide in certain proportions the shares which the company was to issue in payment, there was no way in which the "syndicate," as such, could ever have any profits for division, unless, perhaps, it could sell such ore as might be on hand after the vendors ("the optionors") had been paid the whole of the cash called for by the option—but, whether or not there was confusion as to the possibility of the "syndicate's" having profits for division, there is, both in the agreement and in Sir Charles Ross's action, a recognition of the "syndicate," that is of the "business" owned by him and Mr. O'Connell, as an entity of some sort. If this "syndicate" was an entity, and not merely another name for O'Connell, then, when O'Connell developed the mine, opened a bank account, borrowed money, gave security, and bought goods, in the name of the syndicate, he did all those things *for* and as agent of the syndicate, and in that sense, as agent for each member of the syndicate; and, if he and Sir Charles Ross were the "syndicate," these acts of his were done on behalf of and bind Sir Charles Ross: see the judgment of Jessel, M.R., in *Pooley* v. *Driver* (1876), 5 Ch. D. 458. At p. 476 the Master of the Rolls says:—

"You cannot grasp the notion of agency properly speaking, unless you grasp the notion of the existence of the firm as a separate entity from the existence of the partners; a notion which was well grasped by the old Roman lawyers, and which was partly understood in the Courts of Equity before it was part of the whole law of the land as it is now. But when you get that idea clearly you will see at once what sort of agency it is. It is the one person acting on behalf of the firm. He does not act as agent, in the ordinary sense of the word, for the others so as to bind the others; he acts on behalf of the firm of which they are members; and as he binds the firm and acts on the part of the firm, he is properly treated as the agent of the firm. If you cannot grasp the notion of a separate entity for the firm, then you are reduced to this, that inasmuch as he acts partly

for himself and partly for the others, to the extent that he acts for the others he must be an agent, and in that way you get him to be an agent for the other partners, but only in that way, because you insist upon ignoring the existence of the firm as a separate entity."

See also the judgment of Lord Justice Cotton in *Ex p. Tennant* (1877), 6 Ch. D. 303, at p. 317, where, speaking of Lord Cranworth's judgment in *Cox* v. *Hickman* (1860), 8 H.L.C. 268, 306, and of the statement that if a business is carried on by one person on behalf of another there is a partnership, he says that Lord Cranworth's language shews that he "meant to speak of the action of one partner for the other when one partner is the agent of the partnership, and the agent, therefore, of his co-partner."

There was no agreement, in so many words, that Sir Charles Ross should be a member of the Patricia Syndicate—if there had been, the case, I think, would have been perfectly plain—but there was the acquisition by him of a half interest in the business known as the syndicate, and there was the recognition of the syndicate as "a separate entity from the existence of the "members of it, whoever they were, and the question, as it appears to me, is whether there existed, in fact, that separate entity—be it called "firm" or "syndicate" or "business"—and, if so, whether the two, Sir Charles Ross and Mr. O'Connell, were the members of it. The answer to that question of fact is to be found, as I have said, in the evidence, taken as a whole, and not in some expression, perhaps carelessly used, in a document or letter—for instance, the statement in the agreement of the 2nd April, 1918, that the purpose of the agreement is to make definite the terms and conditions under which the parties thereto have been carrying on the business—or in some single act, such as Sir Charles Ross's act in stipulating, when he put up his last $15,000, that he should be repaid before any division was made of profits earned by the syndicate: any given expression may have been inaccurate: any given act may have been done under a misapprehension of the facts. I do not mean that no attention is to be paid to expressions in the letters or documents, or to any particulat act; what I am endeavouring to do is to treat the evidence as to the language used, and as to the acts done, as what it really is, viz., as part of the whole body of evidence upon which the finding is to be based. Again, the fact that, as between Sir Charles Ross and Mr. O'Connell, there was co-ownership of all such rights as were conferred upon the latter by the option agreement, is not, in itself, decisive: co-ownership may be consistent with the non-existence of any partnership:

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French v. *Styring* (1875), 2 C.B.N.S. 357; *Jones* v. *Gould* (1913), 209 N.Y. 419; but it is a fact which has to be considered with the others.

Taking the evidence as a whole, I think that it does shew that there was the entity of which Jessel, M.R., spoke—the firm. To state the matter shortly, without again going over the evidence which has been reviewed at, perhaps, unnecessary length, it may be said that, in exercising the rights conferred by the option agreement, Mr. O'Connell was exercising rights which as between him and Sir Charles Ross, were the rights of both, and was exercising them for the benefit of both, and not merely for the purpose of rendering his own concession valuable, and incidentally benefitting the man who had put money into the venture; that in the course of his operations he was borrowing money and buying goods, not, at least nominally, on his own credit, but on the credit of Patricia Syndicate, and was pledging, or agreeing to pledge, ore which was no more his than Sir Charles Ross's; that all this he was doing with the knowledge and consent of Sir Charles Ross, so that what he was doing he was doing *for* the two; in other words, that there was "a joint business carried on on behalf of the two," which is a partnership: *Badeley* v. *Consolidated Bank*, 38 Ch. D. 238 *per* Lord Lord Justice Cotton, at p. 250. "No one has ever doubted that if the adventure is carried on for a person so that it is his business, then he is a partner:" *Adam* v. *Newbigging* (1888), 13 App. Cas. 308, 316; and I cannot draw from the whole of the evidence any conclusion other than the conclusion that the business known as the Patricia Syndicate was carried on for Sir Charles Ross and Mr. O'Connell so that it was their business. If I am right in drawing this conclusion—which, it may be observed, is consistent with, even if it is not a necessary result of, the letters, the action of Sir Charles Ross as regards the promissory note, and the declaration in the fourth clause of the agreement that the parties to the agreement had been carrying on the business known as the Patricia Syndicate—I do not know how to describe the relationship between the two otherwise than the relationship of partnership. See also *Wheatcroft* v. *Hickman* (1860), 9 C.B.N.S. 47, and contrast with it *McKim* v. *Bixel* (1909), 19 O.L.R. 81, a case in which the persons whom it was sought to make liable had no control of any kind over the business, but had merely a right to share in the net profits, which did not constitute them partners.

I am not forgetting that, if the option was exercised and the land became the property of Sir Charles Ross and Mr. O'Connell, the mine was to be turned over to the company, and that

the shares of stock issued in payment for it were to be divided in certain fixed proportions, and that, except in the assumption, made by the draughtsman of the agreement and by Sir Charles Ross, that the "syndicate" would, in some event, have profits for division, there is no evidence anywhere that, under any circumstances, Sir Charles Ross and Mr. O'Connell were to take an account of the expenses of the operations carried on and divide between them the sum by which the amount taken in exceeded those expenses. Nor am I overlooking the statement made by Sir Montague Smith, in delivering the judgment of the Judicial Committee of the Privy Council in *Mollwo March & Co.* v. *Court of Wards*, L.R. 4 P.C. at p. 436, that "to constitute a partnership the parties must have agreed to carry on business and to share profits in some way in common;" but I do not think that that statement necessarily means that there can be no partnership unless there is an agreement to share "net" profits; that it does not necessarily bear that meaning is evidenced by the fact that where, on p. 433, His Lordship refers to the rule which, before the decision in *Cox* v. *Hickman*, was said to be established as a rule of law, viz., that participation in the profits of a business made the participant liable as a partner, he uses the expression "net profits," which he does not use in the statement to which I have referred. It is to be noted that, in most of the cases in which the subject has been discussed, the matter to be considered has been, not the possibility of a partnership without participation in net profits, but the effect, as evidence of a partnership, of a finding that there was participation in net profits. See on this point in the judgment of Blackburn, J., in *Bullen* v. *Sharp* (1865), L.R. 1 C.P. 86, at p. 110, a quotation from Lord Cranworth's judgment in *Cox* v. *Hickman;* "It is often said that the test, or one of the tests, whether a person not ostensibly a partner is nevertheless in contemplation of law a partner, is, whether he is entitled to participate in the profits. This, no doubt, is in general a sufficiently accurate test; for a right to participate in profits affords cogent, often conclusive, evidence that the trade in which the profits have been made was carried on in part for and on behalf of the person setting up such a claim. But the real ground of the liability is, that the trade has been carried on by persons acting on his behalf. When that is the case, he is liable to the trade obligations, and entitled to its profits, or to a share of them. It is not strictly correct to say that his right to share in the profits makes him liable to the debts of the trade. The correct mode of stating the proposition is to say that the same thing which entitles him to the one makes him liable to the other, viz., the fact that the trade has been

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carried "on on his behalf, *i.e.* that he stood in the relation of principal towards the persons acting ostensibly as the traders by whom the liabilities have been incurred, and under whose management the profits have been made."

It seems to me that in the agreement that the mine, if acquired, was to be turned over to the company for shares which were to be divided between Sir Charles Ross and Mr. O'Connell, there was a provision for the division of what was to be acquired as a result of the operations which were to be carried on, and that, while those shares would not have been "net profits," they might fairly accurately have been called "profits," in the sense in which the expression was used by Sir Montague Smith in the passage quoted, and, therefore, that there is nothing in his judgment which tells against the conclusion to which I am led by the evidence in this case, and by the other authorities to which reference has been made.

I have mentioned that one or two of the advances by the bank were made after the time when it became apparent that Sir Charles Ross was not going to give his personal guarantee to the bank, and that at least one was made after he had expressly declared that he would not 'increase his investment;" but I do not think that this fact lessens his liability even in respect of those last notes; for, if he was a partner, as I think he was, the notice that he would not be bound by his co-partner's acts must be ineffective: see Lindley on Partnership, 8th ed., p. 255.

There will be judgment for the plaintiffs for the amount claimed, with costs.

Re MAGUIRE.

Ontario Supreme Court in Bankruptcy, Orde, J. September 16, 1921.

BANKRUPTCY (§I—3) — PETITION FOR RECEIVING ORDER — JUDGMENT —EXECUTION—NULLA BONA—CAUSE OF ACTION—TIME—SCOPE OF THE ACT—SEC. 8, SUB-SEC. 2.

In order to exclude a matter from the operation of the Bankruptcy Act, the whole subject matter of the action must have arisen before July 1st, 1920, and so come within sec. 8, sub-sec. 2 of the Act.

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

APPLICATION by Francis R. Maguire upon petition under the Bankruptcy Act, for a receiving order against James E. Maguire.

A. B. Cunningham, K.C. for the petitioning creditor.

H. S. White, K.C., for the debtor.

ORDE, J.:—This application for a receiving order presents some unusual features. The petitioning creditor, Francis R. Maguire, recovered judgment in the Supreme Court

of Ontario, on the 18th February, 1921, against his brother James D. Maguire for $15,000 and costs, the causes of action being criminal conversation and the alienation of the petitioning creditor's wife's affections by the defendant. An appeal from this judgment in the Appellate Division was dismissed (see p. 564 *ante*), and from that judgment the defendant has appealed to the Supreme Court of Canada and has given the required security for costs. In order to obtain a stay of execution the defendant also obtained an order allowing him to give security for the judgment debt and costs, but he failed to furnish the requisite security. The judgment creditor thereupon issued a writ of execution to the Sheriff of the County of Frontenac, and the sheriff has returned the writ *nulla bona*.

There are certain securities held for the debtor in trust under the terms of the will of an aunt, and on the 27th June last the debtor purported to assign these securities to one Arthur Smith.

The petition for the receiving order is based upon the judgment debt owing by the debtor to the petitioning creditor and the alleged available act of bankruptcy consists of the return of the writ *nulla bona*, under sec. 3 (*e*) of the Bankruptcy Act. The petitioning creditor, upon notice, asks that the petition be amended by adding, as an additional available act of bankruptcy, the assignment of the securities to Arthur Smith made by the debtor on the 27th June last, as being made with intent to defraud, defeat, and delay the creditors under sec. 3 (*b*), and I have granted leave to amend accordingly.

The petitioning creditor has endeavoured, by means of an attaching order and a motion for the appointment of a receiver, to realise by way of equitable execution upon the securities in question, but the attachment and receivership proceedings, owing to the opposition of the debtor, have not yet been finally disposed of.

Within the past few days, namely, on the 10th September, 1921, Arthur Smith, re-assigned his interest in the securities in question to the debtor. No evidence has been adduced as to the object of the assignment of the 27th June last to Smith, or why the securities have been re-assigned to the debtor. The fact that the assignment took place within a few days after the delivery of the judgment of the Appellate Division, and that the re-assignment has taken place within a few days before the presentation of the bankruptcy petition, gives rise to the suspicion that the assignment was in fact made for the purpose of defeating and delaying the petitioning creditor in the recovery of his judgment debt.

The debtor opposes this application upon several grounds.

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Orde, J.

Most of these are of a technical nature, and were disposed of by me upon the hearing. The substantial ground upon which the petition is opposed is that the judgment which the petitioning creditor holds against the debtor does not, under the circumstances under which it was obtained, constitute a debt upon which the petitioner can obtain a receiving order. It is admitted by counsel for both parties that the alleged alienation of the wife's affections, which formed one of the causes of action upon which the judgment was based, began before the 1st July, 1920, on which date the Bankruptcy Act came into force, and that it continued until some period after the 1st July, 1920, and in fact up till the date of the trial of the action, and it is also admitted that some of the acts of adultery upon which the cause of action for criminal conversation was based took place after the 1st July, 1920. By its verdict the jury distributed the damages, one portion being given for the criminal conversation, and the other for the alienation of the wife's affections; but the judgment, as entered, is, I understand, for the sum of $15,000, without any distinction as to the two causes of action. Sub-sec. 2 of sec. 8 of the Bankruptcy Act provides that:—

> No act or omission by a debtor in respect of any debt which . . . . (*b*) is as is evidenced by any judgment or negotiable or renewable instrument the cause or consideration whereof . . . existed before the coming into operation of this Act, shall be deemed an available act of bankruptcy, nor shall any such debt be deemed sufficient to found the presentation of a bankruptcy petition."

Mr. White contends that as a part of the cause of action upon which the judgment was based arose before the 1st July, 1920, the judgment debt cannot be treated as an available act of bankruptcy or as a debt upon which to found the petition. In the first place, it seems to be reasonably clear that this section applies to a judgment where the cause of action is a tort, and would undoubtedly apply in any case where the whole cause of action arose before the 1st July, 1920, although the judgment itself may not have been recovered until after that date. It is contended, however, on behalf of the petitioning creditor that where there is a continuing cause of action up to the date of the trial, as there was here so far as the alienation of the wife's affections is concerned, or where any part of the cause of action was an act which happened after the 1st July, 1920, as was the fact with regard to the charges of adultery, the cause of action upon which the judgment is based ought to be deemed to have existed after that date. Mr. White's contention went this length, that, if any part, no matter how small or immaterial it might

be of the cause of action arose prior to the 1st July, 1920, that was sufficient to exclude the jurisdiction of the Court to make a bankruptcy order. The section in question does not follow any previous bankruptcy legislation, so far as I am aware, and the point is one of first impression. Mr. White contended that there was an analogy between the position here and that under the Division Courts Act where in order to give territorial jurisdiction the whole cause of action must have arisen within the jurisdiction. The analogy is rather strained; but, if there is any, then it rather tends against Mr. White's contention than in its favour. In the absence of any such provision as that contained in sub-sec. 2 of sec. 8, the question as to the date when the indebtedness first arose would not arise. The sub-section does not define what debts come within the Act but declares what debts are to be excluded from those which are to be deemed available acts of bankruptcy, or as sufficient to found the presentation of a bankruptcy petition. And so to come within the scope of the sub-section the whole cause of action must have arisen before the 1st July, 1920, and if any part of the cause of action can be shewn to have arisen after that date then there is no room for the operation of the sub-section. This is the view which I think must prevail. Where as here it is shewn that the judgment is based upon a continuing cause of action any part of which has arisen since the coming into operation of the Act, that is, subsequent to the 30th June, 1920, I do not think the Court ought to inquire for the purpose of determining to what extent, if any some part of the cause of action arose prior to that date. Some part of the cause of action having come into existence after the Bankruptcy Act came into force, then it is of no consequence that some other part of the cause of action may have existed prior to that date, and a judgment founded upon such cause of action is, in my opinion, sufficient either as an available act of bankruptcy or as constituting a debt upon which to found the presentation of a bankruptcy petition.

For these reasons, I think the petitioning creditor is entitled to a receiving order.

So far as the other ground is concerned ,it was contended by Mr. Cunningham that the debtor, having once made a fraudulent assignment which constituted an act of bankruptcy, could not escape its consequences by obtaining a re-assignment to himself, because he might repeat the assignment the moment the bankruptcy petition was dismissed. In view of my judgment upon the other point, it seems hardly necessary to deal with the question whether or not the assignment of the securities by the debtor was, in fact, a fraudulent conveyance.

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The present case presents this additional unusual feature. It is said that the debtor has ample means with which to pay the petitioning creditor's judgment debt, and there is no evidence that there are any other creditors. The petitioning creditor stated that upon payment he would have no further reason for proceeding with the petition. The Canadian Bankruptcy Act contains no provision corresponding to that in the English Act enabling the judgment creditor who desires to obtain payment of his own debt to give what is called a "bankruptcy notice," failure to comply with which, within the time fixed by the Act, entitles the Court to make a receiving order. The present situation corresponds to that which in England would be dealt with by a bankruptcy notice. If the debtor is in a position to pay the petitioning creditor, it seems to me that no receiving order ought to be made against him without giving some opportunity of paying or securing the debt. For that reason the receiving order will not issue or become effective until seven days after the delivery of this judgment, and not then if, in the meantime, the petitioning creditor's claim, including the costs of this petition, be satisfied.

McLEOD v. CURRY.

Ontario Supreme Court, Mulock, C.J. Ex. September 16, 1921.

TRUSTS (§IB—5)—DEEDS TO LAND—VESTED IN WIFE OF OWNER—DEATH OF OWNER—AFFIDAVIT OF WIFE AS EXECUTRIX—DEATH OF WIFE—OWNERSHIP OF PROPERTY—TRUST RESULTING.

The affidavit of a wife as executrix of her husband's estate with reference to lands composing the same, but standing in her name, is declaratory of a trust on her part in favour of the estate of her husband.

IN this action the plaintiff, as the surviving executor and trustee under the will of John Curry, deceased, sought a declaration that Frances Arabella Curry, deceased, held certain lands in trust for the said John Curry.

J. H. Rodd, K.C., and *A. C. Bell*, for the plaintiff.

A. B. Drake, for the defendant Mary Genevieve Curry.

E. C. Kenning, for the defendants W. G. Curry and Verene May McLeod.

MULOCK, C.J. Ex.:—The facts are as follows:—John Curry died on the 11th May, 1912, having by his will appointed his wife, the said Frances Arabella Curry, his son Charles Francis Curry, and the plaintiff his executors and trustees, and probate issued to them on the 18th July, 1912.

His widow dies on the 30th October, 1912, intestate, and her son, the said Charles Francis Curry, was appointed administra-

tor of her estate. He died, intestate, on the 24th March, 1920, leaving his widow, the defendant Mary Genevieve Curry, him surviving, and the defendant W. G. Curry was appointed administrator of his estate, and the defendant Verene May McLeod was appointed administratrix *de bonis non* of the estate of the said Frances Arabella Curry. By agreement dated the 13th April 1895, Hiram Walker, for valuable consideration, agreed to sell to William McGregor and the said testator, John Curry, the lands mentioned in the agreement. By indenture of mortgage, bearing date the 6th May, 1895, the said William McGregor granted the lands mentioned in the said agreement to T. W. McKee to secure payment of $15,000. By deed bearing date the 8th June, 1897, the said William McGregor, in consideration of one dollar and other valuable consideration, granted to the said Frances Arabella Curry a portion of the lands purchased as aforesaid by the said McGregor and John Curry from Hiram Walker, subject to the payment by her of one-half of the said mortgage debt of $15,000. By agreement dated the 15th August, 1897, between Thomas W. McKee and John Curry and William McGregor, after reciting that William McGregor had sold and conveyed to John Curry certain lots described in the said mortgage, subject to the payment to the said McKee and John Curry of $7,500, being one-half of the said $15,000, the said John Curry covenanted with the said McKee to pay to him the said $7,500 and interest. The lands in the agreement of the 17th August, 1897, mentioned as having been sold and conveyed to John Curry, embrace a part of the lands in question in this action, but there is no evidence of their conveyance to John Curry; they had been conveyed to his wife, the said Frances Arabella Curry, by the said McGregor by the said indenture of the 8th June, 1897.

In addition to the lands conveyed by William McGregor to the said Frances Arabella Curry, John Curry caused to be conveyed to her other lands, and up to the time of his death she, at his instance, had executed conveyances to various persons of portions of various lands, and at the trial it was alleged by the plaintiff's counsel that John Curry treated the lands vested in his wife as his own, contracting for sales and receiving purchase-moneys, his wife implementing his contracts by executing necessary conveyances, and that the books of the said John Curry shew that he retained for his own use the purchase-moneys in respect of lands thus sold. The plaintiff swore that on the 13th or 14th May, 1912, being a day or two after John Curry's death, Frances Arabella Curry informed him that she owned only two lots of

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land. On application for probate of John Curry's will, the plaintiff McLeod, the said Charles Francis Curry, and Frances Arabella Curry filed their joint affidavit as to the assets of John Curry's estate, para. 4 of which is as follows:—

"That the value of the personal estate and effects is under $201,700, and of the real estate is under $227,000, and that full particulars and a true appraisement of all the said property are set forth in exhibits A and B hereto, which contain a full and true and correct inventory and valuation of the real and personal estate and effects of the said deceased at the time of his death, as far as we have been able to ascertain the same."

The first part of the exhibit annexed to that affidavit, shewing the realty owned by the deceased John Curry, is entitled "Lands owned by the late John Curry in the Province of Ontario;" then follows the description of a large number of properties. The exhibit then proceeds, "Ontario lands owned by the late A. Cameron and deceased in which each had an undivided one-half interest," and the description of about 250 parcels follow. In para. 10 of the statement of claim the plaintiff enumerates, or describes, the lands which he alleges John Curry caused to be vested in Frances Arabella Curry in trust for himself, and he asks for a declaration that they belong to John Curry's estate, and that he be given appropriate relief.

The defendants deny the existence of a trust, allege that the said Frances Arabella Curry was beneficial owner of the said lands, and of other lands vested in her, and that during his lifetime John Curry sold portions of her lands and is accountable to her estate in respect of the purchase-money, and that since his death other portions of such lands have been sold and the purchase-moneys paid to the plaintiff as the executor of John Curry deceased, and contend that all such moneys should be paid over to the administratrix of the estate of Frances Arabella Curry.

The plaintiff contends that the lands in question having been purchased and paid for by John Curry, and at his instance conveyed to his wife Frances Arabella Curry, a resulting trust in his favour arose. If a man purchases and pays for lands with his own money and causes them to be conveyed to a stranger, then, for want of consideration, there is a resulting trust in the purchaser's favour. But if he causes the conveyance to be made to his wife the relationship implies a consideration and in such case the law presumes that the conveyance was intended as an advancement, that is, the relationship implies the intention of the husband to make an advancement to his wife. The existence of such intention, however, is a question of fact, and if the evidence disproves such intention then the wife is trustee for her

husband. Here the onus is on the plaintiff to rebut the legal presumption of an advancement, by shewing a contrary intention on the part of John Curry at the time of the conveyance. Evidence of subsequent intention will not discharge the onus, nor will evidence of the purchaser's actions subsequent to the conveyance to the wife: *Christy* v. *Courtenay* (1849), 13 Beav. 96, 98. If a purchaser, at the time of the purchase and conveyance to, say, his wife, does not intend a resulting trust, he cannot by subsequent change of intention deprive her of the beneficial ownership and make her trustee for him: *Groves* v. *Groves* (1829), 3 Y. & J. Ex. 163; *Sidmouth* v. *Sidmouth* (1840), 2 Beav. 447; *Williams* v. *Williams* (1863), 32 Beav. 370.

The pleadings suggest conveyances at the instance of John Curry to his wife of various lands, but there is no evidence of any such conveyances other than that of the 8th June, 1897, from William McGregor, and I assume that this conveyance was made by the direction of her husband, John Curry. Apart from the wife's affidavit on the application for probate of her husband's will, there is, I think, no evidence sufficient to rebut the presumption of law that this conveyance to her was by way of advancement. Assuming it to be true that John Curry from time to time purchased and paid for various lands and caused them to be conveyed to his wife, and thereafter purported to regard them as his own by contracting in his own name for their sale and by collecting and retaining the purchase-moneys, still such subsequent conduct does not negative an intention of advancement at the time of such conveyances to her. The plaintiff in his evidence speaks of an interview with her a day or two after her husband's death, when, he says, she told him that she owned only two lots of land. At that time, I presume, her husband was lying dead in her house, and it was not a suitable time for the plaintiff to discuss business with her or to obtain from her admissions prejudicial to her interest. She may on that occasion have used language which the plaintiff construed into admissions such as he deposed to, but he may have attached an entirely erroneous meaning to her language. He did not pretend to give her precise words, nor the whole of the conversation, and she is not here to speak for herself. Under such circumstances, it would, I think, be quite unsafe to accept any one's uncorroborated recollection of an alleged verbal admission made 9 years age. Human memory is treacherous. Further it is to be observed that the plaintiff, as the husband of one of John Curry's daughters, has an interest against those claiming through John Curry's widow. Thus the case is narrowed down to the question to what extent, if at all, the widow's affidavit establishes a trust. If at

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the time of the making of the affidavit it were shewn that she did not know that the said lands were vested in her, she might not be bound by the admissions of a trust contained in the affidavit; but, if she knew it, then the affidavit was good and sufficient declaration of trust by her that she held them in trust for him. The deed from William McGregor to her was registered on the 18th September, 1897, and, therefore, in declaring a trust in respect of the lands described in that deed she is deemed by the Registry Act to have notice of the deed. Thus, when she made the affidavit, and knew that the legal estate was then vested in her, she said in substance, over her signature, that, although she held the legal estate, still John Curry at the time of his death was beneficial owner, and that his estate should pay the succession duties payable in respect of such lands. The affidavit does not rebut the implied presumption of an advancement at the time of the conveyance from McGregor to her, and, therefore, does not give rise to a resulting trust, but as a declaration of trust, meeting as it does the requirements of the Statute of Frauds, it so binds her as determining that she held the land in trust for her husband at the time of his death, and it is binding on her representatives. Therefore I think that at the time of his death John Curry must be regarded as the beneficial owner of the lands conveyed by William McGregor to Frances Arabella Curry, and that the plaintiff is entitled to have the unsold portions of them conveyed to him as surviving trustee of John Curry's estate. If the list of lands set forth in the affidavit includes the lands other than those described in the deed from McGregor, and if it were shewn that when making the affidavit Frances Arabella Curry did not know that such other lands were vested in her, and that they were hers beneficially, then her estate might be entitled to be relieved from the effect of an affidavit made in good faith, but in ignorance of the facts.. But such was not shewn, and therefore, I think, she is bound by the affidavit, and that it must be held that John Curry at the time of his death was the beneficial owner of all the lands described in the exhibit annexed to the affidavit.

I cannot determine from the evidence whether all the lands claimed by the plaintiff and described in the statement of claim are included in the said exhibit attached to the affidavit, but I am of the opinion that the plaintiff has failed to establish any right to lands not set forth in such exhibit. In their statement of defence the defendants William G. Curry, administrator of the estate of Charles Francis Curry, and Verene May McLeod, administratrix *de bonis non* of the estate of Frances Arabella Curry, allege that John Curry during the lifetime of the said

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Frances Arabella Curry sold certain of her lands and retained the purchase-money, and that since the death of Frances Arabella Curry certain other of her lands were sold and the purchase-money paid to the executors of John Curry as if the same formed part of his estate. If John Curry without the consent of his wife retained purchase-moneys paid to him of any of his wife's lands he is accountable in respect thereof. Payment of moneys belonging to the estate of Frances Arabella Curry to the estate of John Curry would be a misapplication, and the defendants, if they so desire, may amend their statement of defence by counterclaiming in respect of such moneys and have a reference to ascertain the extent, if any, of such misapplication, and also a reference as to what moneys, if any, of the said Frances Arabella Curry the said John Curry had in his hands at the time of his death, and also to payment of any moneys so found.

Judgment will be entered declaring that John Curry at the time of his death was the beneficial owner of the lands mentioned in the said exhibit, and directing the administratrix of the estate of Frances Arabella Curry to convey any unsold portions thereof to the plaintiff as the surviving executor and trustee of John Curry, deceased; and, on the defendants William G. Curry and Verene May McLeod amending their statement of defence, the judgment, if they desire it, will direct a reference to ascertain what moneys the proceeds of the sale of lands of Frances Arabella Curry have come to the hands of Charles Francis Curry and the plaintiff, or either of them, as executors and trustees of John Curry's estate, and also what moneys, if any, of the said Frances Arabella Curry the said John Curry had in his hands at the time of his decease.

Further directions and costs of such references to be reserved until after the report of the Master.

This is a proper case for payment of costs to all parties, except those reserved, out of the estate.

KERR v. TOWN OF PETROLIA.

Ontario Supreme Court, Mulock, C.J. Ex. September 29, 1921.

INCOMPETENT PERSONS (§II—10)—LEASE OF PREMISES BY TOWN—BY-LAW PROPERLY PASSED—ALLEGED LUNACY OF LESSOR—POWER OF ATTORNEY—RIGHTS OF PARTIES.

A lease by a man through his attorney to a municipal corporation, a by-law having been properly passed therefor, is valid, even though the lessor might be insane, for the contract of a lunatic, though voidable at his option, is binding upon the other party to the contract.

[*Moulton* v. *Camroux* (1848), 2 Ex. 487; *Baxter* v. *Matthews* (1872), L.R. 8 Ex. 134, followed.]

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ACTION by the executors of John Kerr, deceased, to recover the sum of $2,254.83 for rent under a lease of premises in the town of Petrolia made by the said John Kerr to the defendant corporation.

D. L. McCarthy, K.C., for the plaintiffs.

A. Weir, K.C. and *G. G. Moncrieff*, for the defendant corporation.

MULOCK, C.J. Ex.:—The facts are as follows. The Town of Petrolia was establishing a hydro-electric commission to carry on the business of supplying the inhabitants with electrical power, and, until the election of a local commission to take charge of the business, the Provincial Hydro-Electric Commission, on behalf of the town corporation was acquiring the necessary plant. A valuable portion thereof had been delivered at Petrolia, and the Provincial Hydro-Electric Commission was anxious that the town should promptly acquire premises where it might be stored and the business carried on, and made its views known to the corporation. The municipal council had appointed a committee of its members, composed of the members of the hall and market committee and of the fire, light and water committee, to negotiate for securing premises for the commission, and Mr. Pollard, one of it members, was chosen chairman of this committee. Mr. Kenneth Campbell Kerr, one of the plaintiffs, was a member of the committee, but as such took no part in the committee's deliberations or duties. Informal efforts were made to securr offers of premises, and two offers were received, one from the Masonic Temple Company at a rental of $375 a year, and another from John Kerr, through his attorney, Kenneth Campbell Kerr, at a rental of $420 a year. The latter offer did not originate with Kenneth Campbell Kerr, but was the result of Mr. Pollard's asking him for an offer to lease John Kerr's premises.. On the 15th December, 1915, the committee met and considered the two offers and passed a resolution to report to the council that "Your committee believe it to be in the best interests of the town to secure the building in the Tecumseh block owned by Mr. Kerr for the use of the Hydro-Electric Commission," and on the following day the Hydro-Electric Commission took and thereafter remained in possession of the premises until the local commission was elected on the 3rd July, 1916, when the latter entered into and remained in actual occupation of the premises until the 16th March, 1916. On the 29th December, 1915, the mayor directed the clerk to call a special meeting of the council for the 30th December for the purpose of passing a by-law authorising the leasing of premises, and, Dr. Fairbanks, one of the members of the council, being in

London, the clerk by telephone notified him of the meeting, and during this telephone conversation Dr. Fairbanks informed the clerk to the effect that he would prefer it if the meeting was held on the 31st December, and I think it may fairly be inferred from the evidence and from what occurred that the clerk informed him to the effect that he would have the date of the meeting changed and that he might consider the meeting called for the 31st. The meeting took place not on the 30th but on the 31st, and all the members, except Dr. Fairbanks, were in attendance. Dr. Fairbanks was expected by the members until the conclusion of the meeting.

The clerk in his evidence was unable to say by what authority he changed the date of the meeting, but it is quite obvious from all that occurred that he told Dr. Fairbanks he might consider the meeting convened for the 31st, and so notified the mayor; that the latter acquiesced; that the other members were duly notified of the change; and that Dr. Fairbanks fully understood that the meeting was to be held on the 31st.

The following is an extract from the minutes of the meeting of the 31st December: "The meeting was called at the request of the mayor for the purpose of considering a by-law to authorise the execution of a lease of premises for Hydro-Electric purposes." This minute shews that the clerk had the authority of the mayor to call the meeting and that the mayor ratified the notice which I think was given to Dr. Fairbanks by the clerk during the conversation over the telephone above referred to. Further, I think that in the absence of evidence the presumption is that the meeting was properly convened and that the onus was upon the defendant corporation to establish its invalidity, and this they have not done. I find that the meeting was legally convened, which finding includes the giving of legal notice to Dr. Fairbanks.

At this meeting the council adopted the resolution of the committee recommending the corporation to acquire a lease of the Kerr premises, Kenneth Campbell Kerr taking no part in the council's deliberations and requesting to be considered as not present. The council at this meeting passed a by-law (No. 1044) authorising the corporation to enter into the lease; and, upon the by-law being duly completed by the affixing thereto of the corporate seal and by the signing thereof by the mayor and clerk, the lease in question was executed by John Kerr, by his attorney Kenneth Campbell Kerr, and by the corporation, by the signatures to the lease of the mayor and clerk and the affixing thereto of the corporate seal of the corporation. This lease, though bearing date the 16th December, was not in fact executed by

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either party until after the completion of the by-law on the 31st December, the reason for its bearing an earlier date being no doubt that, the commission having on the 16th December entered into possession, it was proper that the rent should be computed from that day. The town solicitors in their letter of the 30th December to the town clerk enclosed the proposed lease and by-law, and it is clear from the tenor of that letter that the lease had not then been executed. The receipt of this letter is noted on the minutes of the 31st December.

The foregoing are the material circumstances in respect of the corporation having entered into the lease.

Dealing now with the defences,, the first is that the lease was not authorised by by-law and that it was not in fact executed by the defendant corporation. I find that the necessary by-law was duly enacted and that the lease was properly executed so as to bind the defendant corporation, and therefore this defence fails.

For the moment I pass over the second defence.

Another defence is that Kenneth Campbell Kerr had no authority to execute the lease in the name and on behalf of John Kerr. By general power of attorney, bearing date the 13th October, 1913, John Kerr duly empowered Kenneth Campbell Kerr to let his real estate, and he was thereby fully empowered in the name of the said John Kerr to enter into the said lands. Therefore this defence fails.

Another defence is that Kenneth Campbell Kerr had an inchoate interest in the lands in question and was also a member of the council at the time of the making of the lease, and therefore was disqualified from contracting with the corporation. Until the death of John Kerr the premises were his and his alone. He may have devised an interest therein to Kenneth Campbell Kerr, and the latter may reasonably have expected to acquire an interest therein on the death of his father, but until then he had no interest. The contract was between John Kerr and the corporation and was not affected by the circumstance that Kenneth Campbell Kerr was a member of the council. Therefore this defence fails.

Another defence is that by-law No. 1044 did not authorise the corporation to execute the lease. This by-law was duly passed at a properly convened meeting of the council, and was duly completed as above stated, and its terms fully authorised the corporation to enter into the lease in question. Further, the by-law on its face is valid and sufficient, and the onus was on the defendant corporation to shew its invalidity or insufficiency, and this has not been done; and this defence fails.

Another defence is that the meeting of the 31st December was not legally convened. I have already stated all the material circumstances respecting the calling of this meeting and am of the opinion that it was legally convened. The passing of the by-law was one of the acts which the council at this meeting was entitled to perform; thus this defence fails.

Another defence is that the "alleged lease was a fraudulent attempt on the part of the said Kenneth Campbell Kerr to forestall the Hydro-Electric Commission, and he anticipated the results of the coming election, which he had reason to expect would result in his losing control of the council." I find it difficult to discover in the above quoted language any statement which, if proved to be true, would constitute a defence; but, if it means to charge Kenneth Campbell Kerr with having been guilty of any fraud, misconduct, or impropriety in connection with the bringing about of the said lease or its execution by the corporation, I find that the question of the corporation leasing the premises of John Kerr did not originate with Kenneth Campbell Kerr but with Mr. Pollard, the then chairman of the committee of council which was charged with the task of securing premises then urgently needed by the commission; that, in compliance with Mr. Pollard's request, Kenneth Campbell Kerr, on behalf of his father, submitted an offer to the committee, but, though a member of the said committee, took no part whatever in procuring the acceptance of such offer either by voting thereon or urging its acceptance; that when the report of the committee was under consideration by the council he also abstained from voting or seeking to influence the council in favour of the offer. Throughout the whole negotiations from their commencement until their termination in the completion of the lease, he took no part either as a member of the committee or of the council in promoting the lease, and his conduct throughout appears to me to have been scrupulously correct, and the charge against him of fraudulent conduct or intent is baseless; and this defence fails.

Another defence is that the "lease was procured by the said Kenneth Campbell Kerr upon his undertaking to perform certain work upon the premises . . . as a condition precedent to the occupation thereof, and the said work was not done . . . whereby the said alleged lease never came into effect." The Provincial Hydro-Electric Commission was in actual occupation of the demised premises when the lease was executed, and the local commission when elected entered into occupation. Thus it is clear that the performance of the work could not have been intended to precede occupation. The facts are that after the execution of the lease John Kerr, by his attorney Kenneth Camp-

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bell Kerr, gave to the council the written undertaking bearing date the 31st December to make certain changes to the premises within one month; that in order to carry out such undertaking Kenneth Campbell Kerr inquired of the manager of the commission when the work might be done, whereupon the manager asked that it be not done then, stating that the place was filled with heavy equipment, and that he did not wish the work to be then proceeded with because of the inconvenience that would thereby be caused to the commission. In compliance with the commission's wishes, performance of the work was deferred to suit its convenience, and it was for the commission to notify the lessor when he might proceed with the work, for without the tenant's consent the landlord would have no right to enter and make the changes. I therefore find that John Kerr was not guilty of any breach of the said undertaking. I am further of opinion that the lease took effect when executed by both parties on the 31st December, 1915, and would not have been affected by any breach of the said undertaking, the only remedy in case of such breach being an action for damages. Thus the 12th defence fails.

The remaining defence is set forth in the third paragraph of the statement of defence in the following words: "The alleged lessor, John Kerr, at the time of making the alleged lease, was, by reason of disease and infirmity, mentally incapable of undertaking any business, was without any hope or chance of recovery, and was ill until speedy death, was wholly bereft of reason, and did not make or authorise the making of said lease."

From the evidence it appears that John Kerr had been engaged in real estate and other business for many years with headquarters in the town of Petrolia, and, being about to go away on a trip, executed on the 11th October, 1913, in favour of his son, Kenneth Campbell Kerr, the power of attorney under which the latter executed the lease in question. He was then perfectly sane. In the early part of 1911 he returned to Petrolia, and up to this time there is no evidence to shew any impairment of his mental faculties. In April, 1914, he went to Toronto to visit a sister, and there was taken ill and died on the 18th April, 1916, of arterial sclerosis, being then 74 years of age.

The defendant corporation also contended that at the time of the execution of the lease John Kerr was of unsound mind and incapable of managing his affairs, whereby the power of attorney was revoked or the right to act upon it was suspended, and that in either case the execution of the lease by Kenneth Campbell Kerr was unauthorised and the lease itself void.

As already stated, John Kerr was in his right mind when he

executed the power of attorney. If, thereafter, and before the lease was executed, he became insane, then the questions are: what effect, if any, had such subsequent insanity upon Kenneth Campbell Kerr's previous authority to execute the lease, and upon the lease itself?

Some text-writers state that insanity of the principal *ipso facto* revokes the agency, but the cases do not support such an unqualified proposition: for example, in the leading case of *Drew* v. *Nunn* (1879), 4 Q.B.D. 661, it was held that a lunatic was liable on contracts made by his agent with third persons who were ignorant of the fact of the principal's lunacy, but to whom the lunatic when sane had represented that the agent had authority to contract for him; thus in such a case the principal's insanity does not revoke the agency. *Daily Telegraph Newspaper Co.* v. *McLaughlin*, [1904] A.C. 776, was cited in support of the general proposition above mentioned, but that case is not in point. There the constituent of the power was insane when he executed it, and the Court held that, having no knowledge of what he was doing, his signing was merely a mechanical act and null and void. Thus it created no agency.

In the present case there was a valid delegation of authority. In the 15th edition of Anson on Contract, p. 433, reference is made to *Drew* v. *Nunn, supra*, in these words: "It seems no longer open to doubt since the case of *Yonge* v. *Toynbee*, [1910] 1 K.B. 215, that insanity annuls an authority properly created while the principal was sane." In that case solicitors were instructed by a client to conduct his defence in an anticipated action, but before action begun the client became and was certified as of unsound mind. The solicitors, in ignorance of the client's insanity, entered a defence, to which the plaintiff replied. Subsequently the plaintiff's solicitors, having learned of the defendant's insanity, moved in Chambers for an order setting aside the defence and all subsequent proceedings and ordering the solicitors who had purported to represent the defendant to pay the costs, and the learned Master set aside the proceedings but refused to order the solicitors to pay the plaintiff's costs. The only appeal from this order was in respect to the Master's refusal to award costs against the solicitors. The Court of Appeal held the solicitors liable for costs, on the ground that, in defending, they had impliedly warranted that they possessed the necessary authority, which, in fact, they had not, and had thereby to their prejudice misled the plaintiffs. But, in thus holding the agents liable for breach of warranty, the Court did not decide that what they had done was void. The Court was not called upon to consider and expressed no opinion in regard

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to that portion of the Master's order which set aside the proceedings. That portion of his order is, I think, contrary to the law as laid down in *Drew* v. *Nunn, supra*, and cannot be accepted as supporting the proposition that mere insanity for all purposes annuls an agent's authority created when the principal was sane: and I am of the opinion that insanity alone (if such existed) of John Kerr at the time of the execution of the lease did not unqualifiedly revoke Kenneth Campbell Kerr's authority.

In *Imperial Loan Co.* v. *Stone*, [1892] 1 Q.B. 599, the defendant pleaded that he was insane when the contract sued on was made, and Lord Esher, M.R., in his judgment, says: "I shall not try to go through the cases bearing on the subject, but what I am about to state appears to me to be the result of all the cases. When a person enters into a contract, and afterwards alleges that he was so insane at the time that he did not know what he was doing, and proves the allegation, the contract is as binding on him in every respect, whether it is executory or executed, as if he had been sane when he made it, unless he can prove further that the person with whom he contracted knew him to be so insane as not to be capable of understanding what he was about. It can hardly be doubted that for a long series of years, if insanity was set up in answer to an action for breach of contract, it must have been pleaded, and the plea was not good unless it went on to allege knowledge on the part of the plaintiff. The fact of such a plea being required, and having to go to that extent, shews that the law as I have stated it was generally accepted."

In Pollock on Contract, 9th ed., p. 98, the law is thus stated:—

"The general rule as to the contract of a lunatic (at all events if not so found by inquisition) or drunken man who by reason of lunacy or drunkenness is not capable of understanding its terms or forming a rational judgment of its effect on his interests is that such a contract is voidable at his option, but only if his state is known to the other party: *Moulton* v. *Camroux* (1848), 2 Ex. 487.

Here the plaintiffs representing John Kerr are not seeking to set aside the lease, but are affirming it and asking the defendant corporation to perform its covenant to pay rent, and I am unable to discover any ground for their being relieved of their obligation.

In Chitty on Contracts, 17th ed., p. 162, reference is made in these words to contracts by persons under disability: "Parties who contract with those whom the law shields from responsibility cannot, in general rely on the incapacity of the latter, as a

defence. This, at least, is the rule in case of contracts with infants." In *Forrester's Case* (1661), 1 Sid. 41, 42, it was held *per* Twisden, J., that the lessee could not avoid the lease because of the lessor's infancy. In *Clayton* v. *Ashdown* (1715), 9 Vin. (Abr.) 393, pl. 4, an infant agreed to lease a farm to the defendant, who, when the infant came of age, refused to continue as lessee, and it was decreed that the defendant should take the lease.

Holt v. *Ward* (1733), 2 Strange 937, was an action by the plaintiff, an infant, for breach of promise of marriage, and it was held that, marriage being a contract advantageous to the infant, she was entitled to maintain the action. In the words of the Court, "Where the contract may be for the benefit of the infant, or to his prejudice, the law so far protects him as to give him an opportunity to consider it when he comes of age: and it is good or voidable at his election . . . But though the infant has this privilege, yet the other party with whom he contracts has not: he is bound in all events."

Baxter v. *Matthews* (1872), L.R. 8 Ex. 134, was an action for breach of contract, and the defendant pleaded that when he entered into the contract he was so drunk as to be incapable of knowing what he was doing, and it was held that the defendant when he recovered his senses could have ratified the contract whereby the plaintiff would have been bound, and that if the defendant could take that position the right must be reciprocal.

Warwick v. *Bruce* (1813), 2 M. & S. 205, was an action by an infant for breach of contract whereby the defendant agreed to sell and the plaintiff to buy a quantity of potatoes, and it was held that, the contract being for the benefit of the infant, the action was maintainable.

These authorities, I think, warrant the conclusion that the contract of a lunatic, voidable at his option, is binding upon the other party to the contract, and therefore I am of opinion that as a matter of law the lease is binding on the defendant corporation.

Further I am not satisfied that John Kerr was incapable of making the lease. He was suffering from arterial sclerosis, but the extent to which his mind was affected was a matter of degree only, and it is not correct to say that he was wholly bereft of reason.

Whilst unaided, he might not have been capable of entering into contracts of a complicated or intricate nature, he had sufficient intelligence to understand the terms of the lease in question, and if at the time of its execution they had been explained to him, I think he was quite capable of forming a correct judg-

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ment in regard to them and of intelligently approving or disapproving of the lease.

For these reasons, I think the plaintiffs entitled to judgment for the arrears of rent, with interest and costs of the action.

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*Re OLIPHANT

Ontario Supreme Court, Middleton, J. October 1, 1921.

DESCENT AND DISTRIBUTION (§IA—4)—DEATH OF HUSBAND—NO WILL—NO ELECTION BY WIDOW—REAL ESTATE—DEATH OF WIDOW—ADMINISTRATION.

Under the Devolution of Estates Act, R.S.O. 1914, ch. 119, and amendments, where there is real property the widow must elect under sec. 9 to take an interest in her husband's undisposed real property in lieu of dower, and in the absence of election the section does not apply and confers no rights on the widow.

MOTION by the administrator of the estate of Maria Oliphant for an order determining a question arising in the administration of the estate.

W. S. MacBrayne, K.C., for the applicant.

W. M. McClement, for persons claiming title under Isaac Oliphant, deceased.

MIDDLETON, J.:—The late Isaac Oliphant died intestate on the 20th January, 1916, leaving him surviving his widow, Maria Oliphant. There were no children.

Maria Oliphant obtained letters of administration to the estate of here deceased husband, and upon her death on the 17th April, 1920, letters of administration *de bonis non* were issued to Robert Oliphant, her brother, and he also obtained letters of administration to her estate.

Isaac Oliphant left some realty, and between $500 and $600 worth of personalty. The debts of his estate amounted to a sum about equalling the personalty, and these were paid by the widow. The real estate was not sold until after the death of Maria Oliphant, when Robert Oliphant, under the letters of administration *de bonis non*, sold it, realising $2,700.

Maria Oliphant did not make any election under the provisions of the Devolution of Estates Act, R.S.O. 1914, ch. 119, sec. 9, but retained possession of the real estate, and was in receipt of the rents and profits during her lifetime.

The question now is whether those claiming under Maria Oliphant have any, and if so what, right to any portion of the proceeds of the land sold.

Notwithstanding Mr. MacBrayne's very careful and forcible argument, I am unable to agree with him. The situation appears to me to be made plain by the terms of the statute.

*Affirmed by the Appellate Division of the Supreme Court of Ontario and to be published in 67 D.L.R.

Under the Act referred to, the widow has her right of dower unless she expressly elects to take her share in the undisposed of realty of the testator. This election is required to be by a deed or instrument in writing. The right given to the widow is, as I understand it, personal, and it would not pass to her representatives. She may elect to give up her dower and to take the share. This is based upon the existence of her dower right, and I do not think that it is possible that the Legislature intended that her representatives should have a right to elect after her dower-right had terminated by her death.

In the alternative, Mr. MacBrayne argued that, under the provisions of sec. 12 of the statute, by reason of their being no issue, the widow would be entitled to the $1,000 mentioned in that section in priority to the next of kin, but the difficulty is that, by sub-sec. 4, the estate consisting in part of real property, the section shall apply "only if the widow elects under section 9 to take an interest in her husband's undisposed of real property in lieu of dower." In the absence of this election the section has no application and confers no right upon the widow.

In the statute as originally framed this provision is not found, and in Mr. Armour's book on Devolution, "Essays on the Devolution of Land upon the Personal Representative and Statutory Powers relating thereto" (1903), p. 226, he expresses the opinion, with which I may say I am in entire accord, that under the Act as it then stood the right was conferred upon the widow whether she elected or did not elect; but, by amendment, the clause which I have quoted is introduced, and it appears to me to determine the matter adversely to the widow.

Under the circumstances, I think it would be fair to allow the costs of both parties out of the husband's estate.

Re McKAY.

Ontario Supreme Court in Bankruptcy, Orde, J. October 6, 1921.

BANKRUPTCY (§II—19) — COMPOSITION UNDER THE ACT — LEASEHOLD PREMISES—CLAUSE AS TO FORFEITURE—NOTICE GIVEN BY TRUSTEE TO LANDLORD UNDER THE ACT—UNEXPIRED TERM—ACCEPTANCE OF RENT BY LANDLORD—WAIVER.

The acceptance of rent by the landlord from the lessee of premises, who has assigned under the Bankruptcy Act, and who has given proper notice as to the retention of the premises for the unexpired term of the lease, constitutes a waiver of right to forfeiture, when the landlord has full knowledge of the circumstances in connection therewith.

[*Straus Land Corp'n* v. *International Hotel, Windsor* (1919), 48 D.L.R. 519, 45 O.L.R. 145, referred to. See Annotations, 53 D.L.R. 135, 59 D.L.R. 1.]

MOTION by the L. R. Steel Company, the owners of the

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reversion in the premises leased to Arthur Alexander McKay, the debtor, for an order declaring that the notices given by the debtor and the trustee of their election to retain the demised premises were null and void and that the leases became forfeited and void on or about the 1st March, 1921, under provisions for forfeiture contained in the leases, by reason of proceedings taken by the debtor under sec. 13 of the Bankruptcy Act.

R. McKay, K.C., for the trustee and the debtors.

Everard Bristol, for the L.R. Steel Co.

ORDE, J.:—On the 27th February, 1915, Arthur Alexander McKay, of Hamilton, who carried on business under the name of R. McKay & Co., became the tenant under two indentures of leases of two adjoining parcels of land for a term of 10 years from the 1st March, 1915. Each lease contained the following provision: "And it is further agreed that if the term hereby granted or any of the goods and chattels of the lessee shall at any time during the said term be seized or taken in execution or in attachment by any creditor of the said lessee or his assigns or if a writ of execution shall issue against the goods and chattels of the lessee or his assigns or if the lessee or his assigns shall make any assignment for the benefit of creditors or become bankrupt or insolvent or shall take the benefit of any Act that may be in force for bankrupt or insolvent debtors then and in every such case . . . the said term shall immediately become forfeited and void and the lessors shall have the same right to enter as is hereinafter given to them in the event of non-payment of rent or non-performance of covenants." The reversions in the demised premises were subsequently, but prior to the month of April, 1921, conveyed to the L. Steel Company Limited.

On the 21st March, 1921, a meeting of McKay's creditors was held, called by an authorised trustee under the provisions of sec. 13 of the Bankruptcy Act, for the purpose of considering a proposal by McKay for a composition in satisfaction of his debts. The proposal was accepted by the requisite majority of his creditors, and was approved by an order of the Court on the 1st April, 1921.

On the 14th April, 1921, the trustee gave to the L. R. Steel Company Limited formal notice of his intention to retain the demised premises for the whole of the unexpired terms, and on the 18th April, 1921, McKay, the arranging debtor, gave similar notice, and on the same day the trustee and McKay, jointly, gave notice whereby each adopted the service of the notice of retainer given by the other.

The L. R. Steel Company Limited attended the meeting of creditors on the 21st March, 1921, but were excluded therefrom and took no part therein, and no notice was given to them of the

result of the meeting or of the order approving of the acceptance of the proposal, except in so far as the notices of the 14th and 18th April may have constituted such notice to them.

Notwithstanding the position now taken by the L. R. Steel Company, rent was paid regularly on the 1st day of each month from April to September, both inclusive, to the agents of the L. R. Steel Company; and (with the exception of the payment made on the 1st September, 1921, which has been retained by the agents pending the result of this motion) the rents were duly paid over by such agents to the Steel company and accepted by them without objection or protest. The cheques for the monthly instalments of rent were all signed by McKay and by the trustee.

The composition with the creditors was duly carried out and completed by the 21st June, 1921. On the 15th August, 1921, McKay and the trustee requested the L. R. Steel Company to consent to an assignment of the unexpired terms under both leases to the Hydro-Electric Commission of the City of Hamilton. This request was the first intimation that the Steel company had of the intention or desire of McKay to assign the terms.

The Steel company now moves for an order declaring that the notices of the 14th and 18th April, 1921, electing to retain the demised premises, are void and of no effect, and that the leases became forfeited and void on or about the 21st March, 1921, under the provisions for forfeiture quoted above, by reason of the proceedings taken by McKay under sec. 13 of the Bankruptcy Act.

It is, I think, admitted by both parties that the submission by McKay to his creditors of a proposal for a composition under sec. 13 of the Act brings him within the provisions for forfeiture in the leases already quoted, in that he is thereby taking the benefit of an Act in force for bankrupt or insolvent debtors. So that, unless by reason of the Bankruptcy Act, McKay or the trustee is entitled to retain the demised premises, or the forfeiture has been waived, the Steel company is entitled to have the leases declared forfeited and void.

The contentions of the landlord are, first, that the Bankruptcy Act cannot operate retroactively upon the contractual rights of a landlord arising under a contract in existence before the Bankruptcy Act came into force; and, second, that if the Act can affect such rights the provisions of sub-sec. 5 of sec. 52, which give the trustee the right to retain the demised premises, are confined to cases where a receiving order has been made or the debtor has made an authorised assignment and do not extend to cases where the debtor chooses to proceed under sec. 13 without first being declared a bankrupt or making an assignment.

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It is, of course, a general rule that where an enactment would prejudicially affect vested rights, or the legality of past transactions, or impair contracts, it shall not be construed so as to have a retroactive operation unless such a construction appears clearly in the terms of the Act or arises by necessary and distinct implication: Maxwell on Statutes, 6th ed., pp. 382, 383. There is nothing in the Bankruptcy Act, apart from special preferences given to landlords by sec. 51 and 52, to indicate that the rights of a landlord arising under a lease are to be regarded in any way different from rights arising under any other form of contract. And if the contention of the landlord here that the Act does not apply to any lease which was in existence before the Act came into force, merely because it retroactively affects or impairs existing contractual rights, is sound, then the contention to be consistent must include all contractual rights whatsoever, so that a creditor whose debt was in existence prior to the 1st July, 1920, might claim that he was not obligated to file any proof but might proceed to judgment against the bankrupt, and no discharge of the bankrupt would be binding upon such creditor. It is only necessary to state this proposition to shew its absurdity. That the Act applies to debts and contracts existing when it came into force is clear from its nature and the sweeping effect of its language. In addition to the general tenor of the Act there is sec. 8, which excludes pre-existing debts from those which might otherwise have been regarded as available acts of bankruptcy or as the basis of a bankruptcy petition; but, in order to make it clear that such exclusion does not otherwise affect the operation of the Act upon such debts the section concludes with these words: "but it shall be provable in any proceedings otherwise founded under this Part, and otherwise." If ordinary debts and contracts in existence at the time of the Act come within its scope, then I can see no reason for excluding leases.

Counsel referred to *In re Athlumney*, [1898] 2 Q.B. 547; *Waugh* v. *Middleton* (1853), 22 L.J.N.S. Ex. 109; and *Gillmore* v. *Shooter* (1678), 2 Mod. 310. Both the *Athlumney* and *Waugh* cases merely establish that an amendment to a Bankruptcy Act will not be given a retroactive application so as to interfere with a scheme already adopted by the Court or so as to validate a defective compromise not theretofore binding upon a creditor. The *Athlumney* case indeed affords an answer to counsel's argument, because the Court there held that, if the scheme had not been approved by the Court before the amending Act came into force, the creditor who had been allowed a larger rate of interest than that permitted by the amending Act, would have been bound by the amendment and restricted in his proof

to the lower rate. The *Gillmore* case merely decided that the Statute of Frauds, which made certain agreements void if not in writing, did not retroactively invalidate a parol contract. I am unable to see how that case has any application here, where the Act is clearly intended to affect existing rights.

The second point raised by the landlord is much more difficult of solution. Sub-sec. 5 of sec. 52 enables the trustee notwithstanding the legal effect of any provision or stipulation in any lease where a receiving order or an authorised assignment has been made" to elect to retain the demised premises for the whole or any portion of the unexpired term. The landlord contends that this right to retain is, by the express language of the sub-section, limited to the two cases expressly mentioned, namely, where a receiving order has been made or the tenant has made an authorised assignment. If, in spite of certain other provisions of the Act, the operation of this sub-section is to be limited to those two cases, then it would seem to be clear that the tenant, by taking advantage of the Bankruptcy Act, has forfeited the terms. But counsel for the tenant contends that the provisions of sub-sec. 15 of sec. 13 extend the provisions of sub-sec. 5 of sec. 52 to all cases where proceedings are taken under sec. 13 so as to enable either the trustee or the debtor himself to overcome the forfeiture which would otherwise have been effected and to elect to retain the demised premises for the whole or any part of the unexpired term.

It may be useful here to make some comparisons between the English Bankruptcy Act and our own. There are no provisions in the English Act corresponding to those of our own as to the rights of the landlord, these being preserved to him quite independently of the Act. Nor is there any provision in the English Act for the making by the debtor of a voluntary assignment. And, while the provisions of sec. 13 for the making by an insolvent debtor of a proposal for a composition, or for an extension of time, or for a scheme of arrangement, correspond to those in the English Act, it is not possible under the English Act for an insolvent debtor to make such a proposal until after a receiving order has been made against him. But the effect of a receiving order in England is different from that in Canada. Under our Act, where a receiving order is made, the order is coupled with an adjudication in bankruptcy, the debtor being then and there declared bankrupt, and there immediately follows upon such declaration the vesting of the bankrupt's property in the trustee. In England the first step in bankruptcy proceedings is the making of the receiving order, which may be made, as here, either upon the petition of a creditor or of the debtor himself, but

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there is not an immediate adjudication in bankruptcy, and the receiving order does not divest the bankrupt of his property. Following the receiving order, the debtor may or may not make a proposal for a composition or an extension or a scheme of arrangement. If such a proposal is made and is accepted and carried out the effect is, as it is under our Act, to discharge the insolvent. And, if no such proposal is made, or, if made, is not accepted or approved, an adjudication in bankruptcy follows almost inevitably, and there is an immediate vesting of the bankrupt's property or estate in the trustee just as in Canada a receiving order and adjudication of bankruptcy and an immediate vesting in the trustee follow the rejection of the proposal. These distinctions, however, in my judgment, are mere differences in procedure, the ultimate result being in effect the same, namely, the distribution of the insolvent's estate equitably among his creditors, either through the medium of an adjudication in bankruptcy or of a composition or extension of time or a scheme of arrangement or by the voluntary assignment of the debtor's property to a trustee for distribution among his creditors; and all these different methods of procedure have the common end in that they result, or are intended to result in the bankrupt's or insolvent's discharge from all further liability to his creditors. Notwithstanding the fact that under the Canadian Act an insolvent person may take steps to submit a proposal for a composition or extension to his creditors under sec. 13 without any previous application to the Court for a receiving order or without having made a voluntary assignment to a trustee, the proceedings under sec. 13 are, in my judgment, proceedings in bankruptcy having for their object substantially the same result as if an assignment or a receiving order had been made; and I can see no reason, except where the Act otherwise provides, for considering that the procedure under sec. 13 is something merely engrafted upon the Act and not a proceeding in bankruptcy, especially when a course of procedure almost substantially the same is also provided under the English Bankruptcy Act as a step which in the ordinary course may logically follow the making of a receiving order. There is also a parallel to be observed between the effect of the procedure under sec. 13 of our Act and that under the English Act, namely, that in neither case is the property of the debtor divested from him until, in Canada, a receiving order or an assignment is afterwards made, or in England an adjudication in bankruptcy takes place. And there is the further point to be observed, that the procedure under sec. 13 is equally applicable whether an assignment or a receiving order has been made or not.

If sub-sec. 5 of sec. 52 has the effect of overriding the provisions for forfeitures in a lease, where a receiving order or an authorised assignment has been made, there seems to be no logical reason, so far as any principle is concerned, why the tenant or the trustee or the creditors should be placed in any different position where a proposal for a composition is made under sec. 13 without a receiving order or an assignment having been made. If sub-sec. 5 of sec. 52 were to be construed by itself, I should be forced to assume that the case of an independent proposal made under sec. 13 had been either intentionally or inadvertently omitted and might feel bound to give effect to the contention of the landlord. But it was argued on behalf of the trustee and of the tenant that the provisions of sub-sec. 15 of sec. 13, that the terms "trustee." "bankruptcy," etc. shall include respectively "a composition, extension or scheme of arrangement, a compounding, extending or arranging debtor and an order approving the composition, extension or scheme," in applying all parts of the Act to the terms of the composition, extension or scheme, enlarge the operation of sub-sec. 5 of sect. 52. It must be admitted that sub-sec. 15 of sec. 13 is not skilfully drawn. It is based on a corresponding provision of the English Act, but the addition of certain words in our section destroys its symmetry. Notwithstanding this, I think it is plain that the intention of sub-sec. 15 is to make all parts of the Act apply in cases where the debtor has made a proposal under sec. 13 so as to avoid a continuous repetition of certain terms, and I can see no reason why sub-sec. 5 of sec. 52 should not be included within the scope of sub-sec. 15 of sec. 13. It was argued that any application of sub-sec. 15 of sec. 13 should be limited to those cases where it was one of the terms of the composition, extension, or scheme of arrangement that the trustee should be entitled to elect to retain the demised premises under sub-sec. 5 of sec. 52, but I think the practical effect of any such limitation would be to nullify completely in the great majority of cases any application whatever of sub-sec. 15 of sec. 13.

It was urged, and with some force, that the intention of sub-sec. 5 of sec. 52 was merely to enable the trustee to retain the demised premises for the unexpired term for the benefit of the creditors, and that the right could not be exercised for the benefit of the debtor himself, and that in the present case the trustee or the debtor is exercising the right to retain for the benefit of the debtor alone. In a sense this may seem to be true, but it is impossible to say to what extent the retention of the demised premises, even by the debtor himself, may not be a factor in the proposal made by the debtor under sec. 15, or in its acceptance by

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the creditors. There may be many cases in which the retention of the demised premises may be absolutely necessary to enable the debtor to carry out and complete a composition or a scheme of arrangement. If any other construction of sub-sec. 5 of sec. 52 is to prevail, it would mean that, in order to avoid the forfeiture which would result from an independent proposal under sec. 13, the debtor would simply go through the formality of making a voluntary assignment under sec. 9, which would be followed by the proposal and the result would be the same in either case. I cannot think that the Act was intended to bring about any different result in the two cases; and I am clearly of the opinion that the effect of sub-sec. 5 of sec. 52 is to override the provisions for forfeiture contained in the leases and to enable the trustee or the debtor himself to elect to retain the demised premises for the remainder of the term.

In the present case, even if my construction of sub-sec. 5 of sec. 52 is wrong, the landlord has waived the forfeiture by accepting rent after having received notice of the election to retain the premises. The landlord was fully aware, by reason of the notice calling the meeting of the creditors, of the fact that its tenant had brought himself within the provisions of the Bankruptcy Act and the forfeiture clause in the leases. Notwithstanding such notice, it has accepted rent for a period of several months without any objection or protest. It was argued on behalf of the landlord that this rent was accepted on the theory that the trustee was simply remaining in possession pending the acceptance and the completion of the composition, and that the rent was being paid merely as occupation rent for the period which the trustee might continue to occupy the premises for such purpose. This argument would have some weight if the landlord was in ignorance of the reason for the occupation of the demised premises, but it cannot plead such ignorance in view of the fact that in April last it received formal notice of the intention to retain the premises for the remainder of the terms. That the acceptance of such rent with a full knowledge of the circumstances under which it was paid constitutes a waiver of the right to forfeit the leases, is clear: *Straus Land Corporation Limited* v. *International Hotel Windsor Limited* (1919), 45 O.L.R. 145, 48 D.L.R. 519.

On both grounds, therefore, I am of opinion that the L. R. Steel Company Limited have failed upon their motion, which will be dismissed with costs. The order should contain a declaration that the leases have not become forfeited or void by reason of the proceedings taken by the tenant under the Bankruptcy Act.

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Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Latchford, Middleton and Lennox, JJ. October 7, 1921.

FRAUDULENT CONVEYANCES (§VI—30)—GRANT TO SON-IN-LAW—DEBTS—DEATH—CREDITORS—FRAUDULENT PREFERENCE.

The grant of the only property of real value to a relative, leaving no assets for other creditors, will be presumed a fraudulent preference, and will be set aside.

[*Spirett* v. *Willows* (1864), 3 DeG. J. & S. 293; *Freeman* v. *Pope* (1870), L.R. 5, Ch. 538, referred to.]

APPEAL by defendants from the judgment of Orde, J. in an action by the plaintiff, on behalf of himself and all other creditors for a declaration that a conveyance was made with intent to defeat, hinder, and delay creditors, and that the sum paid by the purchaser was an asset of the estate and available for the benefit of such creditors, and for other incidental relief.

The judgment appealed from is as follows:—

The late Robert Sproule had been originally a farmer, but for about 30 years before his death had lived in Cannington, where he carried on a small fur business. The business never prospered, and when he died on the 20th March, 1920, he was insolvent.

On the 7th June, 1915, the plaintiff lent Sproule $225, taking a 12 months' note, with interest at 7 per cent. Sproule paid the interest regularly to the 5th August, 1919. On the 29th December, 1915, the plaintiff lent Sproule a further $200 upon the same terms, upon which interest was paid to December, 1919. Evidence was also given of loans made by other persons to Sproule both before and after April, 1917. One Phillip Dawson lent him $400 in 1916, and in 1917 and 1919 further sums to the amount of $600, making in all $1,000 owing to Dawson at the date of Sproule's death. There were also loans by others within a year before his death.

Sproule's business was not of a substantial character, and when he died he apparently had no business assets whatever. He lived in a house in Cannington built upon two lots which he had purchased in 1888. His daughter, the defendant Phœbe Margaret Bradley, for some time after her marriage had lived with her husband, the defendant Luther Bradley, on his farm in East Whitby, but about 16 years ago, her mother, the defendant Jane Ann Sproule, was taken ill, and the Bradleys gave up their farm and came to Cannington to live with the Sproules. According to the evidence of the Bradleys, it was arranged with Sproule that the Bradleys were to bear half the expense of the house, including the taxes, but that Bradley was to pay for any improve-

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ments to the house. Bradley says that in 1914 he advanced $600 to Sproule on the understanding that the latter was to convey the house to Phœbe Bradley, but subject to the condition that Sproule and his wife were to be maintained during their lives. Bradley says that he had to borrow $300 from the Home Bank and $300 from his mother to enable him to lend the $600 to Sproule. Sproule required the money to pay a note for $600 held by the Standard Bank, and Bradley says he paid the money to the bank, took the note home, and one day, when clearing up, he burned it. He did not get the deer from Sproule in 1914, due he says to his own carelessness. In 1916, he says the arrangement as to sharing the household expenses was changed and that from then onwards he and Mrs. Bradley assumed all the burden of caring for Mr. and Mrs. Sproule. Sproule was then about 81 years of age and Mrs. Sproule about 84. Bradley says that even prior to the alteration in the arrangement made in 1916 he had been bearing a good deal of the household expenses, but that after that date he bore it wholly, and he estimates his expenditure upon Mr. and Mrs. Sproule for board and clothing and doctors' bills at from $500 to $600 per annum. He spoke to Sproule once or twice after the loan of $600, and asked him if this "fixed everything up," by which he doubtless meant, "if that paid everything Sproule owed." Sproule said it did.

In 1917 Bradley, wanting to get matters "straightened out," asked Sproule for the deed, and accordingly on the 14th April, 1917, Sproule and his wife executed a conveyance of the property to Phœbe Margaret Bradley in fee simple, in consideration of parental love and affection and the sum of one dollar. The habendum is followed by this clause, "and subject also to the said grantor and his said wife and the survivor of them having and enjoying a comfortable and peaceable home on the said lands and premises so long as they or either of them live." And the grantee also covenants "to allow the said grantor and his said wife to have and enjoy a comfortable and peaceable home on said lands and premises as aforesaid," and the bar of dower by Mrs. Sproule is made "subject to the full enjoyment of a comfortable and peaceable home on the said lands and premises as long as she may live." The deed was registered on the 17th April, 1917, but there was no outward or visible change in the occupation of the house, nor did Bradley or his wife or Sproule notify the assessor, the assessment continuing as before in the name of Robert Sproule. Upon his examination for discovery, Bradley had said that the $600 was advanced to Sproule in 1916, but in his cross-examination he explains that upon looking up the bank records he found he was mistaken and that the loan was made in 1914.

The manager of the Standard Bank says that the bank records shew that in December, 1912, Sproule was indebted to the bank upon a note endorsed by one Wilson for $600, and that this was renewed from time to time, the debt being finally paid on the 26th July, 1914. One peculiar feature about this transaction is that the bank records shew that Bradley's name appeared in the liability record on the occasion of the last renewal. Bradley does not explain this, but he says that the reason Sproule had to have the money was that Wilson refused to endorse any further renewals, and it may be that Bradley endorsed for Sproule pending the raising of the money. The records of the Home Bank shew an advance of $300 to Bradley in July, 1914, and Howard Bradley, his brother, says that he went to the bank in Oshawa and got $300 for his mother in the summer of 1914. The elder Mrs. Bradley is now dead, so that it is not possible to corroborate Luther Bradley's statement that he borrowed $300 from his mother. Phœbe Bradley says that the deed was handed to her husband and herself, and was kept in a box in a clothes closet in their bedroom. She corroborates her husband as to their having supported her father and mother during the past 4 years.

It was agreed by counsel that the examination for discovery of Mrs. Sproule should be treated as evidence given by her at the trial. She says she knew nothing about the $600 advance or about the arrangement as to the deed. The first she knew about the deed was Mr. Sproule's telling her that he was going to give the place over to Luther and Phœbe, and the latter were to support them while they lived. Nothing was said then about the $600 loan. Mr. Hart, the conveyancer who drew the deed and witnessed its execution, says he drew it upon instructions received from Mr. Sproule. Nothing was said to him about the $600.

Bradley says he knew nothing of Sproule's fur business, that he knew nothing of Sproule's having any debts until after the deed had been signed, and that it was about two years ago that he first learned that Sproule owed Dawson some money. But he admits on cross-examination that he wanted to get the house for his wife because he was afraid he and his wife might lose it and also that he wished to secure the $600.

On the 20th July, 1920, after Sproule's death, the property was conveyed to one Johnston for $3,000. There was some correspondence between the solicitors for the parties to this action a few days before this, and it is suggested that the sale to Johnston was hurried through to avoid the issue of the writ and the registration of a certificate of *lis pendens*. Bradley denies this and says that the negotiations for the sale had begun 10 days after Sproule's death, but that they did not wish to close with John-

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ston until they had succeeded in getting another house in Orillia, where the Bradleys now live with Mrs. Sproule.

If Bradley were seeking to establish a claim to the $600 which he says he advanced to Sproule in 1914, against Sproule's estate, he could not succeed, because there is not in my judgment sufficient corroboration of his statement to establish the claim. The evidence of the bank manager that a note for $600, upon which Bradley and Sproule were liable, was paid in 1914, adds no weight to Bradley's statement whatever, as it does not appear that it was Bradley who made the payment. Mrs. Bradley says that she remembers Bradley speaking to her about the $600 and she remembers a note for $600 being put in the box in which she and Bradley kept their papers, but she does not identify the note in any way and does not say that it was Sproule's note.

Section 12 of the Evidence Act (R.S.O. 1914, ch. 76) requires corroboration in an action "against the heirs, next of kin, executors, administrators or assigns of a deceased person." This is not an action of that character, but the provisions of sec. 12 are in reality a declaration of the law and practice which had prevailed prior to the legislation. There was some doubt in England (where the rule has not been made the subject of legisation, as it has been here) as to whether the rule was one of law or of practice, but it seems now to be regarded as one of practice. Notwithstanding the fact that this is not an action by or against the estate of a deceased person, the principle applicable to the weight is to be given to Luther Bradley's uncorroborated statement as to the advance or payment of $600 to the deceased, in a contest with the creditors of the deceased, ought to be precisely the same as if the claim were against the estate of the deceased. And I find that this rule has been applied in cases of this character: *Merchants Bank* v. *Clarke* (1871), 18 Gr. 594; *Morton* v. *Nihan* (1880), 5 A.R. 20.

There being therefore no evidence to corroborate Bradley as to the $600 advance, I am unable to consider it as any consideration whatever for the deed in question, which must stand, if it can stand at all, upon the alleged arrangement that the Bradleys would assume the whole obligation of maintaining the household during the lives of Mr. and Mrs. Sproule.

So far as the deed itself is concerned, it is a voluntary one. There is no covenant on the part of the grantee to maintain the Sproules, or even any implied obligation to do so. The provision that the grantor and his wife shall have and enjoy a comfortable and peaceable home on the lands is in reality nothing more than a reservation in their favour, and the covenant of the grantee to allow the Sproules to have and enjoy a comfortable

and peaceable home on the lands does not carry the reservation any further. There is not involved either in the reservation or in the covenant any consideration passing from the grantee to the grantor. The retention by Mr. and Mrs. Sproule of a comfortable and peaceable home is nothing more than an exception from the grant. The grantee takes what is left; she is not giving anything in exchange.

It is contended, however, by the defendants that the agreement to maintain the Sproules alleged to have been made in 1916 constituted sufficient consideration for the conveyance. As the deed itself does not express this consideration, it is important to examine carefully the evidence upon which the contention is based. Bradley says that the arrangement was made between himself and Sproule in the early part of 1916. In making the bargain it may be assumed that Bradley was acting for his wife, to whom the lands were ultimately conveyed. There is nothing in her evidence which really corroborates her husband's story as to the bargain. It is true that she says that a change took place in the household arrangements but her evidence does not connect that fact with any arrangement that her father was to convey the land to her. Mrs. Sproule, in her examination for discovery, which by agreement was treated as evidence, says that she knew nothing about any arrangement until the spring of 1917, when she was asked to join in executing the deed; that her husband came in two or three hours before Mr. Hart, the conveyancer, came, and told her that Mr. Hart was coming, and then he said, "I am going to give the place over to Luther and Phœbe and they are to support us while we live."

Later she says that her husband did not say why he was making it over to Bradley and his wife; "he said he was making it over and we were to have a comfortable living while we lived with them." She knew nothing as to the $600 loan. Asked as to the change in the arrangements, she says that the taking over of the complete burden of the household expenses by the Bradleys followed the execution of the deed, but she admits that her memory is weak in regard to that. Her evidence in that respect contradicts that of Bradley, who says the change in the arrangement took place in 1916.

Apart from Mrs. Sproule's statement as to what her husband told her when she was asked to sign the deed, there is no corroboration of Bradley's evidence as to the agreement to maintain the Sproules being made the consideration for the promise by Sproule to convey the lands to his daughter. The necessity for corroboration does not rest upon quite the same footing as that required when proving a claim against the estate of a deceased

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person, which has already been discussed with regard to the alleged $600 advance, but upon the principle to which effect was given in *Koop* v. *Smith* (1915), 25 D.L.R. 355, 51 Can S.C.R. 554, that when a conveyance between near relations is impeached as being a fraud on creditors, and the circumstances attending its execution are such as to arouse suspicion, the Court may, as a matter of prudence, exact corroborative evidence in support of the reality of the consideration and the *bona fides* of the transaction. If the alleged bargain had been made simultaneously with the execution of the deed, Mrs. Sproule's evidence might have afforded some corroboration of it, but the bargain is alleged to have been made the year before, and Mrs. Sproule knew nothing of it. I find it difficult to accept her evidence as sufficiently corroborating Bradley's story, in view of all the surrounding circumstances. Bradley alleges a definite agreement in 1916, the terms of which were explicit. Notwithstanding that, he accepts from Sproule a year later, a deed which does not incorporate all the terms of the agreement and which on its face is a purely voluntary conveyance. The burden of shewing the real nature of the transaction which rests upon the defendants is, in my judgment, increased by the fact that, with all the terms of the bargain in mind, the grantee does not insist upon incorporating them in the deed, but accepts a deed which is silent as to the obligation to maintain the Sproules. Bradley admits that one of his reasons for accepting the deed was that he was afraid he and his wife might lose the property. While the existence of a desire to prevent the property from falling into the hands of creditors is not in itself a ground for setting aside a conveyance which can be otherwise supported (*Gibbons* v. *Tomlinson* (1891), 21 O.R. 489, at p. 497, and *Bank of Montreal* v. *Stair* (1918), 44 O.L.R. 79, at p. 83, 46 D.L.R. 718), yet when the evidence of the consideration upon which the grantee seeks to support a conveyance, voluntary on its face, is so weak as it is here, the desire to secure the property may well be regarded as the real motive for the transaction.

For these reasons, I hold that the defendants have failed to establish that there was any consideration for the conveyance, and that the same was voluntary and was given with intent to defeat, delay, and hinder the plaintiff and the other creditors of the deceased, and that the $3,000 for which the lands were sold by the defendants is an asset of the estate of the deceased available for the benefit of the plaintiff and other creditors of the deceased. The defendants Phœbe Bradley and Luther Bradley should be directed to pay the sum of $3,000 with interest from the date when they received it, into Court, and there should be

a reference to the Local Master at Lindsay to receive and adjudicate upon the claims of the plaintiff and the other creditors of the deceased entitled to the benefit of this judgment, and to report. The claim of Jane Ann Sproule, the widow of the deceased, to her dower interest in the proceeds of the sale, must be preserved and be dealt with by the Local Master, and this judgment should not prejudice the defendants upon the reference as to any objections they may take that all or any portion of the claim of any creditor is not entitled to the benefit of this judgment, on the ground that it arose subsequent to the conveyance in question.

The costs of the trial will be paid by the defendants. The costs of the reference will be dealt with by the Master.

J. M. Ferguson, K.C., for appellants.

R. J. McLaughlin, K.C., and *J. E. Anderson*, for respondents.

MEREDITH, C.J.C.P.:—The direct effect of the deed in question was to transfer to the male defendant all the property, of any real value, of his father-in law, leaving nothing for creditors, present or future, with the exception of the father-in-law's bankers, who were to be or had been paid $600 by the son-in-law.

Commonly, and in such transactions more so, the parties to such a transaction should be held to have had the intention to do that which was the result of it; that is, have intended to defeat creditors: and so the judgment in question should stand: see *Spirett* v. *Willows* (1864), 3 DeG. J. & S. 293; and *Freeman* v. *Pope* (1870), L.R. 5 Ch. 538.

But, quite apart from such imputation, and apart from anything that the testimony discloses, the case seems to me to be a plain one of intent to defraud creditors.

The property in question was the home of the father-in-law; and he and his wife, for many years and up to the time of his death, lived there. For several years before the making of the deed in question their daughter and her husband—the main defendants in this action—had lived with them; and, after the making of the deed until the father-in-law's death, there was no apparent change in that state of affairs. The father-in-law was not decrepit, nor was there anything in his mental or physical condition that made any change in that state of affairs necessary. He had kept and still continued to keep a small retail fur "store:" a business which the son-in-law is obliged to describe as precarious—to make it appear that the father-in-law's large indebtedness at the time of his death is attributable to subsequent losses in it.

Nothing in any of the other circumstances of the case shew

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any cause for the transfer of the property; except that which all the circumstances point to—that the purpose was to save the property from creditors.

The fact that the bankers were to be paid $600 gives no support to the deed: the bankers had to be pacified to enable the father-in-law to carry on his business: and a mortgage would have been the usual and proper way of securing the bankers, or the son-in-law if he demanded security.

The assertion that the son-in-law was to support his father-in-law and mother-in-law is opposed to the plain words of the deed and to all the circumstances of the case and is quite as unbelievable by me as it was by the trial Judge. If that were the consideration for the deed, what are we to think of all the parties to it and of the conveyancer who drew it, the plainly expressed consideration being natural love and affection only?

If the man were feeble in mind or body, too old or too ill to look after his own affairs, there might be some ground for giving some effect to a repudiation of the plainly expressed purposes of the deed, but when he was mentally and bodily able to continue carrying on his mercantile business and to incur debts just as he had done before, I must decline to give any weight to such a repudiation.

The case, even thus far only, seems to me to be a very plain one of a deed made for the purpose of defeating creditors, present and future: of keeping the property in the family in case creditors should desire it for the payment of their debts. What other reason could there be? In the ordinary course of events the family would have continued to live together and the father-in-law would have disposed of his property by his will: not have denuded himself and his wife of all they had, and have left them dependent upon the charity of their daughter and her husband, who, with the deed as it is, could very easily have defended themselves against any claim for maintenance; though probably not against an action to set aside the deed on the ground of improvidence.

Then, coming to the testimony adduced at the trial, we find that these views of the transaction are substantiated by the son-in-law himself, who, in the most unmistakable manner possible, swore, at the trial, that the deed was made for the purpose of defeating his father-in-law's creditors: what reason, what excuse indeed, can there be for further discussion?

I am in favour of dismissing the appeal; and do not perceive how any useful purpose would be gained in discussing the reasons given by the trial Judge, which, though not expressed just as I think would have been best, are, in my opinion, gener-

ally speaking, right. The learned Judge did not say that corroboration was necessary to support the transaction in question: he did say that if the defendant Bradley was suing to recover the money said to have been paid by him to the bank for the now deceased father-in-law at his request, corroboration would be necessary.

RIDDELL, J.:—Upon the argument of this appeal I was inclined to think that sufficient was made to appear to support the transaction in question, when properly interpreted.

But a careful and repeated perusal of the evidence has convinced me that the defendant has himself by his testimony made it impossible.

I do not agree with the somewhat stringent view of my learned brother Orde as to the necessity of corroboration in this case; but it is unnecessary here to discuss the law in that regard, as in any aspect of the defendants' evidence, the appeal fails.

MIDDLETON, J.:—Appeal from the judgment of Mr. Justice Orde, pronounced at the trial of the action, setting aside the conveyance complained of.

I have considered this matter with great care, because there was much in the argument of Mr. Ferguson calling for careful consideration. In the result, however, I have come to the conclusion that the appeal should be dismissed.

The conveyance is dated the 17th April, 1917, and purports to be in consideration of parental love and affection and the sum of $1 of lawful money. There is no provision for maintenance. At the time of the conveyance, there is no doubt the grantor was hopelessly insolvent. In the statement of defence filed, the defendant sets up that in August, 1916, he agreed to advance to his father-in-law $600 to clear his then existing debts, and that he also agreed to maintain his father-in-law and his wife, for the term of their natural lives.

The evidence discloses that the advance of $600 was not made in 1916, but in 1914, and the evidence as to the obligation to support and maintain is most unsatisfactory.

My learned brother has based his judgment largely upon what I think is an erroneous view of the law, holding that in actions such as this, where the grantor is dead, it is necessary for the evidence of the grantee to be corroborated. This is not the true effect of the statute. Corroboration is required where the action is by or against the estate of a deceased person. This action does not fall within the terms of the statute. The action is by the creditor of the deceased person against the grantee of the deceased person.

The true situation is, I think, well indicated in the judgment

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of Sir J. Hannen in the case of *In re Hodgson* (1885), 31 Ch. D. 177, where he says (at p. 183) :—

"Now, it is said on behalf of the defendants that this evidence is not to be accepted by the Court because there is no corroboration of it, and that in the case of a conflict of evidence between living and dead persons there must be corroboration to establish a claim advanced by a living person against the estate of a dead person. We are of opinion that there is no rule of English law laying down such a proposition. The statement of a living man is not to be disbelieved because there is no corroboration, although in the necessary absence through death of one of the parties to the transaction, it is natural that in considering the statement of the survivor we should look for corroboration in support of it; but if the evidence giving by the living man brings conviction to the tribunal which has to try the question, then there is no rule of law which prevents that conviction being acted upon."

I would also refer to the views of Sir W. N. James, L.J., in *Hill* v. *Wilson* (1873), L.R. 8 Ch. 888, at p. 900, where he indicated the great caution necessary before uncorroborated evidence can be accepted to alter or vary a written document, particularly where the other party to the transaction is dead.

In this case there are many circumstances of suspicion. It seems to me to be impossible to credit the statement that the $600 was advanced on the faith of the promise suggested. I think the truth may be more accurately gleaned from the evidence of the defendant's wife and of his mother-in-law, which fails to corroborate the evidence of the defendant in this respect. The more reasonable view is that the money having been advanced, as no doubt it was, and not having been repaid, the defendant became apprehensive of its loss, and that the conveyance was the result of an endeavour to protect the grantor from the risks of the mercantile business he was carrying on. The truth is substantially told by the defendant at p. 30 of the notes of evidence, where he says that he knew that the old gentleman was in a mercantile trading business, and then he is asked:—

"Q. You deliberately refrained from asking him whether he had any other debts or not? A. Mr. Sproule was a very close man about his business.

"Q. You wanted to get the house for your wife? Wanted to see that it was secured to her? A. I did.

"Q. That it would not be lost? A. I did.

"Q. And you were afraid if he went on in the fur business you might lose it? A. Yes.

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"Q. That was your reason for the anxiety to get this house? A. That and to secure my $600.

"Q. And to see that the house would not be lost through the risk of the fur business? A. Yes.

"Q. And secured to your wife at all hazards? A. Secured to my wife."

The defendant admits that at the time of the conveyance, and at the time of the advance of the $600, he knew that this left his father-in-law absolutely impecunious.

The appeal will therefore be dismissed with costs.

LATCHFORD and LENNOX, JJ., agreed in the result.

Appeal dismissed.

Re LINDERS LIMITED.

Ontario Supreme Court in Bankruptcy, Orde, J. October 7, 1921.

BANKRUPTCY (§II—19)—ARRANGEMENT UNDER SEC. 13—MOTION FOR APPROVAL OF COURT — OBJECTION BY CREDITORS — APPROVAL BY MAJORITY—REFUSAL OF ORDER.

A scheme of arrangement under sec. 13 of the Bankruptcy Act must have for its object the satisfaction of the debts owing by means of payment in cash either immediately or at some future date.

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

MOTION by an authorised trustee for an order, under sec. 13 of the Bankruptcy Act, approving a scheme of arrangement.

H. H. Davis, for the trustee and for Lindners Limited, the debtor company.

J. M. Bullen, for the Bowes Company Limited, a dissenting creditor.

I. F. Hellmuth, K.C., for the Union Bank of Canada, a secured creditor.

ORDE, J.:—The scheme of arrangement proposed by the insolvent company, in its modified form, as accepted by the majority of the creditors, is, shortly, that all the preferred and secured claims shall be duly paid by the debtor, and that the unsecured creditors shall be paid in full by the allotment and issue to them of fully paid-up preference shares either in the present debtor company or in a new company to be incorporated and organised to take over the business of the present company. Such preferred shareholders are to be entitled to elect four out of the five directors constituting the board.

The proposal was accepted by a majority of the creditors, but was opposed by certain creditors, among them the Bowes Company Limited.

The trustee reports in favour of the scheme; and the sole question to be determined is, whether or not the scheme is one which ought to be forced upon an unwilling creditor.

Ont.

S.C.

RE LINDNERS LIMITED.

Orde, J.

While the proposed scheme of arrangement may possibly result in the ultimate recovery by the unsecured creditors of a greater sum than they would realise if the assets of the company are disposed of immediately, such a result is wholly speculative, and it is fundamentally a startling proposition that an unwilling creditor should be forced to forego his debt and accept in lieu thereof shares of his debtor's capital stock. If it were possible to accomplish such a result, one would have supposed that there would be numerous precedents under the corresponding provisions of the English Act which would furnish some guide as to the principles to be applied in approving or disapproving of such a proposal. But there was not cited, nor have I found, any case in which such a proposal has been dealt with; so that my only conclusion is that no such drastic course of action was ever contemplated by the Act.

Several cases were referred to on the argument, all tending to shew that the Court will not approve of any scheme if it does not provide more for the creditors than would be realised by a winding-up of the estate of the insolvent debtor. It is argued here that a winding-up will realise absolutely nothing for the unsecured creditors. If that is true, then, on the face of it, giving them stock, even preferred stock, in the debtor company, gives them something of absolutely no value. Its value is merely speculative and problematical.

I do not think that in permitting an insolvent debtor to obtain a discharge, because that is what it means, by submitting and obtaining the approval of "a scheme of arrangement of his affairs," it was intended that any such scheme should not only arrange the affairs of the debtor, but should so arrange the affairs of the creditor as to wipe out his claim by absorbing his against his will into the debtor's business. The scheme of arrangement must, as in the case of a composition or an extension, have for its object the satisfaction of the debts by means of payment in cash either immediately or at some future date. The only means whereby the creditor who takes shares in the debtor company could be paid cash would be by a sale of the shares or by waiting for a distribution upon the winding-up of the debtor company. It may be impossible to sell the shares and the company may never be wound-up. The creditor consequently finds himself with a valueless security. He has in fact ceased to be a creditor altogether and has in a sense become associated with the business and affairs of the debtor. In my judgment, no such scheme was intended by the Act to be forced upon an unwilling creditor.

For these reasons, I must refuse to approve of the proposed scheme of arrangement.

GRAY v. QUINN.

Ont.

S.C.

Ontario Supreme Court, Masten, J. October 21, 1921.

LIMITATIONS OF ACTIONS (§IIIJ—151)—ACTION FOR CRIMINAL CONVERSATION—ALLEGED OFFENCE—PLEADINGS—STATUTE OF LIMITATIONS.

An action for criminal conversation is an action upon the case, and the period of limitation is six years, and not two.

[*Bailey* v. *King* (1900), 27 A.R. (Ont.) 703, (1901), 31 Can. S.C.R. 338 referred to.]

MOTION by the defendant for a judgment dismissing the action, upon the ground set out below.

H. S. White, K.C., for the defendant.

E. G. Long, K.C., for the plaintiff.

MASTEN, J.:—This was a motion made on behalf of the defendant for judgment in favour of the defendant dismissing this action with costs upon the ground that it appears from the admissions in the plaintiff's statement of claim and in the particulars thereof delivered and in the examination of the plaintiff for discovery, that the plaintiff's claim sought to be enforced in this action is barred by virtue of the Limitations Act, R.S.O. 1914, ch. 75, sec. 49.

The action is for criminal conversation. The writ of summons was issued in this action on the 4th April, 1921, and the plaintiff in his particulars supplementing his statement of claim sets up as the last act of adulterous intercourse the following: "On Friday, April 12th, 1918, at 3 o'clock in the afternoon, at the defendant's premises at Myrtle, Ontario, and on other occasions of which the exact dates are at present unknown to the plaintiff."

The question at issue between the parties turns on the construction of sec. 49 (1) of the Limitations Act, R.S.O. 1914, ch. 75, and more particularly on paras. (*g*) and (*h*) of that Act:—

"49. (1) The following actions shall be commenced within and not after the times respectively hereinafter mentioned: . . .

"(*g*) An action for trespass to goods or land, simple contract or debt grounded upon any lending or contract without specialty, debt for arrears of rent, detinue, replevin or upon the case other than for slander; within six years after the cause of action arose;

"(*h*) An action for a penalty, damages, or a sum of money given by any statute to the Crown or the party aggrieved; within two years after the cause of action arose."

The defendant contends that the plaintiff's claim is for damages within the meaning of para. (*h*) quoted, while the plaintiff's contention is that for the purpose of determining the ques-

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GRAY v. QUINN.

Masten, J.

tion as to the applicability of the Statute of Limitations the action falls within para. (*g*) as an action upon the case, and that the period of limitation is 6 years and not 2.

The first point raised by the plaintiff in answer to the defendant's contention is that this is an action upon the case within para. (*g*) above quoted, citing *Bailey* v. *King* (1900), 27 A.R. 703, affirmed in *King* v. *Bailey* (1901), 31 Can. S.C.R. 338, and *Chamberlain* v. *Hazelwood* (1839), 5 M. & W. 515. These cases make it clear that an action of criminal conversation is an action on the case. Further reference may be had on the point to Stephen on Pleading, 6th ed. (1860), p. 17, and to Maitland's Equity and the Forms of Action (1909), p. 361.

From these cases it seems to me to be plain that, upon the proper interpretation of para. (h), the damages there referred to are confined to damages "given by any statute," citing *Maitland* v. *Mackenzie* (1912), 6 D.L.R. 336; 13 D.L.R. 129, and *Thomson* v. *Lord Clanmorris*, [1900] 1 Ch. 718. The damages in this action are not given by any statute but by common law.

The views which I have expressed are fatal to the defendant's motion and render it unnecessary for me to pass upon the third point, namely, that, even if the period of limitation was two years, the general terms of the particulars which I have quoted above might permit the plaintiff to shew a cause of action arising within two years before the issue of a writ. I express no opinion upon this argument advanced by the plaintiff.

In the result, the motion is dismissed with costs, to be paid by the defendant to the plaintiff in any event of the action.

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