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ANNOTATED

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VOL. 32

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PATENT AND TRADE-MARK CASES

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CASES REPORTED

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TABLE OF ANNOTATIONS

(Alphabetically Arranged)

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Judicial Committee of the Privy Council, The Lord Chancellor, Viscount Haldane, Lord Atkinson, Lord Shaw and Lord Parmoor. November 2, 1916.

SCHOOLS (§ III A—55)—REGULATIONS AS TO TEACHERS AND LANGUAGE—DENOMINATIONAL PRIVILEGES—B.N.A. ACT.

The Ontario legislature has power under sec. 93 of the B.N.A. Act (*inter alia*) to regulate the manner of conducting schools in the province, to determine the qualifications required by the teachers, and to regulate the use of the French language in the schools; and a regulation of the Department of Education dealing with these matters does not conflict with those rights and privileges with respect to denominational schools which any class of persons had at the passing of the Act.

[See Annotation, 24 D.L.R. 492.]

Statement.

APPEAL from the Supreme Court of Ontario, 24 D.L.R. 475, 34 O.L.R. 335. Affirmed.

The judgment of the Board was delivered by the

Lord Chancellor

LORD CHANCELLOR:—This appeal raises an important question as to the validity of a Circular of Instructions issued by the Department of Education for the Province of Ontario on August 17, 1913.

The primary schools within the province are for the purposes of this circular separated into two divisions: public schools and separate schools, the latter, with which alone this appeal is concerned, being denominational schools, established, supported, and managed under certain statutory provisions to which reference will be made. The population of the province is, and has always been, composed both of English and of French-speaking inhabitants, and each of the two classes of schools is attended by children who speak, some one language some the other, while some, again, have the good fortune to speak both, so that distinction in language does not and cannot be made to follow the distinction in the schools themselves. The circular in some of its clauses deals with all schools, but its heading refers only to English-French schools, which are defined as being those schools, whether separate or public, where French is a language of instruction or communication, which have been marked out by the Minister for inspection as provided in the circular.

The object of the circular is to restrict the use of French in

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these schools, and to this restriction the appellants, who are the Board of Trustees of the Roman Catholic Separate Schools of the City of Ottawa, assert that they are not obliged to submit. The respondents, who are supporters of the same Roman Catholic schools, desire to maintain the circular of instructions in its integrity, and upon the appellants' refusal to abide by its terms the respondents instituted against them the proceedings out of which this appeal has arisen, asking, among other things, a mandatory order enforcing against the appellants obedience to the circular.

The Supreme Court of Ontario granted the injunction that was sought and their judgment was affirmed by the unanimous opinion of the Judges of the Appellate Division of the Supreme Court.

The appellants' defence of their action rests in substance upon the contention that the instructions were, and are, wholly unauthorized and unwarranted and beyond the powers of the Minister of Education, because they were contrary to, and in violation of, the B.N.A. Act of 1867.

In order to confer legislative authority upon the instructions an Act of the Province of Ontario (5 Geo. V. ch. 45) has been passed during the litigation, declaring that the regulations imposed were duly made and approved under the authority of the Department of Education and became binding according to the terms of their provisions on the appellants and the schools under their control, and containing consequential provisions. It is obvious that the validity of this statute depends upon considerations similar to those involved in determining the validity of the instructions, but the statute is the subject of another proceeding, and the present appeal is confined to the question whether the Minister of Education had power to issue the circular. The number of schools which are affected by the dispute is considerable, for of 192 Roman Catholic schools under the charge of the appellants, 116 have been designated English-French schools.

The material sections in the B.N.A. Act upon which the appellants rely are secs. 91, 92, and 93. Sec. 91 authorized the Parliament of Canada to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by the Act assigned exclusively to the legislatures of the provinces. Sec. 92 enumerates the classes of subjects in relation to which the Legislatures of the Provinces

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may exclusively make laws, and includes therein generally all matters of a merely local or private nature in the province. Sec. 93 deals specifically with education, and enacts that in and for each province the legislature may exclusively make laws in relation to education, subject and according to the provisions therein contained. It appears, therefore, that the subject of education is excluded from the powers conferred on the Parliament of Canada, and is placed wholly within the competence of the Provincial Legislatures, who again are subject to limitations expressed in four provisions. Provision (1) is in these terms:—

> Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law in the province at the Union.

Provision (3) contains an important safeguard, which gives an appeal to the Governor-General in Council from any Act or decision of any provincial authority affecting any right or privilege of the Protestant or Roman Catholic minority of the King's subjects in relation to education. Provision (4) provides machinery for making the decision of the Governor-General in Council effective. If a provincial law which seems to the Governor-general in Council requisite for the due execution of the provisions of the section is not made, or any decision of the Governor-General in Council is not duly executed by the proper provincial authority, then, and in every such case, and so far only as the circumstances of each case require, the Parliament of Canada may make remedial laws for the due execution of the provisions of this section, and of any decision of the Governor-General in Council under the section. These provisions contain a procedure of great value to the Protestant or Roman Catholic minority in relation to education. They do not affect or diminish whatever remedy the appellants have under provision (1), and cannot operate to give the Legislature of Ontario authority to legislate in matters specially excepted from their authority.

Accordingly it would require an Act of the Imperial Legislature prejudicially to affect any right or privilege reserved under provision (1), and if the regulations which are impeached do prejudicially affect any such right or privilege, to that extent they are not binding on the appellants.

There is no question that the English-French Roman Catholic Separate Schools in Ottawa are denominational schools to which

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the provision applies, and it has been decided by this Board that the right or privilege reserved in the provision is a legal right or privilege, and does not include any practice, instruction or privilege of a voluntary character which at the date of passing of the Act might be in operation (*City of Winnipeg* v. *Barrett*, [1892] A.C. 445).

Further, the class of persons to whom the right or privilege is reserved must, in their Lordships' opinion, be a class of persons determined according to religious belief, and not according to race or language. In relation to denominational teaching, Roman Catholics together form within the meaning of the section a class of persons, and that class cannot be subdivided into other classes by considerations of the language of the people by whom that faith is held. The appellants and the respondents, therefore, are members of the same class, but this fact does not affect the appellants' position on their appeal, for their case is that even to the class so determined there was preserved by the statute and vested in them as trustees rights or privileges which include the right of deciding as to the language to be used as a means of instruction; and the question, therefore, that arises, is, What were the rights and privileges that were protected by the Act, and were they invaded by the circular according to its true meaning?

Now it appears that at the date of the passage of the B.N.A. Act of 1867, a statute was in operation in Upper Canada by which certain legal rights and privileges were conferred on Roman Catholics in Upper Canada in respect to separate schools, and so far as the facts of this case are concerned this was the only source from which the rights and privileges could have proceeded.

This Act enabled any number of people, not less than five and being Roman Catholics, to convene a public meeting of persons who desire to establish a separate school for Roman Catholics, and for the election of trustees for the management of such schools; by sec. 7 it is enacted that the trustees of such schools should form a body corporate under the statute, should have power to impose, levy, and collect school rates or subscriptions from persons sending children to, or subscribing towards the support of, such schools, and should have "all the powers in respect of separate schools that the trustees of common schools have and possess under the provisions of the Act relating to common

schools." A special clause also related to the appointment of teachers, who, before the passing of this statute, had been arbitrarily appointed by Boards of Trustees, and this power was regulated and restricted by sec. 13, which provided that the teachers of the separate schools should be subject to the same examinations, and receive their certificate of qualification in the same manner as common school teachers; while sec. 26 provided that the schools should be subject to inspection, and should be subject also "to such regulations as may be imposed from time to time by the Council of Public Instruction for Upper Canada."

In order, therefore, to ascertain the true extent and limit of the powers conferred by this statute, it is necessary to see what were the powers enjoyed by trustees of the common schools. These are to be found in another statute of Upper Canada, 22 Vict. ch. 64, known as the Common Schools Act of 1859. This statute conferred upon trustees for common schools certain powers, the most important of which are to be found collected under several heads in sec. 79. A mere glance at this section will shew that such powers are undoubtedly wide. They include under sub-sec. 7 power to acquire school sites and premises, and to do what may seem right for procuring text-books and establishing school libraries, while sub-sec. 8 places in the hands of the trustees the determination of "the kind and description of schools to be established," the teachers to be employed, and generally the terms of their employment. These powers are, however, to some extent limited by sub-secs. 15 and 16, the first of which in effect requires that the text-books should be a uniform series of authorized text-books, while the latter compels the trustees to see that all the schools under their charge are conducted according to the authorized regulations.

Counsel for the appellants naturally place great reliance upon these provisions, and in the wider aspect of their argument they contend that "the kind of school" that the trustees are authorized to provide is a school where education is to be given in such language as the trustees think fit.

They urge that it was a right or privilege possessed with respect to denominational schools in 1867 in determining the number and kind of schools to say within what limits the French language is to be used; for, according to their contention, "kind of school" means a school where the French language, under the

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direction of trustees, may be used as a medium of instruction on terms not less favourable than the use of English. Their Lordships are unable to agree with this view. The "kind" of school referred to in sub-head 8 of sec. 73 is, in their opinion, the grade or character of school, for example, "a girls' school," "a boys' school," or "an infants' school," and a "kind" of school, within the meaning of that sub-head, is not a school where any special language is in common use.

The schools must be conducted in accordance with the regulations, and their Lordships can find nothing in the statute to take away from the authority that had power to issue regulations the power of directing in what language education is to be given. If, therefore, the trustees of the common schools would be bound to obey a regulation which directed that education should, subject to certain restrictions, be given in either English or French, the trustees of the separate schools would also be bound to obey a regulation of the same character affecting their school, provided that it does not interfere with a right or privilege reserved under the Act of 1867, *i.e.*, a right or privilege attached to denominational teaching.

The objections to the instructions which were urged before their Lordships, however, were not chiefly based on the allegation that they prejudicially affected in any special manner denominational teaching, but on the wider ground. Their Lordships appreciate the affection which the French-speaking residents in Ottawa feel for the French language; but it must not be forgotten that, although a majority of the supporters of the English-French separate schools in Ottawa are of French origin, there are other supporters to whom French is not the natural language. This fact has no doubt caused great difficulty in adjusting fairly as between the different inhabitants the natural rivalry as to the languages to be used in the education of the children, and the care with which this difficulty has been considered, is evidenced in the terms of a valuable report which is printed in the record, and to which their Lordships would direct attention:—

> As was stated in our former report, while all classes of the French people are not only willing but desirous that their children should learn the English language, they at the same time wish them to retain the use of their own language, and there is no reason why they should not do so. To possess the knowledge of both languages is an advantage to them. And the use of the English language instead of their own, if such a change should ever take

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place, must be brought about by the operation of the same influences which are making it all over this continent the language of other nationalities as tenacious of their native tongue as the French. It is a change that cannot be forced. To attempt to deprive a people of the use of their native tongue would be as unwise as it would be unjust, even if it were possible. In the British Empire there are people of many languages. The use of these does not affect the loyalty of the people to the Crown, and the English language remains the language of the Empire. The object of these schools is to make better scholars of the rising generation of French children, and to enable them to do better for themselves by teaching them English, while leaving them free to make such use of their own language as they please.

It therefore becomes necessary to examine closely the terms of the circular in order to ascertain the nature and extent of the restrictions it imposes. Unfortunately it is couched in obscure language, and it is not easy to ascertain its true effect. It opens with a definition of English-French schools, and it was argued on behalf of the appellants that even this definition was not within the power of the Department; but there is no weight in this objection, provided that the selected schools are so dealt with as not to impeach any legal right or privilege of the appellants. The second paragraph of the circular is important. The regulations and courses of study prescribed for the public schools, which are not inconsistent with the provisions of the circular, are applied to the English-French schools, with the following modifications:—

The provision for religious instruction and exercises in public schools shall not apply to separate schools, and separate school boards may substitute the Canadian Catholic readers for the Ontario public school readers.

These modifications bring the instructions into agreement with the provisions as to regulations affecting religious instruction in the Common Schools Act and the Separate Schools Act. The only reference to religious instruction to which their Lordships were referred in these statutes is sec. 129 of the former statute. This section provides that no persons shall require any pupil to read or study in or from any religious book or join in any exercise of devotion or religion objected to by his or her parents or guardian, and this provision preserves these rights. Indeed this clause, in their Lordships' opinion, indicates that the whole course of religious teaching in the separate schools is outside the operation of the circular, for the circular applies to public schools and separate schools alike and impartially, and if it contained provisions with regard to religious instruction in the public schools, by virtue of this clause those provisions would not apply to the separate schools; throughout the whole of the

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circular, however, there is nothing whatever to indicate that it is intended to have any application, excepting it may be in the case of public schools, to anything but secular teaching, and it is in this connection that clause 3 must be read. This is the paragraph which regulates the use of French as the language of instruction and communication, and it is against these provisions that the complaint of the appellants is mainly directed. The paragraph refers equally to public and separate schools, and directs that modifications shall be made in the course of study in both classes of schools, subject to the direction and approval of the chief inspector. In the case of French-speaking pupils, French, where necessary, may be used as the language of instruction and communication, but not beyond form 1, except on the approval of the chief inspector in the case of pupils beyond form 1, who are unable to speak and understand the English language. There are further provisions for a special course in English for French-speaking pupils, and for French as a subject of study in public and separate schools.

Mr. Bellcourt urged that so to regulate use of the French language in the separate Roman Catholic schools in Ottawa constituted an interference, and is in some way inconsistent with a natural right vested in the French-speaking population; but unless this right was one of these reserved by the Act of 1867, such interference could not be resisted, and their Lordships have already expressed the view that people joined together by the union of language and not by the ties of faith do not form a class of persons within the meaning of the Act. If the other opinion were adopted, there appears to be no reason why a similar claim should not be made on behalf of the English-speaking parents whose children are being educated in the Roman Catholic separate schools in Ottawa. In this connection it is worthy of notice that the only section in the B.N.A. Act, 1867, which relates to the use of the English and French languages (sec. 133), does not relate to education, and is directed to an entirely different subject-matter. It authorizes the use of either the English or French language in debates in the Houses of Parliament, in Canada, and the Houses of Legislature in Quebec, and by any person, or in any pleading or process in, or issuing from, any Court of Canada, and in and from all or any of the Courts of Quebec. If any inference is to be

drawn from this section, it would not be in favour of the contention of the appellants.

Further objections that are taken to the circular depend upon these considerations, that it interferes with the right to manage which the trustees possess, and that it further infringes a right on the part of the trustees to appoint teachers whose certificates are provided by a Board of whom the trustees can appoint one.

In their Lordships' view, there is no substance in either of these contentions. The right to manage does not involve the right of determining the language to be used in the schools. Indeed, the right to manage must be subject to the regulations under which all the schools must be carried on; and there is nothing in the Act to negative the view that those regulations might include the provisions to which the appellants object. If, therefore, the regulation as to which the trustees of the common schools were bound to carry on the class of school committed to their charge did, in fact, under the Act of 1859, enable directions to be given as to the medium of instruction, the power possessed by the trustees of the separate schools would have been subject to the same limitation, and the question as to interference with the powers of management does not arise as an independent question.

So far as the teachers are concerned the words of sub-sec. 8 of sec. 79 empower the trustees to determine the teacher or teachers; but this merely means that they are to be determined out of the number who are duly qualified, and it is for the Board of Education to impose what conditions they think fit as to the necessary qualification of such a teacher. Under the statute of 1859 the body for examining and giving certificates of qualification for the teacher was constituted by three members of the board of public instruction, including a local superintendent of the schools; and it is argued that, under the power of appointing the local superintendent—a power conferred on the trustees—the provisions in the circular, which impose as a necessary condition of qualification of the teachers that they must possess a knowledge of the English language, interfered with the trustees' right in this respect. To accede to this argument would involve the removal of the condition as to the necessary qualification of the teachers from the Board of Education. This might be a serious matter for the cause of education in the Province of Ontario; but

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there is no need to consider that the statute compels this view. Even assuming that the provision of sec. 96 as to the granting of certificates to teachers might be still revived; yet even then there is nothing to prevent the establishment of special conditions as conditions with which the teachers must comply before any such certificate can be given.

In the result, their Lordships are of opinion that, on the construction of the Acts and documents before them, the regulations impeached were duly made and approved under the authority of the Department of Education, and became binding according to the terms of those provisions on the appellants and the schools under their control, and they will humbly advise His Majesty to dismiss this appeal.

The appellants will pay the costs. *Appeal dismissed.*

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OTTAWA SEPARATE SCHOOL TRUSTEES v. CITY OF OTTAWA. OTTAWA SEPARATE SCHOOL TRUSTEES v. QUEBEC BANK.

Judicial Committee of the Privy Council, The Lord Chancellor, Viscount Haldane, Lord Atkinson, Lord Shaw and Lord Parmoor. November 2, 1916.

CONSTITUTIONAL LAW (§ II A 1—154)—DENOMINATIONAL SCHOOLS—REGULATION—ULTRA VIRES.

The status of the Board of Trustees of the Roman Catholic Separate Schools of the City of Ottawa depends on the provisions contained in the Separate Schools Act, 1863 (U.C.), and is protected by sub-sec. (1) of sec. 93 of the B.N.A. Act. That status cannot be prejudicially affected without an Act of the Imperial legislature, and therefore sec. (3) of 5 Geo. V. ch. 45 (1915), (Ont.) authorizing the Minister of Education to suspend or withdraw all the rights and powers of the Board is *ultra vires* the Legislature of Ontario.

Statement. APPEAL from 30 D.L.R. 770. Reversed.

The judgment of the Board was delivered by the

Lord Chancellor LORD CHANCELLOR:—The question raised in these consolidated appeals is whether sec. (3) of 5 Geo. V. ch. 45 (1915), Ontario, is valid and within the competency of the provincial legislature. The appellants contend that this section prejudicially affects certain rights and privileges with respect to denominational schools reserved under provision (1) of sec. 93 of the B.N.A. Act, 1867.

The preamble of the Act of 1915 recites that an action was then pending in the Supreme Courts of Ontario between R. Mackell and others and the appellants. This action has now been finally decided adversely to the appellants. Their Lordships see no reason to anticipate that this judgment will not be accepted and obeyed. There is a further recital that the appel-

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lants have failed to open the schools under their charge at the time appointed by law, and to provide or pay qualified teachers for the said schools, and have threatened at different times to close the said schools and to dismiss the qualified teachers duly engaged for the same. So far as this appeal is concerned, the accuracy of these recitals was not questioned by the counsel for the appellants. Sec. (1) of the Act does not come into question in this appeal; sec. (2) is a declaration of the duties of the appellants. Sec. (3) is as follows:—

If, in the opinion of the Minister of Education, the said Board fails to comply with any of the provisions of this Act, he shall have power with the approval of the Lieutenant-Governor in Council—

(*a*) To appoint a commission of not less than three nor more than seven persons.

(*b*) To vest in and confer upon any commission so appointed all or any of the powers possessed by the Board under statute or otherwise, including the right to deal with and administer the rights, properties, and assets of the Board, and all such other powers as he may think proper and expedient to carry out the object and intent of this Act.

(*c*) To suspend or withdraw all or any part of the rights, powers, and privileges of the Board, and whenever he may think desirable to restore the whole or any part of the same, and to revest the same in the Board.

(*d*) To make such use or disposition of any legislative grant that would be payable to the said Board on the warrant of any inspector for the use of the said schools, or any of them, as the Minister may in writing direct.

The Acting Minister of Education expressed the opinion that the trustees had failed, and were failing to comply with the provisions of the Act, and submitted the appointment of a commission for the approval of the Lieutenant-Governor in Council. The respondent commission was duly appointed under an Order in Council on July 25, 1915.

The powers conferred on the Minister of Education in subsecs. (*b*) and (*c*) of sec. 3 are expressed in very wide terms. At the instance of the Minister, with the approval of the Lieutenant-Governor in Council, all or any part of the right, powers, and privileges of the appellant Board may be suspended or withdrawn without limitation in time, and only subject to restoration at the discretion of the Minister. The powers withdrawn from the appellant Board may be vested in and conferred upon an appointed commission, a nominated body, in the selection of which the ratepaying supporters of the Roman Catholic Separate Schools have no voice. There is no exception to the universality of the extent to which all the right, powers, and privileges of the appel-

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lant Board may be suspended or withdrawn and vested in and conferred upon this nominated body. Is this legislation consistent with provision (1) of sec. 93 of the B.N.A. Act, 1867?" Sec. 93 enacts that in and for each province the legislature may exclusively make laws in relation to education, subject and according to certain specified provisions. This section has been recently under the consideration of their Lordships in the case of the appellant Board and R. Mackell and others. The effect of the section and of secs. 91 and 92 is to give an exclusive jurisdiction to the legislature of each province to make laws in reference to education subject to the specified provisions. The Parliament of Canada has no jurisdiction in relation to education, except under the conditions in provision (4), which are not in question in this appeal. The rights or privileges reserved in provision (1) cannot be prejudicially affected without an Act of the mperial legislature.

There is no question that the impeached section of the Act of 1915 does authorize the Minister of Education to suspend or withdraw legal rights and privileges with respect to denominational schools. The case of the respondent commission is that the appellant Board does not come within the category of "a class of person," and that no right or privilege with respect to denominational schools, which the appellant Board had by law in the province at the Union, has been prejudicially affected. It was argued that the protection given by provision (1) related to rights or privileges possessed by all the adherents of the Roman Catholic schools in the province, and that the appellant Board only represented the minority of a larger class. The status of the appellant Board depends on the provisions contained in the Separate Schools Act, 1863. Section (2) of that Act confers the right of electing trustees for the management of a separate school for Roman Catholics, not on all the adherents of Roman Catholic schools in the province, but on any number of persons, not less than five, being heads of families and freeholders, and householders, resident within any school section of any township, or corporate village, or town, or within any ward of any city or town, and being Roman Catholics. The right of electing managers is thus conferred on the supporters of a separate school or schools for Roman Catholics within one or other of the designated areas. In the present case the appellant Board are the elected trustees

for the management of Roman Catholic Separate Schools within the city of Ottawa. They represent the supporters of the Roman Catholic Separate Schools within the area of the city, and as such elected trustees enjoy the right of management which was conferred under the Separate Schools Act, 1863. Apart, therefore, from any words of limitation or any implication to be drawn from the context, the appellant Board represent a section of the class of persons who are within the protection of provision (1). Their Lordships can find neither limiting words nor anything in the context which would imply that they are excluded from the benefit of the provision. They are not the less within the provision that any other Board similarly constituted would have similar rights and privileges. They would be entitled to the protection of the provision, though they were the only Board of trustees in the province constituted under the Separate Schools Act, 1863. But if the appellant Board represent people who come within the protection of provision (1), it is difficult to appreciate the argument that no legal right or privilege existing in the province at the Union with respect to denominational schools has been prejudicially affected. It is possible that an interference with a legal right or privilege may not in all cases imply that such right or privilege has been prejudicially affected. It is not necessary to consider such a possibility, and this question does not arise for decision in the appeal. The case before their Lordships is not that of a mere interference with a right or privilege, but of a provision which enables it to be withdrawn *in toto* for an indefinite time. Their Lordships have no doubt that the power so given would be exercised with wisdom and moderation, but it is the creation of the power and not its exercise that is subject to objection, and the objection would not be removed even though the powers conferred were never exercised at all. To give authority to withdraw a right or privilege under these conditions necessarily operates to the prejudice of the class of person affected by the withdrawal. Whether or not a different policy might have been preferable, either in the opinion of the provincial legislature, or in that of the Courts, is not a relevant consideration. It was argued that no evidence on behalf of the appellant Board had been called to prove that the withdrawal of their rights, powers, and privileges, operated to their prejudice. In the opinion of their Lordships no such evidence was necessary.

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For the purpose of these appeals it is unnecessary to say more. The decision depends on a question of construction. During the argument the counsel for the respondent commission pressed on their Lordships the difficulty of providing any adequate alternative in order to ensure the proper education of the children of Roman Catholic parents in the city of Ottawa. Their Lordships realize the great importance of this consideration, and there is no doubt that considerable temporary inconvenience must be involved if the appellant Board, as representatives of the supporters of the Roman Catholic Separate Schools in Ottawa, fail to open the schools under their charge at the time appointed by law, and to provide and pay qualified teachers. It may be pointed out, however, that the decision in this appeal in no way affects the principle of compulsory free primary education in the province established under the School Law of 1850, and that if the appellant Board and their supporters fail to observe the duties incident to the rights and privileges created in their favour, the result is that the children of Roman Catholic parents are under obligation to attend the common schools, and thus lose the privileges intended to be reserved in their favour under provision (1) of sec. 93 of the B.N.A. Act, 1867. The history of this question is thus accurately summarised in the judgment of Meredith, C.J.O. (30 D.L.R. 770 at 774):—

> The ground upon which was based the claim of the Roman Catholics to separate schools was the injustice of compelling them to contribute to the support of schools to which, owing to the character of the instruction given in them, they could not for conscientious reasons send their children because in their view it was essential to the welfare and proper education of their children that religious instruction according to the tenets of the Roman Catholic Church should be imparted to them as part of their educational training.
>
> This injustice, it was claimed, was greatly aggravated when, by the School Law of 1850, a system of compulsory free primary education in schools supported partly by Government grants, but mainly by taxation, to which all ratepayers were liable, was established.

Their Lordships do not anticipate that the appellants will fail to obey the law now that it has been finally determined. They cannot, however, assent to the proposition that the appellant Board are not liable to process if they refuse to perform their statutory obligations, or that in this respect they are in a different position from other Boards or bodies of trustees entrusted with the performance of public duties which they fail or decline to perform.

From what has been said it appears that in their Lordships' view the Act as framed is *ultra vires*, and accordingly liberty will be reserved to the plaintiffs, should occasion arise, to apply to the Supreme Court of Ontario for relief in accordance with this declaration, but their Lordships do not anticipate that it will be necessary for the plaintiffs to avail themselves of this right.

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Their Lordships will humbly advise His Majesty that the appeals be allowed with costs to be paid by the respondent commission here and below, and the respondent commission will pay the costs of the Corporation of the City of Ottawa and of the Quebec Bank. *Appeals allowed.*

Re BECK.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, and Cameron, JJ.A. November 27, 1916.

HABEAS CORPUS (§ I D—24)—DISCHARGE OF PRISONER COMMITTED FOR CONTEMPT—SCOPE OF JUDGMENT.

A Superior Court Judge, hearing a motion to discharge from custody a person who had been sentenced for contempt of court and brought before him on a *habeas corpus* writ, exceeds his powers when he directs that the warrant of commitment should be quashed, the only power he has on such an application is to discharge from custody the person produced before him under the writ, if in his opinion that person was unlawfully detained. Having made an interim order adjourning the application and discharging the applicant from custody without making any order for bail the applicant was thereby discharged permanently, the purpose of the writ accomplished, the proceeding at an end, and the body of the person already released could not be retaken into custody for further enquiry under the *habeas corpus* writ.

[*Re Sproule*, 12 Can. S.C.R. 140, distinguished.]

Statement.

APPEAL from an order made by Haggart, J.A., releasing accused from jail, and setting aside commitment of Commissioner Galt for alleged contempt of Court in connection with published reflections on the Commissioner published in "The Winnipeg Telegram" re Agricultural College Royal Commission, Beck being managing editor of the newspaper referred to.

C. P. Wilson, K.C., and *J. Allen*, D.A.G., for Crown.

F. M. Burbidge, for respondent.

Perdue, J.A.

PERDUE, J.A.:—On September 23, 1916, the Hon. A. C. Galt, the Commissioner named in a Commission issued by His Honour the Lieut-Governor of Manitoba, under R.S.M. 1913, ch. 34, made the following order:—

PROVINCE OF MANITOBA.

To wit: In the matter of An Act respecting Commissions to make enquiries concerning public matters, being ch. 34 of R.S.M. 1913.

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And in the matter of a Royal Commission appointed to enquire into and investigate all matters pertaining to the Manitoba Agricultural College, in the Rur. Mun. of Fort Garry, in the Province of Manitoba.

To John Pyniger, deputy sheriff of the eastern judicial district of the Province of Manitoba, and to the keeper of the common jail of the said eastern judicial district at Winnipeg: Whereas Edward Beck, of the City of Winnipeg, editor, a witness duly subpœnaed before me, the undersigned commissioner, at the sittings of the said Royal Commission, holden in the City of Winnipeg on Saturday September 23, 1916, did as such witness refuse to be sworn and to answer lawful questions put to him by me;

And whereas I did adjudge the said Edward Beck to be guilty of contempt, and for such contempt did order that the said Edward Beck be committed to the common jail of the eastern judicial district of the Province of Manitoba at the City of Winnipeg for the period of 1 month and to pay a fine in the sum of $500.

Therefore I do order that the said Edward Beck do stand committed to the said common jail for a period of 1 month from to-day and to pay a fine in the sum of $500 for his contempt aforesaid;

And I do order you, the said John Pyniger, to convey him, the said Edward Beck, into the custody of the keeper of the said common jail, and you, the said keeper of the said common jail, him safely to keep for the said period of 1 month, and for so doing this shall be your warrant and authority.

Dated at the City of Winnipeg, in the Province of Manitoba, September 23, 1916. (Signed) A. C. GALT, *Commissioner.*

Pursuant to this order the said Edward Beck was taken in custody and lodged in the jail above mentioned. At the same time the commissioner issued orders of commitment against 3 other persons who were also apprehended and lodged in the same jail, but the proceedings in this Court do not include or relate to these persons. On the same day Haggart, J., of this Court, sitting in Chambers as a Judge of the Court of King's Bench, issued a writ of *habeas corpus* directed to the keeper of the jail, to bring forthwith before him, the said Judge, the body of Edward Beck, together with the cause of his being taken and detained. This writ was tested in the name of the Chief Justice of the Court of King's Bench. Mr. Beck was immediately brought before Haggart, J., by the jailer, who produced the warrant, but did not make any written return to this writ. The Judge thereupon made an order, of which the following is a copy omitting only the style of cause:—

Upon the application of counsel for the applicant, upon hearing read the writ of *habeas corpus* herein and the warrant under which the applicant is detained in the common gaol of the eastern judicial district, and upon hearing what was alleged by counsel aforesaid:

It is ordered that the further proceedings under the said writ be and the same are hereby adjourned to come up before Haggart, J., at his Chambers in

the Court House in the City of Winnipeg on Saturday September 30, 1916, at the hour of 11 o'clock in the forenoon;

And it is further ordered that the applicant be released from custody.

(Signed) ALEX. HAGGART, *Judge*.

Immediately upon the making of this order, Mr. Beck was released from custody. No bail was required or furnished. There was, however, a memorandum written at the foot of the order and below the Judge's signature, and signed by Mr. Manning, the solicitor who applied for the writ. By this writing the solicitor undertook that the applicant would appear before the Judge on September 30 at the hour mentioned in the order.

All the proceedings down to the making of the above order were *ex parte* and without notice to the officials of the Crown or to the commissioner or any person representing him.

On September 30, Haggart, J., enlarged the matter until October 6, when counsel for the applicant made his argument and a further adjournment was ordered until October 10, when the Judge delivered a judgment. Counsel for the commissioner appeared when the matter came up on September 30, and took objection that the applicant was not in custody, but declined to take part in the argument. Counsel for the commissioner then withdrew and did not again appear during the proceedings.

In giving judgment on October 10, Haggart, J., said:—

There was no contempt which even a Court could punish in a summary way. The commissioner had not the jurisdiction, and even if he had the jurisdiction of a Court, the proceedings were unwarranted. These men should have had an opportunity given them to shew that they were not liable to the imprisonment and fine inflicted, which they could have done if I am correct in my conclusions.

It is not necessary to consider the other grounds which were urged by Mr. Andrews. The foregoing findings dispose of the matter.

The four warrants of commitment should be quashed and the prisoners discharged from custody.

In connection with the above findings, it is to be noted that the contempt alleged on the face of the warrant is that the said Edward Beck "did as such witness refuse to be sworn and to answer lawful questions" put to him by the commissioner.

No order was issued in pursuance of the judgment delivered on October 10, and Mr. Beck was released from custody and remained and still remains at large solely by virtue of the order made and issued on September 23.

The application before this Court was made by a rule *nisi* obtained by counsel for the Crown calling upon Mr. Beck to

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shew cause why the writ of *habeas corpus* and all proceedings thereunder should not be quashed on the grounds that the same were not according to law, and because he was summarily released from custody on September 23. The application was based upon the authority of *Re Sproule*, 12 Can. S.C.R. 140. It was admitted that no appeal lay from an order discharging a prisoner under a *habeas corpus*. See *Cox* v. *Hakes*, 15 App. Cas. 506. In *Re Sproule* an application was made to the Supreme Court of Canada to set aside a writ of *habeas corpus* and all proceedings thereunder as having been issued improvidently. The writ had been issued by Henry, J., one of the Judges of the Supreme Court of Canada, to release a prisoner convicted of murder in British Columbia and confined in jail in that province awaiting execution. The writ was tested in the name of the Chief Justice of the Supreme Court of Canada. Henry, J., in pursuance of the writ, made an order for discharge although the body of the prisoner remained in jail in British Columbia, and was not produced before the Judge. The application was entertained by the Court and the writ was quashed, not by way of appeal, but because, as it was held, every superior Court has, as an incident to its jurisdiction, an inherent right to inquire into and judge of the regularity or abuse of its process: Per Ritchie, C.J., p. 180; *per* Taschereau, J., p. 242.

It was contended that the application in the case at bar might be made to this Court because it is

> vested with and shall exercise all the rights, powers and duties which immediately prior to July 23, 1906, were held, exercised and enjoyed under and by virtue of the King's Bench Act, or by any other statute of this province or of the Dominion of Canada, by the Court of King's Bench sitting *en banc* and as a Court of Appeal from the judgment, decision, order or decree of a single Judge: Court of Appeal Act, R.S.M. 1913, ch. 43, sec. 6.

It was urged that the inherent jurisdiction of the Court of King's Bench over the orders made by Judges of that Court sitting singly and over its process was now to be exercised by the Court of Appeal. But counsel for Beck urged that sub-sec. 3 of the above sec. 6 preserved the jurisdiction of the Court of King's Bench to sit *en banc* for the hearing of matters other than appeals. This application, therefore, it was urged, not being an appeal but a motion invoking the inherent powers of the Court of King's Bench, should be made to that Court *en banc*. The question is one of much difficulty, and is now raised for the first time. I

think, however, that this rule can be disposed of without deciding the point raised as to the respective powers of the Court of Appeal and of the Court of King's Bench sitting *en banc*.

I will assume that the Judge had power as an ex-officio Judge of the Court of King's Bench to direct the issue of a writ of *habeas corpus* returnable immediately before himself in Chambers. See *Re Sproule*, 12 Can. S.C.R. 140 at 183; *Leonard Watson's* case, 9 Ad. & El. 731, 112 E.R. 1389; Bacon's Abr., vol. 4, p. 592; Wilmot's Opinions, p. 777. The writ issued in the present matter was the common law writ. That was the only form of *habeas corpus* that could be issued in a case like the present one. The law and practice governing such a proceeding was that as it existed in England on July 15, 1870: Crim. Code, R.S.C. 1906, ch. 146, sec. 12. A party in custody in execution under a sentence for a time certain is not bailable, unless there is a statutory provision providing for bail in such case: *R.* v. *Brooke*, 2 Term R. 190; *Ex parte Wilmott*, 30 L.J.M.C. 161; *Ex parte Lees*, E. Bl. & E. 828, 120 E.R. 718. I do not know of any statutory provision for bail in a case of contempt. But the power to grant bail need not be discussed because no bail was granted or furnished in the present case. The undertaking written at the foot of the order and signed by Mr. Beck's solicitor was, apparently, a gratuitous act on the part of the solicitor, which does not appear to have been performed in pursuance of any direction of the Judge. The undertaking expired on September 30, and there was no undertaking shewn to produce the body of the applicant before the Judge at any subsequent time. The contention that the undertaking given by the solicitor was in effect a giving of bail and that the applicant was in fact "in the custody of the Court" is without foundation. The point is not open to serious argument. The result, therefore, was that by the order of September 23, Mr. Beck was released from custody and was under no recognizance or in any way bound to attend before the Judge on the argument or the rendering of the decision. The whole basis of proceedings by way of *habeas corpus* is that the applicant for the writ is actually detained in unlawful custody. If he is not in custody the writ will not be issued. Even if he is under coercion but is not in actual custody *habeas corpus* will not be granted: Gude's Cr. Pr., vol. 1, pp. 286-287. When a party has been discharged from custody the purpose of the writ has been accomplished and the proceeding is

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at an end. When the Judge made the order of September 23 releasing the applicant from custody his control over the body of the applicant ceased. The Judge thereupon had, it appears to me, no greater powers than a Court of Appeal would have where a prisoner has been released on *habeas corpus*. He could not, therefore, undo the order which he himself had made, and which had been acted upon, and re-commit the prisoner: *Cox* v. *Hakes*, 15 App. Cas. 506. On the same line of reasoning, when the applicant had been released under the *habeas corpus* what power had the Judge to again take him into custody? I do not know of any proceeding under which the Judge could re-take the body of the person already released and proceed to a further enquiry under the *habeas corpus*. In *Barnardo* v. *Ford*, [1892] A.C. 326, Lord Watson said, in reference to *habeas corpus*,

> it is the fact of detention and nothing else, which gives the Court its jurisdiction.

I have already shewn that no further order was issued by Haggart, J., subsequent to the one of September 23. With great deference, I think he had no power to make an order of the nature indicated in the written pronouncement he made on October 10.

I might mention, in reference to the powers of the commissioner, that Haggart, J.'s attention was not called to the recent decision of this Court in *Kelly* v. *Mathers*, 23 D.L.R. 225, 25 Man. L.R. 580. He did not sit in the case, and I am confident that if reference had been made to it, he would have modified the views he expressed as to the commissioner's power to compel witnesses to give evidence. I would refer to the conclusion expressed by the Chief Justice at p. 239, and to that of my brother Cameron at pp. 247-8.

In his written judgment the Judge directs that the warrant of commitment in this case (as well as the other warrants before him) should be quashed. With great deference, I would express the opinion that he had no power to do this. He was hearing a motion to discharge from custody a person who had been brought before him on a *habeas corpus*. He could only restore that person to liberty. He was not sitting in appeal from the commissioner. With great respect, I think the only power he had was to discharge from custody the person produced before him under the writ, if in his opinion that person was unlawfully detained. No writ of *certiorari* had been issued (if *certiorari* was available, as to which I

express no opinion), and the proceedings that took place before the commissioner were only shewn by extrinsic evidence produced before the Judge. This extrinsic matter might be used if it were essential to jurisdiction, or to shew a total want or excess of jurisdiction. See Short & Mellor's Cr. Pr., 2nd ed., p. 328, and cases cited. But upon *habeas corpus* proceedings alone the Judge could not set aside the order of the commissioner which adjudged the said Edward Beck guilty of contempt and ordered, not only his committal to jail, but also the payment of a fine. To shew that the Judge had no power to quash the commissioner's order, I need only quote a passage from such a venerable authority as Hale's Pleas of the Crown:— Perdue, J.A.

> They (the Judges) cannot, on the bare return of the *habeas corpus* give any judgment, or proceed upon the record of the indictment, order or judgment, without the record itself be removed by *certiorari*, but the same stands in the same force it did, though the return should be adjudged insufficient, and the party discharged thereupon of his imprisonment: See Hale, Pl. of Cr., vol. 2, p. 211.

It remains to be considered what order should this Court pronounce in this case? The circumstances are very different from those in *Re Sproule*, 12 Can. S.C.R. 140. There the body of the prisoner had not been produced before the Judge who issued the *habeas corpus*. On the contrary, the prisoner remained in the custody of the sheriff under the original warrant. Here the person in custody has been discharged. To set aside the writ of *habeas corpus* would not replace him in custody. I can find no power in this Court or in the Court of King's Bench to issue a warrant of commitment or any process by which Mr. Beck can be again taken and lodged in jail. He was not committed by a Judge exercising judicial functions in either of these Courts, or under process issued from either of them. Neither Court has any control over him. I think the rule *nisi* must therefore be discharged.

HOWELL, C.J.M.:—I have had the advantage of reading the judgment of Perdue, J., and I concur with his views. Howell, C.J.M.

In his written judgment, Haggart, J., directed that an order do issue setting aside the order made by Galt, J., directing a fine and imprisonment. The order pronounced by Haggart, J., has not been issued and, with deference, I think it should not issue. He was not sitting in appeal but had jurisdiction only because the applicant was in jail and his only power was to release the

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applicant from custody. The order directed by the judgment should not be issued.

Richards, J.A.

RICHARDS, J.A.:—I concur in the reasons for judgment of Perdue, J., except that I express no opinion as to that part of Haggart, J.'s, judgment which he quotes, other than what relates to the question of the warrants of commitment. As to that I agree, with deference, that on *habeas corpus* proceedings there was no power to so quash.

Cameron, J.A.

CAMERON, J.A., concurs in the judgment of the Court.

Rule nisi discharged.

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DODDS v. HARPER.

Ontario Supreme Court, Sutherland, J. April 27, 1916.

1. MORTGAGE (§ IV—53)—ASSIGNMENT OF CHARGE—STATE OF ACCOUNT.
The state of accounts can only affect the assignee of a charge or mortgage under the Land Titles Act, R.S.O. 1914, ch. 126, in so far as payments have been made subsequent to the date of the mortgage; if without actual notice when the assignment is made the assignee is not affected by the fact that the amount for which the mortgage was given has in fact never been paid.
[Land Titles Act, R.S.O. 1914, ch. 126, sec. 54; Conveyancing and Law of Property Act, R.S.O. 1914, ch. 109, considered.]

2. MORTGAGE (§ IV—53)—BLANKS—CHARGEE FRAUDULENTLY NAMED—BONA FIDE ASSIGNEE.
The fact that a mortgagee is fraudulently named in a mortgage executed in blank does not affect the right of a *bonâ fide* assignee to treat the person named as the valid holder of the charge, although in fact the latter had paid nothing to the mortgagor; it is only in so far as payments have been made that an assignee is affected by "the state of the account."
[See Annotation following.]

Statement.

ACTION by a second mortgagee to enforce by foreclosure a mortgage or charge made by the defendant upon land which had been brought under the Land Titles Act.

J. E. Jones and *V. H. Hattin*, for plaintiff.

S. H. Bradford, K.C., for defendant.

Sutherland, J.

SUTHERLAND, J.: — On the 10th December, 1915, the defendant Andrew M. Harper was the owner of parts of lots 1 and 2 on the west side of Major street, plan "M" 21, filed in the office of Land Titles at Toronto, subject to a mortgage for $3,100. Requiring more money, he applied to the International Capitalists Limited, of which one Ernest Constant was manager and probably proprietor, to obtain a further loan on second mortgage of $800.

After some negotiations it was apparently agreed between them that if the loan were obtained the defendant Harper would

pay a commission of $200, and the mortgage might be made for $1,000 to enable him to carry out this arrangement.

It appears that the defendant Harper was then owing to the Imperial Life Assurance Company, in connection with the first mortgage, the sum of $530. A written but unsealed charge or mortgage under the Land Titles Act for $1,000, with interest at 6½ per cent. per annum, dated the 10th December, 1914, covering the said lands, was prepared by Constant, the name of the proposed chargee being left blank, and while in that form was signed by the defendant A. M. Harper, his wife, Mabel Harper, joining to bar dower.

Two papers, one an undated letter of instructions, on letter-paper headed "International Capitalists Limited," and reading as follows, "I hereby instruct you to deduct a sum not exceeding the amount of $530 from my loan and hand same to the Imperial Life Assurance Company, on payment on interest on mortgage," and the other an application for a loan of $800, dated curiously the 16th December, 1914, were also signed by Harper and apparently given to Constant. The application for a loan has also the printed name of the company at the top, but contains no authority to receive or disburse the moneys.

Some time after the execution of the charge by Harper, Constant filled in the name of his wife, Gladys Constant, as chargee. He applied to the plaintiff, Eliza Dodds, for a loan on the lands in question, and arranged with her that if she would advance $850 he would procure a mortgage for which she would receive $1,000. She went and saw the property and the defendant Harper, and, having made up her mind that the security was good enough for an advance on second mortgage of $850, notified Constant to that effect, and put the matter in the hands of her solicitors, furnishing them with the funds to carry out the transaction. They prepared an assignment of the charge from Gladys Constant to the plaintiff, dated the 19th December, 1914. This was executed by Mrs. Constant, her husband, Ernest Constant, being the witness to her signature and making the affidavit of execution.

On the 23rd December, 1914, the plaintiff's solicitors issued their cheque for $835 (the difference being for costs) in favour of Gladys Constant, who endorsed it. It was subsequently apparently endorsed by the International Capitalists Limited, per E.

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Constant, and cashed. The charge and assignment were registered on the 23rd December, 1914, in the Land Titles office at Toronto.

Harper applied several times to Constant at the International Capitalists Limited to know if the money had been obtained, and was apparently put off by him. In the end, Constant suddenly left Toronto, and an order was subsequently made for the winding-up of the company. No money was paid to the Imperial Life Assurance Company or to the defendant Harper, and apparently Constant appropriated the $835.

Under these circumstances, the plaintiff, on the 18th day of June, 1915, issued her writ herein, claiming $1,000 principal money and interest as therein provided under the terms of the said charge or mortgage and the assignment thereof. The defendant Harper entered an appearance to the writ and filed an affidavit in which he states that he is advised and believes that the mortgage is not a good and valid security for any amount whatever and is not a security for any moneys actually advanced thereunder.

The main defences set up are two: first, that the plaintiff became assignee of the charge subject to the existing state of the account between chargor and chargee; and, second, that the onus is upon the plaintiff to shew that Constant or the company was clothed with authority to receive the money from the plaintiff, and the plaintiff has failed to shew it.

The charge or mortgage in question herein is similar in form to a mortgage, and is referred to therein as a mortgage, and the terms "mortgagor" and "mortgagee" are applied to the chargor and chargee throughout.

It is important to consider what is the effect of the words "subject to the state of account." If they mean simply, subject to the actual state of the account as it existed between chargor and chargee, then the plaintiff herein must fail, as no money had been paid by the chargee to the chargor at all. I am of opinion, however, that sec. 54 of the Land Titles Act (R.S.O. 1914, ch. 126) must be read in conjunction with secs. 2 and 7 of the Conveyancing and Law of Property Act, R.S.O. 1914, ch. 109.

This charge is, I think, to be considered and treated as though it were an instrument under seal, a mortgage; and, no notice having been brought home to the plaintiff that the consideration acknowl-

edged therein by the chargor had not in fact been paid, I am of opinion that the effect of the words "subject to the state of account" in the Land Titles Act, in the circumstances, is, that it is only in so far as the chargor has made payments to the chargee subsequent to the date of the charge that the assignee can be affected by the state of the account. Here no such payments of course were made.

On the question of the authority of Constant or the company to receive the money I was referred to such cases as *Gillen* v. *Roman Catholic Episcopal Corporation of the Diocese of Kingston in Canada* (1884), 7 O.R. 146; *McMullen* v. *Polley* (1886), 12 O.R. 702; see also (1887) 13 O.R. 299; *In re Tracy, Scully* v. *Tracy*, (1894), 21 A.R. 454; *Rose* v. *Sutherland* (1899), 32 N.S.R. 243; *Gervais* v. *McCarthy* (1904), 35 S.C.R. 14; *Foreman* v. *Seeley* (1902), 2 N.B. Eq. 341. But this is rather a case in which the chargor, by his own indiscretion in signing the charge in blank and delivering it in this condition to Constant, put it in his power to insert his wife's name as the chargee therein and deceive the plaintiff.

It seems to me that, in the circumstances, the plaintiff had a right to treat Mrs. Constant as a valid holder of the charge and to issue a cheque for the money in her favour, as was done. I think it was the lack of caution or ignorance on the part of the defendant that led to the commission of the fraud, and that he must suffer rather than the plaintiff. Reference to Coote's Law of Mortgages, 8th ed., vol. 2, pp. 1320, 1321; *Farquharson Brothers & Co.* v. *King & Co.*, [1902] A.C. 325; *Hiorns* v. *Holtom* (1852), 16 Beav. 259; *Hunter* v. *Walters* (1871), L.R. 7 Ch. 75, 79; *King* v. *Smith*, [1900] 2 Ch. 425; *Rimmer* v. *Webster*, [1902] 2 Ch. 163; *Bickerton* v. *Walker* (1885), 31 Ch. D. 151; *Jones* v. *McGrath* (1888), 16 O.R. 617; *Manley* v. *London Loan Co.* (1896), 23 A.R. 139; *Bateman* v. *Hunt*, [1904] 2 K.B. 530.

The plaintiff will therefore have judgment for foreclosure as claimed. Her counsel having intimated during the argument that, in the circumstances, she would be content to accept for principal money the amount actually advanced, viz., $850, the judgment on the covenant will be limited to that sum, with appropriate interest under the terms of the mortgage, and costs of action.

Judgment for plaintiff.

Annotation. **Annotation—Mortgage or charge signed in blank—Consideration—Assignment.**

BY E. DOUGLAS ARMOUR, K.C.

The prominent features of this case are as follows:—

1. A document signed in blank.

2. A mortgage or charge, without consideration—no money having been advanced.

3. A receipt for the mortgage money contained in the body of the charge.

4. An assignment of the charge for value to a purchaser, without notice that no money had been advanced.

5. No notice of the assignment to the chargor, and no concurrence by him in the assignment.

6. The defence of purchase for value without notice, not considered in the case.

1. *Document signed in blank.*—At the common law, a document under seal executed in blank is not a deed, and can only be filled up by someone other than the signer upon proper authorization: Armour on Real Property, 2nd ed., p. 332.

There may be some difference of opinion as to whether this principle should be applied to dealings under the Land Titles Act, R.S.O. ch. 126.

By sec. 30 (1). Every registered owner may, in the prescribed manner, charge the land, etc. By sec. 38 (1), he may, in the prescribed manner, transfer the land. The prescribed manner is not defined in the Act. But sec. 69 (1) declares that every transfer or charge signed by a registered owner shall confer a right to be registered. And sec. 102 provides that "notwithstanding the provisions of any statute, or any rule of law, any charge or transfer of land registered under this Act may be duly made by an instrument not under seal," and it is to have the same effect as to stipulations therein as if it were under seal. (It is noticeable that transfers of charges are not included in these provisions, although the custom is to dispense with a seal.) So far as these provisions are concerned, sealing alone is dispensed with. And it might be inferred that the other provisions of law respecting conveyances should apply, were it not for the fact that when a signed transfer or charge is presented to the Master of Titles, the transferee becomes entitled to be registered as owner or chargee under sec. 69, and to receive a certificate of ownership. It seems, therefore, that if the transfer or charge were originally void by reason of its having been signed in blank, it becomes effective by the registration, and enables the transferee or chargee to pass on to his purchaser a good title to the land or charge.

2. *Mortgage without consideration.*—It cannot be doubted that where a mortgage is made for an anticipated advance, and the advance is not made, nothing can be recovered by the mortgagee; and the mortgagor has a clear right to have the instrument delivered up to be cancelled.

3. *Receipt embodied in conveyance.*—By R.S.O. ch. 109, sec. 6, "A receipt for consideration money or securities in the body of a conveyance shall be a sufficient discharge to the person *paying or delivering the same*, without any further receipt being endorsed on the conveyance." The English practice was to ignore the receipt in the body of the conveyance, and, when the purchase money was paid, to endorse a receipt therefor on the conveyance; and absence of such endorsed receipt was constructive notice to a subsequent purchaser that the money had not been paid. This was not the practice in Ontario; but, in any event, this enactment renders a separate receipt for the

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purchase money unnecessary. But the purchase money must be actually paid or the securities actually delivered. It is difficult to see what, if any, change has been made by this enactment as to the relations between vendor and purchaser. Equity always allowed a vendor to shew the non-payment of the consideration notwithstanding the receipt. Under this enactment, the receipt is a discharge only if the money has been paid; and it is still open to the vendor to shew, as against his purchaser, that the money has not been paid, notwithstanding the receipt. In other words, as between vendor and purchaser, if the money has been paid the embodied receipt is a discharge to the purchaser; if it has not been paid the enactment does not operate to make the receipt a good discharge.

It is as against a subsequent purchaser only that this section becomes of real importance.

4. *Purchase for value without notice—Embodied receipt.*—By sec. 7 of the same Act it is provided that a receipt in the body of a conveyance "shall, in favour of a subsequent purchaser, not having notice that the money or other consideration thereby acknowledged to be received was not in fact paid or given, wholly or in part, be sufficient evidence of the payment or giving of the whole amount thereof."

The conditions necessary for the application of this section are that there should be a receipt in the conveyance, and no notice to the purchaser that the consideration has not been paid wholly or in part. Under these circumstances the receipt is "sufficient" evidence of the payment of the whole.

"Sufficient evidence" in recitals under the Vendor and Purchaser Act, R.S.O. ch. 122, means *primâ facie* evidence only of the facts recited, because it is qualified by the phrase "except in so far as they are proved to be inaccurate."

Under the present enactment, sufficient evidence is interpreted to mean conclusive evidence.

In *Jones* v. *McGrath*, 16 O.R. 617, such a receipt was held to be conclusive, in favour of a purchaser who had no notice that the consideration mentioned in the deed had not been paid. Ferguson, J., delivering the judgment of a Divisional Court, said (p. 623) that the purchaser is "by law authorized to deal on the footing of that consideration having been paid upon the execution of the conveyance." And he further remarked that, if the receipt was sufficient evidence at the time he was paying away his money, it should not be held to be insufficient evidence in his favour of the same fact at any subsequent time when it is out of his power to regain his former position.

In *Lloyds Bank* v. *Bullock*, [1896] 2 Ch. 192, a trustee, entitled to sell, executed a conveyance containing a receipt for the purchase money to A., who deposited the deed with the plaintiffs for an advance, without having paid the trustee anything, and the plaintiffs were held to be entitled to rely on the statutory effect of the embodied receipt as proof of payment to the trustee.

Bateman v. *Hunt*, [1904] 2 K.B. 530, was very like the principal case. The defendants applied to a solicitor for a loan, and executed a mortgage containing a receipt to the solicitor's clerk. The full amount of the loan was not advanced. The solicitor's clerk subsequently, at the instance of the solicitor, assigned the mortgage to him, and he made a sub-mortgage thereof to the plaintiff's testator. It was held that the plaintiffs were entitled to

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protection under the receipt, which to them was conclusive evidence of the payment of the whole consideration expressed in the original mortgage.

By the interpretation clause of the same Act (R.S.O. ch. 109) the word "conveyance" includes assignment, mortgage, etc.: sec. 2 (*a*), and mortgage includes charge: sec. 2 (*c*).

The effect of this enactment standing alone is therefore to put the assignee of a mortgage in almost the same position as the purchaser of land, where the fact is that none, or some part only, of the consideration has actually been advanced. The assignee is entitled to assume (in the absence of notice to the contrary) that the whole consideration has been paid, and need make no inquiry of the mortgagor or chargor. But he takes subject to the state of the accounts between the mortgagor and mortgagee as to subsequent dealings between them.

5. *No notice of assignment to mortgagor.*—A mortgage or a charge is a chose in action and subject to the enactment relating to the assignment of choses in action. By R.S.O. ch. 109, sec. 49, it is provided that any absolute assignment of a chose in action "of which express notice in writing shall have been given to the debtor" shall be effectual in law to pass and transfer the legal right to such chose in action "from the date of such notice."

It is clear from this enactment that the right to the debt, as distinguished from the title to the land, depends upon the giving of the notice. The title in the assignee is not legally perfect if the notice is not given. No time is fixed or limited for the giving of the notice, except that it must be given before action brought, otherwise the plaintiff's title will not be complete. In *Bateman* v. *Hunt*, [1904] 2 K.B. 530, *supra*, the notice was not given by the sub-mortgagee, but it was given by his executors, the plaintiffs, before action brought, and it was held to be effectual.

In *Pringle* v. *Hutson*, 14 O.W.R. at p. 1085, it is pointed out that the assignee of a mortgage cannot sue without adding the mortgagee if he has not given notice of the assignment to the mortgagor. It does not appear from the report of the principal case whether notice of the assignment was given. But it may be assumed that, if such a notice had been given to the mortgagor, he could have been put on the alert, and that something would have been heard of that at the trial. It may be good policy, however, on the part of the assignee of a mortgage, not to give the notice until his transaction is completed, inasmuch as he is so well protected by the receipt clause. And in any event, the requirement as to notice is no protection to the mortgagor, in a case where the mortgage money is not advanced, because it is not required to be given until after the assignment has been effected.

6. *The defence of purchase for value of a mortgage.*—This point was not dealt with expressly in the case, except in so far as the embodied receipt protected the plaintiff. There is another enactment, the effect of which is problematical, in view of the present case and the authorities upon which it was decided. By R.S.O. ch. 112, sec. 12, it is enacted that "the purchaser in good faith of a mortgage may, to the extent of the mortgage, and *except as against the mortgagor*, set up the defence of purchase for value without notice in the same manner as a purchaser of the mortgaged property might do." Reference may be made to two articles on defence of purchase for value without notice: 3 C.L.T. 1, by A. H. Marsh, Q.C., and 17 C.L.T. 282, by John S. Ewart, Q.C. Purchase for value without notice was always a defence, and not an instrument of attack. The defendant holding the legal

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estate was protected, under the circumstances, as against equities, under the maxim, where equities are equal the law will prevail. As between equitable interests only, the defence had no place. Consequently the provision that a mortgagee may set up the defence in the same manner as the purchaser of the mortgaged property (an equitable interest only) is somewhat cryptic. An assignee of an equity of redemption never could have set it up in a Court of Equity, because he had not the legal estate. But attributing full significance to it, as if it stood without this qualification, what is its effect? It is still a defence only. Possibly, matter of form in pleading might be disregarded. But if the defendant in the principal case had counterclaimed for rescission of the charge and assignment, the plaintiff would have been put to her defence of purchase for value without notice. Similarly, if the action had failed for want of notice of the assignment, and after dismissal the defendant had commenced an action for rescission, the plaintiff would have been put upon the same defence. But the obvious answer would have been—that defence cannot be set up against the mortgagor.

The case would now stand thus:—"Conveyance" includes "mortgage," and "mortgage" includes "charge" (R.S.O. ch. 109, sec. 2 (*a*) and (*b*)). Applying these enactments to sec. 7 of the Act, in so far as it applies to the particular case, it would read as follows: "a receipt for consideration money in the body of a charge shall, in favour of a subsequent purchaser of the charge, not having notice that no consideration was paid, be sufficient evidence of the payment of the whole consideration." On the other hand, defence of purchase for value without notice cannot be set up against the mortgagor. And, if the defence of the assignee under the former enactment is in fact the defence of purchase for value without notice, we have here two contradictory enactments. The enactment as to the receipt can only be taken advantage of by a purchaser without notice, but apparently it does not constitute the defence of a purchase for value without notice as formerly understood. And if the assignee relies on it, he need not resort to that defence at all. It seems clear that in order to call for the application of sec. 12 of R.S.O. ch. 112, the mortgagor must be a party to the proceedings; and he must *ex hypothesi* also be an attacking party in order that the defence may be set up. If so, he cannot set up the defence of purchase for value, but he may set up that the embodied receipt is conclusive proof that the mortgagor received the mortgage money.

An assignee of a mortgage might be attacked by another assignee from the same assignor. Or he might be attacked by some other person who had an equitable right to the land, and defend his legal estate to the extent of the mortgagee. In both of these cases he might set up the defence. But, where the mortgagor attacks, the saving of the right to set up the defence against him, is poor satisfaction, if the mortgage contains a receipt for the money.

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Alberta Supreme Court, Walsh, J. November 15, 1916.

ASSIGNMENT (§ III—32)—AGREEMENT FOR SALE OF LAND—RIGHT TO SUE.

An assignment by mortgage of all moneys due under agreements for the sale of land which does not pass all the legal rights and remedies of the assignor, and all his legal and other remedies, is not an absolute assignment within the meaning of sub-sec. 3, sec. 7, ch. 5 of the Statutes of Alberta, 1907; the assignee cannot sue in his own name by virtue of such an assignment and action on the agreement may be properly brought by the assignor alone.

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ACTION for specific performance on agreement for the sale of land.

Henwood, for plaintiffs; *Field*, for defendant.

WALSH, J.:—The Master in Chambers at Edmonton has referred to a Judge for decision the question whether or not the plaintiffs can maintain this action in their own names alone in view of the fact that after the making of the contract sued upon and before the commencement of this action they assigned to the Dominion Bank all moneys due and accruing due in respect of it, of which assignment the bank gave express notice in writing to the defendant. The bank is not a party to the action.

The action is brought for the specific performance of an agreement for the purchase and sale of lands made between the plaintiffs as vendors and the defendant as purchaser. After the making of the agreement and before the commencement of this action the plaintiffs mortgaged these and other lands to the Dominion Bank. The mortgage contains the following clause:—

> The mortgagee agrees to release the respective parcels of land hereinafter mentioned from this mortgage upon payment to the mortgagee of all moneys due or accruing due under the several sale contracts made by the mortgagors or the said Magrath, Hart & Co. affecting the said lands which contracts are also hereinafter referred to, the mortgagors hereby assigning to the mortgagee as further additional security all moneys due or accruing due in respect of the said contracts.

Then follows a list of the contracts referred to, amongst them being the contract here in question.

The only question argued before me was whether the above is an absolute assignment of the moneys payable under this contract or is one given only by way of charge. Sub-sec. 3 of sec. 7 of ch. 5 of the Statutes of Alberta, 1907, added to sec. 10 of the Judicature Ordinance the following sub-section:—

> 14. Any absolute assignment made on or after the passing of this sub-section by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this sub-section had not been enacted), to pass and transfer the legal right of such debt or chose in action from the date of such notice and all legal and other remedies for the same, and power to give a good discharge for the same without the concurrence of the assignor.

I think that what was assigned by the plaintiffs to the bank, though not a legal chose in action strictly so-called, is one within

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the sub-section under the authority of *Torkington* v. *Magee*, [1902] 2 K.B. 427, 431. An assignment which is within the sub-section passes not only the legal right to the chose in action but also all legal and other remedies for the same. This means that action upon it to enforce any legal or other remedies must be in the name of the assignee. Some doubt was expressed as to this upon the argument, but apart from authority I do not see how there can be any question about it in the face of the language of the sub-section, for how can these rights and remedies pass under the assignment and still remain in the assignor? The point is conclusively settled in that way, however, by the judgments of the Court of Appeal in *Read* v. *Brown*, 22 Q.B.D. 128, and in *Hughes* v. *Pump House Hotel Co.*, [1902] 2 K.B. 190. In the former case Lord Esher, M.R., discussing the corresponding sub-section of the English Judicature Act, the language of which is identical with that of the Alberta sub-section, says, at p. 132:—

> The words mean what they say; they transfer the legal right to the debt as well as the legal remedies for its recovery. The debt is transferred to the assignee and becomes as though it had been his from the beginning; it is no longer to be the debt of the assignor at all, who cannot sue for it, the right to sue being taken from him; the assignee becomes the assignee of a legal debt, and is not merely an assignee in equity, and the debt being his he can sue for it, and sue in his own name.

The other members of the Court concurred in this opinion. In the latter case Mathew, L.J., at p. 193, says:—

> If it is clear from the instrument as a whole that the intention was to pass all the rights of the assignor in the debt or chose in action to the assignee then the case will come within sec. 25, and the action must be brought in the name of the assignee.

I am of the opinion, particularly in the light of the foregoing interpretations, that an assignment which does not pass to the assignee all of the assignor's legal right to the chose in action and all his legal and other remedies for the same is not an absolute assignment within the section. It seems to me to clearly contemplate an assignment under which the assignor is divested of every possible cause of action under the chose in action which it transfers, and when such an assignment is proved, followed by the prescribed notice, action upon the chose in action must be in the name of the assignee. If, on the other hand, it falls short of that, if it is something under which the assignee can exercise only a part of the remedies open under the chose in action, I think it does not fall within the section at all and the assignee cannot, by virtue of the section, sue upon it in his own name.

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Applying that test to this assignment what do we find? What the plaintiffs assigned to the bank was simply all moneys due and accruing due in respect of this contract. Now a vendor has a choice of several remedies open to him against a purchaser who is in default under an agreement for the sale of land, amongst them being that he may sue as at common law for damages for breach of the purchaser's covenant or for specific performance or for rescission. Can it be said that, under this assignment, without more, the Dominion Bank could successfully maintain in its own name alone an action against the defendant either for specific performance of this contract (which is this action) or for its rescission?

It may be that it could carry on the specific performance action for, though not having the title to the land in itself, it might, perhaps, have an equitable right under the assignment to compel the execution of a transfer by the present plaintiffs and that might be sufficient. I am not at all sure of this however. My mind inclines to the opinion that even to such an action the present plaintiffs as being the holders of the title would be necessary parties, and if that is so, all of the remedies open to the vendors have not passed under the assignment, and, therefore, in my view of it at least, it is not within the section. However this may be, I am strongly of the opinion that it could not carry on in its own name an action for rescission. Its right under the assignment, putting it at the highest, is to receive the money payable under the contract. I do not think that gives it the right to say that because the money has not been paid the contract shall be at an end and the parties restored to their original positions. That surely is a matter requiring at least the concurrence of the assignors, and so making it necessary that to an action for rescission they should in any event be co-plaintiffs with the bank. Thus the assignors have not by this assignment been completely eliminated from the transaction, as I think the section contemplates they should be in any case under it. And so, in my opinion, it follows that the assignment is not within the section, and this action is properly brought in the name of the assignors alone.

In view of this I have not found it necessary to decide whether or not this is an absolute assignment as distinguished from one that is by way of charge only. I have, however, given that question

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some study without forming a definite opinion upon it. Both counsel relied upon the same case as an authority for their conflicting views of this document, namely *Durham* v. *Robertson*, [1898] 1 Q.B. 765. That, however, is neither the most recent authority on the point nor the case which is the nearest in point of resemblance to this. *Mercantile Bank* v. *Evans*, [1899] 2 Q.B. 613, and *Hughes* v. *Pump House Hotel Co.*, [1902] 2 K.B. 190, are later judgments of the Court of Appeal in England, while in Ontario the judgment of the Chancellor in *Re Bland and Mohun*, 16 D.L.R. 716, 30 O.L.R. 100, is very useful.

I understood on the argument that it was conceded that the Dominion Bank should be a party to the action, so that its rights as well as those of the plaintiffs should be disposed of in it instead of subjecting the defendant to the danger of further litigation over this matter at its suit, the real ground of difference between the parties being whether it should be a party plaintiff or defendant, and this from the point of view of its liability for costs if made a plaintiff being a matter of importance to the defendant. I quite agree that it should be made a party, and if its consent to be added as a plaintiff cannot be procured, I think it should be added as a defendant. *Judgment accordingly.*

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British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher, and McPhillips, JJ.A. November 7, 1916.

1. INSURANCE (§ VI C—270)—MISREPRESENTATIONS—SUICIDE—EFFECT ON RECOVERY—EVIDENCE.

A statement as to the cause of a parent's death is material to an insurance risk, and, if untrue, will vitiate the policy; there can be no recovery where death of the insured was caused by his own intentional act, which may be inferred from the facts and circumstances in the evidence.

2. ACTION (§ II B—45)—CONSOLIDATION—DIFFERENT ISSUES.

The Court, though having the discretion under O. 44, r. 1, to order a consolidation of actions, has no power to make such an order summarily where there are different issues in some of them.

Statement.

APPEAL by defendants from the judgment of Hunter, C.J.B.C. Reversed.

E. P. Davis, K.C., and *Sir Charles H. Tupper*, K.C., for appellants.

Joseph Martin, K.C., for respondents.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—One of the grounds of appeal is that the trial Judge improperly consolidated the three actions instead of trying them separately. O. 49, r. 1, reads:—

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Causes, matters or appeals may be consolidated by order of the Court or Judge in such manner as to the Court or Judge may seem meet.

In the corresponding English rule the power conferred is to be exercised "in the manner in use before the commencement of the principal Act (Judicature Act) in the Superior Courts of common law." The practice in these Courts was according to the *dicta* of Cozens-Hardy, M.R., in *Lee* v. *Arthur*, 100 L.T. 61, not to consolidate except "where precisely the same relief" was claimed in both actions. The objection to the order cannot, in my opinion, be maintained on jurisdictional grounds. The trial Judge may not have exercised the power and discretion vested in him in accordance with good practice. As to this I express no opinion for reasons hereinafter to be mentioned, but, unless the parties have been prejudiced, new trials ought not, I think, to be ordered. Had the order come before us for review before trial, I should have had to consider this question more fully than I do now; or, if I were of the opinion now that the judgment on the merits is erroneous on the record as it stands, I should have to consider whether there had not been a mis-trial so far as appellants are concerned, by reason of the course pursued in tying the three actions up together as has been done. But, in the view I take of the merits, I do not think I need consider the scope of the rule. The respondent does not and cannot complain of the consolidation, as it was effected at his instance, and if on the record he has failed to make out his case on the merits it would be worse than idle to send the cases back for re-trial merely because of the erroneous consolidation, assuming it was such. The same considerations apply to appellants' complaint of wrongful admission of evidence. In the result they are not injured.

The Chief Justice who tried the actions together has very carefully reviewed the evidence both for and against the theory of suicide: he has left this Court untrammelled by anything which might turn on the demeanour and credibility of the witnesses. He bases his conclusion that a case of suicide was not made out on the inferences to be drawn from the facts and circumstances in evidence. I am therefore left free to draw my own inferences from those facts and circumstances without embarrassment.

After careful consideration I am impelled to the conclusion

that the deceased came to his death by his own intentional act. I also think that his answer to the question as to the cause of his father's death was material and was knowingly untrue, and for this reason also the policies were vitiated.

I would allow the appeals and dismiss the actions.

MARTIN, J.A.:—We have first to deal with the serious objection to the legality of the trial which is raised by the three defendant companies. They submit that Hunter, C.J., had no power to make the order he did make consolidating their separate actions and say that though he had jurisdiction to consolidate in a proper case under r. 656, yet, here, he exceeded the limits of his authority by doing so in a case belonging to a class that has been decided to be one in which his discretion cannot be exercised, which is another way of saying that he acted without jurisdiction by overstepping the bounds of it. An act is just as much *ex juris* because it is done beyond the limits of powers conferred as it is when done without any power at all. Though a Court may have jurisdiction as this Court has, generally speaking, in all appeals from provincial Courts in this province, yet that jurisdiction may be limited as regards time, place, and subject-matter. As regards time, we could not, under the old rule, entertain an appeal where the notice had not been given in time: *Laursen* v. *McKinnon* (1913), 9 D.L.R. 758, 18 B.C.R. 10, nor as regards place, sit in any other town than Victoria or Vancouver (*cf. Anderson* v. *Mun. of S. Vancouver*, 45 Can. S.C.R. 425 at 446, where a similar Act was said to be "fundamentally defective"); nor as regards subject-matter in any appeal, *e.g.*, from a County Court where the amount involved is under the prescribed sum (County Court Act, sec. 116). And so, in like manner, 6 actions could not be consolidated, if, for example, the rule were to say, that this should not be done with more than 5 actions, nor in cases where there were issues affecting mineral claims which should be summarily settled by the gold commissioner on the ground. The existence of any one of these bars or limitations would, upon objection being taken (or if the Court itself raised the objection) oust the jurisdiction *pro tanto* (unless the circumstances were such that the other party could waive his objection) and in the same manner and with the same result as though the Court had no jurisdiction at all in the subject-matter. And the

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fixing of the bounds of the jurisdiction or power of a Judge is determined just as effectually by authoritative judicial decisions as it is by rule or statute. And it is equally clear that a Judge cannot give himself jurisdiction because he erred in his opinion of the legal effect of said rules, statutes or decisions, or mistook the facts necessary to confer it, for jurisdiction cannot be self-created by mistake of fact or an erroneous interpretation of the law and practice of Courts. I feel impelled to make these observations because of some confusion of thought which manifested itself during the argument between the limitation of jurisdiction and the exercise of a discretion in cases which had been excluded from the field of such discretion, the two having been treated as though they could be co-existent or in some way become so interwoven as to be made operative, whereas they are mutually destructive, because discretion can only exist where there is power, *i.e.*, jurisdiction to exercise it.

The English rule on the power to consolidate differs in terms from ours, but in the light of the decision of the Court of Appeal in *Martin* v. *Martin*, [1897] 1 Q.B. 429, not in substance, it having been there held that a plaintiff can now apply to consolidate and that the words in the English rule, "in the matter in use before the commencement of the principal Act, etc," require only "that if an order is made it should be treated in the same manner as before," and that the only limitation upon the language of the rule is that the actions should be in the same division, leaving the application of it in a proper case to the discretion of the Judge to meet the special circumstances thereof: this is only another way of saying in the language of our rule that consolidation may be ordered "in such manner as to the Court or Judge may seem meet," and in deciding what is "meet" a sound, judicial discretion must be exercised within defined limits, which is described in *Morgan* v. *Morgan* (1869), L.R. 1 P. & D. 644, 647, [1869] E.R.A. 798, as "a regulated discretion, and not a free option subordinated to no rules."

What happened here is that when the first case against the N.Y. Life Assurance Co. was called on for trial, the counsel for the two other defendants in the cases not called on, informed the Court that he understood an arrangement had been made with counsel in the first case (to save time and expense) that the evi-

dence taken in the first case would be used so far as applicable in the second and third cases, though there were, admittedly, additional and different issues in the second and third, one additional issue in each which would necessitate special evidence, *e.g.*, on the question of rescission, but there was no consent to consolidation, which was objected to. This statement was not wholly acquiesced in by the plaintiff's counsel who asked that the actions should be consolidated which was strongly opposed by counsel for the three different defendants, but after discussion, the Judge decided to consolidate the three actions, though both of the defendants' counsel protested against this being done without notice or application in the usual way and without having an opportunity to look into the authorities, and insisted upon their right to have their cases tried separately and to retain their separate control over them as counsel; and counsel for the Mutual Life and Sovereign Life companies further protested against being brought summarily into a case, the first, in which he was not counsel or his client a party, and being, as he expressed it, "forced into a consolidation" before his own case had even come before the Court.

After very careful consideration I have reached the conclusion that these objections are well taken. It was, with all due respect, an unauthorized proceeding to base the exercise of summary jurisdiction upon the fact that the counsel for the defendant in the second and third cases was by consent of the other counsel before the Court in the only one that had been called on for trial to explain, as he understood it, and if correct, to carry out the arrangement that had been made with respect to these cases, and because he happened to be placed in that unusual position, exercise said jurisdiction over his clients and dispense with the formal application to consolidate, made by summons entitled in all the actions, and based upon proper material which, in the absence of consent, is required by the practice. After examining a large number of cases I have been unable to find any precedent for such a course, and though it may be possible that circumstances might arise where it would be justified, yet, I am clearly of opinion that they do not arise here. A litigant does not lose his ordinary rights in the conduct and trial of his own case simply because his counsel may happen to come before the Court in another case for special purpose. But I shall not pause to con-

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sider what the exact consequence of this action would be because such consideration is rendered unnecessary by those consequences which inevitably result from the still more serious second objection, viz., that the Judge had no power to make the order where there were different issues upon the record. An investigation of the cases shews that this contention is really beyond argument, and there has been no change in the long established practice which is succinctly stated in that high authority, Lush's Practice (1865), 3rd ed., vol. 2, p. 964:—

> But unless the questions in the several actions and the evidence are the same no such order will be made.

This is founded on the decision given more than 20 years before in *Saltash* v. *Jackman* (1844), 1 D. & L. 851, where Williams, J., said that, in such circumstances, "I have no power to make any order," and his judgment was quoted and followed by the Court of Appeal in *Lee* v. *Arthur*, 100 L.T. 61, reversing a decision of Bigham, J. When the case of *Martin* v. *Martin*, [1897] 1 Q.B. 429, was cited in support of consolidation the Master of the Rolls in *Lee* v. *Arthur*, observed: "The case . . is no authority in your favour. Where precisely the same relief is claimed, consolidation may be ordered, but not otherwise."

And he went on to say, after citing the *Saltash* case:—

> That the Court has power to prevent an abuse of its process I do not doubt. The Court can order the trial of an action to be postponed, until the trial of some other action has been heard, but it cannot compel one defendant against his wish to have his case tied up with those of defendants in other actions.

Moulton, L.J., said, after holding that the order had been made *per incuriam*:—

> The question is whether the actions brought against them (defendants) can be consolidated so that the appellant (plaintiff) here may have his case tied up with those of the defendants in the other actions. It is, in my opinion, absolutely contrary to the unvarying practice of the Court up to the present time to make such an order as has been made in this case. Consolidation is much more rarely applicable than is generally supposed. . .

In view of this authoritative ruling it is really superfluous to cite others, but I feel warranted in drawing attention to the decision of the Court of Exchequer *in banco*, in *McGregor* v. *Horsfall*, 3 M. & W. 320, where two actions brought by the same plaintiffs against different defendants on different policies on the same ship had been consolidated, but it was held that the order of Park, J., to that effect should be set aside, counsel for plaintiffs submitting that "the plaintiffs have an undeniable right to try

which actions they please and ought not to be prevented from exercising that choice. . . ."

It would follow from these authorities that the order for consolidation must be set aside as having been made without authority, and the trial would be not merely a mistrial but no trial at all, and void *ab initio*. But these consequences are sought to be avoided because it is urged that the defendants have not been prejudiced by what has been done and therefore the judgment should stand and we are invited to consider all the evidence and proceedings at the trial to satisfy ourselves that no prejudice was in fact caused, and are referred to such cases as *Bray* v. *Ford*, [1896] A.C. 44, and others collected in A.P. (1916), 704 and Y.P. (1916), 595, to see that "no substantial wrong or miscarriage has been thereby occasioned" as mentioned in English r. 556, and English O. XXXIX. relating to New Trial. The first observation I have to make is that said order has been wholly omitted from our Supreme Court Rules, 1912, and 1906, though it was in the old rules of 1890, so apparently we are thrown back on r. 869, and the Court of Appeal Act, sec. 15 (3), in considering the propriety a new trial, said r. 869 empowers this Court to order a new trial "if it shall think fit and is the same as English r. 869" The second observation upon English r. 656 is, that it relates only to new trials upon three specified grounds, viz., misdirection, improper admission or rejection of evidence, or verdict upon a question not asked to be left to the jury, none of which is now under consideration, because what we are considering is not the question of a new trial but a very different thing, viz., the consequences of the denial of the fundamental right of a litigant to have his case tried by itself under the control of the counsel he has selected and retained for that purpose in all cases save in those where, by the relatively modern practice of our Courts (originally introduced by Lord Mansfield in actions against underwriters: Lush's Practice, *supra*, 964), that right may be curtailed by consolidation. Where rights of that description are invaded the trial, so called, is not a real trial at all, because a litigant cannot lawfully be forced to have his case "tied up," as it is aptly termed in *Lee* v. *Arthur*, *supra*, with other cases. Cases on the invasion of what may be styled "fundamental" rights of that class—see *Anderson* v. *S. Vancouver*, *supra*—are happily, as might be expected, few, but a recent illustration may be found in *Goby* v. *Wetherill*, [1915] 2

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K.B. 674, wherein the verdict of a jury was set aside because an officer of the Court, the town sergeant, to whose care the jury had been intrusted, remained within the jury-room, in an excess of zeal, for about 20 minutes while the jury were deliberating. Despite the fact urged upon the appellate Court, that the trial Judge had found that "beyond shadow of doubt he remained a silent figure in the room and neither by word or deed interfered in any way," the King's Bench set aside the verdict as having been vitiated by the mere fact of the officer's presence, Bailhache, J., saying: "I regret having to come to this conclusion, for I daresay that no harm was done;" and Shearman, J., held that "the cardinal principle of the jury system that a jury must deliberate in private" had been infringed upon, which necessitated a new trial. Now it is just as much a "cardinal principle" in legal history that a litigant must not be interfered with in the trial of his case by another case being interjected into it and tried at the same time, despite his protest, as it is that a jury must not be interfered with by the presence of a stranger during their deliberations, and therefore the Court is not called upon to speculate upon the prejudice that may have resulted. Indeed, in my opinion, the principle in the former case is of stronger application because in it the trial has never been lawfully begun and the litigant's rights have been invaded and the trial vitiated *ab initio*, instead of at the end of a hitherto legal trial when the verdict was under consideration. But if it were necessary to go into the question of prejudice, which it is not, it in fact appears on the face of these proceedings because the litigant's counsel has lost control of his client's case, and it is for the client and not for the Court to decide who shall conduct his case. The client may have the belief that the counsel he retained was better qualified than any other to do justice to his particular case, and even though he might be wrong, still he is entitled to his "choice" as it was said in *McGregor's* case, *supra*, and can the Court in effect substitute wholly, or in part, another counsel for the one so chosen? If so, then where is the line to be drawn? Could not the Court dispense with all counsel and try the case itself, and, going still further, it might likewise dispense, if it thought fit, in the exercise of its discretion, with the assistance of the jury which might have been summoned to try the facts. It may possibly be that a Judge alone and unaided would have by these

methods arrived at the highest possible justice, but should any litigant be placed in the unenviable and invidious position of having to shew to us wherein a Judge failed in that respect? There can, I think, be but one answer to this, in the negative, and the right of audience and control are just as much a "cardinal principle" as the right to trial by jury, in proper cases, which is "constitutional"—*Bray* v. *Ford, supra, per* Lord Watson. It may, of course, be curtailed by rule or statute or established practice as has been done in certain cases where there is now admittedly power to consolidate, but to the extent that it has not been yet curtailed it still exists as firmly as it has existed from legal time immemorial and any encroachment upon it may be successfully repelled. There is, moreover, one very serious and substantial way in which a defendant is prejudiced by his case being wrongly consolidated, namely, that the effect of consolidation is to make him jointly, with all the other defendants, liable to the plaintiff for the costs of the action—*Anderson* v. *Boynton*, 13 Q.B. 308—though, for example, his case by itself might have necessitated the taking of very little or no evidence, whereas tried with others the plaintiff may have called many witnesses at great expense on issues foreign to the objecting defendant. In this very case, indeed, the counsel in the first case before consolidation informed the Court that he proposed to give extensive evidence and call many witnesses on the question of rescission of the policy in his company with which the two other defendant companies had nothing to do.

But, as already intimated, seeing that there has been no trial at all the consideration of this question of prejudice is in reality irrelevant and unprofitable because, where there has been no trial, no judgment whatever can be pronounced in favour of any party, and it is useless to attempt to patch up or bridge over a situation or difficulty which has no foundation to which a remedy can be applied.

It is unfortunate that there is, in my opinion, no escape from the conclusion that we are prevented from attempting to cure the error, therefore the appeal must be allowed and the judgment set aside and the defendants restored to the position they were in before the order for consolidation was made, with costs to them incurred by such order.

B. C.
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Galliher, J.A.

GALLIHER, J.A.:—I do not think the trial can be said to be a nullity, and agree with the course adopted by the Chief Justice of this Court.

I also concur in the conclusions reached by him upon the merits.

McPhillips, J.A.

MCPHILLIPS, J.A.:—I am in entire agreement with Martin, J.A. *Appeal allowed.*

SASK.
S. C.

WILKES v. CITY OF SASKATOON.

Saskatchewan Supreme Court, Sir Frederick Haultain, C.J., Lamont and McKay, JJ. November 18, 1916.

1. STREET RAILWAYS (§ III B—31)—NEGLIGENCE—LOOSE TROLLEY ROPE.
Allowing a rope attached to a trolley pole to hang loose, and capable of being blown out by the wind and entangling persons waiting for cars, is negligence, for which a person injured in consequence thereof may recover.

2. COSTS (§ I—17)—ACTION AGAINST MUNICIPALITY—TENDER.
In the absence of proof that tender of the amount recovered was made a municipality is not entitled to the costs of an action under sec. 525 of the City Act (Sask.).

Statement.

APPEAL from the judgment of the District Court Judge of the judicial district of Saskatoon, dismissing the plaintiff's action for injuries sustained through the negligence of the defendant.

Hogarth, for appellant.

H. L. Jordan, K.C., for respondent.

The judgment of the Court was delivered by

Haultain, C.J.

HAULTAIN, C.J.:—The plaintiff was standing at the proper place, near one of the street corners, waiting for one of the cars of the street railway of the defendant on which he was going to travel. As the car passed him, a rope which was attached to the trolley pole at the front end of the car was blown out by the wind and caught the plaintiff under the jaw, throwing him to the ground and dragging him a short distance. The car was a "double truck" car, equipped with two trolley poles, one at the front and the other at the rear of the car. The front trolley pole, not being in use, was pulled down and held in that position by a rope which is fastened to an iron guard that guards the headlight of the car. When the pole is thus held down there is a certain amount of slack, as the rope is long enough to allow the pole to be adjusted by the conductor when it is on the wire.

According to the evidence, and as found by the trial Judge, the slack rope was not secured, but was lying loose and just as

the car came to where the plaintiff was standing, a gust of wind blew it out and it caught the defendant as above stated.

The trial Judge found on these facts that the occurrence was a pure accident, and was not attributable in any way to negligence on the part of the defendant. A great deal of weight was attached to evidence on behalf of the defendant which shewed that the car was an up-to-date car in general use in the United Kingdom and on the continent, and that the general custom was to fasten the rope as it was fastened in this particular case, although there is a device in use in the United States which takes up the slack.

This evidence does not, in my opinion, justify a state of affairs which is obviously calculated to cause an accident, such as it did in the present case. It is not, in my opinion, necessary for the proper use of the most up-to-date and necessary equipment to leave a large amount of slack rope hanging loose in such a position that it is almost bound to be carried out by the wind as it was in the present case. To leave it in that condition was, in my opinion, clearly negligent, and the plaintiff is, therefore, entitled to recover.

While the trial Judge dismissed the action, he found that if the plaintiff was entitled to damages he was entitled to recover $140.

The statement of defence, in addition to denying negligence and alleging contributory negligence, claims that the defendant tendered to the plaintiff's solicitors the sum of $140, under sec. 525 of the City Act. This tender was made on April 3, 1915, after the action was begun.

The alleged tender was not proved. The defendant is consequently not entitled to its costs of action under the above section. Rules 196 and 201 do not apply, because no money has been paid into Court.

The plaintiff is, therefore, entitled to his costs of action.

The appeal is, therefore, allowed with costs, the judgment appealed from is set aside and judgment will be entered for the plaintiff for the sum of $140 and his costs of action.

Appeal allowed.

B. C.

C. A.

DORRELL v. CAMPBELL.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher and McPhillips, JJ.A. November 7, 1916.

1. MECHANICS' LIENS (§ V—30)—OWNER—POSSESSION UNDER UNREGISTERED CROWN GRANT.

Actual possession under a grant from the Crown, coupled with a statutory right to register the grant, and thereupon to become the owner in fee, creates an estate or interest upon which a mechanic's lien may attach. [*Galvin Walston Lumber Co.* v. *McKinnon*, 4 S.L.R. 68; *Re Heinze*, 26 D.L.R. 211, 52 Can. S.C.R. 15, 20 B.C.R. 99, referred to; Land Registry Act, R.S.B.C. 1911, sec. 104, considered.]

2. EVIDENCE (§ XI A—761)—RELEVANCY—UNREGISTERED GRANT—DATE.

Where the applicability of the Registry Act (B.C.) depends on the date of an instrument, an unregistered Crown grant is relevant evidence to such issue and admissible as such.

Statement.

APPEAL by plaintiff from an order of Grant, Co.J. Reversed.

D. A. McDonald, for appellant.

R. L. Reid, K.C., and *R. M. Macdonald*, for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—This is an appeal in four consolidated mechanics' lien actions brought by sub-contractors of Campbell & Wilkie who contracted with their co-defendants, the City of Vancouver, to erect a building for the city on property described as the n.e. ¼ of the e. ½ of the n.w. ¼ of section 27, Hastings townsite, Vancouver district. Before the trial the Bank of Toronto was made a party defendant for the reason that it claims the balance of the contract price owing to the city by the contractors, Campbell & Wilkie, under an assignment from them, which assignment could not prevail if the plaintiffs should establish their liens against the said property: in other words, if the lienholders succeed, the city could satisfy their claims out of the said balance, and thus defeat the assignment to the extent of the lienholders' claims. No formal order adding the bank was taken out, nor were copies of the summonses and plaints, or other process served, or ordered to be served on the bank, nor did the bank file a dispute note.

Some of the plaintiffs alleged that His Majesty the King was owner of the said lands, but that the City of Vancouver had some interest therein, while others alleged that the city was the owner in fee.

The city filed a dispute note in the consolidated actions admitting that it held a conveyance in fee simple of the said lands from the Crown, and was the owner thereof, and at the same time paid into Court the said balance of the contract price—$6,252.69, which is more than sufficient to satisfy the liens.

The situation at the opening of the trial then was that the city's ownership of the property was by it admitted, and but for the intervention of the bank no question would have been raised in respect thereof. While the bank had no status so far as the pleadings go, yet counsel for all parties appear to have acquiesced in its assumption of the right to oppose the plaintiffs' claims.

Counsel for the plaintiff O'Neill essayed to prove the city's title by calling the city clerk to produce the conveyance from the Crown. Counsel for the bank thereupon objected to the grant being put in evidence on the ground that it was unregistered, which objection was sustained. The fact that it was unregistered appears to have been admitted. Without more, counsel for the bank insisted that the city had no interest in the lands because of sec. 104 of the Land Registry Act, and after considerable argument and notwithstanding that counsel for the plaintiffs desired to proceed with the trial, the County Court Judge decided that said sec. 104 precluded him from holding that the city had any interest whatever in the said lands.

In my opinion, proof of the Crown grant was erroneously rejected. Its date was neither admitted nor proved. The applicability of said sec. 104 depends on the date of the instrument. If the instrument took effect prior to July 1, 1906, the section does not affect it. But whatever its date, unless it fell under sec. 105 of the said Act, which it did not, because it was not sought to set it up against a registered interest, it was admissible in evidence, and the question of its legal effect was matter for argument after proof of the instrument itself. Therefore, on the ground of the rejection of relevant evidence, the judgment below is open to attack. But while to order a new trial would technically dispose of this appeal, the question which must ultimately be answered would be left unanswered. This difficulty was subsequently overcome by counsel agreeing that the grant was later than the said June 30. They also agreed that the city was in actual possession of the land granted at the time or times the work was contracted for, and are still so possessed. These admissions enable us, in my opinion, to dispose of this appeal without ordering a new trial.

This question of law would then arise: Would actual possession under grant from the Crown, coupled with a statutory right

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to register the grant, and thereupon become the owner in fee, create an estate or interest upon which a mechanic's lien could attach? I think it would.

This is not a contest between rival vendees claiming under unregistered agreements from the same vendor, such as was *Goddard* v. *Slingerland* (1911), 16 B.C.R. 329, so much relied on in the Court below. The city *dehors* the grant had by reason of actual possession a good title against all the world. When the Crown grant was delivered it was optional with the grantee to register it or not. The grantee could enjoy the property for all time without fear of eviction by the Crown.

The Crown could have no legal complaint by reason of non-registration of the grant, and in no event would it repudiate its own grant. Added to this perpetual right of possession and enjoyment is the further right given by the statute itself, not by the instrument, to make the estate one of fee simple whenever the grantee chose to do so. The city's interest, therefore, was, in my opinion, a very valuable one, and could be made the subject of assignment or sale. In a much weaker case it was the opinion of Wetmore, C.J., that actual possession alone was an interest in land upon which a mechanic's lien would attach: *Galvin Walston Lumber Co.* v. *McKinnon*, 4 S.L.R. 68; and while it is perhaps not very useful to refer to United States decisions where statutes are involved, I find that the Supreme Court of Iowa held the same view in *Bray* v. *Smith* (1893), 54 N.W.R. 222.

I would allow the appeal and declare that all the right, title and interest of the City of Vancouver is charged by the said liens and subject to be sold to satisfy the same.

Galliher, J.A.

GALLIHER, J.A., concurred.

Martin, J.A.

MARTIN, J.A.:—This appeal has been much simplified by the admission, since the first argument, that the Crown grant to the City of Vancouver is dated August 20, 1912; that actual possession was taken by the city in the autumn of 1913; and that work was begun under the contract in question in August, 1914, which leaves us free to deal on the merits with the substantial point involved and as though it had come before the Judge below on those facts.

The question, therefore, is narrowed down to this: Is a Crown grantee in possession of land an "owner" within the definition of sec. 2 of the Mechanics Lien Act? That section declares that:—

"Owner" means and shall extend to and include a person having any estate or interest, legal or equitable, in the lands upon which the work or service is done, or material is placed or furnished, at whose request and upon whose credit, etc.

Sec. 31 empowers the Judge to "direct the sale of the estate or interest charged" by the lien, and "any conveyance under his seal shall be effectual to pass the estate or interest sold."

Now, apart from statute no one could have a higher or better "estate or interest" in land than a Crown grantee in possession, so for the purposes of this case, unless some limitation can be found in the Land Registry Act, the title of the city as owner is absolute. Sec. 104 of that Act is invoked, and it refers to certain "instruments" as follows:—

No instrument executed and taking effect after June 30, 1905, and no instrument executed before July 1, 1905, to take effect after the said June 30, 1905, purporting to transfer, charge, deal with, or affect land or any estate or interest therein (except a leasehold interest in possession for a term not exceeding 3 years) shall pass any estate or interest, either at law or in equity, in such land until the same shall be registered in compliance with the provisions of this Act. . . .

But, in my opinion, the word "instrument" as here used does not apply to Crown grants. In the first place, it is one section of a group, secs. 102-7, entitled "Transfers" and that word is just as inappropriate to a grant from the Crown as is the word "conveyance," yet the first section of the group, 102, begins "When any conveyance or transfer is made of any land or interest therein, etc."; and sec. 103 relates to conveyances; sec. 106 also to transfer or conveyance; sec. 107 to "transfers" between joint owners, and secs. 104 and 105 to "instruments" which "purport to transfer, charge, deal with, or affect land, etc." The word "transfer" is not defined in the interpretation sec. 2 of the Land Registry Act, but it declares that—

"Instrument" means and shall include any document in writing or printed, or partly written and partly printed, relating to the transfer of land or otherwise dealing with or affecting land or evidencing title thereto, and maps, plans, or surveys.

Compare this definition with, *e.g.*, that to be found in the Alberta Land Titles Act, sec. 2, which begins by saying that "'Instrument' means any grant, certificate of title, conveyance, assurance, etc., etc.," thus covering the very point left open here.

Then, by sec. 77, "before any deed or instrument, executed subsequently to October 8, 1865, other than a Crown grant,

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decree, judgment or order of a Court of civil jurisdiction is recorded or registered," it must be acknowledged as therein provided, and by sec. 15, save in the case of mineral claims (see sec. 17), "the land and every portion of the land comprised in an unregistered Crown grant shall be registered in the register of indefeasible fees," and the certificate of indefeasible title is subject, by sec. 22, to several reservations, the first of which is "(*a*) The reservation contained in the original grant from the Crown;" and sub-secs. (2) and (3) provide:—

(2) Any certificate of indefeasible title issued under the provisions of this Act shall be void as against the title of any person adversely in actual possession of and rightly entitled to the hereditaments included in such certificate at the time of the application upon which such certificate was granted under this Act.

(3) After the issuance of a certificate of indefeasible title, no title adverse or in derogation to the title of the registered owner shall be acquired by any length of possession merely.

Now, estates and interests in land may be granted by or arise out of Acts of Parliament, illustrations of which are to be found in various land grants to railways, one of which was recognized by our recent judgment in this Court in *Re Assessment Act & Heinze*, 26 D.L.R. 211, 20 B.C.R. 99, 52 Can. S.C.R. 15 (leave to appeal to Privy Council refused on February 3, 1916), and yet are such Acts ordinarily appropriately styled instruments? And if so, how are they to be registered in the face of sec. 77 which does not exempt them from the necessity of acknowledgment? In my opinion, the whole Act, read together, goes to shew that the word "instrument" is not intended in sec. 104, at least, to relate either to Crown grants or Acts of Parliament, the language therein, "transfer, charge, deal with or affect," primarily and properly used contemplates land which has been dealt with by "instruments" which are subsequent to the original grant from the Crown, and the various specified modes of that subsequent dealing or alienation are *ejusdem generis*; no lawyer or parliamentary draughtsman in this province at least would begin to treat such a subject by referring to the original alienation from the Crown, by its bounty or otherwise, as a "transfer," and the further one goes with the language employed the further one gets away from such an intention. Of course, "instrument" may be made to include an Act of Parliament, *e.g.*, it does in the English Trustee Act of 1893, ch. 53, sec. 50, which says: "The

expression 'instrument' includes Act of Parliament," which goes to shew the necessity for something of the kind in our Act if it were intended to include Acts and Crown grants. Even a decree of the Court of Chancery, dealing with a landed estate, was held in *Jodrell* v. *Jodrell* (1869), 38 L.J. Ch. 507, not to be included in the expression "any instrument that shall be executed after the passing of this Act," *i.e.*, the Apportionment Act of 1834, ch. 33, 4 & 5 Wm. IV. sec. 50. The truth is that different meanings must be given to the same word in different contexts; and a meaning has to be given to a word "according as reason and good sense require the interpretation, with reference to the context and the subject-matter of the enactment," as was said by Tindall, C.J., in delivering the judgment of the Queen's Bench in *The Queen* v. *Humpherey* (1839), 10 A. & E. 335, at 370, wherein three different meanings were stated which might be given to the word "upon."

It follows from the foregoing that, in my opinion, there is no section in the Land Registry Act which limits the title of the city to the land in question, and so long as it remains in possession under its Crown grant its title is unassailable and it is the "owner" of the land within the meaning of the Mechanics' Lien Act. I do not think it now advisable to discuss at any length, in the absence of argument, the further question of how far one, other than a Crown grantee, in actual possession of land may be deemed to be an "owner" under the Mechanics Lien Act apart from any transfer or conveyance, but I have not overlooked the opinion of Wetmore, C.J., in *Galvin Walston Lumber Co.* v. *McKinnon*, 4 S.L.R. 68, and I observe that the definition of "owner" in our Mechanics' Lien Act is if anything wider than that in the Saskatchewan Act as it says any interest or estate, "legal or equitable," in the lands, etc. The subject of title by possession is discussed in Jones' Torrens System (1886), p. 67, and Thoms' Canadian Torrens System (1912), 66-7. There is in our Act no provision for a qualified possessory title such as there is in Ontario and elsewhere—Jones, *supra*, pp. 40-1. Under our system actual adverse possession for the period contemplated by the Statute of Limitations, R.S.B.C. 1911, ch. 145, sec. 16, will confer an estate outside of the Land Registry Act which need not be evidenced by any instrument at all, and yet will prevail against a certificate of indefeasible title to the extent of

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making the latter "void" as above noted. One consequence at least of finding a person in actual possession is that he in any event may have a valid though unregistered leasehold interest up to three years recognized by said sec. 104, and be an "owner" to that extent under the Mechanics Lien Act, from which it follows that one in actual possession has always the right to shew what his interest really is for it might, *e.g.*, be anything between a short lease and a completed statutory title as aforesaid.

It must not be overlooked (and I make this observation because of the submission made during the argument that in cases where there is no registered owner the Crown would be assumed to be the owner), that in regard to that large portion of this province which comprises the old Colony of Vancouver Island there can be no such assumption because of the fact that said island, with all the royalties of the seas upon its coasts and all mining royalties, was granted by the Crown to the Hudson's Bay Company on January 13, 1849, as "the true and absolute lord and proprietor of the same," and was not reconveyed by the company to the Crown (saving a number of reservations) till April 3, 1867 (appdx. to B.C. Stats. of 1871), after the union of the two colonies on November 17, 1866, and during that time many alienations of lands and water frontages had been made by the company, as are formally referred to, *e.g.*, in said reconveyance, in the Vancouver Island Act for Confirming Titles from the Hudson's Bay Co., 1860; in the V.I. Land Registry Act 1860, sec. 16, and to-day in sec. 31 of the Land Registry Act.

With respect to the present mainland, the former Colony of British Columbia, the circumstances are different, the position of the company never being legally the same therein as it was in Vancouver Island or Rupert's Land as distinguished from its rights by license or otherwise over the Indian and North-West Territories (*vide* my articles on the "Rise of Law in Rupert's Land" in West. Law Times, vol. I., pp. 49, 73, 193; and *Calder's* case, 2 West. L.T. 183; Martin's H.B. Co.'s Land Tenures, 1898, p. 183), and I am not aware of any public document, of which judicial notice could be taken, defining the extent of the reserved areas round its "posts or stations" in British Columbia such as there is in its deed of surrender of Rupert's Land to the Crown, dated November 19, 1869, given under the Rupert's Land Act of

1868 (Martin's Hudson's Bay Co.'s Land Tenures, 1898, appdx. Q., pp. 216, 222).

Finally, I note that there is also another class of owner of "an estate or interest, legal or equitable" in land outside of the Land Registry Act, and in addition to those three already mentioned, viz., (1) under Crown grant, (2) by Act of Parliament, (3) and actual possession under the Statute of Limitations, and sec. 104; I refer to the right of a free miner in his claim, which has been decided to be an interest in land. Though sec. 6 (3) of the Mechanics' Lien Act provides for a lien on a "mine" yet by sec. 17 of the Land Registry Act:—

> No mine or mineral claim, as defined by any Mineral Act or ordinance now or at any time in force in the province, shall be registered in the register of indefeasible fees, nor shall any certificate of indefeasible title to same be issued.

And refer to sec. 15 already cited. A certificate of absolute fee may be obtained after the issue of a Crown grant to a mineral claim under sec. 74 of the Mineral Act, ch. 74, but up to that time all conveyances, bills of sale and documents of title relating to mineral claims or placer claims must be recorded with the mining recorder—secs. 74-5 of the Mineral Act, and secs. 56-60 of the Placer Mining Act. But nevertheless no one has yet ventured to contest the right to file a lien against a "mine," of any description, whether under the two Acts already cited or the coal or petroleum mining operations carried on under the Coal and Petroleum Act, R.S.B.C. 1911—*e.g.*, *vide* sec. 21 (1) (*d*).

I am of the opinion, therefore, that this appeal should be allowed and the lien declared to exist to the full extent of the estate and interest of the City of Vancouver as disclosed by the facts of the Crown grant and possession taken thereunder.

McPHILLIPS, J.A., concurred in allowing the appeal. McPhillips, J.A.

Appeal allowed.

MARTIN v. DOMINION TRUST CO.

MAN.
K. B.

Manitoba King's Bench, Mathers, C.J.K.B. November 27, 1916.

COSTS (§ I—14)—SECURITY—NON-RESIDENT CO-PLAINTIFF.

Where one of several plaintiffs who are joined in a common action resides outside the jurisdiction, no order for security for costs in respect of that individual plaintiff should be granted. The Judicature Act has not altered the pre-Judicature Act practice in that respect.

APPEAL by plaintiff from an order of a referee ordering security for costs. Reversed. Statement.

F. K. Hamilton, for plaintiff Jessie Ross.

James Auld, for Charlotte Stacpoole.

MAN.

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MARTIN v. DOMINION TRUST CO.

Mathers, C.J.K.B.

MATHERS, C.J.K.B.:—The plaintiffs, depositors at the Winnipeg branch of the Dominion Trust Co., filed a caveat claiming an interest in certain mortgages upon Manitoba property registered in the name of the company. The defendants claim that these mortgages have been specially allocated to them as security for money paid to the company for investment.

On February 12, 1916, Curran, J., made an order directing the plaintiffs as such caveators to commence an action in this Court against the company and the other defendants on or before February 22, 1916, to establish their alleged claim as caveators and in default that the caveat should be discharged. Pursuant to such order this action was brought.

Upon the application of Charlotte Stacpoole, one of the defendants, the referee made an order for security for costs against Jessie R. Ross, one of the plaintiffs, upon the ground of her residence beyond the jurisdiction of this Court. From this order the plaintiff Ross appeals.

The cause of action of the plaintiffs is several and but for r. 195 separate actions by each of the plaintiffs would have been necessary.

All the plaintiffs with the exception of the plaintiff Ross reside within the jurisdiction. There can be no doubt that by the law before the Judicature Acts, where one of several joint plaintiffs resided beyond the jurisdiction, yet if any of them resided within the jurisdiction there could be no order for security for costs: *Winthorp* v. *Royal Exchange Ass. Co.*, 1 Dickens 282; *Smith* v. *Silverthorne*, 15 P.R. (Ont.) 197. The reason was that each and every plaintiff was liable for the defendant's costs, and if any one of several plaintiffs resided within the jurisdiction the defendant had in his liability for costs all the security he was entitled to.

Has the law in this respect been altered by the Judicature Acts? That will depend upon whether a defendant who is successful against one or more plaintiffs, but who fails as to others, has a remedy under the rules for his costs against the plaintiffs who have succeeded. R. 195 says that the

> defendant though unsuccessful shall be entitled to his costs occasioned by so joining any person who shall not be found entitled to relief, unless the Court or a Judge in disposing of the costs shall otherwise direct.

Assume that the plaintiff Ross fails and that the other plain-

tiffs succeed, what disposition should, in view of this rule, be made of the costs? In that case the plaintiffs who succeed would be entitled to the general costs of the action. But they have joined as co-plaintiff a party who had no claim and r. 195 says that in such a case the defendants are entitled to the costs occasioned by joining such unsuccessful plaintiff, not merely as against him, but as against the other plaintiffs as well.

English O. 16, r. 1, which contains exactly the same provisions as our r. 195, has been so interpreted. *Viscount Gort* v. *Rowney*, 17 Q.B.D. 625. This interpretation had previously been put upon it by a Divisional Court in *D'Hormusgee* v. *Grey*, 10 Q.B.D. 13. That was an application for security for costs in a case where one plaintiff resided in and the other out of the jurisdiction. The Master made an order for security, which was reversed by Cave, J., on appeal. An appeal from Cave, J., was dismissed by the Divisional Court. The Court held that the law as to security for costs in such a case had not been altered by the Judicature Act, and that under the rule the defendant who succeeded against one plaintiff would be entitled as against the other plaintiffs to the costs occasioned by joining the unsuccessful plaintiff.

The reason underlying the pre-Judicature Act rule has not been taken away. A defendant who succeeds against one of several plaintiffs suing in the same action has a remedy against all for his costs. That remedy does not depend upon whether the cause of action is joint or several. If the plaintiffs are properly joined under the rule they are all liable to the defendant for his costs. If the defendants succeed against the plaintiff Ross, the other plaintiffs are liable to the defendants for the costs occasioned by making Ross a plaintiff, and *Viscount Gort* v. *Rowney, supra*, shews that even as against Ross herself the defendants would be entitled to nothing more.

With respect, I think that the referee erred in making an order for security for costs under the circumstances.

The referee's order must be set aside with costs in the cause to the plaintiff Ross against the defendant Stacpoole in any event.

Appeal allowed.

ALTA.

S. C.

CANADIAN NORTHERN INVESTMENT CO. v. CAMERON.

Alberta Supreme Court, Harvey, C.J. June 14, 1916.

INTEREST (§ II B—65)—MORTGAGE—STATEMENT OF RATE.

The provisions of sec. 6 of the Interest Act, R.S.C. 1906, ch. 120, are not complied with, in respect of a mortgage upon real estate, under which payments of principal and interest are blended, by stating in the mortgage the amount of principal money and the rate of interest, but not stating whether the interest is calculated yearly or half-yearly, nor whether in advance or not. The statute must be strictly followed.

Note.—Except upon one point, only questions of fact and of account were raised in the above action, and therefore the judgment has not been published in full. But upon that point, especially in view of later decisions, the judgment appears to be important.

Colonial Investment Co. **v.** *Borland*, **6 D.L.R. 211, and** *Stubbs* **v.** *Standard Reliance (infra)*, **should be read in this connection.—EDITOR.**

Statement.

ACTION on mortgage.

C. F. Newell, K.C., for plaintiff.

J. R. Lavell, for defendant.

Harvey, C.J.

HARVEY, C.J.:—The defendant sets up non-compliance with the Interest Act, whereby the plaintiff is deprived of any interest.

The sections of the Act (R.S.C. ch. 120) in question are 6 and 9. By sec. 6 it is provided that:—

Whenever any principal money or interest secured by mortgage of real estate is, by the same, made payable on the sinking fund plan, or on any plan under which the payments of principal money and interest are blended . . no interest whatever shall be chargeable, payable, or recoverable on any part of the principal money advanced unless the mortgage contains the statement shewing the amount of such principal money and the rate of interest chargeable thereon, calculated yearly or half-yearly, not in advance.

Sec. 9 provides that any sum paid on account of interest not recoverable may be recovered back or deducted from any other interest payable.

In the mortgage sued on the mortgagor covenants and agrees:—

1. That he will pay the above sum of $1,400 and interest thereon at the rate hereinafter specified . . as follows: that is to say, in instalments of $179.90 half-yearly, on June 24 and December 24 in each year, until the whole of said principal sum and the interest thereon is fully paid and satisfied, making in all 10 half-yearly instalments, the first of said instalments to become due and be payable on December 24, 1907. All arrears of both principal and interest to bear interest at 10 per cent. per annum.

2. That he will pay interest on the said sum or so much thereof as remains unpaid at the rate of 10 per cent. per annum by half-yearly payments on December 24 and June 24 in each and every year until the whole of the principal money and interest is paid and satisfied, etc.

This second covenant is printed, only the blanks for rate and time being filled in. The terms of payment under the first covenant, however, are written in the space left for that purpose;

and on the back of the mortgage is the printed indorsement, "Mortgage (straight loan)."

From this indorsement it would appear that this is not the form of mortgage that the plaintiff uses for a loan payable on the sinking fund plan, but it is quite apparent that it is—and the evidence of the plaintiff's officers shews they considered it a mortgage payable under the sinking fund plan. The question then is, are the above requirements of the statute satisfied? In form they clearly are not, for there is no statement in terms conveying the information the statute demands. The purpose of the statutory provision seems quite clearly to be for the information of the mortgagor because only by a somewhat involved calculation can the rate of interest paid under the blended instalments be determined. Then, if the particulars of the mortgage, though not in form a statement in the terms of the statute, yet in substance contain the information required, it may perhaps be said that the penalty imposed by the statute is not to be applied.

It is clear that the principal of the mortgage is $1,400, and it is also clear that 10 instalments of $179.90 by which it is to be repaid include $399 more than the principal, which must therefore be the interest payable under the first covenant. That covenant provides that interest is payable at the rate thereinafter specified, and there is a rate of 10 per cent. thereinafter specified. If that were all that the statute required there might be room for argument that its requirements are satisfied, though it is of course apparent that a promise by the mortgagor to pay interest at 10 per cent. can hardly be construed as a statement by the mortgagee that the instalment is ascertained by computing interest at 10 per cent., but the statute provides that the interest must be calculated not in advance, and that it may be calculated yearly or half-yearly. As to the former it may perhaps be said that the statement does not require to shew that it is calculated not in advance, because the statute prohibits it being calculated in any other way; but as to the latter, inasmuch as the interests may be calculated either yearly or half-yearly according to the agreement of the parties, it is necessary for the mortgagor to know which it is in order to shew that he agrees to it. The value of a year's interest on $1,400, on the basis of 10 per cent. calculated

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yearly is only $140, but if calculated half-yearly it is $143.50. It is apparent, therefore, that there is a substantial advantage to the mortgagor to know what the fact is in this regard. The instalments of principal and interest are payable half-yearly, but it by no means follows that the amount of the instalment is ascertained by calculating the interest on the principal half-yearly. It might be calculated yearly, in which event the amount of the instalment would be somewhat less than if calculated half-yearly; nor do I see that the second covenant to pay interest furnishes any further information. If full effect is to be given to that covenant the mortgagor is bound to pay in addition to the $399 of interest included in the instalments, also interest at 10 per cent. half-yearly, because the covenants are quite distinct and independent. The provision for interest at the end of the first covenant applies only to arrears, and therefore does not furnish the desired information. If it is said that the mortgage may be given effect to as a security for $1,400 with interest as provided in the second covenant, it may be answered that that is not what the mortgage provides. It provides for the repayment in instalments in which principal and interest are blended, and the statute provides that no interest whatever shall be payable under such a mortgage unless the conditions specified are complied with.

In *Colonial Investment Co.* v. *Borland*, 6 D.L.R. 211, 5 A.L.R. 71, the Court *en banc* held that though there was a distinct provision for payment of the principal and interest at a specified rate, yet as there was an alternative method provided for paying in instalments, which was the method accepted by the parties, the statute applied.

I find it quite impossible to ascertain from the terms of this mortgage whether the interest which is payable under the instalments mentioned is calculated yearly or half-yearly, and I am of opinion, therefore, that the mortgage fails to comply both in form and substance with the conditions of the statute and that consequently no interest whatever can be recovered. The attached statement shews that there is a balance due the plaintiff of $359.77 for which it is entitled to judgment.

Judgment accordingly.

STUBBS v. STANDARD RELIANCE MORTGAGE CO.

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C. A.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron, and Haggart, JJ.A. November 27, 1916.

INTEREST (§ II B—65)—MORTGAGE—STATEMENT OF RATE.

The provisions of sec. 6 of the Interest Act, R.S.C. 1906, ch. 120, are not sufficiently complied with, if a mortgage, under which payments of principal and interest are blended, states the amount of principal and the rate of interest, but does not state whether the interest is calculated yearly or half-yearly. The intention of the Act is that the rate of the interest and how it is computed shall be stated plainly on the face of the mortgage.

Statement.

APPEAL from a judgment of the Chief Justice of King's Bench in an action on a mortgage.

C. P. Wilson, K.C., *A. B. McAllister* and *Garland*, for appellant, defendant.

H. A. Bergman, for respondent, plaintiff.

Richards, J.A.

RICHARDS, J.A.:—Section 6 of the Interest Act (ch. 120, R.S.C.), so far as material for the decision in this case, reads:

Whenever any principal money or interest secured by mortgage of real estate is, by the same, made payable . . on any plan under which the payments of principal money and interest are blended . . no interest whatever shall be chargeable, payable or recoverable, on any part of the principal advanced, unless the mortgage contains a statement shewing the amount of such principal money, and the rate of interest chargeable thereon, calculated yearly or half-yearly, not in advance.

The mortgage does state the amount of principal money. It also states the rate of interest as "10 per cent. per annum," but it does not state whether that interest is calculated yearly or half-yearly, or whether or not it is calculated in advance. The words "per annum" simply fix the rate as being that of 10 per cent. for a year. They do not state how calculated—yearly, or half-yearly. It might be calculated monthly, or daily, and yet be at the rate of 10 per cent.

The argument in favour of the sufficiency of the statement in question is that the words "calculated yearly or half-yearly not in advance" do not mean that the statement is required to give on its face the information that the interest is "calculated yearly," or that it is "calculated half-yearly," but that those words in the statute are merely directory of the method of calculation to be used in ascertaining whether or not the rate really is as stated.

The matter has been dealt with in Alberta by Harvey, C.J., in *Can. Northern Investment Co.* v. *Cameron*, 32 D.L.R. 54. He held, as I understand it, that, as the statement did not say whether the rate of interest named was calculated yearly or

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calculated half-yearly, sec. 6 applied, and no interest could be collected.

The opposite view was taken, a few days later, by Beck, J., in *Can. Mortgage Investment Co.* v. *Baird*, 30 D.L.R. 275.

He held that a statement in the mortgage, that the rate was "10 per cent. per annum," sufficiently complied with sec. 6. I take it, from his reasons for judgment, that the payments provided by the mortgage were such as blended principal and interest together. But I do not gather from his remarks at what periods those payments were to be made.

He considers, as I read his judgment, that the purpose of the statutory provision is merely to enable the mortgagor to make his own calculation, at any time, of the amount he owes.

It may be that, in the case before Beck, J., such calculations could be readily made, but how the ordinary mortgagor could be expected to be able to make it in a case like the present, where the money is repayable in 135 monthly payments of $8.75 each, I cannot understand.

With deference, I think that the intention of the Act is that there shall be stated plainly, on the face of the mortgage, not only the rate of interest, but how the same is computed, so that the mortgagor shall, when entering into the contract, be informed how the named interest had been calculated (whether yearly or half-yearly) and treated as payable, in arriving at the amounts of the fixed payments; and that he shall also be able to afterwards (if he can) check over the amounts and see how he stands.

It is argued that the Act is one in restriction of rights of contract, and should be strictly construed. I think we should apply the language of Cotton, L.J., in *Parsons* v. *Brand*, 25 Q.B.D. 110 at 113:—

> With the policy of the Act we have nothing to do, we have only to carry out the intention of the legislature as appearing in the terms of the Act.

To test the argument that a statement telling only the rate is sufficient, let us take the case of a large mortgage, with, say, 20 equal payments to be made half-yearly, but such that principal and interest are blended, as in the present case. The mortgage states the rate to be, say, "10 per cent. per annum," but does no state whether that rate is arrived at by yearly, or by half-yearly, calculations. It also provides that interest in arrear shall bear interest. How is the mortgagor, in trying to make his own

calculations, to know which to make, yearly, or half-yearly, computation, as the test of the correctness of the statement?

If he finds it correct on the half-yearly computation, but somewhat understating the real rate on a yearly computation, can he then avail himself of sec. 7, and pay on the yearly computation only?

The mortgagee could say: "I computed it half-yearly as the statute permitted me to do." How would the Court decide between them? The statute, if construed as contended by the defendants, would make either view correct.

It may be that, in a case where the payments are half-yearly, or at shorter periods, and where, as in the mortgage before us, there is no provision for compound interest, no actual difference would arise whether the calculation had been made yearly or half-yearly. But, if compound interest were chargeable, then there would be, in case of any delays in making payments, a difference in the results, as pointed out by Harvey, C.J., in *Can. Northern Investment Co.* v. *Cameron*, 32 D.L.R. 54. There the payments were half-yearly, and the mortgage provided for compound interest.

The above, I think, shews that the intention was that the statement contemplated by the Act should state in which way the rate had been worked out. I can not think that it meant that it should so state in cases where the result might vary, according to which way had been followed, but need not do so in cases where it would not.

I think the conclusion arrived at in the judgment appealed against is correct. Whether the statement should also say that the rate was calculated "not in advance" need not now be decided, and I express no opinion on the point.

If I am right in the above, it is unnecessary to consider sec. 7, whatever the rate works out at in the present case. That section only applies after such a statement as sec. 6 requires has, in fact, been made.

I would dismiss the appeal with costs.

Haggart, J.A.

HAGGART, J.A.:—If sec. 6, ch. 120, R.S.C., alone governed, then I doubt whether the statement in the mortgage complied with the statute and shewed "the amount of such principal money and the rate of interest chargeable thereon calculated yearly or half-yearly not in advance," in which event "no interest what-

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ever shall be chargeable, payable or recoverable on any part of the principal money advanced."

But we must with the foregoing section read sec. 7, which contemplates the existence of a difference between the rate shewn in the statement and the rate charged in calculating the amount and number of the blended monthly instalments, and expressly enacts that "no greater rate of interest shall be chargeable, payable or recoverable on the principal money advanced than the rate shewn in such statement."

It is not easy to harmonize what appears to be two contradictory enactments. We must not, however, forget the object of the statute, which clearly was to protect innocent borrowers against excessive interest charges on mortgages of this kind.

The Dominion Parliament, which has exclusive legislative authority as to the matter of interest, enacted the express prohibition set out in sec. 6. This mortgage is drawn and executed in violation of sec. 6 and the penalty is that "No interest whatever shall be chargeable, payable or recoverable."

I would affirm the judgment of the Chief Justice of the King's Bench and dismiss the appeal.

Howell, C.J.M. Perdue, J.A. Cameron, J.A.

HOWELL C.J.M., PERDUE and CAMERON, JJ.A., concurred.

Appeal dismissed.

Annotation.

Annotation—Interest—Statement of rate in land mortgage.

BY ALFRED B. MORINE, K.C.

Three decisions involving an interpretation of the Interest Act (R.S.C. 1906, ch. 120), have been given in Alberta, and one in Manitoba. The decision of Beck, J. (Alberta), in *Canadian Mortgage Investment Co.* v. *Baird*, 30 D.L.R. 275, was in opposition to the opinion expressed in the other three decisions.

The section to be construed reads as follows:—

6. Whenever any principal money or interest secured by mortgage of real estate is, by the same, made payable on the sinking fund plan, or on any plan under which the payments of principal money and interest are blended, or on any plan which involves an allowance of interest on stipulated repayments, no interest whatever shall be chargeable, payable or recoverable, on any part of the principal money advanced, unless the mortgage contains a statement shewing the amount of such principal money and the rate of interest chargeable thereon, calculated yearly or half-yearly, not in advance.

In the *Colonial Investment Co.* v. *Borland*, 6 D.L.R. 211 (1912), the mortgage contained a covenant to pay $600 and interest at 12 per cent. per annum by equal monthly instalments. Harvey, C.J. (delivering the judgment of the Court), said: "There is nothing in the covenant to pay the principal and interest at 12 per cent. to suggest that it is in the result the same so far as amount is concerned as the payments under the proviso, and slight computa-

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tion shews that it is not." It will be noted, therefore, that though the mortgage *stated* the amount of principal and the rate of interest per annum, the Court held that this was not the "statement" required by sec. 6 of the Interest Act. "Moreover," said the Court, "it is not a compliance with the statute, since it provides for interest monthly, and not yearly or half-yearly in advance." But the Interest Act, sec. 6, does not say that interest shall not be payable except yearly or half-yearly, but merely that it shall contain a statement shewing "the rate of interest, calculated yearly, or half-yearly, not in advance." It is submitted as beyond the possibility of successful dispute that interest calculated yearly or half-yearly may nevertheless be made payable in equal monthly instalments.

In the *Canadian Northern Investment Co.* v. *Cameron*, 32 D.L.R. 54, the mortgage *stated* that the principal was $1,400 and the interest thereon at the rate of 10 per cent. per annum, the blended amounts being made payable in ten half-yearly instalments of $179.90 each. The action was tried by Harvey, C.J. (Alta.), and in the judgment he said: "There is no statement conveying the information the statute demands. Only by a somewhat involved calculation can the rate of interest be determined. The instalments are payable half-yearly, but it by no means follows that the amount is ascertained by calculating it half-yearly. It may, perhaps, be said that the statement does not require to shew that it is calculated not in advance, because the statute prohibits it being calculated in any other way, but inasmuch as interest may be calculated either yearly or half-yearly (that is, the statute permits it), it is necessary for the mortgagor to know which it is. The mortgage fails to comply, both in form and substance, with the conditions of the statute."

The *Canadian Mortgage Investment Co.* v. *Baird*, 30 D.L.R. 275, was tried before Beck, J. (Alta.), and his judgment was given less than one month after the one last mentioned. The mortgage in question contained a clause to the effect that the parties agreed that the principal sum was $1,300, and the rate of interest 10 per cent. per annum. The Judge said: "I think this a sufficient compliance with the Act." He held that no statement in figures indicating the method of calculation was necessary. "Statement," in his opinion, meant no more in the Interest Act than "Statement of claim" meant in the Judicature Act. The words "not in advance" were, he said, merely a prohibition. The purpose of the Act was, he thought, to enable the mortgagor to make his own calculations.

In *Stubbs* v. *Standard Reliance Mortgage Co.* (Man.) *supra*, the mortgage contained precisely the same information as in the action last mentioned, but the Court of Appeal preferred the opinions given by the Alberta Court of Appeal and by Harvey, C.J., both above stated, to that of Beck, J. In delivering the judgment of the Court, Richards, J.A., said: "I think that the intention of the Act is, that there shall be stated plainly, on the face of the mortgage, not only the rate of interest, but how the same is computed, so that the mortgagor shall, when entering into the contract, be informed how the named interest had been calculated (whether yearly or half-yearly) and that he shall afterwards, if he be able, check over the amounts and see how he stands."

This last decision goes nearer than any other to expressing distinctly what seems to have been the feeling of all the Judges except Beck, J., as to the purpose of the Act. It seems to mean that in a mortgage providing for

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periodical payments of blended amounts, there shall be a calculation in figures shewing how each amount is constituted, by distinguishing principal and interest, and stating that the interest is calculated yearly or half-yearly, as the case may be, at a named rate. No other method would enable an illiterate or inexperienced man to do what the mortgagor, it is said, should be enabled to do.

But the purpose of a section of the Act must be gathered from its words, if they can be construed precisely, and, if not, they should be given a sense which, though not correct grammatically, is in harmony with the whole Act. If the words of the section admit of more than one construction, the true meaning is to be sought in the context, but the language must not be strained on account of the supposed intention of the legislature. (Maxwell on Statutes). Let us then examine the words of sec. 6 with their context. They deal with mortgages on real estate under which payments of principal and interest are blended. It is provided that the mortgage shall contain a statement shewing the rate of interest chargeable thereon, but no restriction as to the rate which may be charged, and though the rate shewn must be "*calculated*" "yearly or half-yearly," it is not said that the payments shall not be weekly, monthly, or otherwise.

"No interest whatever shall be chargeable unless the mortgage contains a statement shewing the rate of interest, calculated yearly or half-yearly, not in advance."

Beck, J., held that the mortgage need not shew that the interest was not calculated in advance, since "not in advance" were merely prohibitory words, and need not contain figures shewing the rate of interest, and that it was calculated yearly or half-yearly, since, in his opinion, a covenant to pay a named rate yearly or half-yearly was a "statement" in the sense that word is used in "statement of claim," etc. But upon critical examination it appears that the word "statement" cannot be construed in that detached way; it must be "a statement shewing the rate *calculated* yearly or half-yearly;" *not* the rate at which it was calculated, but the calculation itself.

In sec. 4, dealing with mortgages not on real estate, it is provided that if the contract does not contain "an express statement of the yearly rate or percentage of interest," certain consequences shall follow. This is the kind of a statement that Beck, J., thinks sec. 6 aims at, which it clearly is not, for, by the very words of section 4, mortgages on real estate are excepted. A statement of a yearly or half-yearly rate is a different matter then from a "statement shewing a rate *calculated*."

It is submitted, therefore, to be the better opinion that mortgages on real estate under which payments of principal and interest are blended should contain a detailed statement in figures shewing how each payment to be made thereunder is made up, distinguishing principal and interest, and shewing that a named rate is charged yearly or half-yearly.

The fact that so much uncertainty admittedly exists about a matter of frequent occurrence and great importance is a reflection upon the draftsmanship of sec. 6. Indeed, the whole Interest Act could be improved easily in its construction.

Re DOMINION TRUST CO.
(Directors' Case.)

B. C.

C. A.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher, and McPhillips, JJ.A. November 7, 1916.

CORPORATIONS AND COMPANIES (§ IV G 5—131)—LIABILITY OF DIRECTORS—TRUST FUNDS—ULTRA VIRES—NEGLIGENCE—MISFEASANCE.

There must be loss resulting from the negligence or *ultra vires* acts of directors in handling trust funds before they can be charged with misfeasance in the legal sense of the word. Directors who had taken no active part in the management are not answerable for the acts of the Board.

[*Re Dominion Trust Co.*, 26 D.L.R. 408, varied.]

Statement.

APPEAL from the judgment of Murphy, J., 26 D.L.R. 408, upon the hearing of a misfeasance summons, the Judge holding that the directors resident in British Columbia are liable in respect of trust funds misapplied and excusing the non-resident directors from liability therefor, and as to the misapplication or loss of funds of the company other than trust funds excusing all the directors from liability. Varied.

Joseph Martin, K.C., for liquidator.

Davis, K.C., *Bodwell*, K.C., *Whiteside*, K.C., *Bird*, *E. B. Ross*, *L. B. McLennan*, for appellants.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—This appeal stands in rather a peculiar position. The trial has not been completed except so far as those directors are concerned who have been exonerated from responsibility for the acts and omissions complained of in the summons. The position appears to me to be this: the trial reached a stage when it was felt by the Judge and counsel for all parties that a saving of time and expense could be effected by the Judge ruling upon certain questions affecting all or some of the parties charged with misfeasance. These questions were questions of negligence and of *ultra vires*. The Judge set himself the task of deciding in the first place whether or not there was evidence to sustain the charges against all or any of the directors and officers charged with misfeasance. He came to the conclusion that certain of the directors who had taken no active part in the management of the company's business were not answerable for what had been done or omitted by the board. I think the Judge came to the right conclusion in respect of these directors. They attended no meetings of the Board, and are not shewn to have been cognizant of any of the acts of commission or omission complained of. In the *Marquis of Bute's* case, [1892] 2 Ch. 100, Stirling, J., said:—

> But neglect or omission to attend meetings is not, in my opinion, the same

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thing as neglect or omission of a duty which ought to be performed at those meetings.

And he held the Marquis of Bute not liable for the neglect by the board of directors of a statutory duty imposed upon the company.

Having disposed of this part of the case, the Judge came to the conclusion that the other directors and officers (the appellants) had been remiss in their duties and had exceeded their powers, but only in respect of the management and disposition of property intrusted to the company for investment and management as trustees or agents.

This narrowed the matter down to findings that the appellants had been guilty of negligence in not, as the statute directed, keeping trust moneys separate from their corporate moneys, and in separate accounts, and in passing a resolution which in the Judge's opinion gave the managing director, Arnold, control of the bank account in which both corporate and trust moneys were mixed, thus enabling him, as the Judge thought, to commit breaches of trust by diverting trust moneys to purposes to which the company had no power to apply them. He thought that the parting with trust moneys other than on investment in securities specified in the Act was *ultra vires* of the directors. He therefore held them guilty of misfeasance and breach of trust in respect of trust funds only, and reserved for further consideration the question of the amount for which they were answerable.

As far as the trial proceeded it was confined to particular No. 2 of the summons. That particular had to do with the transactions of the company with what is known as syndicate 8, and the concrete question to be tried was whether or not any of the sums mentioned in particular No. 2 were lost through the misfeasance or breach of trust of the appellants.

Respondents' principal contention was that the directors failed to adopt and maintain a system of management of the company's affairs reasonably calculated to protect the company. One defect relied upon was the disregard of the provision of the company's Act of incorporation declaring that corporate and trust moneys should be kept separate. This imperative direction of the statute was admittedly ignored by the company. I do not think appellants can be heard to say that they were not aware of that provision of the statute. I think the directors were bound

to know the provisions of their charter and regulations. It is quite plain that they took no steps to see that the requirement was conformed to by the executive officers. Their counsel took the position that that was a matter of detail which could properly be left to the executive officers and argued that if the appellants had no notice that this term of the statute was being ignored they cannot be charged with negligence in that behalf. I think all the appellants must be held to have had knowledge of the breach of the said statutory injunction, but before pointing out the evidence of such knowledge I will notice in part the system under which the directors were performing their functions.

They appointed what they called an advisory committee and delegated nearly all their powers and duties to that committee. The committee met from week to week and considered the business brought before them. The board met quarterly and at the board meetings the minutes of the preceding meetings of the advisory committee were accustomed to be read and approved by the board. One of the items invariably found in the minutes of the advisory committee was of this character:—

The bank account was reported. "Debit balance, $9,650.15; cash in hand, $17,326.25."

The above is taken from the minutes of April 8, 1913, about a week after the company had taken over the business of its predecessor.

I do not think appellants can be heard to deny knowledge that a single bank account only was kept, in the face of minutes of this character read from time to time at the board meetings and formally adopted.

A motion was made to the Court to admit affidavits of appellants denying actual knowledge that one account only was kept for both classes of funds. In the disposition I would make of this appeal it is of no consequence whether the affidavits are admitted or rejected.

I will therefore assume that each of the appellants will deny actual knowledge of the mixing of the two classes of funds. That denial I do not think can be given effect to in the face of the evidence I have already referred to.

Now, in my opinion, a system of doing business which ignores a factor which, by statute, ought to be part of that system is

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primâ facie a defective and negligent system, and if loss can be shewn to have resulted from it, then I think a case of misfeasance would be made out. In specifying this particular defect, I do not mean to be understood as saying or implying that this is the only defect or that there may not be negligence beyond this. The trial not being ended, I refrain from discussing the question of other wrongful acts or omissions, and only point to one particular to sustain the Judge's refusal at that stage of the trial to dismiss the summons as against the appellants, which, in my opinion, is the only point we ought to now decide.

I think some confusion has arisen in this case by reason of what appears to me to have been a misapprehension of the meaning of the word misfeasance. I think when the Judge found the appellants guilty of misfeasance what he really meant was that they were guilty of negligence and of acts that were *ultra vires*. But this alone would not amount to misfeasance. There must be loss resulting from the negligence or *ultra vires* acts of the appellants before they can be charged with misfeasance in the legal sense of the word.

Towards the close of the proceedings in the Court below a discussion took place between the Judge and counsel as to whether loss had been proven or not, and it was finally determined that the Judge might *assume* loss for the purpose of deciding the questions he was about to consider.

This assumption of loss is not equivalent to an admission of loss; in fact, I cannot understand why a loss should have been assumed—that could not help in the consideration of the questions which the Judge was about to consider. Even if loss had been admitted, I can find no indication at all that counsel intended to admit that any loss could be traced to the alleged defective system or *ultra vires* acts of the appellants. I think, with deference, that what the Judge should have done instead of finding the appellants guilty of misfeasance, was to have made a finding upon negligence and *ultra vires*, and then, having concluded as he did that there was evidence of such, to have proceeded with the trial.

I think it would be premature at this time to go further than to say that the Judge was not in error, having regard to the incompleteness of the trial, in refusing to wholly dismiss the summons as against the appellants. The finding that the appel-

lants were not responsible for loss of corporate funds would not justify, as it were, an interim judgment and an appeal therefrom in the middle of the trial. If the loss of any sums of money, whether trust or corporate, can be traced to appellants' negligence, then I think they are answerable. I am not prepared to say that a system which may entail losses of both classes of funds, can be said to be a good one in respect of the one, and a bad one in respect of the other.

Before leaving the case I wish to refer to a statement of law made by the Judge in his reasons (26 D.L.R. at 416), in which he says:—

> In my opinion, when these trust funds were once received by the company it was the bounden duty of the directors to only part with their control of them on investments set out in sec. 8.

That is to say, sec. 8 of the company's Act of incorporation. That no doubt was the duty of the company to its *cestui qui trustent*, but that duty is not to be confounded with the duty which the directors owe to the company itself. This proceeding is one by the company against its directors for breach of duties which they as directors owed to the company; it is not a proceeding by *cestui qui trustent* of the company against the directors. This is a distinction which I think it is important to bear in mind when dealing with the matters which yet have to be dealt with in the trial.

In the result I would affirm the order dismissing the absentee directors from these proceedings, but would set the judgment aside so far as it relates to the appellants as I think in the case of the latter it goes too far. The trial should proceed as if the order had merely dealt with the absentee directors, and as if with respect to the others the Judge had refused to dismiss the summons.

The appeal should be allowed and the cross-appeal of the liquidator also allowed to the extent above indicated.

MARTIN, J.A., concurred. Martin, J.A.

GALLIHER, J.A.:—I concur in the reasons for judgment of the Chief Justice. Galliher, J.A.

McPHILLIPS, J.A.:—The Judge would appear in his judgment to have proceeded upon two grounds as establishing liability, viz., *ultra vires* and negligent acts of the resident directors. In elaborating the points upon which the Judge proceeded it will be seen that in his view there was a complete handing over McPhillips, J.A.

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of the management and control of the affairs and business of the company to Mr. Arnold (now deceased), the managing director of the company. Further, that there was but one bank account, *i.e.*, all the moneys of the company were placed upon deposit with a chartered bank of Canada to the credit generally of the company. The Judge has held that there was a violation of a statutory duty in having but one bank account, saying, "Now, admittedly, the company had but one bank account in Vancouver, into which all funds, company and trust, were paid, a clear violation of the statutory duty imposed by sec. 9 of the Private Act" (ch. 89, 2 Geo. V. 1912, statutes of Canada). With great respect and all due deference to the Judge, the enactment is not that there shall be a separate or distinct bank account, but that the moneys and securities of any such trust shall always be kept distinct from those of the company and in separate accounts and marked for each particular trust, capable of always being distinguished from any others in the registers and books of the company, and not be mixed up with the general assets of the company. This statutory provision is far from requiring separate accounts in the bank, in fact, to have each account separate if referable to the bank account it would mean, not one trust account but hundreds of accounts, nor does it import that there must be a separate bank account containing only the trust funds, not but what that may be said to be only proper and right, it is another thing, however, to say that it is a statutory requirement. The trial Judge has remarked upon the fact that a most reputable firm of chartered accountants made a continuous audit of the accounts, moneys, investments and securities of the company—it might almost be said too that there was a day-to-day audit—the business of the company was very great indeed in volume—in the millions—and it was not until January 26, 1914, that the auditors called attention to the fact that there was not a separate banking account, and upon the evidence it cannot be said that this letter even got to the notice of the directors, in fact, there is evidence that it was suppressed by the managing director, and at this time the financial position of the company was past repair—it was insolvent. The balance-sheet as at December 31, 1913, which was forwarded with the above mentioned letter and which admittedly went before the directors was most complete and fully in keeping with the understood capacity and ability

of the auditors and was signed by the president, managing director and secretary of the company, and by the auditors as well, the statement immediately above the auditors' signature reading as follows:—

We have audited the books and accounts of the Dominion Trust Co. at the head office in Vancouver, and at the branch offices in Vancouver, New Westminster, Victoria, Nanaimo, Calgary, Regina, Winnipeg, Montreal, London and Antwerp.

All the company's investments and securities were verified by us and are in order. We have examined the securities for trust funds invested and we report that they are properly dealt with and are in good order and filed separately under the client's name as apart from the company's own investments.

We report to the shareholders that in our opinion the above balance sheet is a full and fair balance sheet, and it is properly drawn up so as to exhibit a true and correct view of the state of the company's affairs according to the best of the information and explanations given to us and as shewn by the books of the company. We have obtained from the officers of the company all the information and explanations we have required.

This balance-sheet with the accompanying data, elaborate in its nature, would appear to shew that the company's affairs were in a sound condition, and nothing which would call for any special enquiry. The one person, though, who knew such was not the case was the managing director—since deceased. It was a matter of admission at the hearing that losses were incurred by the company by reason of the default and acts of the late managing director (Arnold) being matters of default and acts done unknown to the directors in the making of loans and advances without security either to himself in association with others or to other persons with whom he was financially associated—losses falling upon the company and which the company out of its assets will be unable to pay, even taking into consideration what may be forthcoming under the will, the company being a beneficiary thereunder and other moneys obtainable from and out of the estate of the late managing director. And it was further admitted upon the part of the liquidator of the company, that the acts complained of being done without the knowledge of the directors, no fraud or moral obliquity could be imputed to them (the directors). Now, in exercising the powers conferred by sec. 123 of the Winding-up Act (ch. 144, R.S.C. 1906) the Court "may make an order requiring (the directors in this case) to repay any moneys so misapplied or retained or for which they have become liable or accountable together with interest at such rate as the Court thinks just, or to contribute such moneys to the assets

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of the company by way of compensation in respect of such misapplication, retention, misfeasance or breach of trust as the Court thinks fit"—the determination of the extent of the liability if the Judge's judgment appealed from be sustained will have to be a matter of future enquiry. The question now is, though, whether the directors are responsible and are liable? The evidence is most voluminous, yet, in my opinion, the matter is narrowed greatly by authority and the effect of the evidence may be summarized and the law applied to the facts as developed. It is common ground that the directors acted honestly and were unaware of the wrongful acts of the late managing director. It would appear that the affairs of the company grew to very large proportions and the seeming success of the company was commensurate with the great advance of business development throughout the province and in particular in the cities of Vancouver and Victoria.

The directors apparently put implicit confidence in the managing director (Arnold) and had no reason to doubt his honesty or capacity, and apparently he was deemed to be a financier of great ability. The detail of management and the carrying on of the business of the company would appear to have been mapped out upon good and sound lines, but with a dishonest managing director all failed to protect the funds of the company, notwithstanding that the method of carrying on the business was laid down along correct enough lines—the lending rules being very precise and complete. (See trial judgment, 26 D.L.R. at 412.)

The Judge, however, is not of the view that the resident directors are without fault in respect to the trust funds, and that in respect to losses from and out of those funds, compensation must be made, holding that the resident directors were guilty of *ultra vires* acts and negligence.

The Judge in his judgment specifically deals with the points of evidence upon which, in his opinion, liability may be imposed upon the directors—shortly, no separate bank account for the trust funds—the resolution of March 31, 1913, admittedly of withdrawals of moneys upon the cheque of Arnold and one other who might be a subordinate officer of the managing director—that sec. 8 of the Private Act (ch. 89, 2 Geo. V. 1912, statutes of Canada) was not complied with, with regard to investment of

trust funds and that notwithstanding that the advisory committee was authorized by by-law it was an *ultra vires* act and that the directors did not act by a proper quorum. The Judge, at p. 418, summed up his finding upon the *ultra vires* acts by saying:—

> They (the directors) in the teeth of their statutory duty by the two acts of passing the resolution and ratifying the illegal banking arrangement did actually hand control of the trust funds over to him (Arnold).

With respect to the finding upon negligence the Judge applied *Marzettis* case, 28 W.R. 541.

Now, in my opinion, the evidence fails to fix liability upon any of the directors for *ultra vires* acts; all that has been proved has been that Arnold, the managing director, has been guilty of *ultra vires* acts; that some trust funds have not been invested as required by statute, *i.e.*, pursuant to secs. 8 and 9 of the private Act; the *ultra vires* acts of the managing director admittedly not known to the directors cannot be acts for which the directors are liable.

It is questionable if any liability at all could be imposed in these proceedings if that which is alleged is non-feasance which at best it might be said to be: *Re Wedgwood Coal & Iron Co.* (1883), 47 L.T.N.S. 612, at 613, however, I do not propose to rely upon this view.

It was not within the powers of the directors to make the loans made by the managing director (Arnold), and they were his, not their, *ultra vires* acts, and they were unknown to the directors; the directors proceeded in all that they did regularly and properly; and in *Re New Mashonaland Exploration Co.* (1892), 61 L.J. Ch. 617, it was held that:—

> To make directors of a company liable for misfeasance or breach of trust in relation to the company on the ground of negligence in performing an act *which is within their power* it must be shewn that they did not really exercise their judgment and discretion in the matter as agents of the company.

Here, what was done by Arnold in making the challenged loans, in my opinion, cannot be in any way imputed to the directors.

It is strongly impressed upon me that the directors are entitled to be absolved from liability in these proceedings by the decision, *Re Kingston Cotton Mills Co.*, [1896] 1 Ch. 331, 65 L.J. Ch. 290 at 295.

The *Kingston Cotton Mills* case went to the Court of Appeal on

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the appeal of the auditors of the company and they were held not to be liable (65 L.J. Ch. 673), the directors being absolved from liability in the Court below. Lindley, L.J., in the appeal, used language which can rightly be applied to the position of the directors in the present case; they relied on Arnold the managing director.

In the present case the business of the company had gone on for several years, and had grown year by year in volume and all the proceedings were carried out in supposed compliance with a system which, if honestly carried out, would have afforded ample protection to the trust funds, there was no dishonesty in the directors—that is admitted—but the dishonesty was that of the managing director, and it was undetected dishonesty—undetected because of the skill and ingenuity of the managing director—can it then be said that the directors were liable? Kay, L.J., at p. 679, in the last cited case, said: "It is said that it is easy to be wise after the event." This language is forceful as applied to the facts before us; the directors admitted to have acted honestly throughout, laid down rules in the carrying on of the affairs of the company which were fitting and proper and in the firm belief that they were being followed, with the aid of skilled auditors always present, went about the exercise of their duties in an honest way; then almost coincident with the sudden demise of the managing director, for the first time it is brought home to them that there has been dishonest conduct by the trusted managing director.

Upon the question of the effect of the resolution as to the advisory committee and the authority to sign cheques and the managing director's ability to check out the trust funds, a decision which seems much in point is *Cullerne* v. *London and Suburban Permanent Building Society*, 59 L.J.Q.B. (C.A.) 525.

The supposition was, and the justifiable supposition, that in drawing cheques they would be payments out in respect of *intra vires* loans and investments—not that the managing director would, as it is claimed he did, commit theft of the moneys of the company—surely this was not a happening to be for one moment apprehended.

After the most anxious consideration of the very able arguments that were addressed to us from the Bar, and consideration of the salient facts, it is borne in upon me that the present

case is one that cannot be viewed cursorily, and liability be imposed upon the directors. There is an absence of those concrete facts which should always be present, admitting of the imposition of such an onerous liability as that imposed by the judgment appealed from—that there has been such a serious loss is a matter to be deplored—but the directors must only bear that burden if the law imposes it.

Mr. Davis, one of the counsel for the appellants very frankly stated in his very forceful argument that unless the appeal fell within the lines of the decision and *ratio decidendi* of *Dovey* v. *Cory*, [1901] A.C. 477, 70 L.J. Ch. 753, the appeal would necessarily fail. In my opinion, the appeal is supportable by that case, and by *Prefontaine* v. *Grenier*, 76 L.J.P.C. 4, [1907] A.C. 101.

In the present case there was absence of ground for suspicion, and I would refer to the language of the Lord Chancellor (Earl of Halsbury) at p. 758.

It may be further remarked that Mr. Martin, the counsel for the respondent, the liquidator, quite frankly stated that it was not contended that there was any dishonesty upon the part of any of the directors, but, in his very forceful and able argument, contended, nevertheless, that they were culpably negligent and recklessly indifferent, and were on that account liable.

In view of the particular facts of the present case the language of Lord Macnaghten in *Dovey* v. *Cory*, *supra*, at p. 759-762, is indeed apt.

Dovey v. *Cory* was followed in *Prefontaine* v. *Grenier*, 76 L.J. P.C. 4.

It is not attempted to be proved and is not the fact that the directors passed any *ultra vires* loans or made to their knowledge any investments of the trust moneys contrary to the statute. I understand that a large amount of investment of trust funds was made and properly and securely made, and passed upon by the directors, but the *ultra vires* loans and abstraction of trust moneys was the act of Arnold the managing director, during the currency of the time when, in ordinary course, the legitimate and proven investment of the trust moneys was being made with the approval of the directors—in short, it was embezzlement by the managing director—and I am not of the opinion that there was any breach of statutory duty or *crassa negligentia* for which the directors can be held to be liable; there was neither fraud or negligence upon

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the part of any of the directors—see *Re Lands Allotment Co.*, 63 L.J. Ch. 291.

It is urged that, owing to there being but the one bank account —that in itself creates liability giving an opportunity for fraud. I decline to accept this as a true proposition of law, and it was not the *causa causans* giving rise to the loss of the moneys; nor do I think that the conduct of the directors—admitted to be honest—was such conduct by way of inattention which creates liability: *Cargill* v. *Bower*, 47 L.J. Ch. 649 at 651.

The directors, in my opinion, are not liable upon this view of the law. After all, the directors are but the agents of the company in the carrying on of the affairs of the company.

In the present case the guilty party was Arnold, the managing director, not the other directors.

It is not shewn that the directors, other than possibly Arnold himself, were at all skilled or experienced financial men; it may be assumed, I think fairly, that such was not the case and fraud is not charged against the directors: *Lagunas Nitrate Co.* v. *Lagunas Syndicate*, 68 L.J. Ch. 699 at 707.

Upon the facts of the present case it is certainly not established to my satisfaction—viewing the matter now from this point of view—that there was conduct of the directors which any jury could reasonable hold that the directors were guilty of negligence, culpable or gross.

In *Liquidator of the Caledonian Heritable Security Co.* v. *Curror's Trustees*, 9 R. (Ct. of Sessions) 1115 (1892), proceedings in the way of charging a director for losses incurred through negligence the Lord Ordinary's judgment, absolving the director's estate from liability, was affirmed on appeal.

It is unnecessary perhaps to point out that in the present appeal—it is not suggested that there was any knowledge whatever in any of the directors much less sanction of the improper investments and wrongful abstraction of the trust moneys. In the case last cited, Mr. Curror had even signed a cheque for certain moneys improperly expended—the further language of the Lord Ordinary at p. 1127 is somewhat pertinent to the argument addressed to us that the banking arrangements as to signing of cheques was improper and constituted negligence in the part of the directors.

Adverting again to the question of a separate bank account for the trust moneys and that that was a statutory requirement —which, in my opinion, is not the statute law—and assuming for the moment that I am in error in this, has the liquidator established that trust moneys have been lost by reason of the non-existence of a separate bank account for the trust moneys, and that the directors personally are answerable for this loss? In my opinion, this has in no way been established: *David* v. *Britannic Merthyr Coal Co.* (1909), 78 L.J.K.B. 659 (affirmed, [1910] A.C. 74, 79 L.J.K.B. 153) at 668.

There is nothing by way of admissions or evidence which proves that the failure to have a separate bank account for the trust moneys gave rise to the loss of the trust moneys—and it is impossible to visit liability upon the directors for this default—if default it was. In *Thacker Singh* v. *C.P.R. Co.*, 15 D.L.R. 487, 20 D.L.R. 511, 19 B.C.R. 575, Martin, J., said:—

> It is not, however, sufficient to have a breach of statutory duty on the part of the defendant to make it liable in an action for negligence. It must be further shewn that such breach was the proximate cause of the accident.

I fail to see upon the admissions and the evidence that any case is made out by the liquidator, the admissions only refer to the acts of Arnold, and that loss ensued—but the question is—are the directors answerable for any of these acts and for the losses that followed and consequent upon them?

I have dealt with what is alleged to constitute liability in the judgment of the Judge, but with great respect I am unable to arrive at the same conclusion.

In winding-up proceedings in *Re Liverpool Household Stores Association*, 59 L.J. Ch. 616 at 620, Kekewich, J., dealt with questions of misfeasance and breach of trust as affecting directors. *Cavendish Bentinck* v. *Fenn*, 57 L.J. Ch. 552.

Turning to the misfeasance summons it is to be noticed that no *breach of duty* is charged—what is charged is breach of trust, no *fraud* is charged— and the impeached resolutions set forth that all that was authorized to be done was to be "subject to the Act of Incorporation and by-laws of the company." I am constrained to hold after the most anxious consideration that, whatever may eventually be held upon proper proceedings taken—and sufficient evidence adduced— *upon this summons* the Judge was not entitled to hold that there was misfeasance upon

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which liability could be imposed—and upon this point I would refer to what Lord Herschell said in the *Cavendish Bentinck* case, *supra*.

In my opinion, as already stated, there was no statutory duty imposed that there should be a separate bank account for the trust moneys, although that might well have been a proper matter of good business precaution; but if wrong in this, it is not proved that any of the directors were aware of this unless it could be said that it became known by reason of the letter which accompanied the balance sheet, etc.—as at December 31, 1913, before referred to. Upon the evidence, I am not inferring that this letter was brought to the notice of any of the directors—it is a matter that can be in any later proceedings dealt with—and evidence upon this point can be adduced in any misfeasance proceedings that may be hereafter brought.

I would affirm the Judge in his judgment wherein he dismissed generally the misfeasance summons as against J. A. Machray, J. Pitblado, D. W. Bole, C. W. Twelves and E. Bell and would also affirm the trial Judge in his judgment wherein he dismissed particularly the misfeasance summons as against F. R. Stewart, W. D. Brydone-Jack, W. H. Clubb, D. W. Bole, W. Henderson, R. W. Riggs, R. L. Reid, E. Bell, R. P. Miller, J. Stark, E. W. Keenlyside, J. Brady, T. R. Pearson and G. E. Drew, in respect to loss of the corporate funds of the company, and would reverse the judgment of the trial Judge wherein he declared the said last mentioned directors to have been guilty of breach of trust and misfeasance in respect to the loss of trust funds—but to be without prejudice to the right to institute further misfeasance proceedings in respect to the loss of trust funds—being of the opinion that no case has been made out of liability upon the admissions and the evidence before the Judge upon the hearing.

Upon the whole, therefore, in my opinion, the judgment should be affirmed in part and reversed in part—but without prejudice to the bringing of such further misfeasance proceedings as may be advised having relation to the loss of trust funds against any of the above named directors—other than Machray, Pitblado, Bole, Twelves and Bell — the reason for this proviso arises from the fact that it cannot be said that all possible evidence was exhausted and it is a proviso in the interests of justice—

and if any further proceedings be taken, care should be had that the particular ground upon which liability is claimed is clearly shewn and made known and the amount of the loss to the funds and assets of the company by reason thereof is established, as was done in *Re Liverpool Household Stores Association, supra.*

Appeal allowed.

ROBERT BELL ENGINE AND THRESHER CO. v. TOPOLO.

Saskatchewan Supreme Court, Sir Frederick Haultain, C.J., Lamont and Elwood, JJ. November 18, 1916.

BILLS AND NOTES (§ I A—2)—NOTE RESERVING LIEN AS PROMISSORY NOTE.

A document containing an unconditional promise to pay at a fixed date, a sum certain in money, is a promissory note, notwithstanding there are additional words expressive of a lien, if such words are meaningless as between the parties.

[*Frank* v. *Gazell Live Stock Ass'n.*, 6 Terr. L.R. 392; *International Harvester Co.* v. *Maxwell*, 15 D.L.R. 654; *Kirkwood* v. *Carrol*, [1903] 1 K.B. 531, referred to.]

Statement.

APPEAL from the trial judgment in an action on a certain note.

G. E. Taylor, K.C., for appellant.

J. C. Martin, for respondent.

Haultain, C.J.

HAULTAIN, C.J.:—The plaintiff company sold an engine to one Henry Tholl. Tholl having fallen into arrears in his payments, an arrangement was made between the plaintiff company, Tholl and the defendant, by which Tholl sold the engine to the defendant for $1,550, for which the defendant was to give three notes; one for $500, and two for $525 each. It was further arranged that these notes were to be turned over by Tholl to the plaintiff, and that upon payment of them by the defendant the plaintiff would release its lien against the engine held by it under the sale to Tholl. The present action is on one of the notes given by the defendant to Tholl.

The note is in the following form:—

$500. Seaforth, Ont., Sept. 27th, 1915.

On November 1, 1915, after date for value received I promise to pay to the order of Henry Tholl the sum of $500 at the Merchants Bank of Canada, Limerick, Sask., with interest at 8 per cent. per annum until due and 10 per cent. per annum after due until paid. Given on account of price of goods and things described in my contract with said company, which includes the following: One 23 h.p. North-West traction engine, one 32 by 34 p.d. case wooden frame separator, one Deere belt, two tanks, one tank pump and hose.

The property in and title to said goods which I hereby agree to buy shall remain in the said company until the purchase price and all notes or other obligations given therefor have been paid in full in cash. This lien note is taken under the provisions of the Farm Implement Act.

Witness: D. J. Macdonald. (Signed) VICTOR TOPOLO.

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The note, as will be seen, was given on one of the plaintiffs' forms. The note is endorsed as follows: "Pay to the order of the Robert Bell Engine & Thresher Co." (Sgd.) Henry Tholl.

On the trial of the action, the trial Judge held that this note was a "lien note" and not a promissory note.

The trial Judge having held that the note was a lien note, further held that it could not be assigned by mere endorsement, citing as authorities: *Frank* v. *Gazell Live Stock Assoc.*, 6 Terr. L.R. 392, and *International Harvester Co. v.* Maxwell, 15 D.L.R. 654.

He held, however, that there was an equitable assignment to the plaintiff company and allowed an amendment to that effect. He then held that the amendment necessitated the addition of Tholl as a party and dismissed the action.

In my opinion none of these questions was involved. The note is a promissory note and not a lien note, as the words relating to a lien are meaningless as between the parties to the note, and need not be taken into consideration. Without these words the note is an ordinary promissory note and, therefore, negotiable by endorsement. While it is not necessary to decide the question, I would express the opinion that the action in any event should not have been dismissed for non-joinder of Tholl. See *Lamb* v. *Lasby*, 10 D.L.R. 624, 6 S.L.R. 192.

The appellant is therefore entitled to have the judgment appealed from set aside and judgment entered in its favour for the amount of the claim and costs and the plaintiff will also have its costs of this appeal.

Elwood, J.

ELWOOD, J., concurred.

Lamont, J.

LAMONT, J.:—The plaintiffs in their statement of claim alleged that the document was a promissory note and sued as the holders thereof in due course for value.

Alternatively they alleged that it was an agreement by which the defendant had promised to pay Henry Tholl the sum of $500 and that they were entitled to the benefit of the agreement under assignment from Tholl. The only assignment was the endorsation on the back of the document as above set out.

At the trial, the District Court Judge before whom the action was tried held that the document in question was not a promissory note and, therefore, not negotiable by mere endorsement, and he cited as authorities: *Frank* v. *Gazell Live Stock Association*, 6 Terr.

L.R. 392, and *International Harvester Co.* v. *Maxwell*, 15 D.L.R. 654. He, however, expressed the opinion that there had been an equitable assignment to the plaintiffs, and he allowed the plaintiffs to amend by setting that up. In giving judgment, however, he held that the plaintiffs in order to succeed upon the amendment must join Tholl as a party. As Tholl had not been made a party he dismissed the action with costs, but gave the plaintiffs leave to sue again. From that judgment the plaintiffs now appeal.

It is contended for the plaintiffs (1) that the document sued on was a promissory note; (2) that the assignment was sufficient under the statute; and (3) that Tholl was not a necessary party and that, even if he were, the action should not have been dismissed, but he should have been added.

Is this document a promissory note? The Bills of Exchange Act provides as follows:—

176. A promissory note is an unconditional promise in writing made by one person to another signed by the maker, engaging to pay on demand or at a fixed or determinable future a sum certain in money to or to the order of a specified person or to bearer.

(3) A note is not invalid by reason only that it contains also a pledge of collateral security with authority to sell or dispose thereof.

The trial Judge held that the document in question was not a promissory note on the authority of *Frank* v. *Gazell Live Stock Assoc.*, *supra*. In that case the document was in the form of an ordinary promissory note, but having on its face the following memorandum:—

Given for Suffolk stallion "His Grace," same to remain the property of J. H. Truman until this note is paid.

Harvey, J., held this note to be a promissory note, founding his conclusion on the authority of *Bank of Hamilton* v. *Gillies*, 12 Man. L.R. 495, and *Kirkwood* v. *Smith*, [1896] 1 Q.B. 582.

In 1903 the case of *Kirkwood* v. *Smith*, however, was expressly overruled by the English Court of Appeal in the case of *Kirkwood* v. *Carrol*, [1903] 1 K.B. 531. In that case the document was as follows:—

We jointly and severally promise to pay Mr. John Kirkwood (carrying on business in the name or style of the Provincial Union Bank) or order the sum of £125, for value received, by instalments in manner following, that is to say, the sum of £5 on Thursday, January 31, inst., and the sum of £5 on the Thursday in every succeeding week until the whole of the said £125 shall be fully paid, and in case default is made in payment of any one of the said instalments the whole amount remaining unpaid shall become due and pay-

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able forthwith. No time given to, or security taken from, or composition or arrangement entered into with, either party hereto shall prejudice the rights of the holder to proceed against any other party.

It was held to be a valid promissory note.

The result in this case would seem to indicate that all those decisions which were founded upon the principle laid down in *Kirkwood* v. *Smith* (namely, that sec. 176 (3) was exclusive, and, therefore, if the document contained anything other than a pledge of collateral security with authority to sell or dispose thereof it was not a promissory note) cannot be supported at any rate upon the ground upon which the judgment was based.

In *Yates* v. *Evans*, 61 L.J.Q.B. 446, the document was in the form of a joint and several promissory note by a principal debtor and a surety for £5 payable by instalments, with the proviso that, in case of default in payment of any one of the instalments, the whole amount remaining unpaid should become due, and concluded with the following clause, namely:—

Time may be given to either without the consent of the other and without prejudice to the rights of the holders to proceed against either party, notwithstanding time may be given to another.

It was held that the clause was a mere consent or license that time may be given to the principal debtor, and that if time be so given the surety will not avail himself of that as a defence.

The facts of the case at bar in my opinion bring it squarely within the last two cited authorities. The transaction took place between Tholl and the defendant. The document, apart from the memorandum, is "an unconditional promise to pay at a fixed date a sum certain in money" to the order of Tholl.

I doubt very much if it was the intention of the parties to the document that the memorandum found on its face should in any way be operative. It is quite evident that the parties were using one of the company's printed forms of note, and they omitted to strike out the printed memorandum. Assuming, however, that the parties did intend the memorandum to be operative, the only portion thereof which is not merely descriptive are the words: "The property in and title to said goods, etc." As to this clause, it is to be observed in the first place that there is no company specified in the document to which the language could be applied, and secondly, if there had been, the agreement on the part of the defendant made with Tholl amounts to no more than a consent by the defendant that the company may

retain the rights which they have by law, and with which both Tholl and the defendant were powerless to interfere.

If the company did not have a lien on the goods sold under their contract with Tholl, no agreement between Tholl and the defendant could confer such a lien; and if they had such lien, no agreement between Tholl and the defendant could deprive them of the same. The clause here, at most, can amount to no more than an agreement by the defendant not to question the right of the company to a lien for the unpaid purchase money, which, under the two authorities last above cited, does not prevent its being a promissory note.

In my opinion, therefore, the document is a valid promissory note and the plaintiffs were entitled to judgment thereon.

The appeal should, therefore, be allowed and judgment entered for the plaintiffs with costs both of the appeal and in the Court below. ——— *Appeal allowed.*

NATIONAL MORTGAGE CO. v. ROLSTON.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher, and McPhillips, JJ.A. November 7, 1916.

MECHANICS' LIENS (§ III—13)—PRIORITY—UNREGISTERED CHARGE.

Lienholders under the Mechanics Lien Act (B.C.) are entitled to priority over an unregistered charge or transfer of which they had no knowledge, actual or constructive; the unregistered interests cannot, therefore, prevail against a purchaser of the property to whom it has been sold in satisfaction of the registered charges.

[Land Registry Act (B.C.), secs. 35, 72, 104, considered.]

APPEAL by defendant from the judgment of Hunter, C.J.B.C. Reversed. Statement.

Brown, for appellant; *St. John*, for respondent.

The judgment of the Court was delivered by

MACDONALD, C.J.A.:—In November, 1911, one Passage appears to have been beneficial, though not the registered owner of the lands in question. He agreed in writing to sell the land to one Patterson, and shortly afterwards let contracts to four contractors for the clearing of the land. The work of clearing was commenced not later than May 1, 1912. At that date the registered owner was one Jewell. It is not important to trace the registered title further back. The records shew that Jewell applied to be registered as owner in April, 1912, and afterwards obtained a certificate of indefeasible title. Macdonald, C.J.A.

On May 3. 1912, Passage made application for a certificate of indefeasible title which was granted on July 29, 1913. By

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virtue of the Land Registry Act this certificate would relate back to May 3, 1912, so that for the purposes of this case Passage was the registered owner from said May 3, 1912, subject to the unregistered agreement of sale to Patterson who never registered his agreement. On May 18, 1912, Passage conveyed the land to the plaintiffs subject to the Patterson agreement, and also assigned that agreement and the moneys due thereunder to them. On May 20, 1912, plaintiffs applied to register the assignment as a charge. The application states that the plaintiff company "is entitled to an interest as purchaser of the vendor's interest in an agreement for sale over the real estate hereunder described," it then states that the application is to have the same registered as a charge accordingly.

This is the only document professing to give notice of the plaintiff's interest in the land to be found in the records until October 31, 1913, when the plaintiffs for the first time made application to be registered under their said grant.

Before this date the lien proceedings had been prosecuted to judgment, and an order for sale had been made. A reference as to title had been ordered and the report thereon dated May 23, 1913, was duly made by which it was certified that "the defendants" (Jewell, Passage and the four contractors who had employed the lien holders) "or one or other of them are the registered owners of said property" as shewn by the register. Then the report proceeds to say "there are no charges of any kind whatsoever against the title of the said defendants" except the liens.

When therefore the sheriff on January 6, 1914, sold all the right, title and interest of Passage, he sold the fee, and that fee was charged only by the liens to satisfy which the land was sold. These liens in my opinion were entitled to priority over all unregistered interests of which the lien holders had no knowledge, actual or constructive.

Assuming, though not deciding, that plaintiffs are entitled to the benefit of sec. 72 of the Land Registry Act, they never having in fact succeeded in obtaining the certificates for which they applied on May 20 as aforesaid, what does the application of May 20 amount to? The plaintiffs on that date were entitled to apply to be registered as owners in fee of the legal estate. That being so, they were not entitled to apply to register a charge

(sec. 35, Land Registry Act) and hence their application was a nullity and was no constructive notice at all of any interest of plaintiffs in these lands. That section of the Act merely gives legislative recognition of an obvious fact that an owner need not register an agreement under which he or his predecessor in title has parted with an interest in his own land, as a charge on that land in his own favour.

But even were it otherwise, a notice of that date, May 20, to the contractors or their workmen that the plaintiffs had obtained an interest in the lands would not have helped them in this action. The contracts for the whole work had been entered into and the work was in progress prior thereto, and the sale of the lands by Passage to the plaintiffs could not I think have adversely affected the rights of the contractors to continue the work with all the protection which the Mechanics Lien Act would afford them or their employees. Had plaintiffs registered or applied for registration of their deed before the report of the referee they would have been given the right to redeem, but they lost that right by their laches.

Assuming, though not deciding, that sec. 104 of the Land Registry Act is capable of a construction which would admit of this contest between the plaintiffs and defendant, on the facts the plaintiffs have made out no case for relief either legal or equitable. The sale to defendant was made to satisfy registered charges against which plaintiffs' unregistered interest cannot prevail.

I would allow the appeal and dismiss the action.

Appeal allowed.

Re KIRKLAND.

Ontario Supreme Court, Garrow, Maclaren, Magee and Hodgins, JJ.A. July 12, 1916.

WILLS (§ III G 7—150)—INCOME—ROYALTIES—APPORTIONMENT.

Where a widow by her will, acting under a general power of appointment conferred upon her in her deceased husband's will, directed the executors of her husband to transfer the residue of the said estate to trustees upon trust "to set apart and invest the residue of the said estate and to pay the income and interest thereof to" her two sisters, and royalties were payable to the husband's estate from time to time upon sales made of books written by him, such royalties are partly capital and partly income, and should be apportioned between capital and income in the proportion that capital would bear to an assumed income at 5 per cent. with yearly rests, from the husband's death.

[Rule in *Re Earl of Chesterfield's Trusts* (1883), 24 Ch.D. 643, followed.]

Statement.

APPEAL from the judgment of Middleton, J. Affirmed by an equally divided Court.

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The judgment appealed from is as follows:—

The testator Thomas Kirkland died on the 31st December, 1898, and by his will, after making provision for his wife, gave her a general power of appointment over his whole estate.

In pursuance of this power, the widow, who died on the 3rd October, 1899, directed the executors of her husband's estate to transfer it to the Toronto General Trusts Corporation upon trust, as to the residue, "to set apart and invest the residue of the said estate and to pay the income and interest thereof to" Mr. Gilchrist's clients, and upon their death to "deal with the said residue" in the way pointed out by the will.

During his lifetime, the testator had written certain books and had obtained copyright; under agreements made by him with publishers, royalties are payable from time to time upon sales made. The executors have during the last fifteen years received these royalties and treated them as capital and paid the life-tenants the money arising from the investments made.

The life-tenants contend that these payments should be regarded as income.

I have come to the conclusion that neither contention is entitled to prevail, and that the case is one in which the amounts received must be apportioned between capital and income in accordance with the rule laid down in *In re Earl of Chesterfield's Trusts* (1883), 24 Ch. D. 643.

In that case the estate had been given to trustees, with power to convert at such time as they saw fit, and pay income to a life-tenant, and on the death of the life-tenant to divide; and it was held that, when the conversion did not take place within the year, in the exercise of the executors' discretion, the holding being in their opinion in the interest of the estate, when the holding came to be realised it should be apportioned between capital and income in the proportion that capital would bear to an assumed income at four per cent., with yearly rests, from the testator's death.

This rule is manifestly fair and has been acted upon in many analogous situations. In our own Courts the rule has been varied by substituting for four per cent. the legal rate of interest, five per cent.

Where the assets are in their nature unproductive, the interest has been directed to be computed from the end of the executor's

year; but, when the assets are income-producing, the interest runs from the date of the death.

Here the testator had sold his property for a price payable *in futuro*, and as each sum came in it was partly capital and partly income. If the executors had been able to ascertain the amount to be paid, they, it is presumed, might have discounted it and then invested the sum received. This is precisely what is done by the rule in question. The true capital is the present value of the money received as of the date of death.

The question dealt with in the case of *Crawley* v. *Crawley* (1835), 7 Sim. 427, when read in the light of the discussion in *In re Whitehead*, [1894] 1 Ch. 678, and *In re Pope*, [1901] 1 Ch. 64, will be seen to be quite different from that here involved.

In re Hengler, [1893] 1 Ch. 586, *In re Godden*, [1893] 1 Ch. 292, *In re Morley*, [1895] 2 Ch. 738, *In re Cameron* (1901), 2 O.L.R. 756, will serve as examples of the various applications of this rule.

The Scotch case *Davidson's Trustees* v. *Ogilvie*, [1910] Sess. Cas. 294, relied upon by Mr. Gilchrist, arose out of the estate of the Rçvd. A. B. Davidson, and the result there arrived at was singular in the extreme. Dr. Davidson had, during his lifetime, sold some works on royalty agreements, and after his death his executors sold other works on similar agreements. The royalties payable under the latter were regarded as capital, the royalties under the former as income. The idea of apportionment was not suggested, and the case seems to me to have turned on Scotch law entirely and to be in conflict with the principles of the English cases.

A second question was raised as to the division of the proceeds of certain stocks held because not now marketable. When these are realised, the proceeds will be divided in the manner indicated.

Costs of all parties out of the estate.

Agnes S. Gilchrist and Josephine Thornton, the life-tenants, appealed from the judgment of MIDDLETON, J.

J. Gilchrist, for appellants.

Hamilton Cassels, K.C., for the Toronto General Trusts Co.

F. M. Gray, for Knox College Ministers' Widows and Orphans' Fund. *E. C. Cattanach*, for the Official Guardian.

MACLAREN, J. A. : — This is an appeal from the judgment of Middleton, J., rendered on the 5th May, 1916, upon an

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originating notice to construe the wills of the late Thomas Kirkland and of his wife, the question arising, as between the life-tenants and reversioners, whether certain sums received by her executors were income or corpus.

The husband died first and left a will giving his whole estate to his wife with a general power of appointment by deed, will or codicil.

Mr. Kirkland was the sole author of two school books and a joint author of two others. Separate agreements were made at different times with a firm of publishers to copyright these and to pay to the authors a certain royalty per volume; in three cases on the bringing out of each edition of each work, and in one case semi-annually on the sales actually made.

The dispute between the parties arises out of the proper construction of the following two clauses of Mrs. Kirkland's will:—

"2. I give devise and bequeath to my sisters Agnes Smith Gilchrist and Josephine Thornton for their own use absolutely in equal shares if they both survive me or all to the survivor of them if one of them should predecease me all the property real and personal of which I may die seized or possessed; but it is not my intention by this clause of my will to deal with or dispose of that portion of my husband's property (other than income) which has not been consumed by me during my lifetime even if it should at any time be adjudged by a Court of competent jurisdiction that the whole of my said husband's estate vested in me absolutely under my said husband's will."

Under the powers in her husband's will she appointed and declared by clause 3 that the property of her husband remaining at the time of her death should be transferred to the Toronto General Trusts Corporation in trust to pay certain specific legacies and "(*k*) To set apart and invest the residue of said estate and to pay the income and interest thereof to my sisters Agnes Smith Gilchrist and Josephine Thornton in equal shares during their natural life and upon the death of one of them then to pay the whole of said income and interest to the survivor of them during her natural life," and after her death to deal with the residue as directed.

The payments under these arrangements were treated by the trust company as capital, only the interest on them being paid

to the sisters of the testatrix; who claimed that they were income, and, as such, properly payable to them under the will.

The judgment appealed from held that neither of these contentions was entitled to prevail; but that the moneys should be apportioned between capital and income; the amount which, reckoning from the date of the death of the testatrix, would, at five per cent., the legal rate of interest, compounded, have produced the respective amounts at the dates of their respective payments, to be reserved as capital, and the balance paid to the life-tenants as income.

With great respect, I am unable to concur in this judgment. It is based upon the decision in *In re Earl of Chesterfield's Trusts*, 24 Ch. D. 643, and certain cases in the English Courts and one in this Province which followed it, in which the rule above stated was applied, where certain assets could not be profitably converted or invested at the time directed, and the conversion and investment were deferred.

In my opinion, there is no analogy between these cases and the present. The royalties paid to Mr. Kirkland during his lifetime were clearly income. They were the proceeds of his labours and his earnings, and would be assessable as income. The annual income of an author includes all that he may receive during the year as the result of his literary efforts, whether from books or other literary productions during the year, or as the result of his labours in previous years. So also the moneys received by his widow after his death, from such sources, would be part of her annual income during the year in which she received them.

I am of opinion that the moneys in question properly fall within the terms of clause 2 of the will of Mrs. Kirkland above quoted, by which she gave the income from her husband's estate absolutely to her sisters, and which fully complies with the provisions of the latter part of sec. 30 of the Wills Act, R.S.O. 1914, ch. 120, which enacts that any bequest of personal estate "shall be construed to include any personal estate, or any personal estate to which such description will extend, which he (the testator) may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention appears by the will."

But, even if clause 2 were not applicable, I consider that the moneys in question would then properly fall within the above

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clause 3 (*k*) of the will, as being part of the income of the residue of the estate, and as such would properly belong to the life-tenants.

To my mind it would seem extremely unlikely that the testatrix should ever think of these small semi-annual payments, which her husband and herself had been receiving as part of their income, being treated as capital, and only the interest upon them paid out to her sisters, and I think it should require extremely clear language to justify our putting such a forced construction upon the language of the will.

No case in point relating to such a disposition of property in a copyright, either in the English or American Courts or our own, was cited to us, nor have I been able to find any. There is, however, a recent case in the Scottish Courts, *Davidson's Trustees* v. *Ogilvie*, [1910] Sess. Cas. 294, which is exactly in point. It was the unanimous judgment of a very strong Court. There the testator directed his trustees to hold the residue of his estate and to give to his niece the life-rent, use, and enjoyment thereof, and to pay to her the free annual income of the estate. The Lord Justice-Clerk said (p. 297): "I think the testator's intention is manifest. Of the books which he himself published he took the income for himself, and when he left the life-rent of his estate to anybody, I think he must be held to have intended that that from which he was deriving income should be a source of income to the life-renter, whoever he might be." Lord Ardwall said (p. 298): "With regard to the literary works published before the testator's death, he had been during his lifetime in receipt of the proceeds, as far as they consisted of royalties or profits, by way of income—income available for himself, to spend year by year as he pleased. . . . I cannot doubt that as a matter of intention we must hold that the free annual income of the estate means the free annual income as it existed at his death, of which these profits or royalties formed a part."

The case was thus decided upon a principle in which the Scottish law agrees not only with the law of England but with the civil law as well.

Lord Ardwall (p. 298) points out the strong analogy which exists between moneys received from copyright and those received from the working of a mine. The law of England on this point is the same as that of Scotland; the tenant for life, even if impeach-

able for waste, being entitled to the rents and profits of mines which have been opened: *Campbell* v. *Wardlaw* (1883), 8 App. Cas. 641, at p. 645; Bainbridge on Mines, 5th ed., p. 15. "Casual profits are income:" 4 Encyc. Laws of England, p. 9. Indeed, there is a much stronger reason for applying the principle to copyright than to mines, as the duration of a copyright is fixed by statute, while the life-tenant of a mine might by excessive working exhaust it, and deprive the reversioner of any benefit or profit from it.

One of the most usual applications of the doctrine of the *Chesterfield Trusts* case is that of the municipal and other debentures which are payable by an equal annual or semi-annual payment covering both principal and interest, so that on the last equal payment the debenture is paid off. I am of opinion that the principle should be confined to such cases as those last referred to and those of deferred conversion or investment such as the *Chesterfield* case, and those in which it has so far been followed. I do not think it should be extended to a case like the present, which, in my opinion, differs so widely in its principle and its facts.

As to the second question, concerning the division of the proceeds of certain stocks not now marketable, I think the judgment appealed from is correct and should be affirmed, as it is precisely similar in its facts to the *Chesterfield* case.

As to the first question, regarding the proceeds from the copyrights, I think the appeal should be allowed, and the whole of these proceeds paid to the life-tenants. Costs out of the estate; those of the executor and Official Guardian as between solicitor and client.

MAGEE, J.A.:—I agree fully with the conclusions and reasons of my brother Maclaren.

The will of Thomas Kirkland gave all his estate, real and personal, to his executors and trustees in trust for the sole and separate use and support of his wife, Jane Todd Kirkland, during her life, and at her death in trust for whomsoever and for the uses and trusts that she might by deed or will or codicil appoint or declare, and, in default of appointment or in the event of her predeceasing him or in the event of a partial appointment only, then upon trust to deliver his household furniture and effects, including books, to his sisters-in-law, Agnes Smith Gilchrist and

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Josephine Thornton, and as to the remaining estate upon certain trusts, the terms of which do not assist in the present questions.

The will is dated the 3rd June, 1896. He died on the 31st December, 1898.

In 1877 and 1878, he had entered into four agreements with a firm of publishers as to four works of which he was author, or joint author. In each of them he agreed that the firm should have the right of printing and publishing, reprinting and publishing and copyrighting, in Canada, the work specified, subject to the terms of the Canadian Copyright Act of 1875; and the firm agreed that they would register the work at Ottawa and comply with all the formalities necessary to secure the copyright of the book, and on the publication of each edition would furnish him with a certificate of the number of copies in such edition and pay him a certain royalty; and that, should the book be out of print for three months, or should they cease to carry out the provisions of the agreement, then their right of publishing should entirely cease and the author or authors might forthwith make any other arrangement he or they should see fit for the publication of the work in Canada. The royalty in the first agreement, as to one work, was a percentage on the retail price; that in the second and third, as to two other works, was so many cents on each copy printed. In the fourth agreement, as to the other work, the royalty was to be a percentage on the retail price, the amounts to be paid half-yearly on the 1st January and the 1st July each year, on the number of copies sold except on the first 1,000 copies. Apparently under the other three agreements the royalty would be payable on the publication of each edition.

The agreements were not sales of the copyrights for a sum certain, which the publishers must pay by fixed instalments, but were in effect "arrangements for publication," which the publishers were not bound to continue, and which, if they did not continue, the authors might make elsewhere. Also it is to be noted that the agreements were not in terms limited to the life of the copyright, though in practice they might be so.

It does not appear in what amounts or how frequently payments were made thereunder before his or his wife's death, but since her death they seem to have been made to her executors half-yearly and of small sums.

She was at least entitled to the income of her husband's estate, and one can hardly doubt that both he and she considered the payments from the publishers to be income.

The reasons for the decision in Scotland in *Davidson's Trustees* v. *Ogilvie*, [1910] Sess. Cas. 294, would bear them out in so considering them, and those reasons commend themselves to me as interpreting the intention of the testatrix, and it is with her intention that we have to deal, as such intention is evidenced by the will, interpreted in the light of the nature of the estate.

Thus, when Mrs. Kirkland came to make her own will and to continue to her sisters the income of her husband's estate, one would naturally expect her to take the same view of the income and continue to them the enjoyment of that which she herself had a right to enjoy. That she did so is, I think, the effect of her will.

The second paragraph begins by giving, devising, and bequeathing to her two sisters, or the survivor of them, all the property, real and personal, of which she might die seized or possessed. Had it stopped there, the gift would, under sec. 29 of the Wills Act, R.S.O. 1897, ch. 128 (R.S.O. 1914, ch. 120, sec. 30), have operated as an exercise of the power of disposal which she had over her husband's estate, and would have included that estate—both corpus and income. She did not intend to include the corpus, and she adds the clause declaring "it is not my intention by this clause of my will to deal with or dispose of that portion of my husband's property (other than income) which has not been consumed by me during my lifetime."

By excluding the income from the exception, she manifests her intention that the income shall be included in the gift, and shall go to her sisters thereunder, as it would if she made no exception.

It may be objected that the word "income" there means income up to her death, and that the testatrix was there drawing the line between what she would consider her husband's estate and what her own. But, in view of the fact that she does later on give the income to her sisters, the fair reading is, I think, "I mean the income to go to my sisters but not the corpus."

It may also be said that this income given them means only the income which is thereafter given her sisters by the will, and so would not be carried to them by this second paragraph, but by

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the third. This third paragraph declares that the property, real and personal, of her husband remaining at her death shall be transferred by the trustees under her husband's will to the Toronto General Trusts Corporation, to be held upon trust to deliver his household furniture and effects to the two sisters and to pay or set apart certain pecuniary legacies amounting to $32,500 and to convey certain land to a nephew upon his attaining a certain age, and not to vest until then, and "to set apart and invest the residue of said estate and pay the income and interest thereof" to the two sisters and the survivor of them for life, and, upon the death of both the sisters, it directs payment of various legacies amounting to $16,000, and the residue to two brothers or their issue as therein. Thus it was evidently not in the contemplation of the testatrix that in order to pay the $32,500 of legacies it would be necessary to resort to the royalties, for she contemplated a surplus of more than $16,000 after they were paid and outside of the land given her nephew. Hence we have a direction to set apart and invest the residue and pay the "income and interest" thereof to her sisters. This is in no sense inconsistent with the idea that the small income from royalties, which was practically incapable of realisation otherwise than by collection, should be set apart and should not be converted, but still treated as income, and that both the "interest" from investments and that "income" from royalties should go to her sisters for life.

Thus there is no inconsistency between the second and third paragraphs of the will as regards the royalties. The second paragraph gave all the income of the husband's estate, but the third paragraph reduced the estate from which that income was to be derived. Neither indicates that the income was to be other than that which the testatrix and her husband would consider, and properly consider, income.

The will of Mrs. Kirkland, being an exercise of a power, takes effect by virtue of the instrument creating the power. Had a bequest of income first to his wife and after her death to her sisters been contained in the husband's will direct, the reasoning of the *Ogilvie* case would apply to give these royalties to them. The asset remained the same as he had made it, unchanged in its nature and condition, though gradually being reduced; and I do not see anything to require a change in its destination, though that is declared by two instruments instead of one.

The question really before the Court is, whether these uncertain payments shall be considered income or principal, not how much of each shall be considered the one or the other. If the latter question were involved, the principle upon which the decision was made in *Beavan* v. *Beavan* (1869), 24 Ch. D. 649 (note), followed in *In re Earl of Chesterfield's Trusts*, 24 Ch. D. 643, would be applicable. But upon the true question, whether the royalties can be looked upon as other than income, the principle of the decisions as to mines seems to me the real one, and it was that principle which was followed in the *Ogilvie* case.

In truth, the application of the rule followed in the *Chesterfield Trusts* case only shews how little adapted it is to such a case as the present. Mr. Kirkland's estate included not only the royalties accruing up to his wife's death or during the lifetime of the two sisters or the survivor but the payments to be received thereafter so long as they should continue to be made. According to that rule, the present value of all these payments has to be ascertained as at the date of the death, and the person entitled to the income gets interest upon such present value as from the death. Hence not only the estate of the survivor of the two sisters but even the estate of the one first dying may continue long after both are dead to receive payments of income which the testatrix beyond doubt intended them to enjoy to the full during their lives, and neither they nor their executors can estimate, much less know, how much that income will be.

I agree that the appeal should be allowed as to the receipts under the agreements.

HODGINS, J.A.:—My reading of clause 2 in Mrs. Kirkland's will is that it deals with what she leaves as her own individual estate. She includes what had been derived from income from her husband's estate, which had been paid to her but had not been expended. This income was therefore money reduced into her possession, and it became in the hands of her executors part of the principal or corpus of her estate.

Clause 3 deals by way of appointment with the rest of her husband's estate which she had not consumed. If there were accruing interest on mortgages or accruing dividends on stock, these would be included as part of the "residue of (her husband's) said estate," as to which she exercises her power of appointment.

In the same way, the moneys arising out of the agreements in

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question, even if similar payments had been treated as income during his life or her life, became after her death vested in the trust company, under her appointment, upon a trust to set apart and invest.

I cannot see that the *Davidson* case is helpful. If Mr. Kirkland had given his wife a life interest in what he described as "my income," his course of dealing with the royalty payments might properly lead to the conclusion that he intended them to go as income and had left them to his wife as such.

In three of the agreements there were lump sums to be paid at uncertain times, i.e., when an edition was published. They might not be made for years, because prior editions might last for a long period. When ultimately paid they would seem to me to partake more of the character of principal than income.

But, even if treated as income during his lifetime, they would pass, I think, to his wife as principal if found deposited in his bank or as choses in action coming in after his death. If in the wife's lifetime she had considered and dealt with them as income, yet they became part of the corpus of her estate on her decease.

The only remaining question is, whether, even if that would be so in ordinary cases of choses in action, these particular securities were similar in character to those dealt with in the *Chesterfield* case, or were, by reason of their peculiar nature, necessarily left outstanding, so that, if treated as set apart or retained, the sum they produced must be treated as one compounded both of principal and interest. They represented the value of literary works and their copyright. If they had been made payable in periodical and fixed instalments without interest, instead of sums made up of so much a volume in each edition when it came out or on each book sold, they might be treated as comparable to the securities of which the *Chesterfield* case affords an example. And, if so, I do not think the agreed mode of payment should cause any difference.

But a sale and conversion of these particular securities would have been practically impossible, and they necessarily had to wait realisation in ordinary course.

I think, therefore, that these deferred payments, whether treated as set apart or as assets whose realisation was postponed for the benefit of the estate, are within the rule stated by Street,

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J., in *In re Cameron*, 2 O.L.R. 756, followed in *Re Clarke* (1903), 6 O.L.R. 551, and that the judgment appealed from is right.

I would dismiss the appeal, allowing all parties costs out of the estate, those of the executors and trustees as between solicitor and client.

Hodgins, J.A.

GARROW, J.A., agreed with HODGINS, J.A.

Garrow, J.A.

In the result, the Court being divided upon the main question, the judgment of MIDDLETON, J., stood affirmed upon all points.

DANYLESKI v. C.P.R. CO.

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Manitoba Court of Appeal, Perdue, Cameron and Haggart, JJ.A. December 20, 1916.

LIMITATION OF ACTIONS (§ III F—130)—INJURY FROM OPERATION OR CONSTRUCTION OF RAILWAY—LOADING RAILS.

The statutory limitation as to time for bringing an action for damages for injuries sustained by reason of "the construction or operation of the railway" (R.S.C. 1906, ch. 37, sec. 306), extends to a case of injury sustained by a labourer, who was employed in a gang loading old rails on flat cars by means of a crane and steel chain which broke, such work being performed in the actual "construction or operation of the railway."

Statement.

APPEAL from a judgment of Macdonald, J., in an action for damages. Reversed.

The judgment appealed from was as follows:—

This action was brought on June 7, 1916, for the recovery of damages for injuries to the plaintiff sustained on or about May 4, 1914.

The defendant, by way of defence (*inter alia*) says, "By statute of Canada, 44 Vict. ch. 1, secs. 1 and 2, and R.S.C. 1906, ch. 37, sec. 306, and public Acts:—The defendant is not guilty."

Sec. 306 provides that all actions or suits for indemnity for any damages or injuries sustained by reason of the construction or operation of the railway shall be commenced within 1 year next after the time when such supposed damage is sustained, or if there is a continuance of damage, within 1 year next after the doing or committing of such damage ceases, and not afterwards.

An application is now made under r. 466 of the King's Bench Act to decide the question of whether or not the case comes within the above section.

The plaintiff was a labourer and at the time of receiving the injuries was employed with others and engaged in lifting old steel rails from the ground on to flat cars by a derrick or crane, which

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lifted the rails by means of a steel or metal cable. While a rail was being so lifted the said cable broke and the said rail fell upon the plaintiff and fractured both his legs.

There are numerous cases dealing with the statutory restrictions of section 306, but none that I can find exactly in point.

In *Prendergast* v. *G.T.R. Co. of Canada*, 25 U.C.Q.B. 193, it was held that the limitation did not apply, the injury charged being at common law.

The case of *Greer* v. *C.P.R. Co.*, 23 D.L.R. 337, 51 Can. S.C.R. 338, was for damages arising out of an injury sustained by the plaintiff by reason of something negligently done in the operation of the railway, and it was held that the limitation of sec. 306 applied. Davies, J., and Idington, J., delivered dissenting judgments. But in that case the work being done and leading to the accident was in the discharge of a duty of freeing the right of way from combustible materials imposed on the company by sec. 297 of the Railway Act, and therefore within the meaning of "the operation of the railway."

In *Roberts* v. *G.W.R. Co.*, 13 U.C.Q.B. 615, it was held that the limitation only applies to actions for damages occasioned by the company in the exercise of the powers given for enabling them to construct or maintain the railway.

In *Findlay* v. *C.P.R. Co.*, 2 Can. Ry. Cas. 380, the action was to recover damages for injuries alleged to have been sustained by the plaintiff while working as an employee of the defendant company, caused by falling into a ditch or excavation made by the defendant's servants.

The plaintiff does not complain of an act done by the railway itself or its maintenance, but of neglect of the defendants to provide adequate protection.

In *North Shore Ry. Co.* v. *McWillie*, 17 Can. S.C.R. 511, what is meant is damage done by the railway itself and not by reason of the default or neglect of the company owning the railway or of a company having running powers over it, by reason of the insufficiency in construction of the engines used or of negligence in the manner of running them upon the railway.

C.N.R. Co. v. *Anderson*, 45 Can. S.C.R. 355, at 359.

In the case of *C.N.R. Co.* v. *Robinson*, 43 Can. S.C.R. 387, on appeal to the Privy Council, [1911] A.C. 739, their Lordships held, at p. 745, that the "operation of the railway" referred to in

the section seemed to signify the process of working the railway as constructed.

The case of *Pszeniczny* v. *C.N.R. Co.*, 25 D.L.R. 128, 25 Man. L.R. 655, cited by counsel for the defendant, does not appear to me applicable. There it was held that an injury received by a railway employee engaged with others in removing rails from one car to another on the railway line because of a rail slipping from the hands of the other men and falling upon the plaintiff is "sustained by reason of the construction and operation of the railway within the meaning of sub-sec. (1) of sec. 306 of the Railway Act." On appeal to the Supreme Court of Canada, 32 D.L.R. 133, this was reversed, but on the ground that the action was barred by sec. 306.

In *Sutherland* v. *C.N.R. Co.*, 21 Man. L.R. 27, it was held that an injury caused by the defective state of a scaffold being used in the construction of an ice-house for the use of the railway company is not one "sustained by reason of the construction or operation of the railway" within the meaning of sec. 306, and therefore an action to recover damages for such injury is not barred by that section by the lapse of one year.

Now, in the case in question, the facts are that the defendants had a quantity of discarded old rails by the side of their right of way at or near the village of Sutherland in the Province of Saskatchewan, and the plaintiff was in their employ as a labourer in a gang engaged in removing these rails in the manner hereinbefore described, when the injury was sustained.

The removal of the rails was not a duty incumbent on the defendants. The work was not being done in the "operation or construction of the railway," nor does it seem that the rails were required for the use of the railway.

The complaint is not that the accident was caused by the railway, but rather by the defective appliances used in other work as incidental to the work of the railway.

It seems to me that the fact that the work was being performed alongside of the railway does not make it the work of the railway proper any more than if the rails were being loaded in the same manner on to a waggon on the side of the track.

The cause of the accident, it is alleged, was the defective cable, and not anything arising out of the "operation or construction of the railway."

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In my judgment the prescription does not apply, and both questions submitted will therefore be answered in the negative.

Green, for appellant; *Heap*, for respondent.

The judgment of the Court was delivered by

PERDUE, J.A.:—This is an action by the plaintiff to recover damages for injury caused to him while he was in the employ of the defendants as a labourer, and while engaged in his duties as such. He and others, he alleges, were lifting old steel rails from a part of defendants' right of way by means of a derrick or crane, and placing them on flat cars to be taken over defendants' railway to their piling yards at Saskatoon. While a rail was being lifted, the steel cable used in the operation broke, and the rail fell, severely injuring the plaintiff. He alleges that the cable was defective, that the system of inspection was inadequate, that proper and safe tools and appliances had not been furnished, and that the accident happened through the negligent operation of the derrick and cable by other employees of defendants.

The defendants, besides denying the allegation in the statement of claim, set up several alternative defences based on different hypotheses as to what the facts really were. They also plead "not guilty by statute" with special reference to sec. 306 of the Railway Act, R.S.C. 1906, ch. 37.

On the application of the plaintiff, under r. 466 of the K.B. Act, the Referee in Chambers made an order containing the following directions:—

1. It is ordered that the following questions of law be decided before any evidence is given or any question or issue of fact is tried, namely:—

1. Is the plaintiff's cause of action as alleged in the amended statement of claim barred by sec. 306 of the Dominion Railway Act? 2. Is such cause of action so barred in case the rails referred to in par. 3 of the amended statement of claim had previously been removed for the purpose, not of being taken to a scrap pile or piling-yard (as alleged in par. 3 of the amended statement of claim) but of being relaid upon the defendants' tracks elsewhere (as alternately alleged in par. 2 of the amended statement of defence)?

The order directed that the questions of law should be set down for argument, and in the meantime all other proceedings were stayed.

The defendants did not appeal from the above order, and in due course, the questions of law were argued before Macdonald, J., who answered both questions in the negative.

I desire to say in the first place that I do not think the Referee should have made the order where there are several versions of

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the facts appearing or suggested in the pleadings. The question of law to be argued is whether the action was barred by sec. 306 of the Railway Act. That question can only be answered finally when the facts relating to the case are found or admitted.

No set of facts is admitted in the case, and the Court is asked to answer a legal question founded upon the plaintiff's view of the facts and another upon a view taken by the defendants, neither of which views may be established at the trial. In such circumstances the order, should, I think, have been refused. I would refer to *Scott* v. *Mercantile Acc. Ins. Co.*, 8 T.L.R. 431; *Parr* v. *London Assce. Co.*, 8 T.L.R. 88; *Gardiner* v. *Bickley*, 15 Man. L.R. 354; *Chalmers* v. *Mackray*, 26 D.L.R. 529, 26 Man. L.R. 105. But the questions having been submitted and answered and the appeal made to this Court, from the findings, it is necessary to consider the propositions of law laid down by the Judge in the answers.

The point or points of law to be considered are whether the limitation of actions provided by sec. 306 of the Railway Act applies to either or both of the statements of facts submitted. I do not think it is necessary to discuss the cases decided under the old form of the section. Taking the first question submitted, we must find whether the injury to the plaintiff was sustained by reason of the construction or operation of the railway. The statement of claim shews on its face that the accident happened on May 4, 1914, and the action was not commenced until January 7, 1916. Clearly, therefore, more than a year elapsed between the happening of the injury and the commencement of the action.

The effect of sec. 306 has been discussed in a number of cases in the highest Courts. I would refer to *Canadian Northern R. Co.* v. *Robinson*, [1911] A.C. 739; *Canadian Northern R. Co.* v. *Anderson*, 45 Can. S.C.R. 355; *West* v. *Corbett*, 12 D.L.R. 182, 47 Can. S.C.R. 596; *Greer* v. *C.P.R. Co.*, 51 Can. S.C.R. 338, 23 D.L.R. 337; and the very late decision of the Supreme Court of Canada in *Pszenicnzy* v. *C.N.R. Co.* The last mentioned case has not yet been officially reported, but copies of the judgments have been furnished to us.* I think the answers to the questions submitted are to be found in that case. There, the plaintiff, a labourer, was engaged in unloading from a box car, steel rails for the defendants in the action. The rails were to be used to replace the track. The action was brought under the

*Reported 32 D.L.R. 133.

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Employers' Liability Act, R.S.M. 1913, ch. 61. The jury found negligence against the defendants in regard to the manner of unloading the rails, and found a verdict for the plaintiff. From that verdict the defendants appealed to this Court, the whole question raised being whether the limitation prescribed by sec. 306 applied to the case, the action having been commenced more than a year after the happening of the accident. It was held by this Court that sub-sec. 4 of sec. 306, preserved the operation of the provincial Act, which fixed the period of limitation at 2 years. [See report of case in 25 D.L.R. 128.] On appeal to the Supreme Court it was held (Mr. Justice Idington dissenting), that the first clause of sec. 306 applied, and that the plaintiff's claim was barred.

Anglin, J. (with whom Brodeur, J., concurred), expressed his opinion as follows:—

That the injury suffered by the respondent was sustained in the operation of the railway in my opinion does not admit of doubt. As their Lordships of the Judicial Committee said in *C.N.R. Co.* v. *Robinson*, [1911] A.D. 739: "Such operation seems to signify the process of working the railway as constructed." Loading and unloading freight and goods upon railway cars is assuredly part of the process of working the railway. It was negligence in the providing of means for such operations that caused the injury for which this action is brought. That actions based on such negligence are within the protection afforded by sub-sec. 1 of sec. 306 has been held in several cases in this Court. *West* v. *Corbett*, 12 D.L.R. 182, 47 Can. S.C.R. 596; *Robinson* v. *C.N.R. Co.*, 43 Can. S.C.R. 387; *Greer* v. *C.P.R. Co.*, 23 D.L.R. 337, 51 Can. S.C.R. 338.

Whatever the facts are in the present case, whether the plaintiff is correct in his statement or the defendants in theirs, the decision in the *Pszenicznzy* case applies. If the facts are as alleged in the first question, then the defendants, while engaged in the loading of rails for conveyance to Saskatoon by their railway, were operating the railway and the injury was sustained by reason of such operation.

If, on the other hand, the facts are as the defendants submit them in the second question, then the defendants were still engaged in the operation of the railway—loading the rails for carriage—and if the rails were to be laid down upon another part of the track, the defendants would be engaged in the construction of the railway. In that state of facts the injury was sustained both by reason of the operation and of the construction of the railway.

The appeal should be allowed, the order appealed from re-

versed, and both questions answered in the affirmative. The costs of the application and of this appeal should be costs to the defendants in any event of the cause. *Appeal allowed.*

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S. C.

Saskatchewan Supreme Court, Sir Frederick Haultain, C.J., Lamont, Brown, and Elwood, JJ. November 18, 1916.

SPECIFIC PERFORMANCE (§ I E 1—30)—SALE OF LAND—NON-COMPLIANCE WITH ESSENTIAL TERMS.

Specific performance of an agreement for the exchange of lands will not be specifically decreed at the instance of a party who is in default in respect of an essential term of the agreement.

[*Brickles* v. *Snell*, 30 D.L.R. 31, followed.]

Statement.

APPEAL by defendant from a judgment decreeing specific performance. Reversed.

G. E. Taylor, K.C., for appellant.

H. J. Schull, for respondent.

The judgment of the Court was delivered by

Lamont, J.

LAMONT, J.:—The plaintiff and defendant agreed to exchange properties. The agreement, which was dated August 21, 1915, provided that the plaintiff would transfer his equities in 4 parcels of city property for the equity of the defendant in a section of land. The equities of the plaintiff were estimated at $13,804, while the equity of the defendant in the farm amounted to $12,840. But, in addition to this equity, the defendant agreed to pay the plaintiff the sum of $900 in cash. The agreement also provided that each party was to pay all taxes outstanding on their respective properties as at December 31, 1915. It also contained the following provisions:—

Both parties further agree to meet all payments of principal and interest due, and outstanding on the various pieces of said property at present owned by them, and as hereinbefore described, as at December 1, 1915, and agree that in the event of any such payments so met, and as immediately hereinbefore stated, changing or increasing the equity of either of the parties in the several pieces of property hereinbefore stated, the difference in the equity of either of the parties, between the amount of said equity hereinbefore stated and the amount following any such payments he or they may make, to be paid by the other party on or before December 1, 1915.

It is further agreed between the parties hereto that in so far as affecting parcels one and three at present in the name of the second party, and in view of the fact that there are unpaid balances due on these properties under agreement for sale, there shall be prepared and entered into between the parties hereto regularly drawn assignments of agreements for sale which assignments shall be prepared, and approved of by the present holders of the agreement for sale affecting these parcels.

On the plaintiff's property there were, on December 1, 1915,

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arrears of purchase price and taxes amounting to $1,521.47. Some of it had been overdue for some considerable time, and the plaintiff was being pressed for payment. On the defendant's land there was a payment of interest on the mortgage against the farm of $540. Under the agreement the defendant was under obligation to make this payment. It was admitted by counsel for the plaintiff, that it was never contemplated between the parties that the defendant was to make the payment, notwithstanding the agreement, for the plaintiff had expressly undertaken to pay it. I, however, do not think anything turns upon this point.

A few days before December 1, the parties met to make final adjustments. It was then pointed out to the defendant that he would have to provide cash to meet not only $900 but all payments which the plaintiff might have to make to square off the arrears on his land. The defendant claimed that this was not the agreement; that it was understood that the only money he was to pay was the $900, and that for this $900 and his farm he was to get equities valued at $13,804, under titles or agreements on which all payments due December 1 had been paid. On learning that he had to furnish cash for all the arrears, he said he was through with the deal. The plaintiff did not pay up either the arrears due on his properties nor the taxes, nor did he secure the consent of the title owners to an assignment of his interest in the properties. On February 16, 1916, he brought an action for specific performance.

The trial Judge held that the payment of the arrears was under the circumstances of this contract, not an essential term thereof, because if the plaintiff had paid them the defendant would have been under obligation to immediately reimburse him the amount. From that decision the defendant now appeals.

For the defendant it is contended that the judgment directing specific performance forces the defendant to accept something substantially different from that for which he contracted. That he contracted for assignments of agreements in good standing, and that such contract cannot be considered as having been complied with by the assignment to him of agreements in arrears.

To be entitled to a decree for specific performance the plaintiff must shew that all conditions precedent have been performed,

and that he has performed, or been ready and willing to perform, all the terms of the contract which he has undertaken to perform whether expressly or by implication. This rule, however, applies only to terms which are essential and considerable. 27 Hals. pp. 52, 57.

Was the payment of the arrears and taxes by the plaintiff an "essential" term of the agreement?

In the view I take of the case, I need only refer to one of the parcels of city property which, under the agreement, the plaintiff was to transfer to the defendant; that is to say, lot 9, block 28, C.P.R. Prior to June 20, 1912, this lot was owned by one Joseph J. Lynd, who on that date sold to one Johnson under agreement for sale. Lynd then sold his vendor's agreement to the Moose Jaw Securities Co., and transferred the said lot to them. Johnson assigned his interest, as purchaser under the agreement, to one Nairn who assigned to the plaintiff. The plaintiff's title, therefore, was based upon the agreement between Lynd and Johnson, then held by the Moose Jaw Securities Co. That agreement provides for the payment by Johnson of $4,700 as therein set out, and all taxes and assessments which may be charged on the land; also for the assumption by the purchaser of a mortgage for $2,000. It contained as well the following provisions:—

Provided that on any default in the payment of any instalment of either principal or interest or taxes the whole of the principal or interest hereby secured shall at once become due and payable or this contract shall be forfeited and determined at the option of the vendor. . .

Time shall be in every respect the essence of this agreement.

It is admitted that on December 1, 1915, there were arrears of $500 due on this agreement to the Moose Jaw Securities Co., and taxes amounting to $66.57, and that neither before action was brought, nor up to the present time, have these taxes been paid nor have all the arrears.

In the recent decision of the Privy Council in *Brickles* v. *Snell*, 30 D.L.R. 31, it was held that

where time was expressly made of the essence of an agreement for sale of land specific performance of the agreement would not be decreed in favour of a plaintiff who was in default.

In the case at bar, Douglas is a purchaser under the Lynd agreement; he is admittedly in default under that agreement. If he brought an action against the present registered owners, the Moose Jaw Securities Co., and they set up that he had been,

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and still was, in default under the agreement, specific performance under the above decision would not be granted in his favour, and he would, therefore, be unable to make title to the lot. In other words: he had not on December 1, 1915, and has not to-day an enforceable title to this lot. Had he lived up to his agreement with Sharpe and, on December 1, tendered the arrears and taxes, and had the Moose Jaw Securities Co. accepted the money, they could not afterwards in an action for specific performance set up the previous default of Douglas. This was the very thing Sharpe was stipulating for in his contract. He stipulated for an agreement on which there were no arrears and which, therefore, was enforceable in an action for specific performance. What he was asked to accept, and what he is now directed to take, is an agreement unenforceable because of the plaintiff's default both as to the payment of the arrears and the taxes, and an agreement under which the vendors can call for the whole amount of principal and interest if they consent at all to take their money. To force him to accept a title in this condition is, in my opinion, to force him to accept the very thing he was endeavouring to guard against by his agreement. There is nothing to shew that if the defendant had gone on December 1 and tendered the arrears which the plaintiff undertook to pay, the Moose Jaw Securities Co. would have waived any of their rights under the contract. Subsequently, on January 13, 1916, they did accept from Douglas a payment of $300 on account, but what they might do for Douglas as a matter of grace they were under no obligation to do for the defendant as a matter of right.

The only title the defendant can be forced to accept is one which will give him the equity he bargained for, and which can be enforced against an unwilling registered owner.

It was argued on behalf of the respondent that the letter of September 3, 1915, from the Moose Jaw Securities Co. to the defendant was an intimation of their willingness to accept the arrears, or a waiver of the rights accruing to them by virtue of the plaintiff's default. The letter is as follows:—

We are advised that you have taken over this property from one John Douglas and that being the case, we desire to enclose herewith a statement of the amount owing us on this property. This amount with interest to date amounts to $597.35. $412.35 of this money is now in arrears.

There is a payment of $125 due November 1, and the balance of $60 on February 1 next. We have been carrying these arrears for Mr. Douglas for

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some little time on his distinct undertaking that they would be cleaned up before October 1. Being that you have entered into possession of this property, these conditions will govern your payments as well.

We desire, therefore, to hear from you as to how soon you can make these payments that have been in arrears so long.

An early reply will greatly oblige.

In response to this letter, the defendant called on the company and stated that the plaintiff was to pay a portion of the amount set out in their account.

Assuming, in the plaintiff's favour, that this letter amounted to an intimation of a willingness to accept the arrears, it, in my opinion, goes no further than an expression of willingness to accept them at that time, or, at most, to accept them up to October 1, by which date they say they had a distinct undertaking from Douglas that they would be paid. I cannot see anything in the letter which can be interpreted as an expression of willingness to accept them on December 1, or on any subsequent date.

Furthermore, neither the letter nor the statement which accompanied it made any reference to the taxes. As to these, there is absolutely nothing from which an inference can reasonably be drawn that the company waived the right which was theirs to demand payment in full, or to determine the contract on account of the default of the plaintiff in the payment of taxes.

I am, therefore, of opinion that the payment of these arrears and taxes stipulated for was an "essential term" of the contract between the plaintiff and the defendant, and that an agreement to assign a contract for the sale of land with all arrears and taxes paid is not complied with by assigning a contract in default, where such default might be a bar to the enforcement of the contract in an action for specific performance.

The appeal should, in my opinion, be allowed, and judgment entered for the defendant with costs both in the Court below and in appeal. *Appeal allowed.*

ST. MARY'S MILLING CO. v. TOWN OF ST. MARY'S.

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S. C.

Ontario Supreme Court, Appellate Division, Garrow, Maclaren, Magee and Hodgins, JJ.A. July 6, 1916.

WATERS (§ II C—80)—RACEWAY—EASEMENT—SERVIENT AND DOMINANT TENEMENTS.

Where the owner of land, over which a raceway carries water for the use of a mill, grants to one person that portion which includes the mill and the inlet and outlet of the raceway, and to another the portion which includes the middle of the raceway, the former portion is the dominant and the latter the servient tenement; the latter has no easement to the use of the water, and the owner of the former may close up the raceway at its inlet and outlet.

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ST. MARY'S MILLING CO. v. TOWN OF ST. MARY'S.

APPEAL by plaintiff from the judgment of Clute, J. in an action for a declaration of the plaintiffs' rights in respect of the waters of a river and for damages for trespasses committed by the defendants and for an injunction and other relief. Varied.

R. S. Robertson, for appellants.

F. H. Thompson, K.C., and *F. C. Richardson*, for defendants, respondents.

Hodgins, J.A.

HODGINS, J.A.:—Action tried by Clute, J. His judgment was mainly in favour of the appellants, who, however, contend that it did not go far enough, inasmuch as he allowed only $200 for damages for trespass, and object that he construed the deed to the appellants as if it had been subject to a reservation which enables the respondents to insist on the uninterrupted flow of the waters through the raceway in question as it existed when the deed to the appellants was given.

The learned trial Judge has held: (1) that the property now divided between the appellants and the respondents was held, down to the giving of the deed to the appellants, which was prior to that of the respondents, by the appellants' predecessor in title as an entire property; (2) that the waters upon the lands were not navigable waters; (3) that there was not any recognition by the appellants or their predecessors in title of any right or claim by the respondents or the public to use the said waters as of right for a pleasure-ground; (4) that the respondents were guilty of trespass except as to removing the cement dam and obstruction placed by the appellants at the head of the raceway and the making of the road leading to Water street; (5) that the respondents have no riparian rights as to the raceway; (6) that the raceway was originally constructed and held for the benefit of the mill owned by the appellants' predecessors in title; and (7) that the respondents cannot claim to be entitled by way of an easement to the flow of water in the raceway, under sec. 35 of the Limitations Act, R.S.O. 1914, ch. 75.

These findings are not contested by the respondents, who rely upon the ground taken by the learned trial Judge, i.e., that the appellants and respondents are, by virtue of their respective conveyances, entitled to the water and the land under the water as it existed at the time they received their respective grants; and that, in consequence, the respondents have the right to the

water in the raceway unimpeded by the appellants. This means that the appellants' lands became a servient tenement so far as to allow the free passage of the water over them to reach the raceway.

The first difficulty is to know just what the right claimed really is. The respondents in this case do not claim the right to take water, nor indeed to have it flow past their lands, except so far as is necessary to keep it there, so that it can be used for purposes of recreation. It is in effect a claim to have the water kept and maintained as an aquatic play-ground for the public. While the people of a district can acquire in England and Ireland by dedication or custom certain rights, such as the user for purposes of recreation, over land which cannot be gained by the general public (see *Edwards* v. *Jenkins*, [1896] 1 Ch. 308, and *Abercromby* v. *Fermoy Town Commissioners*, [1900] 1 I.R. 302), no such case is suggested here. The language of the Lord Chancellor in *Attorney-General* v. *Chambers* (1859), 4 DeG. & J. 55, 65, in dealing with the claim of a party who had turned his cattle out upon a marsh which crossed the invisible line of boundary which separated the marsh from the sea, is applicable to the circumstances of this case: "Where the property is of such a nature that it cannot be easily protected against intrusion, and if it could it would not be worth the trouble of preventing it, there, mere user is not sufficient to establish a right."

The learned trial Judge says that, while the appellants acted in a generous way in permitting boating on their raceway and pond, there never was any recognition of any right so to do existing either in the respondents or in the public.

In *Warin* v. *London and Canadian Loan and Agency Co.*, 7 O.R. 706, Wilson, C.J. (p. 722), describes the claim asserted by reason of long continued user of water in bringing in and anchoring vessels in it, in this way: "The claim which is set up by the defendants is not properly an easement, but a claim in gross of what is equivalent to a right of way over the plaintiffs' waters, and there cannot be such a right."

The common owner never used the raceway for the purposes of recreation or boating. He utilised the water and its flow only for his mill. So that, if the right is not known to the law, such as the right claimed here to paddle canoes over it, it cannot be enforced: *Burrows* v. *Lang*, [1901] 2 Ch. 502.

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But it is said that, if the water cannot be claimed for the purposes of amusement by the inhabitants of St. Mary's, or that select portion of them whom the pleader terms "ratepayers," yet the right to the flow of the water or its maintenance in the raceway may be asserted.

It is this easement or quasi-easement, which latter term Mr. Thompson adopted as a correct description of the respondents' alleged right, which is now insisted on, and which has been allowed by the learned trial Judge. A quasi-easement is a user in a particular way by the common owner, and this may be the subject of a grant or reservation if it is a right known to the law. This I take to be the effect of *International Tea Stores Co.* v. *Hobbs*, [1903] 2 Ch. 165; because the general words of the English Conveyancing Act, 1881, can only carry a legal right: *Lewis* v. *Meredith*, [1913] 1 Ch. 571.

But the right granted or reserved under such circumstances must be determined by the use actually adopted before the grant is made. Here the use, when the grant to the appellants was given, was the flow of the water down to and for the purposes of the mill. And, in view of the accepted findings of the learned trial Judge, the question is really narrowed to this point: Was the use, in the sense I have mentioned, reserved by the grantor when the deed to the appellants was given, or did that deed carry with it the right to an easement over the remaining lands, which the appellants put an end to when they voluntarily filled in the raceway at either end?

It must be remembered that at the time of the grant to the appellants the milling company had failed and gone into liquidation. The sale to the appellants was of the mill property and of two portions of the raceway only: the upper part, comprising the intake, and the lower part, through which the mill was fed. The flats retained included part of the channel of the raceway, which would be dependent as to flow upon the upper part being kept open.

The continuous raceway became in that way severed; and, if the then use of the channel for water to the mill was to be maintained, the part retained by the grantor would of necessity be the servient tenement, having regard to that use. The deed of the appellants is carefully drawn, and contains reservations as to drainage rights through the flats. The situation then would

rather lead to the inference that the grantor by virtue of his deed granted the easement or quasi-easement which the prior user indicated, i.e., to the flow of the water for mill purposes to the appellants if they chose to assert it: *Edinburgh Life Assurance Co.* v. *Barnhart* (1866), 17 U.C.C.P. 63; *Roe* v. *Siddons* (1888), 22 Q.B.D. 224. But, if that were so, the grantee had the right to terminate the easement: *Oliver* v. *Lockie* (1894), 26 O.R. 28. This he has done by closing up both ends of the raceway by permanent structures.

In considering whether the other view is to prevail, namely, that the grantor reserved for his own benefit the right to the flow of the water through the raceway, it is well to bear in mind what is stated by Vaughan Williams, L.J., in *Baily & Co.* v. *Clark Son & Morland*, [1902] 1 Ch. 649: "If, on the other hand, this is an artificial watercourse, any right to the flow of the water must be based on some grant, whether in the nature of an easement or otherwise. The basis of every right to the flow of the water must be an agreement, expressed or presumed from the user, with the owners of the land through which the stream runs" (pp. 663, 664).

Any reservation by the grantor is therefore in the nature of a re-grant by the grantee. And it is evident that such a re-grant would, in this case, burden the grantee with the duty of keeping the raceway open at both ends, with all the labour and expense of repair and maintenance for all time, and that for a purpose not consonant with the working of the mill, but merely for the occasional use of the water in the raceway for pleasure or other objects not then defined.

The grantor was the liquidator of an insolvent company, who was not likely to ask or expect that a purchaser of the mill property, to whom he sold both ends of the raceway, would burden himself for all time with the expense of keeping open and maintaining a raceway for the purpose of some undefined and probably then unanticipated public benefit. The flats were not then owned by the respondents, and it would have needed some prescience to have foreseen that the respondents would buy, and, having bought, would provide for their "ratepayers" an aquatic park.

On the other point, as to whether such a reservation can be implied, there are in *Wheeldon* v. *Burrows* (1879), 12 Ch.D. 31

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(stated by Mr. Gale to be now settled law and followed by our Court of Appeal in *McClellan* v. *Powassan Lumber Co.*, 17 O.L.R. 32), two rules laid down by the Court in the following terms (by Thesiger, L.J., 12 Ch.D. at p. 49): "The first of these rules is, that on the grant by the owner of a tenement of part of that tenement as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent easements (by which, of course, I mean quasi-easements), or, in other words, all those easements which are necessary to the reasonable enjoyment of the property granted, and which have been and are at the time of the grant used by the owners of the entirety for the benefit of the part granted. The second . . . is that, if the grantor intends to reserve any right over the tenement granted, it is his duty to reserve it expressly in the grant. Those are the general rules governing cases of this kind, but the second of those rules is subject to certain exceptions. One of those exceptions is the well-known exception which attaches to cases of what are called ways of necessity." After reviewing various cases, the learned Lord Justice said (pp. 58, 59): "These cases in no way support the proposition for which the appellant in this case contends; but, on the contrary, support the propositions that in the case of a grant you may imply a grant of such continuous and apparent easements or such easements as are necessary to the reasonable enjoyment of the property conveyed, and have in fact been enjoyed during the unity of ownership, but that, with the exception which I have referred to of easements of necessity, you cannot imply a similar reservation in favour of the grantor of land."

Stirling, L.J., in *Union Lighterage Co.* v. *London Graving Dock Co.*, [1902] 2 Ch. 557, at p. 573, says: "In my opinion an easement of necessity, such as is referred to, means an easement without which the property retained cannot be used at all, and not one merely necessary to the reasonable enjoyment of that property."

An easement or right of enjoyment such as is claimed in this case cannot, in any sense, be one either actually necessary or necessary for the reasonable use of the property retained. The flats do not require for their enjoyment a watercourse beside them for boating or other like purposes, nor can any other useful end be suggested in support of the claim. In the case last cited, the almost indispensable advantages of tie-rods necessary to sup-

port a dock were held to fall short of an easement of necessity in a legal sense.

The case of *Burrows* v. *Lang*, [1901] 2 Ch. 502, contains much that is apposite to the question in hand. The common owner first conveyed the farm to the plaintiff. He retained the mill property for seven years, and presumably for that length of time he maintained the water in the artificial watercourse out of which the plaintiff's cattle drank from time to time. Then he conveyed to the mill-owner the mill property through which the artificial watercourse ran. In the present case the common owner deeded the mill property first, retaining part of the raceway. Farwell, J., says (p. 508): "If a man makes a watercourse leading water to a mill-pond for the use of his own mill on his own land, that is a temporary purpose, as it is limited to the period for which he uses the mill."

Here, when the common owner parted with the mill and with sections of the raceway—one of which was its inlet and the other its outlet—it may be concluded, as I have pointed out, that the grantor, the liquidator, had no idea of imposing upon the purchaser, in favour of himself, the burden the extent of which I have already indicated, for the mere purpose of allowing it to be used as a possible recreation-ground by members of the public, whose claims up to that time, the learned trial Judge finds, had never been recognised, or because he conceived it to be something of value to old and unused flats.

The opposite conclusion has practically been drawn in the judgment appealed from, although the probable easement over the respondents' land is not dealt with. But, if an owner of land, through which a raceway ran, grants to another, part of the lands necessary for the existence of the raceway, without reserving any right to its continuance thereon, the more natural presumption would be, it seems to me, that he had intended to part with it both as to the lands which carried the flow of water and as to the right to that flow as well. If, on the severance of two tenements, there is an actual way over one to the other, used and obviously formed for the other, such a way will pass by implied grant: *Brown* v. *Alabaster* (1887), 37 Ch.D. 490.

But the raceway here was not formed for the use of the portion retained, but for the mill property, and the severance was of such a nature as to indicate, not an implied grant, but a destruction

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of the raceway so far as it formed a continuous and used channel. I do not see that the statute, the Conveyancing and Law of Property Act, R.S.O. 1914, ch. 109, sec. 15, helps or affects the matter at all. It provides that every conveyance of land shall include all ditches, waters, watercourses, privileges, easements, and appurtenances whatsoever "to such land belonging or in any wise appertaining," or with the same "used, occupied and enjoyed or taken or known as part or parcel thereof," and if the same purports to convey an estate in fee simple, then it will carry also "all the estate, right, title, interest . . . use . . . property, profit, possession, claim and demand whatsoever, of the grantor, into, out of, or upon the same land, and every part and parcel thereof, with their and every of their appurtenances."

If these words indicate anything, they would compel the conclusion that everything that the grantor had, passed by the appellants' deed to them as grantees. If it is the proper conclusion that the flow of water in the raceway is included in the words "appertaining," "used and enjoyed," or "appurtenances," then the claim to the grant of the easement to flow over the reserved lands would be established. But I do not think the appellants need to rely solely on the statute.

At the time the respondents' deed was given, the lands in it were subject either to an easement in favour of the lands already granted, which the grantee in that deed might at any time abandon, and which he could not be compelled to continue, or no such easement existed, and both parcels were conveyed merely as so much land then covered as to part by water.

If the former was the true situation, as I think it was, then there was nothing for the words in the Act to cover in favour of the respondents. If the latter, then I think it is impossible to include in the deed to the respondents any easement or right in relation to the watercourse. The actual use was for mill purposes, and the enjoyment of the flow of water in the raceway was for that alone, and not for the benefit of the flats, to which it was not an appurtenance; while the suggested public right is negatived by the findings made by the trial Judge.

To give any other construction to these two deeds would present the anomaly of rendering the land in the earlier one the servient tenement, while it was in fact dominant, for that fact

must be determined by the use to which the raceway was actually put at the time of the severance.

The right to construct the sewers and drains in addition to the one specially mentioned, which is reserved in the first conveyance, does not help the respondents. The raceway opposite the flats belongs to the respondents; and it would follow that, if they drained into it, they would be bound to construct a drain or sewer therein, as by the deed they are required to do in such a manner as to cause the least possible interference with the rights of the appellants. This, or the municipal sanitary regulation, would prevent them treating the raceway as an open sewer; they must construct their drains and sewers in the ordinary way; and in any case what they may do in that direction has no bearing upon the right to the flow or stoppage of the water before they exercise their drainage rights. They can put those in force whether the water flows opposite their lands or not.

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On the whole, the appeal should be allowed, and the judgment varied by striking out paragraphs 4, 5, and 6 thereof and all the words after "of this action" in paragraph 7.

The damages allowed should not be interfered with.

The respondents should pay the costs of the appeal.

GARROW, J.A., concurred.

Garrow, J.A.

MACLAREN, J.A., agreed in the result.

Maclaren, J.A.

MAGEE, J.A.:—I agree with the reasons and conclusion of my brother Hodgins. At the argument here, allusion was made by counsel for the defendants to the fact of a small natural stream running into the mill-race in question, and it was thought that the race followed the course of that stream. That might change the whole complexion of the case, but the only reference I find in the evidence to it is a statement by Mr. Johnson, witness for the plaintiffs, when speaking of the mill-race being obstructed; he says: "The water would stand there. Q. But there is nothing else to feed it? A. Yes, there is a small creek. Q. It would have no outlet at the lower end? A. It would raise and go over it." There the matter dropped, and there is nothing to shew whether that creek would enter on the plaintiffs' or defendants' land, or whether it would cross the race. The statement as to it is insufficient to help the defendants, and the plans put in as exhibits do not indicate any such stream. *Appeal allowed.*

Magee, J.A.

Note.

NOTE—BY ALFRED B. MORINE, K.C.

Unity of possession of certain land near the town of St. Mary's existed from 1839 to 1914. Early in that period a raceway was cut through the land to carry water to the owner's mill. Dams at the inlet and outlet caused a pond between, and at certain seasons of the year this pond was used for pleasure boating by inhabitants of St. Mary's. In 1914, that portion of the land which included the inlet and outlet to the raceway, was conveyed to the plaintiff, and in 1915 the "flats," or middle portion, including part of the raceway, was conveyed to the defendant. Disputes between the new owners arose in 1915; the plaintiff closed the inlet and outlet; the defendant destroyed the obstructions; the plaintiff brought this action for damages, and the defendants asked for a declaration of rights.

The trial Judge held that the parties took the land as it was at the date of their conveyances, and, therefore, that the defendants were entitled to an unimpeded flow of water through the raceway. The Appellate Division held that the defendants had no such right, but that an easement to the use of the raceway was implied in the conveyance to the plaintiff, and that it could be discontinued at the plaintiff's will; in other words, that the abated obstructions complained of were lawful, and the defendants' conduct in abating them a trespass.

The only really debatable question in the action was this: when the plaintiff obtained its land, in 1914, did the vendor reserve for the remainder the right to the uninterrupted flow of water through the raceway which had been apparent and continuous for 60 or 70 years. The plaintiff was evidently entitled by implication to an easement over the defendants' land, for the continuance of the raceway, for the main or only purpose of the raceway was to supply water to the mill on the land deeded to the plaintiff, and a grantor cannot derogate from his grant; but was the defendant entitled to those incidental uses to which the raceway had been put for the benefit of the so-called "servient" portion of the land while there was unity of possession?

Relying on *Wheeldon* v. *Burrows* (1879), 12 Ch.D. 31, and other cases cited above, the Appellate Division held that a reservation of easements, except those of necessity, cannot be implied in favour of a grantor of land. *Thomas* v. *Owen*, 20 Q.B.D. 225, modifies this doctrine to some extent, for a reservation of an easement was implied in favour of the lessee of a dominant tenement against the grantee of the servient tenement; it was said, however, that it might have been otherwise had the owner instead of the lessee been in possession of the dominant tenement. In Goddard on Easements, 6th ed., p. 193, relying on *Thomas* v. *Owen*, it is said, rather too broadly perhaps, that the distinction between implied grants and implied reservations has been almost swept away. It should also be noted that in *Thomas* v. *Owen*, the easement claimed to be reserved was for the sole benefit of the land retained, while in the action under review the easement was almost, if not altogether, for the benefit of the granted land; the servient land had little or no advantage from the raceway.

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CANADA FOUNDRY CO. v. EDMONTON PORTLAND CEMENT CO.

Alberta Supreme Court, Appellate Division, Scott, Stuart and Hyndman, JJ.A. November 3, 1916.

DAMAGES (§ III P 2—340)—BUILDING CONTRACT—DELAY—LOSS OF PROFITS —CONCLUSIVENESS OF AWARD.

For delay in completion of a contract for the construction of a building plant beyond what would be considered a reasonable period for per-

formance (no time of completion being stipulated clearly in the contract), the owners of the building are entitled to claim from the contractors damages for the delay resulting in the loss of profits, where it is established that it was clearly within the contemplation of both parties that loss of profits would result from such delay. Where the trial Judge has awarded damages for the delay, and has fixed the amount upon a thorough calculation after consideration of the circumstances in evidence, his award should not be disturbed on appeal.

[25 D.L.R. 683, affirmed.]

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APPEAL from the judgment of Walsh, J., 25 D.L.R. 683. Affirmed.

E. B. Edwards, K.C., for plaintiff; *O. M. Biggar*, K.C., and *S. B. Woods*, K.C., for defendant.

SCOTT, J., concurred with STUART, J.

Scott, J.

STUART, J.:—In form the contract in this case is certainly remarkable. First there is a printed page with the defendant's name and address typewritten at the top as if it were the beginning of a letter and with the plaintiff's name printed at the bottom and a signature "by F. W. Macneil." This page is called "C.F. 161," that is, presumably, contract form 161; then there is a typewritten page addressed to the defendants with no signature attached; and then the third page is a printed form of agreement expressed to be between parties of the first and second part and is apparently another contract form in use by the plaintiff. These three documents are bound together and a back put upon them and the whole is called "Proposal No. 156."

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In my opinion the plaintiffs cannot expect the Court, in proceeding to interpret such a series of documents, to treat them exactly as it would treat a contract regularly and formally prepared. We cannot avoid observing the peculiar manner in which the contract was thrown together. Two different printed contract forms in use by the plaintiffs were annexed to each other with a special typewritten page inserted between them.

It is apparent beyond all doubt that the first form was never intended for use in such a contract as chiefly came into question in this action. As the typewritten page and the evidence shew, the contract was almost entirely for the manufacture and erection of the steel framework of certain buildings for the defendants in which buildings the defendants were to place certain machinery for manufacturing cement. With the manufacture of this machinery the plaintiffs had nothing to do. Their contract related almost solely to the steel frame work for the buildings. The slight exception consisted in a clause whereby the plaintiff

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agreed to furnish a crane at a price of $1,488. The price for the steel framework was $37,000. Yet page 1 of the contract, the first of the two printed forms, which contains a clause particularly relied upon by the plaintiffs, speaks of furnishing "apparatus;" of delivering "plant and machinery," of the "equipment" being "operated in accordance with the company's directions," for furnishing a suitable location for the "apparatus," and of the purchaser providing all necessary "buildings." It stipulates "that all normal 'operating expenses' shall be borne by the purchaser from the date the plant starts" and "that should the purchaser require the apparatus or any part of the *machinery* to be put into operation before the entire completion of the work, the plant, as affecting the terms of payment shall be considered as having started." Now the terms of payment, which are to be found in the third document, that is, the second printed form, naturally make no mention of the "starting" of the "plant."

Then we find the following clause:—

> The company (*i.e.* the plaintiffs) shall not be responsible for any direct or indirect damage, loss, stoppage or delay which the purchaser may sustain whether the said plant or machinery is specified for any particular purpose or not.

This clause the plaintiffs plead in answer to a counterclaim by the defendants for damages for delay in sending forward and erecting the steel framework contracted for.

It may be true that the words "plant" and "apparatus" are wide enough to include the steel framework of a building though the definitions of the meaning of those words in the dictionaries suggest some doubt even on that point. But as used in the document before us it seems clear that they must be given a narrower meaning. Certainly the plant or apparatus is sharply distinguished from the "buildings" in which to put the plant and apparatus. We heard, moreover, no suggestion as to how the steel framework of a building could be "operated" or as to what the "operating expenses" would be. Neither does the evidence disclose any "instructions" from the plaintiff as to how the framework was to be "operated." Upon reading the whole of the first page or printed form it seems clear that it refers to something which may be "operated" as a piece of machinery. And there was just this much reason for the use of such language, viz: that the "15 ton hand *operated* crane" formed a subordinate part of the goods to be supplied. The contract is intelligible as

applied to that article but otherwise and as referring to the steel framework it seems to be quite unintelligible. For this reason I think the "stoppage or delay" spoken of in the special clause relied upon by the plaintiffs does not refer to delay in delivering and erecting the steel framework but is applicable only to the crane, and to stoppage in the *operation* of machinery and delay caused thereby.

The rather surprising result of the contention of the plaintiffs would be that they were at liberty to fulfil their contract whenever they pleased, *i.e.*, as slowly and with as much delay as they pleased. It is more charitable, I think, to impute to them —evidently a responsible and widely-known business firm of large connections and operations—an intention merely to relieve themselves from liability for stoppages in machinery manufactured and installed by them occurring after it had been so installed and after operations had begun, than to suppose that they expected to do business with sensible customers on the basis that they could fulfil a contract whenever it suited their convenience to do so.

The specifications upon which the defendants had called for tenders and which were incorporated by reference into the contract had stated that time was an important factor in the contract and that the guaranteed time of completion of the contract "which must be specified" would be considered in awarding the contract. The tender put in by the plaintiffs, which was the typewritten page above referred to as being annexed to and bound up with the formal contract or contracts, merely said: "We would expect to make shipment of this material about April 1 and to complete erection of the steel work in about 2 months after the arrival of the same at site."

The trial Judge held that the plaintiffs had thus bound themselves down to certain dates for shipment and completion. He treated April 1 and "2 months after arrival" as guaranteed time. For my part I have some hesitation in adopting this view. There is no doubt much to be said in support of it, and I also hesitate to directly dissent from it. In my view of the case, however, it is not necessary, so far as the question of liability is concerned, to decide whether the Judge's view is the correct one or not. There is at least nothing to be found in the contract which would relieve the plaintiffs from the obligation of delivering and com-

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pleting within a reasonable time. And in deciding what, in the circumstances, was a reasonable time the statement of the plaintiffs as to when they would expect to deliver and complete is very material to be considered although perhaps it is not necessarily absolutely decisive. I do not think the contractors in stating when they would expect to complete would be likely to mention a time which would be unreasonably short. The very fact that they mentioned that date, even though according to their own contention they were not absolutely binding themselves down to it, is very strong evidence that they considered the dates mentioned as allowing a reasonable time. The use of the word "about" should, I think be taken as allowing the plaintiffs some amount of delay; and, in considering what that should be, the time between the date of the contract, December 27, and the date mentioned should be considered. Apparently the plaintiffs thought 3 months was not an unreasonably short time. In such a case I do not think the use of the word "about" should be held by itself to give them double that time. A delay of another month or a month and a half might, I think, not unreasonably be allowed; but to go beyond that, except for very special reasons, would have been taking an unreasonable time. In their letter of November 13, which contained their original tender, the plaintiffs made no mention of time. Just when the typewritten document which forms page 2 of the contract was drawn up is not quite clear but apparently it was about the time of the execution of the contract, viz: December 26. It may be that it was prepared some short time previous to that but even if that was the case they must have known that some little time would be required for the execution of the contract and they must also have taken into consideration the necessity for the preparation and approval of "detail and dimension drawings" as mentioned in the typewritten page which contains the reference to the date for completion.

It would not, of course, be suggested by the plaintiffs that the Court should entertain a suspicion that in naming April 1 they named a delusively early date with the mere intention of making their offer more attractive.

It would in my opinion be making quite a generous allowance for miscalculation as to the possible length of innocent delays of all kinds to add 6 weeks to the time (practically 3 months)

which the plaintiffs themselves named as the time they would expect to take.

There are, however, one or two special circumstances which ought to be considered and which in my opinion have the effect of extending somewhat the limit of reasonable time. A clause of the contract stated "the contractor shall furnish duplicate copies of detail and dimension drawings on crane and steel within 30 days after signing the contract which shall be approved by the engineers of the purchaser before any shop work is done, the responsibility for errors in said drawings to remain with the contractor." It was contended that the defendant had delayed so greatly in their approval and return of these drawings that the plaintiffs' scheme of operations in regard to the total amount of work in their factories or shop was entirely disarranged and that therefore the defendants were really responsible for the delays.

It would seem to me necessary to bear in mind what the plaintiffs' contract involved. It involved an agreement not merely to manufacture and erect the steel framework in question but an agreement to prepare and submit for approval the detail and dimension drawings according to which the work was to be done. The specifications and plans which formed part of the contract were obviously merely preparatory and general and intended as a guide to persons tendering for the work when they were making up the price to be submitted. The plaintiffs made a contract as draughtsmen also, in addition to their contract as manufacturers. They bound themselves to prepare and submit for approval the detail and dimension drawings. This work they were bound to perform as their contract stated within 30 days and, of course, it involved a corresponding duty of diligence in approval on the part of the defendants. In my opinion, the plaintiffs must be taken to have anticipated and allowed for the lapse of reasonable times and periods for this purpose when they mentioned "about April 1" as the probable date for the shipment of the steel. The specifications and general plans were in their hands and were placed before their proper department on December 26. There is no evidence to shew what length of time, *i.e.*, what proportion of the time between that date and "about April 1" was expected to be taken or should be reasonably allowed, not merely for the preparation (which was 30 days) but for the approval of these drawings. One would have thought that owing

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to the enormous distance at which the parties were dealing with each other and the time consequently necessary for making and receiving replies to letters a very considerable portion of the time between December 26 and April 1 might have been expected to elapse before the drawings of details for 6 or 7 separate buildings could be finally agreed upon and approved. And it is remarkable that in all the correspondence that passed between the parties in relation to the drawings, there appears only once or twice a slight reference on either side to delays which were taking place in this regard. Indeed by April 1, when (according to the original view of the parties as expressed in the contract and according to the subsequent ideas of the plaintiffs as expressed in their letter of February 1, where they say they see no reason why they cannot ship "as per agreement"), the shipment should have been made, there had been only one of the drawings finally approved, that is the general lay of the power house. And yet during all of April and May the defendants continued to receive and return drawings without reference to delays. Early in April they did enquire as to shipment and about the middle of May they began to become urgent in so far as the building first on the order, that is, the power house, was concerned. But with respect to the other buildings up to that very time and for some time after the defendants still continued to receive, approve and return other drawings relating to other buildings with practically no comment as to the delay which had occurred. The truth was, of course, that with regard to these other buildings the defendants were only approaching readiness, in respect of foundations, to receive and use the steel. It seems to me therefore that in view of these facts we must assume a tacit extension by the parties of the anticipated time for shipment and that while April 1, or thereabouts or even a month or so later, might at the beginning have been looked upon as a reasonable date for shipment we should not hold the plaintiffs guilty of any unreasonable delay until after the expiration of three months beyond that date, that is, until after July 1.

I am unable however to discover any excuse for the plaintiffs not having shipped all the steel by that date.

The contention as to the disarrangement of the plaintiffs' scheme of operations does not appeal to me as being a sound one. Even if it were proper to take into consideration the state of the

plaintiffs' general business, as to which there would seem to me to be much doubt (see judgments of Bramwell and Brett, L.JJ., in *Hydraulic Engineering Co.* v. *McHaffie*, 4 Q.B.D. 670, 673-675.) I think more detailed and explicit evidence should have been given by the plaintiffs than was in fact given. The plaintiffs stated that they had the defendants' work scheduled for April and May. No statement was made as to when they prepared this schedule or why they scheduled the work for the two months following the date at which they had expected to complete it. Nor was any evidence given as to when or in what order the other large contracts which they said they had on hand had been entered into or when the schedule in regard to these was made up. We have nothing but a mere general assertion that the delay in returning the plans had resulted in a disarrangement. It is impossible to rest anything upon such a mere general assertion.

With respect to the delay in the work of erection after the steel arrived I think nothing need be added to what was said by the trial Judge. The plaintiffs were clearly responsible for this delay. Assuming that they were in the circumstances entitled to ask until July 1 for the shipment of all the steel and that a month for transit were allowed (which according to the evidence of the exhibit was the time generally taken in transit), the period of 2 months for erection which they themselves mentioned would have elapsed by October 1. Even if some modification of this were allowed there would appear to have been no reasonable excuse for delaying the completion of the erection beyond a time which would have, according to the facts, permitted the defendants to complete the buildings and instal their machinery by April 1, 1913, which is all the defendants are contending that they desired to do. There was no suggestion that owing to delays from other quarters, *e.g.*, in the delivery of the machinery, the defendants could not have begun their installations of their machinery at any earlier time in any case than they actually did begin it.

The only remaining contention made by the plaintiffs in answer to their alleged liability for damages rests in the defendants' delay in making payments for the work.

There is nothing in the plaintiffs' defence to the counterclaim which seems to raise a defence of this kind and inasmuch as

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there is no reference to the subject in the reasons for judgment of the trial Judge, it would seem possible that it was raised on appeal for the first time. That may not however be the case. But in any event there would not appear to be any legal basis for the contention. In their judgment the plaintiffs were given 5% interest, obviously as damages, upon the over-due payments. Why should the defendants not get damages from the plaintiffs for the delay in doing their part? I do not think the doctrine of waiver applies to a claim for damages for breach of contract. An omission to claim them, or to threaten to claim them, may be of some value as evidence of the small amount of the damages but it surely can have no effect in the way of destroying or removing the legal liability for the breach of contract. It seems to me only an agreement for valuable consideration could have that result. The plaintiffs never set up delay in payment as an excuse for their own delay in completion. The telegram of May 5, 1913, in which the defendants say, "we have presented no claim for damages but are remitting $15,000, etc." so far from indicating a belief on the part of the defendants that they had suffered no damages rather suggests the contrary to my mind. Neither does it express any intention to make no claim. I should interpret it rather as a reservation, or a suggestion, of the possibility that such a claim might still be made. From the letter of Macneil of October 23, it would appear that the defendants had already threatened to sue for damages for delay. And there were undoubtedly, through the correspondence from April 1 onwards, numerous complaints. On October 17 a letter expressly told the plaintiffs that they would be held responsible for the delays. It would be strange indeed if, when certain instalments of purchase price were only due when certain portions of the work contracted for were done, the contractors could delay and delay and then hold themselves free from liability for such delay if the purchasers or owners failed to pay exactly according to the terms of the contract. The two wrongs will not make a right; and, as I have said, the defendants have judgment against them for damages for their wrong, in the way of interest. Certainly, then, the plaintiffs should pay damages for the wrong they did and for their breach.

The question of the quantum of damages is really the most difficult point in the case. The defendants claimed for the loss

of profits which they would have made in operating their cement manufactory between April, 1913, when they would have been able to start if there had been no breach, and September 1, 1913, when they were actually able to start.

The trial Judge, quoting Mayne on Damages, 8th ed., p. 64, where it is said "Loss of profits is recoverable so far as it is the natural result of the breach of contract" and Vaughan Williams, L.J., in *Chaplin* v. *Hicks*, [1911] 2 K.B. 786, at 790, where he said:

> This (*i.e.*, the test) generally resolves itself into the question whether the damages flowing from a breach of contract were such as must have been contemplated by the parties as a possible result of the breach,

proceeded to say that judged by that test he was of opinion that the loss of profits might be recovered. The defendants' claim was for a very large amount. In the pleadings it was put at $108,000 odd, while at the trial and on appeal it was put at nearly $80,000. The trial Judge critically examined the elaborate calculation by which this amount was made up; and, partly on account of his conclusions as to the defects in the calculation and partly out of deference to the views of the Supreme Court of Canada in *Leonard* v. *Kremer*, 11 D.L.R. 491, 48 Can. S.C.R. 518, in regard to the proportion of the damages claimed to the contract price, he concluded that substantial justice would be done by fixing the damages at $10,000. This was given definitely as loss of profits.

Neither party is satisfied with this result. The plaintiffs contend that loss of profits cannot be allowed at all in such a case while the defendants, by cross-appeal, seek to have the amount increased and their calculation accepted and acted upon.

The rule in *Hadley* v. *Baxendale* (1854), 9 Ex. 341, to which all the discussion in other cases goes back, is a double one. The damages must *either* be:

> Such as may be fairly and reasonably considered as arising naturally, *i.e.*, according to the usual course of things from such breach of contract itself, *or* such as may reasonably be supposed to have been in the contemplation of the parties at the time they made the contract as the probable result of the breach of it.

Whatever may be said as to the application of the latter branch of the rule to the question of loss of profits it would seem to me that there must certainly be something more than merely nominal damages assignable even under the first branch of the rule to such a breach as occurred there. It surely cannot be said that there would be no damages "arising naturally, *i.e.*, according to

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the usual course of things" from a delay of five or six months in a contract to erect an important part of the defendants' works. What such damages, which I think would be quite aside from loss of profits in the business to be carried on in the works, would amount to or upon what basis they could be assessed whether on a basis of interest on money invested or rental value or something of that nature may become a very pertinent question. But leaving for the moment this aspect of the case and going to the second branch of the rule and the question of profits it seems to me helpful to observe very particularly the facts both in *Hadley* v. *Baxendale* (1854), 9 Ex. 341, and in *B.C. Sawmill Co.* v. *Nettleship*, L.R. 3 C.P. 499. The former was an action by a mill owner for damages *against a carrier* for delay in delivering a broken shaft from the plaintiff's mill to an engineer who was to make one to replace it, and loss of profit in the operation of the mill consequent on the delay in getting the new shaft was claimed. The actual decision was rested, as a perusal of the last paragraph of Alderson, B.'s judgment will shew, on the ground that the special circumstances were not communicated. He said "nor were the special circumstances which *perhaps* would have made it (that is the loss of profits) a reasonable and natural consequence of such breach of contract communicated to or known by the defendant." In that case therefore the Court did not, to say the least, absolutely reject the possibility of recovering loss of profits, even from a *carrier*. Then, in the *B.C. Sawmill Co.* v. *Nettleship*, L.R. 3 C.P. 499, [1868] E.R.A. 1552, Bovill, C.J., thought it pertinent to say:—

> It is to be observed that the defendant is a carrier and not a manufacturer of goods supplied for a particular purpose.

I think it is clear that the vigorous language of Willes, J., upon which so much reliance was placed, related rather to the danger of an attempt to calculate with accuracy and to the full the amount of profits which would have been made and the impropriety of holding that the full extent of such a speculative loss had been in the contemplation of the parties. But I think that is very far from saying that in no circumstances can a manufacturer or a builder be conceived as contemplating the possibility of a loss of profits as a consequence of his delay in supplying goods or in erecting a building which he has contracted to supply or to build. There are expressions in the judgment of Willes,

J., which seem to have suggested the idea that there must have been practically a contract with regard to the loss of profits from delay. Similar suggestions are to be found in *Horne* v. *Midland R. Co.*, L.R. 8 C.P. 131, and in *Elbinger Actien Gesellschaft* v. *Armstrong*, L.R. 9 Q.B. 473. But I think the answer to these suggestions was given by Cotton, L.J., in *Hydraulic Engineering Co.* v. *McHaffie*, 4 Q.B.D., 670 at 677, where he said:—

It cannot be said that damages are granted because it is part of the contract that they shall be paid; it is the law which imposes or implies the term that upon breach of a contract damages must be paid:

and also in the judgments of Bowen and Fry, L.JJ., in *Hammond & Co.* v. *Bussey*, 20 Q.B.D. 79. In this latter case the costs of an action brought by sub-vendors of coal against their vendor for breach of warranty were held, in an action by their vendor against the original vendor upon a similar warranty, to have been reasonably within the contemplation of the parties to the original contract of sale as a probable consequence of a breach of the warranty.

The case of *Simpson* v. *London & N.W. R. Co.*, 1 Q.B.D. 274, is a very strong case in favour of awarding damages for loss of profits. There, a manufacturer of goods was in the habit of shewing samples of his wares at agricultural shows and of making a profit thereby. He delivered his samples to an agent of the defendants upon a show ground at Bedford to be carried and delivered at another town, Newcastle, where he intended to exhibit them at a fair to be held there on a certain day. The contract contained a clause, "must be in Newcastle on Monday certain;" but nothing was expressly said as to the plaintiff's intention to exhibit the goods at Newcastle. The goods did not arrive in time for the Newcastle fair. Cockburn, C.J., said:—

The defendants had an agent on the ground at the Bedford agricultural show, where this contract was made, for the purpose of drawing custom to their line; and their agent must have known that the plaintiff had been exhibiting these goods, and that they were being sent to Newcastle for the same purpose. I, therefore, cannot doubt that there was in this case common knowledge of the object in view. As to the supposed impossibility of ascertaining the damages, I think there is no such impossibility; to some extent, no doubt, they must be a matter of speculation, but that is no reason for not awarding any damages at all.

And Mellor and Field, JJ., took the same view.

This case was cited and followed by the Ontario Court of Appeal in *Kennedy* v. *American Express Co.*, 22 A.R. (Ont.) 278,

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in which also another similar case, viz: *Jameson* v. *Midland R. Co.*, 50 L.T.N.S. 426, is also referred to.

There are indeed numbers of cases in which loss of profits has been awarded for breach of contract. Each case has to be dealt with according to its special facts. In actions against carriers the Courts have perhaps hesitated more than they have in actions against manufacturers and builders. I have already shewn that this distinction had some weight in the case of *B.C. Sawmill Co.* v. *Nettleship*, L.R. 3 C.P. 499, [1868] E.R.A. 1552. In *Hadley* v. *Baxendale*, it was, during the argument, also referred to by Parke, B.

It would appear to me to be fairly clear that the hesitation which the Courts have shewn in awarding loss of profits as damages has arisen not so much from any difficulty in finding that at least some loss on that account was reasonably within the contemplation of the parties, as from an appreciation of the danger and difficulty of making a purely speculative calculation in order to ascertain the amounts. But this difficulty, as Cockburn, C.J., said in *Simpson* v. *London & N.W. R. Co.*, *supra*, is no reason for awarding nothing on account of loss of profits at all.

Walsh, J., was here sitting as a jury and it was his duty to decide as a fact whether the loss of profits was within the contemplation of the parties to this contract as a consequence of a delay in erecting a material and necessary portion of the buildings in which the defendants proposed to operate their mill. He held that it was. Our duty is to consider, first, whether he could reasonably so decide upon the evidence; and, secondly, if we think he could reasonably so decide, to say whether in our opinion he was nevertheless upon the facts so clearly wrong that we ought to reverse his finding.

In my opinion it is impossible to interfere with his decision. First, I think it impossible to say that no reasonable jury or Judge could find that the loss of profits was within the contemplation of the parties. The plaintiffs were manufacturers themselves. They were working a big plant themselves. They knew, obviously, that the defendants were proposing to start such a manufacturing plant. Can they say that they did not know that a delay in erecting the buildings would cause a delay in commencement of manufacturing operations and therefore a loss of the contemplated profits to be made during the period of

the delay? I think, first, it was quite reasonable for the trial Judge to find that they did know and understand this; and, secondly, that we cannot say that he was obviously wrong in making such a finding. I was at first much impressed with the view that the plaintiffs had not contracted to erect both buildings and machinery complete and that many other circumstances might have intervened to cause delay. But I agree with the view expressed by Ferguson, J., in *Smith* v. *Tennant*, 20 O.R. 180, at 189-190, where in a somewhat analogous case he said that it did not lie in the mouth of the builder to raise such a point but that he should have given the owner "the opportunity by doing the work he ought to have done." And in any case, in the evidence of Klossoski, the defendants' resident engineer, it is expressly stated that if the plaintiffs' erections had been completed by October 1, or even November 1, the remaining work of completing the buildings and installing the machinery could have been completed by April 1, or a few weeks later. He was not cross-examined on this. No suggestion was made as to the machinery not having been ready. The statement stands uncontradicted and even unquestioned. In my opinion therefore we are bound to assume that it was the plaintiffs' delay which caused the long postponement of the commencement of operations.

It seems to me to be clear from the evidence that the trial Judge did not award too large an amount in respect of loss of profits. I think clearly there was at least a loss of $10,000 and that therefore the plaintiffs' appeal should be dismissed.

But the considerations which led the trial Judge to hesitate to calculate to a nicety and to award an extremely large sum for loss of profits possibly in excess of the contract price appeal to me with equal force. The judgment places the defendants in the position they would have been if they had begun operations in their mill on April 1, 1913, as a new enterprise in a somewhat sparsely settled country, had operated it till September 1, paid all overhead expenses and costs of operation and had then a profit to the good of $10,000 and were ready to go on with operations. That is not so bad a result or a start, considering the contingencies of all such kinds of business. Walsh, J., practically followed the course of Duff, J., in *Leonard* v. *Kremer*, 11 D.L.R. 491, and assessed the damages as a jury at a certain amount

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which he considered it absolutely safe to allow. It would be taking a very grave step to venture to increase this amount. The defendants must remember that it is impossible always to get exact and full reparation for a breach of contract. See remarks of Jelf, J., in *Sapwell* v. *Bass*, [1910] 2 K.B. 486 at 493, and the decision in *Cory* v. *Thames Iron Works*, L.R. 3 Q.B. 181, where the purchaser was shewn to have actually suffered a greatly larger loss of profits than was awarded him but was confined to an amount which was more in accordance with the anticipations of the vendors as to the use of the article in question. Here we cannot assert that the plaintiffs had any definite knowledge of the possible or actual extent of the defendants' proposed business and operations.

Finally, I return for a moment to the first part of the rule in *Hadley* v. *Baxendale, supra*. To be deprived for 5 months of the use of the buildings in question should be compensated for in damages in any case quite aside from profits and I am strongly inclined to think that the value of the use of such extensive buildings for such a length of time would be found to be as much as $10,000 in any case.

I think both the appeal and cross-appeal should be dismissed with costs.

Hyndman, J.

HYNDMAN, J.:—Appellants contend that the contract in itself must be taken to be conclusive on the question of the plaintiffs' liability; that there is no express or implied promise therein binding the plaintiffs to pay damages; but on the contrary there is an express provision protecting the appellant company against all liability, there was no notice given from the defendants to the plaintiffs that failure to complete the contract by any particular date would prevent the defendants from enclosing its buildings or completing the work and equipping the factory; and that the plaintiffs had no notice of the anticipated profits which are now claimed.

So far as the time for performance is concerned I do not think April 1 was to be considered definitely as the date of shipment, but that it should be within a reasonable time. There is no doubt some of the delay was due to plans not being ready for which the defendants were in part to blame, but I would say that under all conceivable circumstances the plaintiffs were at least 3 or 4 months late in carrying out their agreement beyond what

I think ought to be considered a reasonable period for performances. The plaintiffs' own statement was that they would expect to make shipment about April 1, and admitting that they did not bind themselves to that date it is a fair guide in working out what would be a reasonable time.

The price of the work was $37,000 and if defendants' contention is correct the damages to which they are entitled are about $79,000, that is more than double the contract price. It is obvious that it is a most serious matter for the plaintiff and such damages should not be granted unless it is clear and beyond doubt that they bound themselves to such consequences.

What transpired after the contract was made cannot increase, except by agreement, the liabilities of the parties in respect of damages for breach of the contract.

I fail to find in the correspondence prior to the agreement anything which would indicate to the plaintiff what volume of business was expected to be done by the defendants or what the proportion their particular work was to that of the whole plant. What they clearly did was to agree as manufacturers of steel products to do certain things for the defendant company, *i.e.*, supply, erect in place and pay the freight on steel work for buildings in accordance with certain specifications and blueprints. It was not indicated to them what work by other concerns had to be done after the building was erected and when the whole working and manufacturing plant was expected to be ready for operation. So far as the evidence goes the plaintiff company was not made aware of the nature or possible profits of the cement business. Is it reasonable then to suppose that they deliberately bound themselves under this contract to pay for loss of profits in connection with so large a concern without ever inquiring what such anticipated profits might amount to?

If the plaintiffs had been the contractors for the whole plant and machinery of the defendant company and made fully aware of their intended operations and of possible engagements by the defendants for the manufacture and delivery of their products and had been made aware that everything depended wholly on the fulfillment of the terms of their contract and it was quite clear, either expressly or by inference, that they should be held liable for loss of profits which might result from default on their part, then, I presume, they would be liable; but it must be re-

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membered that they had but a fraction of the work which had to be done in the setting up of a cement factory.

I think if it had been shewn that their delay put the defendant company to expense, loss or damage as between the defendants and other contractors doing work depending on the plaintiffs completing theirs, that might very properly be placed in the category of damages naturally flowing from this breach, but so far as I can see nothing of this kind has been proven except the claim of Dowling which was disposed of by the trial Judge and with whom I agree.

Apart altogether from the possible effect of the clause in the agreement, namely: "The company shall not be held responsible or liable for any direct or indirect damage, loss, stoppage, or delay which the purchaser may sustain, whether the said plant or machinery is specified for any particular purpose or not," in order to recover damages for loss of profits it must have been part of the contract between the parties that the plaintiff would be so liable, that is, such damages must have been in the contemplation of both parties. *Hadley* v. *Baxendale*, 9 Ex. 341; To my mind this is not borne out by the evidence. It is significant too that the defendant company had never yet done business, but was merely under construction, and what their profits might amount to was extremely speculative, depending on many features, including good business management, accidents, state of markets, and numerous other contingencies. The remarks of Willes, J., in *B.C. Sawmill Co.* v. *Nettleship*, L.R. 3 C.P. 499, and referred to by Idington, J., in *Leonard* v. *Kremer*, 11 D.L.R. 491, seem to me to be specially applicable.

The damages sought to be recovered are very heavy and it does occur to me that if they had been contemplated by the defendants they might well have referred to them in some way in the contract or previously. The absence of such reference and the express provision (whatever weight should be given it) that plaintiffs would not be liable for any direct or indirect damage seems ample to negative such serious liability. The case of *Leonard* v. *Kremer*, 11 D.L.R. 491, was much stronger than this in favour of the defendants, inasmuch as the plaintiff was made aware before the date of the agreement that the defendant had disposed of all his prospective output for the summer of 1910, and that he was looking to the appellant to supply him

with a boiler and fittings on the date stipulated to enable him to commence operations as soon as the season should permit him to do so. (See judgment of Duff, J., p. 497.)

The acts of the defendant throughout, the delay in making, and the indefiniteness, if not feebleness, of their claim, the fact of making and promising payments after it was clear that the plaintiffs had not carried out their contract within the time which, according to defendants' present contention, it should have been performed, strengthen the inference that no damages in the nature of loss of profits were contemplated by the defendants themselves. In fact, it was only after pressure was brought to bear for payment of their account that they seemed seriously to have intended filing such a claim, although damages for delay had before been mentioned.

The agreement itself was certainly carelessly drafted and I am very doubtful whether the clause relieving plaintiffs from liability for ordinary damages can reasonably be held to apply to the facts of this case. From the context it appears to be intended to cover "machinery" and "plant" in the usual acceptation of the terms as opposed to buildings. Perhaps it should be properly held to cover the traveling crane if it applies at all. If such clause is then ineffective so far as relieving plaintiff of damages for delay in constructing the building is concerned, defendants ought to be entitled to recover general damages incidental to every breach of contract where not expressly provided against by agreement. The defendants, however, have not claimed such, but only loss of profits. If amendment is necessary, I am in favour of allowing same and would grant the sum of $2,500 as reasonable damages under the circumstances.

As plaintiffs have succeeded generally I think they should have the costs in the Court below and of the appeal.

Appeal and cross-appeal dismissed.

RACEY V. INTERNATIONAL HARVESTER CO.

Saskatchewan Supreme Court, Newlands, Lamont, Brown and McKay, JJ. November 18, 1916.

JURY (§ I B 1—15)—EQUITABLE ACTIONS—CANCELLATION OF DOCUMENTS.

A jury notice in an action for equitable relief, to set aside certain documents, should be set aside, as not being an action contemplated in sec. 50, ch. 52, R.S.S. 1909, by the words "in actions where the claim, dispute or demand arises out of a tort, wrong or grievance, etc." which refer to actions for pecuniary claims.

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McKay, J.

G. E. Taylor, K.C., for appellant; *F. L. Bastedo*, for respondent.

The judgment of the Court was delivered by

McKAY, J.:—This is an appeal from an order in chambers made by my brother Elwood dismissing an appeal from an order of Wood, Dist.J., in his capacity as Local Master, whereby the said Local Master set aside a jury notice given by the plaintiff herein.

In our Courts, in civil cases, the right to a jury is a statutory right, and is given by sec. 50, ch. 52, R.S.S. (1909).

> 50. In civil trials the issues of fact and the assessment or inquiry of damages shall be tried, heard and determined and judgment given by a Judge without a jury.
>
> Provided that in actions for libel, slander, criminal conversation, seduction, malicious arrest, malicious prosecution or false imprisonment no matter what may be the amount claimed and in actions where the claim, dispute or demand arises out of a tort, wrong or grievance in which the amount claimed exceeds $500 and in actions for a debt or on a contract in which the amount claimed exceeds $1,000. If either party to the action demands a jury and files with the local Registrar and leaves with the other party or his solicitor at least fifteen days before the day fixed for trial a notice to that effect the issues of fact and the assessment or inquiry of damages shall be tried, heard and determined by a Judge with a jury unless otherwise ordered by the Judge.

It is to be noted that according to above section civil trials are to be tried before a Judge without a jury, unless they come within the proviso. In order, therefore, to be entitled to a jury trial the appellant must shew that this case comes within the said proviso.

The appellant's statement of claim alleges that when an infant he was, by fraud, induced to execute an order for a 45 h.p. gasoline engine and other machinery, to deliver to the respondents certain Hudson Bay Co. contracts for a half section of land, to execute a quit claim of said lands, that he was induced to sign and deliver two chattel mortgages by fraudulent devices, alleging actual fraud, that in consideration of appellant signing the quit claim the respondents' agent agreed to return the first chattel mortgage given and to procure from one Hyde (a joint purchaser) certain securities, and that defendant never procured these securities or returned the chattel mortgage, that contrary to this agreement the respondents are now setting up all these documents as valid securities; that the appellant has received no consideration whatsoever for the making of the said documents; that the engine delivered was not a 45 h.p. engine and was of no

use or value, etc.; that owing to concealed flaws and improper workmanship the engine went to pieces; that the respondents have always assured the appellant that they guaranteed the machinery.

The appellant, in his prayer for relief, claims: (1) An order setting aside the said order of August 21, 1911, the said chattel mortgage of the said date, the said quit claim and the said chattel mortgages of August 21, 1911, and May 22, 1914, and a declaration that he is not liable to the defendants thereon. (2) An injunction restraining the defendants from enforcing the said securities or any of them. (3) An interim injunction. (4) Removal of the said caveat. (5) Return of the said contracts referred to in par. 2 of the statement of claim. (6) Such further or other relief as to this honourable Court shall seem meet.

It will be apparent, from the above summary of the statement of claim, this action could only possibly come under that portion of the above proviso which provides for a jury trial

> in actions where the claim, dispute or demand arises out of a tort, wrong or grievance in which the amount claimed exceeds $500; and in actions for a debt or on a contract in which the amount claimed exceeds $1,000,

but, in my opinion, it does not. To my mind this portion of the proviso contemplates an action for a pecuniary claim, and this is not such an action. And I do not think pecuniary relief could be granted in this action even under the general claim for relief. The gist of the action is for equitable relief to set aside the documents referred to, and is such an action as would, under the English practice, be tried by a Judge without a jury: Judicature Act (1873), sec. 34; Ann. Pr. O. 36, r. 3, marginal rule 427.

And when the legislature introduced this sec. 50 to our Judicature Act, I do not think it was the intention to make a case of this kind, formerly triable by a Judge without a jury, triable with a jury.

For the above reasons I have come to the conclusion that the appeal should be dismissed with costs. *Appeal dismissed.*

CANADIAN NORTHERN R. CO. v. PSZENICNZY.

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Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Anglin and Brodeur, JJ. October 16, 1916.

LIMITATION OF ACTIONS (§ III F—131)—INJURY FROM CONSTRUCTION OR OPERATION OF RAILWAY.

Injuries sustained while unloading rails from a box car to a flat car for easier distribution in replacing the old track, are sustained "by reason of the construction or operation" of the railway, within the meaning

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of the Railway Act, and an action for damages must be commenced within one year as provided by sec. 306, ch. 37, R.S.C. 1906.

[*Greer* v. *Canadian Pacific R. Co.*, 23 D.L.R. 337, 51 Can. S.C.R. 338, followed.]

APPEAL from the judgment of the Court of Appeal for Manitoba, 25 D.L.R. 128, 25 Man. L.R. 655, affirming the judgment maintaining the plaintiff's action entered by Prendergast, J., on the verdict of the jury at the trial.

O. H. Clark, K.C., for appellants.

Fitzpatrick, C.J.

FITZPATRICK, C.J.—The plaintiff's claim for damages is alleged in his factum to have arisen in these circumstances:—

> The plaintiff was a labourer and at the time of receiving the injury he was employed with others by the defendant in unloading steel rails from a box car, in which they had been shipped to the defendant, to a flat car, for more convenient distribution along the railway. The company at the time was replacing the old track with heavier rails.

It appears, therefore, that the injury complained of was sustained by reason of the construction and operation of the railway and the question to be decided is, does the limitation of sec. 306, par. 1 of the Railway Act apply, the action not having been commenced within the year.

Assuming, as I think we must, that it was competent to the Dominion Parliament to pass this legislation I am satisfied that the language of paragraph 1 is sufficiently comprehensive to include all claims for damages, whether they arise at common law or under a statute. The claim was originally made at common law and under the statute, but was finally submitted to the jury as an action under the provincial Workmen's Act.

I have reluctantly come to the conclusion that par. 4 of sec. 306 gives the respondent no assistance. That paragraph is applicable to the cause of action and means that if an accident occurs for which the company would be liable either at common law or under some special provincial statute, nothing contained in the Act, and no inspection had under the Act, will in any wise diminish or affect any such liability or responsibility. Here it is admitted that there was originally a good cause of action, but the suit to enforce the claim was not brought within 1 year next after the occurrence out of which the cause of action arose. Prescription under the civil law is a manner of discharging a debt by lapse of time. A debt or obligation, on the other hand,

is not affected by a statute which says it may not be enforced after a certain period of time. The statute, in par. 1, does not affect the cause of action, it merely fixes one year as a reasonable time within which an action may be brought to enforce that right of action.

I do not think that the case of *Greer* v. *C.P.R. Co.*, 23 D.L.R. 337, 51 Can. S.C.R. 338, is applicable. The Courts below disposed of that case on the ground that the injury complained of was caused by something done in pursuance and by authority of the Railway Act (*per* Anglin, J., at pp. 339-40), and in that conclusion the majority of this Court concurred. Here we have to deal with a case of negligence.

Fitzpatrick, C.J.

I would allow although with much regret.

DAVIES, J.:—I am of opinion that this appeal must be allowed. I cannot doubt that the injuries of which the plaintiff complains were sustained by him "by reason of the construction or operation of the railway" within the meaning of those words in sec. 306, ch. 37 R.S.C. 1906, the Dominion Railway Act, nor do I doubt that sub-sec. 1 of that section was *intra vires* of the Dominion Parliament.

Davies, J.

The Court below held, for different reasons assigned by the Judges, that this section of the Railway Act was not applicable to the negligence complained of and that the limitation in the Employers' Liability Act of the province for bringing the action within two years was the governing section and not sec. 306 of the Dominion Railway Act which fixed the time at one year.

At the time, however, when the judgment was given the judgment of this Court in the case of *Greer* v. *C.P.R. Co.*, 23 D.L.R. 337, 51 Can. S.C.R. 338, had not been reported and was not called to the attention of the Court below.

That case is now reported and determined that sub-sec. 1 of sec. 306 of the Railway Act, R.S.C. (1906) ch. 37, applied to injuries caused by the *negligent* construction or operation of the railway and that sub-sec. 4 did not restrict or affect the limitation in sub-sec. 1.

I was one of the Judges who dissented from the judgment in *Greer's* case; but, of course, I am bound by it and I am quite unable to distinguish the appeal now before us from that judgment, though I freely admit the difficulty of reconciling the sub-sec. 4 of sec. 306 with the rest of the section.

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Idington, J.

For this reason I would allow the appeal and dismiss the action with costs it not having been brought within the limitation prescribed in sec. 306 of the Railway Act.

IDINGTON, J. (dissenting):—The only question raised herein is whether or not sec. 306 of the Railway Act can be relied upon as a bar to an action under the Manitoba Employers' Liability Act which enables a recovery for damages suffered by an employee under such circumstances as in question herein by action brought during the period of two years from the happening of the accident.

The Court of Appeal for Manitoba were unanimous in holding it was not, but *Greer* v. *The C.P.R. Co.*, *supra*, though decided then, had not been reported.

Whether the decisions of that case by the Ontario Courts, which were reported, were cited or considered does not appear. They were accepted by the majority of this Court as correct.

The only question now left is whether or not that case is distinguishable in principle from this.

I, with great respect and some hesitation, find in the stress laid in the opinion of two of my brother Judges, composing the majority deciding that case, upon sec. 297 of the Railway Act, that the cases are distinguishable.

It is conceivable that a burning of refuse including old ties on the track was rendered imperative by that section. If that view is accepted, though it was not mine, then the company acting under the paramount authority of the Railway Act and discharging a duty created thereby could not be held bound by any Act of the legislature in conflict therewith and, as a corollary thereto, the applicability of the limitation of action in sec. 306 of the Railway Act may be arguable. There is nothing of that sort in this case.

It cannot be pretended, at least so far it has not been since the legislation questioned in, and the decisions in the case of *Re The Railway Act of* 1904, 36 Can. S.C.R. 136, and under the name of *G.T.R. Co.* v. *Att'y-Gen'l of Canada*, [1907] A.C. 65, that the Employers' Liability Act or similar legislation does not bind the railway companies.

Subject therefore to the limitations imposed upon me by the decision in the *Greer* case, 23 D.L.R. 337, 51 Can. S.C.R. 338,

thus understood, I remain of the opinion I expressed therein and for the reasons assigned in that case.

The case of *C.N.R. Co.* v. *Anderson*, 45 Can. S.C.R. 355, cited therein, in my opinion, seems much in point. That was a case arising out of work carried on for purposes of construction. The sole difference is that this is a case of a man engaged in the transportation of rails intended for construction or repair and renewal, and that was a case of a man engaged in procuring ballast to be transported and used in construction. Yet in that case leave was refused by the Judicial Committee to appeal from our decision, 45 Can. S.C.R. vii.

The enactment of sub-sec. 4 of sec. 306, now in question, by the last revision of the statutes, places it under the limitation clause therein as if germane thereto and thus emphasizes its purpose and effect.

But quite independently of such relation it is in substantially the same form in which it has remained ever since the session of 1868, immediately after Confederation; and was obviously designed by the change of expression then adopted to render effective just such provincial legislation as now in question.

It helps nothing to trace its history beyond the enactment of said 31 Vict. ch. 68, sec. 40, when the laws of a province were excepted as well as anything in the Railway Act itself.

The argument set up in the appellant's factum that to give effect to it in the way contended for in the judgments of the Judges of the Court below, would destroy the effect of the decision in *Roy* v. *C.P.R. Co.*, [1902] A.C. 220, is answered by the fact that it was relied upon therein and held not to have such effect.

To give effect to the argument herein for appellant would go a long way to destroy sub-sec. 4 of any efficacy whatever. As a matter of law I incline to think the section never was necessary to protect those entitled to claim under such legislation as the Workmen's Compensation Act or the Employers' Liability Act in question here. But it clearly was the design of the Parliament of Old Canada in providing against railway accidents, of which some shocking illustrations were present to the minds of everyone in the Canada of those days and doubtless led to the enactment of the statute in which the substance of this section is first found.

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It was intended no doubt to brush aside any possibility of any one ever arguing that such provisions as then enacted were intended to affect the civil rights of any one.

That was, as already stated, extended to protect the right of any one acquiring rights under provincial legislation from anything in the Railway Act including the section, now sec. 306, sub-secs. 1 and 2.

Again, it was at the same time as the Act was revised in 1903 that this section was placed as a sub-section of sec. 242 in that Act.

The character of that revision was radical in many respects and intended to protect the public in many ways as, for example, by the creation of a Board of Railway Commissioners and in relation to the very subject of the limitations of actions against railways, was so amended as to change the original words used in that regard "by reason of the railway" to the words "by reason of the construction or operation of the railway" and adding sub-sec. 2 which is now sub-sec. 3 of sec. 306.

The railway companies had obtained conflicting decisions as to the meaning of the words "by reason of the railway" but never succeeded in bringing contracts within the range of that limitation. To make clear that it should not sub-sec. 2 of said sec. 242 was adopted. And, as if to make clear that provincial or other legislation should not be affected by the limitation clause, it put the present sub-sec. 4 of sec. 306 under the same caption. However clumsy the effort there cannot be much doubt of the intention to let it be treated as if part of the limitation and qualifying it. It effectually did so if we should only read it literally by itself as preserving for those entitled to relief under any provincial legislation to the full effect thereof including the limitation of any action resting thereon.

Of such legislation that now in question is part and must stand unimpeached or unaffected by a limitation statute designed for other purposes than in any way controlling or affecting anything save that strictly within the operation of the Railway Act itself.

If the usual rule governing statutory limitations of actions is adhered to, the text of sec. 306, sub-secs. 1 and 2, cannot be extended to apply to such legislation as the Act in question

herein and the collocation of sub-sec. 4 should put it beyond peradventure.

The appeal should be dismissed with costs.

ANGLIN, J.:—For reasons which it deemed sufficient, parliament has thought it desirable to give to every railway company under its jurisdiction the protection of a statutory limitation of one year after the time when the damage has been suffered within which all actions or suits against it for indemnity for any damages or injury sustained by reason of the construction or operation of the railway must be brought. If this "law is truly ancillary to railway legislation," although it should deal with and affect civil rights in the province and should overlap provincial legislation, it is *intra vires* and must prevail in cases which fall within its scope. *G.T.R. Co.* v. *Att'y-Gen'l for Canada*, [1907] A.C. 65. Many reasons may be surmised why parliament should consider it advisable, if not necessary, for the efficient and satisfactory working and management of their undertakings that railway companies should be relieved from the necessity of preserving records of accidents and keeping available as witnesses for more than a year employees and other persons who may be in a position to give evidence as to them. With the merits of such a policy we are not concerned. So long as parliament has not, under the guise of railway legislation, enacted what is not such but is truly legislation as to civil rights, its authority may not be questioned. I am unable to say that this vice is present in sub-sec. 1 of sec. 306 of the Railway Act, which though frequently before the Courts, has never been challenged as *ultra vires*.

That the injury suffered by the respondent was sustained in the operation of the railway in my opinion does not admit of doubt. As their Lordships of the Judicial Committee said in *Robinson* v. *C.P.R. Co.*, [1911] A.C. 739, "such operation seems to signify the process of working the railway as constructed." In loading and unloading freight and goods upon railway cars the company's servants are assuredly engaged in the process of working the railway. It was negligence in the providing of means for such operations that caused the injury for which this action is brought. That actions based on such negligence are within the protection afforded by sub-sec. 1 of sec. 306 has been held in several cases in this Court. *West* v. *Corbett*, 12 D.L.R. 182; *Robinson* v. *C.P.R. Co.*,

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43 Can. S.C.R. 387; *Greer* v. *C.P.R. Co.*, 23 D.L.R. 337, 51 Can. S.C.R. 338.

But, it is urged, the Manitoba Employers' Liability Act gives a new statutory remedy for such an injury when sustained by an employee of the company and provides a special period of limitation within which an action under it may be brought. To such a case, it is argued, the general limitation of the Dominion Railway Act does not apply. I am somewhat at a loss to appreciate the ground of distinction suggested between rights of action arising under the common law of the province and rights of action created or conferred by provincial statutes where there is a question of the application to them of paramount Dominion legislation. The question is not, as it was in *Robinson* v. *C.P.R. Co.*, [1892] A.C. 481, which of two provincial limitation sections governs. If it were, a very strong argument could be made for applying the special provision found in the statute conferring the right of action. The question is whether a provision of a Dominion Act, framed in terms making it applicable to all actions against Dominion railway companies for infringement of civil rights in the course of the construction or operation of the railways which cause injury or damage, should be held inapplicable in cases where by provincial legislation a defence that would otherwise be available to railway companies, as employers, has been taken away, because the provincial legislation has annexed to the right to maintian an action in such cases the condition that it shall be brought within two years. The right of action in the present case, although it exists by virtue of the Employers' Liability Act having taken away the defence of common employment, is, nevertheless, for damages or injury sustained by reason of the operation of the railway and as such, in my opinion, falls within and is governed by the period of limitation prescribed by sec. 306 of the Dominion Railway Act. To hold differently would be improperly to allow otherwise valid provincial legislation to prevail over *intra vires* Dominion legislation in a field in which they overlap. *Compagnie Hydraulique de St. Francois* v. *Continental L., H. and P. Co.*, [1909] A.C. 194.

The history and construction of sub-sec. 4 of sec. 306 were recently considered in *Greer* v. *C.P.R. Co.*, *supra*, and, for the reasons there stated by Duff, J., and myself, I am of the opinion

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that sub-sec. 4 does not render sub-sec. 1 inapplicable to the case at bar.

The appeal should be allowed with costs in this Court and in the Manitoba Court of Appeal, and judgment should be entered dismissing the action with costs.

BRODEUR J.—I concur in the opinion of Anglin, J. This appeal should be allowed with costs. *Appeal allowed.*

PRAIRIE CITY OIL CO. v. STEWART MUNN & CO.

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Quebec Court of Review, Fortin, Guerin and Lamothe, JJ. November 30, 1916.

SALE (§ I B—8)—DELIVERY—APPROPRIATION—BILL OF LADING—LIABILITY FOR LOSS.

A shipper of goods who has the bills of lading made to his own order, and attached to a draft drawn upon the purchaser through a bank; for delivery to the purchaser upon payment of the draft, does not thereby appropriate the goods so as to vest the property in the purchaser, and the seller is therefore liable to pay the amount of any loss or damage to the goods during transit, if the purchaser has paid the price of the goods at the time of shipment.

Statement.

APPEAL from the judgment of Archibald, J., in an action to recover the value of the shortage of a consignment of oil, which it had ordered from the defendants at Montreal. Affirmed.

The following is the judgment appealed from.

ARCHIBALD, J.:—The plaintiff sued the defendant for the sum of $812.50, alleging that about July 15, 1911, the plaintiff, a Winnipeg firm, ordered from defendant, 60 barrels of seal oil at the price of 58 cents a gallon, which oil was shipped by defendant to plaintiff on or about August 1, 1911, and a bill of exchange for $1,666.34, at 30 days after date, was sent by defendant to plaintiff for acceptance and payment. Plaintiff accepted said bill of exchange on August 8, and returned the same to defendant, the oil in question not having, on that date, arrived at Winnipeg. Plaintiff paid the said bill of exchange at maturity. When the oil arrived at Winnipeg, it was found that 14 barrels were entirely empty and many others had leaked, so that there was altogether a shortage of 1,250 gallons; that the oil was worth 65 cents a gallon at Winnipeg, and the shortage amounted to $812.50. Plaintiff further alleges that said barrels were in bad order and condition, and were leaking when they were delivered by said defendant to the carriers, the Inland Lines Ltd., on or about August 1, 1911, with instructions to deliver at Fort William to the C.P.R.; that the said Inland Lines Ltd. refused to carry the said goods unless the bill of lading were endorsed by the shipper

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to the effect that they would not be held responsible for the leakage of said oil, and upon said demand of the carriers, defendant wrote to said Inland Lines Ltd. the following letter:—

In consideration of your giving us a clear bill of lading for the 60 barrels of seal oil shipped to Winnipeg via Fort William and which you said were received by you in a leaking condition, we hereby guarantee you against any claims arising from this cause. STEWART MUNN & CO.

Defendant pleaded, admitting the shipment and the making of the bill of exchange and its acceptation and payment; admitting also the writing of the letter above cited, but denying the interpretation that the plaintiff puts upon the letter and denying the other essential allegations of the declaration; alleging that the oil in question was delivered to the carters of the Inland Lines Ltd. in good order and condition at the Black Diamond Line Wharf, Montreal, and defendant's responsibility for the oil ceased when it was handed to said carriers; that if the oil had not arrived in good condition, it was due to the fault of the Inland Lines Ltd. or the C.P.R. Co., in the handling and forwarding of said oil, and defendant is in no way responsible.

Plaintiff answers, praying acte of defendant's admissions and denying defendant's allegations.

On August 5, the defendant wrote to plaintiff at Winnipeg the following letter:—

We have drawn on you at 30 days date as per invoice of seal oil. The bank has instructions to surrender the bill of lading on acceptance. The oil reached Montreal on July 27, but the Inland Line steamer which was to have left here on the 28th was detained and only sailed on August 1. We understand from your telegram that you are in a hurry for the goods, and have therefore instructed the steamship company to rush shipment from Fort William. Kindly protect our draft.—STEWART MUNN & CO.

A copy of the bill of lading was produced in the case and it appears that the bill was made out to the order of the defendant, the shipper of the goods, and not to the order of the consignees, the purchasers. It was sent through the bank with the bill of exchange attached and the bill was afterwards accepted and paid by plaintiff. The goods came from St. John, Nfld., by the Black Diamond Steamship Line and were placed on the dock at Montreal on July 27, and remained there until August 1, during a period of considerable heat. There is no proof that the barrels in which the oil was contained were inferior to those ordinarily used in that trade, but they were barrels which had been subjected to the temperature and to the humid atmosphere of the Gulf, which is

very different from that of the city of Montreal in mid-summer. The proof is decisive that when the carters of the Inland Lines received the oil from the Black Diamond Steamship Co. the barrels were leaking. The carters have been examined and declared that they were leaking seriously. The Inland Lines notified Stewart Munn & Co., of the fact. Stewart Munn, & Co. sent two coopers to cooper the barrels. The Inland Lines originally offered to Stewart Munn & Co. a bill of lading which expressed on its face that the barrels were leaking. Stewart Munn & Co. did not wish to accept that bill, and wrote the letter above recited releasing the carrier from all responsibility for loss. The bill of lading also contained a clause that the carrier should not be responsible. The barrels were stowed in the steamship in a favourable position. There is absolutely no proof that they were subjected to any bad usage by the steamship company, and yet a very large quantity of oil leaked out and invaded the hold of the steamship where the barrels were placed. There is no exact proof of the quantity of oil that leaked from these barrels. It would seem that the engineer of the steamship had used a quantity of it and that a large quantity of it was afterwards baled out.

The goods then proceeded to Winnipeg where they arrived in due course, but plaintiff was not notified of arrival and the goods remained in the car at Winnipeg for a week before plaintiff knew they were there. It seems that the original bill of lading, though drawn to the shipper's order, bore the indication, "Notify Prairie City Oil Co.;" but that does not appear to have been indicated by the Inland Lines Ltd to the C.P.R., who continued the transportation.

Plaintiff has completely proved the loss of the oil for which it claims: defendant contends that a considerable portion of that loss might be due to the heat of the sun at Winnipeg during the long period that the oil remained undelivered there. In answer to that, plaintiff contends that the bill of lading, being to the order of the shippers, they who retained the power of control over the oil are responsible for the failure to notify plaintiff promptly of the arrival of the oil at Winnipeg.

Plaintiff at first directed its claim against the C.P.R. Co. They investigated the claim, and, after investigation, communi-

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cated to plaintiff the fact that the barrels had been delivered in bad condition, and that in consequence of such bad condition the carriers had demanded a letter exempting them from liability, which defendant had given, and thereupon plaintiff directed its attack against defendant. Defendant says: My obligation concerning the oil ceased upon delivery to the carriers of the Inland Lines Ltd. You were to pay the freight and, therefore, the goods became your property and you, plaintiff, are responsible for the loss if any occurred.

The invoice indicated that the goods were f.o.b. Montreal. That would put upon the shipper the obligation of paying the cartage to the carrier. The carters who transferred the oil from the Black Diamond Line to the Inland Lines Ltd. were public carters and not in the employ of any of the parties in the case. They were wholly disinterested and their evidence indicated beyond doubt that the barrels were leaking when they delivered them to the Inland Lines Ltd.

The plaintiff has paid for the oil and ought to either get the oil or have some recourse. It apparently can have no recourse against the carriers because the shipper accepted the bill of lading in which the carrier's responsibility was entirely cut off. From that point of view, it seems to me that the defendant cannot now direct the plaintiff to the carriers. Defendant, of course, says that their guarantee would not release the carriers from their obligation to make good the loss that was caused by their own fault—and that is true. But fault is never presumed, and it would be unfair to plaintiff to compel it to assume the responsibility of taking action against the railway company without the means of proving any fault on their part.

The first bill of lading which is filed is plaintiff's exhibit P-2, bearing date of July 29th, 1911, and purporting to be a bill of lading of 60 barrels of seal oil shipped by Stewart Munn & Co., consigned to shipper's order, with the direction, "Notify Prairie City Oil Co., Winnipeg." It contained in the margin the following notation: "Barrels leaking; not responsible for loss of contents." Defendant was not satisfied with that bill and obtained another of date July 31, also consigned to order of shipper, with the notation in writing, "Notify Prairie City Oil Co., Winnipeg," and the further notation, also in writing, "Not responsible for loss of

contents of barrels;" and it was upon this latter bill of lading that the goods went forward. The change in the bill of lading was made by the carriers in consequence of the reception of the letter of the defendant releasing the carriers from responsibility on the ground of the allegation of the carriers that the barrels were leaking.

The Inland Lines Ltd., when they transferred the goods to the C.P.R., at Winnipeg, neglected to include in the manifest the notation, "Notify the Prairie City Oil Co." The bill of lading received by defendant was forwarded to the Bank of Nova Scotia at Winnipeg attached to a draft for the price of the oil, $1,666.34, payable 30 days after date and drawn upon the plaintiff by the defendant, with instructions by the defendant to deliver the bill of lading to the plaintiff on certain conditions. The defendant, in its letter of August 5, 1911, to the plaintiff, which will be found attached to the return of the commission for examination of witnesses filed in this case, says: "We have drawn on you at 30 days as per invoice of seal oil. The bank has instructions to surrender the bill of lading on acceptance."

Otherwise, the evidence would seem to shew that the bill of lading was not actually surrendered until after payment of the draft. The letter of the defendant to the bank containing instructions is not produced.

Under these circumstances, the questions to be decided are: (1) Upon the evidence, has such proof been made by the plaintiff that the cause of the loss of the oil was due to the fault of the defendant in shipping the same in bad condition? (2) If defendant were not in fault, would the loss fall upon the plaintiff or defendant under the circumstances proved, viz., oil delivered to carrier indicated by plaintiff free on board at Montreal, but consigned to shipper's order, Winnipeg? (3) Would the plaintiff or the defendant be responsible for loss caused by delay of delivery in Winnipeg?

Speaking generally, the delivery "free on board, Montreal," would have the effect of appropriating the property to the plaintiff and plaintiff would become, immediately upon such delivery, proprietor, and the principle that the risk of loss or damage is upon the proprietor of the goods would apply.

On the other hand, the shipment of these goods to the shipper's

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order at Winnipeg, under ordinary circumstances, would be a reservation of the right of ownership in the goods, and would, upon application of the same principle, throw the loss upon the shipper.

But it is contended, on the part of the defendant, that the circumstances of the case do not indicate a reserve of ownership in the goods, but only the retention of a lien upon the goods, which would not have the same effect; and it may be admitted that the defendant's contention would be right if only a lien were reserved and not the right of ownership. The responsibility for any loss which might have happened by delay in Winnipeg would also be governed by the same consideration. If defendant reserved the right of ownership in the goods, the loss or delay there would fall upon defendant, because the carrier would be the agent of the defendant to carry the goods and not the agent of the plaintiff. The delay appears to have happened through the fault of the Inland Lines Ltd. in not instructing the C.P.R., to whom they delivered the goods, who was to be notified upon arrival.

I have come to the conclusion that the effect of the bill of lading issued by the Inland Lines Ltd. in this case was to reserve the ownership of the goods. The goods are shipped to the shipper's order without anything to indicate that there is any other intention than that indicated upon the face of the bill of lading. That bill of lading certainly did enable the defendant to control the goods in Winnipeg. There was no such appropriation of the goods to the plaintiff as to justify the plaintiff in maintaining an action in revendication unless he became the holder of the bill of lading. Besides that, there is the fact that the defendant specially contracted with the carrier for exemption from liability on the carrier's part. Defendant would have no right to make such a bargain with the carrier unless it had been owner of the goods.

Benjamin on Sales, 5th ed., pp. 400 *et seq.*, sums up the principles deduced from the review of authorities.

In the present instance, these conclusions of law evidently support the contention of the plaintiff that the vendor in shipping the goods to his own order unendorsed, with the bill of lading addressed to the bank, reserved the ownership of the goods, and, consequently, put whatever loss might have occurred during the

carriage upon the defendant and not upon the plaintiff unless, of course, the person principally responsible could prove that the loss happened through the carelessness or fault of the carriers.

Upon the merits, however, I am clearly of opinion that the balance of proof indicates that the barrels were in bad condition when received by the Inland Lines Ltd. and were leaking seriously.

With regard to the total amount of loss from the barrels when delivered to the plaintiff, the proof is absolute. With regard to the amount of loss which occurred in the hold of the steamship, the proof is vague and insufficient. There is, however, a witness who swears that at the point where the oil was stored, there was a slope towards the bow of the vessel. The hold at the point is said to have been 38 ft. wide and the oil is stated to have been 6 inches deep at the extreme forward end, sloping to nothing in a space of 16 ft.

It would be quite possible to make a calculation as to the amount of oil which would be contained in a space of that size—but indications of the space are so vague and indeterminate that little or no reliance can be placed upon their accuracy. For example: although the hold at the point in question is stated to have been 38 ft. wide, it is not stated whether that width continued throughout the whole 16 ft. to which the oil extended. Nor does there appear to have been any exact measurement of the depth of the oil or of anything else in connection with the statement. But if the statement were correct and accurate, there would have been at least over 700 gallons of oil in the hold when the barrels were removed.

There is proof that there is always a shortage of seal oil, but that does not extend to more than half a gallon or, at most, a gallon in a barrel. I think the witness who is most worthy of confidence expressed himself as against the supposition that any oil would be generally supposed to leak through any of the joints whether between the staves or the chimes. The only thing which happens is a sort of sweating which never amounts to any considerable loss of oil.

On the whole, I am of opinion that the plaintiff has proved his case, both in fact and in law, and is entitled to the judgment it seeks.

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Fortin, J.

Defendant inscribed in review from the decision of the trial Judge.

A. R. McMaster, K.C., for defendant, appellant.

G. C. Papineau-Couture, for plaintiff, respondent.

The judgment of the Court was delivered by

FORTIN, J.:—We are unanimously of opinion that the judgment of the trial Judge is well founded for the reasons fully stated by him in his notes of judgment. Since the rendering of the judgment by the Superior Court, the Supreme Court of Canada has ruled in the same sense in *Pioneer Bank* v. *Canadian Bank of Commerce*, 31 D.L.R. 507, 53 Can. S.C.R. 570, holding that delivery of goods to the shipper's own order is not a delivery to the purchaser. The judgment is confirmed. *Appeal dismissed.*

NOTE.—It is suggested that as the goods agreed to be sold here were *not* so many gallons of oil, but so many casks of oil, the agreement was for the packages as well as the contents; and that the decision ultimately reached could have been justified very briefly by the following:—

"Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, . . . the property in the goods thereupon passes to the buyer:" Benjamin on Sale of Goods, 5th ed., 343.

The evidence could leave no real doubt that the casks in this case were not in a deliverable state—that is, such as the buyer would be bound to take delivery of—when delivered to the carriers.—EDITOR.

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Re INITIATIVE AND REFERENDUM ACT.

Manitoba Court of Appeal, Howell, C.J.M., and Richards, Perdue, Cameron and Haggart, JJ.A. December 20, 1916.

CONSTITUTIONAL LAW (§ I D 2—90)—INITIATIVE AND REFERENDUM—ULTRA VIRES.

An Act to confer upon the electors of a province the right to initiate legislation which should come into force if certain votes in its favour were given would be an abdication of the powers conferred upon the Legislature by the B.N.A. Act, 1867, and an interference with the powers of the Lieutenant-Governor, and, therefore, the Initiative and Referendum Act, Man. Stat. 1916, ch. 59, is *ultra vires*.

Statement.

APPEAL from the Court of King's Bench in the matter of Order-in-Council No. 26,510 and of "The Initiative and Referendum Act," ch. 59, 6 George V. (Man.)

By the above Order-in-Council it was directed, pursuant to ch. 38 of R.S.M. 1913, that the following questions be referred to the Court of King's Bench for hearing and consideration, subject to appeal, namely:—

1. Had the Legislative Assembly jurisdiction to enact the said Act, and if not, in what particular or respect has it exceeded its powers? 2. Had the Legislative Assembly jurisdiction to

enact secs. 3, 4, 4*a*, 7, 9, 11, 12, 17 (sub-sec. 1) of said Act, or any of them, and if so, which of them?

The Court of King's Bench answered to the first question that the Legislature had jurisdiction to enact the said Act, and answered the second question in the affirmative, whereupon an appeal from the said answers was made to this Court.

The Court of Appeal having heard the arguments of counsel on behalf of the appeal and of counsel for the Attorney-General of Manitoba for the Direct Legislation League in support of the Act, allows the appeal and answers the said questions as follows:—

The first question: No. The particulars in which the Legislative Assembly exceeded its powers are set forth in the several reasons for judgment delivered by members of the Court and forwarded herewith.

To the second question, as to secs. 3, 4, 4*a*, 7, 9, and 11, the answer is: No. As to secs. 12 and 17 (sub-sec. 1) the answer is: Taken with their context, No.

W. H. Truman, for negative.

I. Pitblado, K.C., for Attorney-General.

H. MacKenzie, for Direct Legislation League.

HOWELL, C.J.M.:—At the outset it must be admitted that the proposed Act could be passed by the British Parliament, and could become the law governing Great Britain, or any part of the British Empire. The power of the British Parliament is well set forth in Dicey's Law of the Constitution (7th ed.), at p. 39, where he quotes:— Howell, C.J.M.

> The power and jurisdiction of Parliament, says Sir Edward Coke, is so transcendent and absolute that it cannot be confined either for causes or persons within any bounds.

In the same volume, at p. 517., the author discusses the Initiative in Switzerland, and takes for granted the power to so legislate by the Imperial Parliament. He also previously discussed the subject in the Contemporary Review, vol. 67, p. 489.

It is urged that on the authority of the wide language used in *Hodge* v. *The Queen*, 9 A.C. 117, at 131-2, this Province must within the range given to Provincial legislation, have the same power.

The legislation proposed by the Act in question has been much discussed in the United States.

The State of Massachussetts, in 1894, passed an Act respecting female suffrage, and made its coming into effect dependent on a

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vote of the people, and referred the question of its constitutionality to a bench of very distinguished Judges, who, by a large majority, decided against the power to legislate in that way. See 160 Mass. 586.

A vigorous article by a distinguished western Judge against the constitutionality of such legislation is published in 56 Cent. L.J., at 247, and many cases on the subject are reviewed in articles in that journal, notably vol. 61, p. 3: and 68, p. 386. Some of the States have so amended their constitutions as to permit of this kind of legislation as shewn in *Kodderly* v. *Portland*, 74 Pac. Rep. at 720, where the legislation of the State of Oregon is discussed. I find a complete summary of the law in Am. and Eng. Annotated Cases, vol. 40, 1916 B., p. 860.

It seems clear that the portion of the proposed legislation which might be called "Initiative" is, in the United States, beyond the powers of the State legislatures without most complete and radical amendments to their original constitutions.

Where in the United States a legislative Act is complete, having passed through all the constitutional formalities necessary to perfected legislation, and where in the Act there is a provision that it is not to go into effect if not assented to by, or if it is subject to the approval of, the electors of a portion of the State, as in a city or municipality, the Courts seem to hold that, such legislation is constitutional; but if the Act depends for its validity upon the general vote of the electorate of the entire State the prevailing judicial opinion seems to be against its validity: Cooley on Con. Lim., 7 ed., 168; Oberholtzer, 209, 217.

The fundamental principle invoked in the American cases is that a pure democracy vested in the State legislature certain legislative powers as delegates only, and as the legislature had only delegated power, they could not re-delegate this matter to the democracy.

This position is not open for discussion here because of statements of the law in the *Hodge* case above referred to, and also in *Powell* v. *Apollo Candle Co.*, 10 A.C. 282. At 290 the following language is used:—

> Within these limits of subjects and area the local legislature is supreme, and has the same authority as the Imperial Parliament. . . It is a legislature restricted in the area of its powers, but within that area unrestricted and not acting as an agent or a delegate.

All this is very high sounding, but legislatures in this Province in drawing Acts must keep at their elbow the British North America Act, and must also keep in view Imperial legislation, and must ever remember that the same powers which enacted the British North America Act can alter and have altered it and can pass and have passed laws binding on Canada notwithstanding that Act.

The question of the constitutionality of an Act of the British Parliament could not arise either in English or Canadian Courts. Here it seems to me the British North America Act is up for discussion in Courts oftener than any other statute.

In the United States it is claimed that a pure democracy vested in, or delegated to a representative democracy the power to make laws, and that the representative democracy have not the power to re-delegate this legislative power back to the pure democracy. The British Parliament consists of the King, an hereditary house and a representative democracy. That Parliament wished to vest law-making powers in a Federal Government in Canada, giving some power to the Dominion and some to the Province, but making it clear that the King shall be a part of each legislative body. For the Province this is made clear by secs. 69 and 71 of the B.N.A. Act, and sec. 9 of the Manitoba Act.

Although it is clear that the King is to be part of each legislature, yet in no place in the Act is it stated what part in legislation he is to take, except in sec. 54, relating to money bills and taxes. Sec. 55 sets forth what the Governor-General shall do if a bill is presented to him for the Queen's assent, and sec. 90 makes the above 2 sections, and the 2 following ones, applicable to the Provinces, and by inference it is assumed that Acts of the Legislature are to be assented to by the Governor-General and Lieutenant-Governors in the King's name. It has been assumed that this is the proper course to take, and Acts are assented to by the Lieutenant-Governor in the King's name. Manitoba Acts are assented to as follows: "His Majesty by and with the advice and consent of the Legislative Assembly enacts as follows."

Nowhere in the B.N.A. Act is it declared that before a bill shall become law it shall be assented to in the King's name, but it has been taken for granted that this, with the restriction in sec. 54, is the part taken by the Lieutenant-Governor in legisla-

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tion. In no place has the Imperial or Dominion Parliament declared the duties of the Lieutenant-Governor with reference to legislation further than declaring that he is a part of the legislature. To find what these duties, rights and powers are we must go back to the unwritten law and history to find the duties of the King in Imperial legislation.

The Lieutenant-Governor can dismiss his ministers and call on others, he can refuse to take the advice of his ministers and can order investigations as to their actions, and has many wide executive powers, none of which are to be found in the B.N.A. Act. In fact, we might say that the Act is the merest skeleton, vesting British law-making power in Canada, but reserving, under sec. 9, full executive power and authority in the King.

The Act, sec. 92, sub-sec. 1, gave power to the Provinces to amend their constitutions "except as regards the office of Lieutenant-Governor," and it is claimed by the respondents that the proposed Act is justified by this provision.

The B.N.A. Act is divided under great heads, the fifth of which is "Provincial Constitutions," and it includes secs. 58 to 90; but as to a large part of these sections there is no power to interfere because they relate to the office of the Lieutenant-Governor.

To find what the Provincial constitution is, we must go far afield and will get little assistance from the Act. It, however, declares that there shall be in each Province a Legislature, and then declares what the Legislature consists of. This clause can no doubt be amended, as it was in Manitoba, by doing away with one House, leaving it still a Legislature. If the proposed Act is within the powers of the Legislature, then all powers of legislation could be taken from the Legislative Assembly and given to the democracy and the Assembly could be wiped out. Representative Government would cease to exist and there would be a reign of pure democracy, and yet, into it there must be placed the power of the King as the chief executive and as part of the legislature.

I feel called upon to construe the B.N.A. Act like any other Act. Canada divided into Provinces with governments established on British monarchical and representative principles, with ministerial responsibility, desired to have a federal government and applied to the Imperial Parliament for the Act. Both parties

to the legislation, if I may use the term, believed in and desired that Canada should get a monarchical government with legislative powers in the Crown and in representatives of the democracy. The Act teems with provisions about Legislatures and representatives, and in the Imperial Act, 34 & 35 Vict., which ratified and confirmed the Manitoba Act, sec. 6, carefully preserves to Manitoba the right to change the law as to the qualification of electors and members of the Legislative Assembly, and the laws as to elections in the Province. The power to legislate in certain subjects is limited to a particular manner by sec. 54, and must be by a Legislature. Everything shews that the intention was to give to the Canadian Provinces a representative Legislature with ministerial responsibility.

The law-making power is, by sec. 92, vested in the Legislature, and that is reiterated in sec. 91. The proposed Act provides that any person may draw a bill and get a petition signed by at least 8 per cent. of the electors supporting it, and may force that bill to an election, and if carried on a vote of the electors, it will become law, even against the will of the Legislative Assembly. I cannot think that such a proceeding is the Act of a Legislature within the meaning of sec. 92. I feel safe in stating that no person in the Imperial House, and none of the statesmen in Canada who advocated the legislation, ever intended that power should be given to Canada, or to the Provinces, to enact laws otherwise than through or by a body of men who were in some way the representatives of the people, and with whom the representative of the Crown could meet and discuss matters requiring legislation and thus consider his assent thereto in the King's name. With this method of legislation the representative of the Crown has as advisers well-known ministers who represent the democracy and upon whom rests the responsibility for the legislation.

The Legislature can in no way change any of the provisions of sec. 92. By sub-sec. 1, the Provincial constitution can be changed by the Legislature, but no matter what changes are made in the constitution, the Provincial Legislature and no other body can legislate on the subjects set forth in the remainder of the sub-sections. I think that is a fair construction to place on that section, read in the light of the whole Act.

The word "Legislature" used in that section has a well-known meaning, and I do not think that a bill drawn up by some in-

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dividual and submitted to a vote as provided in secs. 3, 4 and 7 of the proposed Act can be dignified with the name of an Act of the Provincial Legislature, within the meaning of sec. 92.

There must be, in my view of the law, a body of men selected for law making for such term and in such manner as the Province may require, who can meet the representative of the Crown and legislate and thus become a Legislature before laws can be passed under sec. 92.

It was urged that for a long time other bodies have been given legislative powers independent of the Legislature, as municipal councils, and notably the body referred to in *Hodge v. The Queen*, *supra*.

It will be observed that even in the United States, where the slightest transfer of legislative power was frowned upon, such legislation was permitted. Such powers are simply necessary for the proper carrying into effect of legislation as decided in the case last referred to. Power to municipal councils to pass by-laws on certain subjects was an important part of municipal legislation existing when the Act was passed, and when Provinces were given power to legislate on this subject.

I do not think that the portion of the proposed Act which is known as the Initiative, including the procedure for repealing statutes, is within the power of the Province to enact.

There is another objection which to my mind is fatal to the portions of the Act last above referred to. The Crown is a vital portion of the legislative power, and there is no provision for the representative of the King having any part in this proposed legislation, and apparently there might be legislation in defiance of secs. 53 and 54. The law apparently is to take effect without the assent of the Crown. Who is to advise the Lieutenant-Governor as to these bills which are voted on, and who is to be responsible for the legislation? If a bill was passed which did not meet with the approval of the Chief Minister, the Lieutenant-Governor would be without an adviser, and there would be no representative of the people responsible for the legislation. This, it seems to me, would be legislation regarding the office of the Lieutenant-Governor.

It seems to me that in Canada there is power to pass what is called conditional legislation, which in the United States is

generally held to be *ultra vires*, as above stated. Such legislation has in Canada frequently been passed, and has not been questioned. Where an Act has passed through all the constitutional formalities, and has been assented to in the name of the King, and is perfected legislation, and where in the Act there is a condition that the same is not to come into force until the expiration of a certain period of time or the happening of a certain event, as a proclamation by the Governor-in-Council or the favourable vote of the people, I have always thought such an Act proper and constitutional, and I can see no objection to such conditional legislation in Canada.

It is difficult to separate sec. 12 of the proposed Act from the other sections, and therefore difficult to pronounce as to its legality.

I would allow the appeal and answer the questions submitted to the Court in this matter in the manner set forth in the certificate filed with the Registrar of this Court.

Richards, J.

RICHARDS, J.A.:—By Order in Council the constitutionality of the above Act has, pursuant to ch. 38 of the R.S.M. 1913, been referred to the Court of King's Bench, subject to appeal, and the questions asked are:—

1. Had the Legislative Assembly jurisdiction to enact the said Act, if not, in what particular or respect has it exceeded its powers? 2. Had the Legislative Assembly jurisdiction to enact secs. 3, 4, 4*a*, 7, 9, 11, 12, 17 (sub-sec. 1) of said Act or any of them and if so which of them?

In approaching the matter we get practically no help from any decided cases in England or Canada, and little from those in the United States of America.

In England no questions approaching that before us have arisen. In the United States the Initiative and Referendum question has been before many Courts. But conditions there are different from those we work under. There the sovereign power is in the people and, in adopting, or amending, a State constitution, the sovereign power (that is the people) can, while creating or retaining a Legislature, reserve to itself the rights to act directly by either Initiative or Referendum, or both, that being held to be not inconsistent with a republican form of government, which, by the constitution of the United States, a State government must be.

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In Canada we have cases, such as *Hodge* v. *The Queen*, 9 App. Cas. 117, which declare that Provincial Legislatures may, as to minor details, delegate limited powers of legislation to bodies created by, or by authority of, those legislatures, or may permit localities to decide whether or not certain Acts, such as those regulating the sale of intoxicating liquors, shall be in force in such localities.

Those powers so given are, however, merely in the nature of policing regulations. They do not interfere with or purport to cause others to take the place of or perform the functions of, the Legislature.

In *Hodge* v. *The Queen*, the question was whether a Provincial Legislature could confer upon a board of commissioners, appointed under a Liquor License Act, authority to pass regulations in the nature of police or municipal regulations, to carry out the details of the Act. It was decided that the conferring of such powers was within the authority of the legislature.

The chief argument against the power of the legislature to so enact was that it (the legislature) was, within its ambit, merely the delegate of the Parliament at Westminster, and could not again delegate the powers so given to it by Parliament.

In declining to follow that argument, Sir Barnes Peacock, at p. 132, after stating that the Provincial Legislatures were in no sense delegates, said that, in enacting sec. 92 of the B.N.A. Act, the Imperial Parliament conferred "authority as plenary and as ample within the limits prescribed by sec. 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow."

He added:—

Within these limits of subjects and area the local legislature is supreme, and has the same authority as has the Imperial Parliament or the Parliament of the Dominion would have had under the like circumstances, to confide to a municipal institution, or body of its own creation, authority to make by-laws or resolutions as to subjects specified in the enactment, and with the object of carrying the enactment into operation and effect.

He further added:—

It is obvious that such an authority is ancillary to legislation, and without it an attempt to provide for varying details and machinery to carry them out might become oppressive or absolutely fail.

Careful consideration makes me think that the broad language of the first quotation was not meant to stand by itself but to be read with, and qualified by, the second and third extracts, and

not to extend further than as so qualified. There was no need of any broader meaning for the purposes of the decision. On a preceding page (128) the judgment referred with approval to a remark of Hagarty, C.J., in the Ontario Court of Appeal,

> That in all these questions of *ultra vires* it is the wisest course not to widen the discussion by considerations not necessarily involved in the decision of the Court in controversy.

It also at the same page (128) quoted a recommendation of its own body in *Citizens &c.* v. *Parsons*, 7 App. Cas. 96, that:—

> in performing the difficult duty of determining such questions it will be a wise course for those on whom it is thrown to decide each case which arises as best they can, without entering more largely upon the interpretation of the statute than is necessary for the decision of the particular question in hand.

The first part above has, in some subsequent cases and in text books, been quoted in its own broad language, without the limiting qualifications which follow.

But, reading together all the extracts from p. 132, in the light of that from p. 128, I think that, however broad the first quoted language seems, it should be held as meant to go no further than the 2 passages that follow it indicate.

I mention the above particularly because the general language at p. 132 has been dwelt on in this case as justifying the powers assumed by the provincial legislature in passing the Act under consideration.

Our sole enquiry here is whether the Legislature had power to pass the Act. With its merits we have nothing to do.

Sec. 92 of the B.N.A. Act reads:—

> In each Province the Legislature may *exclusively* make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say:—
>
> (1) The amendment from time to time, *notwithstanding anything in this Act*, of the constitution of the Province, except as regards the office of Lieutenant-Governor.

Then follow 15 other classes of subjects which need not be set out here.

It will be noticed that the section provides that the Legislature may "exclusively" make the laws of the classes named in the sub-sections, and, on the other hand, that the power of amendment referred to in the sub-section may be exercised "notwithstanding anything in this Act."

What is the limit of the power of amendment so given? If it permits the passing of the Act in question it must go so far

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as to allow the Legislature to create a completely new constitution based not on the sovereignty of Parliament but on that of the people, and which can control and render nugatory the acts of the Legislature itself.

The people have never held the sovereign power in the United Kingdom. It was originally wholly vested in the King; and while it has gradually departed from the King, except in form, it has, in fact, been taken over by the Parliament, who now exercise the real sovereignty.

In Canada there is no sovereignty in the people. So far as we are concerned it is in the Parliament at Westminster, and our powers to legislate are such, and only such, as that Parliament has given us.

Now it will be noticed that sec. 92 says that the Legislature may "exclusively" make laws for the 16 different classes that follow in its sub-sections. It also says in sub-sec. (1) that laws may be so made for the "amendment" of the constitution.

But, supposing that the Legislature were able to divest itself of its powers in favour of the people, or of any other body not a legislature, what body could make laws of the classes referred to in all of the sub-sections other than the first one? Not the people, I take it, as they would undoubtedly not be a legislature, and it is, by sec. 92, only a "legislature" that may make laws as to those classes of subjects.

The section does not say that the legislature or any body it may substitute for itself, whether such body substituted is or is not a legislature, may make laws, &c. It says that "the Legislature may exclusively make laws" &c., for each of these 16 different classes of subjects.

It is argued that the word "exclusively" in sec. 92 is only to be read as excluding the Parliament of Canada from legislating on the 16 classes in the sub-sections. That it does exclude the Parliament of Canada is patent. But that it excludes it only, I see no ground for holding. It is broad enough to exclude all other law-making bodies, other than the Legislature itself, and of course other than the Imperial Parliament. That I think is what is really meant.

It seems to me that the amendments that may be made under sub-sec. (1) must necessarily be such that they do not purport to destroy or take away or give to others the law-making powers

of the Legislature. Otherwise they might result in the creation of a body that would purport to take the work and assume the powers of a Legislature, and which yet would under sec. 92 have no power to make laws on any of the classes of subjects in sub-sec. (2) to (16) inclusive.

The words "notwithstanding anything in this Act" in sub-sec. (1) affect only sub-sec. (1) itself. They do not purport to affect the other sub-sections or the first part of the section further than in its relation to sub-sec. (1).

It will be noticed, too, that the power is one of amendment. It does not purport to be one of totally changing. "Amendment" of course implies changing to some extent, but, I think, not to the extent of altering the whole nature of that which is amended.

It is true that in Parliamentary procedure and at public meetings or assemblies, a motion or change, usually called an amendment, may be adopted that in effect will change the whole nature of, or even defeat, that which it purports to amend. Such a change is not properly called an amendment, though as it is introduced, and dealt with, in the same way as a true amendment, (which is properly a partial change really altering only in some detail, but leaving the principle intact), it has come to be referred to as an "amendment" in everyday language.

Our Legislature consists of the Lieutenant-Governor and the Legislative Assembly. To substitute the popular vote for that of the Legislative Assembly would leave us without a legislature.

I cannot think that it was in contemplation of the Imperial Parliament that the machinery for enacting laws should be such that a bill, once introduced, no matter how well, or badly, drawn should be incapable of being amended or changed, in the process of enacting, so as to remedy defects that might be found in it. If enacted by a Legislative Assembly those changes could be dealt with in the different stages of the bill, as the need for them became apparent. But, under the system proposed by the Act before us no such alterations could be made.

In stating the above, I have not overlooked the provision of sec. 4, which apparently permits changes approved of by the Speaker of the Legislative Assembly "and certified by him as not altering the meaning of such proposed law." But a moment's consideration will shew that such a power of making changes is too limited to be of much value.

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If it were not for the fact that, in *Hodge* v. *The Queen*, their Lordships of the Privy Council held that the powers given under sec. 92 were not delegated powers, but rather full sovereign powers within their limits, though subject necessarily to the control of the Imperial Parliament, and for the further fact that, in the United States of America, the powers of State legislatures have been held to be delegated powers, we could find in the different State Courts many decisions to help us.

In our case the authority is given by the sovereign power, which is the Parliament of the United Kingdom. In the case of a State legislature the authority is also given by the sovereign power, which is the people of the State. Each granting sovereignty has the right to take back, or alter, that which it has given. I can find no dividing line between the two cases which would shew why in the one the power given should be held to be delegated and in the other it should be held not to be delegated.

If, as above stated, it were not for that difference, we should find many valuable authorities in the different State Courts, in nearly all of which it was held that a State legislature has not the power to confer its own powers on other bodies—not even on the electors of the State, who are, in effect, the very body that, acting under the provisions of their Federal constitution, created the Legislature.

My learned brothers have discussed in detail the questions of the interference of the Act with the provisions of the B.N.A. Act, as to the office of Lieutenant-Governor, and as to money bills. It is therefore sufficient for me to say that I concur in the view that such interference necessarily renders the Act unconstitutional.

I would allow the appeal and answer the questions submitted to the Court in this matter in the manner set forth in the certificate filed with the Registrar of this Court.

Perdue, J.A.

PERDUE, J.A.:—The intention of this Act is to provide means by which a certain number of the electors, not less than eight per cent. of the total votes polled at the general provincial election last held and whose names appear on the last made list of electors, may, by petition, submit a proposed law to the Legislative Assembly. If the steps provided in the Act for ascertaining whether the petition has been sufficiently signed or not have been taken, and if it has been found to be sufficiently signed, sec. 4 provides

that the proposed law, unless enacted by the Legislative Assembly at the session at which it is submitted without change, other than those certified by the Speaker, as not altering the meaning of the proposed law, shall, subject to the provisions of sec. 4*a*, be submitted by the Lieutenant-Governor in Council to a vote of the electors of the Province, at the next general provincial election, unless a special referendum vote is asked for in the petition.

Sec. 4*a* provides for the question of the constitutional validity of the proposed law, or any essential provision of it, being referred to the Court under the above mentioned ch. 38 before the proposed law is submitted to a vote of the electors.

Sec. 5: Where a special referendum vote is asked, it is to be held within 6 months from the date of the presentation of the petition, or, in the other case provided, not earlier than 2 years from the last general election or the last referendum vote on the proposed law.

Sec. 6 provides that if the proposed law is enacted by the Legislative Assembly at the session at which it is submitted without change, other than changes certified by the Speaker as aforesaid, it shall not go to a referendum vote unless in pursuance of a petition under secs. 9 to 11 (respecting repeal of existing Acts or parts of Acts).

Sec. 7 is of great importance. That section provides that:—

A proposed law so referred to the electors and approved of by a majority of the votes polled thereon, shall . . *take effect and become law*, subject, however, to the same powers of veto and disallowance as are provided in the B.N.A. Act, or as exist in law, with respect to any Act of the Legislative Assembly, *as though such law were an Act of the said Assembly*, on a date *to be fixed by proclamation by the Lieutenant-Governor in Council*, which date shall not be later than 30 days after the Clerk of the Executive Council shall have published in the Manitoba *Gazette* a statement of the result of the vote on said law in accordance with sec. 35 hereof.

Sec. 9 provides that on a petition of electors not less in number than 5 per cent. of the total votes polled at the last general provincial election held previous to the petition, addressed to the Lieutenant-Governor in Council,

requesting that any Act of the Legislative Assembly, or part or parts thereof, whether now or hereafter in force, or not yet in effect, . . be referred to the electors, the Lieutenant-Governor in Council shall . . submit such Act or law or part or parts thereof to a vote of the electors of the Province to be taken at the next general provincial election.

Provisions are added for determining the sufficiency of the petition.

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Sec. 10 provides for the taking of a special referendum vote.

Sec. 11: In case such Act or law or part or parts thereof (that is the law or parts thereof the repeal of which is sought by the petition) "not being approved by a majority of the votes polled at such referendum, such Act or law or part or parts thereof so disapproved, shall, at the end of 30 days after the Clerk of the Executive Council shall have published in the Manitoba *Gazette* a statement of the result of the vote on such Act or law, or part or parts thereof, *become and be deemed repealed.*"

Sec. 12 provides that no Act of the Legislative Assembly shall take effect until the expiration of 3 months after the termination of the session at which the Act was passed except it is declared an emergency measure, that such declaration shall be made in the preamble and shall state the facts constituting the emergency, and that the preamble must be carried by a two-thirds majority. It also provides that certain enactments are not to be considered emergency measures. It also provides that any Act or part or parts thereof not in force at the time it is referred to a vote of the electors under secs. 9 to 11 shall be suspended from taking effect until approved by the electors on a referendum vote. Supply bills with certain exceptions are exempted from the provisions of the section.

The remaining clauses of the Act provide the machinery relating to the petition and the taking of the referendum vote.

It is urged that the legislature of the province had no power to pass this Act.

In the first place, it is contended that the legislature by enacting the proposed law, would not merely amend its constitution, but would delegate to another body its powers of legislation, and in that regard would abdicate its own functions.

The preamble of the B.N.A. Act, 1867, recites that the Provinces of Canada have expressed their desire to be federally united into one Dominion under the Crown of the United Kingdom, "with a constitution similar in principle to that of the United Kingdom." It further recites that it is expedient not only that the legislative authority in the Dominion be provided for, "but also that the nature of the executive government therein be declared." The Act contemplates the establishment of responsible government in the Dominion and in the several provinces, to be exercised by the Dominion and each of the provinces within the limits

of their several legislative jurisdictions. Parliament is the legislative power in the Dominion and it consists of the King, the Senate and the House of Commons. In each province there is a legislature, or law-making power, consisting of the Lieutenant-Governor, representing the King, and either one or two Houses, the Legislative Assembly always, and in some of the provinces originally a Legislative Council. If there is only one House, as is now the case in Manitoba, then the legislature consists of the Lieutenant-Governor and the Legislative Assembly. See Manitoba Act, 33 Vict. (D.) ch. 3, sec. 9, and 39 Vict. (Man.) ch. 28, sec. 2; R.S.M. 1913, ch. 112, sec. 3. The Legislative Assembly of the province corresponds to the House of Commons in the Dominion Parliament, and, in respect of provincial legislation in Manitoba, performs the functions that are performed by the two Houses of Parliament in respect of Federal legislation.

By sec. 92 of the B.N.A. Act it is enacted as follows:—

> In each province, the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say. . .

Then follows the list of subjects assigned for the purposes of legislation to the Provinces.

I think the word "exclusively" refers to the legislative powers conferred on the provinces in contradistinction to "the exclusive legislative authority of the Parliament of Canada," B.N.A. Act, sec. 91. Without the use of that word the Act sufficiently shews that the legislature provided for each province is the only provincial law-making authority to which legislative power has been assigned over the subjects mentioned in sec. 92. I think one may safely assert that neither the framers of the B.N.A. Act nor the Imperial Parliament that passed it ever contemplated the creation by the legislature of a new legislative body such as that sought to be created by the "Initiative and Referendum Act," to which body the legislature would delegate its powers of legislation, or with which it would share them.

It is, however, argued that the Act in question is only an amendment of the constitution such as may be made under subsec. 1 of sec. 92 of the B.N.A. Act. That provision places amongst the classes of subjects respecting which the legislature may make laws, "the amendment from time to time, notwithstanding anything in this Act, of the constitution of the Province, except as

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regards the office of Lieutenant-Governor." I shall deal with the exception in this clause later on and shall first consider whether the legislation proposed to be brought into force is merely an amendment of the constitution authorized under the above provision.

Secs. 69-90 of the B.N.A. Act relate to legislative power and the constitution of a legislature in each of the original provinces of Canada. By the Manitoba Act, 33 Vict. ch. 3, sec. 2, the provisions of the B.N.A. Act, except where they have special local application, are made applicable to the Province of Manitoba. The Privy Council has declared that "the Act (B.N.A. Act) places the constitutions of all provinces within the Dominion on the same level:" *Liquidators of Maritime Bank* v. *Receiver-General of New Brunswick*, [1892] A.C. 437, 442. It was therefore held that what was true with respect to the legislature of Ontario had equal application to the legislature of New Brunswick.

Section 9 of the Manitoba Act declares that:—

> There shall be a Legislature for the Province, consisting of the Lieutenant-Governor and of two houses, styled respectively the Legislative Council of Manitoba and the Legislative Assembly of Manitoba.

The members of the Legislative Council were to be appointed by the Lieutenant-Governor, while those of the Assembly are elected by the voters to represent the electoral divisions of the Province. By an Act of the Legislature of Manitoba the Legislative Council was abolished: See 39 Vict. (Man.) ch. 28, sec. 2. The legislature has since consisted of the Lieutenant-Governor and the Legislative Assembly. It is urged that if the legislature had power to amend the constitution in this respect, it had power to pass the present Act.

It was in fact argued that as the Province had amended its constitution already by abolishing the Legislative Council it might further amend it by giving to the electorate the power to initiate and pass laws without the intervention of the remaining house. If the power to amend given by sub-sec. 1 of section 92 was extensive enough to do away with one branch of the legislature, it is urged that no limit can be placed upon the power of amendment. But, in construing any Act we must take the whole of the Act together: per Lord Blackburn in *Turquand* v. *Board of Trade*, 11 A.C. 286, 291. "Construction is to be made of all the parts together, and not of one part only by itself:" Maxwell on Stat.,

5th ed., 47. From other portions of the Act dealing with the constitution of the provinces it is abundantly clear that the law-making power in each province was entrusted to a legislature which must consist of a Lieutenant-Governor and a Legislative Assembly at least, whether there is a Legislative Council or not. From the first, Ontario had no Legislative Council. To make the constitution of this Province the same as that of Ontario might well be considered a proper matter of amendment. But the "Initiative and Referendum Act" would provide new means for passing legislation. It would make the electorate a law-making body possessing powers which by the B.N.A. Act are conferred on the legislature alone. This would be wholly opposed to the spirit and principles of the Canadian constitution and of the constitution of the United Kingdom. The procedure for enacting laws provided by the new Act would, where it was invoked, override or have equal force with the system of legislation provided by the constitution. Its effect would be to do away with the debate and deliberation which a bill receives in the Legislative Assembly on the floor of the house and in committee. Under the new system a proposed law would be submitted to a vote of the electors who must either accept it or reject it intact. No opportunity is permitted for changing or amending anything in the measure submitted. This, I think, would not only be contrary to the spirit of the constitution, but would be subversive of it. The amendment contemplated by sub-sec. 1 of sec. 92 was not the substitution of a new constitution or of one founded on new principles. It was intended, I think, merely to give the provinces power to alter certain details of structure or machinery deemed necessary for the efficient operation of the constitution, the essential design and purpose being preserved.

There are cases, no doubt, in which provincial legislatures have conferred extensive powers on bodies of their own creation. The Municipal Act affords a good example of this. The Ontario Liquor License Act, considered in *Hodge* v. *The Queen*, 9 A.C. 117, contains another instance of delegated powers. But in each case the Legislature was dealing with a subject within its own exclusive jurisdiction. It was held in the above case that the Legislature had power to confide to a municipal institution or body of its own creation authority to make by-laws or resolutions as to sub-

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jects specified in the enactment with the object of carrying the enactment into operation and effect (p. 132).

Sir Barnes Peacock, giving the judgment of the committee, further said:

It is obvious that such an authority is ancillary to legislation, and without it an attempt to provide for varying details and machinery to carry them out might become oppressive or absolutely fail.

It is obvious that the power of delegation referred to in the above is very different in principle from that claimed in the present case. The proposed Act has for its object the creation of a new legislative power which will initiate and pass legislation which hitherto the legislature alone could enact. This is not a delegation of authority for the purpose of making by-laws or rules to aid in carrying an enactment into effective operation. It is an endeavour to endow another body with the same power of making laws that the legislature itself possesses.

In *Hodge* v. *The Queen*, *supra*, the following passage is found in the judgment:—

When the B.N.A. Act enacted that there should be a legislature for Ontario, and that its legislative assembly should have exclusive authority to make laws for the Province and for provincial purposes in relation to the matters enumerated in sec. 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by sec. 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subjects and area the local legislature is supreme, and has the same authority as the Imperial Parliament, or the Parliament of the Dominion, would have had under like circumstances, to confide to a municipal institution or body of its own creation, authority to make by-laws or resolutions as to subjects specified in the enactment, and with the object of carrying the enactment into operation and effect.

It is noticeable that in the passage above quoted the body that is referred to as having exclusive authority to make laws for the Province, is the legislative assembly.

It is argued that the above passage is an authority for the proposition that under sub-sec. 1 of sec. 92 a province has the same power over its own constitution as the Imperial Parliament has over the British constitution. The questions involved in the above case did not deal with the power conferred by sub-sec. 1, and the case was decided under sub-secs. 8, 15 and 16.

The above passage is followed by this statement:—

It is obvious that such an authority is ancillary to legislation, and without it an attempt to provide for varying details and machinery to carry them out might become oppressive, or absolutely fail. Clearly, I think, the expressions

in the judgment, to which such a wide meaning is now sought to be given, refer simply to the matter then before the Committee, the power of a provincial legislature to entrust to a board of commissioners authority to make regulations of a merely local character for the good government of taverns, etc.

I cannot believe that sub-sec. 1 was intended to give to the legislature the power of abolishing itself, or conferring on another body its power of enacting laws, or of abolishing the Legislative Assembly so that only the Lieutenant-Governor would be left. On the other hand, I take it that the Imperial Parliament could annul the British constitution, and substitute something completely new. There is no fetter on its power. The provincial powers are limited to those conferred by the words or the reasonable intendment of the B.N.A. Act. The legislature is vested with the responsibility of making the laws. It can amend the constitution but not destroy it. It may change its procedure, the number of members, the electoral divisions, the qualifications of voters and other matters for which provision was primarily made in the B.N.A. Act or the Manitoba Act and which may be properly considered as subject to amendment under sub-sec. 1 of sec. 92. But there must be a legislature and the laws must be enacted by a legislature. It cannot, in the guise of an amendment to the constitution, completely abolish the representative chamber in the legislature or suspend its law-making functions or delegate them to another body of its own creation.

Reference has often been made to the statement of Lord Selborne in *The Queen* v. *Burah*, 3 A.C. 889, 905, on the question of delegation by a province of its legislative powers or of part of them. It was held in that case that the Indian Legislature might authorize a Lieutenant-Governor of a province of India to declare whether the Act or any part of it should be applied to a particular district. That was held to be conditional legislation and not a delegation. Lord Selborne, in giving the judgment of the Privy Council, said:—

> Their Lordships agree that the Governor-General in Council (the legislative body) could not by any form of enactment, create in India, and arm with general legislative authority, a new legislative power, not created or authorized by the Councils Act.

The question of delegation is briefly discussed in Lefroy's "Canada's Federal System," p. 387, where the *Burah* case is quoted: There are many authorities shewing that an Act may legally provide that the time and manner of its taking effect may

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depend upon a vote of the electors, or a proclamation of the government: See *Rex* v. *Carlisle*, 6 O.L.R. 718, 722; *Russell* v. *The Queen*, 7 A.C. 829, 835; *Fredericton* v. *The Queen*, 3 Can. S.C.R. 505, 530. This is not a delegation of the powers of legislation. By the Act now in question, even where the legislature should act on the petition under sec. 4, and itself pass the proposed law, it would be bound to do so without any change that would alter the meaning of such proposed law. In this way the legislature would tie its own hands in respect of any matter which the electors, or the designated percentage of them, appropriated as a subject for legislation. This, it appears to me, would be an abdication by the legislature of its legislative powers, rather than a mere delegation of them.

I will now deal with the second and even more formidable objection to the Act in question, namely, that it falls within the exception mentioned in sub-sec. 1 of sec. 92 of the B.N.A. Act and interferes with the office of the Lieutenant-Governor.

Sec. 90 of the B.N.A. Act is as follows:—

> The following provisions of this Act respecting the Parliament of Canada, namely, the provisions relating to appropriation and tax bills, the recommendation of money votes, the assent to bills, the disallowance of Acts and the signification of pleasure on bills reserved—shall extend to and apply to the legislatures of the several provinces, as if those provisions were here re-enacted and made applicable in terms to the respective provinces and the legislatures thereof, with the substitution of the Lieutenant-Governor of the Province for the Governor-General, of the Governor-General for the Queen and for a Secretary of State, of one year for two years, and of the Province for Canada.

By sec. 55 of the Act,

> where a bill passed by the Houses of the Parliament is presented to the Governor-General for the Queen's assent, he shall declare, *according to his discretion*, but subject to the provisions of this Act and to Her Majesty's instructions, either that he assents thereto in the Queen's name, or that he withholds the Queen's assent, or that he reserves the bill for the signification of the Queen's pleasure.

Secs. 56 and 57 give the procedure for disallowance and for dealing with bills where the assent of His Majesty is withheld or the bill is reserved for the signification of His Majesty's pleasure.

Applying the above provisions of the B.N.A. Act to the Provincial Legislature, it is clear that a bill must pass the Legislative Assembly before it can be presented to the Lieutenant-Governor for his assent. The passing of the bill by the Legislative Assembly is a condition precedent to its receiving the assent of the Lieutenant-Governor. He cannot assent to any

proposed law which had not been submitted to and passed by the Assembly.

In assenting to, or withholding his assent, or reserving the bill, the Lieutenant-Governor acts "according to his discretion," and therein he represents and exercises *pro tanto* the power of the King (sec. 55). He acts in these matters in his legislative capacity as one of the two essential elements in the legislature—that of Lieutenant-Governor.

Section 7 of the "Initiative and Referendum Act" clearly seeks to dispense with the assent of the Lieutenant-Governor where a proposed law, submitted to a vote under the provisions of the Act, has been approved by a majority of the votes polled. Such proposed law, when so approved, is "to take effect and become law" on a date to be fixed by the Lieutenant-Governor in Council, which date shall not be later than 30 days after the publication of the result of the vote.

It cannot be argued that the provisions in the bill for the submission of the proposed law by the Lieutenant-Governor in Council to a vote of the electors (secs. 4 and 9) or the proclamation by the Lieutenant-Governor in Council in sec. 7 is equivalent to, or obviates the necessity of the assent of the Lieutenant-Governor as required by the constitution. Orders of the Lieutenant-Governor in Council are executive acts done with the advice of the Executive Council: Interpretation Act, R.S.M. 1913, ch. 105, sub-secs. 16 and 27 (*e*); B.N.A. Act, sec. 66. But the power to assent to bills, or to withhold consent, is a power conferred upon the Lieutenant-Governor by the B.N.A. Act as a constituent element of the Provincial Legislature, a power which he exercises, not with the advice of his ministers, but according to his discretion.

Instead of obtaining the Lieutenant-Governor's assent to a measure which has obtained a majority vote under the Act, it is to become law on a date to be fixed by proclamation by the Lieutenant-Governor in Council. That is to say, instead of the Lieutenant-Governor giving or withholding his assent according to his own discretion, the assent or non-assent is to be dealt with by the Executive and the Lieutenant-Governor will be required to act on the advice of his ministers. It is argued that the wording of sec. 7 implies that the assent of the Lieutenant-Governor is to be obtained. I think the section clearly shews that, in respect

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to legislation passed under the Act, his assent is to be deemed unnecessary and to be dispensed with. If there are any doubts that this is the effect under sec. 7 the intention of the Act to dispense with assent of the Lieutenant-Governor is most clearly shewn by sec. 11. That deals with the repeal of an existing law. If such law is not approved by a majority vote then, at the end of 30 days after the publication of the result of the vote, it shall "become and be deemed repealed." Nothing could be clearer than the intention of this section to do away with the assent of the Lieutenant-Governor.

An attempt is made in sec. 7 to preserve the "powers of veto and disallowance" provided by the B.N.A. Act. "Veto" and "disallowance" mean the same thing and refer to the provisions of secs. 55 and 56 as applied to a Province. Before the power of disallowance can be exercised the bill must have been passed by the Legislative Assembly and must have received the assent of the Lieutenant-Governor. The provisions of the above two sections in so far as disallowance, assent or reservation are concerned, are wholly inapplicable to legislation passed under the "Initiative and Referendum Act." In this respect the Act not only attempts to amend the constitution of the Province, but also in effect attempts to interfere with the powers of the Governor-General under the B.N.A. Act.

In *Attorney-General of Canada* v. *Attorney-General of Ontario*, 20 O.R. 222, 247, Boyd, C., in discussing sub-sec. 1 of sec. 92 of the B.N.A. Act, said:—

> That veto is manifestly intended to keep intact the headship of provincial government, forming, as it does, the link of federal power; no essential change is possible in the constitutional position or functions of this chief officer, but that does not inhibit a statutory increase of duties germane to the office.

The word "veto" was used in the above passage as indicating an exception to the powers conferred by sub-sec. 1 and an admonition against interference with the office of Lieutenant-Governor.

The word "veto," or "power of veto" is sometimes used for the "disallowance" provided by sec. 56 of the B.N.A. Act. Lefroy, Leg. Power in Canada, page 185 *et seq.*; Can. Fed. Sys. 30-44; *Lenoir* v. *Ritchie*, 3 Can. S.C.R. 575, at p. 624.

In a report by Sir John Thompson, cited in the footnote to page 387 of Lefroy's Canada's Federal System, we find the following:—

In the opinion of the undersigned it is immaterial whether a legislature by an Act seeks to add to or take away from the rights, powers or authorities which, by virtue of his office, a Lieutenant-Governor exercises, in either case it is legislation respecting his office.

No doubt, there is judicial authority that a provincial legislature may declare that the Lieutenant-Governor is vested with certain powers, authorities and functions, such as the power of remitting sentences for offences against provincial penal enactments (*Att'y-Gen. of Canada* v. *Att'y-Gen. of Ontario, supra,* affirmed 19 A.R. 31, and 23 Can. S.C.R. 458); but there is no authority for taking away or encroaching on the power conferred upon him by the B.N.A. Act in regard to giving or withholding his assent to bills.

Even if it could be shewn that sec. 7 did imply that the assent of the Lieutenant-Governor should be obtained, or if the Act were amended so as to make it clear that such assent was required under both secs. 7 and 11, the Act would still remain unconstitutional, because, as I have pointed out, the Lieutenant-Governor can only assent to an Act that has been passed by the Legislative Assembly.

There is another serious objection to the constitutional validity of the Act. Under the provisions of sec. 54 of the B.N.A. Act, as applied to the Legislature of the Province by sec. 90, it is not lawful for the legislature to adopt or pass a vote, bill, etc., for the appropriation of any part of the revenue, or any tax or impost, to any purpose that has not been first recommended to Assembly by message of the Lieutenant-Governor. This procedure would be quite inapplicable to the "Initiative and Referendum Act," and, therefore, measures introduced under that Act could not provide for the appropriation of any part of the public funds, and could not impose any tax for the purposes of the measure. Any attempted evasion of the provisions of sec. 54 would be an interference with the office of the Lieutenant-Governor and would be unconstitutional.

During the argument a great many passages were read from text-books and commentaries which in reality related to the policy of the Act. With that the Court has nothing to do. It was a matter for the Legislative Assembly which, in debate and in committee, could fully consider the wisdom or utility of introducing so fundamental a change in the manner of enacting laws.

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The Court can only deal with the constitutional aspect of the matter and answer the questions of law submitted to it.

I would allow the appeal and answer the questions submitted to the Court in this matter in the manner set forth in the certificate filed with the Registrar of this Court.

CAMERON, J.A.:—We are here called upon to answer certain questions with reference to the Act to enable electors to initiate laws and relating to the submission to the electors of Acts of the Legislative Assembly, being ch. 59, 6 Geo. V.

This Act purports to do two different things, which are indicated in its title as above.

In the first place it is provided that a certain number of electors of the Province, being not less than 8 per cent. of the total vote polled at the last Provincial general election, may petition the Legislative Assembly of the province within 2 weeks after the commencement of a session thereof, to pass what is termed a "proposed law" which may mean (1) "Any proposed law, bill, measure, (or) resolution," or (2) "Any amendment to any Act or Acts of the Legislative Assembly," or (3) "Any amendment to any law or laws enacted under this Act."

The Speaker of the Assembly upon receipt of the petition is to verify the signatures thereto, or he may refer the matter to a Judge of the Court of King's Bench. If the petition is found to have the required number of signatures, then, unless the "proposed law" is enacted without change at the session of the Assembly, to which it is submitted, it shall be submitted by the Lieutenant-Governor in Council to the electors of the Province, either at the next Provincial general election "unless a special referendum vote is asked for in the petition." The "special referendum vote," if asked for, is to be taken at the time provided by sec. 5. But if it is enacted by the Assembly, "It shall not go to referendum vote unless in pursuance of a petition under secs. 9 to 11 inclusive." It is then provided in sec. 7:—

A proposed law so referred to the electors and approved of by a majority of the votes polled thereon shall, unless a later date is specified therein, take effect and become law, subject, however, to the same powers of veto and disallowance as are provided in the B.N.A. Act or as exist in law with respect to any Act of the Legislative Assembly, as though such law were an Act of the said Assembly, on a date to be fixed by proclamation to be made by the Lieutenant-Governor in Council, which date shall not be later than 30 days after the Clerk of the Executive Council shall have published in the Manitoba

Gazette a statement of the result of the vote on said law in accordance with sec. 35 hereof.

The foregoing provisions relate more particularly to what may be termed the "Initiative."

In the second place it is provided that a number of electors being not less than 5 per cent. of the total votes polled at the last Provincial general election, may request that (1) Any Act of the Legislative Assembly, or part or parts thereof now or hereafter in force, or not yet in effect by virtue of sec. 12 of the Act, or (2) Any law enacted under the previous ("Initiative") proceedings of the Act, shall be referred to the electors by the Lieutenant-Governor in Council, at the next general election, unless a special referendum vote is asked for in the petition. (Sec. 9, sub-sec. 1). The Lieutenant-Governor in Council is to "take steps" to verify the signatures to the petition, and the Attorney-General, or a Judge of the Court of King's Bench at his request, is to pass finally upon the same.

The time when a special referendum vote shall be taken is fixed by sec. 10. By sec. 11 it is provided:—

> In the event of such Act or law or part or parts thereof not being approved of by a majority of the votes polled at such referendum, such Act or law, or part or parts thereof, so disapproved, shall at the end of 30 days after the Clerk of the Executive Council shall have published in the Manitoba *Gazette* a statement of the result of the vote on such Act or law, or part or parts thereof, become and be deemed repealed.

These last mentioned provisions provide for what may be called "the Referendum" as distinguished from "the Initiative."

Provision is made by sec. 12 as to when Acts of the Assembly shall come into force.

By sec. 17, it is provided that "Whenever a vote is to be taken under this Act, the Lieutenant-Governor in Council shall order the issue of writs in His Majesty's name for taking such vote."

The other sections of the Act provide the machinery for carrying it into effect, and are not of importance in respect of the questions asked on this reference.

The powers of the Legislative Assemblies of the Provinces with respect to the matters enumerated in sec. 92 of the B.N.A. Act, have been frequently set forth by judicial decisions of the highest authority. The Judicial Committee of the Privy Council has held that the authority of the Provincial Legislature in respect

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of these matters is "as plenary and as ample within the limits prescribed by sec. 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within the limits of subjects and area, the local Legislature is supreme, and has the same authority as the Imperial Parliament, or the Parliament of the Dominion:" *Hodge* v. *The Queen*, 9 A.C. 117, at 132. This statement was cited and approved by the Board in *Liquidators of the Maritime Bank* v. *Receiver-General*, [1892] A.C. p. 442. The same doctrine is set forth in *Dobie* v. *Temporalities Board*, 7 A.C. 146, and *Union Colliery Co.* v. *Bryden*, [1899] A.C. 584-5. These far-reaching utterances fully and finally established the plenary nature of the powers of Provincial Legislatures, acting within the area prescribed by our Constitutional Act.

By sec. 92 of the B.N.A. Act, it is provided that: "In such Province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects, next hereinafter enumerated, that is to say: (1) The amendment from time to time, notwithstanding anything in the Act, of the constitution of the Province, except as regards the office of the Lieutenant-Governor.

Can the legislature create within the province a new legislature or law-enacting body not already created or authorized by the B.N.A. Act? That is no doubt the intention of the Act before us. In certain matters it is intended that laws should be enacted not by the Legislature but by the general body of the electors. It does not purport to abolish the legislature. But it does purport to create a method of enacting laws without the approval of the legislature. It does seem to me that a strong case can be made out, in view of the broad and sweeping language of the above sub-sec. (1), in support of the contention that the Provincial Legislature can go to that length without transgressing the limitations prescribed by the B.N.A. Act, so long as it leaves intact the office of the Lieutenant-Governor. The words in the section, "Notwithstanding anything in the Act," are clear and explicit and cannot be ignored. In this view it would appear that the legislature can do as it sees fit in delegating or transferring the law-making power with the exception stated in the section.

Mr. Lefroy's opinion is that the Provincial Legislature certainly could arm with general legislative authority, within the limits of its sphere, "a new legislative body not created or auth-

orized by the British North America Act," and he adds: "It cannot be said that so to create a new legislative body would, either in the case of the Dominion Parliament or the Provincial Legislature, be a permanent and irrevocable abdication of functions. They would remain invested with the responsibility for what they had done."

In the same work, at p. 384, the writer says:—

> Under this sub-section of sec. 92, Provincial Legislatures have the same power to alter and amend the constitutions of their respective Provinces (except as regards the office of Lieutenant-Governor) by their own legislative act, as the Imperial Parliament possessed, at the date of the passing of the B.N.A. Act.

The legislature of this province abolished the Legislative Council, a part of the legislature as constituted under the Manitoba Act, which provided for a legislature consisting of a Legislative Council and a Legislative Assembly. The Council was abolished by Act of the Provincial Legislature, 39 Vict. ch. 28, sec. 2, the validity of which was never called in question. It may well be said that there is now no constitutional reason why the legislature could not restore the Council, and then proceed, after its restoration, to abolish the Assembly. And if either body can be constitutionally abolished, why not both? These questions do not, however, arise here. But it is clear beyond question that if this present Act were now in force, it could be repealed by the legislature at any time. The legislature would not have abdicated but merely delegated its powers, and can resume them at will.

The rules of interpretation in seeking to arrive at the meaning of the provisions of the B.N.A. Act have been authoritatively declared:

> In the interpretation of a completely self-governing Constitution founded upon a written organic instrument, such as the British North America Act, if the text is explicit, the text is conclusive alike in what it directs and what it forbids.

Attorney-General for Ontario v. *Attorney-General for Canada*. [1912] A.C. 571, 3 D.L.R. 509.

Courts of law must treat the provisions of the B.N.A. Act by the same methods of construction and exposition which they apply to other statutes of a similar character, that is to say, statutes conferring constitutional charters. The B.N.A. Act cannot be construed in a rigidly technical manner. "Lefroy Legislative Power," at p. 21, where *Bank of Toronto* v. *Lambe*, 12 A.C, 579, is, with numerous other cases, cited as authority for this

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proposition. The wording of sub-sec. (1) being apparently clear and explicit, why should it be assumed that the Provincial constitution if and when and as amended by the legislature, must still conform to the general constitutional provisions of the B.N.A. Act, or to the general scheme of parliamentary or representative institutions existing in Great Britain at the time of its passage. I confess I see great difficulty in answering in favour of such assumption.

The foregoing considerations are of the highest importance, and have not yet been the subject of judicial review. I feel bound to state that though my own views upon them are as indicated as above, I appreciate the force of those expressed by the Chief Justice in his judgment in this matter. But it does seem to be that they can be regarded as largely speculative and that the question here submitted answered without reference to them. We have in sub-sec. (1) the express inhibition on the legislature in respect of the office of the Lieutenant-Governor. Beyond doubt that office cannot be impaired or diminished by action of the legislature. Can the duties of the office, however, be added to? On the subject, I quote at length the note at p. 100 of Lefroy on Legislative Power:—

> In a report of Sir John Thompson, as Minister of Justice, dated July 16th, 1887, upon the Quebec Act of 1886, respecting the executive power, 49-50 Vict. ch. 96, which declared the Lieutenant-Governor, or person administering the government of the Province, to be a corporation sole, he says:—
>
> The office of Lieutenant-Governor is one of the incidents of the constitution, and the authority to legislate in respect thereof is excepted from the powers conferred upon the legislatures of the provinces, and is exclusively vested in the Parliament of Canada. In the opinion of the undersigned, it is immaterial whether a legislature by an Act seeks to add to or take from the rights, powers, or authorities which, by virtue of his office, a Lieutenant-Governor exercises, in either case it is legislation respecting his office;

and he recommended that the Act should be disallowed, and it was disallowed accordingly: Hodgins' Pro. Leg., vol. II., pp. 58-9. However, in *Attorney-General of Canada* v. *Attorney-General of Ontario*, 20 O.R. 222 (1890), at p. 247, Boyd, C., speaking of sub-sec. 1 of sec. 92, "which forbids interference with the office of Lieutenant-Governor," says:—

> That veto is manifestly intended to keep intact the headship of the provincial government, forming, as it does, the link of federal power; no essential change is possible in the constitutional position or functions of this chief officer, but that does not inhibit a statutory increase of duties germane to the office.

And so in his published argument before the Court of Appeal in this case, elsewhere referred to, Mr. Edward Blake says of this clause of the Act:—

> This means that those elements of the constitution which can be properly deemed to be parts of the constitution relating to the office of the Lieutenant-Governors are not to be changed; and for an obvious reason, because the Lieutenant-Governor is the link between the federal and the provincial, aye, and between the Imperial and the provincial authority; he is the means of communication, he is the chain and conduit of Imperial as well as federal connection; and, therefore, his office in the constitution, his constitutional position as a federal officer, is not to be affected.

And the Ontario Court of Appeal (19 O.A.R. 31) and the majority of the Supreme Court of Canada (23 S.C.R. 458) affirmed him in holding the Ontario Act there in question *intra vires*, though it purported to vest certain powers, authorities, and functions in the Lieutenant-Governor of Ontario. In the latter Court, however, Gwynne, J., says:—

> So to extend the powers, authorities and functions of the Lieutenant-Governor of Ontario beyond those expressly vested in him by the Constitutional Act is, in my opinion, a violation of the terms of No. 1 of sec. 92 of that Act. . . An Act which purports to vest in a Lieutenant-Governor of the Province the royal prerogative in excess of so much thereof as is expressly or by necessary implication vested in him by the British North America Act must, I think, be held to be an alteration of the constitution of the Province as regards the office of Lieutenant-Governor.

The other Judges of the Supreme Court do not specially refer to this clause, Strong, C.J., and Fournier, J., resting their decision in favour of the Act upon its precautionary phrases: "So far as this legislature has power to enact," etc.—referred to in the notes to Proposition 32, *infra*, while Taschereau, J., simply refers to the case of *The Liquidators of the Maritime Bank of Canada* v. *The Receiver-General of New Brunswick*, [1892] A.C. 437.

I might add that Chancellor Boyd himself, in his judgment above referred to, pointed out the limitations of the Act before him. "The Act is full of cautionary phrases—saving the royal prerogative and limiting its provisions to matters within the provincial jurisdiction:" p. 246. "It is, perhaps, impossible to say how much ground this covers: it may be that (apart from what is specifically named in the next section, cited at p. 223) not a single appropriate power exists outside of statutes, which will fall within the purview of this enactment." "And again, if the section operates on nothing, it may be innocuous, but it is not unconstitutional," p. 246. So that clearly the Chan-

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cellor's judgment had in view the limitation in the Act before him.

For my part, I would accede to the opinion of Sir John Thompson that it is immaterial whether a legislature by an Act seeks to add to or take from the rights, powers or authorities which, by virtue of his office, a Lieutenant-Governor exercises; in either case it is legislation respecting his office, an opinion fortified by the judgment of Mr. Justice Gwynne as above cited. The Lieutenant-Governor is an essential link between the provincial and the federal authority and between the provincial and the Imperial authority as stated by Mr. Blake. It was not contemplated that the office should be impaired or interfered with. It can be well imagined that new and onerous duties, duties perhaps impossible of performance, could be added by the legislature to those already appertaining to the office. If we were to suppose the legislature required that every by-law of every municipal corporation in the province should receive the considered approval of the Lieutenant-Governor before becoming effective, that surely would be legislation purporting to amend his office—an alteration of his status and duties as established by the B.N.A. Act, and therefore beyond the powers of the legislature.

See secs. 54, 55, 56, 57 and 90 of the B.N.A. Act.

The subject of the recommendations of the Crown for grants of money or charges is dealt with in Halsbury, Laws of England, XXI., 266. The House of Commons will not proceed upon any motion therefor except upon the recommendation of the Crown. In Canada,

> all bills providing for the payment of salaries or any expenditure whatever out of the public funds of the Dominion, must be first considered as resolutions in committee of the whole. And all such resolutions necessary to the introduction of a bill must first obtain the recommendation of the Governor-General: Bourinot, Parliamentary Procedure, 4th ed., (1916) 502.

The Act before us applies to all appropriation bills exceeding $100,000, and to all bills for raising money by taxation. That is to say, it applies to bills "for imposing any tax or impost" as under sec. 53, as the same is made applicable to a provincial legislature by sec. 90.

Now, there is no reference whatever made in the Act to a message from the Crown as being required or contemplated as a

pre-requisite in the case of appropriation bills or "proposed laws." On the contrary, it is plainly the intention of the Act to dispense with anything of the kind. And I am unable to resist the conclusion that this is clearly such an attempted amendment or alteration of the office of the Lieutenant-Governor as is explicitly forbidden by the B.N.A. Act. This objection goes to the foundation of all money bills or "proposed laws" whether they might be of the "initiative" or "referendum" classes as defined by the Act.

Then we have to deal with the constitutional requirement of the assent of the Crown represented by the Lieutenant-Governor to all bills. The Lieutenant-Governor must, for the Crown, assent to all bills and these in their preamble assert that they are enacted by and with the assent of His Majesty. In Todd on Parliamentary Government in the Colonies, we read, p. 440, that the Lieutenant-Governor properly assents to or withholds his assent from bills passed by the provincial legislature "in his Majesty's name," "and that in this particular, we are not warranted in substituting the name of 'the Governor-General' for that of 'the King.'" This last remark states a difficulty frequently commented on in translating sec. 55 literally as directed by sec. 90. There is no doubt whatever that Mr. Todd's view on this point, stated as far back apparently as 1880, has been universally adopted without question.

By the provisions of sec. 55, as made applicable by sec. 90, the Lieutenant-Governor in Council is to either declare his assent to a bill passed by the legislature or that he withholds it or that he reserves the bill for the signification of the Governor-General's pleasure. If he assents (sec. 56), a copy is to be sent to one of the Governor-General's principal Secretaries of State, and thereupon within one year the same may be disallowed. If reserved for the signification of the Governor-General's pleasure then the procedure is prescribed by sec. 57.

Now, there is no express reference here to the Lieutenant-Governor's assent to bills (whether of the "initiative" or "referendum" classes) or to his right to withhold assent, or to his right to reserve for the consideration of the Governor-General.

It was argued before us that it must be taken as the intention to exclude the Crown from the operation of the Act inasmuch as the Crown is not expressly mentioned. But, in my opinion, it

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is impossible to read the Act without coming to the conclusion that it was the intention that the "proposed law" should take effect without the intervention of the Crown by way of assent or otherwise. There is nothing said about assent or withholding assent or reservation for the Governor-General. These essentials are ignored, and I am satisfied they were intended to be ignored.

It was further argued that the word "veto" has been given so general a signification that it includes withholding assent to a bill. No doubt it has been broadly used by eminent speakers and writers, particularly in reference to the powers of the Crown in England. But it seems to me that in the case before us the term "veto" is used in the sense in which it has been commonly used in Canada, that is, in reference to the power of disallowance (under secs. 56 and 90 of the B.N.A. Act) by the Governor-General in Council of provincial enactments. Todd speaks at p. 427 of "the veto power over provincial legislation." Sec. 7 attempts to preserve, at least not to interfere with, the powers of the Governor-General in Council with respect to "veto and disallowance," 2 words, to my mind, meaning here one and the same thing. It was obviously intended not to appear to encroach upon the Dominion power of disallowance. But it was not, in my opinion, intended by those words to preserve the right of withholding the assent of the Lieutenant-Governor to "proposed laws." On the contrary, the intention was that the will of the electors, expressed as in the Act provided, should prevail and become effective without any reference to the Lieutenant-Governor whatever whether for his assent or to give him the privilege of withholding his assent. And it is absolutely clear that there can be no stretching of the meaning of the word "veto" that could by any possibility make it include the reservation by the Lieutenant-Governor of the "proposed law" for the signification of the pleasure of the Governor-General.

As I have already indicated, in my view, the Act before us, whether dealing with proposed laws of the "initiative" or "referendum" classes, excludes by its wording and by its plain intent and meaning, the rights of assent, of withholding assent and of reservation for the Governor-General all made essentials of the office of Lieutenant-Governor by the B.N.A. Act. Assuming, however, that that view is not well founded, and that the rights

that I consider have been dispensed with are still preserved, there can be no question that the legislation in question before us adds materially to the duties and responsibilities of the office of Lieutenant-Governor. He must examine these proposed laws, give give them his assent, or decide to withhold from them his assent or express his intention of reserving them for the consideration of the Governor-General and perform all the duties necessary to carry out these decisions. I am prepared to hold, therefore, that the Act before us adds, or attempts to add, to the duties of the office of Lieutenant-Governor, and is therefore legislation respecting the office of the Lieutenant-Governor and altering and amending the constitutional functions thereof.

I would answer the questions submitted on this reference in the manner indicated in the memorandum filed.

Appeal allowed.

BRITISH AMERICA ELEVATOR CO. v. BANK OF B.N.A.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron and Haggart, JJ.A. November 20, 1916.

BANKS (§ IVA 2—58)—*Trust Funds—Application—Direction—Measure of Damages*]—Amendments to judgment in 26 D.L.R. 587.

Hugh Phillipps, K.C. and *C.S. A. Rogers*, for plaintiffs. *Isaac Pitblado*, K.C. and *A. C. Ferguson*, for defendants.

RICHARDS, J.A.:—I agree with the trial Judge that the evidence shews that the bank's manager misapplied the funds in question by putting them to the credit of Youngberg or Youngberg & Vassie, to cover the indebtedness of those two accounts to the bank, and to enable those parties to use the money for their own purposes.

It seems to me that the plaintiffs have distinctly proved their claim to the extent of the whole $13,528.10, and that the bank has been properly charged with that amount.

As to the first $500 draft, I agree with the view taken by my brother Cameron. As to the $1,000 draft, the proceeds of which are said to have been used to pay the $1,000 cheque given to the plaintiffs' inspector, I differ, with deference, from the view taken by the Chief Justice. The cheque was, to the knowledge of the bank manager, given to pay back $1,000, part of certain moneys of the plaintiffs in Youngberg's hands which the plaintiffs

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had required him to repay to them, and the bank manager knew that it was so received by the plaintiffs. If the proceeds of the draft were, in fact (which I think has not been proved) used to pay the cheque, then the bank manager was a party to misleading the plaintiffs by causing them to think that the cheque had been paid out of Youngberg's own funds, and the bank should not be permitted to set up their own wrongful act as a defence. The decision in *Toronto Club* v. *Imperial Trusts Co.*, 25 O.L.R. 330, does not seem to me to apply to such facts as the above.

The bank, however, claim that the accounts between the plaintiffs and Youngberg are such that the plaintiffs' loss is really less than $13,528.10; and that Youngberg, in fact, delivered to the plaintiffs (who got the benefit of it) more grain than that purchased with the moneys (other than such $13,528.10) received by him from them for the purpose of buying grain, and that he, in other ways, recouped part of the plaintiffs' loss on the drafts in question.

On the argument of the appeal, the plaintiffs' counsel, on being pressed by the Court, stated that the plaintiffs had received moneys, or other property, in respect of which Youngberg was entitled to credits, but refused to admit that such credits could be applied on the liability in respect of the drafts in question, and stated that they were applicable in respect only of other matters (not in question in this action), in which Youngberg, as he stated, was in default to the plaintiffs.

It appears that Youngberg acted for the plaintiffs in transactions other than grain buying—such as selling coal for them—and it is, apparently, in respect of such other matters that the plaintiffs claim to apply the credits in question.

In my reasons for judgment, as originally delivered, I overlooked the above and stated, in effect, that the admissions were that, in respect of the drafts in question, the plaintiffs' actual loss was less than the $13,528.10. On hearing Mr. Phillips' objections to such statement (made on the motion to settle the minutes of judgment) I am convinced that I was in error in so stating, and that what was said is, substantially, as first above stated by me.

As, however, the bank assert their claim that the $13,528.10 liability on the drafts sued on has been reduced, as between

Youngberg and the bank, it would be unjust, in my opinion, to deprive them of their rights to have that enquired into.

The matter may, I think, be looked on as a joint misappropriation of the $13,528.10 by Youngberg and the bank; and, so considering it, it seems just that the bank should be at liberty to take advantage of any set-off, or counterclaim, which Youngberg could have availed himself of if this action had been against him.

I think the plaintiffs have proved their case to the extent of the full $13,528.10, but would add to the judgment appealed from, by directing a reference to the Master, to enable the defendants to shew, if they can, the balance, if any, which would be due by the plaintiffs to Youngberg on a taking of the grain accounts between them, if he, Youngberg, were not chargeable with the $13,528.10 or any part of it, but were chargeable for all other moneys received by him from them for the purpose of purchasing grain. If any such balance should be found, then the $13,528.10 to be reduced thereby.

I would direct the Master that the $13,528.10 has been proved as a liability of the defendants to the plaintiffs and that, in taking the above account, the onus of proving that there is anything by which such $13,528.10 is to be reduced, lies on the defendants.

In my reasons for judgment, as originally delivered, I purported to concur in the judgment of the Chief Justice, but I did so under a misunderstanding as to its effect, and because of my having mistaken, as above stated, the effect of Mr. Phillipps' admissions to the Court.

HOWELL, C.J.M., has amended his reasons for judgment, so as to make the terms of the reference to the Master, to find:—1. What loss the plaintiffs sustained by reason of the drafts set out in the statement of claim (drawn after September 15, 1911) being credited to the account of Youngberg or that of Youngberg & Vassie in the books of the bank instead of being paid to Youngberg in cash. 2. The amount, if any, that the plaintiff has received from or on behalf of Youngberg on account of the drafts set out in the statement of claim.

And let it be declared that the appellant should be liable for the sum found in par. 1 of the said reference less the sum, if

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any, found in par. 2 thereof, provided, however, that in no event should the appellant's liability exceed the sum of $12,028.10.

HAGGART, J.A.:—The foregoing were my reasons given when judgment was delivered. By reason of the difference of judicial opinion some difficulty arose on settling the minutes of the formal judgment of the Court. To have a majority judgment from which an appeal could be taken, I, with the consent of defendant's counsel, agreed to the minutes as now drawn, and concurred in the conclusion of the Chief Justice.

B. C.

S. C.

MILNE v. DISTRICT OF S. VANCOUVER.

British Columbia Supreme Court, Clement, J. October 25, 1916.

TAXES (§ III G—151) — *Redemption — Extension of time— "Owner"—Mortgagee—Notice.*]—Stated case.

Reid, K.C., for plaintiff; *D. Donaghy*, for defendant.

CLEMENT, J.:—In my opinion there is nothing in the language of secs. 259 or 260 of the Municipal Act to warrant the holding that sec 260 operates as an extension of the time for redemption as definitely fixed by sec. 266. It is open to argument that sec. 260 is limited to requiring notice, as therein specified, to encumbrances only—the first and only notice to that class specially provided for in the Act. The "person assessed" gets notice at once after the tax sale: sec. 263. Under sec. 266 only the "owner" is given the right, a statutory right purely, to redeem. "Owner" does not include a mortgagee as I read the interpretation clause, R.S.B.C. ch. 71, sec. 2. It is also open to argument that the notice to encumbrancers required by sec. 260 should not be given until *after* the year has expired and after the buyer at the tax sale has demanded his deed, which he cannot do while the year runs. But, apart from these considerations, I cannot, as I have intimated, find anything in these other sections to warrant me in holding that by sec. 266 the time for redemption is impliedly extended.

See *McConnell* v. *Beatty*, [1908] A.C. 82, to which I referred counsel on the argument. Effect can be given to the word "previously" in sec. 259 by referring it to its nearest time phrase, namely, "the expiration of one year" rather than to the phrase "executed.....at any time." *Answered accordingly.*

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Manitoba Court of Appeal, Howell, C.J.M. and Richards, Perdue, Cameron and Haggart, JJ.A. December 20, 1916.

MUNICIPAL CORPORATIONS (§ II C 3—112)—SHOPS REGULATION—EARLY CLOSING—DRUG STORES—JURISDICTION.

The first fourteen sections of the Shops Regulation Act (R.S.M. 1913, ch. 180) are in force in the City of Winnipeg; a by-law passed thereunder requiring that shops be closed at and after 6 p.m. each week day does not apply to druggists' shops; except as to goods the sale of which after hours is specially prohibited by such by-law, there is no limitation as to what a druggist may sell; a magistrate has no power to decide what goods fall within the description of "goods usually sold or kept for sale" by druggists; but such goods may be defined in a by-law.

[See also *Re Simpson* (Ont.), 1 D.L.R. 15; *Re McCoubrey* (Ont.), 9 D.L.R. 84, 12 D.L.R. 855; *Re Medicine Hat* (Alta.), 20 D.L.R. 149; *King* v. *Schuster* (Man.), 8 Can. Cr. Cas. 354; *Rex* v. *Doll*, 7 Terr. L.R. 472; *Montreal* v. *Beauvais*, 42 Can. S.C.R. 211.]

STATED case in a prosecution under the Shops Regulation Act (R.S.M. ch. 180). Statement.

R. B. Graham, for informant.

F. K. Hamilton, for defendant.

RICHARDS, J.A.:—The facts are set out in the stated case. It does not shew the amount of the fine imposed, but no question was raised as to that. Richards, J.A.

The 2nd question asked—whether the by-law is *ultra vires*—was abandoned on the argument.

The points to be decided are: (1) Are the first 14 sections of the Shops Regulation Act (R.S.M. 1913, ch. 180) in force in Winnipeg? (2) If they are, was the Drug Co. obliged by the by-law to actually close its place of business at 6 o'clock in the afternoon? (3) If not so obliged, was it permissible for the Drug Co. to sell, during the hours prohibited by the by-law, an article which the magistrate considered to be one not usually sold, or kept for sale, by druggists or pharmaceutical chemists?

It was not contended that the by-law (No. 1853) was not in force. That was settled by *Stark* v. *Schuster*, 14 Man. L.R. 672—reported as *The King* v. *Schuster*, in 8 Can. Cr. Cas. 354. But it was argued strongly that, though the by-law was saved by sec. 691 of the City Charter, as held in that case, the present Shops Regulation Act is not in force in Winnipeg.

The argument is founded on sec. 15 of that Act and on the proviso following sub-sec. (*a*) of sec. 2 of the Municipal Act; to which may be added sub-sec. (*ee*) of sec. 27 of the Manitoba Interpretation Act. Sec. 15 of the Shops Regulation Act says:—

15. Subject to the provisions in the preceding sections contained, any by-law passed by a municipal council under the authority of this Act shall,

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for all purposes whatsoever, be deemed and taken to have been passed under and by authority of the Municipal Act, and as if the preceding sections of this Act had formed part of the Municipal Act, and the preceding sections of this Act and the Municipal Act shall be read and construed together as if forming one Act.

The proviso following sec. 2 (*a*) of the Municipal Act says:—

Provided, however, that, except in the particular cases where it is specially made applicable, this Act shall not apply to the City of Winnipeg. . . .

I can find nothing in the Municipal Act which expressly makes the Shops Regulation Act applicable to the City of Winnipeg.

It will be noticed, however, that the above clause does not purport to exclude from applicability to the City Acts that for certain purposes are to be read as one with the Municipal Act.

Sub-sec. (*ee*) of sec. 27 of the Manitoba Interpretation Act says: Subject to the limitations in sec. 2 of this Act, in every Act of the Legislature:—

(*ee*) the expression "municipal council" means the council having the government of a municipality under the Municipal Act, or other Act relating to municipal institutions.

Sec. 2 of the Interpretation Act says:—

2. Each provision of this Act shall . . apply to every Act of the legislature . . , except in so far as such provision (*a*) is inconsistent with the intent and object of any such Act. . .

The Interpretation Act itself has the following: 27. Subject to the limitations in sec. 2 of this Act, in every Act of the legislature—"(x) the expression 'city' . . includes a city having a special charter. (y) the expression 'municipality' includes a city . ."

The Shops Regulation Act, under the heading "Interpretation," says: "2. In the 16 next following sections, and in any by-law passed under the provisions thereof, unless the context otherwise requires—(*c*) the expression 'municipality' means the city, town, village or rural municipality, the municipal council whereof, . . passes any by-law under the provisions of this Act. (*d*) the expression 'municipal' relates to *any* municipality."

Reading the above with the provision in the Interpretation Act, that "city" includes a city having a special charter, there should, I think, be little difficulty in holding that sec. 27 (*ee*) of the Interpretation Act does not control the expression "municipal council" in the Shops Regulation Act so as to prevent such words from extending to the council of the City of Winnipeg.

The interpretation clauses of such last named Act having been specially enacted as to that Act, would for the purposes of that

Act override any clauses in the general Interpretation Act, with which they clashed.

Sec. 3 of the Shops Regulation Act—eliminating words not necessary for this decision—reads:—

> Any municipal council may by by-law require that . . shops within the municipality . . shall be closed and remain closed . . between 6 of the clock in the afternoon of any day and 5 of the clock in the forenoon of the next following day.

Unless sec. 15 makes the sections which precede it of no effect except as part of the Municipal Act, the proviso in the Municipal Act that such last-named Act shall not apply to the City of Winnipeg can have no application to the Shops Regulation Act.

When the Shops Regulation Act was first enacted by ch. 32 of 51 Vict. as the Manitoba Shops Regulation Act, 1888, it contained in sub-sec. 14, of sec. 2, a provision similar in effect to sec. 15 in the present Act.

That was made advisable by the fact that the then Municipal Act contained machinery for passing and enforcing by-laws, and an incorporation in the Shops Regulation Act of the clauses containing that machinery saved unnecessary repetition in the latter Act.

Winnipeg was then subject, like all the rest of the province, to the Municipal Act, under which its council acted. It still was applicable to Winnipeg when the by-law in question was enacted.

The special charter of Winnipeg was enacted in 1902, and was merely a special municipal Act relating to that city.

Sec. 931 of that charter says:—

> Any and all provisions of any existing statute of Manitoba which are inconsistent with the provisions of this Act, but such provisions only, and only in so far as the same are so inconsistent, are hereby repealed, such repeal, however, shall affect the City of Winnipeg only, . . but all rights, powers and privileges now held and enjoyed by the city and not specifically abrogated or taken away or amended by this Act shall be and remain in full force, virtue and effect, in the same manner as if this Act had not been passed and to the full extent thereof. . .

If the provisions of sec. 2, sub-sec. 14 of the Act of 1888 had the effect of making the preceding parts of the Act nothing but a part of the Municipal Act, then that sub-sec. 14 . . to the extent to which it so narrowed it . . was, I think, repealed, as to the City of Winnipeg, by the above sec. 931.

In the R.S.M. 1902, which came into force March 6, 1903, the Municipal Act contained a provision that it should not apply to

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Winnipeg. But it can hardly be doubted that nothing in it was intended to curtail the powers which the city possessed outside of the Municipal Act. Its sec. 527 enacted that:—

> Notwithstanding anything herein contained . . the corporation of the City of Winnipeg shall retain and enjoy all rights, powers and privileges . . which at the time of the coming into force of this Act, such corporation, by virtue of sec. 931 of the Winnipeg Charter or otherwise, was entitled to retain and enjoy . . except as by any other Act provided otherwise.

This sec. 527 was not re-enacted in the 1913 revision, but its mere omission can hardly be said to have changed the application of the Shops Regulation Act to Winnipeg.

In those Revised Statutes of 1902 the Shops Regulation Act was re-enacted, as a separate Act, and, so far as concerns secs. 2, 3 and 15, in language practically similar to what is quoted above from the present Act.

In the Act bringing those Revised Statutes into force, sec. 6 says they shall not operate as new laws but shall be construed and have effect as a consolidation, and as declaratory of the laws as contained in said Acts and parts of Acts, for which they are substituted. The Act bringing in the Revised Statutes 1913 contains a similar provision.

If the Shops Regulation Act does not apply to Winnipeg, probably nine-tenths of the shops intended to be affected by it are not so affected. I know of no other general Act which was so peculiarly and, in its working out, almost exclusively, applicable to that city. Its practical effect can be very little outside of Winnipeg. That being so, I think every reasonable effort should be made to hold that its application to the city has not been eliminated.

If the intention was to make it, or its first 14 sections, solely a part of the Municipal Act, why was it (or at least the part so affected) re-enacted as a separate Act from the Municipal Act in each of the two revisions of the statutes that have taken place since the time when the city became excepted from that Act, instead of being merged in the Municipal Act? The fact that it was not is, I think, strong evidence that it was not so intended.

I can only think that the continuing of sec. 15 in its present form in the two revisions was had without noticing the effect now sought to be given to its reading with the above quoted part of the second section of the Municipal Act. It can hardly be supposed that, in such a manner, sec. 931 of the City Charter was

to be altered, so as to prevent its retaining the application of the Shops Regulation Act to Winnipeg.

Then, if the Act is in force in Winnipeg, we have to deal with the question whether a by-law, enacted under sec. 3 and not purporting to except drug shops from its operation, requires a druggist to actually close his shop at 6 o'clock.

Druggists are not excepted by sec. 2 (*a*) of the Act, or by the terms of the by-law itself, which only purports to except such shops as are excluded by 2 (*a*) from the operation of the Act.

In the Act of 1888, sec. 2, sub-sec. (10), which enacted that a druggist should not be liable to a penalty for supplying medicines etc., after the hour appointed for closing, said at its end: "but nothing herein contained shall be deemed to authorize any person whomsoever to keep open shop after the said hour."

Sub-sec. (11) of that section provided that nothing in the by-law should render the occupier of any premises liable for supplying articles to lodgers or articles required for immediate use because of any emergency from sickness, ailment or death, and ended with a proviso similar to that at the end of sub-sec. (10) that it should not authorize keeping open shop after the hour appointed by the by-law.

Provisos of similar effect were enacted at the end of secs. 11 and 12 in the R.S.M. of 1902, which deal with the same subject as sub-secs. (10) and (11) in the 1888 Act. There was a practical contradiction between the permission under sub-sec. (10) of the 1888 Act, continued as sec. 11 in the 1902 revision, to sell after 6 o'clock and the prohibition of keeping the shops open provided by sec. 3 and by-laws passed under sec. 3. At least it must have been found that, if the prohibition were enforced, its operation would very inconveniently restrict sales to people needing medicines after 6 o'clock.

As a result, probably, of such contradiction, or of the inconvenience of such restriction, ch. 40 of 7 & 8 Edw. VII. was enacted, by which sec. 11 was repealed and a new section enacted in its place. That new one contained no provision, as the former ones had, that it should not "be deemed to authorize any person whomsoever to keep open shop after the said hour."

In the revision of 1913, sec. 11 is in the exact words as enacted by the Act of 7 & 8 Edw. VII., but sec. 12 of the 1902 Act, as re-enacted in the 1913 revision, still contains the prohibition against

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keeping open shop after the hour appointed by the by-law. There are, therefore, in the 1913 Act these 2 secs. 11 and 12 side by side; the latter still continuing the prohibition and the former not merely not containing it, but having twice been enacted without it, after formerly containing it.

It is true that secs. 2 and 3 do not purport to except druggists' shops from the by-law. But, considering the need, which is a matter of common knowledge, for the keeping open of drug shops during the evenings, I can only conclude, from the omission in the new sec. 11 and the continuance in the new sec. 12 of that prohibition, that the intention of the legislature was that, notwithstanding secs. 2 and 3, the closing hour, fixed by the by-law, was not meant to continue to apply to druggists' shops.

Then, if a druggist is at liberty to keep open shop after the closing hour fixed by the by-law, is he restricted from selling, during that period, such goods as a magistrate shall consider do not come within the classes allowed by sec. 11 to be then sold?

Sec. 11 (omitting parts immaterial to the present case) reads:—

No pharmaceutical chemist, or chemist and druggist, nor any of his employees, shall be liable to any fine, penalty or punishment under any such by-law for supplying medicines, drugs, or medical applicances, or selling any goods usually sold or kept for sale by pharmaceutical chemists, or chemists and druggists, subject to the limitations in this section hereinafter provided . . but should it appear to any council at any time that such druggists are taking advantage of the provisions of this section to sell, after the prescribed hour for closing, any line of goods which is, in the opinion of any such council, not properly within the class of goods usually sold by druggists, such council may pass a by-law specifically stating that any particular line or class of goods shall not be sold in any drug shop after the prescribed hour for closing, and such by-law may *then* be enforced and any infraction thereof punished notwithstanding anything contained in this section.

The section recognizes that druggists might sell, after hours, goods not within the description of those, the sale of which it is the intention of the section to permit, and provides, as a method of preventing such practices, that a by-law may be passed defining classes of goods that should not be so sold. The remedy by such by-law is apparently a complete one.

I am therefore of opinion that, except as to goods the sale of which after hours is prohibited by such by-law, there is no limitation in the Shops Regulation Act as to what may so be sold.

It is true that the section only expressly permits such selling of medicines, drugs or medical appliances "*or goods usually sold or kept for sale* by pharmaceutical chemists or chemists and drug-

gists," but the words "goods usually sold or kept for sale" are indefinite, and I think the latter part of the new section was intended to provide the sole method of fixing what does not come within their meaning. The remedy is in the hands of the council. It is for them, and I think for them only, to say what goods do not come within the above definition.

If, without such a by-law, a magistrate is to decide the question, a druggist can never be sure what he may, or may not, sell under the definition "goods usually sold or kept for sale," etc. Magistrates might, and doubtless would, differ in their views, and so increase the uncertainty.

There has admittedly been no such restricting by-law in Winnipeg.

I would answer the first question in the affirmative and the third question in the negative, and quash the conviction.

Richards, J.A.

HOWELL, C.J.M., PERDUE and CAMERON, JJ.A., concurred with RICHARDS, J.A.

Howell, C.J.M.
Perdue, J.A.
Cameron, J.A.

HAGGART, J.A.:—I agree with the conclusion arrived at by Richards, J.A., whose reasons I have been allowed to peruse.

Haggart, J.A.

Sec. 11 of ch. 180 R.S.M. is the most recent legislation respecting the early closing of drug stores.

Having come to the conclusion that Winnipeg is not excluded from the provisions of this statute, then when the enactments contained in sec. 11 differ from or are inconsistent with any other early-closing law enacted by by-law or statute, sec. 11 will govern, and must, I think, as contended for by Mr. Hamilton, be read into such earlier law. Sec. 11 enacts that

> should it appear to any council at any time that such druggists are taking advantage of the provisions of this section to sell after the prescribed hour for closing, any line of goods which is in the opinion of such council not properly within the class of goods usually sold by druggists, such council may pass a by-law specifically stating that any particular line or class of goods should not be sold in any drug shop after the prescribed hour for closing, and such by-law may then be enforced and any infraction thereof punished notwithstanding anything contained in this section.

It is to be observed that this section is specially directed against the druggists, and the legislature, in its wisdom, has left it to the council of the municipality to say what is most for the convenience of its citizens.

A by-law passed by the council under the provisions of sec. 11 would be necessary to sustain a conviction for the offence in question.

MAN.

C. A.

Haggart, J.A.

I would answer Q. 1 in the affirmative; and Q. 3 in the negative. Counsel did not press for an answer to Q. 2.

Conviction quashed.

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IMPERIAL LUMBER CO. v. GIBSON.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Scott, Stuart and Beck, JJ. December 16, 1916.

APPEAL (§ VII M 3—535)—CORRECTNESS OF COURT'S FINDINGS—CONFLICTING EVIDENCE.

Where the evidence at a trial is conflicting, the Appellate Court will not set aside the finding of the trial Judge, who has had the advantage of seeing and hearing the witnesses, and forming a correct estimate of the value of their evidence, unless it is obvious that he has come to a wrong conclusion on the facts of the case.

Statement.

APPEAL by plaintiff from the trial judgment in an action on an alleged contract; dismissed by an equally divided Court.

O. M. Biggar, K.C., for appellant.

C. C. McCaul, K.C., for respondent.

Harvey, C.J.

HARVEY, C.J.:—The plaintiff maintains that the defendant agreed to supply it with the whole season's cut of lumber at its mill at Bickerdike at the price of $11.50 per M. at the mill. At the trial the plaintiff's manager swore that such an agreement had been made with him, and other witnesses were called to corroborate him. The defendant on oath denied it. The trial Judge held that the burden which was on the plaintiff to establish to his satisfaction the existence of the contract had not been satisfied and dismissed the action.

In a case such as this where there is conflicting oral testimony upon the essential facts the advantages the trial Judge has for forming a correct conclusion as to the value of the evidence, which are not available to one having nothing more than the transcript of the evidence, are such that the Appellate Court will hesitate to say that he is wrong. It is true that the trial Judge made no suggestion that anyone was, in his opinion, committing perjury, but if he had accepted the testimony of the plaintiff's manager with the confirmation it received from the other witnesses he would have been satisfied and would have given the plaintiff judgment. The consideration of the appeal must, therefore, I think, be approached with the view that the evidence was rejected, and I propose therefore to consider the case from the point of view of the defendant's evidence only. It is admitted that there was a long discussion in the McDonald Hotel for the purpose

of arriving at the agreement which the plaintiff maintains was made. It is also admitted that at that discussion the plaintiff's manager made a memorandum in a note-book of the particulars, and that the memorandum was read over to the defendant. That memorandum is in the following terms:—

Mill cut per thousand, flat rate, f.o.b. Bickerdike $11.50, D. 4 S. f.o.b. Bickerdike $12.00, Mill cut to be 3,000,000, sawn to specifications sent by Imperial Lumber Co., mill to cut three or four cars weekly. Terms to be sight draft to be paid as soon as cars received and checked. D. 4 S. after May 1, 1916.

The interview took place about the middle of February, and almost immediately thereafter the defendant began shipping to plaintiff, and shipped 7 cars, for the price of which he made drafts at the rate of $11.50 per thousand. He then ceased shipping, and refused to ship any more.

Prior to the meeting the defendant had written plaintiff a letter on February 2, stating that he would be ready to ship in about 2 weeks, and offering to ship at $14.50 per thousand, Edmonton, which he explains was considered the same as $12 f.o.b. Bickerdike, terms of payment being sight draft 4 to 8 days from date of invoice. He says "we can double surface, D. 4 S. 1x4, 1x5, 1x6, 1x8, 1x10, 1x12 at $2 more." It is explained that D 4 S means "dressed on four sides."

The defendant claims he refused to supply the whole cut at anything less than $12, his reason being that owing to an obligation to some one else he could not sell at less without losing money, but that to avoid the expense of piling and waiting he did agree to ship the plaintiff at $11.50 per thousand as long as he could afford to do so. There is an apparent inconsistency in this, but perhaps what he had in mind was that he would ship at that price until he could get a better one from some one else. He admits, however, that he did not refuse to ship any more cars for that reason, for after his refusal to ship to plaintiff he shipped several cars to another party at the same price. He, therefore, on his own admission, broke the contract which he says he made, but he justifies it on the ground that payment was not made as agreed. The evidence does not appear to establish this, but as this is not the contract sued on, it is unnecessary to consider this further.

In the opening of the defendant's examination in answer to his own counsel after stating that the plaintiff's manager said he could buy lumber at $11.50 or less he said, "I said go ahead and

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buy it at that price because I have to allow Mr. Ecker $12, and if I sell to you at $11.50 I will lose 50c. a thousand and the rest of the argument was over that 50c. a thousand." Although he suggests here that this was the only point of difference, he explains further on that—the amount 3,000,000 ft. was only what he said the mill would cut if running all the time. Though by the statement of claim it is alleged that there was a guarantee of that amount no such claim was made on the argument so there is no real point of dispute in that now. The defendant says, however, that the terms of payment were to be as specified in his letter and not as noted in the memorandum. This difference is also of no importance for the present consideration. As to everything else, he admits that they were in agreement on the terms specified in the memorandum.

I find myself quite unable to reconcile the fact of agreement on the price of $12, for lumber D 4 S with the continued standing out for $12 as the general price. That it was agreed that he would not be bound to supply such lumber for 2½ months indicates a contemplation that the supply would continue for a considerable length of time, but even assuming that he only means that that was conditional upon his continuing to supply under the agreement which he states was made, the agreement on the price of lumber D 4 S at $12, and specifying it appears to me quite inconsistent with the view that the general price had not been agreed on at something less. In the letter he asked $2 extra per thousand. It seems clear that the price would be more and if it were not there would be no occasion whatever for specifying any price.

I am of the opinion that the trial Judge overlooked the bearing of this fact. There is no suggestion in the defendant's evidence that there was ever any question between them as to the price of this class of lumber. The price would naturally be based on the price for undressed lumber and would therefore naturally be determined only when the price for undressed lumber had been determined.

All of the facts appear to me to be consistent with the view that there was a concluded agreement as maintained by the plaintiff's evidence while this fact appears inconsistent with the defendant's story and the subsequent conduct appears to be less consistent with it. I think, therefore, that judgment ought to be in favour of the plaintiff declaring that the agreement was

that the defendant should supply all of the year's cut and as that agreement has been broken there should be a reference to determine the damages suffered. I would therefore allow the appeal with costs and direct that the judgment be set aside, and judgment entered for plaintiff as indicated with costs on the scale to be determined by the result of the reference.

SCOTT, J., concurred with STUART, J.

Scott, J.

STUART, J.:—I think this appeal should be dismissed. The trial Judge, in my opinion, took exactly the right view of the matter. The evidence was contradictory. He simply refused to be convinced by the plaintiff's testimony that the defendant had agreed to sell them the whole output of his mill at the price named. I should myself also have entertained the same doubt. Much reliance was placed upon a memorandum which Cook had scribbled in pencil on a scrap of paper. This was stated to contain the terms of what was agreed upon. Upon looking at it I cannot find any such agreement in it. Nowhere does it say that the defendant was to sell all the output of his mill. The expression "mill cut to be 3,000,000 ft." does not amount to that, quite obviously. What we are asked to believe is that the defendant entered into a contract to sell 3,000,000 ft. of lumber, the price being $48,000, during this haggling conversation. The phrase I quote must mean that or it means little of anything. But, of course, it does not even say that. Neither is there a hint in the memorandum that what was sold was to be all the lumber cut however much that was. Yet it is contended that the memorandum contains what was agreed upon.

Stuart, J.

Furthermore, I do not think it is safe to allow witnesses, who cannot quote, who do not attempt to quote, a defendant's words, to fasten a bargain upon him of such magnitude by swearing to the effect of his language or to the substance of it. This may be allowable and quite the proper course where what is testified to is collateral only. But where the enquiry is, did the defendant agree to a certain important thing, the very basis of the action, it is for the Court to say what the substantial effect of his language was. I do not think the witnesses should usurp this function of the Court and swear to the conclusion or inference from his words which it is for the Court to make. For myself, in such a case, I always am anxious to hear what the defendant's exact words were,

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so that I may myself know and decide what was their substance and effect rather than take that conclusion from the witnesses.

I do not think the trial Judge's criticism of the attempt to conceal Hawe's identity was the basis of his decision. I cannot find anything else in his judgment which, upon principle, can be objected to; and as he was unconvinced—as I think properly so—of the real terms of the bargain or conversation, I do not see why we should interfere with his decision.

Beck, J.

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

Appeal dismissed, the Court being equally divided.

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BONHAM v. The SHIP "HONOREVA."

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Anglin and Brodeur, JJ. October 16, 1916.

SHIPPING (§ I—3)—COLLISION—CHANNEL—BRIDGE—LIABILITY.

A steam vessel which fails to keep to the starboard side of a narrow passage between the piers of a bridge across a canal violates rule 17 of the "Canal Rules and Regulations," and if a collision occurs in consequence she is solely liable for the resulting damage.

Statement.

APPEAL from the judgment of the Exchequer Court of Canada affirming the decision of Dunlop, J., in the Quebec Admiralty Division of the Exchequer Court of Canada, by which the plaintiff's claim for damages was dismissed with costs, and the defendant's counterclaim, on a reference for reconsideration, was maintained.

J. A. H. Cameron, K.C., for appellant.

Heneker, K.C., and *Chauvin*, K.C., for respondent.

Fitzpatrick, C.J.

FITZPATRICK, C.J.:—I concur in the conclusion reached by Idington, J.

Davies, J.

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

Idington, J.

IDINGTON, J.:—This is an appeal against the judgment of the Exchequer Court maintaining a judgment of Dunlop, J., in favour of respondent.

The appellant sued as owner of the barge "The Maggie" sunk and lost or damaged by reason of a collision with the respondent in the Soulanges Canal when being towed by the tug "Frank Jackman" down said canal and about to enter the Red River bridge, crossing said canal.

It seems quite clear that the collision took place west of the bridge and, according to respondent's factum, when her stern was opposite the "West Rest Pier."

The respondent was moving westerly and the tug-and-tow easterly. The bridge is a swing bridge and when opened rests

with either end on a cement pier. The easterly one is known as the "East Rest Pier" and the westerly one as the "West Rest Pier." The entire distance between the easterly side of the "East Rest Pier" and the westerly side of the other is a little over 300 ft. The entire length of the bridge is a little over 220 ft. It swings on a pivot half way between these piers. It is less than 40 ft. in width and occupies in itself but little space.

The water channel between the cement walls on either side of the canal underneath the bridge and its sweep of space in opening or closing and between these piers is 102 ft. in width—or a few feet less in width than the general width of the canal for a long distance on either side of the bridge.

The water is of the same depth between the cement walls belonging to the bridge structure and that in the bottom of the canal on either side thereof.

In fact, the only practical difference in the channel passing under the bridge and that in the part after the bridge is passed, is that the cement walls are about perpendicular and the bank of the rest of the canal slopes up on each side thereof from the bottom of the general depth of the water. In considering this case and the draught of the respondent and circumstances herein the difference is of little consequence.

The rule of the road applicable to the case of meeting vessels is art. 25, sub-sec. (*a*) which reads as follows: —

> In narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel,

enforced, as it seems to me, by art. 17 of the Canal Rules and Regulations, which reads as follows:—

> 17. In all cases of vessels meeting in a canal, their passing shall be governed by the then existing rules and regulations of the Marine Department respecting the passage of vessels; and any violation of such rules shall subject the owner or person in charge of the offending vessel to a penalty of not less than two dollars and not exceeding twenty dollars.

The observance of these rules on the part of the respondent would have avoided the collision in question. A little regard for the rights and safety of others on the part of respondent would also have avoided the collision.

There never perhaps can be framed rules that will serve the infinite variety of circumstances arising in navigation, and hence due care and use of a little common sense must be held binding

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upon all concerned as well as the due observance of the written law.

Whether any two vessels should ever attempt to meet and pass each other in such a place as between the walls and piers at and under this bridge must depend largely on the size and structure of the craft involved in the movement. No one would pretend that two row-boats or two small launches or small tug-boats without any tow should never attempt to pass each other in that part of the canal simply because there was a swing bridge overhead. Nor do I imagine that two such vessels as respondent, or as she and the tug-and-tow in question, should try to do so.

Having outlined the situation and what I conceive to be the law applicable, there are a few outstanding contentions set up which I wish to dispose of without pretending to enter upon all the points of dispute raised herein.

The appellant claims that his vessel had the right of way because there is a current and he was moving with the current. I am not inclined to dispute his contention in a proper case, but his tug-and-tow failed to reach the place where they might have asserted such a right and they failed to signify, either by what some assert is the usual practice or in any other way, the intention to claim what I assume, without expressing any definite opinion, might have been their right.

Moreover, counsel at the trial did not in launching this case found anything upon that pretension. All involved therein seems to me should be set aside from consideration herein.

The respondent's pilot and others pretend they did not see the tug-and-tow till within 300 ft. All I need say is that, in my opinion, if they did not they should have seen them earlier, as it was broad daylight and no reason why a proper lookout should not have observed the tug-and-tow when a mile away as those on the latter, with probably less chance of observation, did see respondent at that distance.

I can find no excuse therefor unless I find it in the anxiety for dinner or laziness. Nay, more, if a proper lookout had been kept the pilot in charge should have known the situation better and governed himself accordingly. If he had done so he would not or should not have persisted in keeping to the centre line of the narrow channel when it was so easy to have kept to the starboard without running the slightest risk or inconvenience. If

he had tried to get into a position where he would have been enabled to observe the letter of the law when he reached the place where the collision took place, he would then have put his vessel on the starboard side of the channel and there would have been no such collision as took place, unless there had been more unjustifiable conduct on the part of the tug-and-tow than appears.

The letter of the law, to say nothing of the reasonable conduct called for under the circumstances on the part of the pilot had he realised as he should have done the actual situation, demanded that the respondent ought to have been at her point of progress where the collision took place on her own side of the channel.

For these reasons I think the appeal should be allowed and the respondent be condemned to pay damages.

The case of *Davies* v. *Mann*, 10 M. & W. 546, is, strangely enough, relied upon by respondent. I should rely upon it as furnishing that law of reason and common sense (which ought to be identical) which forbade the respondent, if due care and proper outlook had been kept, from running down this tug-and-tow even if, by the folly of their managers, tethered like the donkey in the wrong place. My difficulty in the case begins there, however.

At common law the respondent in such a case would be cast for the whole damages. Can we find anything in the conduct of the tug-and-tow to blame?

Giving due heed to the excuses put forward for being placed where they were I cannot quite excuse them for taking all the risks they did.

It seems impossible to be quite sure whether the effect of the movement of respondent in the water produced all the results in the movement of the tow which are described. It would have been so easy after whistling its intentions, by a single blast, of going to starboard for the tug to have tried to remain still for a few minutes or to have got to the starboard side and tried to remain so, still, when it had evidently lost its chance of priority in entering the bridge area that I cannot acquit it of all blame. I think it was the minor offender. It was smaller than respondent and the insolence of the stronger, who will not be just, cannot be too often rebuked and made to bear the consequences of disregarding the rights of others.

I shall be governed by others of this Court taking my view

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of respondent's action in allotting the relative shares to be borne of the damages.

The counterclaim of course fails, in my view, and no need for entering upon the law bearing upon the case in that regard.

I may, however, remark that those disposed to take the case of the ships *"A. L. Smith" and "Chinook"* v. *Ontario Gravel Freighting Co.*, 51 Can. S.C.R. 39, 23 D.L.R. 491, for their guide, should observe that there the tug-and-tow were both owned by and under the direction of one common owner.

Anglin, J.

ANGLIN, J.:—An outstanding and most material fact, found by the trial Judge, affirmed on appeal to the Exchequer Court and supported by the evidence of the witnesses for the defence as well as that of the witnesses for the plaintiff, is that, when the collision which forms the subject of this action occurred, the up-coming steamship, the "Honoreva," was in mid-channel. If she was rightly there—if she had an exclusive right of way—if it was the duty of the downgoing tug-and-tow at their peril to have avoided her, then the judgments in appeal are well founded. They rest on this basis, held by the learned trial Judge, and affirmed by the learned Judge of the Exchequer Court, as a matter of law and upon the construction of the rules deemed applicable to the circumstances. If, on the other hand, the down-going tug-and-tow had right of way, or if both vessels were equally entitled to the right of passage through the bridgeway, then the "Honoreva" was at fault in holding the mid-channel and the judgments in her favour cannot be supported.

If the judgments in appeal depended on findings of fact, made upon conflicting evidence, I would be disposed not to interfere with them. In regard to several questions of fact, however—some of them important, others probably not vital—I am, with great respect, of the opinion that conclusions have been reached which indicate a grave misapprehension of the evidence. For instance, the trial Judge states:—

> The "Honoreva," when she was about to enter the opening of the bridge and when it was not possible for her to stop or to turn back, observed a steamer towing a large barge coming in the opposite direction.

The plaintiff's witnesses agree in stating that they saw the "Honoreva" when she appeared to be 6 or 7 arpents (1150-1300 feet) below the bridge, they themselves being about the same distance above. The defendant's pilot, Daignault, says that the

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"Honoreva" was 300 ft. below the bridge when he saw the down-coming tug immediately on the opening of the bridge. He adds that the tug was then a quarter of a mile, or 1,320 ft., above the bridge, the two boats according to this estimate being over 1,600 ft. apart. Yet the trial Judge says:—

> The pilot, Daignault, swears that the tug was about 300 feet away when it was first seen by those on board the "Honoreva."

Daignault adds that he concluded, when he first saw the tug on the opening of the bridge, that he would have time to pass through before the tug and barge would enter. He says he did not tie up to the right side of the canal below the bridge because he believed he had time to pass through; and that if he had anticipated the boats meeting in the bridgeway, would, as a prudent man, have waited below the bridge. He went on because he was convinced that he had time to pass through. From this evidence it is abundantly clear that the "Honoreva" could have stopped below the bridge after her pilot saw the approaching tug-and-tow.

When the bridge was opened the "Honoreva" was ascending the canal in mid-channel at a speed of about four miles an hour. She probably slowed down to 2½ or 3 miles an hour while passing through the bridge. The tug-and-tow were descending at a speed of about 5 miles an hour and maintained that speed. I have no doubt that the "Honoreva" was in fact considerably nearer to the bridge than were the tug-and-tow and that the estimate of witnesses for the plaintiff as to the distance of the "Honoreva" below the bridge when they first saw her is erroneous. I accept Daignault's statement that she was then about 300 ft. below the bridge.

The Judge further holds that Daignault would have seen the tug sooner if the latter had whistled to have the bridge opened. He might have heard such a signal, although those on board the tug did not hear the like signal given by the "Honoreva;" but, according to the evidence, the bridge until opened probably obstructed the view and would have prevented the tug-and-tow being seen from the "Honoreva;" and Daignault says he saw the tug as soon as the bridge was opened.

In par. 5 of the statement of defence, it is stated that chief officer Denwoodie of the "Honoreva" was on the forecastle head on the lookout. No doubt he should have been there. There is

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no suggestion that there was any other lookout. Denwoodie gives this evidence:—

Q. Did you see the accident? A. No. Q. Where were you? A. I was getting dinner in the saloon. Q. Therefore you know nothing about the accident? A. No. Q. You were downstairs? A. Yes.

The failure of those in charge of the "Honoreva" to see the tug earlier, if the bridge did not prevent it, was probably due to this absence of lookout. The tug is blamed for not having signalled for the opening of the bridge. But it was opened on the signal of the "Honoreva" given when she was 500 ft. below the bridge, and while the tug was still over 1,300 ft. above it. There was no obligation upon her to give an unnecessary signal.

Shortly after the opening of the bridge, signals were exchanged between the two vessels to indicate upon which side they intended to pass one another. The Judge states:—

The "Honoreva" blew one blast of her whistle notifying the "Jackman" that she wished to pass her port to port, at the same time putting her helm to port. This latter signal was answered properly by the "Jackman."

The fact, as deposed to by the plaintiff's witnesses and also by the pilot Daignault, is that the "Jackman" first signalled by one blast of her whistle for a starboard course and that the "Honoreva" by a like signal replied accepting that course. There is no evidence that the "Honoreva" first signalled for a starboard course. If, as the Judge says, and plaintiff's witnesses thought was the case, the "Honoreva" put her helm to port when the signal for a starboard course was given (a fact which the "Honoreva's" witnesses deny), she must have reverted to the mid-channel course very shortly afterwards, because the testimony of Daignault and of all the other witnesses is explicit that in passing through the bridge she held the mid-channel. If the helm of the "Honoreva" was momentarily put to port, as the Judge finds, that fact affords an explanation of the statement of the plaintiff's witnesses that, if the "Honoreva" had held the course then taken or the course they properly assumed she had taken, in view of her response to the "Jackman's" signal, the passage could have been safely effected and the collision would not have happened. Indeed, Vernier, the captain of the tug, appears to have been under the mistaken impression that the "Honoreva" had gone to starboard when she answered the tug's signal, had maintained a starboard course when coming through the bridge piers and, as he puts it, "sheered" to mid-

channel only very shortly before the collision. According to the evidence of Daignault the "Honoreva" maintained her mid-channel course until she was clear of the bridge, and her helm was then put to port. Very shortly afterwards—according to the evidence of the assistant engineer, Stewart, either a couple of seconds before or a couple of seconds after the collision (he puts it both ways)—the engines of the "Honoreva," which had been at "dead slow forward," were reversed to "full speed astern." The effect of the change of helm and reversal of engines probably was to deflect the bow of the "Honoreva" slightly to starboard at the moment of the collision and to throw her stern somewhat to port. This accounts for the fact that the vessel was struck 30 ft. abaft her stem. But, as deposed to by the bridge keeper, Sauvé, and other witnesses, the "Honoreva" still occupied the mid-channel at the moment of the collision. The Judge of the Exchequer Court says that this testimony of Sauvé corroborates the evidence for the "Honoreva." As the trial Judge puts it:—

> The "Honoreva" proceeded to pass through in mid-channel. The "Honoreva" had not only entered the bridge but had *practically* passed through before the collision occurred.

It may, therefore, be taken as conclusively established that when the collision occurred the "Honoreva" was still in mid-channel.

In order to make the situation clear it is advisable to state a few other material facts which the evidence seems to place beyond doubt.

The "Honoreva" was 240 ft. long by 36 ft. wide and, as laden, drew about 14 ft.

The tug "Jackman" was 65 ft. long and between 13 and 14 ft. wide. The barge "Maggie" was 175 ft. long, 26 ft. 4 inches wide. She was light. The distance between the stern of the "Jackman" and the bow of the barge was between 20 and 35 ft. The Soulanges Canal has a uniform width at the bottom of the channel of 100 ft. and its banks a slope of two feet to one. The approximate depth of water is between 16 and 17 ft. At the Red River bridge the width at top and bottom alike is 100 ft. clear between piers.

There is a current down the Soulanges Canal of about 1 mile an hour. There were at the time of the collision, and there still are tying-up posts on the north, or right bank ascending, below the Red River bridge. At the date of the collision there were no tying-up posts on the south, or right hand side descending,

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above the Red River bridge; such posts have since been placed there.

The tug "Jackman" passed clear of the "Honoreva" which was struck 30 ft. abaft her stem by the barge "Maggie," whose captain says:

Il m'a frappé en joue de ma barge, à peu prés trois (3) pieds en avant de mon bateau, de côté.

The force of the collision drove the "Maggie" against the south pier of the bridge with such violence that she received injuries which subsequently caused her to sink.

Since the "Honoreva" was in the mid-channel, if not slightly to the south of it, she occupied at least 18 ft. of the 50 ft. of channel south of the centre line. It follows as an indisputable physical consequence that the port side of the tug was more than 18 ft. to the south of the centre line of the channel and the port side of the barge about that distance south of the centre line when the collision occurred. This bears out the statement of the captain of the tug that he had placed his helm to port and taken the starboard side of the canal from the moment that he signalled to the "Honoreva" his intention to take that course. The evidence of the captain of the tug is that at the moment of the collision the tug was 6 or 7 ft. from the south pier of the bridge and the captain of the barge says that the barge was 8 or 10 ft. north of the line of the face of that pier. There is no contradiction of these statements. The tug had already entered the piers of the bridge when the collision occurred; the barge was still some 25 ft. above them. As the trial Judge finds, "the 'Honoreva' . . had practically passed through before the collision occurred." When about 150 ft. away from the "Honoreva," the tug, already well to the starboard side of the canal, turned still further to the right, but the barge did not immediately take the new direction, possibly owing to there being but a single tow line. In the effort to pull away from the "Honoreva" the tug also increased its speed. The barge maintained its course for a few seconds—up to the time of the collision, the defence witnesses insist—a circumstance which accounts for the fact that at the moment of collision, while the starboard side of the tug was within 6 or 7 ft. of the south pier, the starboard side of the barge, although she was wider, was still from 8 to 10 ft. north of the pier line. But it also shews that the course maintained by the barge had kept her

port side from 13 to 15 ft. south of the centre line of the channel. Yet the case has been treated in both the lower Courts as if the tug-and-tow had maintained a mid-channel course until collision was imminent and had then first sought to pass to the starboard side of the channel. The Judge of the Exchequer Court says:—

I think it is evident the captain of the tug miscalculated the space between the "Honoreva" and the port shore and ported her helm too late and then to make up for her negligence put on extra speed preventing the tug from colliding but throwing the barge to port.

The captain of the tug states that, although already well to starboard, he turned still farther to starboard, when a short distance from the "Honoreva" because he then realized that she was persisting in her mid-channel course and that collision was inevitable unless he could succeed in bringing the tug and barge farther to the south. With the "Honoreva" occupying 18 ft. of the 50 ft. of channel to the south of the centre line, there was left for the barge, 26ft., 4 inches wide, only 32 ft. of clear way to pass through.

Apart from the fact that there were no tying-up posts on the south side of the canal above the bridge, which affords most cogent evidence that down-going vessels were not expected to stop, there is uncontradicted testimony, if, indeed, it be necessary, that, whereas it is comparatively easy to stop a steamer ascending against the current, it is more difficult to stop a down-going steamer, and that when the down-going steamer is accompanied by a tow it is dangerous to attempt to stop or even to slacken speed. Had the "Jackman" slowed and thus lost control of her tow in the current, a very strong case of negligent navigation might have been made against her. The trial Judge speaks of a "common custom and rule" that:—

No two vessels are allowed to cross each other in going through the opening of the bridge, which is the narrowest part of the canal; the first one arriving has the right to proceed through the bridge, the other being tied up or at least remaining a sufficient distance to enable the first vessel to get clear of the bridge, which, it appears by the evidence, the "Jackman" did not do.

I find no such rule in the record and no evidence of any such custom. Testimony bearing upon this particular matter is given by the bridge-keeper, Hector Sauvé, an independent witness, who says:—

Q.—Lorsque deux (2) bateaux viennent en sens inverse, est-ce que c'est l'habitude pour les bateaux qui remontent le courant d'accoster plus bas que le pont? A.—C'est presque toujours ce qu'ils font; surtout la nuit.

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Q.—Ils laissent passer le bateau qui descend, et passent après? A.—Oui. Ils s'en rencontrent quelqu'un; mais la plus grande partie attendent en bas; ils se rangent à côté, ils arrêtaient complètement; il y en a d'autres qui passaient pareil.

Q.—Mais la prudence est de modérer en bas? A.—Ils peuvent passer la même chose.

Although the pilot Daignault urges that because the tug-and-tow were so much farther above the bridge the "Honoreva" had the right of passage, he also says that if two vessels are about the same distance from the bridge the down-going boat has the right of passage.

Daignault says that his object was to pass through the bridge and clear it before the tug-and-tow entered and that it was because he thought he had time enough to do this that he proceeded instead of tying-up below. Yet he also states that when about to enter the bridge he reduced the speed of his vessel from about 4 miles an hour to dead slow—2¾ miles an hour—although he then realized that the tug-and-tow were coming down fast—he thought at more than 5 miles an hour. Daignault also makes the following statement:—

Q.—Juste avant la collision, avez-vous cru que la collision était possible, avez-vous craint qu'il y aurait collision? A.—Non monsieur.

This makes it clear, if further proof were needed, that the tug and barge were well to the starboard side of the canal, because Daignault of course knew the "Honoreva" was in mid-channel. He also gives the following answers:—

Q.—A quel moment avez-vous donné le signal de faire vitesse en arrière sur votre bateau? A.—Du moment que j'ai vu que la barge venait sur nous autres.

Q.—Et, est-ce qu'à ce moment-là vous aviez tourné votre gouvernail de manière à diriger votre navire à droite? A.—Oui, monsieur.

Read with the evidence last quoted, this would indicate that the helm of the "Honoreva" was put to port only when Daignault at the last moment realized that a collision was imminent. Moreover, although Daignault swears that the reverse signal was given at the same time—he says a minute and a half before the collision—it was obeyed only a second or two before, or a second or two after, the collision according to the evidence of Stewart, who was then in charge of the engines. Stewart was not qualified to act as an engineer—a direct violation of the statute, 8 Edw. VII., ch. 65, sec. 20, amending R.S.C. 1906, ch. 113, sec. 631, sub-sec. 1.

Finally, it was stated by Henry Newbold, the engineer of the "Honoreva," and by David Fitzpatrick, her captain at the date

of the trial, both witnesses for the defendant, that there was plenty of water to permit of the "Honoreva" having passed quite close to the north pier of the bridge, that it was quite safe and practicable for her to have kept to the starboard side and within 5 ft. of the north pier, in passing through the bridge. This evidence is uncontradicted. She was in fact 32 ft., if not more, south of the north pier.

Under sec. 24 of ch. 35 of R.S.C. 1906, the Railways and Canals Act:—

The Governor in Council may, from time to time, make such regulation as he deems proper for the management, maintenance, proper use and protection of all or any of the canals.

Regulation 17, enacted by the Governor in Council under this statute, provides that:—

In all cases of vessels meeting in a canal their passing shall be governed by the then existing rules and regulations of the Marine Department respecting the passage of vessels.

Art. 25 of the—

RULES for NAVIGATING the GREAT LAKES, including GEORGIAN BAY, their connecting and tributary waters, and the ST. LAWRENCE RIVER as far east as the lower exit of the LACHINE CANAL and VICTORIA BRIDGE of Montreal, adopted by order-in-council, April 20, 1905, and amended May 18, 1906, is as follows:—

(*a*) In narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such a vessel.

(*b*) In all narrow channels where there is a current and in the Rivers St. Mary, St. Clair, Detroit, Niagara and St. Lawrence, when two steamers are meeting, the descending steamer shall have the right of way and shall before the vessels shall have arrived within the distance of half a mile of each other give the signal necessary to indicate which side she intends to take.

Sec. 916 of R.S.C., ch. 113 (The Canada Shipping Act), enacts that—

If in any case of collision it appears to the Court before which the case is tried that such collision was occasioned by the non-observance of any of such regulations (for preventing collisions and for distress signals, of which the foregoing article 25 is one) the vessel or raft by which such regulations have been violated shall be deemed to be in fault unless it can be shewn to the satisfaction of the Court that the circumstances of the case rendered a departure from said regulations necessary.

If, as I think, the Soulanges Canal is a narrow channel, the "Honoreva" was guilty of a breach of paragraph (*a*) in having failed to keep to the starboard side of the fairway or mid-channel after the approach of the tug-and-tow became known. There is nothing to indicate that it was not safe and practicable for her to do so.

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In passing through the bridgeway the "Honoreva" was undoubtedly in a narrow channel where there is a current. She was meeting the descending tug-and-tow. The latter under clause (*b*) had the "right of way." In reasonable compliance with clause (*b*) the tug signalled for a starboard course. The "Honoreva" accepted that course by responding with a like signal. It was her clear duty thereafter to have taken and kept the starboard side of the channel. In distinct contravention of clause (*b*) she maintained a mid-channel course up to the moment of the collision. She did so at her peril. There is no room for doubt that the collision between the "Honoreva" and the "Maggie" was occasioned by the non-observance by the "Honoreva" of the regulation contained in art. 25. There were no circumstances in the case rendering a departure from that regulation necessary. On the contrary, the evidence of the defence witnesses themselves is that, instead of maintaining a mid-channel course with her starboard side 32 ft. to the south of the north pier of the bridge as she did, the "Honoreva" could with perfect safety have passed through the bridgeway within 5 ft. of the north pier and in such a manner that she would have been well to the starboard side of the fairway or mid-channel. She could, while keeping the starboard side, have maintianed a space of about 14 ft. between her and the north pier. Her non-observance of art. 25 clearly occasioned the collision. Had she obeyed it, no collision would have occurred. She must, therefore, be deemed to have been in fault under sec. 916 of the Canada Shipping Act.

Regulation 22 of the Canal Regulations, passed under the authority of sec. 24 of the Railways and Canals Act above quoted, is as follows:—

(*a*) It shall be the duty of every master or person in charge of any vessel on approaching any *lock or bridge* to ascertain for themselves by careful observation, whether the lock or bridge is prepared to allow them to enter or pass, and to be careful to stop the speed of any such vessel in sufficient time to *avoid a collision with the lock or its gates, or with the bridge or other canal works*, any violation of this regulation shall subject the owner or person in charge of such vessel to a penalty of not less than five dollars, and not exceeding two hundred dollars.

(*b*) All vessels approaching *a lock*, while any other vessel going in the contrary direction is in or about to enter the same, shall be stopped and be made fast to the posts placed for that purpose, and shall be kept so tied up until the vessel going through the lock has passed. Any violation of this provision shall subject the owner or person in charge of any such vessel to a penalty of not less than four dollars and not exceeding twenty dollars.

Par. (*a*) of this article relates to both locks and bridges, but it has to do not with the safety of vessels passing through them but with the safety of the structures themselves, its purpose being, as the paragraph states, "to avoid collision with the lock or its gates or with the bridge or other canal works." This paragraph has no application to the present case. Par. (*b*), on the other hand, applies only to vessels approaching a lock, and has no application to vessels approaching a bridge. The distinction between the language of the two paragraphs is marked. In the present case we are dealing not with vessels approaching a lock but with vessels approaching a bridge. Yet the trial Judge would appear to have applied par. (*b*). He says the "Jackman" violated rule 22 in that:—

> She should have slowed down at a reasonable distance from the bridge or tied at the posts provided for that purpose.

He apparently entirely overlooked the fact that there were no "posts provided for that purpose" to which the "Jackman" could have tied. Again he refers to "the rule" that—

> No two vessels are allowed to cross each other in passing through the opening of the bridge which is the narrowest part of the canal. The first one arriving has the right to proceed through the bridge, the other one being tied up or at least remaining at a sufficient distance to enable the first boat to get clear of the bridge, which it appears from the evidence the "Jackman did not do.

This misapprehension as to the application of r. 22 is the foundation of the Judge's judgment, which rests upon his view that because the "Honoreva" was about to enter the bridgeway, clause (*b*) required that the down-going "Jackman" and her tow should have been stopped, made fast to posts and kept tied up until the up-going vessel had cleared the bridge. Not only is there no such rule applicable to the case of a bridge, but, according to the evidence of the bridgeman, Sauvé, who was in the best position to know about it, although both vessels had the right to pass through simultaneously, and vessels do frequently so pass through the bridge in opposite directions, the more usual practice is for the up-going vessel to tie up below the bridge and await the passage of the down-going boat.

The pilot, Daignault, on his own admission, saw the down-going tug-and-tow when he was in a position to have stopped the "Honoreva" and tied her up and allowed the tug-and-tow to pass. He chose not to do so. He says he proceeded because

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he thought he had time to get through the bridge and clear it before the tug-and-tow would enter. He perceived that "the tug was coming down quickly." Elsewhere he says he thought its speed exceeded 5 miles an hour. Nevertheless he had the speed of the "Honoreva" changed to "dead slow" and, in direct violation of art. 25 of the rules of the road, he still maintained his course in mid-channel.

Daignault says that sometime after replying to the "Jackman's" signal for a starboard course he gave three short blasts of his whistle by which he intended to call upon the tug to moderate its speed, but that the tug did not reply. Those upon the tug deny having heard any such signal. Assuming that it was given, Daignault must have known the difficulty and danger of slackening the speed of a down-going tug-and-tow owing to the current and, having received no reponse, he should not have assumed that the tug captain would attempt anything of the kind. He should have made allowance for the tug's encumbered condition. The "*Independence*," 14 Moo. P.C., 103, at 115-6. Without asserting that it was the duty of the "Honoreva" to have tied up below (but see *Montreal Transportation Co.* v. *Norwalk*, 12 Can. Ex. 434, at 441-2; *The "Talabot"*, 15 P.D. 194, at 195; *The "Ezardian,"* [1911] P. 92; "*Earl of Lonsdale*," Cook's Adm. Rep. 153), or questioning her right to have proceeded through the bridgeway simultaneously with the tug-and-tow, if those in charge of her saw fit so to proceed they were bound to conform to art. 25 of the rules of the road by keeping to the starboard side of the fairway. To do so was safe and practicable and they had themselves assented to the adoption of that course. There were no circumstances which excused, still less rendered necessary, a departure from the regulation. They maintained the mid-channel course at their own peril. They thereby put themselves in fault and must be held answerable for the consequences.

On the other hand, was there fault on the part of the tug-and-tow which contributed to the collision? Their right to pass through the bridge is clear. In doing so their duty was likewise prescribed by art. 25—it was to keep to the starboard side of the fairway. That they did so seems, upon all the evidence, to be beyond question. From the moment that the tug entered the bridgeway the facts in evidence prove that neither tug nor barge was at all near the mid-channel. The "Honoreva," by

wrongfully occupying the mid-channel, took up 18 ft. of the waters which should have been left open for the passage of the tug-and-tow. The latter were thus obliged to attempt the difficult feat of passing the up-coming steamer with a clearway only 32 ft. wide, although the width of the barge was 26 ft., 4 inches. Assuming that she should succeed in exactly maintaining the middle of the 32 ft. thus left to her, there would be only 2 ft., 10 inches on the port side between her and the "Honoreva" and only 2 ft., 10 inches on the starboard side between her and the bridge pier. Fitzpatrick, captain of the "Honoreva," gives this evidence:—

Q.—How close to the pier or wharf would it have been safe to go? A.—Within 10 ft.—within 5 ft., but as a general rule the further off the safer you are.

The "Honoreva" had no right to force the tug and barge into a position where they had only 32 ft. of water in which to navigate. Complaint is made that the tug went farther to starboard when only 150 ft. from the "Honoreva" and that the barge, owing to its having a single tow line, did not immediately follow but maintained its course or even sheered slightly to port. Assuming this to be the case, the manœuvre of the tug was made when collision seemed imminent and in an attempt to escape. The "Honoreva," whose fault created the critical situation, cannot complain of the failure of this manœuvre. The captain of the tug did the best he could in an emergency which he had no reason to anticipate the "Honoreva" would create. The tug-and-tow were already so well to starboard that pilot Daignault, who of course knew that his own ship was in mid-channel, did not expect a collision until immediately before it occurred. Why should the captain of the tug have anticipated it earlier? In fact, notwithstanding the very small margin of safety left to him, he appears to have taken the step he did to avoid or minimize the impending collision before anything was done on the "Honoreva" for that purpose.

Complaint is also made of the speed of the tug. But there is no evidence that this was excessive. On the contrary, the evidence is that she was travelling at the rate of about 5 miles an hour, whereas the canal regulations appear to contemplate a speed up to 7½ miles an hour.

Again it is charged that the tug was at fault in not slackening

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speed in answer to the signal of the "Honoreva." Upon the evidence I incline to the view that that signal, if given, was not heard. Not only has no specific rule been cited which imposed an obligation on the tug to slacken her speed, but had she in doing so lost control of the barge, as might not improbably have happened owing to the current, she would have laid herself open to a charge of negligent navigation.

Under such circumstances the statutory rule requiring that steamships approaching one another so as to involve risk of collision shall slacken speed, or stop and reverse if necessary, cannot be invoked.

It is further urged that there was no person at the helm of the "Maggie." There is some suggestion of this in the defence evidence—but it is rather a surmise than a statement of fact. The pilot, Daignault, merely says that he "did not remark anybody at the wheel of the barge." There is nothing more. On the other hand, the evidence of Captain Castonguay is perfectly clear and satisfactory on this point. He took the wheel from Laferrière when the tug signalled for a starboard crossing. His evidence is corroborated by Josephus Thauvette who had given over the wheel to Laferrière a short time before. The barge probably did not at once take the new direction given it by the tug just before the collision. But this does not prove either the entire absence of a man at the wheel, or that, if there, he neglected his duty, or that anything he could then have done would have prevented the collision.

On the whole in my opinion, the only proven fault which clearly contributed to causing the collision was the flagrant breach by the "Honoreva" of the provisions of art. 25 of the rules of navigation, which required her to keep the starboard side of the fairway. While the utmost skill may not have been displayed in the management of the tug and the barge when collision was imminent, while it may be that if there had been a bridle between them as well as a tow rope, the collision would have been avoided (I think this extremely doubtful), there is not, in my opinion, any sufficient proof of fault such as would impose liability upon them. Marsden on Collisions,—p. 3; *The "Cape Breton* v. *Richelieu & Ont. Nav. Co.,"* 36 Can. S.C.R. 564, at 591; *The "Arranmore"* v. *Rudolph,* 38 Can. S.C.R. 176, at 185.

I would for these reasons set aside the judgment of the learned

Judge of the Admiralty Court, and the confirmatory judgment in the Exchequer Court, and would direct that judgment be entered for the plaintiff declaring him entitled to the damages for which he sues and the costs of this action as well as of the appeals to the Exchequer Court and to this Court, condemning the defendant and its bail in such damages and costs, and directing that an account should be taken by the registrar of the Admiralty Court, assisted by merchants, of the amount of such damages, with the usual provisions for report, etc. The counterclaim should also be dismissed with costs throughout.

BRODEUR, J.:—I am of opinion that this appeal should be allowed with costs and that the "Honoreva" should be held entirely liable for the collision. *Appeal allowed.*

Brodeur, J.

GIBSON v. COTTINGHAM.

British Columbia Supreme Court, Macdonald, J. November 3, 1916.

SALE (§ III C—72)—RESCISSION—SALE—MISREPRESENTATION—AGENT.
A material false representation, inducing a sale, entitles the purchaser to rescission, even if made innocently by an agent.
[*Cornfoot* v. *Fowke*, 6 M. & W. 358, referred to. See annotation following.]

ACTION for rescission of an agreement for sale and cancellation of a chattel mortgage and promissory note.

Statement.

Herbert Wood, for plaintiff.

Douglas Armour, for defendant.

MACDONALD, J.:—It appears that the plaintiff, being desirous of going into the rooming-house business, negotiated the purchase of a quantity of furniture situate in what is known as the Stanley Apartments on Pender St. in this city. The plaintiff and his wife interviewed Mrs. Clark, a real estate agent for that purpose; and she introduced the plaintiff to the defendant who was then in occupation of these apartments. It is quite apparent to me that the object of the plaintiff was not simply to become the purchaser of the furniture, but also to become the lessee of the premises in connection with which the lease was about expiring in May, 1916. The plaintiff was greatly interested in knowing whether the business that might be carried on in these apartments would be satisfactory: from statements of the plaintiff and his wife I take it that they expected to carry on a respectable business, first utilizing the tenants that were then in occupation and later on changing the form of the business, but all with a view to carrying on a business that would be at least respectable

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and one in which they would not be interfered in from time to time with visits from the police authorities.

I am quite satisfied that these premises had not only a bad reputation, but that that reputation had been earned by the lessee allowing, from time to time, prostitutes and street-walkers and other immoral people to resort to and make use of these premises.

The situation then presents itself as to whether or no the sale having been completed, the plaintiff is under these circumstances entitled to rescission of the contract and return of the $500 paid in connection therewith. No question arises as to any misrepresentation with respect to the value of the goods. The whole question for consideration is whether the premises were of such a kind as to be disreputable, and thus destroy the benefit which might otherwise be derived from the purchase and use of this furniture in the premises mentioned. The principal point raised as being one of misrepresentation is that during the negotiations, the plaintiff, or his wife, being suspicious of the character of the premises, inquired from the agent, Mrs. Clark, and that the reply was of such a nature as to destroy his suspicions and pursue the sale, completing it by payment and giving a chattel mortgage back for the balance of the purchase-money. No particular stress has been laid by plaintiff's counsel on the actions of the defendant during the time when inspection was taking place on the premises, nor of her representations as to the class of people who were then rooming in these apartments. I find as a fact, to her knowledge, one at least of the tenants was a bad character. She had just recently been convicted in the Police Court. No inquiry, however, seems to have been made of her as to the character of any other roomers, although it is stated that she represented they were quiet people. I think, however, the strongest point as outlined by the plaintiff is the one to which I have referred, that is, as to whether any statement made by Mrs. Clark was of such a nature as to be binding upon the defendant and thus create a cause of action. Now, in order to have misrepresentation that has any bearing in creating a liability against the defendant, it is necessary that such misrepresentation should be made by either defendant or by someone acting on her behalf. The question arises whether Mrs. Clark in the first place was authorized to make a statement which was binding upon her principal, and in the second place did she make any statement which

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is of such a nature as to be material and to have operated upon the mind of the plaintiff in consummating the transaction. It is quite apparent that the plaintiff and his wife were not simply using the telephone in a chance conversation with Mrs. Clark, but were deliberately endeavouring to find out from the party who ought to know the character of the premises in which this furniture was situate. I can see very little difference between the account of the conversation as given by Mrs. Gibson, and that given by Mrs. Clark. They may differ in a word or two, but the net result, to my mind, is the same. She went to the telephone for a set purpose and she came from the telephone, to my mind, assured that as far as the character of these premises were concerned she need not entertain any further fear. The words as stated to have been used, according to the recollection of Mrs. Clark, as I say, differ to some extent, but surely they amounted to this, that she was not referring the plaintiff to someone else for information, but was hazarding her own statement as an agent assisting the sale of property. It was not argued by counsel for the defence that a statement of this kind, if material, and I so find it, was not binding upon the principal unless it could be shewn that the agent made the statement knowing it to be false. I think that he was, in my view of the law, correct in not taking such a ground, although counsel for the plaintiff prepared a well-considered argument in support of the position that was taken by Lord Abinger, the dissenting Judge in *Cornfoot* v. *Fowke*, 6 M. & W. 358. In that case the facts are somewhat similar to the one before me to-day. In my view of the law the principal is liable for a material representation made by an agent in the course of a sale, even though such agent when he made the statement believed it to be true, if as a fact, it is untrue, to the knowledge of the principal. In other words, I do not think that a principal who is aware of a fact which would prevent a sale being consummated, can obtain the benefit of a sale carried out through an agent, simply because that agent honestly represented that such a fact does not exist. A material false representation inducing a party to make a contract is equally wrong and creates a cause of action whether he knows it to be wrong or whether he be reckless and disregardful of the truth of it. Now this agent, Mrs. Clark, I will not say was reckless, but at any rate she was careless, of the importance that might be attached by people purchasing

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property of this kind. In representing that the premises were "in good order" she meant to convey by her words to Mrs. Gibson, an important feature, that the premises were respectable. The fact is to the contrary. I think that the representation was material, and that it operated upon the mind of the plaintiff in entering into the contract. I accept his statement in this regard, and it is only necessary to refer to the evidence of Mrs. Gibson as to her feelings when she found out the true character of the premises, to support her husband's statement in this connection.

Plaintiff then sought to obtain rescission of the contract but failed. The defendant is thus liable for the result that followed from the representation made by her agent. The position of affairs was that the plaintiff came into possession of these premises under lease, and also obtained possession of the furniture. They could not, when rescission was sought, come to any arrangement for some time but eventually, according to exhibit filed, the furniture was sold and half the proceeds placed in trust to abide the result of this action. As I understand it, as far as the judgment of the Court is concerned, it is to be operative as if the goods were still *in esse* so that the money in hand takes the place of the goods so far as the order of the Court is concerned.

I direct and order that the chattel mortgage and the promissory notes given be delivered up to be cancelled. The agreement of sale is rescinded and there will be a repayment of the sum of $500 with interest at 5 per cent. from the time of issuance of the writ out of moneys held in trust. I disallow any other claim for damages which may be referred to in the statement of claim. The plaintiff is entitled to costs.

Annotation.

Annotation—Rescission of contract for fraud and damages for deceit.

BY ALFRED B. MORINE, K.C.

This was an action for rescission of a sale of goods and consequential relief. The facts seem to be as follows: the defendant, while lessee of an apartment house, sold the furniture thereof to plaintiff. The existing lease to defendant was about to expire, and plaintiff designed to procure a lease to himself, and purchased the furniture for the purpose of running the house. The plaintiff was introduced to the defendant, probably as a purchaser, but the negotiations were conducted with defendant's agent. This agent knew that plaintiff's object in acquiring the furniture was to run the apartment house but it was not proven that the agent had communicated the fact to the defendant. The house had a bad reputation for the character of its roomers, and defendant knew this, but the agent did not know. The plaintiff would not have bought the furniture if he had known the reputation of the house,

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and this the agent was made to understand, but the agent, believing what she said, gave the plaintiff assurance that the house was respectable. Upon learning of the evil reputation of the premises, the plaintiff demanded rescission of the sale, repayment of the part paid on the purchase price, and cancellation of a mortgage for the balance. No evidence was given that, in fact, the pecuniary result to the plaintiff of the previous reputation of the house, would have been bad, but it seems to have been held that the plaintiff was entitled to rescind the contract because it would have been unpleasant to him to conduct the house in the face of its reputation.

It should be noted that the defendant had not authorised the agent's misstatement of fact, and that the agent believed her statement to be true. The agent had committed no fraud, nor had the principal authorised any, or intentionally concealed the truth from the agent, in order that she might make the false statement. It was not shewn in fact that the principal knew that the statement had ever been made. Since *Derry* v. *Peek* (1889), 14 App. Cas. 337, the defendant would probably not be held liable in an action for deceit. In such an action it must be proved that a material representation was made dishonestly: though active concealment may amount to dishonest misrepresentation. *Glasier* v. *Rolls*, 42 Ch. D. 436; *Udell* v. *Atherton*, 7 H. & N. 172. In *Cornfoot* v. *Fowke*, 6 M. & W. 358, the action was for deceit and damages were claimed. The Court, Lord Abinger dissenting, held that the action (on all fours with the case under discussion) would not lie, and the result of all subsequent cases left the law as it was stated on this point in *Haycraft* v. *Creasy*, 2 East 92, 102 E.R. 303. In so far as *Cornfoot* v. *Fowke* (*supra*) may be considered to decide that a guilty principal is not responsible for an incriminated statement by an innocent agent, it has been reversed by *Pearson & Son* v. *Dublin Corporation*, [1907] A.C. 351. "The principal and agent are one, and it does not signify which made the incriminated statement, or which of them had the guilty knowledge". But it is still good law in so far as it decided that an action for deceit will not lie for innocent misrepresentation.

For the distinction between an action for deceit, and one for rescission, see *Redgrave* v. *Hurd*, 20 Ch. D. 1. To obtain rescission it is sufficient to shew that a material representation was in fact false. *Stewart* v. *Kennedy* (1890), A.C. 108. Macdonald, J. (supra) says: "In my view the principal is liable for a material representation made by an agent in the course of a sale, even though the agent believed it to be true, if it is untrue, *to the knowledge of the principal*." The qualification contained in the words we italicize seems to be unnecessary. In an action for rescission on the ground of misrepresentation, the only vital points seem to be (*a*) was the representation material, (2) was it untrue? It is immaterial whether the fact misrepresented would be damaging or otherwise to the representee; if he has made the contract in reliance on the misstatement, he is entitled as of right to a rescission. *Ayles* v. *Cox* (1852), 16 Beav. 23.

BLACK v. McMULLEN.

MAN.

C. A.

Manitoba Court of Appeal, Howell, C.J.M., and Richards, Perdue, Cameron and Haggart, JJ.A. December 20, 1916.

COURTS (§ II A 3—164)—JURISDICTIONAL AMOUNT—COUNTERCLAIM.

Where a plaintiff abandons a part of his claim, in order to bring the demand within the jurisdiction of the Court, a counterclaim if allowed must be set-off against the amount so demanded, not against the original claim.

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Richards, J.A.

APPEAL by defendant from a judgment of a Co.Ct.J., in an action for damages. Reversed.

R. B. Graham, for appellant.

H. Phillipps, K.C., for respondent.

The judgment of the Court was delivered by

RICHARDS, J.A.:—The plaintiff sued in the County Court for damages for breach of contract. The damages, as stated, exceeded $500. But the plaintiff, in order to bring his claim within the County Court jurisdiction, abandoned all excess over $500 and claimed only to recover $500.

The defendant, in addition to disputing the plaintiff's claim, filed a counterclaim for $201.96.

The trial Judge found in the plaintiff's favour for the $500. He also found for the defendant on the counterclaim, but set off its amount against the excess over $500 which the plaintiff had abandoned, and entered judgment for the plaintiff for the full $500.

In so setting off, the trial Judge held, as his authority, *Jarvis* v. *Leggatt*, 10 C.L.T. 155.

In that case a solicitor sued in a Division Court in Ontario on a bill of costs of $135.38, and, to bring the case within the jurisdiction of the Court, abandoned the excess over $100 and claimed for $100 only.

The Judge considered the whole bill of $135.38, deducted $71.52 from it and entered judgment for the balance, $63.86. A motion for prohibition was made on the ground that the Judge ousted himself of jurisdiction by considering the whole bill, the total amount of which was beyond the jurisdiction of his Court. The motion was refused.

The case here would be the same as contended for the defendant there if the Judge had gone over all the claim of the plaintiff and had held that it was only proved to the extent of $500 or less and had then deducted from that balance of $500 or less all that he had disallowed of the plaintiff's whole claim. I cannot see that that decision is in point here.

The plaintiff's contention in this case can be tested as follows; as suggested by the Chief Justice on the hearing of the appeal: if the defendant had chosen to sue for his claim by a separate action, the plaintiff could not have set up, against it, the excess he had abandoned in the present action. And, if he could not,

why should he be allowed to do so when the defendant very properly, instead of so suing, set it up by way of counterclaim in the present action?

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The counterclaim is a separate right of action vested in the defendant. The fact that it is tried in the same suit with the plaintiff's cause of action does not change that fact, or lessen the defendant's rights under it. To hold otherwise would deprive the defendant of those rights, and would lead to separate actions instead of counterclaims in cases where the plaintiffs had abandoned excess of claim in order to get the benefit of trying the action speedily and comparatively inexpensively in the County Court.

We are of opinion that the counterclaim, as found, must be set off against the $500, and the verdict in the plaintiff's favour reduced to $298.04.

The defendant's costs of appeal are to be set off *pro tanto* against the judgment in the Court below after it has been so reduced. *Appeal allowed.*

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Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Davies, Idington, Duff and Anglin, JJ. January 31, 1916.

APPEAL (§ VIII B—672)—INCREASING AMOUNT OF ARBITRATORS' AWARD.

Upon an appeal from the award of arbitrators made under the Railway Act, R.S.C. 1906, ch. 37, the Appellate Court may increase the amount of the award, upon consideration of the evidence given before the arbitrators.

APPEAL by the Railway Co. from a judgment of Ontario Supreme Court (Appellate Division) 32 O.L.R. 141. Varied. Statement.

FITZPATRICK, C.J.:—It is the function of Courts of law to decide disputes between parties. There are, however, certain classes of cases which can be more conveniently dealt with by means of arbitration. These are commonly such as involve no legal question for their decision, but a complexity of detail taking up much time. Not only are such cases often referred to arbitration by agreement of the parties, but the egislature has provided this means for settlement of questions between them in numerous instances. Notable amongst these are such cases as the present, where a railway company is given powers of taking compulsorily the private property of individuals, making suitable compensation. In the main of course the principles upon which the compensation is to be ascertained are the same in every case Fitzpatrick, C.J.

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of such taking all along the line of the railway. It is in each case only a matter of the particular amount to be allowed the claimant, this of course varying according to the particular circumstances; the amount and value of the property taken, the loss occasioned to the owner and other special considerations.

Now the Courts retain a jurisdiction over arbitration proceedings to redress any injustice that may have been done in them, but this does not mean that where arbitrators are named by the legislature as the appropriate tribunal for the settlement of certain questions the Courts are to take the matters out of the hands of the arbitrators by setting aside their award and substituting for it the decision of the Court. This is what, it seems to me, has been done by the Appellate Division in the present case.

Hodgins, J., delivering the judgment of the Court, speaks in his first sentence of "the problem in this case." Now there is no problem in the case. The railway has taken 8 8/10 acres of the respondent's land, and the only question is what is the amount of the compensation which the respondent is entitled to recover? Sec. 209 of the Railway Act provides that any party to the arbitration may appeal from the award upon any question of law or fact. I am not sure that the appellant's notice of appeal raises any question of law or fact on which an appeal can properly be brought, and I do not think the Appeal Court gives any judgment on such points. The judgment is what the Court would have awarded if the matter had come before it in the first instance, and I do not think it was entitled to give such a judgment. Neither do I think it was equally qualified. The arbitrators had the advantage of viewing the property and hearing the evidence and, speaking with all possible respect of the Court, I think the arbitrators were at least as well qualified to deal with the matter with expert knowledge.

There is, to my mind, a question whether the arbitrators have sufficiently taken into account the possible difficulties of play over the railway. I feel that in their place I should have attached greater weight to this point. It must be remembered, however, not only that they have allowed a substantial sum for damages for severance, but that they have allowed generally a higher compensation by reason of the land being used as a golf links. If we were to disturb the award at all probably it would be neces-

sary to enter into other considerations which the arbitrators have not sufficiently appreciated; for instance, it does not appear that they have allowed for what I may call the ephemeral use of the land as a golf links, yet for such use compensation should not be allowed on the same footing as for the permanent values of land regarded for agriculture, building or other such necessary purposes of life. The golf club may be given up in a short time, perhaps will be if the war continues and it becomes necessary to reduce the extravagant scale of our mode of life with its estates devoted to pleasures and countless other luxuries.

I think, therefore, there is not sufficient ground on the whole for interfering with the award. I mention the above point that it may not be thought I have overlooked it.

Personally, I am unable to appreciate the views set out by the Judge; it would be difficult as well as unnecessary to consider them in detail. He has a preference for a particular method of ascertaining the compensation which may be called that of "reinstatement;" he cites two cases from which he says it appears that this would afford a fair test of the damage suffered by the appellants. It is rather remarkable that he goes on to say that in the first of these cases Jessel, M.R., denied that the damages were really "reinstatement," and that in the second case Lord Shand decided that the principle of so-called "reinstatement" could not be applied. The Judge adds that "that method is of course not the only way of arriving at the compensation to be paid."

I have read with the greatest care both the award and the judgment substituted for it, and I have no hesitation in saying that the former commends itself to me not only for the correctness of the principles on which it is based but for the fair and reasonable results arrived at. I do not find anything in the judgment which would lead me to vary any part of the award, whilst I entertain a very strong opinion that parts of the judgment at any rate could not be supported. The appeal should be allowed with costs.

DAVIES, J.:—This is an appeal by the railway company from the judgment of the First Appellate Division of Ontario allowing an appeal from an award of arbitrators fixing compensation for the expropriation by the railway of 8 8/10 acres of the club's golf grounds and the damages caused thereby. The award

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allowed in all $7,240 and this amount the Appellate Division increased to $18,059.

The Appellate Division formed the opinion that the lands expropriated by the railway for its track, 8 8/10 acres, and the 6¾ acres lying south of the track and severed by the track from the rest of the limits were all rendered useless for the purposes of the club, and that it was necessary for the club to purchase some 15 acres additional on the northern side of its links in order to lay out a new and suitable course.

The arbitrators had held that such a suitable course could be laid out upon the club lands not taken by the railway company using the whole of said lands, that is using the 6¾ acres severed and lying south of the railway.

Of this 6¾ acres about 1¾ acres form the bank of the steep river and are of no use for golf purposes, leaving only 5 acres which ever were suitable for such purpose.

The arbitrators accepted the evidence of Erickson, the golf expert called by the company, who stated that after careful examination of the grounds he was of the opinion that there were several different courses which could be laid out on these grounds with the railway track running as it did and which would be equally as good as the old course was. One of these proposed courses did not utilize the 6¾ acres severed, the other two did. The arbitrators appear, after an inspection of the property, to have accepted his evidence with respect to the courses available by using the severed land to the south of the track, and to have rejected the evidence of Cummings, the golf expert examined on behalf of the club, who was of the opinion that no suitable course could be laid out on these lands with the railway running through them, and that other lands would have to be procured elsewhere, and that the severed land was useless.

Proceeding, however, upon the assumption that the additional acreage was necessary and accepting the evidence of Cummings and rejecting that of Erickson, the Appeal Court awarded $15,000 for lands to take the place of the 15 acres to the south of the north boundary of the railway track, about 9 acres of railway lands and 6 acres to the south of them retained by the club. The real question in dispute between the parties is whether the lands as left to the club are sufficient to lay out a good, suitable and convenient course upon, and if so what damages the club has

sustained for the land taken and the damages caused by the severance and the inconvenience arising out of it.

I quite agree with the Appellate Court with respect to the 20 acres lying immediately south of the railway, and which 20 acres counsel for the club contended were also useless for golf purposes, that such a contention is unreasonable. It is based upon the evidence of Cummings, the expert which the arbitrators did not accept. Upon this point, the arbitrators, the Appellate Division, and this Court are all agreed.

Then upon the substantial question in dispute, I think that while under ordinary circumstances the club members would not have the legal right to play across the railway track, it would be impossible for the railway company in such a case as this having contended before the arbitrators, the Appellate Division and this Court that they had such right, and had the damages awarded on that basis, afterwards to challenge or dispute the right or privilege.

The arbitrators' award was made upon the basis of an existing privilege to play across the track and to utilize the severed land, and from the fact that the club did not offer any evidence whatever of the value of the lands to the north of the club grounds which the Appellate Division concluded were necessary for a suitable course, I conclude that the golf club was of the opinion that with the privilege of playing across the track they would not require additional lands. If they thought they would require these additional 15 acres it is almost inconceivable that they would not have given evidence of what they would cost to purchase. If that is so and I think it is—there would only remain the question of damages for the inconvenience, delays and difficulties which would be caused the players by playing across the track.

The Railway Board has made an order providing that the railway company supply suitable access to the river from all property from which the approach to the river will be cut off by the railway, and that such access should be in the nature of a farm crossing and where reasonably practicable should be provided by a subway or bridge over the track.

With such a crossing and accepting the expert Erickson's evidence, I cannot see how the 6¾ acres can be held as useless or why it cannot be utilized for one suitable and convenient green as it was before the railway lands were taken.

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I was inclined to think that under these circumstances I should maintain the award of the arbitrators inasmuch as outside of the damages arising from severance I think all their other valuations fair and reasonable. But I do not think the inconvenience, delays and difficulties which the players will be subject to by reason of the severance of the 6¾ acres, are far from negligible and have not been fully appreciated or allowed for by the arbitrators. For this reason, I will concur with the decision of the Court that the arbitrators' award be increased by the sum of $2,000, making in all $9,240, and the judgment of the Appellate Division reduced to that sum. Costs to follow the judgment.

Idington, J.

IDINGTON, J.:—The respective parties hereto are what their names indicate. The appellant has expropriated for right of way part of respondent's land. The majority of the three arbitrators chosen under the Railway Act to determine what compensation should be paid respondent, awarded the sum of $7,240. The Appellate Division increased this to the sum of $18,059. That Court found its justification for doing so chiefly in the evidence of a witness testifying as an expert that in his opinion it was necessary to acquire adjacent land valued, not by him but others presently to be referred to, at $1,500 an acre, to make a suitable golf course of nine holes.

The owner of this land was not heard from in any way. The respondent cannot expropriate the land. The expert in question may be right, and if his opinion is to govern, the entire property is destroyed for uses the respondent is holding it for. In such a case the respondent should have shewn what loss it sustained thereby, by shewing the market value of the property for other purposes, and then what it probably would cost to acquire a suitable property elsewhere. No satisfactory effort seems to me to have been made in that direction.

The same expert speaks of looking round Brantford for other places which respondent might acquire, but says he could find none except one and that he refers to as inaccessible.

On cross-examination he discloses rather a meagre knowledge of its exact location, and excuses himself by saying he was driven about. I cannot say that this evidence is of a very satisfactory character, and I must be permitted to doubt if the beautiful country surrounding Brantford can only furnish one spot for a golf club and nine-hole course.

Nor can I think that the Appellate Court proceeded upon a correct principle in adopting the suggestion made that the adjacent land, of necessity, must be acquired.

I agree with the opinion judgment of that Court that there is "a curious absence of evidence dealing directly with the problem in this case," but that is, I respectfully submit, no reason for setting aside an award based upon such evidence as does exist, when applied in light of personal inspection, by those making the award of the whole property and the actual situation of things in question to be dealt with.

The difficulty of setting aside or modifying any award made under such circumstances seems to be almost insuperable unless it appears that the arbitrators proceeded upon an obviously erroneous principle.

It is only in one respect, to which I shall presently refer, that I can find possible any substantial semblance of such error. Before doing so I desire to refer to the general features of the case presented.

The property in question was acquired, as to one part, by virtue of a lease in 1906. Of about 60 acres of land, to be used as a golf course and country club, and improved by the proprietor, for such purposes for the use of the respondent, and an option in said lease to purchase the property so improved. The price of that part of the property thus improved was, in June, 1910, $8,100. Another part consisting of 15 acres was acquired in May, 1910, for $1,750. The respondent spent besides, up to April, 1913, about $8,000 in improving and developing the property for what it was designed.

This expenditure I accept as presented, though not likely on close examination to be all properly treated as on, strictly speaking, capital account. With that dubious sort of capital expenditure assumed to be correct, the total cost up to the date of expropriation in April, 1913, which must be the date for fixing compensation, was $17,850.

One of the respondent's experts testifying to the value of the whole property puts it at $114,000 without the railway, as he expresses it Another expert called by respondent puts it as $1,500 an acre.

That arbitrators, or anyone having a judicial duty to dis-

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charge, can make of such evidence, is certainly puzzling, to say the least.

The growth of Brantford and consequent increase of real estate in the neighbourhood in 7 or 8 years, may have been rapid, but can it justify such statements of value in face of the admitted facts? The arbitrators saw the witnesses and saw the ground and evidently declined to accept in their entirety, even when sworn to, any such estimates.

I cannot, without having seen either, find my way to depart from the appreciation which the majority of the arbitrators according to the result must have placed upon the evidence. I am also unable to say that they, having seen both the Muir property, brought in question in argument before them and herein, and had a chance of comparing that with the respondent's now in question, erred in failing to fix the same, or approximately the same, value for that taken in each case.

I may imagine I should have put a higher value upon the land taken from respondent, but to modify the award in that regard would be to proceed upon imagination, and not upon facts as found by those having such great advantage over me as the arbitrators had in that regard.

The same answer applies to the question of the amount allowed for depreciation on the club house. There the common knowledge of everyone is not to be laid aside, for the supposed disturbance from smoke, cinders, dust, noise and vibration, are not by any means such a palpable certainty to be suffered from a railway, observing the law, as to enable us to say that due allowance has not been made

The cut through which the trains are to run make such possible annoyances less likely than in the case of trains passing on the same level as the club house in question.

There remains just one serious question with me as to error on the part of the arbitrators, and that is the point well taken and well presented by Mr. Henderson, in regard to the right to use the 6 acres severed by the railway in the way the arbitrators seemed to think it could be used.

I am quite clear he is right in his contention that in law the golfers have no legal right upon which they can insist to play across the railway track. I think they have the right to cross

the track. I think the expression "farm crossing" in the Railway Act is only typical and illustrative as it were of the duty imposed upon the railway in any case of severance.

The railway must provide a crossing suitable to the owner using the land, when the severance is created, in the fullest manner possible, to enable the owner to enjoy the possession of both parcels of the land thus severed.

To walk across or drive across as often as he likes upon a suitable crossing is his right, but it does not imply the tossing of a ball to and fro through the air across the track.

The possibility of this being denied had to be faced and I do not think that the arbitrators having regard to the language they use in their reason duly appreciated this aspect of the case. They assumed as if a matter of course that the severed 6 acres was clearly available.

In the recent (unreported) case of *Power* v. *The King*, in which judgment was given June 24, 1915, we referred back to the Exchequer Court for reconsideration an appreciation of the possibilities involved in a situation somewhat analogous to that presented herein. The efficiency of the institution here in question certainly would be impaired by the severance of the property and construction of a railway across it and it ultimately might have to move altogether and get a new home.

The question of whether the club, or rather its members, can use advantageously the 6 acres cut off, even if the appellant helps them to do so, has not been solved. No doubt it is a possibility that the appellant may find it advantageous for many reasons to promote their doing so. Though fighting just now, these corporate bodies may find mutual advantages hereafter in working together.

I can imagine a railway service, more efficient than any other road can offer, might by the appellant be arranged, for delivering members of the club and visitors to the club house at the door thereof. It is in the interest of the appellant to bring about something of that nature and to do everything possible to induce the golfers to use the severed 6 acres.

If that should happen then the situation contemplated by the arbitrators would have been realized. On the other hand, it may be found either that the parties cannot agree or that the

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golfers cannot in fact play across the railway in comfort and hence the 6 acres are useless.

The respondent in either of such cases would lose more than the arbitrators had reckoned upon in making the allowance they have made. It is quite clear a nine-hole course can be laid out on 53 acres, but whether or not very much less efficient and satisfactory than what the arbitrators had in view, I cannot say. I assume it would be substantially less satisfactory, but how much so? In short, what sort of compensation can be made in respect of this unprovided-for contingency and is it something to be compensated for in money?

It is said we cannot refer this matter back. I have no opinion on that subject. It would be most undesirable to do so for all that is involved.

The assessment of what should in such a case, if anything, be added to that already awarded must be bordering upon a guess.

There is also this view which presses one much, that in all probability relief can be got by acquiring at a reasonable price from the owner of the adjoining land enough to compensate for anything in question herein; and indeed perhaps the whole of what he owns there, and have an eighteen hole course established.

I should not be surprised to find he feels that $300 or $400 an acre could be invested much more profitably than holding on to that 38-acre property and waiting for the realization of such visions as some of the evidence presents.

Having regard to all these considerations I would add $1,500 to the sum already allowed by the arbitrators, to cover not only what I have dealt with but also some minor items the Appellate Division say were overlooked.

I would therefore allow the appeal without costs here and in the Appellate Court below and add to the award the sum of $1,500. As the result of discussion since foregoing was written I agree $2,000 instead of $1,500 be added to the award.

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DUFF, J.:—The respondents are entitled to be compensated for the loss suffered by them in consequence of the exercise of the powers of the company in respect of the diminution of the value of the land to them in so far as they can, with reasonable certainty, be appraised in money. The phrase "the value of the land to them" has most frequently been made use of to emphasize the fact that it is not the value of the land arising in consequence of

the requirements of the undertaking for which it is taken that ... to determine the scale of compensation.

It is needless to emphasize perhaps that the phrase does not imply that compensation is to be given for "value" resting on motives and consideration that cannot be measured by any economic standard.

It does not follow, of course, that the owner whose land is compulsorily taken is entitled only to compensation measured by the scale of the selling price of the land in the open market. He is entitled to that in any event, but in his hands the land may be capable of being used for the purpose of some profitable business which he is carrying on or desires to carry on upon it and in such circumstances it may well be that the selling price of the land in the open market would be no adequate compensation to him for the loss of the opportunity to carry on that business there. In such a case Lord Moulton in *Pastoral Finance Ass.* v. *The Minister*, [1914] A.C. 1083 at 1088, has given what he describes a practical formula, which is that the owner is entitled to that which a prudent person in his position would be willing to give for the land sooner than fail to obtain it.

And I think it is an adaptation of this formula which furnishes the principle that ought to be applied in the case before us.

For the respondent's property as a country club and golf course there would, I think, it is conceded, be no competitive market. And yet it is not disputed that looking at it from the strict economic view it has as a golf course and country club a money value considerably higher than the agricultural value or the site value for residential or other purposes. What is the source of that value? Obviously that to the members of the respondent club it has for the purposes of a country club and golf course elements of economic value for which if it were a question of retaining it or being deprived of it, or having it remain as it is, or having its advantages and amenities impaired, they would be willing to pay the money. There are a certain number of people in Brantford who desire to enjoy the advantages of a golf course and country club and for these advantages were willing to pay, and for them they have paid. How much their loss is for the purpose of estimating compensation on compulsory purchase by reason of a part of the propetty being taken away or by reason of the advantage of the property being impaired is a question which

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cannot be put in form, by how much these operations reduced the value to them of the property as a golf course and country club, but I think the most practical way of putting it is perhaps the way I have suggested above.

To answer such a question is of course very difficult. It is the sort of question, however, upon which people called upon to appraise the value of a property or the amount of damages suffered by reason of destruction or partial destruction of property, have to pass every day. Such appraisements are very often of necessity little more than guesses; and because of the impossibility of bringing them to anything like a conclusive test, the function of a Court of Appeal called upon to review such an appraisal is a very difficult and embarrassing one. I have come to the conclusion, however, that the arbitrators have not given sufficient weight to the impairment of the golf course as a golf course, and I think some further allowance must be made for that.

There are several considerations which bear upon the point; first, I am satisfied from the evidence of the experts that with reference to the use of the triangle in the south-west corner of the links the presence of the railway is a very considerable disadvantage. I am, however, satisfied that the Board of Railway Commissioners has power under sub-secs. 252 and 253 to require a crossing, or more than one crossing, in its discretion, for the purpose of providing for a reasonable enjoyment of that part of its course, and having regard to the order of November 19, 1913, I have no doubt, in view of the plans which have been produced in evidence by the company shewing suggestions made as to the manner in which the triangle can be used, the railway company would offer no serious opposition to any application made on behalf of the respondents. The attitude of the company on these proceedings, moreover, would be an effectual answer to any attempt on the part of the company as land owner to prevent the members of the club playing across the railway track by any sort of process *in personam*, assuming, of course, the play be conducted with anything like reasonable regard for the convenience of the company as public carriers.

As to the possibility that this electric tramway which in its present state can hardly be said to be a serious drawback in respect of noise and vibration may be converted into a steam railroad or may be used as such: that is perhaps a remote possi-

bility, but the possibility is there, and it is a circumstance which must be considered in estimating the reduction of value. On the whole, while I think it may be assumed for the purposes of the question before us that—the probabilities are entirely against the club being embarassed in its use of the triangle in question by any further act of the railway company, and while it may be assumed that this possibility of use of the railway for the passage of heavy trains is a very remote one, still I am quite satisfied that the presence of the rail vay is seriously prejudicial to the value of the property as a golf course; and I have come to the conclusion that to the amount allowed by the arbitrators the sum of $2,000 should be added.

It would be sufficiently clear from what I have said already that I do not in the least differ from the judgment of the Court of Appeal delivered by Hodgins, J.A., in its main position, which, as I read it, is simply that the respondents are entitled to be compensated for the diminution in value to them of the property in respect of the purposes for which they have purchased and improved it and for which they make use of it.

I find myself unable, with great respect, to concur in the view that it was in the circumstances competent for the Court of Appeal to take as a measure of that diminution the cost of purchasing property adjoining the golf links from Mr. Cockshutt; and assuming it was competent to do so I am unable, with great respect, to find any satisfactory evidence to support the conclusion that such property could not be purchased at less than $1,000 an acre.

The cost of providing additional ground for the purpose of redressing the disadvantage of the presence of the railway, would, no doubt, be a proper circumstance to consider, and had the respondents put their case before the arbitrators upon the footing that such a purchase would be necessary, and had the purchase price of the lands been shewn them, it may be that in this case the proper conclusion would have been that the cost of such purchase was a just allowance.

The respondents did not put their case in that way and perhaps for one of two reasons. It may have been on the one hand that they could not honestly say that the purchase of additional lands would be strictly necessary; such a purchase.

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it is to be observed, is not suggested in the dissenting opinion of Mr. Woodyatt. It may be it is a suggestion which one cannot incontinently repel in view of the relations between Mr. Cockshutt and the club, and the circumstances in which the adjoining property was acquired—that evidence as to the cost of acquiring additional property from Mr. Cockshutt would not really have added to the weight of the evidence in support of the claim made by the respondents.

However that may be, two things are quite clear. The respondents are not entitled as a matter of law to take the position:—You have prejudiced by your works the utility of our property for the purpose to which we devote it, and consequently we require from you such a sum of money as will enable us by the expenditure of it to procure for ourselves a property equally useful for those purposes. The authority to which Hodgins, J.A., refers, namely, *Queen* v. *Burrow* (Boyle & Waghorn on Compensation, p. 1052), as well as the observation of Lord Shand in the explanation of an award in *Edinburgh* v. *N. British R. Co.* (Hudson on Compensation, p. 1530), are quite sufficient to establish that proposition. It must be shewn, as Bowen, L.J., points out in the *Burrow's* case, that purchase is the reasonable consequence of the taking or the injurious affection of the owner's lands. If I were obliged to answer that question I should infer from all that took place before the arbitrators that it was not the reasonable consequence and indeed that it was not the consequence at all; but I do not think that I am entitled to speculate about a point of that kind on behalf of the parties who did not see fit to bring it forward at the proper time.

Second, the arbitrators rejected the evidence of value of the witnesses upon which the Court of Appeal relies in fixing the price of the property to be purchased at $1,000 an acre. I do not think the arbitrators' judgment on this point can properly be disturbed, and accepting their conclusion upon that point there is no evidence, I think, from which, assuming purchase to be necessary, a higher price than $300 an acre can be arrived at as a probable purchase price.

In this view the amount allowed by the Court of Appeal would have to be reduced by $10,500, a reduction which brings it within $300 of the amount allowed by the arbitrators.

My conclusion on the whole is that the appeal should be allowed, the judgment of the Court of Appeal set aside, the amount of the award by the arbitrators increased by the sum of $2,000, that the appellant should have the costs of the appeal to this Court and the respondents the cost of the appeal to the Court of Appeal.

ANGLIN, J.:—I am, with great respect, unable to find in the record evidence to support the allowance of $15,000, made by the Appellate Division on the basis of reinstatement, for the cost of procuring 15 acres of adjacent land, requisite in their opinion to restore the Brantford Golf & Country Club course to a condition equal to that in which the advent of the appellants' railway found it. On the evidence a part of the adjoining Cockshutt farm, comprising 38 acres, is probably the only suitable land. But there is no evidence of the value of that land (or of any other neighbouring land) and it is quite uncertain whether the owner will part with any portion of it. Assuming the necessity for acquiring 15 additional acres to be established, for the allowance of $1,000 per acre for lands to be so acquired, counsel for the respondents were unable to find warrant in the evidence. It would seem to be impossible, except upon the merest conjecture, to deal with the case on the basis which commended itself to the Appellate Judges.

On the other hand, viewing it in the light of the decision of the Judicial Committee in *Atlantic & N.W.R. Co.* v. *Wood*, [1895] A.C. 257, the award of the arbitrators, in at least two particulars, appears to me to proceed on an erroneous view of the effect of the evidence. It deals with the 6¾-acre parcel severed by the railway as still available for golfing purposes, and merely allows, on that assumption, for the inconvenience which the crossing and recrossing of the railway will entail; and it ignores entirely the destruction for golfing purposes of a strip of land containing about 7 acres, the eastern part of the low level land lying between the north limit of the right of way and the bank or bluff on which the club house stands.

Wide as the purview of sub-secs. 252 and 253 of the Railway Act may be (see authorities collected in *New* v. *T.H. & B. R. Co.*, 8 Can. Ry. Cas. 50, and *T.H. & B. R. Co.* v. *Simpson Brick Co.*, 8 Can. Ry. Cas. 464, 17 O.L.R. 632), I gravely doubt whether crossings for golfing purposes, including playing over the right

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of way, are within them. However that may be, the order made by the Railway Board approving of the general location under sec. 159 of the Act, and providing for access to the river does not cover such rights of crossing as the arbitrators apparently assumed the golf club would have. Whatever might be done in the way of providing for crossing by agreement between the club and the railway company, no such agreement has been made. But, assuming that the club has a strict legal right both to cross and to play over the right of way, the inconvenience and danger attendant upon the exercise of that right would be quite out of proportion to any advantage to be gained by placing a single hole—and that is the most that it is suggested could be done—to the south of the railway.

It is said that play is carried on across railways on other golf courses. But in each of the several instances mentioned, with only one exception where the railway divides the course in halves, it has been shewn that the golf club after having for some time attempted to play over the railway, abandoned the part of the links severed by it from the larger portion. I think the position taken by Mr. Cummings—an expert whose competency is unquestioned—that for all practical golfing purposes, whatever may be the theoretical rights, the 6¾ acre parcel has been lost to the club, is indisputable. Perhaps it may still be used for a market garden patch or something of the sort and in that character may have some small value—possibly $20 an acre. For depreciation owing to severance the award allowed $600 in respect of this parcel, approximately one-third of its value as fixed by the arbitrators. Deducting $135 for any use that may be made of it for other than golfing purposes on the basis of valuation allowed by the Board ($300 per acre) from which, though upon the evidence it certainly does not err on the side of liberality, I do not see my way to depart. I would increase the allowance in respect of this parcel by $1,290.

For the 7 acre strip to the north of the railway and below the bank at the east end of the property I think a substantial allowance should also be made. For golfing purposes it is no longer of use. Cummings, the respondent's expert, so testified and on none of the plans prepared by Erickson, the expert called by the railway company, was any use of this strip of land suggested. It may still be of some slight value, however, for other than

golfing purposes, and on the basis of $300 an acre set by the arbitrators, $250 an acre, or $1,750 in all, would probably be a fair allowance to make in respect of it.

No allowance has been made for the practical deprivation of the advantages of frontage on the river. That is, in my opinion, an appreciable element of damage which would entitle the owners to compensation. But its value is difficult to arrive at, and, unfortunately, there is no evidence on vhich to base an estimate. If it were open to me without evidence or the advantage of a view to fix the amount of compensation for this item I should think between $1,000 and $1,500 should be allowed. But without evidence I am unable to make any such allowance.

The arbitrators, on the footing of the golf club having been deprived only of the use of 8 8-10 acres actually taken by the railway, allowed for the depreciation in the value of the remaining 67 acres of the golf course $1,750. But, as above indicated, the club will in fact lose not merely the 8 8-10 acres comprising the actual right of way, but will also lose for golfing purposes 13¾ acres more, and will be left with only 53 acres available for a nine-hole course. That the taking of the 13¾ additional acres from a golf course originally of 76 acres and already reduced to 67 acres would materially affect the value of the remaining 53 acres is not open to question. No doubt a nine-hole course of some kind can be laid out on the 53 acres. But it scarcely requires the evidence of a golf-course expert to establish the fact that such a course would be less desirable than one laid out on 67 acres. The allowance of $1,750 made by the arbitrators includes matters, such as the presence of the railway, in respect of which it must be assumed that full compensation for all the damage that they will cause has been given. If would, therefore, not be proper to take this whole amount and increase it by a sum in the proportion which 8 8-10 bears to 13¾. Dealing with the matter on the assumption that only a part of the allowance now under consideration was made in respect of depreciation due to the diminution of the area available for golfing, I would increase the $1,750 allowed by the arbitrators to $2,500.

If, acting upon my own views, I would, therefore, have increased the whole award from $7,240 to $11,020. I fully realise that the allowances which I would make are at best but approxi-

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mations, yet they are as nearly accurate as the evidence enables me to make them and I would deal with the case in this way only because, as I understand sec. 209 of the Railway Act, we have not the power of reference back. As success on this appeal has been divided I would have given costs to neither party.

But my learned brothers, who think, as I do, that the arbitrators erred and that their award should be increased, are of the opinion that the addition should be of a smaller amount. In deference to their views and in order that the judgment to be pronounced may be that of a majority of the Court, I concur with my brothers, Davies and Duff, in fixing the compensation which the respondents should receive at $9,240.

Judgment accordingly.

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REX v. HALL.

Nova Scotia Supreme Court, Longley, J. December 7, 1916.

1. ESCAPE (§ I—5)—BY NEGLIGENCE OF OFFICER—RECAPTION UNDER ORIGINAL WARRANT.
   If a prisoner, when being taken to jail to serve a sentence imposed on summary conviction, escapes because the constable became intoxicated and permitted him to go, the escape is not a voluntary one and the escaped prisoner may be retaken on the original commitment.
2. HABEAS CORPUS (§ I D—21)—FORM OF RETURN.
   A return in habeas corpus will not be quashed because addressed to "the Chief Justice and other Justices of the Court" instead of being addressed, in strict conformity with the habeas corpus order, to the Judge who made the order.

Statement.

THE prisoner was convicted at Springhill on May 1st, 1916, of a second offence of selling liquor against the provisions of the N.S. Temperance Act, 1910, and sentenced to three months imprisonment in the Amherst gaol. The prisoner was delivered to a constable on this date with a warrant of commitment reciting the conviction, and upon the constable and his prisoner arriving at the gaol in Amherst, the hour being late, they were unable to secure admittance. They went to a hotel for the night. It appeared from the affidavits submitted that the defendant, early in the morning of May 2nd, left the room and custody of the constable in his presence and with his knowledge. Defendant then left the Province of Nova Scotia and did not return until some time in July, 1916, and was re-arrested on the original warrant on Nov. 15th, 1916. This was a motion for the discharge of Hall under cap. 181, R.S.N.S., "The Liberty of the Subject Act."

W. J. O'Hearn, K.C., for the Chief Inspector, moved that the

order in the nature of a writ of habeas corpus and the return thereto be quashed on the following grounds:—

1. Because the affidavit of the applicant did not satisfy section 3(2), of cap. 181, R.S.N.S., by showing that the issuing of a writ of habeas corpus itself would be attended with "unnecessary delay, expense, &c."

2. The return was made to the "Chief Justice and other Justices of the Court" instead of to the Judge granting the order as so therein directed.

LONGLEY, J., declined to quash the proceedings and overruled the preliminary objections.

The motion for discharge was then argued on the merits.

J. S. Smiley, for the applicant:—It is common ground that the constable permitted an escape. When the escape is voluntary, there can not be a recaption under the original warrant; see Archbold's Criminal Pleading, 22nd ed., 852; Paley on Convictions, 7th ed., 281.

W. J. O'Hearn, K.C., for the Chief Inspector:—Hall's conviction is good. A good judgment cannot be defeated by a defective commitment or a commitment fraudulently or negligently executed. The evidence shows that the constable was drunk and thereby permitted an escape. Both are liable under the Criminal Code. (See sections, 185, 191, (*b*).) It was Hall's duty to surrender. The escape here was not "*voluntarily*" permitted by the constable, but rather negligently or fraudulently. See *R.* v. *O'Hearn*, No. 2, 5 Can. Cr. Cas. 531.

LONGLEY, J.:—On the 1st day of May, 1916, the accused was convicted of a violation of the Temperance Act and sentenced to three months in the county gaol, and he was on the said first day of May arrested and taken to Amherst, where he escaped, owing to the negligence, if not worse, of the constable. He appears to have got drunk. The defendant then went to New Brunswick and stayed there some considerable time, and ultimately came back to Springhill. A difficulty was found in getting some person to arrest him, and finally a man from Halifax was sent up and arrested him and lodged him in the gaol in the latter part of November. He is there to serve his time. Longley, J.

The application is made on the ground that the escape was voluntary, and, secondly, the offence is one which will not stand

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over. I have given both these matters full consideration. I have looked upon the escape as not a voluntary one, but due to the drunkenness of the constable arresting him, and I consider there is no time fixed in which a man may not be called upon to serve the term of his sentence. The consequence is that I refuse to grant habeas corpus. *Discharge refused.*

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Alberta Supreme Court, Walsh, J. December 28, 1916.

LEVY AND SEIZURE (§ III A—40)—NEGLIGENCE OF BAILIFF—LIABILITY.

A bailiff in Alberta, although subject to the instructions and orders from the sheriff of the district, is appointed by the government of the province and the sheriff is not responsible for negligence or misconduct by such bailiff.

Statement.

ACTION against sheriff for negligence of bailiff.

G. H. Ross, K.C., and *C. F. Adams*, for plaintiffs.

S. J. Shepherd, for defendant.

Walsh, J.

WALSH, J.:—The plaintiffs are execution creditors of one Lonsdale whose writs of execution were by their solicitor placed in the hands of the defendant, who then and still is the sheriff of the Judicial District of Lethbridge. They complain that the defendant "failed, refused and neglected to do as he was by said writs of execution commanded, namely: (*a*) to serve or cause to be served on the execution debtor J. A. Lonsdale said writs of execution or copies thereof; (*b*) to seize or cause to be seized the goods and chattels of the said execution debtor Lonsdale, and the said sheriff still fails, refuses and neglects to do so." And they allege that by reason of his failure to seize or cause to be seized the goods of the execution debtor they have suffered to the extent of their respective judgments. I do not understand the meaning of ground (*a*) above set out. Nothing was said as to it at the trial, the evidence and the argument being addressed to ground (*b*) exclusively, and it is therefore with it alone that I propose to deal.

The facts are very simple. The execution of the plaintiff Great Northern Insurance Co. was received by the defendant on January 18, 1916. The covering letter from its solicitors informed him as to the residence of Lonsdale, the exact quarter section being named, and instructed him that Lonsdale had a splendid crop of grain which they were anxious to have a levy made upon "as early as possible, so as to catch any of the grain he has harvested this year, and seize for the amount of our claim before he

has a chance to dispose of it all." On the day on which he received this execution, the defendant sent a warrant under it to the the bailiff at Warner, in whose district Lonsdale resided, with instructions to act upon it at once. The execution of the plaintiff Carson came into the defendant's hands on January 27, 1916, and he on the same day sent a warrant under it to the same bailiff. This bailiff appears to have done nothing towards making a seizure under either of these warrants until February 21, and Lonsdale took advantage of this delay to dispose of the grain upon the seizure and sale of which the plaintiffs rested their hopes of being able to realize the amount of their judgments. On February 18 he made a bill of sale to one Ross of 2,600 bushels of wheat and 1,500 bushels of oats and 15 bushels of barley which had evidently been at his place during the whole of the time that these warrants had lain unexecuted in the bailiff's hands, a period of about 6 weeks in the case of the company, and 3 weeks in the case of Carson. The sale to Ross appears to have been a *bonâ fide* affair; at any rate the plaintiffs did not impeach it and the grain which should have been seized and sold for their benefit was lost to them. And this really is of what the plaintiffs complain.

That the bailiff was guilty of gross negligence is not, I think, open to question. The only excuse for it offered by him is that which appears in his correspondence with the defendant, for he was not examined as a witness at the trial, and that is that the weather was so severe during the greater part of this period of inactivity on his part that he would not undertake to travel the comparatively short distance between his home and that of Lonsdale for the purpose of making a seizure. That does not excuse him, even if it is true. The plaintiff's letters to him were frequent and insistent, and if he was not prepared to undergo some little hardship in the performance of his duty he should have resigned his office. Moreover, the certificate of the superintendent of the weather bureau, taken from the meteorological records at Lethbridge, which was put in by consent, shews that for the 4 days preceding February 18, the day of the sale of the grain to Ross, the lowest temperature was 27.4 above zero and the highest was 60.2 above at Lethbridge and it of course would be practically the same at Warner, so that he then had at least 4 days of spring-like weather in which to do the job which he apparently

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was so loath to undertake. But he even then did not do it and so the grain was lost to the plaintiffs.

Although Mr. Ross in opening his argument said frankly that no complaint could fairly be made of the defendant's personal handling of these executions, both he and Mr. Adams, as their argument developed, seemed disposed to recede somewhat from this position. In my opinion, however, no fault can reasonably be found vith the manner in which the defendant handled his end of the business. After forwarding the warrant under the company's execution on January 12, he wrote for a report on the 25th of that month, and on the 3rd, 8th and 16th of February he wrote urgent letters impressing upon the bailiff the necessity for prompt action and insisting that he act without delay. Mr. Adams criticised the instructions given in the letter of January 12 to "kindly levy at your earliest convenience," but I do not think that the letter, read as a whole, warrants his criticism. The expression to which he objects and which is to be found in the opening sentence of the letter is one which has grown into general use in a sense very different from that to be drawn from its literal meaning. The following sentences of the letter are plain enough to dispel any idea that its recipient might gather from these words that he was to act when he got ready, for he is told in them that "the solicitors are very anxious that you endeavour to make a seizure at once" and to "kindly give this your immediate attention and let us hear from you promptly." It is suggested that he should have taken the matter of the seizure in hand himself or that he should have withdrawn the warrant from this delinquent bailiff and placed it in the hands of another one. For reasons which I will give when dealing with the question of the rights and liabilities of sheriffs in this province I do not think that he was bound to do the former or entitled to do the latter of these things. Moreover, the bailiff's letters of the 7th and 17th of February might reasonably have led him to believe that he was not neglecting the matter. I have no hesitation in acquitting the defendant of any failure to do his part.

The real question presented for decision here is whether or not the defendant is liable for this bailiff's neglect of duty. It may seem strange that there should be any doubt about this in the face of an unbroken line of decisions of the English and Canadian Courts that he is so liable, but that doubt does exist. And it does

so because of the entire difference that there is between the system that prevails here and that which obtains in England and in those Provinces of Canada from which these decisions come in everything that relates to the conduct and arrangement of a sheriff's office and the appointment of his subordinates. In them, as I understand it, the connection between the State and the sheriff after his appointment or election is of a very casual character. He is practically placed in the sole and undisturbed discharge of the duties of the shrievalty. He takes to his own use the emoluments of the office and out of them meets the expenditures of it. He employs under sheriffs or deputy sheriffs and bailiffs of his own selection. He assigns to them the work that they are to do, pays them their salaries and dismisses them at his pleasure. His office is in its management entirely free from outside dictatorship or control. He runs it as an institution for which he and he alone is responsible to those whose business passes through it. And so in those jurisdictions he is held liable for the misconduct of those whom he employs in his office. Maule, J., in *Smith* v. *Pritchard*, 137 E.R. 629, 8 C.B. 565, at 588, says:—

> the reason that the sheriff is held liable is that having a duty imposed upon him by law instead of performing it himself, he delegates it to another; and therefore it is but just that he should be responsible for the misconduct of those to whom he so delegates the performance of his duty.

Our system is the very opposite to this. There is no very clear statutory definition of the duties imposed upon sheriffs in this province. Sub-sec. 1 of sec. 2 of the Sheriffs' Act which authorizes their appointment simply says that a sheriff "shall discharge all the duties connected with his office and also such other duties as may be assigned to him or appertain to his office by law." The Rules of Court, inferentially at least, provide that a writ of execution shall issue to the sheriff of the judicial district in which it is to be executed, and the writs here in question are directed to the defendant. There can be no doubt, I think, but that it is the duty of a sheriff into whose hands such a writ comes, either to execute it himself or to put it in the hands of some other properly qualified person for execution. That he may do in person what the writ commands him to do is, I should say, not open to question, but I do not think that the law either requires or expects him to personally do anything in the execution of it which cannot be done in or from his office. This is so in the first place of necessity although this is equally true of

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sheriffs in other jurisdictions. The bailiwick of every sheriff in this province is of tremendous size. Nearly every district has a populous city within its limits and every district has a large number of towns and villages with a scattered far ning population dotted here and there over its rural sections. From the very impossibility of it no sheriff could be expected to do personally the things which the law requires to be done through the medium of his office, and so I do not think that the law imposes that duty upon him.

The form of a writ of execution is suggestive of the idea that he is not expected to personally make a levy for it does not command him to make the money but to cause it to be made.

Then the Sheriffs' Act provides, I think, the machinery by which the sheriff is to do the work which comes to his office and which he cannot personally do. Provision is made for the appointment of an assistant sheriff "who shall have power to do and perform in the name of the sheriff any duty or act which the sheriff of the said district has power to do and perform," and of deputy sheriffs for the whole or any part of a district who "shall within their respective districts have and exercise all powers, duties and obligations which may now be exercised or performed by the sheriff," and of bailiffs "at such places in the province as the public convenience requires." But the sheriff has no power to make any of these appointments. That power is by the Act conferred in each case upon the Lieut.-Governor in Council, the source of his own appointment. It was suggested in argument that the right of the Lieut.-Governor in Council to make the appointments of bailiffs is not exclusive, for sub-sec. 5 of sec. 2 of the statute which confers it simply says that he may make them, and that being so there is nothing to prevent the sheriff from appointing such other bailiffs as he sees fit. I do not think that this contention is well founded. The statute is, in my opinion, exhaustive of the power of appointment. It undertakes to say by whose authority the office shall be filled, and that impliedly at any rate excludes every other person from the right to appoint.

The whole scheme of the Act appears to be to make the sheriff's office in each district a department of the civil service. The sheriff is appointed as its head, and he is furnished by the govern-

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ment of the day with the necessary staff to carry on his work, an assistant sheriff when he needs one and bailiffs in the different districts of his bailiwick to serve and execute process. Every one is paid by salary except that a bailiff may be allowed the whole or any portion of the fees payable for work done by him. All fees received from the office are to be paid to the Provincial Treasurer.

To hold a sheriff under these circumstances personally responsible for the neglect of duty or misconduct of one of his bailiffs would be as unfair as to make a registrar of land titles or a clerk of the Court personally liable for some sin of omission or commission on the part of one of his staff which is provided for him in the same way that bailiffs are provided for a sheriff. There is, I think, a close analogy in this respect between the position of a sheriff under this Act and that of a registrar or clerk of the Court.

While, as Maule, J., says it is but just that under the English system he should be responsible for the misconduct of those whom he employs, how unjust it would be to impose liability upon a sheriff in this province for the acts of a man for whose appointment he is in no sense responsible and over whom he has absolutely no power of dismissal or even suspension. It must be remembered that if he is liable at all his liability is not limited to such a class of action as we have here for "a sheriff is civilly liable for any fraud or wrongful act or omission on the part of his under-sheriff, bailiff or officer in the course of his employment though there may be no proof of any recognition by the sheriff of the act or default complained of." Hals., vol. 25, p. 826 par. 1439, and cases there noted.

Another reason why it cannot be said to have been in the contemplation of the legislature that a sheriff might appoint his own bailiffs is to be found in the fact that the Act contains no provision for the payment of remuneration to a bailiff other than one appointed by the Lieut.-Governor in Council. The sheriff is paid by salary and in the absence of other provision he would have to pay out of his own pocket the remuneration of a bailiff employed by him and that would certainly be a most unreasonable thing.

An argument for the plaintiff is that there should be liability somewhere for such a thing as has happened here. I quite agree that there should be, but that is no reason why the sheriff should be made the scapegoat. I should think there could be no ques-

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tion but that the bailiff himself is liable, and in this case at any rate the bailiff is under the bond of a responsible company which seems to me quite broad enough to cover liability for this default. Fortunately in this case there will be practically no loss for as a result of this year's magnificent harvest both of these executions will be paid in full out of grain which the sheriff has had seized since this action was started. Except for the question of costs this action is therefore of but academic interest.

I dismiss the action but without costs. It is apparent from one of the exhibits filed that the Att'y-Gen'l's Department is defending this action, and very properly so, in my opinion. I have no doubt but that this department would not ask for its costs under the circumstances as the plaintiff's action is founded on the undoubted negligence of one of its officers though, in my judgment, they have sought to place the blame on the wrong officer, and it looked when the action was started as if the plaintiffs had sustained a complete loss through that negligence. This is the first time that this question has come up for decision in this province, and I do not feel like imposing upon the plaintiffs the burden of paying the costs incurred by the Att'y-Gen'l's department in securing a construction of this statute, even though the plaintiffs took a wrong view of it.

Judgment accordingly.

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REX v. GOYER.

Saskatchewan Supreme Court, Sir Frederick Haultain, C.J., Newlands and Lamont, JJ. November 18, 1916.

1. POST OFFICE (§ III—15)—OFFENCES—MAILING INDECENT PRINTS—PRIVATE LETTER CONTAINING INDECENT MATTER.

In the interpretation of sub-sec. (*a*) of Cr. Code sec. 209 as to mailing indecent prints, etc., the words "or other publication" are to be construed as referring to matters *ejusdem generis* with the books, pamphlets, etc., which are previously mentioned in the sub-section and do not include indecent matter written in a private latter sent sealed; the sending of such a letter would, however, be an offence under Cr. Code secs. 317 and 318 (defamatory libel) if sent without the permission of, and if designed to insult, the addressee; the words "matter or thing" which follow the word "publication" in sec. 209 (*a*) refer to some other object such as a statue or carving.

Statement.

CASE reserved on the application of the Crown to review the finding of Brown, J., that a sealed private letter was not within the scope of sec. 209 (*a*) of the Criminal Code as to mailing indecent matter.

H. E. Sampson, for the Crown; *D. E. Doerr*, for accused.

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Newlands, J.

The judgment of the Court was delivered by

NEWLANDS, J.:—This was a case stated by my brother Brown, asking the opinion of this Court upon the question whether an indecent letter of a private character and being one among others written in the course of a correspondence that took place between two parties was an offence under sec. 209 (*a*) of The Criminal Code.

This section is as follows:—

"209. Every one is guilty of an indictable offence and liable to two years imprisonment who posts for transmission or delivery by or through the post—(*a*) any obsence or immoral book, pamphlet, newspaper, picture, print, engraving, lithograph, photograph or other publication, matter or thing of an indecent, immoral, or scurrilous character."

This section in my opinion refers only to a publication, i.e., something for public circulation. It does not in words refer to a letter, and the words "or other publication" has reference to something of the same sort as those mentioned, and which is issued for public circulation, the final words of the section "matter or thing" refer to some other object, such as a statue or carving.

If it was an offence under sec. (*a*) to send a letter through the mails containing indecent matter on the inside, it would certainly be an offence to send such a letter containing indecent matter on the outside, and therefore sec. (*b*), which prohibits the sending of any letter upon the outside or envelope of which there are words, devices, matters or things of an indecent character, would have been unnecessary.

The sending of an indecent letter to a person without such person's permission would be an offence under sec. 317 of the Code. That section provides that a defamatory libel is matter published, without legal justification or excuse . . . designed to insult the person of or concerning whom it is published; and by sec. 318 publishing a libel is, amongst other things, causing it to be delivered with a view to its being read or seen by the person defamed.

Where the person to whom such a letter is written is a consenting party to the transaction, there is no offence unless the indecent matter is on the outside or envelope of the letter.

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Newlands, J.

The question whether the learned Judge was right in holdin that such a letter was not subject to an indictment should b answered in the affirmative. *Judgment for the accused.*

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UPPER CANADA COLLEGE v. CITY OF TORONTO.

Ontario Supreme Court, Appellate Division, Garrow, Maclaren and Magee, JJ.A., and Masten, J. October 10, 1916.

TAXES (§ I F 3—85)—EXEMPTION—COLLEGE—LOCAL IMPROVEMENTS.

Upper Canada College not being a school maintained in whole or in part by a legislative grant or school tax, and being a college or seminary of learning, would by the Local Improvement Act, R.S.O. 1914, ch. 193, sec. 47, be liable to assessment for local improvements, but sec. 10 of the Upper Canada College Act, R.S.O. 1914, ch. 280, exempts it from all assessments, including local improvements, and the latter Act being a local Act is not repealed by the public general Act, and so being exempt from taxation the college is not a necessary party to a petition for local improvements.

Statement.

APPEAL by plaintiff from a judgment of Falconbridge, J., in an action to determine the validity of certain by-laws.

Frank Arnoldi, K.C., and *D. D. Grierson*, for appellant.

Irving S. Fairty, for defendant.

H. E. Rose, K.C., and *G. H. Sedgewick*, for P. W. Ellis and other property owners interested.

The judgment of the Court was delivered by

Masten, J.

MASTEN, J.:—This is an appeal by the plaintiff from the judgment of the Chief Justice of the King's Bench dated the 25th April, 1916, whereby he dismissed the plaintiff's claim without costs.

The action is to set aside three by-laws of the defendant municipality and to restrain it from proceeding with the construction of an asphalt pavement and of a sidewalk on Oriole road, in the city of Toronto, at the points and in the manner now proposed.

The plaintiff's claim is put upon two grounds. The first is, that the city council, by resolution adopted by it at the time of a conference between the governing body of the college and the city council, agreed to locate the pavement and sidewalk in question symmetrically with respect to the centre line of Oriole parkway (a sixty-seven foot roadway), and is bound by the agreement and resolution to so locate its pavement in the middle of a sixty-seven foot street, and the sidewalks and boulevards symmetrically thereto. During the course of the argument this contention was determined adversely to the appellant's contention, and the only point now remaining for decision is that next stated.

(2) The other branch of the case upon which the plaintiff

founds its claim is, that the by-laws under which the pavement and sidewalk are being laid by the city are invalid and should be quashed or declared ineffective, because such by-laws can only be passed after compliance with the preliminary statutory formalities prescribed by R.S.O. 1914, ch. 193, including in particular the lodging of a petition signed by two-thirds in number and one-half in value of the property-owners liable to assessment for the proposed improvement (sec. 12). The contention of the appellant is, that it owned more than one-half in value of the lots which, if legally assessable, should be specially assessed in support of this improvement.

It therefore becomes the sole question in this action whether the plaintiff was or was not legally assessable for this local improvement, or, in other words, whether or not it was a person qualified and competent to sign the petition for the local improvement, and so whether the petition which forms the basis for the local improvement by-law was insufficiently signed.

The petition relative to the asphalt pavement and the sidewalk appears to have been lodged in the month of June, 1914, and the local improvement by-laws based thereon to have been passed in June and July, 1914.

The opposing contentions are as follows. On the one hand, the defendant contends that the lands of the plaintiff are not liable to assessment for local improvements, being exempted by the Upper Canada College Act, R.S.O. 1914, ch. 280, sec. 10, which declares as follows: "(1) All property now vested in or which shall be hereafter in any way acquired by or vested in the College shall be exempt from taxation in the same manner and to the same extent as property vested in the Crown for the public uses of Ontario." On the other, the plaintiff contends that its lands are liable to assessment for local improvements under the Local Improvement Act, R.S.O. 1914, ch. 193, sec. 47, coupled with secs. 5 and 6 of the Assessment Act, R.S.O. 1914, ch. 195.

Section 6 of the Assessment Act provides that: "The exemptions provided for by section 5 shall be subject to the provisions of the Local Improvement Act as to the assessment for local improvements of land, which would otherwise be exempt from such assessment under that section."

Section 47 of the Local Improvement Act, R.S.O. 1914, ch. 193, provides that: "Land on which a church or place of worship

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is erected or which is used in connection therewith, and the land of a university, college or seminary of learning, whether vested in a trustee or otherwise, which is exempt from taxation under the Assessment Act, except schools maintained in whole or in part by a legislative grant or a school tax, shall be liable to be specially assessed."

With respect to the by-law for opening Oriole parkway, passed in 1912, on a petition filed in the same year, the statutes then in force must govern; but, while they differ in words, I do not find that they differ in effect from the consolidation contained in the Revised Statutes of 1914, which I have just quoted above. Notwithstanding the appellant's argument, I am of opinion that the collection of money for local improvements pursuant to R.S.O. 1914, ch. 195, is taxation. I understand it to be admitted that Upper Canada College is not a school maintained in whole or in part by a legislative grant or a school tax, and that it is a college or seminary of learning. The provisions of sec. 47, standing alone, would therefore apply to render its lands liable to assessment for local improvements.

On the other hand, the provision of sec. 10 of the Upper Canada College Act exempts it broadly from all taxation, including local improvements, if lands of the Crown are likewise so exempt. The two sections are thus in conflict, and the question is, which governs?

The general rule is that, in the absence of any indication of intention on the part of the Legislature, local Acts are not repealed by public general Acts: Craies' Statute Law, 4th ed., p. 469. This rule is illustrated and applied by Ferguson, J., in the case of *Ontario and Sault Ste. Marie R.W. Co.* v. *Canadian Pacific R.W. Co.* (1887), 14 O.R. 432. In that case he held that where there are provisions in a special Act and in a general Act on the same subject which are inconsistent, if the special Act gives a complete rule on the subject, the expression of the rule acts as an exception of the subject-matter of the rule from the general Act.

In the present case the general Act provides that a college or seminary of learning shall be liable to taxation for local improvements. The Upper Canada College Act makes that particular institution an exception to the general rule; and that, I think, is the result in the present case.

Some effort was made in argument to reach a different conclu-

sion on the footing that the later general Act repealed the earlier special Act. I think that the rule of construction which I have quoted and applied would override this latter argument; but an examination of the provisions of the statutes in force from time to time leads me to the conclusion that, apart from the rule on which I have relied, this argument of the plaintiff is not sound.

The lands in question were conveyed to the Crown in 1889. The deed is absolute and not in trust (if that makes any difference).

At that date the matter was governed by the Assessment Act, R.S.O. 1887, ch. 193, sec. 7 (1), by which there was exempted from taxation all property vested in or held by Her Majesty. The original enactment from which sec. 47 of R.S.O. 1914, ch. 193, is derived, was first enacted in 1890, as sec. 3 of ch. 55 of that year; but, when passed, it had no effect on the lands in question, because they were lands held not by the college, but vested in and held by Her Majesty.

So the matter remained until in 1900 the passing of the Upper Canada College Act, 63 Vict. ch. 55, vested these lands in the college.

At that date the general statutory provision corresponding to what is now sec. 47, was the Municipal Act, R.S.O. 1897, ch. 223, sec. 684, and it seems to me probable that during the years 1900-1901 and until the Act 1 Edw. VII. ch. 42 was passed, these lands were liable to taxation for local improvements; but it also seems clear to me that that Act was passed for the very purpose of removing any such liability, and that its purpose was effectively accomplished.

If, then, such an investigation has any bearing, I am unable to see that it aids the plaintiff's contention; but the investigation seems to me irrelevant, for in the present case we are governed by the two statutes which became law simultaneously on the bringing into force of the Revised Statutes of 1914.

Since, then, the lands on the west side of Oriole park are admittedly held by the plaintiff, Upper Canada College, the matter is governed by the direct provision relative to this particular college, namely, that its land shall be exempt from taxation to the same extent and in the same manner as the lands of the Crown.

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By sec. 5 (1) of the Assessment Act, the interest of the Crown in any property is exempt from taxation. The inquiry resolves itself into a question whether property vested in the Crown for the public uses of Ontario is or is not liable to taxation for local improvements.

Local improvement taxes cannot be imposed on the Crown unless the statute making the imposition expressly directs that the statute is to apply to the Crown. I can find no such direction anywhere in the Local Improvement Act or elsewhere.

The result may be summarised thus:—

The levying and raising of money under the Local Improvement Act is taxation.

Crown lands are exempt from taxation under R.S.O. 1914, ch. 195, sec. 5 (1).

This exemption is not cancelled or varied by the Local Improvement Act or otherwise. Hence Crown lands are not subject to taxation for local improvements, and neither are the lands in question.

It was not therefore necessary that the petition for the by-laws relative to these improvements should be signed by the plaintiff.

The by-laws, therefore, appear to be valid, and this action not well-founded.

This renders it unnecessary to deal with the other question argued on behalf of the plaintiff, i.e., whether the certificate of the city clerk, given in pursuance of sec. 16 of the Local Improvement Act, is final and conclusive, or whether it can now be questioned. It also renders it unnecessary to discuss the point raised by Mr. Rose, that the by-laws in question cannot be quashed after the expiry of one year.

The result is that the appeal must be dismissed.

Appeal dismissed.

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BEDARD v. VILLAGE OF BEAULIEU.

Quebec Superior Court, Dorion, J. September 29, 1916.

HIGHWAYS (§ I V A 5—154)—ACROSS FROZEN WATERS—BREAKS—LIABILITY OF MUNICIPALITY.

Municipal corporations are not responsible for accidents caused by the breaking of the ice on roads laid out and maintained by them on rivers or other bodies of water.

Statement.

ACTION for damages for the drowning of a horse. Dismissed.

Plamondon & Bedard, for plaintiff.

Taschereau & Roy, for defendant.

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Dorion, J.

DORION, J.:—Whereas plaintiff claims from defendant $275 as damages for the loss of a horse and harness on January 20, 1916, on the road laid and opened to the public by the defendant on the ice bridge between Quebec and the Island of Orleans;

Whereas plaintiff alleges that the ice having given way under the weight of his horse, the latter was drowned in the St. Lawrence river; that the accident is due to the fault of the defendant, which laid the road at a place where the ice was not sufficiently thick; that the defendant, although it knew the road was in a bad state, allowed it to remain so, did not close it and did nothing to notify the public of the dangers existing;

Whereas the defendant contests the action alleging that, seeing the ice bridge had only formed recently, it had closed and obstructed the said road at both extremities of the portion maintained by it so as to advise the public not to venture thereon or, at least, to do so only at its own risk and that, consequently, plaintiff was notified of the risk; that the horse was not drowned in the river but was led by the plaintiff into a pool of water wherein it slipped and whence plaintiff was unable to bring it out, and that finally the state of the road was due to irresistible force and to climatic conditions;

Considering that on January 23, 1916, the son of the plaintiff crossed from Quebec to the Island of Orleans on the road laid out and maintained by defendant on the ice bridge with a mare and vehicle belonging to the plaintiff and that the animal fell in a hole from which it could not be extricated, and was drowned;

Considering that the only eye-witnesses of the accident state that the horse was swimming in the river and that the ice was broken;

Considering that a witness verified more than 3 days after the accident that there was a hole of a foot and one-half in the ice;

Considering that according to art. 849 of the Municipal Code, corporations are not responsible for accidents or damages resulting from the breaking of the ice on the roads laid out and maintained by them on rivers or other bodies of water;

Considering that although municipal corporations are responsible for accidents due to the bad state of the winter roads laid out by them, those who venture thereon assume all risk of the ice breaking;

Considering that the plaintiff's action is unfounded, doth dismiss the same with costs. *Action dismissed.*

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LAKE ERIE & NORTHERN R. CO. v. MUIR.

Supreme Court of Canada, Davies, Idington, Anglin and Brodeur, JJ. June 24, 1915.

APPEAL (§ VII M 8—659)—CONCLUSIVENESS OF ARBITRATOR'S AWARD—AMOUNT.

The Appellate Court will not interfere with the award of arbitrators who have had the advantage of viewing the property, on a mere matter of valuation, unless it is evident that they have acted on a wrong principle in making the award.

Statement.

APPEAL from 20 D.L.R. 687, 32 O.L.R. 150. Reversed.

Davies, J.

DAVIES, J.:—This is an appeal from the judgment of the Appellate Division increasing the damages allowed by the majority of the arbitrators appointed under the statute to value the compensation to be paid by the railway company to Muir for a piece of land comprising 1.65 acres expropriated by them for the purposes of their railway. This 1.65 acres formed all that part of Muir's property fronting on a small and rather shallow river. I do not find it in the evidence, but it was stated by counsel at bar and not contradicted, that the river is one navigable only for very small craft such as canoes and pleasure boats and has only a depth of 3 or 4 ft. at the outside. The bank of the river is very steep and high, rendering access from top to water's edge almost impossible. It appeared, however, that there were two ravines running through the land taken to the shore of the river, and it was contended that means of access could, with reasonable expenditure, be made along the smaller ravine to the river front. The property of Mr. Muir fronted 348 ft. on the river. It was strongly contended by the appellants that the evidence shewed that the river came up to the foot of the bank and that a person could not walk along there. The evidence was somewhat conflicting on the point. In appellant's factum it was stated that:—

part of the frontage of 348 ft. was composed of a ravine over 60 ft. deep to the east of the property. Then there was a neck of land 30 ft. wide which dropped to a bank which was 30 ft. above the water. West of this was a small ravine and west of that was a triangular piece of property with no available frontage. The only frontage facing the river was this neck of land 30 ft. wide. The bank along the water was 30 ft. above the water and had a grade of 1 foot in 2. There was no road down to the water, the steps being on the adjoining property of Schultz.

I found it very difficult even with the aid of the maps and plans produced and the oral explanation of counsel, clearly to understand the exact local conditions existing. But, of course, the arbitrators having inspected the property twice would under-

stand the evidence, some of which when read without the aid of local knowledge is difficult of appreciation.

I may say that the Grand Trunk Railway ran on the opposite side of the road in front of Mr. Muir's house and that it was there when Mr. Muir purchased his property and built his house. It was conceded that there was a very large traffic on that railway.'

The arbitrators allowed: For 1.65 acres taken, extending across the whole of the river front of the property at $1,500 per acre, including trees, $2,475. Damages to the remainder caused by the purpose for which the land is expropriated $1,775 = $4,250.

The appellants' arbitrator dissented from his colleagues and allowed $15,780.

The Appellate Court did not accept either the award of the majority or that of the dissenting arbitrator but assessed the damages at $6,897.50. Neither did they accept the valuations of any of the expert witnesses called for the parties. The Judge who delivered the judgment of the Appellate Division says:—

> The evidence of these expert witnesses is to my mind unsatisfactory. Those called for the appellant (Muir) displayed no knowledge of actual sales and depended upon enquiries as to properties none of which were stated to be in any way similar in position or value to the one in question. The respondent's (company's) evidence of this class is open to criticism in the same direction, and its weight is much weakened by statements such as that of Pitcher that he had not looked over the river front to value it, and of Bullock that he placed no value on the river front and that he would not build on the property on the river because it was further away from access to the city.

It is but fair, however, to say with reference to Pitcher's statements that they were made, as I read and understand them, with reference to the Woodyatt property which he had not looked over to value and not to the property in question here. It is clear that the value of the right of access to and from this river depends largely upon such access being practically feasible. The arbitrators at their several inspections would of course be able to determine this without such difficulty. It seems clear that the little ravine referred to was the only practical and feasible method by which people could reach the river and the arbitrators visiting it could easily determine whether by a reasonable expenditure of money it could be made so.

With reference to Bullock who was asked the question: What is the objection to building on the river bank? His answer was

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that "it was further away from access to the city and almost an impossible thing to build on the back end and that nobody does build there."

I cannot find anything, however, in his evidence "to the effect that he placed no value upon the river front." He was speaking with reference to the proposed subdivision of Muir's place into building lots.

Mr. Fair, the third witness called for the railway, in speaking of the access to the river from Mr. Muir's land before the railway was constructed said: "There always has been a very abrupt bank and it is a difficult access."

I gathered from the argument at bar by Mr. Muir's counsel that access of some kind could be had by way of the smaller ravine, but not as it exists at present but as it could be improved by the expenditure of money. The company appellant contested this however with the result that I found it very difficult clearly to understand from the evidence the nature and feasibility of this suggested access.

The conclusion I reached from a careful examination of the evidence on the point was that access to the river by means of the small ravine was not impossible but that though it was very difficult it could be improved by a somewhat large expenditure and made practically feasible.

The result is that we have none of the valuations of the different witnesses, including Mr. Muir himself, accepted, the award of the majority of the arbitrators and the dissenting opinion of the arbitrator for Mr. Muir both rejected, and a new valuation made by the Appellate Court, substituted for that made by the majority of the arbitrators.

The Court says that while it was not easy to arrive at a proper percentage in estimating the damages to the lands not taken and overlooking the river "it was clear that the arbitrators had not viewed it in the light of its advantage to a property of the nature and kind in question as used by the appellant" (Muir). I cannot agree with this statement.

I agree that it is not to be doubted that the owner of lands expropriated is entitled to be compensated on the basis of the value of the lands to him and not to the expropriators, but I cannot concur in the conclusion of the Appellate Court "that the

only explanation of the arbitrators' figures is that they have treated the property as one incapable of useful subdivision or as one which, though equipped with a good residence, approximates rather to a farm than a villa property."

I cannot see anything in the record to justify any such conclusion.

The arbitrators were men whose integrity and uprightness have not been impeached. The third arbitrator chosen was the County Judge, presumably selected because of his experience, knowledge and judgment in matters of this kind.

The arbitrators, assuming the conclusion of the Appellate Court that the valuations of the witnesses called as experts upon the damage sustained by Muir could not be accepted, had to rely very largely upon their own judgment, and that judgment would necessarily in a case of this kind depend largely upon their inspection of the property as a whole, and of the possibility of access from it to the river. It seems to be indisputable that, except by means of the small ravine, access to the river was not practically feasible. The height and the steepness of the bank prevented any such access, but it was said by counsel before us that the smaller ravine offered a means of access which at a reasonable expenditure could be obtained. That is a matter which, in my judgment, could be best determined by a personal view and inspection of the place. Without that I do not feel that I myself or my colleagues are in a position on the record as it exists to reach any satisfactory conclusion. The Appellate Division was in the same position as that in which this Court is.

The arbitrators had the very great, almost necessary advantage of twice seeing and inspecting all of Mr. Muir's property, including the land taken, in the presence of counsel on both sides. They gave their reasons for their award shortly but clearly enough. I cannot agree that these reasons shew a departure from the proper principles upon which lands so taken should be valued. They agreed that "the property as a whole had no great potential value for subdivision purposes" and the Appellate Division says that the plan of subdivision into small lots was given up before them, and that it was contended that a division into villa lots "was the preferable method."

The arbitrators then go on to say that they put the high value of $1,500 per acre for the 1.65 acres taken by the railway,

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amounting to $2,475, because "it was the river bank of the whole property, and cuts off the ends of the 'springs' and in that sum they intend to cover the value of this parcel taken, to the balance of the property as *river front*," and lastly they allow the balance of the $4,250 awarded by them, namely, $1,775, for "damages to the balance of the property caused by the purpose for which the land is being expropriated."

They value the property taken not only as "the river front" of Mr. Muir's whole property but as "covering the value of this parcel taken to the balance of the property as river front."

They did not use the express words "cutting off access to the river" but they expressed the idea in language which seems to me clearly to shew that such cutting off of access was embraced and allowed for. On what other conceivable principle could or should they have allowed what they call the "high rate per acre" they fixed, or what other meaning can be given to the words "the value of the parcel taken to the balance of the property as river front?"

In a mere question of valuation alone where no legal principle is involved and no legal error shewn, I do not think the Court should, except in a demonstrable case of injustice, substitute their own opinion for that of the arbitrators, more especially in a case such as this where a view and inspection of the lands taken and left seems essential to enable a fair valuation to be made. The Court is to "examine into the justice of the award given by the arbitrators on its merits and on the fact as well as the law." *Atlantic and North W.R. Co.* v. *Wood*, [1895] A.C. 257, 263.

But this does not mean that they are entirely to supersede the arbitrators and to substitute their own valuation for those of the arbitrators in a case where, in my humble judgment not possessing the great advantage of a view of the premises, they are not as well able to form as fair and reasonable a valuation as are the arbitrators.

In short, as the Privy Council say in the case above cited, they are to "review the judgment of the arbitrators as they would that of a subordinate Court in a case of original jurisdiction, where review is provided for."

I confess that, sitting here in a Court of Appeal, although I have gone over the evidence carefully and had the advantage of

hearing the views of the contestants ably presented by counsel and explained by maps and plans and coloured sketches, I do not feel myself competent to form a judgment which I should substitute for that of the arbitrators on a mere question of the valuation of a right of access to the river.

Our statutory duty is to deliver the judgment which the Court of Appeal should have given, and, in my opinion, they should not on a mere question of valuation such as I think is here involved, interfere with the arbitrators' award.

The proper principle to be acted upon by arbitrators in valuations of this kind is that laid down by their Lordships of the Judicial Committee in *Cedars Rapids Co.* v. *Lacoste*, 16 D.L.R. 168 at 171, [1914] A.C. 569 at 576, as follows:—

> The value to be paid for is (1) the value to the owner as it existed at the date of the taking not the value to the taker; (2) the value to the owner consists in all advantages which the land possesses, present or future, but it is the present value alone of such advantages that falls to be determined.

It seems to me that the arbitrators in this case have acted upon that principle. They have valued the compensation Mr. Muir is entitled to receive, not by the mere value of the acreage of the area taken, but "because it was the river bank of the whole property," and in the sum they awarded for it they say they intend to cover "the value of the parcel taken to the balance of the property as river front."

The question therefore, in my judgment, simply resolves itself into a question of quantum and as stated by Fitzpatrick, C.J., in a recent judgment delivered by him in the appeal to this Court in the *Canadian Northern R. Co.* v. *Billings*, 31 D.L.R. 687 at 694.

> In cases of this nature the Court, as in reviewing the verdict of a jury or a report of referees upon questions of fact, can not reverse unless there is such a plain and decided preponderance of evidence against the finding of the arbitrators or commissioners as to border strongly on the conclusive.

The case of *James Bay* v. *Armstrong*, [1909] A.C. 624, was decided by their Lordships of the Judicial Committee on its special facts and the award of the arbitrators reviewed and increased because the arbitrators in their award "did not give any indication of the way in which these several heads were dealt with or any clue to the reasons on which the award was based" and that the facts led "to the inference that these arbitrators were under the impression that they could prevent or nullify an appeal by giving merely a general verdict."

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No such facts exist here. No suggestion is made of any attempt by these arbitrators to withhold information as to the grounds on which they based their award. The question of a right to appeal is not challenged. The only question, I repeat, in my judgment, is whether the arbitrators have awarded a sufficient sum to the owner for the lands taken and for the loss of such access to the river as he possessed from his lands on the river front; and such other damages to the lands not taken as were sustained by the owner.

It seems to me in considering these appeals now becoming so very numerous from the awards of the arbitrators that in cases where it is not shewn that these arbitrators have erred in omitting to value some element or thing they should have considered, or that they have improperly considered some element or thing they should not, or that they have in their valuation acted upon some error or wrong principle, which satisfied the Court that the award is either insufficient or excessive, the Court of Appeal should not interfere. That is only another way of saying that in a pure matter of the valuation, not involving principles or demonstrable errors the Courts should not substitute their own valuations for that of the arbitrators unless indeed there is such a plain and decided preponderance of evidence against the finding of the arbitrators as to border strongly on the conclusive. And I would the more strongly submit that such rule be followed in cases where the evidence can only be properly appreciated from a knowledge of the locality gained by seeing and inspecting the lands taken and their surroundings.

If I am wrong in my conclusion as to the duty of the Appeal Court in cases such as this and if it becomes my duty with my imperfect knowledge and opportunities to form a judgment as to the amounts proper to be allowed, I would say I have found nothing in the record or in the able argument at bar to justify me in interfering with the amount allowed by the arbitrators.

In coming to this conclusion, I have considered and given due weight to the order of the Board of Railway Commissioners for Canada made in November, 1913, which the arbitrators no doubt also considered, ordering that the railway company "supply suitable access to the river front from all property from which the approach to the river will be cut off by the railway" and that "at all places where reasonably practicable such access shall be

provided by a subway or a bridge over the track for pedestrian traffic only" etc., and that in cases of disagreement the Board should settle the matter.

I would allow the appeal with costs and restore the award of the arbitrators.

IDINGTON, J.:—The respondent bought in July, 1910, for less than $100 an acre, 27 acres on the banks of the Grand River at a point 2½ miles distant from the trade centre of Brantford, and then gave one-half of it at same price to another party, retaining the other part whereon he bui t a house costing from $15,000 to $16,000. That city is a place of 23,000 people (if we are allowed to refer to census returns.) The appellant on April 13, 1913, would seem to have got an order from the Board of Railway Commissioners approving plans whereby the railway would run along the river bank, and take the usual width of allowance for right of way.

The order was amended a month later directing suitable access from the rest of the property over or under the railway to the river.

The date of registration of plan, etc., is not given, but the notice of expropriation is dated, as also certificate of surveyor, May 29, 1913, and probably served then or shortly after; thereby making that the date for consideration of compensation. Some rather wild estimates, which no one having regard to the actual value of the property as shewn by the purchase price less than two years before, should take very seriously, seem to constitute the respondent's case, coupled with the extension of city water and light, and something from the result upon values of building new first-class houses thereabout.

The appellant produced some witnesses who gave evidence of a more sober character. Some facts and figures were got from a number of the witnesses on both sides which are of value to enable comparison and reach, as I presume was done, a rational judgment.

The majority of the board of arbitrators, of whom one was the County Judge of Wentworth, experienced in such references, awarded $4,250, and the Appellate Division of the Supreme Court of Ontario have increased that by some $2,647. I cannot assent thereto. I think the award of the arbitrators should be restored.

During the argument I felt inclined to think that I should, if

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acting as arbitrator, have been a little more generous, but, reading the evidence since, in support of respondent's claim, upon which we are invited to act, I have become quite disenchanted. It was the duty of respondent to have presented a reasonable case supported by reasonable evidence. I am unable to understand why the judgment of a competent board of arbitrators who had the immense advantages of seeing and hearing these witnesses and of seeing and inspecting the property, which we have not had, and making, by inspection, however casual, some comparisons with other properties which as well as this had been in the market quite recently, and been sold, and who, no doubt, used the facts and figures I have alluded to with such means of doing justice in the best way they could, are to be overruled by anything presented in this case.

Moreover, the case was so loosely presented to the board that no one can tell what title the respondent had to the use of the river of which so much had been made. If it is only a riparian proprietor's rights he has, I hardly think that of very great value to this property. If the right is absolute, to go boating on the river, or fishing there, even if not many fish to be caught, the privileges are possibly very valuable. But if it is only the goodwill of those owning the river bed that is to be depended upon, then in all probability respondent, or those under him, will likely get all they desire by use of that suitable access that must be constructed not in a perfunctory fashion, but in a manner that will, to the fullest extent of what is implied in the order, give that which a gentleman's place of the kind in question may need for its enjoyment of such liberties.

I was inclined to think, before full consideration, I could perhaps justify a dismissal of the appeal by the due regard to be respectfully had (in any case allowing difference of view) to those appealed from. I think this case presents features that do not in my judgment permit of arbitrators, with the advantages they had, being overruled.

There is a principle involved in requiring due regard thereto that has, I respectfully submit, been overlooked in the judgment appealed from. The appeal should be allowed with costs throughout and the award be restored.

Anglin, J.

ANGLIN, J. (dissenting):—In *Toronto Eastern R. Co.* v. *Ruddy*, heard during this term, I have expressed my views as to the duty

of an Appellate Court acting under sec. 209 of the Railway Act. In my opinion, it cannot be said that it was not within the province of the Appellate Division, if convinced that the majority of the arbitrators had failed to appreciate the full extent of the injury to property such as that here in question occasioned by access to the river running in front of it being cut off, to increase the amount of the award. The conclusion reached in the Appellate Division substantially agrees with that at which I have arrived after an independent consideration of all the evidence, and I feel that I cannot usefully add anything to the carefully prepared opinion delivered by Hodgins, J.A.

I would dismiss the appeal and cross-appeal.

Brodeur, J.

BRODEUR, J.:—It is a question of compensation for a little less than two acres of land taken for railway purposes.

The majority of the arbitrators awarded $4,650. The Appellate Division increased the amount and gave the respondent $6,897.50. The railway company appeals from that decision. Respondent by way of cross-appeal asks to have the award increased to $12,000, though his own arbitrator had been willing to give him $15,000. There does not seem any principle of law involved in this case but simply a question of fact as to the value of the piece of land taken.

The rule governing such cases has been laid down by the Privy Council in the case of *Atlantic and North West R. Co.* v. *Wood*, [1895] A.C. 257. In such cases the Courts should not substitute their own opinion for that of the arbitrators unless the award is manifestly incorrect and unreasonable.

There was certainly evidence upon which reasonable men could have found as the majority of the arbitrators did.

The whole property from which this piece of land has been taken was purchased in 1910 by the respondent at less than $100 an acre. The arbitrators awarded $2,475 for the 2 acres taken. Those 2 acres are at the rear of the property and are on the bank of the Grand River. No great use of that river is being made by the riparian owners; but in this case access to it has been provided for by an order of the Board of Railway Commissioners.

This case is in many respects similar to the case of *Canadian Northern R. Co.* v. *Billings*, 31 D.L.R. 687, decided by this Court a few months ago.

CAN.

S. C.

Brodeur, J.

It cannot be said that the estimate made by the arbitrators is unreasonable or manifestly incorrect and we should not substitute our discretion for theirs.

The judgment *a quo* should be reversed with costs and the award of the arbitrators restored. *Appeal allowed.*

ONT.

S. C.

YOUNG v. SPOFFORD.

Ontario Supreme Court, Middleton, J. October 6, 1916.

INTERPLEADER (§ I—10)—EXECUTION—WIFE'S PROPERTY—PARTIES.

Until the presumption of ownership implied from possession is properly displaced, property in the possession of a married woman *primâ facie* belongs to her. In an interpleader issue between an execution creditor and the debtor's wife, as to property claimed by her, the former may be made plaintiff to the issue; the form of the issue is immaterial.

[See Annotation following.]

Statement.

APPEAL by the execution creditor from that part of an interpleader order made by the Master in Chambers which directed that the appellant should be plaintiff in an interpleader issue between the appellant and the claimant, the wife of the execution debtor; the interpleader application having been made by a sheriff who had seized goods under the execution.

R. L. McKinnon, for execution creditor, appellant.

Goetz, for claimant; *P. Kerwin*, for the sheriff.

Middleton, J.

MIDDLETON, J.:—In this case the wife, being the owner of the house, was in apparent possession of the goods, and the execution creditor is rightly the plaintiff in the issue: *Farley* v. *Pedlar* (1901) 1 O.L.R. 570.

When the husband is the owner or tenant of the house, the goods are in his apparent possession, and the wife is rightly plaintiff: *Hogaboom* v. *Grundy* (1894), 16 P.R. 47.

The execution creditor, it is true, has, in another proceeding, attacked the wife's title to the land; but this can make no difference—it cannot in the meantime be assumed against her that she will not succeed in maintaining her title.

At the trial, no doubt, the claimant must face the difficulty there always is in satisfying the Court that property acquired during coverture is that of the wife; but the dictum of Strong, J., in *Crowe* v. *Adams* (1892), 21 S.C.R. 342, at p. 344, that the goods found in the possession of the wife are *primâ facie* the goods of the husband goes altogether too far.

The better view is that a married woman now stands in precisely the same position as any one else; and, once it is shewn

that the goods are actually in her possession, *primâ facie* they are hers as against all the world. The real difficulty may be to ascertain whether the husband or wife has possession. Here the wife, being the owner of the land, is in possession.

Clearly the onus is upon the execution creditor in his attack upon the wife's ownership of the land—why should it not also be so in his attack on the ownership of the goods?

As a rule nothing is more idle than these discussions as to the form of an interpleader issue. As pointed out in *Bryce Brothers* v. *Kinnee* (1892), 14 P.R. 509, 510, 511: "Whatever be the form, the substance must be looked at . . . The object of the issue being to inform the conscience of the Court, it is immaterial for that purpose which party is made plaintiff."

If the wife were plaintiff, and she proved that the goods were in her possession at the time of the seizure, the onus would then shift to the execution creditor to displace the presumption of ownership implied from the fact of possession.

The appeal is dismissed with costs to be paid by the execution creditor to the claimant in any event.

The sheriff had no interest in the question, and should have no costs. *Appeal dismissed.*

Annotation—Summary review of the law of interpleader. Annotation.

BY I. FREEMAN.

IN GENERAL; RIGHT TO REMEDY.—Interpleader is the process whereby a person, who is or expects to be sued by two or more parties, claiming adversely to each other, for a debt or goods in which he has no interest, obtains relief by procuring such parties to try their rights between or amongst themselves only. Where the applicant is a sheriff, and a claim is made to goods seized in execution by any other than the person against whom the execution issued, the process is called a "sheriff's interpleader."

At one time an independent suit in equity, called a "Bill of interpleader," had to be brought against the several rival claimants by the person having no interest; but under present legislation a more simple and expeditious procedure is provided. Whart. Law Lex., 11th ed., p. 462.

It enables one to obtain relief upon a summary application, where formerly it would have been necessary to file a bill. *McElheran* v. *London Masonic Assn.*, 11 P.R. (Ont.) 181.

Interpleader orders should be granted with extreme caution, and only after strong presumptive evidence of the goods being the debtor's, which should ordinarily appear by his being in possession. *Duncan* v. *Tees*, 11 P.R. (Ont.) 66.

An interpleader issue is within the term "action;" the plaintiff must give notice of trial, the failure of which entitles the defendant to apply for an order to bar the claim. *Douglas* v. *Burnham*, 5 Man. L.R. 261; *Plaxton* v. *Monkman*, 1 Man. L.R. 371.

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The claims must be "adverse" before relief can be granted. An insurance company is not entitled to an interpleader, as against the claims of a lessor and lessee as joint beneficiaries, who claim the proceeds of the policy for the same thing. *Sun Insurance* v. *Galinsky*, [1914] 2 K.B. 545.

The claimant must succeed on the strength of his own title and not on the weakness of the execution creditor's title. *Green* v. *Rogers*, 2 Car. & K. 148; *Wells* v. *Hughes*, [1907] 2 K.B. 845. Where he claims under a title which he fails to prove, he is not precluded from relying on the title found. *Peake* v. *Carter*, [1916] 1 K.B. 652. But goods seized in execution of a judgment against one partner, which are claimed by the other partner to be his sole property, which he fails to prove, he is thereby precluded from afterwards relying on the title of the partnership. *Flude* v. *Goldberg*, [1916] 1 K.B. 662, reversing [1915] 2 K.B. 157.

The Master in Chambers, in the Ontario case of *Barber* v. *Royal Loan Co.*, 5 D.L.R. 885, referring to *Re Scottish American Co.* v. *Rymal*, 14 O.W.R. 685; *Re Smith & Bennett*, 2 O.W.R. 399; *Re Elgie, Edgar & Clemens*, 8 O.W.R. 33, 299, 307, 944; 9 O.W.R. 614, has held to be no case for an interpleader where the defendant did not stand neutral, and had disclaimed any relation with the plaintiff.

The legatee of a valuable autograph book has no *locus standi* in an interpleader, unless he could prove that, if it was in fact the property of the person under whose bequest he claims, he would be entitled to it. The matter could not be determined by simply deciding whether it was the property of the testator at the time of his death. Such issue might be sufficient if the executors were asserting the claim, but not where the latter stand neutral and the issue is directed against an art museum having the presumed ownership from possession under the terms of another person's will. *Re Smith*, 6 D.L.R. 849.

Interpleader is not allowable after final judgment has been given. *Stevenson* v. *Brownell*, [1912] 2 Ch. 344.

An interpleader will not be granted to try the validity of an attaching order, or to determine the amount due to the judgment debtor. *McNaughton* v. *Webster*, 6 L.J. 17. Nor to try the validity of an assignment of a debt sought by garnishment. *Kerr* v. *Fullerton*, 3 P.R. (Ont.) 19.

Before a garnishee's liability for the debt is established he has no right to interplead. *Mears* v. *Arcola &c. Co.*, 7 Terr. L.R. 86.

It is not the appropriate remedy for the assignee of a debt in order to enforce his rights under the assignment. *Plant* v. *Collins*, [1913] 1 K.B. 242, affirming [1912] 2 K.B. 459.

In Ontario an interpleader is provided in case of conflicting claims under an assignment of debt or other chose in action, if the debtor, trustee or other person liable thereon thinks fit to require the respective claimants to interplead concerning the same. The Conveyancing and Law of Property Act, R.S.O. 1914, ch. 109, sec. 49 (2).

An equitable title is sufficient on which to base a claim in interpleader; particularly as against an execution creditor, who had no title at all. *Beaver Lumber Co.* v. *Dolsen*, 24 D.L.R. 895, 8 S.L.R. 231.

There is no jurisdiction to grant an interpleader when a receiver is appointed by the Exchequer Court. *Williamson* v. *Bank of Montreal*, 6 B.C.R. 486.

A corporation is entitled to relief by way of interpleader, as against the claims for shares by several claimants, notwithstanding that there was also

a claim for damages by one of the claimants. *Re Underfeed Stoker Co.*, 1 O.L.R. 42; *Robinson* v. *Jenkins*, 24 Q.B.D. 275. **Annotation.**

The validity of a chattel mortgage as against execution creditors has been tested in an interpleader issue. *McCall* v. *Wolff*, 13 Can. S.C.R. 130; *Dominion Bank* v. *Markham* (Alta.), 14 D.L.R. 508, 17 D.L.R. 1.

Likewise, rights to goods under a landlord's distress and of a chattel mortgagee. *Enright* v. *Little* (Man.), 30 D.L.R. 578.

A purchaser of land is entitled to an interpleader order in respect of adverse claims to the purchase money. *Molsons Bank* v. *Enger*, 10 O.L.R. 452.

PROPERTY OF NON-RESIDENTS.—In main, there is jurisdiction to make an interpleader order, if the property is within the jurisdiction of the Court, although the parties are outside of the province, and have brought themselves within the jurisdiction. *Re Underfeed Stoker Co.*, 1 O.L.R. 42.

It has been held, that a claimant, a resident of the United States, having placed the goods here, is liable to the jurisdiction of the Courts here in any question concerning them. *Buffalo & Lake Huron R. Co.* v. *Hemmingway*, 22 U.C.Q.B. 562; *Credits Gerundcuse* v. *Van Weede*, 12 Q.B.D. 171. But not where the subject matter has no existence here. *Re Benfield & Stevens*, 17 P.R. (Ont.) 339.

SHERIFF'S INTERPLEADER.—The object of the law as to sheriff's interpleader proceedings, which is entirely statutory, is to protect the sheriff, who before such enactment was between two fires: liable to the execution creditor for returning "*nulla bona*" if there was property of the execution debtor available, and liable to a third person if the property turned out to be his. So well was this recognized, that the rule at one time was not to allow the sheriff any costs however proper and meritorious his conduct might have been, it being claimed that a sufficient benefit had been conferred on him by allowing him to interplead at all. And later on, under the English practice, if the sheriff seized goods without authority from the execution creditor and they were claimed, and the sheriff without authority from the execution creditor to resist the claim interpleaded, and the execution creditor withdrew, the sheriff had to pay his own costs of the interpleader. *Fraser* v. *Ekstrom*, 7 Terr. L.R. 1 at p. 3. And this practice seems to have obtained in Manitoba. *Blake* v. *Man. Milling Co.*, 8 Man. L.R. 427.

By sec. 24 (6) of the Ontario Execution Act (R.S.O. 1914, ch. 80) the sheriff's right to apply for relief by interpleader is preserved.

Under the Saskatchewan Rules (559, 563), to entitle a sheriff to interplead he must satisfy: (1) that the goods claimed were taken or intended to be taken in execution under a process of the Court; (2) that the sheriff has no interest in the goods other than for his costs; (3) that there is no collusion between the sheriff and any of the claimants; (4) that the sheriff is willing to pay, or transfer the goods, into Court. A claimant who has intervened upon a sheriff's interpleader will not be allowed to set up that there was in fact no valid seizure. *Dodd* v. *Vail*, 9 D.L.R. 534, 6 S.L.R. 22, 10 D.L.R. 694.

Under the Prince Edward Island Statute (20 Vict., ch. 11, sec. 5) the sheriff is not entitled to an interpleader order where the claims of the attaching creditors are not of the nature contemplated by that enactment. *Toombs* v. *Block*, 12 E.L.R. 76.

A sheriff cannot have interpleader until he has seized the goods. *Gaslin* v. *Tune*, 2 U.C.Q.B. 177; *Ogden* v. *Craig*, 10 P.R. (Ont.) 388. Nor is he en-

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titled to relief if he has allowed a large portion of the goods to be taken out of his possession. *Wheeler* v. *Murphy*, 1 P.R. (Ont.) 336.

As the sheriff is not bound to consider the legality of a claim put forward, he is of necessity entitled to an interpleader order. *Hall* v. *Bowerman*, 19 P.R. (Ont.) 268.

A sheriff has the right to seek the direction of the Court as to the disposal of seized property, which proves inconvenient or expensive to retain. But where these circumstances are not disclosed he has no status to apply for such order in bar of claimant, because of their non-compliance with an interpleader order, in an issue between them and the execution creditors to which the sheriff was not a party. *Kent* v. *Brenton*, 15 D.L.R. 92, 6 S.L.R. 277.

The sheriff, before interpleading, must allow a reasonable time to execution creditors to investigate the claim of a claimant, in order to admit or dispute it. *Fraser* v. *Ekstrom*, 7 Terr. L.R. 1.

A delay of three weeks, after receipt of a claimant's notice, before making the interpleader application, does not disentitle the sheriff to the relief, unless the objecting party has been prejudiced thereby. In any event such objection is not open to a surety. *McCallum* v. *Schwan*, 5 Terr. L.R. 471.

A sheriff, making seizure of company shares claimed under an assignment, is entitled to interplead though he has not actual possession of the share certificates. Only one issue should be directed for the adjustment of the rights of persons claiming under several such assignments. *Paltandt* v. *Flynn* (Ont.), 9 D.L.R. 460.

A direction in an interpleader order, that the sheriff should continue in possession of the goods until the final disposition of the issue, was upheld against the contention of an execution creditor that the sheriff should be directed to sell it, or the claimant pay into Court or give security for the appraised value. *Farley* v. *Pedlar*, 1 O.L.R. 570.

In a suit against the sheriff and an execution creditor in respect of alleged irregular levy under a writ of execution, the sheriff is not obliged to interplead, but may be joined properly in a defence with the execution creditor. *Taylor* v. *Robertson*, 31 Can. S.C.R. 615.

Where a sheriff seeks relief against a claimant, and the latter does not ask for an issue, the Local Master may dispose of the case summarily. *Wright* v. *Bennett* (Sask.), 10 W.W.R. 957.

CREDITORS' RELIEF ACTS.—The Ontario Creditors' Relief Act (R.S.O. 1914, ch. 81, sec. 6) provides for the distribution of money received by a sheriff as the proceeds of a sale of property by him under an interpleader order. The statute entitles only those creditors, who are parties thereto and agree to contribute to the costs of the contestation, to share in any benefit derived therefrom. A reasonable time is also provided for other creditors to come in.

This statute has been held not to override the provisions of the Assignments and Preferences Act (R.S.O. 1914, ch. 134, sec. 14) and the execution creditors' rights cannot arise as against an assignee for the benefit of creditors, at least until they have obtained a judgment in the interpleader. *Sykes* v. *Soper*, 14 D.L.R. 497 (annotated), 29 O.L.R. 193, overruling *Soper* v. *Pulos*, 10 D.L.R. 848. Such, at least, was the construction placed on the *Henderson* case, 22 O.L.R. 306, 24 O.L.R. 356, affirmed *sub. nom. Martin* v. *Fowler*, 6 D.L.R. 243, 46 Can. S.C.R. 119.

In *Dominion Bank* v. *Markham* (Alta.) 15 D.L.R. 549, the correctness

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of the view expressed in *Sykes* v. *Soper* was questioned, and applying *Martin* v. *Fowler* (the *Henderson* case), it was held, that the Creditors' Relief Act (Alta. 1910, ch. 4), being a later statute, it supersedes the Assignment and Preferences Act (Alta. 1907, ch. 6, sec. 8), and judgment was given against the assignee.

In the recent case of *Re Harrison*, 26 D.L.R. 157, 35 O.L.R. 45, the Ontario Court of Appeal, in a unanimous judgment of the Court delivered by Riddell, J., it was held, that where the fund realized under execution has been entered under the provisions of the Creditors' Relief Act (R.S.O. 1914, ch. 81, sec. 6), prior to the debtor's assignment for creditors, it is distributable under the statute, even as to those creditors who placed their executions after the making of the assignment but within the period fixed by the Act.

Where the sheriff seizes money *in specie* and forthwith pays it over to the execution creditor, it cannot be reached by the assignee under an immediate assignment for the general benefit of creditors. *Adam* v. *Richards*, 22 D.L.R. 509, 21 B.C.R. 212.

Under the British Columbia Creditors' Relief Act (R.S.B.C. 1911, ch. 60, sec. 31), the service of a summons for the attachment of a debt, while not creating a transfer of the debt itself, creates a charge thereon in favour of the attaching creditor, in priority to writs of execution subsequently received. *Anderson* v. *Dawber* (B.C.), 25 D.L.R. 644; *Slinger* v. *Davis*, 20 B.C.R. 447.

The sheriff's right to interplead, when goods in his possession are claimed by an assignee for the benefit of creditors, has been generally upheld. *Barnes* v. *Steel*, 2 C.L.J. 189; *Brand* v. *Bickle*, 4 P.R. (Ont.) 191. But, apart from the execution debtor, neither the sheriff nor the execution creditor can require the assignee to interplead for goods in his possession. *McMaster* v. *Meakin*, 7 P.R. (Ont.) 211. On the other hand, the assignee in possession may require other assignees to interplead. *Wells* v. *Hews*, 2 Gr. 131.

Where a purchaser of property voluntarily pays to the sheriff the amount of an execution in his hands, in a *bonâ fide* belief that it was a charge upon the property, he cannot claim the money so paid as against an execution creditor; the property, it was held, was neither "taken not sold under execution" within the Interpleader Act (Con. Stats. Man. ch. 37). *Federal Bank* v. *Canadian Bank* (1886), 13 Can. S.C.R. 384.

In the Alberta case of *Case Thresher Machine Co.* v. *Sing*, 7 D.L.R. 814, it was held by a District Court Judge, that moneys improperly paid over to the sheriff in a garnishment proceedings cannot be deemed moneys levied by the sheriff so as to be distributable by him under the provisions of the Creditors' Relief Act, and that they therefore belonged to an assignee claiming them. See also *Draper* v. *Jackson*, 26 D.L.R. 319, 26 Man. L.R. 165.

The provisions of the Alberta Creditors' Relief Act, with regard to the procedural formalities, were held to be merely directory, and mere irregularities will not nullify the proceedings, which can be taken advantage of only by the execution debtor. *Campbell* v. *Medicine Hat Grocery Co.*, 16 D.L.R. 471, 7 A.L.R. 365.

FORM OF ISSUE; WAGERS.—Fraud may be charged in an interpleader issue, as whether or not a sale or transfer of goods is a mere sham or device to defeat execution creditors. Per Newlands, J., in Chambers, in *John Deere Plow Co.* v. *Knudston* (Sask.), 9 W.W.R. 574, following *West* v. *Ames Holden & Co.*, 3 Terr. L.R. 17.

Any objection by the claimant, as to want or insufficiency of the material

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on which the attaching order was sustained, should be raised in answer to the sheriff's application. It will be too late to raise such objection at the trial of the interpleader issue. *Turner* v. *Tymchorack*, 17 Man. L.R. 687.

Interpleader cannot be had to determine a wager; but a feigned issue in the form of a wager, to try the right to a lien on a cargo, has been held not to be rendered illegal by a statute (8 & 9 Vict. ch. 109, Imp.) prohibiting actions upon wagers. *Luard* v. *Butcher*, 2 C.B. 858.

PARTIES:—In an interpleader issue, the plaintiff, attacking a transaction between the defendant and the claimants, whether under 13 Eliz. ch. 5, the Assignment Act, or the Bills of Sale Act, he must prove his status as a creditor; he is not to be assumed such merely because he had obtained the writ upon an affidavit proving his claim. *Palmer* v. *Ross* (Sask.) 18 W.L.R. 204.

Attaching creditors may be "claimants." *Leech* v. *Williamson*, 10 P.R. (Ont.) 226; *Macfie* v. *Pearson*, 8 O.R. 745; *Standard Ins. Co.* v. *Hughes*, 11 P.R. (Ont.) 220.

Where the claimant is in possession of the goods at the time of seizure, the execution creditor is made plaintiff in the interpleader issue directed on the sheriff's application. And this rule applies where the claimant is the wife of the execution debtor, and the goods are seized upon the premises where a business is carried on by her in which she is assisted by him, but in which he has no interest. *Farley* v. *Pedlar*, 1 O.L.R. 570; *Union Bank* v. *Tizzard*, 9 Man. L.R. 149.

TRIAL; VENUE; JURY.—An interpleader issue should ordinarily be tried in the county where the goods are seized; but where the sheriff is to remain in possession of the goods of a going concern, a speedy trial is so important, that for the purpose of securing it, the issue may be sent to another county, having regard to considerations of expense and convenience. *Farley* v. *Pedlar*, 1 O.L.R. 570.

It has been held, that neither a Judge nor the Court *in banc* has power under the North-West Territories Act, sec. 88, to direct an interpleader issue to be tried by a jury. *McIntosh* v. *Shaw*, 4 Terr. L.R. 97.

NEW TRIAL.—There is no difference between interpleader issues and other actions, as regards the granting of a new trial. *James* v. *Whitbread*, 2 L.M. & P. 407.

JUDGMENT; RES JUDICATA.—Crop grown with the seed of an execution debtor, harvested and marketed by him, was held on interpleader, to be the property of the latter and not that of the claimant upon whose land it was grown. *Lachance* v. *Price* (Sask.), 22 D.L.R. 918.

An execution creditor cannot prevail against the rights of an assignee of a future crop. *Jacobson* v. *International Harvester Co.* (Alta.), 28 D.L.R. 582, affirming 24 D.L.R. 632.

Likewise in case of an assignment of promissory notes otherwise not negotiable, they cannot be attached or garnisheed against the rights of the assignee. *Chandler* v. *Edmonton Portland Cement Co.* (Alta.), 28 D.L.R. 732. See also *Shaw* v. *Can. Motor Car Co.* (Man.), 28 D.L.R. 782; *Taylor* v. *Tucker* (N.S.), 26 D.L.R. 646.

In an interpleader issue as to the right to mortgage-money which has been assigned to one as trustee for the purpose of adjusting certain claims of a corporation, if it appears that none of the parties are entitled to it, the Court, in order to insure a proper disposition of the fund for the benefit of all creditors, will, of its own motion, order the fund paid to the liquidator of the corporation. *Bailey* v. *Imperial Bank*, 27 D.L.R. 484, 9 A.L.R. 315.

Annotation.

The adjudication of an interpleader adverse to a claimant is not *res judicata*, in respect of a claim for the same property, as against a different party. *Gregory* v. *Great West Lumber Co.* (Sask.), 22 D.L.R. 70; *Evans* v. *Evans*, 50 Can. S.C.R. 262, affirming the judgment of the Supreme Court of Alberta.

Where claims for damages are not allowed in the interpleader proceedings, the successful claimant is not precluded from subsequently bringing an action for trespass. *Salbstein* v. *Isaacs*, [1916] 1 K.B. 1.

COSTS.—The costs of interpleader proceedings must be taxed on the same scale as costs in the action in which the proceedings are taken. *Shupe* v. *Heller* (Sask.), 10 W.W.R. 874.

A claimant who is entirely successful is *primâ facie* entitled to his costs of interpleader; when partly successful he is *primâ facie* entitled to his costs antecedent to the issue and also to his subsequent costs incidental to the portion of his claim to which he so succeeds. There may be circumstances which justify the Court's exercise of discretion in departing from such rule. *Brown* v. *Thompson*, 7 Terr. L.R. 479; *Lewis* v. *Holding*, 2 Man. & G. 875; *Davis* v. *Clifton*, 6 E. & B. 392.

Sask. Rule 560 makes the execution creditor liable for the sheriff's costs up to the time the sheriff receives notice of the execution creditor's admission of the claimant's claim; the execution creditors are liable, without apportionment, to pay the costs of the sheriff and the successful claimant. The provisions of the Creditors' Relief Act (R.S.S. 1909, ch. 63, sec. 3) does not alter the rule. *Macdonald* v. *Nicholson*, 8 S.L.R. 187; *Edwards* v. *Sewell* (Alta.) 33 W.L.R. 271, considering Alta. Rules, 490, 491.

It has been held to be against the policy of the law to allow a sheriff any cost for serving an interpleader summons in a proceedings for his benefit. *Commercial Bank* v. *Fehrenbach*, 7 Terr. L.R. 8.

Execution creditors, who are misled because of the claimant's property being registered in her husband's name, cannot be taxed with the costs of the interpleader issue. *Kelly* v. *Macklem* (Ont.), 3 D.L.R. 58. See also *Young* v. *Spofford*, 11 O.W.N. 232.

Where there is nothing to shew that the Court's discretion as to interpleader costs has not been properly exercised it cannot be interfered with on appeal. *Beaver Lumber Co.* v. *Dolsen*, 24 D.L.R. 895, 8 S.L.R. 231; *Bew* v. *Bew*, [1899] 2 Ch. 467.

SECURITY.—An execution creditor, in insolvent circumstances, may be ordered to give security for the sheriff's costs. *Farley* v. *Pedlar*, 1 O.L.R. 570.

It is not necessary to produce sureties. The claimant's own bond (as the bond of a chartered bank who is claimant), approved by the proper officer of the Court, is sufficient security for the forthcoming of the goods. *Ontario Bank* v. *Merchants Bank*, 1 O.L.R. 235.

APPEAL.—Every decision or order, made under the provisions of the law relating to interpleader proceedings, is appealable. The County Courts Act, R.S.O. 1914, ch. 59, sec. 40.

In British Columbia, by virtue of sec. 116 of the County Courts Act, R.S.B.C. 1911, ch. 53, an appeal lies, without leave, from a County Court judgment in an interpleader issue where the amount involved is $100 or over. *Ritchie Contracting Co.* v. *Brown*, 21 D.L.R. 86, 21 B.C.R. 89.

The decision of a Local Master in an interpleader under the Creditors' Relief Act (R.S.S. 1909, ch. 63) is subject to appeal to a Judge in Chambers. *Douglas* v. *Carrington, Vivian* (Sask.), 20 D.L.R. 919, 7 S.L.R. 80.

Annotation.

An appeal from the Local Master is a re-hearing and the whole issue can be gone into, and consequently an interested party can be heard in support of the appeal, although he may not have served a notice of appeal. *Macdonald* v. *Nicholson*, 8 S.L.R. 187.

The decision on an interpleader issue, as to the title to property taken under execution, is not an interlocutory order, and is appealable. *Hovey* v. *Whiting*, 14 Can. S.C.R. 515, 13 A.R. (Ont.) 7, 9 O.R. 314. See *Frumento* v. *Shortt*, 22 B.C.R. 427.

Where, in addition to determining the issue, there is a final disposition of the whole matter of the proceedings, an appeal will be from so much of the order as determines the issue. *Cox* v. *Bowen*, [1911] 2 K.B. 611.

MAN.

C. A.

BRYNJOLFSON v. ODDSON.

Manitoba Court of Appeal, Howell, C.J.M., Perdue, Cameron and Haggart, J.J.A. December 20, 1916.

MECHANICS' LIENS (§ VIII—66)—TIME FOR FILING—PERFORMANCE OF WORK.

Work performed by a contractor on buildings in pursuance of and to complete his contract, after the date fixed for completion, entitles him to file his mechanic's lien within the statutory limit of time as from the performance of such work. The triviality of the work done or the amount involved cannot affect the plaintiff's rights.

Statement.

APPEAL by plaintiff from a judgment of the referee in a mechanic's lien action.

I. Pitblado, K.C., *A. C. Campbell* and *A. Anderson*, for appellant.

H. A. Bergman, for Oddson; *S. E. Richards*, for Royal Bank.

W. D. Lawrence, for Bank of Ottawa and Alsip Lumber etc.

Howell, C.J.M. Perdue, J.A.

HOWELL, C.J.M., and PERDUE, J.A., concurred in judgment of the Court.

Cameron, J.A.

CAMERON, J.A.:—This is a mechanics' lien action tried before the Referee. The plaintiffs, contractors, entered into a written agreement with the defendant Oddson, dated March 12, 1914, to do certain work and provide certain materials for the erection of an apartment block on lands described in the pleadings for the sum of $38,680, on which it is claimed there is a balance due of over $15,000. It is alleged that the last material was supplied and the last work done under the contract April 2, 1915. The plaintiffs ask for an order against the defendant Oddson, and for a declaration that they are entitled to a lien on the lands in priority to the defendants the First National Investment Co. Ltd., the Alsip Brick, Tile & Lumber Co. Ltd. (whose mortgage was assigned to the Bank of Ottawa), and the Royal Bank of Canada, all of whom claim as mortgagees. The defendant counterclaimed, alleging non-completion of the contract, and claiming damages therefor to the extent of over $42,000.

The Referee gave judgment for the plaintiffs for the amount of their claim against the defendant Oddson with interest and costs, but refused to hold them entitled to a lien on the lands. From this judgment the plaintiffs appeal asking for a declaration that they are entitled to their lien. The defendant Oddson and the defendants, mortgagees, above mentioned, oppose the appeal. The facts of the case are set forth in the judgment appealed from.

The principal subject of discussion before us was as to the precise date of the completion of the contract, and on that one point the rights of the parties depend. This Court considered the question raised as to amendment of the pleadings by reason of any alteration in the size of the building while it was being constructed as a matter of little importance in view of Od son's knowledge of the facts and of the evidence generally. If any amendment were necessary it could readily be made at this stage.

The Referee based the plaintiffs' failure to be entitled to a lien on the ground that they had completed their contract to the satisfaction of the defendant more than thirty days before the filing of the lien. He found, as a fact, "that the defendant had settled with the plaintiffs on January 14, 1915, in full of their claim for the contract price and extras, and had given a promissory note on that day in full settlement of the balance agreed on after deducting the amount of notes previously given." Now this settlement is a matter of inference to be drawn from the evidence, oral and written, and any such inference can be drawn by this Court, as has been repeatedly held.

The contract in question was prepared by Oddson, who acted as his own inspector, by himself and his foreman. The plaintiffs were to do the work and provide the materials for the excavation, concrete work and brick work as set out in the contract. he rest of the work was done and materials provided by others, Oddson himself doing and providing part.

The building was almost wholly completed in November and shortly thereafter tenants went into possession.

The settlement referred to was effected January 14, 1915. It was argued that this must be taken as the final date of completion. Oddson's position here is equivocal. For the purpose of defeating the plaintiffs' claim to a lien he asserts completion as of that date. For the purpose of his counterclaim,

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however, he is driven to assert that the work has not yet been performed.

November 13, 1914, Oddson wrote the plaintiffs that certain work in connection with the contract was incomplete, mentioning the cement floors and the side-walk. This work was accordingly done.

January 15, 1915, the plaintiffs wrote Oddson acknowledging payments in material, cheques and notes equivalent to the amount of the contract.

On the same day, being the day after the alleged settlement was made and note given, Oddson wrote the plaintiffs as follows:—

Gentlemen: I am sorry to again have to draw your attention to your contract of my apartment block on Burnell St. As you are aware there is still work to be done on the boiler-room, fixing the floor and also putting the catch-basins in orders.

I trust that you will attend to this as soon as possible and oblige.

This was handed by Oddson to the plaintiffs at the same time that they gave him the above acknowledgment. This work was done by the plaintiffs accordingly.

February 20, 1915, Oddson wrote the plaintiffs the following letter:—

Dear Sirs: I am sorry once more to have to draw your attention to the work which was included in your contract of my apartment block at the corner of Ellice Ave. and Burnell St. and which has not been completed yet. All the sills in the basement and the laundries are defective and have to be taken out and replaced. I would ask you to see that this would be fixed as soon as weather permits.

This work was also done by the plaintiffs.

March 30, 1915, Oddson wrote the plaintiffs the following:—

Dear Sirs: There is still further work to be done on the apartment block which you built for me on Burnell St. last summer, on the outside of the rear wall under the sills.

Trusting that you will see that this is done as soon as possible, I am &c.

The reason assigned for the non-completion of the work called for by the letter of March 30 is set out in the evidence of Fraser, a stone-mason and bricklayer, employed by the plaintiffs as foreman on this work. He says that he could not finish this particular part of his work when he finished the rest of it, about September 1, because the plasterer had left his materials there. He (the plasterer) had his material and sand boxes and was mixing his mortar outside the window sills, and Fraser did not know when these obstructions were removed. He told one of the plaintiffs about this unfinished work in September, and says

that, though he went back to the work February 23, he had absolutely forgotten that this work had not been done. He went back on April 1 and 2 and pointed the sills in the court at the back of the building. One of the plaintiffs shewed him the letter of March 30, the day he started to work in April, and he says he performed all the work called for by the letter. Fraser worked 1 hour on April 1 and 3 hours on April 2. Ingi Brynjolfson's evidence is to the same effect.

The Referee, as to this work of April 1 and 2, says: "I thought the small job of work done within the 30 days was not done in good faith for the purpose of completing their (the plaintiffs') contract, but had been purposely left undone so that the time for filing a lien might be prolonged." It is clear from these words "purposely left undone" that the Referee considered that the work of April 1 and 2 was work to be done under the contract. He really says it was done for the purpose of completing the contract, but not "in good faith."

It is important to bear in mind that at the time of the settlement Oddson was negotiating for a loan to meet his requirements on this work, and it was because of this that he gave the plaintiffs notes from time to time.

From the evidence, the facts of the case and the documents before us, what are we to conclude was the real agreement between the parties in January, 1915? I think the inference must be drawn that the settlement of January 14 was not intended to be final and conclusive, and that there was an understanding at the time between the parties that work required to be done to complete the contract might and should still be done and would be requested to be done, and the time for filing a lien by the plaintiffs extended accordingly. We must hold the parties bound by their acts, the consequences of which are so perfectly plain. Oddson must be held to the meaning clearly appearing on the face of his letters and all attempts to explain them away on the various grounds suggested to the Court must be rejected as utterly futile.

That being the inference to be drawn (and it is substantially that reached by the Referee) is there any reason why the plaintiffs should be denied their statutory remedy of a lien? The work done April 1 and 2 was done pursuant to the contract and within the statutory period, and it was done at the request of Oddson, who

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knew when he wrote the letters that the work mentioned therein was required by the contract but not yet performed. It is difficult to see how Oddson can escape from the position in which he deliberately placed himself.

The contention made on behalf of the plaintiffs is that so long as work done is work required to be done pursuant to the contract, the statutory remedy by way of lien is available if the proceedings thereon are duly taken and that the trifling amount or value of the work so done is not, in itself, material, if it is done pursuant to the contract.

In *Summers* v. *Beard*, 24 O.R. 641, a lien was claimed for certain steel work done on a building which had been completed by September 30, 1893, with the exception of the cutting down of certain bolts which it was afterwards found projected out of the walls too far and which work was done between October 17 and October 25, 1893. The lien was registered November 17. It was held by Falconbridge, J., that the time for registration was not extended by the alterations of the bolts, on the authority of *Neill* v. *Carroll*, a correct report of which is given in note (*a*) p. 642. It is reported originally in 28 Gr. 30 and 339. That was a case of remedying defects in certain brasses, part of the machinery in question, which did not prevent the working of the machinery as was shewn by the fact that when the plaintiff sent men to adjust the defects, the work was postponed at the defendant's request as the machinery was in use. The machinery was not only supplied and placed, it was used and worked and accepted.

In *Day* v. *Crown Grain Co.*, 39 Can. S.C.R. 258 (on appeal from the Full Court of this Province, whose judgment is reported in 16 Man. L.R. 366), the judgment of the majority of the Court was delivered by Idington, J., who says:—

> The appellant's work on that date (April 19, 1904) was all done save some parts which would not cost very much to do and which could have been done in a few hours had the rest of the work Cleveland (the contractor) had to do been ready to receive these parts in their proper place, p. 261.

The question of an alleged settlement was brushed aside and Idington, J., expressed the opinion that the plaintiff could not, on April 20, have sued as for a completed contract and makes that the test. He also considers the importance of the work to be done for the proper working of it as an element to be con-

sidered. he result was the restoration of the judgment of the trial Judge who had given effect to the claim for lien.

I consider this judgment is not in accord with the decision of the majority of the Court in *Neill* v. *Carroll*, but rather with that of Blake, V.C., in that case at p. 344 of 28 Grant. Nor is it in accord with *Summers* v. *Beard*. We must consider the authority of these cases as at least much undermined by the Supreme Court decision.

In *Clarke* v. *Moore*, 1 A.L.R. 49, the saving work there done consisted merely in fastening the hot-air furnaces in place in the house there constructed and painting them. Harvey, J., held this sufficient, citing Irving, J., in *Sayward* v. *Dunsmuir*, 11 B.C.R. 375:

> If the material was supplied in good faith and for the purpose of completing an order previously given, and not colourably to revive the lien, the delivery of such material would extend the time for filing the lien in respect of the earlier items.

and Macdonald, J., in *Steinman* v. *Koscuk*, 4 W.L.R. 514 at 515:

> Although such materials and work were of a trivial character, yet as they were necessary for the proper completion of the building, I must hold that this work was done in good faith and not colourably to revive the lien.

Harvey, J., further says:—

> In the present case there is no doubt the work, though inconsiderable, was a part of the contract and something which the owner would have insisted on being done before accepting the work as complete and therefore sufficient under the Act.

In *Robock* v. *Peters*, 13 Man. L.R. 124, 136, Killam, C.J., said it did not affect the matter that the latest orders were for small quantities of goods at long intervals. They were required for small finishing jobs usual in building operations and he distinguished cases such as *Summers* v. *Beard*, *supra*, and *Kelly* v. *McKenzie*, 1 Man. L.R. 169, where contractors have been called upon to remedy defects after assuming to have completed their contracts.

In *Merrick* v. *Campbell*, 17 D.L.R. 415, 24 Man. L.R. 446, the saving work was comparatively trifling and occupied only a few hours, yet was held sufficient by the Referee. *Fuller* v. *Beach*, 7 D.L.R. 822, is to the same effect. *Foster* v. *Brocklebank*, 22 D.L.R. 38, was a case where some debris was cleared away by the contractor. It was held that this was necessary for the complete performance of the contract and therefore saved the lien.

In *Billings* v. *Brand*, 73 N.E.R. 637, it was held that the

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mere fact that more than 30 days elapsed between the times when work was done on a contract did not invalidate a lien as the work actually done, on which reliance was placed, was pursuant to the contract and presumably, therefore, not colourably but in good faith.

In *Miller* v. *Wilkinson*, 167 Mass. 136, it was held by the Massachusetts Supreme Court, by Holmes, J. (now of the U.S. Supreme Court) giving the judgment of the Court, that the putting in of a marble back to a washbowl in the basement was sufficient to save the lien. The headnote reads:—

It cannot be said, as a matter of law, that work done by a mechanic under a contract substantially performed at an earlier date is only colourable because it is trifling in amount, and done with the ulterior purpose of saving his lien.

I refer also to the notes to *Badger Lumber Co.* v. *Parker*, 35 L.R.A. (N.S.) 901, 904, *et seq.* At p. 905 I find this:—

If the furnishing of material or the performance of some service is expressly required by the terms of the contract, the time for claiming a lien will commence to run from the date of furnishing such article or performance of such service, although the article is furnished or the labor performed some time after the substantial performance of the contract, and it is trivial in character.

In *Nancolas* v. *Hitaffer*, 12 L.R.A. (N.S.) 864, it was held that the cost of repairs necessary to place in working order a lock furnished for a building and the expressage thereon was sufficient to save the lien in favour of one who had contracted to furnish the lock. The leading paragraph of the notes to this case is reproduced in Wallace, Mechanics Liens, 2nd ed., 1913, p. 129. There the distinction is drawn between work done at the request of the owner to remedy defects which is sufficient and cases where the work has been completed according to contract, but the contractor discovers defects and voluntarily seeks to remedy them, which is generally held not to be sufficient.

The decisions in some of the cases to which we were referred, such as *Kilbourne* v. *McEwan*, 6 W.L.R. 562, and *Renny* v. *Dempster*, 2 O.W.N. 1303, are quite inapplicable to the facts in this case. I can say the same of *Franklin* v. *M.E. Church*, 7 S.E.R. 245, where the contractor was held bound by his acts and express admissions to his statement that the building had been completed prior to the time he claimed. In particular he had accepted a deferred payment which was only payable under the contract on completion of which payment he had received interest.

General Fire Extinguisher Co. v. *Schwartz*, 65 S.W.R. 318, was a decision of the Supreme Court of Missouri. The work there done was of a slight character and consisted in the placing of certain gauges on tanks in the elevator in question. They were put in and then one was broken and this was remedied. A sand-hole was then discovered in one of the valves of another and the plaintiff was required to replace this. This was done and was the last work. This was held sufficient, the Court stating:—

Correcting defects thus discovered was not in the nature of making repairs, but of rendering the original perfect. We are satisfied from all the evidence in the case that the contract was not finished until November 12, and that the lien was filed in time.

Upon consideration, I am of opinion that the work done in this case on April 1 and 2 was done pursuant to the contract and at the request of the defendant Oddson. The evidence of Fraser that the work was finally completed by the work of April 1 and 2 must, I think, be accepted. Oddson took no other ground until later, when these proceedings were commenced. The evidence given by witnesses of what they saw some time after the work was done by Fraser is not sufficiently satisfactory to overcome his positive evidence. Oddson himself is clearly, in the light of his correspondence, in no position to make any charge of bad faith, and it is difficult to see how the other defendants can, in this respect, be in any better position.

In view of the clear weight of authority, and upon consideration of the facts, I am of the opinion that the work performed April 1 and 2, actually done by the plaintiffs in pursuance of the contract and at the request of the owner, is such as to entitle them to a declaration that they have a lien upon the land. The triviality of the amount involved or of the work done cannot affect the plaintiffs' rights as the work was performed in accordance with the contract. For the same reason that the work was done pursuant to an understanding entered into at the time of the so called settlement of January 14 is immaterial.

In my humble opinion the question of good faith cannot well arise when the crucial work has been done pursuant to a contract which it is the bounden duty of the contractor faithfully to fulfil. And it also does seem to me that whether this work is done, and this duty performed, by the contractor in obedience to the demand of the owner, speaking through the terms of an unfulfilled

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contract, or through the medium of a written or verbal request to fulfil that contract does not make a particle of difference. In principle they are all on precisely the same footing, one no higher than the other. But as I see it, these considerations are not necessary for the determination of this case.

As to the position of the defendants, the mortgagees, in view of the plain provisions of sub-sec. (*c*) of sec. 2 of the Act, it seems clear that they are in no better position than Oddson. They are "persons claiming under him." No serious attempt was made to controvert this position as presented on the argument. It was open to the First National Co. and the Alsip Co. to protect themselves in time. As for the Royal Bank it would seem that its mortgage has not yet been completely registered, and in any event, its position is not so strong as that of the others. They all must come subsequent to the rights of the lien-holders, who have duly complied with the provisions of the Act. The case of *Inman* v. *Henderson*, 45 Pac. Rep. 300, can be readily distinguished on the facts. The lumber there in question was furnished, after the expiry of the time for filing a lien, ostensibly to be used in the construction of a porch in front of each of the houses at some indefinite future time, but in fact was never so used and was sold by the owner. The Court quite justifiably held that this course of action could not affect the mortgagee. The owner apparently did not dispute the claim.

It has been frequently held that the Act must receive a liberal interpretation with a view to securing workingmen and materialmen in claims they have against properties improved by their labour and materials.

I would allow the appeal and declare the plaintiffs entitled to a lien prior to the mortgagee defendants represented on this appeal.

The plaintiffs must have the costs of their appeal.

Haggart, J.A.

HAGGART, J.A.:—Wallace, in his work on Mechanics Liens, 2nd ed., 1913, devotes a chapter to the construction of Mechanics Lien Acts, and after a consideration of the various authorities in Canada and the United States, practically sums up the matter by saying:—

> While in the various provinces in Canada having Mechanics Lien Acts a strict construction will be given by the Courts to the sections creating the right to a lien, which sections would not be extended beyond the plain sense of their words, the same rule would probably not be generally followed with other sections of the Act dealing with the enforcement of the lien.

Meredith, J., in *Bickerton* v. *Dakin*, 20 O.R. at p. 702, lays down a broader and more benign canon of construction when he says, referring to Mechanics Lien Act laws:—

> These essentially remedial Acts are to be given such fair, large and liberal construction and interpretation as will best ensure the attainment of these objects. Effect ought not be given to technical objections, founded upon matters which in no way have prejudiced or could prejudice anyone . . It was never intended that the benefits of the Acts should be frittered away by requiring the skill of a special pleader to secure them.

Robock v. *Peters*, 13 Man. L.R. 124 at 139, also discusses the question of the interpretation of the Manitoba Act.

I accept generally the statement of facts as given by the Referee in his reasons, and I concur in his finding when he holds that the amount of the indebtedness owing by the defendant Oddson to the plaintiffs is that sum deliberately arrived at by the parties when the owners gave their note to the contractors. But, with all due respect, I differ from him when he holds that the lien is gone; that the work relied on was trifling and had been purposely left undone so that the time for filing a lien might be extended.

Reading the four letters written by the owner to the contractors and considering what was done in pursuance of those letters, I think that both parties understood, and each wanted the other to understand, that the doing of the work referred to in the last letter, dated March 30, would be the completion of the work. The parties concerned had deliberately fixed the time for the completion of the work and I do not think that either should now be permitted to assert to the contrary. Both parties are intelligent men and were contractors or builders on a large scale and I have no doubt that they were fully cognizant of the position they occupied and of their rights under the Mechanics Lien Act.

I would observe here that the plaintiffs were on the eve of finishing their work and that the time for filing a lien was growing less. The plaintiffs, the other contractors, and Oddson were all looking for payment to the proceeds of some mortgage to be negotiated on the property. If some settlement was not arrived at before the time for filing liens expired the plaintiffs would have filed a lien for the amount agreed upon between the parties, and this would be the signal for other contractors, material-men and wage-earners to file liens also. The title would be so clouded that it might be difficult if not impossible to negotiate the mortgage and it would be a prudent thing to do on the part of all parties to

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avoid such complications as might arise from the filing of this lien.

The plaintiffs and Oddson had a perfect right to do as they were doing. There was no bad faith. By the correspondence and what was done in pursuance of that correspondence, they fixed a time for the finishing of the work.

As to the contention that the work was trivial and should not be taken into account, I think the weight of authority is against the contention of the defendants.

See *Clarke* v. *Moore*, 1 A.L.R. 49 at 51—(Harvey, J.)

In *Steinman* v. *Koscuk*, 4 W.L.R. 514, it was held that although the materials and work were of a trivial character, yet as they were necessary for the proper completion of the building, the work was done in good faith and not colourably to revive the lien.

Merrick v. *Campbell*, 17 D.L.R. 415, 24 Man. L.R. 446, is a case somewhat similar to the one at bar. There a mechanic's lien was held to be valid if filed within thirty days from the time when the last work was done under the contract although the contract had been substantially completed more than thirty days previously, and that the last work was comparatively trifling and occupied only a few hours, if such work was necessary to be done before the contractor could sue upon his contract as completed.

In *Swanson* v. *Mollison*, 6 W.L.R. 678, which was cited in support of the foregoing case, the architect notified the contractor on the 19th November that the mason and brick work, the subject-matter of the plaintiff's contract as such contractors, was quite satisfactory to them and, with the exception of one or two minor items, was complete. The plaintiff did no further work on the building until December 19 when they spent about half a day in doing some beam filling on the stone work, some pointing on the outside and filling up some joints with red mortar. It was held by Stuart, J., that they were not too late in filing their lien on the 14th of January following.

In *Carroll* v. *McVicar*, 15 Man. L.R. 379, it was held that the plaintiff's lien was registered in time, having regard to the date upon which he had completed the "touching up" which, whether much or little, was a part of the work necessary under the contract. The Judge, at the conclusion of the argument, says:—

Well, I don't think anything turns upon that, whether it took him the afternoon or took him three or four days, if it was part of the contract. The contract was not completed until the work was done, and if it was only a half hour's work, and if it was not held back in bad faith, it would be a proper completion of the contract.

A similar case was *Foster* v. *Brocklebank*, 22 D.L.R. 38. It was held there that the work of cleaning up the debris after building operations, which was insisted upon by the owner and undertaken by a sub-contractor at the request of the contractor, was within the purview of the contract, and that the time for filing the lien dated from the completion of the cleaning up.

There are other cases along the same line cited upon the hearing which I have perused: *Billings* v. *Brand*, 73 N.E.R. 637; *Miller* v. *Wilkinson*, 167 Mass. 136; *Badger Lumber Co.* v. *Parker*, 35 L.R.A. (N.S.) 901 *et seq.*

The case before us comes within the foregoing authorities. The work was not done voluntarily: Oddson demanded that it should be done, and made four separate demands on four different occasions, and these demands were complied with. It is not here voluntarily furnishing an article or performing a service for which no compensation is expected. There never was any formal acceptance by Oddson prior to the doing of the last work. There was no bad faith. The foregoing cases shew that it does not matter whether these latter services were trivial. Evidently both both parties thought they were substantial matters. Here the service is performed at the request of the owner. It was required by the original contract, and it matters not that it had been previously omitted. The final completion of the structure dates from the time that such omission is supplied at the request of the owner, and, even if the owner took over possession of the property, the contractor has not lost his lien. An authority for this is *Avery* v. *Butler*, 47 Pac. Rep. 706.

Nichols v. *Culver*, 51 Conn. 177, is an authority that even a small amount of work performed a number of months after a house has been substantially completed is sufficient to extend the time of the lien if done at the request of the owner and not for the mere purpose of preserving the lien.

The subsequent encumbrancers, the other defendants, have no better right or claim as against the plaintiffs than has the defendant Oddson. There was no duty imposed on the plaintiffs to

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notify these subsequent encumbrancers in this suit of everything that passed between the plaintiffs and Oddson or to notify them of any steps he was taking to preserve his rights.

I would declare that the plaintiffs have a good and valid lien on the property in question for the amount of their claim represented by the promissory notes given by Oddson at the time they made the settlement as to the balance owing.

I would allow the appeal. *Appeal allowed.*

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THE QUEBEC BANK v. GREENLEES.

Alberta Supreme Court, Harvey, C.J. December 7, 1916.

1. PRINCIPAL AND AGENT (§ II C—20)—AUTHORITY TO PURCHASE—AGENT'S PROPERTY—CONCEALMENT.
An agent to buy lands cannot hold his principal to an agreement to purchase land which is, in fact, the agent's own, if he failed to make that fact known to the principal, or to disclose all the material facts.

2. CONTRACTS (§ V C I—390)—REPUDIATION—WAIVER.
There can be no waiver of the right to repudiate an agreement where there has been no knowledge of the facts on which the right to repudiate is based.

Statement.

ACTION for payment of an instalment due under an agreement of sale of land and counterclaim for rescission of the agreement. Action dismissed, counterclaim allowed.

Davidson & Beattie, for plaintiff.

C. S. Blanchard, for defendants.

Harvey, C.J.

HARVEY, C.J.:—The plaintiffs are the assignees of the rights of the vendors under an agreement for sale made by the F. M. Ginther Land Co. to the defendants of the s.w. ¼ sec. 31, tp. 12, rge. 6, west of the 4th M., the purchase price of which was $16,000, payable in 3 instalments; $4,667 on the execution of the agreement, which is dated February 24, 1913, and $5,667 on February 24, 1914, and $5,666 on February 24, 1915.

The action is for the payment of the last instalment and the accrued interest. The plaintiffs produce a transfer from the registered owner to themselves shewing that they are in a position to deliver title. The defendants resist the plaintiff's action on various grounds of misrepresentation and misconduct, but the only one which I find it necessary to deal with is the allegation that the Ginther Land Co. occupied a position of trust towards the defendants by acting as their agent to buy and that in selling land of their own they failed to make known the fact that it was their property they were selling or to disclose all the material facts which it was their duty to disclose. On this ground the

defendants also counterclaim against the plaintiffs and the Ginther Land Co. for rescission and for repayment of the money already paid.

It appears that all the conduct of the business relating to the purchase, on behalf of the defendant, was made by the defendant Greenlees. The defendants themselves all lived in or in the vicinity of Glasgow, Scotland, the defendant Greenlees having also business in the City of Winnipeg which brings him to Canada occasionally. In November, 1912, he came through Medicine Hat with a letter of introduction to Mr. Sprinkill, one of the members of the firm of the Ginther Land Co., which at that time consisted of a partnership. The letter of introduction was from Mr. Mather, one of the defendants who had been in Medicine Hat earlier and had purchased some land through Mr. Sprinkill or his firm. While here in November, 1912, Mr. Greenlees purchased some lots from Mr. Sprinkill for the price of $14,000 without inspecting the lots and relying on Mr. Sprinkill's advice and representations. After his return to Scotland, Mr. Sprinkill had some enquiries by a prospective purchaser for these lots and on January 6, he wrote to Mr. Greenlees a letter which he addressed as "Dear friend, Greenlees." In this letter he points out that he has a prospective purchaser and asks the defendant Greenlees to cable if he will accept the price and terms proposed. It appears that Mr. Greenlees had purchased the lots with the expectation that he would induce his co-defendants or some others to join with him in the purchase and his co-defendants did so join. Apparently Mr. Greenlees cabled, because on February 5, Mr. Sprinkill forwarded agreements for sale of the lots in question to be executed by the defendants, stating that he had also executed one himself on their behalf as attorney which would be destroyed upon the receipt by him of the agreement duly executed by the vendors. In the letter of January 6, Mr. Sprinkill suggests that he could re-invest the money received from the purchaser of the lots in question, which, he says, "would also mean a good profit before the second payment of the re-investment became due.' Further in the letter he said:—

> I wonder if you think I could form a syndicate over there raising a few thousand dollars capital to be invested at the discretion of this company, that is to say allowing us the power of attorney to sell or re-sell for this syndicate property in and around Medicine Hat.

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He also added, "You have seen this town and know the possibilities and we can assure you references that will place us in a class by ourselves regarding liability and judgment," and adds: "It seems to take a long time to get a reply to a letter from over there, that is why I am asking you to cable me a price for your block." In the letter of February 5, on the suggestion of re-investment, Mr. Sprinkill says:—

> Now in regard to the re-investment of this money, do you not think it would be a wise plan to re-invest this money for you? There is bound to be a large increase in values for close in acreage especially this spring and at the present I have some property in mind which I believe would net you very large returns and the amount of money we are holding in trust for you would cover the first payment entirely with a little to spare and the other payment being due in 1 and 2 years.

He gives further particulars about the location of this land and says:—

> This land is worth $150 and will be worth $400 in another year at a most conservative estimate or at least this is my opinion, and I have reason to believe that it will be worth even more than that or I may be wrong altogether, but do not think so. If upon receipt of this letter you will cable me whether or not you will pay $100 per acre for this land which contains 160 acres on terms of one-third cash and the balance in 1 and 2 years, I shall be pleased to hold it for you.

He gives some further details then shewing how they are likely to realize a profit of $100,000 and adds, "Kindly cable me upon receipt of this letter whether I shall proceed with the papers for this property or not." After referring to the profits made on the sale of the lots he adds, "Now I believe this acreage will make you far more money, but will take longer to do it. Taking it all around it is a very profitable piece of land, taking it as an investment." This letter was received by Mr. Greenlees on or prior to February 20, on which date he sent a cable to the Ginther Land Co. in the following terms:—

> Agreement signed and mailed drawing $1,000 leaving original sum for purchasing close in 160 acres as described in letter. Do your best.

On the same day he wrote to Mr. Sprinkill stating that he had on that day had a meeting of the syndicate and talked the matter over with them and that they had signed the agreement (for the sale of the lots), which was being forwarded through the bankers. He says:—

> Now they, after a long talk, are quite agreeable for you to retain the principal sum and re-invest it in close in acreage. You say you have something in your mind towards the reservoir. Well, if it is absolutely safe and a good buy they are quite willing to allow their money to lie in it.

Mr. Sprinkill on receipt of the cable had an agreement prepared which is dated February 24, 1913, but which was not forwarded until March 3, under a covering letter of 5 pages consisting largely of glowing descriptions of the prospects of making money quickly in Medicine Hat real estate. Mr. Sprinkill in this letter states that the drawing of the $1,000 was not quite in accordance with the terms quoted, but that he would accept it, although not entirely satisfied "for the reason that the price of the property was exceedingly low to give you and your associates a chance to make a nice bunch of money." He also says:—

Close in acreage such as you have just bought from us is the surest and the quickest way of making profit around Medicine Hat. The price of acreage has taken a big jump, and within a few months, as I stated in my last letter, there is bound to be even a greater development in acreage.

He also states that a quarter section of land adjoining this quarter is being quoted at $250 per acre, which, however, he thinks is more than it would bring at that time. Near the end of the letter he says:—

We would suggest, Mr. Greenlees, that you get a report from the Commercial Agency or banks in Medicine Hat regarding the standing of our company, as we would like to be in a position at any time to advise you by cable regarding certain properties that come up for sale which must be closed reasonably quick and feel that you have confidence in our judgment, ability and integrity.

This letter was followed by one dated March 11, enclosing a map of Medicine Hat and stating:—

It is worthless to mark the ordinary snap buys on a map to quote to you by mail because long before I could hear from you it would be sold, perhaps a couple of times and as I said before it is necessary to have the money right on the ground in order to secure the snap buys and I would suggest, Mr. Greenlees, that you give me a power of attorney for your syndicate and send a certain amount of money with which to pick up snap buys with instructions to turn as quickly as possible to make you nice profits. The condition here remains about the same. A good buy is offered today and gone tomorrow, hence the necessity of quick action, the cost of cablegrams being prohibited, (prohibitive?) if used often. You will see the advantage of having some money here to your credit to be used when a real good buy comes up. (He says) I have already had enquiries about this land since you bought it, but would not advise selling it just now.

Two days later on the 13th he writes another letter acknowledging receipt of the letter of February 20, advising of the signing of the agreement for sale of the lots.

In the letter of February 20, to which he refers, Mr. Greenlees stated that he had several friends in Medicine Hat whom he might ask to inspect the property for him. Referring to that Mr. Sprinkill in the letter of March 13 says, "Regarding having

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some one of your friends in Medicine Hat inspect the property that we submit to you will say that this will be perfectly satisfactory, but our experience has been that the more people become implicated in a deal the more complications arise and as far as our misrepresenting any property is concerned, you can rest assured that we cannot afford to do that. However, do as you like on that score. It is our aim to make the F. M. Ginther Land Co. Ltd., one of the greatest institutions of its kind in Canada, if not in America, and we have earned a reputation that is envied by many other concerns and we have earned this reputation by fair dealing." He adds:—

> Regarding the acreage you bought from us, will say that I priced it yesterday for a quick sale at $150 per acre, but that it would have to be verified by you before accepting that price. I think that for a week, turning a profit of $50 an acre would be quite reasonable, however, if not sold within a week or so at that price I should advise you not to let it go for anything like that figure, as I told you before, the land within a year will easily bring 2 or 3 or perhaps 4 times what it cost. You can trust us, Mr. Greenlees, to furnish your clients with opportunity to make them money that will cause them to be great boosters, but as I think I told you before, in order to get in on the snap buys it is quite necessary that the money should be here where it can be got at without delay.

On March 29, Mr. Greenlees got his co-defendants together, when they executed the agreement for purchase which is in question in this action. The letter returning it to the Ginther Land Co. is dated the same day and is a short, hurried letter written to catch the first mail, but has instructions that the property is not to be sold without first cabling. It does not appear fro m the letter whether Mr. Sprinkill's letters of March 11 and March 13 had been received, but if they took no longer in the mail than the letter of February 5, which was answered 15 days later, they should both have been in Mr. Greenlees' hands at the time of the execution of the agreement.

It appears perfectly clear from the facts already related that the Ginther Land Co., through Mr. Sprinkill, held itself out to the defendants as being entitled to implicit confidence in the matter of making investments for the defendants. There is no doubt therefore that it could not itself sell to the defendants, its own land without making known to the defendants that it was doing so. In the first letter referring to this land as desirable there is no suggestion that the Ginther Land Co. is interested in it as owner or otherwise than in its usual capacity as agent for

sale. The agreement, however, which was forwarded, and which was signed by the defendants, is expressed to be between it as vendor and the defendants as purchasers and in the letter enclosing the agreement is the expression which I have already quoted "close in acreage such as you have just bought from us." Notwithstanding these facts Mr. Greenlees swears that he and his associates believed that the Ginther Land Co. was acting as their agent to purchase, and that the agreement being in this form was merely a matter of convenience due to the Ginther Land Co. perhaps having taken the property in its own name while waiting to hear from them. He states that if he had known that the Ginther Land Co. was itself the owner he would not have advised his associates to enter into the agreement. With reference to the statement in the letter regarding the land being "purchased from us," a similar statement appears in two prior letters to Mr. Greenlees with relation to the lots which had been purchased, whereas the fact is that those lots were not purchased from the Ginther Land Co. at all, but only through it as agent. It is clear therefore that not much importance can be attached to that statement in the letter and the sole disclosure which the Ginther Land Co. made is limited practically exclusively to what is to be gathered from the terms of the agreement. What took place afterwards of course would have no bearing upon what was in the minds of the parties at the time of entering into the agreement, but it does appear that in a letter of April 7, a portion of which only is produced but which quite clearly refers to this property, Mr. Sprinkill states:—

> In order to get this at the snap price which we got on it we were forced to close a deal with the owner in our name in order to hold the property for you.

It seems quite plain that if at that time the defendants had had any suspicion that the property had not been purchased for them from the original owner, it would have been lulled by that statement. Mr. Ginther states in his evidence that in 1913, when Mr. Greenlees was in Medicine Hat, he shewed him the property and in answer to a question by Mr. Greenlees he stated that they had purchased it from a Mr. Beck of Montana. It is not clear, however, that this raised in Mr. Greenlees' mind any idea other than that the purchase from Mr. Beck was for the defendants, but from a letter which Mr. Greenlees wrote to Mr.

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Ginther on June 21, 1915, I feel little doubt that at that time, though perhaps not certain, he was satisfied that the price which the defendants agreed to pay was not the price agreed to be paid by the Ginther Land Co. In the last mentioned letter no suggestion is made of repudiating the contract, but it is stated that the defendants had been informed that the property was worth not more than $15 or $25 an acre and that they had also learned that the property was held by a Mr. Beck of ontana. He says:—

> They want to know straight what you paid for it to him and how much of it is paid up, also who holds the title to the property? They learned you do not hold the title. They also asked if any mortgage or caveat registered against the property.

In his letter he suggests that if the price is reduced to $80 an acre and the arrears of interest dropped they will carry the matter through. In the reply to that letter the Ginther Land Co. state that they cannot accept the suggestion to reduce the price. They say the title holder is prepared to deliver title free of encumbrances as soon as the final payment is made. No answer, however, is given to the other questions which were asked. Mr. Greenlees was not in Canada during the year 1915, and apparently the defendants got no further information about the property. It appears that in November, 1912, Sprinkill had taken an option from Beck, the owner of this property, and on January 8, 1913, two days after his letter to the defendant Greenlees, he entered into an agreement for the purchase of it from Beck at the price of $40 an acre payable in 3 annual instalments. This agreement he assigned to the Ginther Land Co. on February 24, 1913, the date of the agreement from the Ginther Land Co. to the defendants. On May 7 following this was further assigned to the limited company which had then been formed and on December 31 of the same year it was assigned to the plaintiffs. When the solicitors of the plaintiffs wrote to the defendants in the fall of 1915 demanding payment, no attempt was made at repudiation nor was any until after the action was brought. The action was begun in February of this year and the defendant Greenlees was served in June when he was in Winnipeg. It was not until about that time that he learned that the property had been purchased by the Ginther Land Co. from Beck for $40 an acre.

It is urged that the defendants, by their conduct, have waived

any rights they might have to repudiate the contract both by taking no action and also by having made payments, for they paid the plaintiffs interest up to February 24, 1915. It seems clear that there can be no waiver without knowledge of the facts on which the waiver is based. If the defendants knew all the facts upon which they would be justified in repudiating the contract and subsequently did anything which might be deemed an affirmance of the contract, then they might be held to have waived their rights of repudiation. It is not clear, but it appears to me very probable that early in 1915 they knew or had good reason to believe that the Ginther Land Co. had not paid for the land the price which the defendants had agreed to pay, but it is also equally clear that they did not know until after the action was brought what the purchase price to the Ginther Land Co. actually was. Therefore they could not have waived any right which they would have by reason of the knowledge of that fact.

In two recent cases in the Saskatchewan Court, *Pommerenke* v. *Bate* (1910), 3 S.L.R. 51, and *Newstead* v. *Rowe* (*ibid.*) 176, the principles affecting transactions between an agent and his principal are discussed and a number of authorities referred to. In *Lagunas Nitrate Co.* v. *Lagunas Nitrate Syndicate* (1899), 68 L.J. Ch. 699, there is a somewhat extended consideration of the principles underlying such cases. *New Sombrero Phosphate Co.* v. *Erlanger*, 46 L.J. Ch. p. 425; *Williams* v. *Scott*, [1900] A.C. 499.

I take it that the rule thus laid down applies to all cases where the relationship of confidence has been created. In that case a sale had been made by trustees to one of themselves. The trustee purchaser had given a mortgage on the property and it was through that mortgage that title was being given. The case that came before the Court was a question of whether a good title was shewn. A conveyance had been obtained from all the *cestuis que trust* confirming the sale to the trustee. The Judicial Committee held that in the absence of evidence sufficient to prove that the *cestuis que trust* had full knowledge of everything to shew what they were confirming, the transaction was one which still might be set aside and the title was therefore defective.

The decision involves the conclusion that the *cestuis que trust*, although having signed a conveyance for the purpose of confirming the transaction, were not by that act precluded from

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subsequently setting up that they did not have full knowledge of all the material facts. It also involves the conclusion that, although the mortgagee, a subsequent person had advanced money that fact did not stand in their way. These two conclusions appear to me to be important in the present case.

It is urged that by reason of the assignment to the bank the defendants should not be permitted to raise these questions as against the plaintiff. That objection is quite clearly answered, I think, by what is involved in *Williams* v. *Scott*, *supra*. It also establishes that the person attempting to enforce this agreement must prove its validity.

If there had been delay on the part of the defendants in repudiating the agreement on the grounds of want or full disclosure after they became aware of all of the facts the present plaintiff might perhaps have a somewhat stronger position than the original vendors would have, but as I have already indicated the material facts relating to the purchase price and the terms of the sale upon which the Ginther Land Co. purchased this property were not known to the defendants until after the action was brought and it was therefore impossible for them to take advantage earlier of such knowledge. That these facts were material must be apparent, not merely from what has been said in the cases to which I have referred, but also from the consideration that if known they could not have failed to have some effect on the minds of the defendants in deciding whether they would buy from the Ginther Land Co. or not. The defendants were not dealt with at arms length and thay had no independent advice such as the cases say should exist. Indeed they were invited by the Ginther Land Co. to rely implicitly on its integrity and judgment and not to seek independent advice.

I am of the opinion therefore that the defendants on these grounds not merely have a good defence to the action for specific performance, but also have a good ground for their claim for rescission.

There will be judgment therefore dismissing the action with costs and judgment upon the counterclaim in favour of the plaintiffs declaring rescission and directing re-payment of the moneys by the defendants to the counterclaim of the respective amounts which they received as stated in the counterclaim with interest at the legal rate from the time of payment.

Judgment accordingly.

LAVAL ELECTRIC CO. v. FERLAND.

QUE.

K. B.

Quebec King's Bench, Trenholme, Cross, Pelletier, Charbonneau and Mercier, JJ. April 28, 1916.

ELECTRICITY (§ III A—16)—DEFECTIVE WIRING—FIRES—PROXIMATE CAUSE.

In an action for damages caused by a fire, it is not sufficient to prove defective installation of electric wiring, by which the fire might have been caused, even though no other probable cause was shewn by the defence.

Statement.

APPELLANT is a company supplying industrial establishments with motors, wires, fuses and other electrical apparatus. Respondent entrusted appellant with the electric installation of its sash and door factory. A fire occurred in the factory on August 3, 1913. Respondents sued appellant in damages to the amount of $9,872.80, basing their action on certain defects of installation which they alleged were responsible for the fire. Appellant denied all responsibility. On December 5, 1915, Mr. Justice Lafontaine in the Superior Court rendered judgment in favour of the respondents for the entire amount claimed.

The defendant inscribed in Review.

Lafleur, MacDougall, Macfarlane & Pope, for appellant.

Leblanc, Brossard, Forest & Lalonde, for respondent.

The opinion of the Court was delivered by

Pelletier, J.

PELLETIER, J.:—The respondents state the question which we are called upon to decide as follows: "Did the trial Judge err in holding that the respondents explained with precision the cause of the fire at their factory by proving defects in the installation of the wires, fuses and electric motor as made by the appellant, and by eliminating all other possible conjectures as to the reasons of the fire, and by concluding that the appellant did not shew any other probable cause for the fire, and did not even attempt to explain the origin thereof in any other manner?"

The fact of the fire is proven beyond a shadow of doubt, and it is certain that the factory and its entire contents were destroyed, but there is no proof either direct or circumstantial establishing that the fire originated as a result of the negligence of the company-defendant.

Plaintiffs say—and the judgment *a quo* concurs in their statement—that as they have established by way of elimination that every other cause of fire has been disproved, the defendant must be condemned because its installation remains the sole possible cause of the fire.

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Respondents had two policies amounting to $2,437.50; they appraised their losses at $12,000; deducting the insurance there remains a balance of $9,562.50, and it is for this amount that they ask judgment.

Several important questions requiring serious consideration arise. (The Judge took up the question of fact as to the proof of the amount of loss, and found that the sum awarded was double the amount really suffered.) Another important fact is deserving of consideration. The Superior Court condemned the appellant because it installed the electric motive power in the factory of the respondent, and because this installation was defective.

The judgment does not state what defects were charged against the appellant, but the respondent names four:—

Questions of fact: 1. Absence of metallic covering on the motor. 2. Absence of switch. 3. Improper fuses. 4. Interior wiring not protected by rubber.

The trial Judge going into these stated that if these facts constituted negligence, the plaintiffs must be responsible therefor. In any event, if these defects had caused the fire they would only tend to reduce the amount of the damages.

Another aspect of the question deserves no less serious consideration as it goes to the very root of the claim.

The final judgment of the Superior Court was preceded by an interlocutory judgment. The evidence on the facts was then completed and the trial Judge declared at this stage that it was not sufficient for the plaintiff to raise presumptions by proving certain defects in installation, but that it should be established that the fire was the result of these defects and was caused thereby. And, added the trial Judge, the evidence adduced by plaintiff was too uncertain to allow judgment to be based thereon. Consequently the *deliberé* was discharged to allow additional proof on the four facts of which plaintiffs complained in their factum. This interlocutory judgment appears to me founded on a sound legal basis much preferable to that of the final judgment.

New witnesses were then called, but these additional witnesses were all experts who had not seen the premises, and who submitted exclusively their respective theories on scientific problems. To say the least, this additional evidence by the experts is contra-

dictory, and when the Judge rendered his final judgment he held that the evidence adduced by the plaintiffs disclosed possible causes of fire as a result of the defects in the work done by the defendant; that, under such circumstances, it was not necessary for the plaintiffs—all other causes of fire having been eliminated—to explain the precise reason of the fire; it being sufficient, says he, that the installation of the defendant disclosed defects which were a source of danger, and that the fire is unexplainable in any other manner.

That is the principal considerant of the judgment. I am of opinion that it is unfounded both in fact and in law, because it is not sufficient that some defect may have caused the fire, it must further be shewn that a particular defect did actually cause the fire. Now as a matter of fact this proof was never made.

The trial Judge in another of his grounds of judgment apparently admits that the appellant followed the requirements of the underwriters in making this installation, but he holds that this is not sufficient, and that, seeing the mystery with which electricity is still surrounded, greater prudence is required than called for by the fire underwriters, which is tantamount to saying that one should be more Catholic than the Pope.

In the first reason of judgment the trial Judge states that there are no other causes that can explain the fire outside of that of spontaneous combustion, and yet he finds that there is not in the evidence the necessary elements to presume whether or not spontaneous combustion had occurred.

The evidence disclosed nothing regarding the elements which might cause spontaneous combustion, but I am compelled to put this question: under the circumstances were not the plaintiffs obliged to prove the entire absence of other possible causes of fire? Evidently, yes: It then behooved the plaintiff to establish that there was nothing present that could have allowed of spontaneous combustion. Now the record does not contain one word of evidence on this subject. The best known case of spontaneous combustion is that where strong sunlight, piercing glass, strikes oil or rags soaked in oil. Now the factory of the respondent is a small factory, where oil is as necessary to the proper operation of the machinery as air for breathing; and yet the plaintiff did not establish that in this regard the necessary order and precautions obtained.

Morover, there are other facts of a graver nature which are

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not taken into account, and which tend to shew that every other cause of fire had not been eliminated.

Plaintiffs tell us that the factory was locked. One of them was asked how the doors and the windows were shut, but he answers only as to the doors. Now one of the witnesses of the respondent who assisted at the fire states that the doors were open, that he tried to enter through them, that he was prevented by the excess of smoke, that he went to open the windows but that the smoke was so dense at that spot that he closed them down. Evidently these windows open from the outside, and therefore any passer-by could open one of these windows, light his pipe and negligently allow his match or lighted tobacco to fall. Is not that a possible cause of fire which has not been eliminated? It is also established by one of the plaintiffs who saw the fire first that the flames were 30 feet distant from the electric motor.

And yet again another fact is still more serious than all these, for it is in evidence that another electric installation entered the factory in question, which installation had been installed by other contractors for purposes of lighting the factory. There were then two electric installations in this factory. If one of the electric companies is to be held responsible for the fire, it is absolutely necessary to prove that the fire could not have been caused by the other installation. Was this other installation well done? We find absolutely no word in regard thereto.

Could it be said that every other possible cause of fire has been eliminated without proving that the second electrical installation is not a defective one?

Was there a switch for the electric light installed by Dion and Paradis? If so, where? Might not this lighting apparatus have caused the night previous a fire that might have smouldered for some time between the floors and then broken out suddenly after having run around between the walls.

We must admit that there were other possible causes of fire which have not been eliminated.

These are not the only ones, but I have said sufficient on the subject.

On the whole, I am of opinion to maintain the appeal, to reverse the judgment of the Superior Court, and to dismiss the action with costs both in the Superior Court and in appeal and this is the unanimous opinion of this Court. *Appeal allowed.*

[To be appealed to Canada Supreme Court.]

REX v. PETERSON.

SASK.

S. C.

Saskatchewan Supreme Court, Sir Frederick Haultain, C.J., Lamont McKay, JJ. November 20, 1916.

1. WITNESSES (§ III—58)—CORROBORATION—DENIAL EXCLUDING ONE THEORY OF FACTS.
Evidence which is consistent with two views is not corroborative of either, but if the accused has denied under oath the correctness of one of such views, the evidence becomes corroborative as to the other.
[*Re Finch, Finch* v. *Finch*, 23 Ch. D. 267, referred to.]

2. PERJURY (§ II B—50)—CORROBORATION AS TO FALSITY.
On a charge of perjury the material particular for which corroboration is required is not the fact that the accused had sworn to the statement but that the statement itself was false.
[*R.* v. *Daun*, 11 Can. Cr. Cas. 244, 12 O.L.R. 227, referred to.]

Statement.

CROWN case reserved on a conviction for perjury.

H. E. Sampson, for the Crown.

H. Y. MacDonald, K.C., for the accused.

Haultain, C.J.

HAULTAIN, C.J.:—I have had an opportunity of reading my brother Lamont's judgment, and, while I agree with his statement of the law, I cannot agree with its application to the facts of this case.

As stated by Lindley, L.J., in *Re Finch, Finch* v. *Finch*, 23 Ch. D. 267, evidence which is consistent with two views is not corroborative of either, or to put it in another way, facts which are not more consistent with the truth of the testimony required to be corroborated than the reverse are inadmissible as confirmatory evidence.

If the only evidence in the case were that of Brunner and Smith the principle above stated would undoubtedly apply, because, then, Smith's evidence would be consistent with two views, one, that Peterson had got the cheque from Brunner, and the other that he had got it from Wilson or somebody else, or in some other way.

But can the second view or theory, or possibility, be invoked in this case? In addition to the question and answer upon which this charge is founded, other portions of the evidence given by Peterson at the same time were put in at the trial. In this evidence Peterson swears to the effect that he not only did not get the $4,000 cheque from Brunner, but that he did not get a cheque at all, or any money, except about $200. This evidence, to my mind, completely excludes the theory that he might have got the cheque from someone other than Brunner, unless we are to proceed on the further theory that he did not speak the truth when he swore that he did not get any cheque at all.

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That evidence, in my opinion, excludes the benevolent interpretation of the statement upon which this charge is founded.

If my view of the effect of this evidence is correct, Smith's evidence must be held to be corroborative of Brunner's statement that he gave Peterson the cheque on the 13th December, 1913.

Holding this view, I am therefore of the opinion that the first question submitted to us should be answered in the affirmative.

As to the second question, the evidence shews that the cheque was returned to the Licensed Victualler's Association, and, when last seen was in the possession of one Scott, the then secretary of the Association. Scott on one occasion refused to give up the cheque to Brunner, the treasurer, and apparently at that time was carrying it about in his pocket. Some time before this prosecution was brought, Scott left the service of the Association and the business of the Association was wound up. A search of the offices of the Association was made and failed to discover the cheque.

These facts, in my opinion, afforded a sufficient foundation for the reception of secondary evidence of the cheque, and I would therefore answer the second question in the affirmative.

Lamont, J.

LAMONT, J. (dissenting):—This is a case reserved for the opinion of this Court by my brother Newlands. It is stated as follows:—

"The accused was convicted of perjury, for swearing that he 'did not get from Frank Brunner a cheque for four thousand dollars upon the account of the Licensed Victuallers Association.'

"Frank Brunner swore that he gave the cheque in question to accused. The only corroborative evidence was that of Smith, the manager of the Bank of Ottawa, who swore that he cashed the cheque for Peterson.

"The cheque in question was not Brunner's cheque, but the cheque of the Licensed Victuallers Association, and was signed by Brunner as treasurer and one Wilson, the secretary of that Association. Under these circumstances, is the fact that Peterson had this cheque in his possession corroborative evidence that it was given to him by Brunner?

"During the trial, evidence was given of the contents of the cheque in question. The only evidence of its loss was that of Brunner, that he had searched in the office of the secretary of

the Association and it was not there. Is that sufficient evidence of its loss to let in secondary evidence of its contents?"

The questions submitted for the opinion of the Court are:—

"1. Was there any corroboration of the evidence of Brunner?

"2. Was I right in admitting secondary evidence of the cheque?"

1. Was there corroboration?

Sec. 1002 of the Criminal Code reads as follows:—

"1002. No person accused of any offence under any of the hereinafter 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 . . . (*b*) perjury; . . . ."

The corroboration required is evidence that will strengthen and fortify the evidence of the main witness upon the point requiring corroboration. It must point to the guilt of the accused. *Rex* v. *Daun*, 11 Can. Cr. Cas. 244, 12 O.L.R. 227.

The crime charged against the accused is that he committed perjury by swearing that "he did not get from Frank Brunner a cheque for four thousand dollars upon the account of the Licensed Victuallers Association."

The material particular for which corroboration is here required, is not the fact that the accused swore to the above statement, but that the statement sworn to was false. Crankshaw, 4th ed., at p. 1075.

To establish the falsity there must be at least the evidence of one witness which is corroborated by other evidence implicating the accused, and shewing (1) that he received a cheque of $4,000 on the account of the Licensed Victuallers Association, and (2) that he received it from Frank Brunner.

If it is shewn he received a cheque of $4,000, and that it was upon the account of the Licensed Victuallers Association, but it is not shewn that he received it from Brunner, the Crown fails to establish the falsity of the statement.

A positive statement is shewn to be false when any allegation of fact therein is shewn to be untrue, but to establish the falsity of a negative statement it must be shewn that each material allegation of fact therein is untrue.

Wigmore, in his work on Evidence, vol. 3, at p. 2043, states the rule as to corroboration as follows:—

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"(3) The rule of course applies only to the proof of the fact alleged as falsely sworn, and therefore a corroboration as to the act of swearing and the words sworn is not called for. Moreover, the corroboration is required for the perjured fact as a whole, and not to every detail or constituent part of it. *But as to each separate assignment of fact in the indictment (whether or not in the same count) the rule applies independently.*"

The evidence of one witness testifying to the falsity of the accused's statement that he did not get the cheque from Brunner therefore requires corroboration.

Brunner testified that he was the treasurer of the Licensed Victuallers' Association, and that one Wilson was the secretary; that he had gone to Wilson and had a cheque for $4,000 made out and signed, and that he gave it to Peterson in the office of the Association in the presence of Wilson. Wilson was not called as a witness. The evidence relied on to corroborate Brunner is the testimony of Smith, the manager of the Bank of Ottawa, who testified that the accused had the cheque in his possession. This, in my opinion, cannot be considered as corroboration of Brunner's testimony that he gave the accused the cheque. The accused's possession of the cheque is no more evidence that he got it from Brunner than that he got it from Wilson. Both were present at the time. It is a question of who handed it to the accused. Possession by him of the cheque is just as consistent with his having received it from Wilson as from Brunner. Now, evidence which is equally consistent with two different sets of facts is corroboration of neither.

This is laid down by Lindley, L.J., in *Re Finch, Finch* v. *Finch*, 23 Ch. D. 267 at p. 277, where the learned Judge uses the following words:—

"Now, before that can be regarded as corroborative evidence, we must look at it in order to see what it corroborates. It is undoubtedly consistent with the lady's story; that is plain enough. But it seems to me to be equally consistent with another view altogether; and evidence which is consistent with two views does not seem to me to be corroborative of either."

I am, therefore, of opinion that the possession of the cheque by the accused is no corroboration of Brunner's statement that he gave him the cheque.

It was contended that, as the accused had sworn before the Committee of the Legislature that he had not received the cheque from anyone, thereby impliedly swearing that he had not received it from Wilson, it was not now open to us to say that the possession of the cheque was just as consistent with his receipt of it from Wilson as from Brunner. The evidence of Smith, if believed, establishes that the accused did not tell the truth when he swore that he never had the cheque, but the fact that the accused on that occasion did not tell the truth in no way, so far as I can see, points to the fact that he had got the cheque from Brunner rather than from Wilson. His statement is just as strong a denial that he got it from one as from the other. From such a denial, I do not see that any inference can be drawn as to the person from whom he received it.

The first question, in my opinion, should be answered in the negative and the conviction quashed.

Having reached this conclusion, it is unnecessary to deal with the other question submitted.

McKay, J.

McKAY, J.:—I have had the opportunity of reading my brother Lamont's judgment in this case, and, while I agree with him in his statement of the law as to the corroboration required, I disagree with him in his application of it to the case under consideration.

In my opinion, in the light of the evidence given at the trial, which is before us, we are precluded from taking the view suggested, that the evidence of Smith is not corroborative of Brunner's testimony because Peterson might have got the cheque from Wilson.

We must bear in mind that the evidence of Peterson given before the select committee of the legislature, and which was put in evidence at his trial, is to the effect that he did not get the $4,000 cheque at all (page 4 of the evidence submitted with the case reserved), which would mean that he denied getting it from Wilson as well as from Brunner.

It seems to me, then, we have these two views or contentions presented to us:—

1. Brunner swearing that he gave Peterson a $4,000 cheque on the Licensed Victuallers' Association's account, and—

2. Peterson swearing that he did not get the cheque at all.

The evidence of George Sharpe, at pp. 29 and 30, shews that

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it had been arranged that Peterson was to look after a certain matter in which the Licensed Victuallers' Association was interested, and, as the members of the executive committee of the Association were going to leave their homes, Mr. Brunner (the treasurer of the Association) and Mr. Peterson were given authority to use the money of the Association for that purpose. The matter in question was left in the hands of Peterson, and, as I understand the evidence, Brunner, the treasurer, was authorized to give him the money of the Association as he required it. Peterson, at p. 3 of the evidence, admits getting about $200 from Brunner.

Smith swears he received the $4,000 cheque on the Licensed Victuallers' Association from Peterson on the 13th December, 1913 (the day Brunner says he gave it to Peterson), and cashed it for him.

It seems to me, then, Peterson having denied getting the cheque at all, and Brunner swearing that he gave it to him on the 13th December, 1913, and Smith swearing that he received it from and cashed it for Peterson on that day, Smith's evidence is corroborative of Brunner's, and the question submitted should be answered in the affirmative.

As to the second question submitted:—

Brunner swears that the secretary of the Association looked after getting back the cheques from the bank; that the secretary did all the banking and received the vouchers at the end of the month; that the cheque in question was at one time in the office of the Association; that he once asked D. M. Scott, the secretary of the Association, for it, and the latter refused to give it to him; that he last saw the cheque on the person of the said D. M. Scott; that he and the president of the Association searched the offices of the Association, where its records were kept, but could not find the cheque; that the Licensed Victuallers' Association went out of business in June, 1915, and it was in June, 1915, that he last saw the cheque.

Taylor on Evidence, 10th ed., at p. 330, says:—

"First, if an instrument be destroyed or lost, a party who seeks to give secondary evidence of its contents must, to begin with, give some evidence that the original once existed, and then either prove positively, or at least presumptively (as by shewing that it has been thrown aside as useless), that such instrument

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has been destroyed, or he must shew that it has been lost by proof that a search has been unsuccessfully made for it, in the place or places where it was most likely to be found."

In *M'Gahey* v. *Alston*, 2 M. & W. 206:—

"A cheque, drawn on account of the parish, was delivered to A., who was then the paying clerk of the parish. It was shewn that the bankers of the parish, on the same day, paid a sum of that amount, and that their custom was to return the cancelled checks to the paying clerk, and that they were deposited in an apartment in the workhouse. A., having gone out of office, application was made to his successor at that place, for inspection of the checks. He handed to the witness several bundles, which he searched, without finding the cheque in question:—*Held*, a sufficient search to let in secondary evidence of the contents."

See also *Gathercole* v. *Miall*, 15 M. & W. 319, at p. 335.

On the foregoing authorities, I am of the opinion that the learned trial Judge was correct in allowing secondary evidence of the cheque, and the second question submitted should be answered in the affirmative. *Conviction affirmed.*

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British Columbia Supreme Court, Macdonald, J. November 17, 1916.

INSURANCE (§ IV A—161)—TRANSFER OF POLICIES—"WRITING"—WILL—DESCRIPTION.

A will is a "writing" within the meaning of the Life Insurance Policies Act, R.S.B.C. ch. 115, sec. 7, for the purpose of declaring that a policy of life insurance shall enure for the benefit of one of the specified class, but a bequest in a will of "the first $75,000 collected on account of policies" does not sufficiently identify any policy or policies taking it or them within the provisions of sec. 7, when there are several policies amounting to more than the sum named.

[*McKibbon* v. *Feegan* (1894), 21 A.R. (Ont.) 87; *Lynn* v. *Toronto General Trusts Co.*, 20 O.R. 475; *Re Chesborough* (1899), 30 O.R. 639; *Re Harkness* (1904), 8 O.L.R. 720; *Re Cochrane* (1908), 16 O.L.R. 328; *Re Baeder and Canadian Order of Chosen Friends* (1916), 28 D.L.R. 424; *Re Watters* (1909), 13 O.W.R. 385; *MacLaren* v. *MacLaren* (1907), 15 O.L.R. 142, referred to.]

S. S. Taylor, K.C., for plaintiffs.

J. Martin, K.C., and *G. A. Grant*, for defendants.

Macdonald, J.

MACDONALD, J.:—W. R. Arnold died on October 12, 1914. By his will, dated January 15, 1914, he appointed the Dominion Trust Co. his executors and trustees and gave all his property not otherwise disposed of to such trustees upon certain trusts. By such will he disposed of a portion of his life insurance as follows:—

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> The first seventy-five thousand dollars ($75,000) collected on account of policies of life insurance I give to my dear wife Laura Blanche Arnold, with the reservation that the same be placed in a savings account in the Standard Bank of Canada, Vancouver, B.C., with the right to draw the sum of twenty thousand dollars ($20,000) with which to purchase or erect a home (which home is to be hers absolutely and free from any trust) and the sum of two hundred dollars ($200) per month and interest on the said savings account for living expenses and the maintenance of my infant children.

At the time of the date of and presumable execution of the will, the deceased had his life insured to an extent, far beyond the $75,000 referred to. The Dominion Trust Company is in liquidation and the liquidator of such company admits that he "collected" before the commencement of this action, and still has in hand, over $200,700 as the proceeds of such policies of life insurance. I am satisfied that the estate of W. R. Arnold is insolvent. This conclusion is arrived at on the evidence, and aside from the consideration of the extent of the claim of the Dominion Trust Co. against the estate. The question arises, whether under these conditions, the $75,000 referred to, should be held by the liquidator, and be available to carry out the provisions of the will, or be applied towards payment of the debts of the testator. None of the policies of insurance, under which moneys were collected were payable to the widow or children. In that event, the moneys payable thereunder would, upon the death of the deceased, in the ordinary course, become part of his estate unless such contracts of insurance have been varied. Such variation even without the consent of the insurance company can be effected by utilizing the provisions of the Life Insurance Policies Act, R.S.B.C. ch. 115. This Act was passed "to secure to wives and children the benefit of life insurance." Sec. 7 thereof provides that:—

> In case a policy of insurance effected by a man on his life is expressed upon the face of it to be for the benefit of his wife, or of his wife and children, or any of them, or in case he has heretofore indorsed, or may hereafter indorse, or by any writing identifying the policy by its number or otherwise has made, or may hereafter make, a declaration that the policy is for the benefit of his wife, or his wife and children, or any of them, such policy shall ensure and be deemed a trust for the benefit of his wife for her separate use, and of his children, or any of them, according to the intent so expressed or declared; and so long as any object of the trust remains, the money payable under the policy shall not be subject to the control of the husband or his creditors, or form part of his estate when the sum secured by the policy becomes payable. .

The contention of the plaintiffs is that this section has been, by the terms of the will, complied with, so that the proceeds of such policies of insurance should to the extent of $75,000 enure as a

trust for their benefit, and should not form part of the general estate of the late W. R. Arnold or available for payment of his debts. It is submitted by the defendants that the section cannot be brought into play and its benefits obtained by the execution of a will. This point was raised and considered in the Province of Ontario, where a similar statute exists. In *McKibbon* v. *Feegan* (1894), 21 A.R. (Ont.) 87, the majority of the Court decided that the proceeds of a policy of life insurance could be bequeathed by will and followed the decision of *Lynn* v. *Toronto General Trusts Co.*, 20 O.R. 475. It was considered that the words "in writing" in the Act included a will and that unless there was some good reason shewn for excluding a will, a declaration by will was a sufficient compliance with the Act. Osler, J., dissented from the judgment in the case, but there are numerous decisions to the same effect prior to the passage of legislation removing any doubt in the matter. I see no reason why I should not follow the decisions in Ontario on this point. Assuming then that such policies could have been declared by will to be for the benefit of the wife and children, are the words of the will effective for that purpose? The Act was passed as a remedial measure and of assistance in effecting one of the principal benefits of life insurance. It was intended, notwithstanding the terms of the contract with the insurance company, that the assured could of his own volition vary the same and make provision for his dependants in case of death. It is limited in its operation to his wife and children. I think, under such circumstances, that the Act should receive "such fair, large and liberal construction and interpretation as will best insure the attainment of its object." No decision has been cited to me on the point, in which the facts are on all fours with those presented in this case.

In *Re Cheesborough* (1899), 30 O.R. 639, it was held that policies of insurance, effected after the date of the will, did not come within the provisions of the will which bequeathed all the testator's property, real and personal, and including life insurance policies to his executors in trust. This decision was approved of in *Re Harkness* (1904), 8 O.L.R. 720, and its effect was in *Re Cochrane* (1908), 16 O.L.R. 328, at 333, declared to be that general language in a will "did not operate on a policy made to the testator after the date of the will . ." The will was thus treated, in

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regard to "this action of the Insurance Act as speaking not from the death of the testator, but from its date." If the terms of the will are sufficient to apply the section then under these decisions the only policies affected are those on the life of the deceased at the execution of the will. It is submitted, that if the testator had bequeathed all his real and personal property, including then existing life insurance policies, to his wife and children, that the proceeds of such policies would without regard to the rights of creditors, have been payable to the wife and children. It is contended, however, that the attempt to simply appropriate or set aside a portion of the moneys that might become payable under such insurance policies, is not a compliance with the provisions of sec. 7 of the Act. The words of the Act that can be alone applicable so as to meet the situation are the making by the assured of a declaration "by any writing identifying the policy by its number or otherwise." It was held in *Re Cheesborough*, *supra*, that the policies do not have to be identified by their number, where the proceeds *of all life insurance policies* are being bequeathed.

In *Re Harkness*, *supra*, the testator did not refer to policies of insurance by number but gave the residue of his property including life insurance to his wife and children. It was held that these words were sufficient and made it certain and clear as to what policy of insurance was meant. There was apparently sufficient identification within the requirements of the statute.

In *Re Cochrane* (1908), 16 O.L.R. 328—in this case a testator made the following provisions by his will:—

> I give and bequeath out of my life insurance funds the sum of $200 to my sister. All the rest, residue and remainder of insurance funds real and personal estate of what kind soever, I give to my daughter.

It was held the bequest to the sister was invalid and that she was outside the class of preferred beneficiaries under the Act, and that the amount of $200 bequeathed to her lapsed and fell into the residue and became payable to the daughter. It was thus not decided that the bequest became invalid through the wording being insufficient in not identifying the policy of insurance, but because it proposed to dispose of life insurance moneys payable under life insurance policies to a party not entitled to be benefited by the Act.

In *Re Baeder & Canadian Order of Chosen Friends* (1916),

28 D.L.R. 424 at 433, Riddell, J., refers to the conclusion to be drawn from the latter case as follows:—

It will be seen that it was taken for granted in that case that, had the sister been within the class, the declaration by will would have been effective although the policy was not in favour of the assured.

These remarks, however, cannot be taken as a decision but only as a passing reference shewing a deduction that might be drawn from a previous judgment.

Re Watters (1909), 13 O.W.R. 385. In this case the intestate insured his life in 1888, for the benefit of himself, his legal representatives and assignees. Then, on December 6, 1893, he made his will which contained two clauses bequeathing the sum of $1,000 "to be paid out of the insurance moneys on my life at my decease." There was only one policy of insurance effected on the life of the deceased either at the time the will was made or thereafter and the question was whether the deceased, having married in 1902, the moneys payable under such policy were the property of and should be paid to the daughters. They sought to obtain a declaration that a valid trust was created by the will, which enured to their benefit, and was not affected through the will having been revoked by marriage. It was submitted to the contrary that the will did not sufficiently identify the policy "by number or otherwise." Clute, J., considers such contention as follows:—

The wording here is certainly very general, but, the fact being admitted that the policy in question existed at the time, and was the only policy of insurance upon the life of the deceased, either then or subsequent thereto until his death, there can be no doubt, I think, that the testator, at all events, referred to the policy in question, and, having regard to the facts, that there could be no question as to what policy he did refer to.

References are then made to the decisions on this point, but the applicants failed, as it was held that the will, though duly executed, was afterwards revoked by marriage and thus lost the effect it would otherwise have had under the statute. Had it not been for this conclusion it is apparent that the Court would have decided that the bequests were operative though the will did not refer to any particular policy of insurance nor did it adopt the same language as was considered sufficient in the *Cheesborough* case.

In *MacLaren* v. *MacLaren* (1907), 15 O.L.R. 142, at 146, Anglin, J., after referring to the statute being passed for the purpose of securing benefits to wives and children and that it should

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receive such construction as would effect that object says:—"The Courts have gone far to place upon the statute a liberal construction in favour of beneficiaries of the preferred class."

He mentioned in this connection *Re Cheesborough*, *supra*. He declined to give effect to a bequest of one of four policies (all of a similar description) as being an insufficient identification of the policy intended to be bequeathed. He concluded his judgment as follows:—

I should go far beyond any decision yet pronounced in favour of preferred beneficiaries upon the question of identification under the statute. In my opinion it is not possible to maintain that a bequest of one of four policies, any one of which may be selected to answer a bequest, is such a designation as meets the requirement of the statute—that the policy shall be identified by number or otherwise.

It is admitted in this case that W. R. Arnold had a number of policies in force at the time when he made his will. The face of such policies exceeded $75,000 and it is thus doubtful, out of which policies the testator expected or intended such amount to be paid. It is thus contended that even if a will can by apt terms operate so as comply with the Act that the language of the will in question falls short of the identification contemplated and intended by the statute. He could easily have identified a particular policy in the will. He did not do so, however. Can the wife and children under the terms of the will obtain the benefit of the Act without some such compliance? I have already referred to my intention to follow the Ontario decisions. I think I should do so particularly in this matter, involving the consideration of a statute similar to one in force in that province. It is appropriate on this point, in connection with matters of insurance and the desirability of uniformity in decisions, to refer to the remarks of Brett, L.J., as to following American decisions in England, *vide.*: *Cory* v. *Burr* (1882), 9 Q.B.D. 463 at 469:—

If I thought that there were American authorities clear of this point, I do not say that I would follow them, but I would try to do so, for I agree with Chancellor Kent, that, with regard to marine insurance law, it is most advisable that the law should, if possible, be in conformity with what it is in all countries. I must therefore add that, although American decisions are not binding on us in this country, I have always found those on insurance law to be based on sound reasoning and to be such as ought to be carefully considered by us and with an earnest desire to endeavour to agree with them.

I think that while the intention of the testator to appropriate the proceeds of insurance is quite clear, still, this is not sufficient: I should not as a Court of first instance hold that the policies have

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been properly identified so as to comply with the statute. If I decided otherwise, I feel that I would be going farther than the decisions warrant. It was uncertain at the time when the will was made, or when Mrs. Arnold was informed as to the provisions of the will, as to what policy or policies would afford the moneys to pay the $75,000. This is still unascertained. There is not the "clear, sure and certain identification which seems to be imperative, having regard to the repeated and particular expressions of the Insurance Act"—*vide*. Boyd, C., at p. 334 in *Re Cochrane, supra*.

The plaintiffs also set up an equitable assignment of the policies of insurance to the extent of $75,000. I mentioned during the trial that, in my opinion, this position is not tenable. The facts, even with the most liberal interpretation, do not afford the plaintiffs any relief.

It is to be regretted that the testator did not implement his intention of providing for his dependants out of his life insurance —in a legal manner. In my opinion, the statute permitting this course to be pursued for the benefit of wives and children has not been complied with. The moneys collected from the life insurance policies are not available for payment of the $75,000.

The action is dismissed with costs. *Action dismissed.*

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Ontario Supreme Court, Appellate Division, Meredith, C.J.O., and Maclaren, Magee and Hodgins, JJ.A. April 19, 1916.

LIMITATION OF ACTIONS (§ II M — 95) — REDEMPTION OF MORTGAGE — DISABILITIES.

The disability sections of the Limitations Act, R.S.O. 1914 ch. 75, do not apply to an action to redeem.

[*Faulds* v. *Harper*, 11 Can. S.C.R. 639, referred to.]

Statement.

APPEAL by the defendants from a judgment of Lennox, J. in an action for redemption and an account. Reversed.

J. D. Falconbridge and *J. A. Jackson*, for appellant.

A. B. Cunningham, for respondent.

J. L. Whiting, K.C., for the defendants the Toners, respondents.

The judgment of the Court was delivered by

Meredith, C.J.O.

MEREDITH, C.J.O.:—This is an appeal by the defendant Darling from the judgment, dated the 20th January, 1916, which was directed to be entered by Lennox, J., after the trial of the action before him, sitting without a jury, at Kingston, on the previous 8th October.

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The respondent Smith is one of the children of Margaret Ann Smith, deceased, who in her lifetime was the owner of the lands in question, which may for convenience be referred to as the Kingston property and the Storrington property. She and her husband, on the 24th July, 1900, mortgaged the Kingston property to Sands S. Guess to secure $400, and they on the same day mortgaged it to the appellant to secure $726, and Guess's executor assigned the $400 mortgage to the appellant. The appellant has also acquired the interests of four of the heirs at law of Mrs. Smith. The appellant sold the land under the power of sale contained in his mortgage to Lawrence Frey for $750, and on the 29th April, 1910, entered into an agreement with Frey to convey the land to him on payment of the purchase-price. Frey sold his interest to Joseph E. Wilder, and the appellant on the 17th February, 1911, entered into an agreement with Wilder to sell to him for $731.68. This agreement is still subsisting, and no conveyance has yet been made to Wilder.

The Storrington property was mortgaged by Smith and his wife, and Elizabeth Smith, to the executors of Benjamin Bailey on the 2nd December, 1895, for $1,500, and the mortgage was assigned by them to the appellant on the 8th April, 1901. Before assigning the mortgage, the executors of Bailey had begun proceedings for foreclosure upon their mortgage, and these were continued by the appellant in the name of the executors, and resulted in a final order of foreclosure being obtained. Although Mrs. Smith had died pending the action, no notice was taken of this, and her heirs were not made parties, nor was an order to continue the proceedings against them obtained. The appellant, not knowing of this defect in the foreclosure proceedings, and assuming to be the owner of the land free from the equity of redemption, sold and conveyed it to Walter Toner on the 30th June, 1904, and Toner has since sold and conveyed a part of it to the Perfect Brick and Tile Company.

Toner is made a party defendant, but the Perfect Brick and Tile Company is not a party to the action.

The appellant sets up the Limitations Act as a bar to the action, and it is conceded that, unless the respondent Smith's right to redeem is saved by what is now sec. 40 of the Limitations Act, it is barred, but that, if that section applies to an action for redemption, he is entitled to redeem.

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On the argument an arrangement was made between the parties as to the Kingston property; and it is therefore necessary to deal only with the Storrington property.

The question as to the application of the disability sections to an action for redemption is by no means free from difficulty, and the difficulty is increased by the conflict of judicial opinion as to it.

The legislation in this Province has followed closely on the lines of Imperial legislation.

3 & 4 Wm. IV. ch. 27 (Imperial) is the first of the Acts to which reference need be made. By it the time was limited for making an entry or distress or bringing an action "to recover any land or rent:" sec. 2. By secs. 16 and 17, a longer period was allowed in case of disability arising from infancy, coverture, idiocy, lunacy, unsoundness of mind, or absence beyond seas; and sec. 28 limited the time for bringing a suit to redeem, the period for which was twenty years after the time when the mortgagee had obtained the possession or receipt of the profits of the mortgaged property, unless in the meantime there had been a written acknowledgment of the mortgagor's title or his right of redemption, and in that case within twenty years after the acknowledgment, or the last of the acknowledgments, if more than one.

Shortly after this Act came into force, attention was called by Lord St. Leonards in his work on real property, Sugden's Real Property Statutes, 1st ed., p. 114, to the omission from sec. 28 of any saving for disabilities. He there says: "There is, it should be observed, no savings (*sic*) for disabilities of the mortgagor or his heirs in regard to the bar created by section 28" (p. 118, 2nd ed.)

Mr. Fisher appears to have been of a different opinion. In the first edition of his work on mortgages, p. 95, para. 142, he refers to the passage I have just quoted, and says that "if the position of the clauses be alone considered there seems to be good reason for this conclusion, but whether it was intended, and whether Courts of Equity in construing the Act would feel bound to deprive the mortgagor and his heirs of this benefit, may be doubted. The only reason why they should be deprived of the advantage which it is clear they enjoyed when their rights were governed by analogy to the old Statute of Limitations seems to

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be that by the present statute the right to redeem is limited by a distinct and separate clause, whilst the remedies of mortgagees are affected only in common with the remedies of other persons who claim 'any land or rent in equity' and to whose rights the disability clause is generally applicable. But for this there were several reasons: the time of accruer of the right to sue, the nature of the acknowledgment, the person in whose favour and against whom the acknowledgment is to operate, the part of the estate which may be redeemed in certain cases, and the proportion of the mortgage-debt and interest necessary to be paid on such redemption, are all matters for which, as they affect the rights of the mortgagor, it was necessary or was thought fit to make special provisions, which were most conveniently contained in a separate clause. But this does not alter the fact that a redemption suit is a suit to recover 'land or rent in equity.' To such suits the disability clause, as well as those which relate to cases of express trusts and of fraud, are generally applicable, and it would be a singular and narrow construction of the Act to bind a mortgagor under disability now who was not so bound before the present statute, because it was found necessary to give a larger explanation of his other rights. The extension of the 16th to the 28th section appears by no means so strong a conclusion as the extension of the 25th (express trusts) to the 40th and 42nd, for in the former case both sections refer in effect to suits for the recovery of land, but in the latter, one contemplates the recovery of land and the other money and the interest of money charged on land."

This passage does not appear in the 6th edition, but the following takes it place: "The 28th section of the Act of 3 & 4 Wm. IV., which bars the right of redemption, and the 7th section of the Act of 1874, which corresponds to it, are not affected by the disability clause (s. 16) of the former Act; a redemption suit not being a suit to recover land within the meaning of the Act" (p. 724, para. 1412.)

The authorities given for this statement are Sugden's Real Property Statutes, p. 114; *Kinsman* v. *Rouse*, 17 Ch. D. 104; and *Forster* v. *Patterson*, 17 Ch. D. 132.

I have not found any English case in which the question arose before *Kinsman* v. *Rouse* (*supra*).

That case was decided by the Master of the Rolls (Jessel), and his decision did not depend upon the arrangement of the

sections, or the order in which they appeared in the Act, but was based upon the broad ground that an action for redemption was not, within the meaning of the Act, "an action to recover land."

In 1874, the Act reducing the period of twenty years allowed by 3 & 4 Wm. IV. ch. 27, to twelve years, was passed (37 & 38 Vict. ch. 57), in the preamble of which it is recited that "it is expedient further to limit the times within which actions or suits may be brought for the recovery of land or rent, and of charges thereon."

In this Act the arrangement of the sections is the same as in the earlier Act, sec. 5 corresponding with sec. 16, and sec. 7 to sec. 28.

The recital in the preamble would seem to indicate that the draftsman thought that an action to redeem was an action to recover land, otherwise one would have expected that the recital, which refers to charges, would also have referred to actions to redeem.

In *Forster* v. *Patterson* (*supra*) the question arose on the Act of 1874, and the same conclusion was reached by Bacon, V.-C., as was come to by the Master of the Rolls in *Kinsman* v. *Rouse* (*supra*), though the Vice-Chancellor laid stress "upon the order in which the clauses are arranged" (p. 135).

It is not surprising that the text-writers differ as to the question, though most of them state the law to be as it was held to be in the two cases to which reference has been made.

In Banning on Limitation of Actions, 3rd ed., p. 174, it is said that "under the 3 & 4 Wm. IV. ch. 27, as that statute has been construed by the Courts, the period of twenty years (now twelve years) is now absolute—and runs whether the mortgagor or the mortgagee is under disability or not, at the time when the right of action accrued — *scil.*, at the time when the right of foreclosure or of redemption accrues, these being the rights against the land."

In the second edition (1892), pp. 187-8, the writer says, referring to the opinion of Lord St. Leonards, already quoted: "With the greatest deference to so high an authority it may be remarked that the correctness of this observation is now perhaps doubtful. And inasmuch as a redemption suit appears equally with a foreclosure suit to be a suit for the recovery of land within section 24 of the Act, which places suits in equity on the same footing with actions at law, it seems to follow that all the savings

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which are allowed in favour of other plaintiffs will (so far as applicable) be allowed a mortgagor plaintiff in a redemption suit. And it may be noticed that, according to the old law, a mortgagor had benefit of disability."

In Coote on Mortgages, 8th ed., pp. 774-5, it is said: "There is in the Acts now in force no express saving of disabilities of the mortgagor or his heirs in any distinct clause; they were saved under the old Statute of Limitations; but it has been held that section 16 of the Act of Wm. IV. as to disabilities does not apply to a mortgagor redeeming, inasmuch as an action for redemption is not an action to recover land for the purposes of the Statutes of Limitation."

In the following works it is stated that the disability section does not apply to suits to redeem: Dart on Vendors and Purchasers, 7th ed., p. 438 (note *b*); Williams' Real Property, 21st ed., p. 563; Darby and Bosanquet on Limitations, 2nd ed., pp. 469, 470; Halsbury's Laws of England, vol. 19, p. 150, para. 302.

I pass now to the consideration of the Provincial Acts and the decisions upon them.

The Legislature of Upper Canada, in the year after 3 & 4 Wm. IV. ch. 27 was enacted, passed an Act intituled "An Act to amend the Law respecting Real Property, and to render the proceedings for recovering possession thereof in certain cases, less difficult and expensive" (4 Wm. IV. ch. 1). Sections 16 to 45 (inclusive) are the same as the sections of the Imperial Act, though the numbers of them are not the same. The order in which the sections are arranged is the same, and all the provisions of the Imperial Act, except those which deal with ecclesiastical matters and estates tail, are embodied in the Provincial Act.

This Act was consolidated in 1859, and appears as ch. 88 in the Consolidated Statutes of that year. With it are consolidated the provisions of 10 & 11 Vict. ch. 5, secs. 1 to 8 inclusive, which relate to prescription in the case of easements, of secs. 9, 10, and 11 of the same Act, which relate to estates tail, of 16 Vict. ch. 121, sec. 1, which relates to the making of entries and bringing of actions by mortgagees, and of 7 Wm. IV. ch. 2, sec. 11 (dormant equities).

In this chapter the sections are arranged under headings, and changes are made in the previous order of some of the sections.

Section 28 of the Act of 1834, which corresponds to sec. 16 of the Imperial Act, became sec. 45, and appears under the heading "Disabilities and Exceptions" and the sub-heading "In cases of land or rent;" and sec. 36, which corresponded with sec. 28 of the Imperial Act, became secs. 21, 22, and 23.

The disability section (45) begins with the words: "If at the time at which the right of any person to make an entry or distress, or to bring an action to recover any land or rent, shall have first accrued, as hereinbefore mentioned."

It should be noted here that sec. 25 (a consolidation of part of sec. 1 of 16 Vict. ch. 121) provides that "any person entitled to or claiming under a mortgage of land, may make an entry or bring an action at law or suit in equity to recover such land, at any time within twenty years next after the last payment of any part of the principal money or interest secured by such mortgage, although more than twenty years may have elapsed since the time at which the right to make such entry, or bring such action or suit in equity, shall have first accrued."

I refer to this section because it may be thought that the language indicates that it was thought that a suit for foreclosure is an action to recover land within the meaning of the Act, However that may be, the rearrangement of the sections in the Consolidated Statute to which I have referred was obviously due to the plan which was adopted by the Commissioners for the revisions of the statutes of arranging the sections under appropriate headings, and not with the object of making any change in the existing law.

The next legislation was the statute of 1874 (38 Vict. ch. 16), the purpose of which was similar to that of the Imperial Act of the same year (37 & 38 Vict. ch. 57).

It is necessary to refer to the preamble of this Act, for its recitals were relied on in the Court of Appeal in *Faulds* v. *Harper*, 9 A.R. 537, in coming to the conclusion to which a majority of the members of the Court came, that the disability sections do not apply to actions for redemption.

The recital of the preamble is: "Whereas it is expedient to lessen the time for making entries and distresses, and for bringing actions and suits to recover land or rent, in certain cases from forty to twenty years, and in certain other cases from twenty to

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ten years, and in certain other cases from ten to five years, and also to lessen the time for redemption by mortgagors, and for recovery of dower, and of money charged on lands or on rent, and of legacies, and also to provide for cases of money and legacies charged on land or on rent secured by express trust, according to the provisions hereinafter contained respectively relating thereto."

In this Act the order of the sections of the Imperial Act and of the Act of 1834 is followed, sec. 1 containing the general provisions as to the time within which an entry or distress may be made or an action or suit to recover land or rent may be brought, secs. 5 and 6 the disability sections, and secs. 8, 9, and 10 the sections relating to actions or suits to redeem.

Before referring further to the case of *Faulds* v. *Harper*, reference should be made to *Caldwell* v. *Hall*, which is reported in (1860) 6 U.C.L.J. 141, and, *sub nom. Hall* v. *Caldwell* (1861), 7 U.C.L.J. 42, 8 U.C.L.J. 93. The suit was for redemption, brought by the heir at law of the mortgagor, and the question of the applicability of the disability sections of the Limitations Act then in force (C.S.U.C. ch. 88) came up on demurrer, though there were other grounds assigned for it. The judgment of the Court of Chancery (6 U.C.L.J. 141) was delivered by Esten, V.-C. The demurrer was overruled, the reason, as to the question of the Statute of Limitations, being that it obviously interposed no bar, "possession not having been taken until 1839, less than twenty years before the commencement of the suit."

The defendants appealed to the Court of Error and Appeal, the Judges being Sir John Robinson, C.J., the Honourable W. H. Draper, C.J., Esten, V.-C., Burns, J., Spragge, V.-C., Richards, J., and Hagarty, J. The case in appeal is reported twice, first in 7 U.C.L.J. 42, and afterwards in 8 U.C.L.J. 93. In the earlier report the opinions of the Chief Justice of the Court and Esten, V.-C., appear, and in the later report only the opinion of the Chief Justice, which is reported at much greater length than in 7 U.C.L.J. The Chief Justice, according to the earlier report, was of opinion that, assuming that every statement in the bill must be taken against the pleader, it was sufficiently alleged that the mortgagee had been in possession for more than twenty years, but that the right to redeem was not barred, because the plaintiff was entitled

to claim the benefit of the disabilities clause of the Act, and that "the object of the mortgage clause was to settle the law as to the right of the mortgagor to redeem and not to limit him in any other way, and therefore not to deprive him of the advantages of disabilities which he enjoyed before." The reasons for this view are more elaborated in the report in 8 U.C.L.J. Esten, V.-C., referred to the observations of Lord St. Leonards and to Mr. Fisher's criticism of them, and expressed the opinion that "the clause in the Statute of Limitations providing for disabilities must be held to apply to redemption of mortgages, as well as to actions for the recovery of land," and he thought that "the Legislature did not intend to deprive the mortgagor and his heirs of that benefit."

The question next came up in *Faulds* v. *Harper*, 2 O.R. 405, 9 A.R. 537, 11 S.C.R. 639. The case was ultimately decided in favour of the plaintiffs, who were heirs of the mortgagor, upon the ground that the Statute of Limitations did not apply because the possession was not as mortgagee but as trustee. The case was tried before Blake, V.-C., who made a decree declaring the three eldest of the plaintiffs barred by the Statute of Limitations, and dismissing the bill so far as they were concerned, also declaring that the two younger plaintiffs were not entitled to redeem the land, but were each entitled to one-fifth of the proceeds of the sale, subject to what was due on the mortgage. The case was reheard and twice argued—the second time before Proudfoot and Ferguson, JJ. *Kinsman* v. *Rouse* (*supra*), *Forster* v. *Patterson* (*supra*), and the *Caldwell* case (*supra*), were cited, and the latter case was followed in preference to the English cases, both Judges holding that the *Caldwell* case was binding on the Court, and Proudfoot, J., saying that it enunciated the true construction of the statute. It was also decided that the equity of redemption was "an entire whole" (2 O.R. at p. 411), and that, "while any of the owners is entitled to sue for redemption, it enures for the benefit of all" (p. 412); and it was adjudged that all the plaintiffs and their mother were entitled to the whole proceeds of the sale.

It should have been mentioned that the mortgagee had put the mortgaged property up for sale under a power of sale in his mortgage, and that it was bought in for him, but was subsequently sold to a *bonâ fide* purchaser for value without notice, who was entitled to hold free from any right of redemption.

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The Court of Appeal consisted of Spragge, C.J.O., Burton, Patterson, and Morrison, JJ.A., and its conclusion was that the disabilities sections of the Act did not apply to suits to redeem. The Chief Justice dissented, basing his opinion upon the ground upon which the case was ultimately decided, and expressing no opinion upon the point upon which it was decided in the Court of Appeal.

Burton, J.A. (9 A.R. at pp. 548, 549), relied upon the preamble of the Act of 1874, which, he said, drew a distinction between "an ordinary suit for the recovery of land and a suit to redeem." He also relied upon the provision of sec. 16 of that Act, which provided that the Act should "come into force on the 1st July, 1877, as respects any person who at the time of the passing of the Act resided out of the Province, and who was entitled to make an entry or distress, or to bring any action or suit, to recover any land or rent, *or who was a mortgagor or person entitled to redeem within the meaning of the 21st and three subsequent sections* of the *Consolidated Statute*." He called attention to "the marked distinction throughout the statute between ordinary actions, or suits to recover land at law, or in equity, and a suit to redeem," and the fact that sec. 5 "grants the extension in the cases specified notwithstanding that the period of ten years *hereinbefore mentioned*, that is, in the four previous sections limited, not by *this Act limited*, had expired." He also (p. 550) quoted the observations of Lord St. Leonards to which I have referred, and said that if he was "wrong in holding that under the words of our statute an action to redeem is not, properly speaking, 'an action to recover land' within the previous section of the statute," he was "content to err in such good company as the late Master of the Rolls, who so held in *Kinsman* v. *Rouse*" (*supra*), "where he held that those sections evidently referred to cases of ordinary ownership, where the rightful owner of land has been dispossessed, and that it was not intended to put the rights of the mortgagee upon the same footing as the rights of persons claiming under an ordinary dispossession of land."

Patterson, J.A., was of the same opinion, and, referring (p. 560) to R.S.O. 1877, ch. 168, and the words "as aforesaid" in sec. 43, pointed out that those words were not in sec. 5 of the Act of 1874, which, by sec. 16 of that Act, was substituted for sec. 45 of the Consolidated Statute. These words, he said, were

not in the roll mentioned in 40 Vict. ch. 7, nor among the amendments of that roll authorised by that Act. He was, however, of opinion that they effected no change in the law as enacted by the Act of 1874, because "the Revised Statutes are not held to operate as new laws, but are to be construed and have effect as a consolidation, and as declaratory of the law as contained in the statutes for which they are substituted . . . The Court could properly look at the original statute as a guide to the interpretation of the law as found in the Consolidated Act."

Farquharson v. *Imperial Oil Co.* (1899), 30 S.C.R. 188, affords an illustration of the extent to which this rule of construction is carried. The Court there, for the purpose of construing sec. 5 of ch. 120 of R.S.O. 1887, went back to ch. 47 of the Consolidated Statutes of Upper Canada, although there had been an intervening revision.

The view of the Court of Appeal was that, in the circumstances, *Caldwell* v. *Hall* was not a binding authority and ought not to be followed, and it was not followed.

In the Supreme Court, as I have said, it was decided that the Limitations Act did not apply, and it was therefore unnecessary to decide the question as to the applicability of the disability sections of it to suits to redeem. Opinions as to it were, however, expressed by Strong and Henry, JJ.

The view of Strong, J. (11 S.C.R. at pp. 655, 656), was that if he had to choose between the decisions in *Caldwell* v. *Hall* and those in *Kinsman* v. *Rouse* and *Forster* v. *Patterson*, he "should certainly have agreed with the learned Judges of the Divisional Court" (i. e., Proudfoot and Ferguson, JJ.); "for the reason that since the two cases in 17 Chancery Division were decided the House of Lords has held in *Pugh* v. *Heath*, 7 App. Cas. 235, that a foreclosure suit is an action for the recovery of land. This being so, it follows *â fortiori* that a redemption suit is also an action or suit for the recovery of land. And it is impossible, without doing violence to the words of the statute, to hold that the saving of disabilities does not apply to any action or suit, as well in equity as at law, for the recovery of land."

Henry, J., was of the same opinion, for reasons which he stated, and illustrated the injustice of a different construction of the statute by a supposititious case which he said was not unlikely to occur (p. 662): "A property is mortgaged for an amount equal

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to a small percentage of its value by a man who at his death leaves two or three infants, not one of whom are (*sic*) over five years of age at the time the mortgagee enters into possession, as he is entitled to do—he holds that possession for ten years, and the right to redeem of the infants, not one of whom is then over sixteen or seventeen years, is forever barred."

A short reference should now be made to the course of the legislation since the revision of 1877. In the Revised Statutes of 1887, ch. 108 became ch. 111, practically without change, except that secs. 4 to 15 inclusive are headed "Land or Rent," and in sec. 43 the words "as in sections 4, 5, and 6 mentioned" are substituted for the words "as aforesaid."

In the revision of 1897, ch. 111 became, without any change, ch. 133.

In 1910, with a view to the revision which is now R.S.O. 1914, 10 Edw. VII. ch. 34 was enacted. In this Act all the Limitation Acts are brought together. Part I. relates to real property, and the only change made is in sec. 40 (sec. 43 of ch. 111, R.S.O. 1887) by the substitution for the words "as in sections 4, 5, and 6 mentioned," the words "as herein mentioned."

In the Revised Statutes of 1914 this Act forms ch. 75, and the heading "Land or Rent" does not appear.

It is not surprising that Canadian text-writers differ, as do the English. The authors of Bell and Dunn on Mortgages, pp. 382-3, adopt the view taken by Strong and Henry, JJ., in *Faulds* v. *Harper* (*supra*); and the author of Leith's Blackstone the opposite: 2nd ed., p. 444.

Although the arguments in favour of the view that the disability sections are applicable are weighty, they are not, I think, conclusive. As was argued by Mr. Fisher, it may be said that it was unlikely that the Legislature intended to deprive mortgagors of the benefit of disabilities which they enjoyed before the Act of 1833 was passed; and, as Henry, J., pointed out in *Faulds* v. *Harper*, there are cases in which, if there be no saving in case of disabilities, injustice would be done. It is true also that a suit to redeem has been decided to be a suit to recover land.

The time for bringing actions of dower was, by 32 Vict. ch. 7, sec. 22, limited to twenty years from the death of the husband. That section was repealed by sec. 14 of the Act of 1874, and a new section limiting the time to ten years was substituted for it;

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and, by sec. 14 (now sec. 26 of R.S.O. 1914, ch. 75), it is expressly provided that the section shall apply notwithstanding any disability of the demandant or of any person claiming under her. This shews that there were some cases to which it was thought that the disability sections should not apply; and, if they ought not to apply to a dowress, why may not the Legislature have thought that they should not also apply to mortgagors seeking to redeem? The words "as herein mentioned" in sec. 40 (i.e., of ch. 75 of the Revised Statutes 1914), it will be observed, apply to the time at which "the right of any person to make an entry or distress, or to bring an action to recover any land or rent, *first accrues*." That is a matter dealt with by sec. 6, which defines the time at which the right first accrues in various cases, none of them being the case of a mortgagor seeking to redeem; and it is, I think, to these provisions that sec. 40 refers. The mortgage sections do not define the time at which the right to redeem shall be deemed to have *first accrued*, but the provision is that the action shall not be brought but within ten years next after the time at which the mortgagee obtained possession or receipt of the profits of the land. In addition to this, the words used in sec. 40 are the same that are used in sec. 5, and the words "as herein mentioned" are, I think, the equivalent of the words of the section in the Revised Statutes of 1887 and 1897, which correspond to sec. 40, "as in sections 4, 5, and 6 mentioned;" and, therefore, while it is true that, unexplained by the context, "an action to redeem" is "an action to recover land," the other provisions of the Act and the context indicate that it was not in that sense that the words were used, but in the sense in which they were interpreted in the two English cases and by the Court of Appeal in *Faulds* v. *Harper*.

Upon the whole, though necessarily not without some doubt owing to the conflict of judicial and other opinion to which I have referred, my conclusion is, if the question is *res integra*, that the disability sections do not apply to actions to redeem.

I am, however, of opinion that we ought, if indeed we are not bound, to follow the decision of the Court of Appeal in *Faulds* v. *Harper*. It was a decision on the very question we are now called upon to determine. The judgment of the Supreme Court of Canada, though it reversed the judgment of the Court of Appeal, proceeded on an entirely different ground from that upon which

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the case was decided in the Court below, and the expressions of opinion of Strong and Henry, JJ., as to the application of the disability clauses, were only *obiter*.

I would, for these reasons, reverse the judgment and dismiss the action as to the Storrington lands, but I would leave each party to bear his own costs of the action and of the appeal as far as these lands are concerned. The conflict of opinion as to the meaning of sec. 40, and the consequent uncertainty of the law as to the question we have had to determine, I think warrant that disposition of the question of costs being made.

Appeal allowed.

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Quebec King's Bench, Cross, J. September 26, 1916.

1. SUMMARY CONVICTIONS (§ II—21)—LIMITED RIGHT OF PROSECUTION—WITHDRAWAL OF IRREGULAR CHARGE.

If a statute provides that summary prosecutions for a certain offence shall be brought only in the name of certain officials, the trial upon a prosecution in contravention of that restriction would be a nullity; the accused in such case has not been placed in jeopardy so as to bar a second prosecution instituted by the proper official after the first prosecutor had consented to the charge being withdrawn.

[*Davis* v. *Morton*, [1913] 2 K.B. 479, applied.]

2. INTERNAL REVENUE (§ I—3)—SALES TO "CONSUMERS"—WAR REVENUE ACT.

If drug preparations required by the War Revenue Act, 1915, to be stamped on being sold to consumers are sold unstamped to a revenue officer buying only for the purpose of prosecuting the seller, such retail sale may be the subject of prosecution under the Act, as by its terms all sales at retail are to be considered as included in the term "selling to a consumer."

[*Patenaude* v. *Paquet Co.*, 31 D.L.R. 229, 26 Can. Cr. Cas. 204, disapproved.]

3. MASTER AND SERVANT (§ III A—289)—MASTER'S LIABILITY UNDER PENAL LAWS FOR SERVANT'S DEFAULT.

The scheme of the War Revenue Act, 1915, Can., is to make the employer liable for the penalties which it provides in respect of failure to affix revenue stamps on the retail sale of certain drug preparations, in respect of sales made in his store by his employees, although he was absent at the time of sale and although general directions had been given the employees not to sell such goods without affixing and cancelling the stamp.

[*Patenaude* v. *Paquet Co.*, 31 D.L.R. 229, 26 Can. Cr. Cas. 204, disapproved; and see Annotation on "Master's Liability under Penal Laws," 31 D.L.R. 233.]

Statement.

APPEAL by defendant Ethier against a summary conviction for having "sold to a consumer" one box of tooth paste, neglecting at or before the time of sale to affix to such box an adhesive stamp of the requisite value as required by "The Special War Revenue Act, 1915," of Canada.

Wilfrid Handfield, for appellant.

O. Gagnon, for prosecutor.

CROSS, J.:—A charge in the same terms had previously been made in the name of one Loranger, an excise officer, against the appellant. That charge was withdrawn as would appear by an entry: "31 Mars, 1916, 'Retiree' G. F. St. Cyr, Magistrat de Police."

The first ground of appeal is that the withdrawal of the first summons amounted to an acquittal and ended the matter.

It is pointed out by counsel for the respondent that proceedings to recover penalties under the part of the Act applicable to this matter must be taken, either in the name of the Attorney-General of Canada, or of the Minister of Inland Revenue (sec. 20), and it is said that, upon discovery of the fact that the first complaint was in the name of Loranger, it was seen that the summons would have to be abandoned as was in fact done.

For the appellant, evidence was tendered to shew that Loranger in making the charge was acting for the Revenue Department and that the charge was not only withdrawn but settled.

On the first point it is clear that the charge in the name of Loranger cannot by the effect of extraneous evidence be treated as a charge "in the name of" the Minister.

On the second point, it appears that counsel for the prosecutor in the first case did assume to settle the matter but his letter of instructions shews that his mandate was to withdraw the summons and did not extend to settling the matter.

It is true that the withdrawal of a summons generally amounts to a discharge of the accused from the complaint, but that consequence does not follow when the trial would be a nullity because of there having been some illegality or irregularity which would have made a conviction void if the trial had gone on. I consider that the appellant was not in jeopardy under the first summons, and that he was subject to be tried on the second one.

I adopt the view taken by the King's Bench Division in *Davis* v. *Morton*, [1913] 2 K.B. 479, 29 T.L.R. 466. The first ground of appeal is therefore overruled.

The second ground of appeal is that the sale was not made to a consumer as contemplated by sections 14, 15 and 17 of the Act. The sale was made to a revenue officer, who bought the package with a view to taking out the summons. In that sense, the buyer was not a consumer, The scheme of the Act, however, is that the tax-burden is not to be imposed upon wholesale dealings

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but upon the ultimate sales, that is, the sales by which the commodities go out of trade.

Such sales are spoken of as sales to consumers, but it is declared in the Act itself that "selling to a consumer" includes selling by retail. Upon the import of the word "includes" as employed in statutory enactments, reference may be made to the decisions cited in Beal, Cardinal Rules of Interpretation (2nd ed.) at p. 295. It is clear that the sale here in question was one in respect of which the Act required the affixing of the stamp.

The second ground of appeal is therefore unfounded.

The remaining and more serious ground of appeal is that the appellant did not himself make the sale but in fact was out of the country on the date given in the complaint.

The testimony of the two witnesses heard in support of the complaint is that they bought the package in one of the appellants' shops from a clerk or employee. I accept that as a fact proved, notwithstanding that the appellant and the manager of the pharmacy in question, proceeding upon inferences from their knowledge of the stock, the shop-marks on it and the fact of general directions having been given to employees to sell no such articles without affixing the stamps, have denied that the package in question was sold in any of the appellants' shops.

The appellant, however, was absent and knew nothing of this particular sale. Can he then be subjected to liability to pay the penalty?

In general, a person is not personally responsible for infractions committed by others in the position of servants or agents. But, as pointed out in Craie's Statute Law (2nd ed.) p. 469:—"This rule is not absolute. Whether there must be proof express or implied of a *mens rea* in the accused person before he can be convicted of a criminal offence depends on the terms of the statute or ordinance creating the offence. In many cases connected with the revenue certain things are prohibited when done by certain persons or under certain conditions. Unless the person who does one of these things can establish that he is one of the privileged class, or that the prescribed conditions have been fulfilled he will be adjudged guilty of the offence although in fact he knew nothing of the prohibition."

And, at page 471:—

"And convictions of employers for contravening the Licensing

Acts, the Merchandise Marks Acts, the Weights and Measures Acts and even revenue Acts have been supported in respect of the violation of the statutes by a servant, if the act done was within the scope of the servant's authority, and even if it was done in disobedience to express directions by the master." Reference may also be had to Laws of England, "Criminal Law and Proc." No. 502 and notes. That would establish that a master may be involved in penal responsibility for the act or omission of his servant by the effect of statutory enactment. Thus, in *Police Commissioners* v. *Cartman*, [1896] 1 Q.B. 655, 12 T.L.R. 334, 74 L.T.R. 726, 60 J.P. 357, a licensed publican was convicted of selling to an intoxicated man, though he knew of nothing which could have made him aware that the man was intoxicated and though the sale had been made by a manager in breach of general instructions. Regard was had in that case to the fact that the business was carried on under license and also and principally to the object of the enactment. Reference may also be had to *Parker* v. *Alder*, [1899] 1 Q.B. 20. In the present case there is nothing in the Act indicating in an express way that the master is to be answerable for infractions committed by his servants and, so far, the general rule would seem applicable. It is, however, recognized by authority that the penal responsibility may exist by implication. In *Strutt* v. *Clift* (1910), 27 T.L.R. 14, it was said by the Lord Chief Justice that: "In ordinary circumstances *mens rea* had to be shewn, but by express or necessary implication the doctrine of *mens rea* might be included. In that case the defendant was convicted of having kept a vehicle for conveyance of passengers without being licensed to do so. In point of fact, the vehicle was a milk waggon; but the man engaged to drive the milk had, without the defendant's knowledge, used it to convey his wife and friends home after the milk had been delivered. I refer to that case largely because the Act there in question was a revenue Act as is the one here invoked.

I am to be guided by inferences from the Act, and, looking at it, I find, in the first place, that it is a revenue Act. I find that the only punishment decreed is a money penalty; there is no mention of imprisonment even in default of payment, though section 739 of the Criminal Code would seem to warrant an order for imprisonment in default of payment. Next, I find that the Act

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makes it the duty of the "person selling" to affix the stamp (sec. 15); and that "Every person required by this part to fix an adhesive stamp . . . who fails or neglects to fix an adhesive stamp as required" . . . incurs the penalty. Finally, I observe that there is no mention of prosecuting for offences but merely that penalties "may be sued for, prosecuted and recovered with costs." It is significant that the offence consists in failure or neglect. It is an offence of omission. Whose omission?

The appellant, having knowledge of the Act and having the commodity to be sold for his profit and in his name, knew that upon sale the stamp was to be affixed.

I consider that he, as well as the clerk is chargeable with the "failure or neglect" mentioned in the Act. The appellant appears to have given orders that the stamps were to be affixed, but he is not relieved by having given the orders. The question in such a case is whether the clerk who neglected to affix the stamp was acting within the scope of his employment in selling the article. It would be different if, without the master's consent, a stranger had intermeddled and committed the offence. *Phelon & Moore Ltd.* v. *Keel*, [1914] 3 K.B. 165; 83 L.J.K.B. 1516.

I therefore conclude that the magistrate was right in making the order for payment of the penalty. It may be appropriate to add that some confusion of reasoning may have been caused by the wording of the complaint. It is not a commendable specimen of the pleader's art. It purports to complain of the act of selling and relegates the mention of the real element of the offence, namely, neglect to affix the stamp, to a subordinate clause. Precision of statement and adequate specification have their advantages. The act or omission which the statute constitutes the offence should be the one directly charged.

For the foregoing reasons the appeal must be dismissed and the magistrate's decision confirmed.

As the appellant was, in the first instance, put to the trouble of answering an ineffective summons, and as the second and third grounds of appeal appear to have given rise to divergence of judicial opinion at the Sessions, there will be no order for costs of the appeal. As to the penalty and costs before the magistrate, the magistrate's decision is confirmed. *Appeal dismissed.*

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Saskatchewan Supreme Court, Sir Frederick Haultain, C.J., and Brown and McKay, JJ. November 18, 1916.

SEDITION (§ I—10)—SEDITIOUS LIBEL—INTENT.

Defamatory words likely to stir up and excite public discontent and disaffection will constitute a seditious libel under Cr. Code sec. 132 as being "expressive of a seditious intention," if they are found to have been published with intent to have the seditious effect alleged; the question of the existence of such intention in any particular case is one for the jury, and while it may be inferred by them from the nature of the publication, the verdict against the accused must be set aside and a new trial ordered if the trial Judge declined to charge the jury in any way as to the intention of the accused.

[*Reg.* v. *Burns*, 16 Cox C.C. 355; *R.* v. *McHugh* (1901), 2 Irish R. 569, approved; *R.* v. *Aldred*, 22 Cox C.C. 1, disapproved.]

Statement.

RESERVED case granted by the trial Judge in respect of a charge of seditious libel as to the matter of publication and appeal by the defendant from the refusal of the trial Judge to grant a reserved case in the matter of directing the jury on the question of intention on the part of the accused and on the question of whether or not the words complained of were seditious.

H. E. Sampson, for the Crown; *J. E. Doerr*, for accused.

The judgment of the Court was delivered by

Brown, J.

BROWN, J.:—The accused was tried and convicted before my brother Newlands and a jury on the following charge:—

"For that he, the said Ludwig A. Giesinger, on or about the 13th day of April, 1916, at or near Holdfast, aforesaid, being a wicked, seditious and ill-disposed person and greatly disaffected to our sovereign lord the King, and wickedly, maliciously and seditiously contriving, devising and intending to stir up and excite discontents and disaffections among His Majesty's subjects, wickedly, maliciously and seditiously did write and publish and cause and procure to be written and published a certain wicked, malicious and seditious libel of and concerning His Majesty's soldiers."

During the course of the trial, questions arose as to whether there was any evidence of publication by the accused, and as to whether the words complained of were seditious. Counsel for the accused also requested that the jury be instructed that, if they found that the accused published the words complained of, it was material for them to consider the intention of the accused, and that, in order to find the accused guilty, they would have to find a seditious intention on the accused's part. The Judge de-

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clined to charge the jury in any way in respect of the accused's intention.

The questions presented for our consideration are as follows:—

"(*a*) Is there any evidence upon which the jury could find publication by the accused?

"(*b*) Are the words complained of and alleged to have been published by the accused seditious?

"(*c*) Was the learned Judge right in declining to give any charge to the jury on the question of the accused's intention?"

The article complained of is as follows:—

"There have been actually some here who have had courage enough to volunteer as soldiers. The one was half blind, the other deaf, and all had some physical disability. Such people would be able to effect much in Europe if they ever got over the water, which I doubt.

"It is my belief that if these people only in a dream at night saw a German soldier, they would die of fright before morning."

With reference to the first point, the evidence shews that the accused lived at Holdfast, Sask., and on or about the 13th April, 1916, he wrote the article complained of and mailed the same through the post for publication to the editor of the *Staats Anzeiger*, a newspaper published in the German language in the State of North Dakota, and which has a circulation in this Province. The article, upon receipt by the said editor, was duly published in the said newspaper.

The evidence shews that there are several thousand German speaking people in the Province of Saskatchewan; that a large number are living in the Holdfast district; that a number of these, being regular subscribers for the said newspaper, would naturally receive same with the article complained of published therein, and that at least one of these, the father of the accused, read said article in said newspaper, and that the accused knew that his father was a subscriber to and regularly received the said paper.

The article was not only written and posted in Saskatchewan, but the paper containing it and in which it was intended to appear, was received and read in the Province by other than the accused. Surely, under such circumstances, there is ample evidence of publication in the Province, and the accused must be held responsible for such publication to the same extent as if he himself had circulated the newspaper.

The other two questions raised may best be considered jointly. By sec. 134 of the Criminal Code, everyone is guilty of an indictable offence who publishes any seditious libel, and, by sec. 132, a seditious libel is a libel expressive of a seditious intention.

In 9 Halsbury, at p. 460, I find the following:—

"Every person is guilty of the common law misdemeanour of seditious libel if, with seditious intention, he either speaks and publishes any words or publishes a libel. . . ".

"If the words used, however defamatory, were not spoken with a seditious intention the defendant is not guilty, such an intention being of the essence of the offence; but the character of the words may form irresistible evidence of the nature of the intention."

And on p. 463:—

"A seditious intention is an intention" (*inter alia*) "to raise discontent or disaffection amongst His Majesty's subjects."

In *Reg.* v. *Collins*, 9 C. & P. 456, the indictment was in part as follows:—

"And that the defendant intending to excite divers liege subjects of the Queen to resist the laws and to resist the persons so being part of the metropolitan police force in the due execution of their duty, and to bring the said force into hatred and contempt, and to procure unlawful meetings, and to cause divers liege subjects of the Queen to believe that the laws of this kingdom were unduly administered, and intending to disturb the public peace, and to raise discontent in the minds of the subjects of the Queen, and raise and excite tumult and disobedience to the laws, did publish a certain false, etc., libel."

And in *Reg.* v. *Lovett*, 9 C. & P. 462, where the indictment was in precisely the same form as that in the preceding case, Littledale, J., at p. 466, in summing up for the jury, said:—

"The first inquiry you have to make is, whether the defendant published this paper. If he did not publish it, there is an end of the case altogether. If you are of opinion that he did publish it, you will then have to consider, whether he did so with the intent charged in the indictment; and if he did publish it with that intent, then the question arises, whether it be a seditious libel; and I am bound to tell you that if it is proved to your satisfaction that the defendant published this paper, and had the intention charged, it is, in my opinion, a seditious libel."

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And again:—

"You will first consider, whether the introductory allegations of the indictment are proved; and if they are, whether the defendant published this paper; and whether he published it with the intent imputed to him by the indictment; and lastly, whether it be or be not a seditious libel; as to which latter question I have already given you my opinion."

In *Reg.* v. *Sullivan*, 11 Cox 44, at p. 52, Fitzgerald, J., in summing up for the jury, said:—

"The jury are constituted by law the sole judges to determine every question between the Queen and the defendant. I would remind you in the outset that there will be four questions for you to apply your attention to. The first is a question of fact—Did the defendant publish the libels? Upon that there will be no difficulty, for it is not a matter of controversy that Mr. Sullivan, the defendant, is the proprietor and publisher of the *Weekly News*, and that the several articles and wood-cuts were published in that paper. The next question for you to examine into is this: Do these publications, whether printed matter or woodcuts, fairly bear the interpretation which the Crown has put upon them by the innuendos? The next question is one of paramount importance, and it is the one of which the jury are the sole judges, whether these publications are seditious libels? That question of law and fact is entrusted to the jury alone."

And again:—

"You should bear in mind that, while you will receive assistance from me, you are not bound to follow anything I tell you. You are the sole judges of law and fact. There are some questions upon which I shall have to give you assistance in point of law, namely, whether the publications in question were published by the defendant with the intention alleged in the indictment. If you come to the conclusion that the defendant published those articles, that the true meaning has been given to them, that they are seditious libels published with the intention imputed to them, you have all the elements which would warrant you in bringing in a verdict of guilty."

And again:—

"Without defining sedition further than for the purposes of this trial, I have to tell you if you, in your honest judgment, come to the conclusion that these publications, or any of them, are

calculated and intended to excite hatred of the Government and the administration of the laws, or create dissatisfaction, or disturb the public peace, then they are seditious libels. I do not think I can put the matter plainer than that. If the publications are calculated and intended to carry out these intentions they are seditious libels."

In *Reg.* v. *Burns*, 16 Cox 355, at p. 364, Cave, J., in summing up for the jury, said:—

"I am unable to agree entirely with the Attorney-General when he says that the real charge is that, though these men did not incite or contemplate disorder, yet, as it was the natural consequence of the words they used, they are responsible for it. In order to make out the offence of speaking seditious words there must be a criminal intent upon the part of the accused, they must be words spoken with a seditious intent; and, although it is a good working rule, to say that a man must be taken to intend the natural consequences of his acts, and it is very proper to ask a jury to infer, if there is nothing to shew the contrary, that he did intend the natural consequences of his acts, yet, if it is shewn from other circumstances, that he did not actually intend them, I do not see how you can ask a jury to act upon what has then become a legal fiction."

In *R.* v. *McHugh* (1901), 2 Ir. R. 569, which is a case that came on for hearing before four Judges of the Queen's Bench Division by way of demurrer, Lord O'Brien, L.C.J., at p. 577, said:—

"Have we then in this case, in substance, the essential elements of a seditious libel? No doubt the words complained of are defamatory, but have we in the averments what is equivalent to the allegation of a seditious intent? This brings me to the consideration of what is the legal definition of a seditious intent. It is correctly stated in the late Mr. Justice Stephen's work on the criminal law. He there defines 'a seditious intention' to be 'an intention to bring into hatred or contempt, or to excite disaffection against, the person of Her Majesty, her heirs or successors, or the Government and Constitution of the United Kingdom as by law established, or either Houses of Parliament, or *the administration of the law* . . .' I stop here and do not give the full definition. I give only the relevant portion. An intention,

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then, to bring into hatred or contempt the administration of the law falls within the definition of seditious intent."

Madden, J., in the same case, at p. 584, says:—

"I shall consider this case, in the first instance, on the assumption that the offence charged in the information is that known as seditious libel. Sedition in all its forms, including seditious libel, is an offence against society. It is one of the crimes classified by Sir James Stephen, in his Digest of the Criminal Law, under the heading of 'Offences against Public Order.' In order to constitute the offence of seditious libel there must be something more than the publication of a defamatory writing. The publication must have been made with the intention to offend against public order. This intention is of the essence of the offence. It may, of course, be inferred from the nature of the publication; but in the absence of an intention of this kind the publication of writings, be they ever so defamatory, does not constitute the offence of seditious libel, and the question of the existence of this intention, in any particular case, is one for the jury."

And again, at p. 587:—

"Probably none of the attempts which have been made to define a seditious intention, or rather to enumerate various kinds of intention which the law regards as seditious, are completely satisfactory or exhaustive. But it is clear that an intention to bring the administration of justice into hatred or contempt amounts to such an intention. The intention is, in each instance, something different from the defamatory writing. The character of the writing may be strong, and in some cases irresistible, evidence of the existence of an intention to bring the administration of justice into contempt. In other cases a jury might fairly believe that a charge was brought, against persons engaged in the conduct of a trial, for the purpose, not of vilifying, but of purifying, the administration of justice. In such a case the defendant ought to be acquitted, because the intention, which is the essential part of the offence, was not proved as charged."

The conclusion that I arrive at from the foregoing cases is, that the words complained of constitute a seditious libel if they are expressive of a seditious intention, and that they are expressive of a seditious intention if they are both calculated (likely) and intended to stir up and excite discontent and disaffection among His Majesty's subjects. If the words are not calculated to have

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the alleged effect, there is no libel, and if they are not intended to have that effect they are not seditious; if they are both calculated and intended to have the effect alleged then we have a libel that is seditious.

There are certain authorities, such as *Rex* v. *Aldred* (1909), 22 Cox C.C. 1,* and in Encyc. Laws of England, 2nd ed., vol. 13, at p. 210, where it seems to be laid down that the intention with which the words are written and published is a matter of indifference, that it is sufficient if the words are calculated to have the effect alleged, and that is the view that was taken by the learned trial Judge in this case. I am of the opinion, however, that the weight of authority supports the contrary view.

For the reasons aforesaid, I am of the opinion that there is evidence from which the jury could find that the defendant published the words complained of, and although the evidence in other respects seems weak, I am not prepared to hold that there is not sufficient from which a jury could find that the words were calculated and intended to have the effect alleged, but as the jury made no finding on the question of intention I am of opinion that there should be a new trial. *New trial ordered.*

THE KING v. HUNTING, BARROW AND BELL.

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Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Idington, Duff, Anglin and Brodeur, JJ. May 2, 1916.

DAMAGES (§ III L 2—240)—EXPROPRIATION—VALUE—10% ALLOWANCE.

In fixing the compensation to be paid for property expropriated under statutory powers, it is proper and customary in ordinary cases to add ten per cent. to the fair market value in order to fully compensate the owner for contingent losses and inconveniences caused by the compulsory taking.

[*Re Athlone Rifle Range*, [1902] 1 Ir. 433; *Dodge* v. *The King*, 38 Can. S.C.R. 149; *The King* v. *Condon*, 12 Can. Ex. 275; *Symonds* v. *The King*, 8 Can. Ex. 319; *Jervis* v. *Newcastle and Gateshead Water Co.*, 13 T.L.R. 14, referred to. See also annotation 27 D.L.R. 250].

Statement.

APPEAL by the Crown from an award of arbitrators in an expropriation proceeding.

Fitzpatrick, C.J.

FITZPATRICK, C.J.:—If there is to be any limit to litigation there must be some finality in the determination of law and in rules of practice. The allowance of 10% for compulsory purchase has become so thoroughly established a rule from the innumerable cases both here and in England in which it has been awarded almost as a matter of course, that I certainly should not be prepared to countenance its being questioned in any ordinary case.

*Coleridge, J., at Central Criminal Court in his summing-up to the jury.

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At the time of the passing of the Consolidated Lands Clauses Act, 1845, it was suggested that 50% should be the allowance for compulsory purchase; this, however, was too high and long experience has proved that 10% is a reasonable sum to add to cover anything not included in the actual valuation. That owners may have such further claims if they are to be fully compensated for the taking of their property may, I think, be seen in the present cases, where they have been brought before two Courts before they can recover the compensation to which they are entitled. I suppose it is well known that the costs they can recover from the Crown do not represent the expense to which they are put in such litigation. That this charge should be open to dispute and be specially fixed in each case would be, I think, disastrous. The 10% allowance does not, of course, profess to be anything but a covering charge, and perhaps there might be cases in which it ought not to be allowed. In ordinary cases such as the present and where allowed by the Judge, I do not think it should ever be questioned in this Court.

Idington, J.

IDINGTON, J.:—I assume that the respective amounts tendered represent what those acting for the Crown concluded were fair market values due each party for her compensation, and that being so, I think there should have been added to each such amount the usual 10% thereof in way of compensation for compulsory taking. I agree there is no rule of law rendering it an invariable consequence of compulsory taking. It, however, in the majority of cases, is no more than justice demands.

In the case of men having to find another home, or place of business, it is often less than justice demands. In the case of a man in easy circumstances who holds his property as an investment and desires to replace that form of investment by another of the like character he is put in procuring it, to expense, loss of revenue and inconvenience which those taking should help to bear.

In the case of those only too anxious to get rid of their property at its fair value and apply the proceeds to meet their needs it may be that the practice works an injustice against those expropriating. Sometimes that cannot be helped for want of proof that such is the case.

There is again the case of the mere speculator who intervenes and, as it were, forestalls the Crown or other expropriator. Such

an enterprising party is perhaps entitled to no such allowance. These people are not of that class. It is good policy on the part of the Crown as well as practice in dealing with such a class as respondents to see that they do not suffer, but get what is usual. The interloper should thus be discouraged. I think, therefore, the 10% should be added to each amount tendered.

DUFF, J. would simply dismiss the appeal.

ANGLIN, J.:—But the chief complaint made on behalf of the Crown is against the allowance by the Judge in each case of 10% "for compulsory parting with the property." Counsel challenged the legality of such an allowance in any case. In the present instance the properties were all tenanted and the Crown assumed the tenancies. The owners, therefore, do not suffer the personal inconvenience of being disturbed in their occupation of the premises; and the Crown deals with the tenants. Under these circumstances, counsel insists that there is no ground for the 10% allowance. Although in *Re Athlone Rifle Range*, [1902] 1 Ir. 433, 437, it is said:—

> Arbitrators in the same way as juries do frequently add something for the annoyance of being disturbed in the possession and the difficulty and delay in procuring other suitable premises,

the inconvenience and possible loss attendant upon disturbance in occupation is not the only element involved in the 10% allowance, which has now become customary. In some instances the 10% has been allowed on the expropriation of vacant land. *The King* v. *N.B.R. Co.*, 14 Can. Ex. 491, 497. An element present in every case is the inconvenience and possible loss in finding a satisfactory re-investment. In *Dodge* v. *The King*, 38 Can. S.C.R. 149, 156, Idington, J., with whom Davies and Duff, JJ., concur, says the 10% is added "to cover contingencies of many kinds." In Arnold on Damages and Compensation (1913), at p. 230, it is said that the 10%

> may be regarded as covering various incidental expenses and charges to which the deprived owner is subjected. If no general 10% allowance be made for such expenses incidental to *compulsory eviction*, each individual item thereof would have to be considered in making the assessment.

Nevertheless the disturbance in occupation and the inconvenience of being obliged to find other suitable premises are no doubt very important features of the damages incident to compulsory taking.

Compensation should cover not merely the market value of

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the land, but the entire loss to the owner who is deprived of it. It must, therefore, usually exceed the market value, though it may occasionally be less, as where the land taken is, while in the owner's hands, subject to depreciatory restrictions from which it is relieved when expropriated. The 10% allowance is of course independent of and additional to any sum in excess of market value to which the owner may be entitled because of special adaptability of the expropriated premises to his purpose.

Formerly larger (*The King* v. *Condon*, 12 Can. Ex. 275), the allowance to cover all loss and damages over market value plus the value of special adaptability, which the deprived owner may sustain, has now in practice come to be fixed at 10%. The amount of a fair compensation to the deprived holder and not merely the value of the expropriated property to him being the subject of inquiry, the legality of including in it something to cover incidental and contingent losses and inconveniences is unquestionable; but the authority for fixing the "additional allowance" at 10% depends entirely upon practice.

When such an important item of inconvenience and possible loss as disturbance in occupation, involving the finding of other suitable premises, is wholly absent, as it is in the present instances, I think a substantial reduction in the allowance of 10% may well be made.

Where the owner is in actual occupation and sustains all this damage, the "additional allowance" is limited to 10%. Where the premises are leased the landlord entirely escapes this injury. While the tenant always differs from the landlord in that his right of occupation is not permanent, if his lease has some time to run he may suffer substantial damage in disturbance of his occupation. Indeed that damage may be serious even where he is evicted only a short time before the end of his term. For if the tenant has a claim for compensation which, in addition to the value (if any) of his leasehold interest (Arnold on Damages and Compensation, p. 229), should be deducted from the compensation payable to the owner. If the lease is taken over the tenant will, of course, have no claim for compensation; but the delay in obtaining possession may be burthensome and expensive to the body expropriating, even though the tenant should be paying a rack rent.

Exceptional cases will, of course, occur for which it is practically impossible to provide. Thus, although in personal occupation, if at the time of the expropriation he should be on the eve of leaving the premises, the owner, should he receive the full 10%, may obtain an advantage to which he may not be fully entitled. On the other hand, where a tenant is in occupation but the term is at will or is shortly to expire, so that possession can be obtained without interfering with his legal rights, the expropriating body, if required to pay less than 10% for compulsory taking, obtains an advantage. But even in that case the landlord does not suffer the annoyance of disturbance, and, unless where he intends personally to occupy the premises on the expiration of the current tenancy, he is not put to the inconvenience of finding other suitable premises.

Since the basis of compensation is the loss to the holder deprived of the land taken or of an interest in it, it follows that he ought not to recover for injury which he does not suffer. *A fortiori* should this be so if the expropriating body will be obliged to compensate another person for that very injury.

After giving careful consideration to the various elements in respect of which the 10% is allowed, I would fix the allowance (in addition to market value and for special adaptability) at 4% for disturbance in actual occupation, including the inconvenience of finding other suitable premises, and 6% to cover all other expenses, damage and inconvenience to the deprived owner entailed by the taking of his property. Like the 10% itself this 4% is of course an arbitrary figure. While no authority can be cited to support it, reason demands that, where there is no actual disturbance of possession, the allowance for compulsory taking should be less than where that serious inconvenience is suffered, and the division of the "additional allowance" of 10% into two parts, ascribing 4% to damage caused by actual eviction, and 6% to other damage occasioned by the taking of the property, will probably at least work approximate justice in the majority of cases. There is no suggestion in the present cases that any of the landlords intended to enter into personal occupation of her premises on the expiration of the tenancy.

Brodeur, J.

BRODEUR, J.:—This is an appeal concerning expropriation by the Crown of lands in the city of Hamilton.

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The amount which has been granted for the market value is justified by the evidence, but there is an allowance of 10% for "compulsory parting" about which, according to my opinion, the appeal should be allowed. The evidence does not disclose any facts which could justify such an allowance.

The general principle is that where lands are required for public works the land owner is not entitled to receive more than the market value of the land expropriated, except where he has a use of the same for some special purpose. If he is in occupation of the premises, he is entitled to compensation for damages incurred through the necessity of the removal since these are losses consequent on the taking of the property under statutory powers. (Cripps, Compensation, p. 106.) If it was found also that the money he would receive for the market value of his property could not be easily re-invested and that he would have to suffer losses of interest, he should also be compensated for those losses.

The properties in question were rented for stores and hotels for a certain number of years and the owners did not occupy them at the time of the expropriation. There is then for those owners no necessity of removal.

The compensation money which they are to receive will give them a much larger income than they were receiving in rent. Take the case of Mrs. Hunting. She was granted $83,000, outside of the 10% allowance and the trial Judge had found that she was having an income of $2,000 a year, a figure which is disputed as being too high. However, taking that sum of $2,000, it represents a little more than 2% of her capital.

In view of the situation of the money market she could easily invest her money at about 6%. She could deposit it in Government Savings Bank at 3%. So she is not exposed to lose a cent as far as re-investment is concerned. The best government or municipal securities she could acquire every day would give her a larger income than the one she was deriving from her property. The same thing could be said with regard to the other owners.

The 10% allowance is given to cover various incidental costs and charges to which an owner is subject (Cripps, p. 111). It is not being granted where the price allowed is liberal and generous, since there is no express authority for that. (*Symonds* v. *The King*, 8 Can. Ex. 319.)

It is said to be the practice in England, though it does not seem to be accepted as settled law. (*Jervis* v. *Newcastle and Gateshead Water Co.*, 13 T.L.R. 14.)

Mr. Cripps, a great authority upon compensation, speaks of it as only justified as part of the valuation and not as an addition thereto (p. 111). Arnold on Damages and Compensation, adopts this statement (p. 230).

The owners have received in this case a very large and liberal compensation for their lands taken; they were not occupying those lands and will not suffer any damages by removal. The amount which they are receiving will give them an immediate return larger than the rents they were receiving and they do not then in that regard suffer any damages. *Appeal dismissed.*

GINGRAS v. GARIÉPY.

Quebec Court of Review, Archibald, A.C.J., Monet and Mercier, JJ. April 15, 1916.

DEEDS (§ II C—30)—DESCRIPTION OF PROPERTY—SIZE AND DIMENSIONS—WARRANTY.

A description of a lot in a deed of sale as containing "26 ft. in width by 100 ft. in depth," and giving the boundaries of the lot, is a sale of the lot as a whole, and not a warranty as to the exact size of the lot.

Statement.

APPEAL from the judgment of the Superior Court in an action in warranty. Affirmed.

On July 4, 1912, Deguise and others sold to Hébert a lot of land, which on July 8, was sold to Gariépy, who on July 15 sold to Gingras and his wife. The lot sold was described as follows:—

A lot of land situated at Viauville in the Town of Maisonneuve, near Montreal, being official redivision No. 2-1283, on the official plan and book of reference of the incorporated village of Hochelaga, containing 26 ft. in width by 100 ft. in depth; bounded on the south-west by Fifth Ave.—on the north-east by the lane bearing No. 1281 of the said redivision—on the north-west by lot No. 1287 of the said redivision, and on the south-east by lot No. 1285 of the said redivision; this lot being sold by English measure and more or less; etc.

The lot instead of containing the area mentioned in the deeds of sale in reality only had 24 ft. 1 inch frontage and 24 ft. 6 inches at the rear. Gingras and his wife, the last purchasers, brought suit against their vendor to have the sale cancelled on this ground and claiming besides $1,065 alleging that they purchased this property to the knowledge of their vendor for the purpose of building two tenement houses each of 13 ft. in width, and that the vendor was to put up the buildings. Had they known that the

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property did not have the required width as mentioned in the deed, they would not have purchased it, inasmuch as it is impossible to build the houses they intended to build.

Gariépy called Hébert his vendor to warn him and he in turn called the original vendor Deguise, *et al.* The defendants in rear warranty contested the action on the ground that they had sold to plaintiff Hébert a property certain and determinate, to wit, a lot of land bearing a certain cadastral number.

The Superior Court rejected the action in rear warranty for the following reasons:—

Considering that in said several deeds the property is described as follows: (See above).

Considering that said deed of July 4, 1912, contained a number of prohibitions as to the character and position of any building to be erected and especially that no building put thereon should be less than 20 ft. in width; and that neither of the two above recited subsequent deeds contained the like restriction;

Considering that the sale was of a certain determinate thing, with certain stated boundaries, and that was known as a property according to its description on the official plan and book of reference; that the sale was made for a single price for the whole, to wit, for $442;

Considering that the dimensions were only given as more or less, and by way of general description, and were not determinative of the price per foot, or meant as the warrantees of the area;

See C.C. 1501, 1502, 1503 and *Bessette* v. *Seguin* (1911), 39 Que. S.C. 473.

The Court of Review confirmed this judgment.

A. S. Deguire, for Gingras *et al.*; *Martineau & Jodoin*, for Gariépy; *Handfield, Handfield & Handfield*, for Hébert; *St. Germain, Guerin & Raymond*, for Deguise *et al.*

The judgment of the Court was delivered by

Archibald, A.C.J.

ARCHIBALD, A.C.J.:—The description of the property in all the sales, except the description just above referred to in the deed between the defendant *en arrière-garantie* and the plaintiff *en arrière-garantie*, differed from this last description, being as follows:—

A lot of land known and designated as No. 2, subdivision 1286, on the plan and book of reference of the village of Hochelaga, containing 26 ft. in width, by 100 ft. in depth, more or less, English measure.

The boundaries in this case are omitted and the expression *pour le tout* (for the whole).

The defendants *en arrière-garantie*, when called in, pleaded that they had sold and refused to take up the *fait et cause* of the plaintiff *en arrière-garantie* and pleaded that they were not responsible for any warranty; that they had sold the property as a

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whole, without regard to its contents, and this position was maintained by the Courts.

It is contended on the part of the plaintiff *en arrière-garantie* that it was the duty of the defendants to take up the plaintiff *en arrière-garantie*'s case and to defend it, whether he was right or wrong, and that they had no right to plead against the plaintiff *en arrière-garantie* matters which might result in the dismissal of the principal action.

I cannot adopt that view in the present case. In the first place, clearly the defendants *en arrière-garantie* could not be responsible in any way for an action which might not be well founded upon the description of the property sold in all of the other deeds except their own, while the description of the property in their own deed varied substantially from the others. Also the defendants *en arrière-garantie* could not be responsible for the result of promises or undertakings made between subsequent vendors and their purchaser.

It seems that as a matter of fact the lot did contain the number of feet mentioned in the various deeds, but there had been a trespass upon the lot by the building adjoining which reduced it somewhat from its stated measure. But the action is not taken on the ground of failure to deliver property, but on the ground that the property did not contain the number of feet required.

I am quite convinced that the judgment is sound and I am to confirm it. *Appeal dismissed.*

DUFFIELD v. PEERS.

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Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Magee and Hodgins, JJ.A., and Lennox, J. October 6, 1916.

MASTER AND SERVANT (§ III A 2—290)—SCOPE OF EMPLOYMENT—NEGLIGENT DRIVING—LIABILITY.

A "sales-agent" who sells and delivers wares of his employer, and rents a horse and conveyance from him for delivering the goods, although not required to devote any specified time to the work, and paid entirely by commissions, is acting within the scope of his employment when taking the horse and conveyance to the stable after a day's work on his employer's business, and the employer is liable for his negligence.

Statement.

APPEAL by the defendants from the judgment of LATCHFORD, J., in an action for damages for injuries sustained by being thrown down by a horse driven by an employee of the appellants.

There was evidence that Peers was engaged with the horse and conveyance upon the business of the appellants when the injury to the plaintiff was caused; but the circumstances of the

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employment were peculiar; they are indicated in the judgment below.

M. C. Cameron, for appellants.

D. L. McCarthy, K.C., for plaintiff.

The judgment of the Court was delivered by

MEREDITH, C.J.C.P.:—Cases of this kind present difficulties enough even when the evidence is well-directed to the real points in the case, and all that is available is adduced; they become much more difficult when slipshod methods only are applied, and one is obliged to grope, much in the dark, for the facts which are to govern them; but the parties chose to leave this case as it was when it went to the jury, and to be presented to the jury, as it was, without objection of any kind; and so we must deal with it, however unsatisfactory the material upon which it has to be considered may be.

The one question now involved is: whether there was any evidence upon which reasonable men could find, as the jury in this case did find, that the man who was found by the jury to be in law blamable for the accident, which is the subject-matter of the action, was, at the time of the accident, acting within the scope of an employment by the appellants.

He was what is called "a sales-agent;" he sold and delivered the appellants' wares, being paid for his services by way of a commission on the price of the goods sold only. There is nothing in the evidence to shew whether he was bound to give any specified time to the sale and delivery of the goods; for aught that appears in evidence, directly, he may have been under no obligation in this respect. He was bound to use a horse and conveyance owned by an agent of the company, in selling and delivering some of the goods, and in some other work, apparently, about them, and to pay the owner, through the appellants, hire for the use of such horse and conveyance; and the plaintiff's injury, for which large damages have been awarded, was caused in a collision with the horse which the man, in the conveyance, was then—it is said—driving back to their stables after his day's work was done.

The evidence relating to this question is extremely meagre: the appellants' general manager testified that the man was: one of the appellants' agents; selling for them "on commission;" and that "his territory" was "anywhere we had a mind to send him;" that the "horse and rig" before-mentioned belonged to J. H.

Davidson, who is also employed by the company; that the man used them in his work, and paid Davidson, through the company, for such use: and the man testified that they were not used by him for any other purpose; that in the first instance he was told by the "sales-manager" to use the horse and conveyance, and that he was then under his "authority" and "control:" and it seems to have been admitted that when the accident happened the horse and conveyance were being driven back to their stables, by the man, after his day's work was done.

Upon this evidence reasonable men might find that the man was, when the accident happened, about his employers' business and conforming to the terms of his contract with them, as well as about his own business of earning his livelihood by the commissions he won in doing the work involved in selling and delivering his employers' wares, and such other services as he performed respecting them, about which the evidence is very far from clear.

It may be that they could not have commanded him to go upon the business he was then about, or to be where he was when the accident happened; but, being there upon their business, even if at the same time in his own interests and at his own choice, there was evidence upon which it could be found that his acts in and about that business were, as to third persons affected, their acts, and none the less so because he paid hire for the horse and conveyance; if they were his own, and he was to provide them, as well as his own services, in his employment, that would not necessarily exclude him from being in the service, and acting in the place, of his employers. There was also some evidence upon which reasonable men could find that, in using the horse and conveyance generally, he was acting under the directions of his employers, and that it was part of his duty to them, under such directions, to return the horse and conveyance to the stables, as he was doing when the accident happened.

Some of the cases under the Imperial Workmen's Compensation for Injuries enactment are helpful to the plaintiff on the question of the scope of the man's employment; but it is always to be borne in mind that, having regard to the purposes of such enactment, a very liberal interpretation has been given often, as might be expected, to the words "arising out of and in the course of the employment:" see *Duck* v. *North Sea Steam Trawling Co. Limited* (1915), 9 B.W.C.C. 83, [1915] W.C. & I.R. 529;

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Parker v. *Owners of Ship "Black Rock"*, [1915] A.C. 725; *Richards* v. *Morris*, [1915] 1 K.B. 221; and *Edwards* v. *Wingham Agricultural Implement Co. Limited*, [1913] 3 K.B. 596; and see also *Whatman* v. *Pearson* (1868), L.R. 3 C.P. 422, and *Turcotte* v. *Ryan* (1907), 39 S.C.R. 8.

The verdict cannot be disturbed, and consequently this appeal must be dismissed. *Appeal dismissed with costs.*

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WARRELL v. RAILWAY ASBESTOS PACKING CO.

Quebec Court of Review, Fortin, Guerin and Allard, JJ. June 15, 1916.

PATENTS (§ IV A—35)—SALE—OBTAINING NEW PATENT IN ANOTHER COUNTRY —INJUNCTION.

The seller of the rights in Canada to a patent and trade-mark is entitled as of course to apply outside of Canada for a similar patent and trade-mark; the consent of the buyer, though unnecessary, is binding upon him, and an injunction will be granted to restrain the buyer from interference with the seller's attempts to obtain such patents and trade-marks outside of Canada. An injunction operates *in personam* to restrain wrongful acts in a foreign country by a resident here.

Statement.

The judgment of the Superior Court for the District of St. Francis was rendered by Globensky, J., on April 23, 1915. This was a demand for injunction and claim for damages in connection with patent rights and trade-marks. The plaintiff was president of the company-defendant. He was proprietor of a patent obtained from the Government of Canada for a lubricant composed in part of asbestos in different forms called "asbestolene" "spedolene" "journolene" "cupolene" and "axolene."

On June 24, 1910, he sold his rights to the defendant. Subsequently, by consent of the parties, plaintiff caused to be registered, at Ottawa, for the company, divers trade-marks in connection with the patent. On April 16, 1912, the board of directors of the company adopted the following resolution. (See judgment of Fortin, J.) Later, both the plaintiff and the company applied respectively for registration of these trade-marks in the United States, each in its own name.

Plaintiff then brought his action in damages for $900 accompanied by a petition for injunction to prevent the defendant from continuing its efforts to obtain the registration of these trade-marks in the United States. The Superior Court rendered judgment in favour of the plaintiff, maintaining his demand for an injunction and granting him $405 damages with costs.

Defendant inscribed in Review.

R. C. Smith, K.C., for appellant; *A. R. McMaster*, K.C., for respondent.

FORTIN, J.:—The plaintiff obtained an interim injunction which was subsequently confirmed, enjoining the defendant, its officers, agents and employees to abstain under all legal penalties, from making any attempts to obtain from the Patent Office of the United States, the registration in its own name of the trade-mark "Spedolene," and from transferring to any one, except the plaintiff, any pretended rights to said trade-marks in the United States. It appears from the record that some time prior to 1910, plaintiff had invented a certain lubricant in which asbestos was used, and for which he obtained a patent bearing No. 124,785 from the Canadian Government, and that he had also obtained or applied for similar patents in the United States, Great Britain, France, Australia, New Zealand and Italy. The defendant company was organized with the object of taking over and exploiting in Canada the patent obtained for this country, and the plaintiff's rights in said patent were transferred to the defendant as far as the Canadian patent was concerned.

The plaintiff, with the assistance of his son, invented or found a suitable name and also decided to register it as a trade-mark in connection with this patent; and, as was agreed between plaintiff and the company-defendant, such trade-mark was to be transferred to the defendant for its trade and manufacture in Canada. It was first intended to obtain such registration in the name of the plaintiff; but after consulting with his patent solicitor, in order to avoid the costs of transfer, the application for the registration was made in the name of the company.

In 1909, the plaintiff, who had applied to the Patent Office of the U.S. for a patent similar to the one obtained in Canada, was notified that his application had been allowed, but not yet issued. He thereupon applied to the U.S. Patent Office for the registration of one of the registered trade-marks under the name of "Spedolene." He was told by his patent solicitor that the application in the U.S. for the trade-mark already registered here had to be made in the same way as it had been in Canada. He was, at the time, the president of the company-defendant. He asked the company to pass a resolution granting him the necessary permission in order to obtain the registration

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of the trade-mark "Spedolene" in the U.S., and such resolution was passed on April 16, 1912, in the following terms:—

Moved by director Clough, seconded by director Bryant:—"That the said company allow Mr. Warrell, the president, to file his application in Washington, U.S.A., for the registration in the United States of the company's names Spedolene, Journolene and Asbestolene and Trade-Mark of the "shield" registered in the Canadian Patent Office, in the same forms as were used to obtain said Canadian registration, to comply with the law of the United States governing the filing of applications for registration of foreign trade-marks."

Carried, director Irwin voting "nay," director Jackson declining to vote.

After passing this resolution, the plaintiff pressed his application for the registration of the trade-mark at Washington, and was informed that the company-defendant had taken steps to oppose registration of the said trade-mark "Spedolene."

The company, therefore, broke its word, and departed from the covenant it had entered into with him by said resolution of April 16, 1912. The plaintiff thereupon applied for the injunction.

The written and oral evidence of record establish beyond any doubt that the plaintiff was the inventor of the lubricating compound in question, and that he was also the inventor of the trade-marks referred to. He transferred his rights to the defendant as regards the use of the said patent and trade-marks for Canada.

The resolution adopted by the company was not necessary to convey to plaintiff what he already possessed as regards all the world with the exception of Canada; but for the reason already mentioned, the resolution was deemed necessary in order to make the application for the registration of the trade-mark in the name of the company at Washington, as it had been made at Ottawa.

The injunction is to prevent such violation by the defendant of its agreement.

Under the law as it stood prior to the Code of Civil Procedure, actually in force, the law regulating the issue of injunctions specially provided that an injunction would lie "whenever any person does anything in breach of any written contract or written agreement." Sec. 5991 of the R.S. of Que. 1888.

The wording of art. 957 (C.P.) is somewhat different. But if we turn to the report of the commissioners who prepared the new Code, it will be seen that they never intended to restrict the

cases in which the remedy would be available. Their report on this point reads as follows:—

A new system of injunctions is organized in this chapter of the draft. In the English law an injunction may be granted whenever it appears "just or convenient" to restrain the commission or continuance of an act.

The Ontario statute is couched in the same terms.

In New York, injunctions are allowed against acts which produce injury to the plaintiff or are in violation of the plaintiff's rights, as well as to prevent fraudulent disposal of the defendan 's property.

The Louisiana Code, in the same way as ours, contains a restrictive enumeration of special cases in which this remedy is allowed.

The California Code, avoiding the limitative specification of the Code of Louisiana, as well as the extreme enumeration of the English Act, states three broad grounds of injunction.

The last mentioned system has been adopted as the basis of that contained in the draft. *The principal effect of the* change will be to widen the scope of this useful remedy.

The draft referred to is art. 957.

It has been objected that this Court has no right to enjoin the defendant from opposing plaintiff's demand in a foreign country. The majority of the Court does not find that there is anything of the kind in plaintiff's application. The defendant is a Canadian company having its place of business in the city of Sherbrooke. It is therefore subject to the jurisdiction of this Court.

The order of injunction is directed as it is said *in personam*, to the defendant.

In granting injunctions the Court operates *in personam*. The person to whom its orders are addressed must be within the reach of the Court or amenable to its jurisdiction. But the Court will not suffer any one within its reach to do what is contrary to its notions of equity, merely because the act to be done may be, *in point of locality, beyond* its jurisdiction.

As a consequence of the rule, that in granting an injunction the Court operates *in personam*, the Court may exercise jurisdiction independently of the locality of the act to be done, provided the person against whom relief is sought is within the reach and amenable to the process of the Court. This jurisdiction in not grounded upon any pretension to the exercise *of judicial or administrative rights abroad*, but on the circumstances of the person to whom the order is addressed being within the reach of the Court. Kerr on Injunctions, p. 11.

We agree with our learned brother when he says that we cannot judge of the merits of the application made in Washington, but we believe we are not called upon to do that.

We are merely called upon to decide whether the company's covenant is violated by its opposition to plaintiff's application

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in Washington. We find that it is, and that the company's conduct is a breach of the agreement with the plaintiff.

For these reasons we are of opinion that the judgment should be confirmed and it is confirmed with costs.

GUERIN, J., dissented. *Judgment confirmed.*

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Re COPE FRUIT CO. Ltd. AND BANK OF MONTREAL.

Alberta Supreme Court, Appellate Division, Scott, Stuart, Beck and Walsh, JJ. December 23, 1916.

1. ASSIGNMENT (§ III—25)—AS SECURITY—DEBTS—COLLECTION—INSOLVENCY.

An assignee of debts as security by permitting the assignor to collect them, and to use the proceeds, does not thereby release or abandon the security, and may withdraw its permission at any time, and the assignor is trustee for the assignee of any portion of such debts collected, and not used by the assignor, but existing in a fund, which can be identified, at the insolvency of the assignor. Per Scott and Walsh, JJ.

2. ASSIGNMENT (§ III—25)—DEBTS—COLLECTION—LIQUIDATION.

Under a general assignment of present and future debts, etc., as security, when the assignor is permitted to collect and apply the proceeds, in the ordinary course of business, the money actually collected becomes the property of the assignor, and any balance of such collected money, existing at the time of the assignors' insolvency, even in a fund capable of identification, would belong to the liquidator, and the fund itself is not within the scope of such an assignment. (Per Stuart and Beck, JJ.)

Statement.

APPEAL by defendant from a judgment of Hyndman, J., upon an issue directed to be tried between the liquidator of the company and the bank as to which is entitled to money in the custody of a third party. Affirmed by an equally divided Court.

A. M. Sinclair, for appellant.

H. P. O. Savary, for liquidator.

Scott, J

SCOTT, J.:—On June 30, 1915, the company by deed for valuable consideration assigned to the Bank of Montreal, among other things, all debts, demands and choses in action then due or thereafter to become due or which might be vested in the company whether in connection with the business then carried on by it or any future business or otherwise. A schedule of the accounts then due or accruing due to the company was delivered to the bank with the assignment, and subsequently, on October 28, 1915, the company furnished the bank with a list of other debts then due to the company. No notice of the assignment was given by the bank to any of the company's debtors, and the company, apparently with the knowledge and assent of the bank, continued to collect the debts assigned and use the proceeds in the business then carried on by it.

Sometime after the assignment the company transferred its account to the Merchants Bank of Canada, and thereafter continued to collect the assigned debts and deposited the proceeds in its account with that bank. In some cases the bank itself made the collection and credited the company's account with the proceeds. This account was a general account of the business of the company, in which deposits made by it and negotiable paper discounted by it from time to time were credited, and cheques if owed by the company and paper due by it were charged against it. When the company went into liquidation on October 23, 1915, the balance standing to the credit of the company in this account was $750.30 which is the fund now in question.

It does not clearly appear from the evidence given at the trial of the issue that this fund consisted exclusively of moneys collected upon the debts assigned by the company to the Bank of Montreal, but Hyndman, J., in his reason for judgment, states that it was admitted that such was the case and, as the appeal from this decision was argued solely on that assumption, this appeal should be disposed of on that basis.

The issue was tried before the Master in Chambers at Calgary who held that the Bank of Montreal was entitled to the fund, but, on appeal from him, Hyndman, J., allowed the appeal with costs.

In my view the bank, by permitting the company to proceed with the collection of the debts assigned and to apply the proceeds in its business, did not intend to release or abandon its security, and should not be presumed to have done so except for that purpose. It retained the right to withdraw that permission at any time and, if it had done so, the proceeds of any of the assigned debts collected by the company after such withdrawal would have been the property of the company. It is not shewn that the permission ever was withdrawn, and, if the company had continued to carry on business, it might have been open to question whether it would not have been entitled to apply the fund in question in its business but, as the company is now in liquidation that question cannot arise, and I am therefore of opinion that the bank is entitled to the fund as against the company, and that the latter should be held to be a trustee thereof for the bank.

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Scott, J.

If the moneys collected by the company could not have been identified the bank's only remedy would have been to claim for them as an ordinary creditor of the company but, the identification of the moneys being complete in this case, I see no reason why the bank should not be held to be entitled to them. Lewin on Trusts, 12th ed., p. 268.

In view of the admission I have referred to that the fund in question is exclusively the proceeds of the debts assigned by the company, I cannot see that any distinction can be drawn between the placing of the moneys in a bag or cash box in the company's office and the placing of it in the Merchants Bank. The latter is merely the custodian of them for the company and in either case the latter could withdraw the whole or any portion of them at any time. If they had withdrawn them, they would have lost their identity, and they would not then have been followed.

It may be that, by reason of the Bank of Montreal not having given notice of the assignment to the debtors, the legal right to the debt has not passed to the bank under it, but it nevertheless operates as an effectual, equitable assignment and such being the case, the bank is entitled to the debt assigned by it as against the liquidator. See *Scott* v. *Surman*, Willes 400, 125 E.R. 1235, and the cases there referred to.

I would allow the appeal with costs and direct that judgment upon the issue be entered for the Bank of Montreal with costs.

Walsh, J.

WALSH, J., concurred.

Stuart, J.

STUART, J.:—The evidence given before the Master in this case was extremely meagre. But from that evidence and from what was said to us on the argument by counsel I think it is a fair inference that the Bank of Montreal took a general assignment of present and future book debts of the company in liquidation as security for any amount which might from time to time be owing to the bank from the company, that it was tacitly agreed that the company should go on doing its business in the ordinary way, collecting money from its customers on their accounts and using that money in carrying on its business in the ordinary way, that is, paying its employees their salaries, paying its rent, if any, for its premises, paying cash, if it saw fit, for new goods purchased, and paying its acceptances as they fell due, all out of moneys collected from its customers. I think the real

meaning of the agreement was that what was assigned was book debts while they remained book debts, but not the money in the company's hands resulting from debts collected by it. The test to be applied to the case seems to me to be this: Could the bank after the company had collected a certain debt say to the company "that money which you collected yesterday is ours, you hold it as trustee for us, you must not pay your stenographer's monthly salary out of it, you must not pay your rent out of it, you must not pay any acceptances with it, you must give it to us for it belongs to us?" I think the company could have truthfully answered "we assigned to you our book debts as they existed uncollected from time to time, but we did not assign to you our whole business, our body and soul. The agreement was that we should go on doing business, and we have done so. We collected that debt before you applied your assignment to it by notice to the debtor, and that specific money is ours, not yours. You have the uncollected book debts as they now stand. We shew you our list. You may notify the debtors of course if you please, but as you tacitly agreed to our continuing in business and collecting on accounts for the purpose of our business, and as we have now under that understanding collected that debt it is removed from the category of assigned debts, and its place must be taken by the new credits we have just given to others. You have those of course under your assignment if you notify the debtors." This, I think, was the agreement really, though tacitly, made, and I therefore think the debts collected by the company before the petition for liquidation in the ordinary course of business were thereby withdrawn from the assignment. If any debts had been collected by the liquidator, these of course would stand in a different position, but I understand there is no question of that.

I do not think it ever would have occurred to the appellant bank to charge the company with a breach of trust because it collected and used for its own purposes one of its trade accounts during the course of its business. Nor do I think the bank would have thought of claiming as its own money a sum, standing to the credit of the company derived from collections, say at a period a few months before the liquidation, while business was going on as usual.

It follows also from what I have said that the debt due from

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the Merchants Bank, that is, the fund which that bank as the company's bankers held upon deposit in the ordinary course of the company's business, is not such a debt as can come within the real meaning of the assignment. Every one knows what an assignment of book debts means. True the words used are not "book debts" but "all debts, demands and choses in action" and all contracts, bills, notes, lien notes, books of account, letters, invoices, papers and documents in any way evidencing or relating to or which may be received as security for or on account of such debts, demands or choses in action." But I think those words shew clearly that the company's ordinary bank account was not intended to be included. I have never yet heard of a Canadian chartered bank giving security for the money it owes a depositor who has an account with it.

I think the appeal should be dismissed with costs.

Beck, J.

BECK, J.:—It cannot be questioned that an assignment of book debts to be subsequently contracted effectively operates as an assignment upon the debts coming into existence and that the debts come into existence subject to the rights of the assignee; and that the title of the assignee is good except as against one dealing with the nominal creditor *bonâ fide* without notice of the assignment. Neither can it be questioned that the proceeds of the sale of property held in trust can be followed in the hands of the trustee or volunteers or purchasers *mala fide* if they are ear-marked.

On the other hand, a mortgagor of a stock-in-trade has an implied authority to sell the mortgaged goods in the ordinary course of trade; and any mortgagee may of course consent to his mortgagor selling any of the mortgaged goods; so also in the case, as here, of an assignment by way of security of book debts the assignee may of course waive his rights under the assignment to any extent he pleases.

In the present case the Bank of Montreal, the assignee, did in fact waive their rights and consented to the now insolvent company, the assignor, collecting the assigned debts.

The question is: Did the company on receipt of the proceeds become a trustee of them for the bank? I think not. The purpose of the bank in permitting the company to collect was that it might use the proceeds for any proper purposes of the company to which the company might think fit to apply them.

Under these circumstances I think the company was in no sense a trustee for the bank; nor on any other principle was the company liable to account to the bank for the proceeds, which, in my opinion, fell into the general assets of the company freed from the assignment.

I can find no English or Canadian authority dealing with the precise point and few of the American reports are available; but some assistance may perhaps be derived from a reference to the cases cited in Jones on Chattel Mortgages, 5th. ed., par. 441; 464 *et seq.* and in 7 Cyc. p. 52, n. 75, tit. Chattel Mortgages.

In my opinion therefore the liquidator is entitled as against the Bank of Montreal to the moneys in the hands of the Merchants Bank; for, meeting another contention put forward by the Bank of Montreal, I think it is impossible to hold that the "debt." resulting from the bald fact that the current account of the company in the Merchants Bank shewed a credit in favour of the company, is a debt covered by the assignment from the company to the Bank of Montreal.

In my opinion, therefore, the appeal should be dismissed with costs. *Affirmed by a divided Court.*

CANADIAN NORTHERN R. CO. v. BILLINGS.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Idington, Duff, Anglin and Brodeur, JJ. May 26, 1914.

EMINENT DOMAIN (§ III E 2—171)—COMPENSATION—ACCESS—DEVISEES—CO-TENANTS.

Tenants in common, devisees of a strip of land, intended by the testator to be dedicated and used as a public road, and who have refused to follow out the testator's wishes, and have held the land for the purpose of obtaining damages for expropriation thereof, have no such interest as will entitle them to damages under sec. 155 of the Railway Act, R.S.C. 1906, ch. 37; although the land has been used as a means of better ingress and egress to and from land owned by one of the parties.

[English Railways Clauses Consolidation Act, sec. 16, Railway Act, R.S.C. ch. 37, sec. 155; *Ricket* v. *Metropolitan R. Co.*, L.R. 2 H.L. 175-176; *Hammersmith R. Co.* v. *Brand*, L.R. 4 H.L. 171; *Cowper Essex* v. *Local Board of Acton*, 14 A.C. at 153; *Stubbing* v. *Metropolitan Board of Works*, L.R. 6 Q.B. 37, referred to.]

Statement.

APPEAL from Ontario Supreme Court, 15 D.L.R. 918, 29 O.L.R. 608, 16 Can. Ry. Cas. 375. Reversed.

Fitzpatrick, C.J.

FITZPATRICK, C.J.:—I would allow this appeal with costs. I agree with Idington, J.

Idington, J.

IDINGTON, J.:—This appeal raises the question of how much compensation is due respondent under the following circumstances:—

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Idington, J.

Charles Billings owned a farm. A railway company, of which the C.P. Ry. Co. is the successor in title, constructed a railway through the centre of said farm from north to south. Between him and the railway company farm crossings were arranged for.

The use of one of them and its legal character has come to have an important bearing upon the rights of the parties hereto.

I understood it to be conceded in argument that the crossing was to be merely such as the Railway Act then in force would in case of expropriation have given Mr. Billings and his successors in title. It was designed to enable him to enjoy as a whole the use of his farm thus severed. And if there be any doubt of this no proof is adduced warranting any other inference. All we have in evidence is a reservation extracted from the description in a deed of lands conveyed to the railway company in 1852 for a right of way as shewn by the old style of registration memorial in the registry office. That form of registration omitted often many important things in deeds of conveyance. The reservation in question is as follows:—

> Reserving, however, to him the said party of the first part and his heirs, the right or privilege of crossing, or right of way over the said lands hereby granted, and over the railroad tracks to be built thereon, at each one hundred acres of the said lots 16, 17, 18 and part of 19 in the said Junction Gore.

Coupled therewith we have the acts of the parties which are consistent only with the view that it was an ordinary railway crossing and nothing else which was reserved. And if this memorial is to be taken literally it was only to the grantor and his heirs that there was any reservation.

This farm crossing for half a century had gates on each side of the track. About 4 years before the circumstances now to be considered, the gates were dispensed with and the fencing on either side of the crossing (widened in fact I infer to cover the continuation of Billings' Ave. about to be referred to) was constructed with the usual cattle guards across the track. A signboard, I assume of the usual warning character, designating the existence of this new railway crossing, was also erected by the C.P.R. Co. authorities, and if not actually agreed to was not objected to by respondent.

So far as I can learn from the case or argument the original liability of the railway company to maintain this farm crossing in good repair remained, but can only be considered as an obliga-

tion enuring to the benefit of a farmer occupying land on either side of the railway track and needing such service.

Mr. Billings died in 1906, and by his last will and testament gave to the respondent the part of said land lying east of said railway track. That part was not touched by the appellant's proposed railway route now in question which ran alongside the western boundary of the C.P.R. railroad allowance.

He devised the other part of his said farm, lying west of the railway, to another son, saving and excepting the strip of 15 ft. wide which I am about to refer to.

It so happened that an adjacent proprietor had, in 1892, laid out a survey of town lots and in doing so dedicated by his plan a roadway 25 ft. wide (called Billings' Ave.) along side this latter part of Billings' land. One would say this was probably done in anticipation of Mr. Billings contributing the like quantity of land to make a street serviceable for the development of both their properties. However this may be the testator in devising to his son Charles all of the lot between the railway and the river, excepted thereout a strip of land 15 ft. in width along the southerly boundary, adding the words "which I hereby reserve for a public highway."

He gave the residue of his estate to his said two sons who in view of the result of litigation relative to this strip in which it was sought to have it declared a public highway or part thereof, must be held to be owned by said two sons as tenants in common. But I express no opinion as to the possibility of that being yet declared in another suit differently constituted to be in trust for the public.

It so happens that this strip extends from the C.P.R. railway allowance at right angles thereto and there touches said farm crossing so that persons can pass from the main parcel of lands devised by said will to respondent by using the farm crossing and travelling upon the said strip to a public highway at right angles thereto.

The appellant railway company seeks to expropriate ninety feet of the end of this strip which lies next the C.P.R. railway allowance as part of their new railway route. Admittedly this piece of land 15 ft. by 90 ft. is not in itself worth more than $60.

The respondent, one of the two tenants in common thereof,

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claims that he is entitled, in such expropriation proceedings, to build upon such a basis, as furnished by the foregoing facts, and the rights growing thereout, the right to claim damages (allowed by the Court of Appeal for Ontario at $8,750) for injurious affection of his parcel of land which is not to be touched by the construction of the railway now in question.

The claim is unique. I have considered the many cases cited in the opinions of the arbitrators and in the judgment appealed from and in argument before us and a great many others, and I think I can safely say no case is to be found where so much has been founded upon so slender a foundation.

This dedication of a 25 ft. wide avenue, called Billings' Ave., appears on a registered plan sanctioned by the municipality and hence that avenue is a public highway. It is known to all and recognized by those concerned, including the C.P.R. Co., as a travelled road east and west of the C.P.R. track. It is hinted or suggested that the C.P.R. railway track allowance lying between and interrupting the continuation of the parts of Billings' Ave. east and west of the said allowance, cannot be considered as a part of such highway though the C.P.R. Co. seems to have so recognized it in the manner above pointed out.

Then all it requires to complete a 40 ft. wide street is the consent of respondent and his brother to respect and execute the plain purpose of their father's will and allow an order to be made by the Board of Railway Commissioners putting beyond doubt the full constitution of such a highway, giving respondent and all others he may sell to in developing his land as a residential district, the full benefit of ingress to and egress therefrom leading to other highways.

So simple a method would not suit his purpose herein. Hence the 15 ft. strip has to be kept as a foundation for a legal grievance from which he may reap damages for what his neighbours, who have no interest in a similar strip, have to endure without redress.

We must therefore examine the law and facts to see if he has such a singular advantage by reason of the interest he owns as co-tenant in this strip.

There is not a shadow of authority for pretending that he is in law entitled to claim damages to his other lands for anything flowing from the construction, or use when constructed, of this

railway, unless he can rest it upon the deprivation of his share of part of this strip.

In the line of English authorities cited many rest only upon the provisions of the Lands Clauses Consolidation Act of 1845, which expressly provide for cases of severance from "lands held therewith" and injuriously affecting "other lands" of same owner, and are expressed more favourably to those claiming by reason thereof than is the provision of our Railway Act.

The same may be said of cases resting upon the English Railways Clauses Consolidation Act which also in the view of eminent authority is possibly more extensive than our Act in these regards.

I do not pretend that these authorities resting upon either of such Acts, or both, are not instructive, but I do not think they can be safely relied upon in any case such as this arising under our Act to bind us in any way.

It seems probable that our sec. 155 of the Railway Act was taken from sec. 16 of the English Railways Clauses Consolidation Act. It has been said to be in substance the same but the language is in truth not identical. Sec. 16, after giving powers to execute works, goes on thus:—

"Provided always, that in the execution of the powers by this or the special Act granted, the company shall do as little damage as can be, and shall make full satisfaction in manner herein, and in the special Act, and any Act incorporated therewith provided, *to all persons interested, for all damages by them sustained by reason of the* exercise of such powers."

Our sec. 155 is as follows:—

155. The company shall, in the exercise of the powers by this or the special Act granted, do as little damage as possible, and shall make full compensation, in the manner herein and in the special Act provided, to all persons interested, for all damage by them sustained by reason of the exercise of such powers.

Lord Westbury was disposed to put in the case of *Ricket* v. *Metropolitan R. Co.*, L.R. 2 H.L. 175 at 206, upon the word "satisfaction" used in sec. 16 a wider meaning than that with which the word "compensation" had been used. And evidently he was disposed to think in some cases that clause gave a more effective remedy than other clauses.

But what has struck me very much in reference to the application of the English decisions resting upon the Acts above referred to is the language and argument of Lord Cairns in the case of *Hammersmith, etc., R. Co.* v. *Brand*, L.R. 4 H.L. 171, where he

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relied upon the language of these Acts in the various sections other than sec. 16, above referred to and in part quoted, as the basis of his argument for liability, though of course not abandoning sec. 16 entirely. It seems to me when so great a lawyer as Lord Cairns found a distinction between what might be claimed under these sections, other than sec. 16, and omitted to express definitely his view of what that section might cover, we may well ask ourselves if that section alone ever has been judicially determined in any of the many cases cited as the legal basis upon which to rest any claim founded only upon a severance. I cannot find that it has. And when we come to consider that upon the interpretation and construction of said sec. 16, standing alone, we have no direct authority to guide us in construing our sec. 155, we must not follow blindly what rests upon that sec. 16 and other legislation as if exactly applicable to this case.

We may find in these English authorities much that is most instructive, something here and there that is most helpful, but after all when we are asked to follow the results of the decision in the *Cowper Essex* v. *Local Board of Acton*, 14 App. Cas. 153, upon the Lands Clauses Consolidation Act, entirely different in terms from our own Railway Act as expressed in sec. 155, we must pause and ask if we are to be governed thereby in this case.

Lord Cairns and Lord Westbury were respectively overruled in their opinions upon the construction of sec. 16 from which ours was taken. The course of English jurisprudence has been since, as a result of the view then taken by the Courts, that we have not the development of a line of authorities resting upon the construction which these great Judges were inclined to give sec. 16. It seems to me, I submit with great deference, that as if to rectify the injustice suffered by some as the result of the decisions in *Hammersmith* v. *Brand*, *supra* and *Ricket* v. *Metropolitan R. Co.*, *supra*, an effort has been made to do more than justice required in some other cases.

The doctrine that is laid down in some cases that a land owner has a veto when part of his rights is invaded, entitling him to have a measure of consideration extended to him in relation to other properties which he would not otherwise be entitled to, may well find some warrant in secs. 49 land 63 of the Lands Clauses Consolidation Act, 1845, but is not in harmony with what I

submit is the true interpretation and construction to be given and which I think was intended by the framers of our Act.

In the view I have come to of the respondent's claim it is not necessary to do more than to intimate thus the results I have reached from an examination due to the course of the argument herein.

It is not satisfaction for an invasion of a man's rights but compensation for the loss of part and damage done, as the result of expropriation, to some specific property and that enjoyed therewith that must be our guide.

Reverting to our own Railway Act I may point out that the deposit of a plan such as required by the statute and approved by the Board of Railway Commissioners, and notice thereof, is constituted by sec. 192, general notice to all parties concerned, and the date of such deposit shall be the date with reference to which such compensation or damages shall be ascertained.

193. The notice served upon the party shall contain, (*a*) a description of the lands to be taken, or of the powers intended to be exercised with regard to any lands therein described; and (*b*) a declaration of readiness to pay a certain sum or rent, as the case may be, as compensation for such lands or for such damages.

This section is by the use of the disjunctive conjunction "or" capable of being read as if the proceeding might be directed to taking lands or merely exercising some power from which damages might flow without the taking of any lands. But the next section, requiring a surveyor's certificate to accompany the notice, by sub-sec. (*c*) thereof, requires him to certify

that the sum so offered is, in his opinion, a fair compensation for the land and damages aforesaid,

seems clearly to imply that at all events when land is taken there may be arising from the taking thereof some damages consequent upon such taking.

Is this necessarily to comprehend and cover damages arising from the use to which the land is to be put so far as it may affect other lands of the owner of those lands so taken?

So far as severing the lands in two or more parts may diminish the value thereof, clearly the mere taking of the part used must be a damage to the owner. And so the construction of something upon the land taken likely to be a damage contemplated by the Act as a thing to be compensated for as within the exercise of the powers of the company.

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But is the use thereof for all time by running trains thereon to be compensated for? Is the damage to be done thereby to the other parts so severed to be made good? And is the severance of each easement appendant or appurtenant to the injured estate to be the basis of estimating compensation for the owner of such injured estate, no matter how remotely the easement may contribute to the intrinsic value of the estate as a whole?

And above all is the doctrine of severance as the basis for making such allowances to be extended to an interference with an interest or estate no matter how small the share in or interest may be in the strip, if connected by some slender tie by way of easement no matter how slight the tie may be leading in some way or another to a connection with or approach to the estate which the owner beyond all these may enjoy or seek to be indemnified for injuries thereto beyond what others not having such easement tie or some such relation to land taken can in law claim?

It is as was aptly expressed by Cockburn, C.J., in the case of *Stebbing* v. *Metropolitan Board of Works*, L.R. 6 Q.B. 37, at 42, the loss which the owner sustains by reason of something taken which is to be the basis and its value estimated at and tested by what it was worth to him, which should measure the claim.

It is quite clear that as means of ingress to and egress from this respondent's property, this strip is not necessary. It may be true that for many years he and his father may have used that strip as their path. But after 1892 when this Billings Ave. was dedicated and travelled upon, the value of the path as such had vanished. There were only a few known to be served by the avenue at the time of the arbitration.

When, say, two dozen are to be served they will see that the municipal council mends its ways and expropriates this 15 ft. strip so far as not already taken by appellant and that a respectable roadway is constructed and a good first-class railway crossing such as the respondent has never had is constructed. Such are the probabilities the evidence herein abundantly demonstrates.

The authorities shewing that the reasonable probabilities of what may happen in the future are to be considered by arbitrators estimating damages, are collected by Hodgins, J.A., and others in the case of *Re Gibson and Toronto*, 11 D.L.R. 529, 28 O.L.R. 20.

Applied to the facts before us the claim of the respondent to any damages beyond what the arbitrators allowed disappears in respect of the loss of this means of access.

Again the connecting little link of the farm crossing is not the respondent's. The land is vested in the C.P.R. Co. The right to pass over it was only reserved for the purposes of a farm crossing which as such is no longer needed. The reason of its existence having ceased by the act of the testator giving that part of his farm on one side of the railway to one son and on the other to another son without intending or evincing any intention of giving this crossing to anyone, I think the obligation to maintain it has ceased.

If it could be conceived as existent still in the heirs within the language of the reservation which makes no mention of assigns, it could not be held in any way as appurtenant to the devise to respondent.

That brings us to the consideration of the question from the point of view of the property in the strip of which part is expropriated by appellant.

He is admittedly a tenant in common with his brother who can insist upon a partition or sale of the property; assuming there is no way of strangers enforcing the trust expressed in the devise of it. Suppose the brother had insisted upon partition, how could respondent claim this particular part of it now in question?

He could not insist as matter of law upon anything in that regard. The result might and would be a sale. On what then can his present contention rest relative to its forming a part of his other estate and thus founding his claim for damages thereto?

Again, it is quite clear that it is not appurtenant to the other estate as a right of way. The express terms of the will forbid the possibility of any such contention. The right to found a claim for damages to the remaining property by reason of this being taken away and thus an injurious affection thereto, seems to me wholly without foundation to rest upon. Such a claim certainly never was within the purview of sec. 155 and the other sections of the Act by which its purpose is to be executed.

Whatever may be said of the applicability of precedents dealing with an actual severance of property under any other Act to cases where such a severance has taken place and its

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consequences have admittedly to be reckoned with under any view we take of this Act, there is nothing in this case but the taking from two of three parties (the municipality was served as well as the two brothers with the notice proceeded upon) of a part of a property these two hold in common. Hence no such legal relationship exists between the ownership of the property alleged to be damaged and that taken to constitute them one specific property of which part is taken.

Even if I could find and hold otherwise I should fail to see how the claim to damages as allowed by the Court of Appeal can be sustained under the peculiar facts in this case.

The land except the house and 13 acres had been sold in 1910 to a real estate dealer for $160,000 of which part had been paid and interest paid on the balance for some time before the arbitration. The only interest respondent has beyond that is a 10% possibility upon any profit his vendee may make by way of a syndicate to buy the land.

In the first place it is quite clear that though this is only an optional sale, the land is not likely to revert to respondent. Indeed, it may be that the advent of this railway secures against such result. His only chance of ever getting anything out of the profit his vendee may make is under the following clause in the option:—

> 5. Upon the formation of a syndicate and the sale of the land to them, I am to receive 10% of the net proceeds of sale, over and above the said purchase price of $160,000.

As there is nothing binding the buyer to form a syndicate I fail to see on such rise in values why one should be formed unless for the philanthropic purpose on the part of this real estate dealer to help respondent along in the world.

Then again there is the following curious clause in this option:—

> 8. In the event of any money being received from a railway company for land taken for railway purposes, the same shall be received by me and shall be applied in reduction of the purchase money.

The figures given by the evidence shew that it is extremely improbable that this option will fail to be carried out and then as I understand this clause this judgment, if allowed to stand, helps not the owner to a single dollar, but the real estate dealer to complete his purchase.

I assume that it may be quite competent for a landowner to sell and his buyer to speculate in the prospective damages to

such lands, but does the foregoing statement of facts present anything but an air castle to build such a speculation upon?

It has seemed to me throughout rather a far fetched claim for damages to land not touched, but resting upon an interest in the strip owned by respondent and another. And with this curious side-light shed upon the subject investigated by the arbitrators how can we say they erred? How can we be sure respondent has been damnified beyond what the arbitrators found?

In the amount allowed there is a sum of, I am not clear how much, but quite substantial I infer, for damages resulting from smoke, noise and vibration.

Now from the case of *City of Glasgow Union R. Co.* v. *Hunter*, L.R. 2 H.L. (Sc.), 78, down to the recent case of *Horton* v. *Colwyn Bay Urban Council*, [1908] 1 K.B. 327, the Courts holding that damage arising from the use of the works injuriously affecting the remainder of a claimant's estate, seems to say it must be damage done by reason of use upon that part of the claimant's estate expropriated, which is to be taken into consideration.

It seems to me that the logical result is that only so much of the smoke, noise and vibration as generated on the part taken can be reckoned with in estimating damages arising from such causes. We are not informed by the evidence just how much of this smoke, noise and vibration is supposed to be likely to be generated on the share of respondent in this 15 ft. wide strip. An estimate thereof would entail some curious calculations and I fear would hardly sustain the judgment in the Court of Appeal.

It must be presumed that all the other smoke, noise and vibration are the legitimate product of what is legally done elsewhere and not the subject of any claim on the part of respondent.

It is quite possible someone may say this is not what the cases mean. I am not responsible for the cases, I am only puzzled to know how they can be applied to the use of a railway.

It will be observed that I have doubted the applicability of these cases to our Railway Act which must be given a rational interpretation of some sort.

I may also observe that the respondent did not, nor did his witnesses, attach much, if any, importance to these incidents in the use of the railway.

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It was the crossing so many railway tracks that great stress was laid upon as the cause of diminution of market value. I conclude that the judgment of the Court of Appeal is not on any of the grounds taken by the Court sustainable and must be reversed.

And I am of opinion that the arbitrators proceeded upon a misconception of the legal rights enjoyed by respondent in relation to the C.P.R. farm crossing and failing to observe that the interest of respondent in the strip of land in question could not in law be held to be appurtenant to the property of respondent in regard to which they assess damages.

I am not however quite satisfied that it would not have been competent for the respondent and his brother to have so agreed for the acquisition by either of the other's estate and thereby given some vitality to the right to use the C.P.R. farm crossing which was reserved for the grantor and his heirs.

The argument before us and, so far as I can see, before the arbitrators, did not take any such ground or suggest such possibility. The ground they did take seems to me quite untenable.

It has occurred to me that if they had taken the ground I suggest it might have suggested a possible solution of all the difficulties in the way I have indicated above as the common sense method of applying to the municipal council and the Board of Railway Commissioners to constitute the roadway known as Billings' Ave. plus the farm crossing, at the point of the crossing, a public highway.

In doing so there would be involved considerable legal expense which might approximate the sum allowed by the arbitrators for damages and might not unfairly have been asked as compensation from the appellant, the disturber of a situation of peace.

The truth is, respondent sought to force the erection of a subway and failed. The parties have evidently been standing on their strict legal rights and I presume must abide by the result.

The appeal should be allowed with costs and the amount awarded be reduced to the value of the land as allowed by the arbitrators to the owners thereof.

Duff, J.

DUFF, J.:—I think this appeal should be allowed and the award of the arbitrators restored. I am unable to discover from the opinions filed that the majority of the arbitrators misdirected

themselves in any material way. As to the principle upon which the damages should be ascertained and as to the quantum of damages I see no sufficient ground for disturbing their conclusion.

ANGLIN, J.:—The facts of this case are fully stated in the opinions of the arbitrators and in the judgment of the Ontario Appellate Division, delivered by Hodgins, J.A., 15 D.L.R. 918, 29 O.L.R. 608. Upon the legal questions involved in the appeal I concur in the views which prevailed in the Appellate Division.

Two well-known cases—*Holt* v. *Gaslight & Coke Co.*, L.R. 7 Q.B. 728, and *Cowper Essex* v. *Local Board of Acton*, 14 App. Cas. 153—answer the appellant's objections based on absence of unity of title and insufficiency of connection between the small piece of land taken by the railway company and the property claimed to be injuriously affected, and also that based on the precarious nature of the right of crossing the railway of the C.P.R. Co. on the 15 ft. strip. The facts of the present case bring it within the principles which underlie those decisions. It is too late now to question the applicability to the provisions of our Railway Act of the decisions of the English Courts on the Railway Clauses Act and the Land Clauses Act. *Re Devlin and Hamilton & Lake Erie R. Co.*, 40 U.C.Q.B. 160; *G.T.P. R. Co.* v. *Fort William Land Investment Co.*, [1912] A.C. 224; *Powell* v. *T.H. & B. R. Co.*, 25 A.R. (Ont.) 209.

I do not think we are concerned with the option held by Mr. Rogers. The claimant is still the legal owner of the property in question.

But while I accept the legal propositions enunciated in the judgment of the Appellate Division, I am, with respect, unable to agree with their views as to the quantum of the compensation to which the respondent is entitled. By sec. 209 of the Railway Act conferring jurisdiction on the Appellate Court it is provided that:—

> upon the hearing of the appeal such Court shall decide any question of fact upon the evidence taken before the arbitrators, as in a case of original jurisdiction.

It is our duty to render the judgment which in our opinion the Appellate Division should have given.

I concur in the following passage from the judgment of Hodgins, J.A. (See 15 D.L.R. 933.)

If the narrowing of the roadway at the railway crossing from

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a width of 40 ft. to a width of 25 ft. injured the homestead property of 13 acres, it certainly also injured the claimant's lands lying between that property and the railway. I, therefore, accept the conclusion of the Appellate Division that damages in this connection should be allowed in respect of the larger area of 25 acres.

But I am, with respect, of the opinion that that Court has allowed too large a sum for compensation on account of severance and interference with access. The majority of the arbitrators assessed the damages on this branch of the claim at $850; the Appellate Division increased them to $6,500. The value of the land is placed at $1,200 per acre, as I read the judgment, and the Court allows a depreciation of 25% in respect of 25 acres. This I would make $7,500; but the Appellate Division has allowed only $6,500, adopting the figures of the dissenting arbitrator, Mr. Hogg. (See 15 D.L.R. 934.)

On the other hand, if I may say so with all respect, I think the appellate Judge has attached too much weight to the bare possibility (I doubt if it is even that) of Billings Ave. being closed at any time in the future. With that avenue open the only interference with access by the respondent is the narrowing of the roadway from 40 to 25 ft. in width for a distance of 90 ft. At level crossings over railways highways are usually narrowed and the width of the planking provided at the actual rail crossing is restricted to that of the *via trita*, which seldom exceeds 20 ft. Of course there will also be the additional danger and delays from the increased traffic over an added trunk line of railway. Taking all the circumstance into account, including whatever remote possibility there may be of Billings Ave. being closed, and dealing with the matter upon the whole evidence "as in a case of original jurisdiction" but not as in a Court of first instance, *Atlantic and N.W. R. Co.* v. *Wood*, [1895] A.C. 257, I think the allowance of $850 made by the majority of the arbitrators was a fair and reasonable award in respect of the 13 acres with which they dealt. Allowing compensation on the same basis in respect of 25 acres I would increase their award on this branch to $1,635.

On the other item—compensation for damages to be occasioned by "anticipated legal use of the works to be constructed on the land which has been taken," to which I think the respondent is entitled—I have found no sufficient reason to disturb the assessment made by the Appellate Division.

I would, therefore, reduce the amount of the award as amended in the Appellate Division, $8,810, to $3,945.

The appellants should have their costs in this Court; but the order of the Appellate Division as to costs should stand.

BRODEUR, J.:—I concur with my brother Anglin.

Appeal allowed.

NATIONAL BREWERIES v. GUILLEMETTE.

Quebec Court of Review, Fortin, Guerin and Archer, JJ. May 31, 1916.

BILLS AND NOTES (§ VI A—150)—RIGHT TO SUE ON ORIGINAL CONSIDERATION —RETURN OF NOTE.

A creditor who has received a promissory note in settlement of his claim may sue on his original claim without producing the note, but if the debtor has reason to believe that the note is in the hands of a third party, he may, under art. 177, C.P. (Que.), par. 2, file a dilatory exception requesting a suspension of the proceedings until the production of the note.

Statement.

APPEAL from the judgment of the Superior Court, September 29, 1914, in an action on account for beer sold and delivered, bottles and cases not returned. The defendants pleaded by way of compensation. The contestation only raised questions of fact, with this exception:—

Plaintiff at the time it brought suit was holder of two notes of the defendants to the amount of their indebtedness. Nevertheless the action was based on its original claim and it did not offer to return the notes to the defendants. The defendants in their plea alleged this fact. Plaintiff only filed the notes of record with its answer to plea.

The Superior Court in view of this, only allowed the costs incurred by the defendants subsequent to the filing of the answer to plea. The defendants inscribed in Review both on the merits and on the question of costs.

J. A. E. Dion, for appellant; *C. A. Archambault*, for respondent.

Fortin, J.

FORTIN, J.:—As to the question of costs defendants have no ground of complaint. The plaintiff received the two notes from the defendants as collateral security; it did not return the notes with this action but only filed them much later, after its answer to plea.

Defendants contend that plaintiff could not obtain judgment without producing the notes, that hence it is only entitled to the costs from the date when they were produced. This contention in my opinion is unfounded.

In the first place it is not correct to say that where a creditor

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has received a note in settlement of his claim, he is not entitled to sue on his original claim without offering to return the note when he takes the suit. A note does not operate novation of the claim for which it is given. The creditor may, therefore, sue on the original claim seeing it has never been extinguished. But if the defendants have reason to believe that the note may be in the hands of a third party, they may, under the sanction of par. 2 of art. 177 C.P., file a dilatory exception requesting the suspension of the proceedings until the production of the note.

The defendants therefore only have a dilatory exception and cannot raise this ground as a contestation on the merits, inasmuch as this is not a sufficient reason to obtain the dismissal of the action.

Plaintiff has not appealed from the judgment which to my mind has improperly refused to grant it all the costs to which it was entitled. Hence there can be no modification of the judgment in this regard. *Appeal dismissed.*

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CLARKE v. STEWART.

Alberta Supreme Court, Appellate Division, Scott, Stuart and Beck, JJ. December 23, 1916.

DISCOVERY (§ IV—32)—DEFAMATION—RELEVANCY OF EVIDENCE.

In an action for slander, where both the meaning of the statements complained of, and the person to whom they referred, have to be established by *innuendo*, the defendant cannot properly be compelled to answer on discovery if the statements referred to plaintiff; where the defendant, however, has pleaded fair comment, such questions are proper, and must be directly answered.

Statement.

APPEAL from a judgment of Walsh, J., dismissing a motion to strike out the statement of defence in an action for slander. Reversed.

J. A. Clarke, plaintiff, in person; *H. H. Hyndman*, for defendant.

Scott, J.

SCOTT, J.:—I concur in the result.

Stuart, J.

STUART, J.:—The point involved in this appeal is whether, when a plaintiff sues for damages for slander, and the reference to himself as well as the meaning of the defendant's statements have to be established by innuendo, the defendant upon examination for discovery can be compelled to answer the question: "Did you mean the plaintiff when you used those words?" Walsh, J., held that he could not be so compelled and the plaintiff appeals.

The decision appealed from is based on views expressed in

Hulton v. *Jones*, [1910] A.C. 20, and in *Gibson* v. *Evans*, 23 Q.B.D. 384, at 385. In the former case the House of Lords decided that the fact that the defendant did not in fact intend to refer to the plaintiff furnishes no defence. I am not sure, however, that it necessarily follows from this that the plaintiff may not be entitled to shew that the defendant did in fact and in his own mind refer to the plaintiff. The decision in *Hulton* v. *Jones* was that the absence of intentional reference was not a defence which would defeat the action. The plaintiff here contends that the presence of an actual intention in the defendant's mind to refer to the plaintiff is a material fact *adducible in evidence* by the plaintiff to support his assertion that the words were spoken of him.

It seems to be clear that the defendant cannot be asked to say whether he intended, by the statements he made which by innuendo are alleged to be slanderous, to convey the meaning alleged in the innuendo. *Heaton* v. *Goldney*, [1910] 1 K.B. 754. If the words are reasonably capable of bearing the innuendo the plaintiff may shew, by the evidence of witnesses who heard them and after shewing special circumstances owing to which the words might bear a special meaning, what those witnesses understood by the expression used. Odgers, 4th. ed., p. 633. It is not what the defendant meant by the words, but what the hearers understood from them that constitutes the material enquiry. *Gibson* v. *Evans*, *supra*.

For myself I am unable to see any reason why the defendant should be forced to tell his own meaning and intention with respect to the person referred to any more than with respect to the allegations made. I think this is the answer to the argument of the Ontario Divisional Court in *Morley* v. *Patrick*, 21 O.L.R. 240, at 244. Where evidence *pro* and *con* is given as to the real meaning conveyed to hearers by the slanderous words used, it would be just as much help to the jury to be told what the speaker in his mind intended and meant, as it would, when they were enquiring whether the words referred to the plaintiff or not, to be told that the defendant really meant the plaintiff. And yet I think it is the undoubted rule that the defendant cannot be asked to say what he meant by the supposedly slanderous words. That is not material. The question is how were the words understood by the hearers in view of all the surrounding circum-

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stances. So also the question is, did the hearers understand the words to refer to the plaintiff in view of all the surrounding circumstances. In one case, as in the other, the plaintiff relies upon innuendo, and for this purpose I see no distinction between the innuendo as to the person referred to and the innuendo as to the slanderous allegation.

As I pointed out on the argument, if the question were permitted, a person, who in a public address had referred to a man whom he once knew, with no reference which could identify him in any way, and had told about some crime that the man had in his opinion committed or some wrong that he had done, could be sued by the man referred to and forced to say that he had been speaking of him. Of course, the answer is that he could not succeed because, *ex hypothesi*, there was nothing in his words or in the circumstances from which *the hearers* could infer any reference to any definite individual. But this just shews that the proof of the reference to the plaintiff must be made by means of the understanding of the hearers in the circumstances, not by the thought in the defendant's mind.

The only relevancy that the question would have at the trial as it seems to me would be upon the matter of exemplary or punitive damages. But for this purpose I can see no reason for allowing this question. As pointed out in *Heaton* v. *Goldney*, *ubi supra*, ever since interrogatories and examinations were first invented:—

> it has been recognised that they constitute a process which might become oppressive and be used for improper purposes; and therefore that the allowance or disallowance of interrogatories is a matter for the discretion of the Judge, and they should be allowed or disallowed on the merits of the particular case, per Vaughan Williams, L.J.

In that case it was not suggested that the fact that the defendant really meant to convey the meaning alleged in the innuendo would be a ground for giving exemplary damages and that therefore the question there asked in the interrogatories should be allowed.

I think that the trial Judge would be entitled to instruct the jury that if they found that the two innuendoes, *i.e.*, first, as to the person intended (the plaintiff), and second, as to the meaning conveyed, were proven, they could add something for exemplary damages upon the assumption that the plaintiff really meant what they found him to mean. Any suggestion that the

whole thing was an accident, as in *Hulton* v. *Jones*, *supra*, would have to be raised by the defendant as a reason for minimising the damages. The defendant would have to go into the box to swear that he did not mean to refer to the plaintiff. He could then of course be cross-examined. It may be said no doubt, that the plaintiff ought to be allowed then at least to put in an answer made on discovery by the plaintiff if such answer is inconsistent with his denial of actual intention. In my opinion, however, there is a danger here of injustice to the defendant because the answer might be used by the jury, not merely on the question of the amount of damages they would allow, but also in their enquiry as to what was the meaning of the words used. In that enquiry I think *Heaton* v. *Goldney* is a sound authority to shew that the intention of the defendant in his own mind cannot be shewn. Under the old rule in equity discovery was never allowed at all in aid of an action of tort. *Hennessy* v. *Wright*, 36 W.R. 878, 880. I think as a matter of discretion discovery in aid of an action of tort should not even now be allowed where the sole object is to lay a basis for punitive damages, and particularly where there is danger that the answer would be improperly used to establish the legal liability. In other words, I think the Court in the exercise of its discretion ought to refuse to allow the question where its only relevant purpose is not to ascertain damages actually suffered (Bray, p. 21), but to impose what is really a penalty, even though that penalty does go to the plaintiff.

So far I have dealt with the matter as if the defence consisted merely of a denial of publication and a denial of the innuendoes. But the defendant has raised pleas of justification and of fair comment. These pleas necessarily are based on an admission that the plaintiff was referred to. I am unable, therefore, to understand why the defendant should object to answering the question when the answer apparently expected by the plaintiff would in any case be nothing more than he has already by his pleading admitted to be the fact. True, the pleading is in the alternative, but it seems to me to be almost an abuse of the privilege of alternative pleading that the defendant should say in one paragraph, "I did not refer to the plaintiff," and in the next, "I did refer to you, and my statements are true in fact, and as far

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as they were expressions of opinion were fair comment upon you in your character of an alderman." The answer may be unnecessary, but that is, I think, no reason for objecting to make it.

My conclusion is, therefore, that the appeal should be allowed with costs, and that as the pleadings stand the defendant ought to answer the questions and any other proper questions, and should be ordered to attend again at his own expense for that purpose.

Beck, J.

BECK, J.:—This is an appeal by the plaintiff from an order of Walsh, J., dismissing the plaintiff's motion made under r. 243 to strike out the statement of defence for the reason that the defendant refused to answer certain questions on the examination for discovery. The action is for slander. The defences are (1) denials of the speaking of the words; (2) denials of the innuendoes; (3) fair comment, *i.e.*, that so far as the words consisted of statements of fact they were true and as for the rest they were fair comment.

The defendant in his examination for discovery refused to answer the questions: "Will you say you didn't intend to include Clarke?" "Who were the men you meant, was Clarke one of them?"

Walsh, J., was of opinion that *Hulton* v. *Jones*, [1910] A.C. 20, (H.L.) having settled it, that it was immaterial that a defendant in an action for defamation did not intend the plaintiff, the converse was also true and it was immaterial that a defendant did intend the plaintiff. I think the Judge has misunderstood and misapplied this decision. The House of Lords, so far as is relevant to what we are considering, decided, as I understand the case, nothing more than this, that the necessary allegation in a statement of claim for libel or slander that the words were written or spoken with reference to the plaintiff would be proved by evidence that reasonable and sensible people who knew the plaintiff understood the words to refer to him, though the defendant's intention was otherwise, because a man must be held responsible for the natural consequences of his wrongful act; as Lord Loreburn, L.J., said, "his remedy is to abstain from defamatory words." The Court did not, as I read the case, hold that the defendant's real intention was immaterial, but merely that "just as the defendant could not excuse himself from malice by

proving that he wrote it in the most benevolent spirit, so he cannot shew that the libel was not of or concerning the plaintiff by proving that he never heard of the plaintiff. His intention in both respects equally is to be inferred from what he did."

In other words, the allegation that the defendant spoke or wrote the words of or concerning the plaintiff is not necessarily an allegation that the defendant's mind was directed to the plaintiff. That on my reading of the case cited is the extent to which in this respect the decision goes.

Whether or not in a civil case—for it certainly would be so in criminal libel—the plaintiff could support his case by proving merely that the mind of the defendant directed his words against the plaintiff without proof that any one so understood them or would be likely to so understand them, I need not, I think, attempt to solve; for it is not, I think, possible to contend that the real intention of the defendant with relation to the whole affair is not admissible in evidence either in aggravation or in mitigation of damages. Bray on Discovery, p. 21, Odgers' Libel and Slander, p. 688. Ann. Prac. 1917, p. 522.

Now, all this I have said without regard to the special defence of fair comment. It seems to me that the plaintiff's right to put the contested questions to the defendant is much less open to argument in view of this plea. The plea assumes that the defamatory words apply to the plaintiff and gives the plaintiff the right to inquire fully into the sources of information and the grounds of belief of the defendant. It would, I think, be the height of absurdity that the defendant should be permitted to answer all such questions merely hypothetically.

There is good direct authority that the questions are proper. *Wilton* v. *Brignell* (W.N.), 1875, 239; 20 Sol. Jo. 121. *Morley* v. *Patrick*, 21 O.L.R. 240.

I think the order of the Judge should be set aside; that the defendant should be ordered to attend at his own expense for further examination and answer the questions referred to, with liberty to the plaintiff to continue the examination for discovery. The defendant shall pay the costs of the motion before Walsh, J., and the costs of the appeal.

Appeal allowed.

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RYAN v. CANADIAN PACIFIC R. CO.

Ontario Supreme Court, Appellate Division, Garrow, Maclaren, Magee and Hodgins, JJ.A. July 6, 1916.

TRIAL (§ V C 1—285)—SUFFICIENCY OF VERDICT—NEGLIGENCE—CAUSE OF DEATH.

Where there is no proper evidence of direct causal negligence, the verdict of a jury that the accident was caused by "a frog not properly packed," without indicating how the want of packing was the cause of death, cannot be sustained.

Statement. AN appeal by the defendants from the judgment of CLUTE, J., in favour of the plaintiff, the widow of Stephen Patrick Ryan, upon the findings of the jury at the trial, in an action to recover damages for his death, caused, as she alleged, by the negligence of the defendants.

The deceased was employed by the defendants, and, while engaged in uncoupling cars, his foot caught (it was said) in an unpacked frog, and he was thrown down and killed by the train.

W. H. Williams, K.C., for appellants.

R. J. Byrnes, for respondent.

The judgment of the Court was delivered by

Hodgins, J.A. HODGINS, J.A.:—The following are the questions put to the jury, and their answers:—

"1. Were the defendants guilty of negligence that caused the accident? A. Yes.

"2. If so, what was the negligence; explain fully? A. Frog not properly packed.

"3. Might the deceased Stephen Patrick Ryan have avoided the accident by the exercise of reasonable care? A. No.

"4. Did the deceased Stephen Patrick Ryan go between the cars when the train was in motion, backing, on the occasion in question? A. No.

"5. At what sum do you assess the damages? A. $7,000."

In the charge of the learned trial Judge to the jury is found this paragraph: "It is charged that they were guilty of negligence because they did not have the frog properly packed. Was that the cause of the accident? Was the frog properly packed? If it was, that ends that part of it, and you would answer that question as to whether the defendants caused the accident by "No," because, if the frog was properly packed, that is the negligence that was charged. But, if you find that the frog was not properly packed, or, rather, that the defendants were guilty of negligence, then the next question is: 'If so, what was the

negligence; explain fully?' That gives you the opportunity and the duty to explain fully why you think the company were guilty of negligence, if they were guilty. The charge is that the frog was not properly packed. If you found it was not, that would not necessarily entitle the plaintiff to succeed. Was the fact of its not being properly packed the cause of the accident? Explain fully there what you think about that, as to what was the negligence that caused the accident."

Previous to putting this to the jury, he had explained fully to them the evidence shewing that the deceased had voluntarily gone in between the cars as well as the contrary theory that he had stumbled and was thrown in between. The jury have found that the deceased was not guilty of contributory negligence.

In the absence of direct evidence as to the cause of the accident, where contributory negligence is negatived, the Privy Council in *McArthur* v. *Dominion Cartridge Co.*, [1905] A.C. 72, upheld a verdict where there was no other reasonable explanation of the mishap than the one adopted by the jury.

Here there was evidence that the deceased had gone in voluntarily between the cars. This the jury reject. But what explanation do they adopt? In answering questions 1 and 2, in view of the learned Judge's charge, they were dealing with the frog alone and its packing, and entirely omitted to state or indicate how or why that want of packing was the cause of the deceased's death. There are explanations which might be accepted, if the direct evidence of what was seen is disbelieved, and these are: first, one which is most likely, that the deceased stumbled and fell in under the flat car, in front of the wheels, and was run over and killed; second, that he fell in and came in contact with the frog, which entangled him so that his death resulted from his being held fast; and, third, that he stumbled on the south wing of the frog after it branched out into the track to the south, and then fell in.

It is difficult to understand how, with the car moving with him in the same direction, a man stumbling and falling in could catch his foot in a frog, the jaws of which were away from him and opened wider as he progressed, or how, if he stumbled on the wing of the frog, blood was found on its point.

My strong impression from all the evidence is that the verdict was a sympathetic one, and that there was no reason for rejecting

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the evidence, as the jury evidently did, of the fellow-employees of the deceased who actually saw his latest actions.

But the negligence found is not linked up by the jury with the death, nor is the theory upon which they must have acted the only reasonable theory. Want of packing is consistent with liability or non-liability; and I think that the jury, having declined to accept the only evidence touching upon the vital issue, were bound to indicate the connection between the negligence they found and the accident, as they were directed to do. This duty should be insisted on in any case which, as here, presents features making it most difficult, in view of the non-acceptance of the statements of the only eye-witnesses, to draw a reasonable conclusion as to what else the deceased actually did. Strictly speaking, the result is that the respondent cannot hold her verdict. There is a want of proper evidence of direct causal negligence and absence of intelligible expression by the jury of what they thought was a reasonable inference.

I think there should be a new trial, and that the costs of the former trial should be in the cause and those of this appeal should be to the appellants in any event. *New trial ordered.*

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MACKINNON v. HORN.

Alberta Supreme Court, Scott, Beck and Hyndman, JJ. December 23, 1916.

ASSIGNMENT (§ III—28)—SET-OFF.

The intent of sec. 26 of the Assignments Act (Alberta, 1907, ch. 6) is to secure to debtors the right to set-off debts due to them before the assignment, and therefore a debt acquired afterwards cannot be set-off by a defendant in an action by an assignee.

Statement.

APPEAL by defendant from a judgment of a trial Judge in an action for specific performance. Affirmed.

Steer, for respondent; *Cormack*, for appellant.

The judgment of the Court was delivered by

Scott, J.

SCOTT, J.:—This is an action for specific performance of an agreement entered into by the defendant for the purchase of certain lands in Edmonton. In addition to the claim for specific performance the plaintiff claims judgment for $608.97, being the balance unpaid upon the purchase money with interest thereon and a lien for such balance.

At the trial the defendant admitted the plaintiff's title, and that the amount claimed by the plaintiff was the amount due under the agreement. He offered no defence to the action, but

counter-claimed for a promissory note for $519.13 made by the assignors to one R. W. Horn, a brother of the defendant, and endorsed to him.

The defendant admits that the note was endorsed to him after the assignment (of Schubert & Wentzell) to the plaintiff, and that the consideration for the endorsement was a note for the same amount given by him to his brother which note was to be paid if he got the money from assignors. The conclusion is, therefore, irresistible that the object and intention of the transfer of the note was that R. W. Horn should obtain payment in full of the note, instead of receiving merely a dividend upon it from the estate to which he would otherwise be entitled.

The Chief Justice before whom the action was tried held that the plaintiff was entitled to the usual judgment for specific performance, and dismissed the counter-claim with costs, on the ground that the defendant was merely a trustee of the note for his brother, and that there was therefore no right of set-off. The defendant now appeals from the judgment upon the counter-claim.

Sec. 26 of the Assignments Act (ch. 6 of 1907) is as follows:—

> The law of set-off shall apply to all claims made against the estate, and also to all actions instituted by the assignee for the recovery of debts due to the assignor in the same manner and to the same extent as if the assignor were plaintiff or defendant as the case may be.

It is pertinent to compare this provision with sec. 57 of the Dominion Winding-up Act (R.S.C. 1886, ch. 129) which is as follows:—

> The law of set-off as administered by the Court whether of law or equity shall apply to all claims upon the estate of the company, and to all proceedings for the recovery of debts due or accruing due to the company at the commencement of the winding-up, in the same manner and to the same extent as if the business of the company was not being wound up under the Act.

In *Maritime Bank &c.* v. *Robinson*, 26 N.B.R. 297, it was held that, in an action by a bank in liquidation under ch. 129, the liquidators were not bound under sec. 57 to accept in payment of a debt due to the bank promissory notes issued by the bank which were acquired by the debtor subsequent to the liquidation proceedings for the purpose of setting them off against the bank claim.

King, J., in his judgment in that case reviews at length the English cases bearing upon the question of the right of set-off under the Winding-up and Bankruptcy Acts in force there. The

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view there expressed is that the allowance of a set-off of a debt acquired after the liquidation proceedings had commenced would be contrary to the spirit and intention of the Winding-up Act, and he reaches the conclusion that it would be contrary as well to the spirit and intention of ch. 129, and that sec. 57 was not intended to and did not apply to debts so acquired.

In *Thibaudeau* v. *Garland*, 27 O.R. 391, the effect of a section of the Ontario Assignment Act, similar to sec. 26 of the Act of this province, was considered. There the debt sought to be set-off was acquired before the assignment for the benefit of creditors, and it was held that the right of set-off existed. Boyd, C., applied the principle laid down in the English cases respecting the right of set-off in winding-up proceedings, and bases his judgment entirely upon the ground that the debt sought to be set-off was acquired prior to the assignment. Meredith, J., however, goes further and holds that the section is broad enough to cover debts acquired after the assignment. Ferguson, J., concurred apparently merely in the result. Meredith, J., was therefore alone in the view he expressed, and, as it was unnecessary to decide the question in that case, his opinion upon it was merely *obiter dictum*.

It may be said of the effect of an assignment under our Assignment Act as was said of the effect of winding-up proceedings under the English Winding-up Act by Williams, J., in *Ince Hall Rolling Mills Co.* v. *Douglas Forge Co.*, 8 Q.B.D. 179:—

> The purpose of the Act is to make an equable and rateable distribution of all the assets of the company from the moment of the commencement of the winding-up . . amongst all the creditors without favour or preference to any one according to the legal rights of the creditors and the company at the moment of the commencement of the winding-up. All the assets of the company are to be got in and collected in the most beneficial way and distributed. In fact, from the moment of the winding-up the company is stopped as an independent going concern.

The right of set-off exists only where there are mutual debts both due from and to the same parties in the same right. An assignee under the Assignment Act in suing to recover a debt due to the assignor sues not only on behalf of the assignor but also for and on behalf of his creditors, and it is therefore, in my opinion, open to serious doubt whether in the absence of any statute authorising it, a debtor of the assignor would be entitled in such an action to set-off a debt due by the assignor even if

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such debt were acquired before the assignment, and whether any remedy would be open to him other than by claiming for it as an ordinary creditor of the estate and obtaining a dividend thereon.

In my view the intent of both sec. 26 of the Assignment Act and sec. 57 of the Winding-up Act is merely to secure the right of debtors of the assignor or company to set-off debts acquired before the assignment or the commencement of the winding-up proceedings. To hold that those actions entitled a debtor to set-off a debt acquired after that time would in many cases defeat the object and intention of the Act. In cases where the estate is small and the liabilities heavy, and they are numerous, it would be impossible for the assignee or liquidator to collect debts due to the estate as the debtors might purchase for a song debts due by the assignor or the company and thus escape liability.

In *Barrett's* case, 4 DeG. J. & S. 756 at 760 (46 E.R. at 1118) Westbury, L.C., says:—

> It would be an injurious thing under a winding-up order as it had been held to be an injurious thing in bankruptcy, that a debtor to the estate should be permitted subsequently to the winding-up order, or subsequently to a bankruptcy, to purchase up claims upon the estate for the purpose of making a case of set-off.

In *Ings* v. *Bank of Prince Edward Island*, 11 Can. S.C.R. 265, the bank which was then being wound up sued Ings for a debt due by him. He claimed to set-off the amount of a draft made by the bank which had been acquired by him from the Union Bank prior to the commencement of the winding-up proceedings and it was held that he was entitled to do so. Strong, J., who delivered the judgment of the Court, says, at p. 270:—

> I think it was very clearly and satisfactorily proved that the appellant acquired the draft, which he seeks to set-off, *bonâ fide* and for valuable consideration and that he does not hold it as a trustee for the Union Bank; nor was it endorsed to him in order to carry out any fraudulent or colourable contrivance to enable the Union Bank to obtain a preference.

The reasonable inference to be drawn from these words is that if it had been shewn, as it has been shewn in this case, that the transfer of the debt was a colourable contrivance to enable the transferor to obtain a preference, it would not have been held that the transferee was entitled to the right of set-off.

I would dismiss the appeal with costs.

Appeal dismissed.

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TAIT v. B.C. ELECTRIC R. CO.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Davies, Idington, Duff and Anglin, JJ. October 18, 1916.

APPEAL (§ II A I—35)—CANADA SUPREME COURT—COUNTY COURT ACTION. An appeal does not lie to the Supreme Court of Canada from the judgment of the B.C. Court of Appeal, on an appeal from a County Court in an action for damages within its jurisdiction.

(*Champion* v. *The World Building Co.*, 22 D.L.R. 465, referred to.]

Statement. MOTION to quash an appeal from the judgment of the Court of Appeal for British Columbia (27 D.L.R. 538), affirming the judgment of McInnes, Co.J., in the County Court of Vancouver, dismissing the plaintiff's action with costs.

R. M. Macdonald, contra.

Fitzpatrick, C.J. FITZPATRICK, C.J.:—This is an action for damages brought in the County Court, in British Columbia, in which the plaintiff claimed some $560. His action was dismissed at the trial and this judgment was affirmed by the Court of Appeal. The plaintiff now appeals to the Supreme Court of Canada and the case is set down for hearing on the "Western List." No question of jurisdiction is raised in the respondents' factum, but they launched a motion on June 16, last, returnable on the first day of this session of this Court in which they asked to have the appeal quashed for want of jurisdiction. The Supreme Court Rules provide, by r. 4, that, within 15 days after security is approved, the respondent shall move to quash for want of jurisdiction, and r. 5 provides that, upon service of the motion, all further proceedings shall be stayed unless a Judge of the Supreme Court should otherwise order. The bond appears to have been made in June, although the exact date is not given, but the order allowing it is dated June 2, so that notice of motion was given promptly by the respondent. Notwithstanding the rules, the appellant has proceeded to print his case on appeal and file his factum and the respondents have also filed their factum, nobody appearing to pay any attention to r. 5 which stayed proceedings and which was expressly passed to avoid costs being incurred of the printing where the Court might have no jurisdiction.

The jurisdiction of the Court turns, in part, on the view to be taken of sec. 37 (*b*) of the Supreme Court Act, which gives an appeal where the amount in dispute is $250 or upwards and the Court of first instance has concurrent jurisdiction with a superior Court. The cases in which the County Court, in British

Columbia, shall have concurrent jurisdiction with the Supreme Court of that province are set out in R.S.B.C. 1911, ch. 53, sec. 40, and none of these covers an ordinary case of damages as to which the County Court is given express jurisdiction up to $1,000 by sec. 30 of the Act. If there is jurisdiction in this case, it means that every action in a County Court in British Columbia, between $250 and $1,000, is appealable to the Supreme Court of Canada. There is no doubt that the Supreme Court of the province has jurisdiction in every kind of action, including the actions in which special jurisdiction is conferred upon the County Court and other inferior Courts, but this cannot mean that because the Supreme Court always has concurrent jurisdiction with inferior Courts an appeal therefore will lie. Our Act surely means that an appeal lies here only in a case where the inferior Court is given concurrent jurisdiction with the Superior Court in matters which, without some express provision, would alone be cognizable by the Superior Court. *Vide Champion* v. *The World Building*, 50 Can. S.C.R. 382, 22 D.L.R. 465.

The motion to quash should be allowed with costs.

DAVIES, J. agreed that the appeal should be quashed with costs. Davies, J.

IDINGTON, J., also agreed that the appeal should be quashed with costs adding that he remained of the opinion he expressed in the case of *Champion* v. *World Building Co.*, *supra*. Idington, J.

DUFF, J. (dissenting):—The ground of the application is that this is an appeal from a "judgment upon a motion for a new trial" within the meaning of sec. 70 of the Supreme Court Act. Duff, J.

The circumstances are that, at the conclusion of the plaintiff's, appellant's, case, in a trial in the County Court of Vancouver, the defendants, respondents, moved for judgment and the trial Judge granted judgment dismissing the action. The plaintiff, appellant, then appealed to the Court of Appeal praying, by his notice of appeal, a judgment of that Court reversing the judgment appealed from and directing that judgment be entered for the plaintiff for the sum of $578.59 or such other sum as to the Court of Appeal may seem meet or, in the alternative, remitting the said action to the County Court to have the damages assessed or such further order or judgment as to the said Court of Appeal may seem meet.

The plaintiff's complaint upon which the action was brought was that he had been wrongfully run down by one of the defendants' cars; and the defence was contributory negligence. This

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defence the County Court Judge held to have been established. The Court of Appeal, in hearing the appeal, was exercising the powers conferred upon it by sec. 116 of the County Courts Act, sec. 6 of the Court of Appeal Act (R.S.B.C., 1911), ch. 51 and O. 53, rr. 1-3*a*; these last mentioned rules providing that all appeals "shall be by way of re-hearing" and that the Court of Appeal

> shall have all the powers and duties . . of the Court or Judge appealed from . . to draw inferences of fact and to give any judgment or order which ought to have been made and to make any such further or other order as the case may require.

The plaintiff had, as above mentioned, completed his evidence in the County Court and the Court of Appeal had before it all the materials necessary to enable it to give judgment for the plaintiff, if he was in law entitled to it, on the facts established by that evidence. The defendants having deliberately taken the position that they were entitled to judgment on the evidence as it stood were not (if the Court of Appeal should be against them on the main issue) entitled as of right to demand that the case be remitted to the County Court even for the assessment of damages.

No ground was or could be suggested for granting a new trial to the appellant if he should be held not entitled to judgment on the evidence before the Court of Appeal.

The Court of Appeal gave judgment dismissing the appeal on the ground that the defence of contributory negligence was proved and that the judgment of the County Court Judge dismissing the action was right.

In these circumstances it seems clear that sec. 70 of the Supreme Court Act has no application. The judgment of the Court of Appeal was a judgment upon an appeal "by way of re-hearing" in which the plaintiff prayed judgment for a specified sum for which he alleged judgment ought to have been given in the County Court on the evidence adduced before that Court; it was a judgment declaring that, on that evidence, the County Court was right in refusing him judgment and dismissing his action. The plaintiff now appeals to this Court asking that this judgment of the Court of Appeal be reversed and that judgment be given in his favour for the sum claimed in his action.

The fact that by the plaintiff's notice of appeal in the Court of Appeal alternative relief was prayed as well as the fact that the Court of Appeal had power to deal with the appeal by remitting the case to the County Court are nothing to the purpose.

By sec. 15, sub-sec. 3, of the Court of Appeal Act, every appeal includes an application for a new trial unless the notice of appeal expressly states otherwise.

It could not be argued that every appeal brought by such a notice is necessarily a "motion for a new trial" within sec 70; it could not be so argued for the reason that until you looked into the merits you could not say that on the materials before the Court of Appeal it was not the duty of the Court of Appeal to give judgment in favour of the appellant.

That is precisely applicable to this case in which the Court of Appeal had, in fact, all the necessary materials before it and the defendants (respondents) had elected at the trial to stand on that material and to ask that the issues between them and the plaintiff should be determined according to the effect of that material.

In *Sedgwick* v. *Montreal L. H. and P. Co.*, at p. 642, this Court unanimously concurred in the following statement of the law:—

> In my view the words "motion for a new trial," in section 70, should be read as meaning "motion for a new trial only" and not as including cases in which the motion is substantially for other relief and only as an alternative for a new trial;

and, in that case, the Court having decided unanimously that a motion for judgment *non obstante veredicto* could not succeed, but that, on the ground of misdirection, a new trial should be granted pursuant to the alternative claim in the appellant's motion in the court below, for the reason mentioned in the above quotation from the judgment of my brother Anglin, held that the appeal was not an appeal from a judgment on a motion for a new trial and that sec. 70 had, therefore, no application.

The second objection was suggested from the bench—an objection of which I desire to speak with the greatest respect because it has the support of the opinion of my brother Idington expressed in his judgment in *Champion* v. *The World Building Co.*, 22 D.L.R. 465, 50 Can. S.C.R. 382, at 386. The objection arises in this way: The jurisdiction of this Court to entertain an appeal such as this, where the action out of which the appeal arises did not originate in a Superior Court, rests upon sec. 37, sub-sec. *b*, of the Supreme Court Act which provides that in such a case, in the Provinces of Nova Scotia, New Brunswick, British Columbia and Prince Edward Island, this Court shall

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possess jurisdiction to entertain an appeal from any final judgment of the highest Court of final resort where—

the sum or value of the matter in dispute amounts to two hundred and fifty dollars or upwards, and in which the Court of first instance possesses concurrent jurisdiction with a Superior Court.

The point made against the appeal is that the jurisdiction of the County Court of Vancouver to entertain the plaintiff's action was not a jurisdiction that satisfied the condition "the Court of first instance possesses concurrent jurisdiction with a Superior Court."

Were it not for the difference of opinion among the members of this Court I should have said that the objection was demonstrably untenable. The jurisdiction of the County Court to entertain the plaintiff's action is given by sec. 30 of the County Courts Act, sub-sec. 1, and the powers the County Court possessed in the exercising that jurisdiction are set forth in sec. 22. These provisions are as follows:—

Sec. 22.—Every County Court shall, as regards all causes of action within its jurisdiction for the time being, have power to grant and shall grant in any proceedings before such Court such relief, redress, or remedy, or combination of remedies, either absolute or conditional, and shall in every such proceeding give such and the like effect to every ground of defence or counterclaim, equitable or legal (subject to the provision next hereinafter contained), in as full and ample a manner as might and ought to be done in the like case by the Supreme Court. 1905, ch. 14, sec. 22.

Sec. 30, sub-sec. 1.—In all personal actions where the debt, demand, or damages claimed do not exceed one thousand dollars.

Within the natural meaning of the words "concurrent jurisdiction" clearly the jurisdiction of the County Court in respect of actions coming within sec. 30, sub-sec. 1, is "concurrent" with that of the Supreme Court. It is said, however, that in applying sec. 37, sub-sec. *b*, to British Columbia a restricted meaning must be attached to the phrase "concurrent jurisdiction," that the classes of actions falling within the description contained in sub-sec. *b* must be limited to actions brought before the County Court under the authority of sec. 40 of the County Courts Act which establishes and defines the equitable jurisdiction of County Courts and in which this language appears:—

The said County Courts shall also respectively have and exercise, concurrently with the Supreme Court, all power and authority of the Supreme Court in the actions or matters hereinafter mentioned.

A good many reasons could be adduced to shew the fallacy of this line of argument but I shall limit myself to two. 1. The provisions of the Act relating to the jurisdiction conferred by

sec. 30 are as apt and sufficient to shew that the jurisdiction thus conferred is "concurrent" with the jurisdiction of the Supreme Court as is the language quoted in sec. 40 although in the first mentioned provisions the word "concurrent" itself is not employed.

2. The underlying assumption of the argument is that sub-sec. *b* of sec. 37 of the Supreme Court Act, in its application to appeals from British Columbia, must be governed in the interpretation of it by reference to the B.C. legislation touching the jurisdiction of the County Courts, in other words, that sub-sec. *b*, as regards such application, was framed with a view to such provisions. If that be the assumption upon which sub-sec. *b* is to be read, it is sufficiently obvious that, consistently with the supposition that the legislature was not actuated by the merest caprice, the argument cannot be sustained. That is so, for this reason—which would occur immediately to persons familiar with the operation of the County Court jurisdiction in British Columbia. By far the most important jurisdiction of the County Courts in many respects is what is known as the "mining jurisdiction," Mineral Act, R.S.B.C., 1911, ch. 151, sec. 140; Placer Mining Act, R.S.B.C., 1911, ch. 165, sec. 154. The County Court by virtue of the provisions of the Mineral Act and the Placer Mining Act has "all the jurisdiction and powers of a Court of law and equity" in a great variety of actions in respect of subjects touching mines, the business of mining, water-rights relating to mining; including among other things personal actions where the debt or damages claimed arise directly out of the business of mining, suits for foreclosure or redemption in relation to mining property, actions of ejectment or trespass in relatio to such property, actions between employers and employees, actions for supplies to persons and companies engaged in mining, in all cases without limitation as regards amount or value. It is, of course, inconceivable, or perhaps one should say hardly conceivable, that any legislature dealing with the subject of appeals to this Court arising out of actions in County Courts in British Columbia should have deliberately enacted, or in its enactments have intentionally used language having the effect that the jurisdiction in appeal of this Court should be limited to appeals arising out of actions of the classes enumerated in sec. 40 of the County Courts Act (where, speaking generally, the amount or the value

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of the thing involved is limited to $2,500), thereby denying the right of appeal to suitors in the "mining jurisdiction" of the County Court in cases involving tens or hundreds of thousands of dollars. Yet such is, beyond question, the intention that must be attributed to the Dominion Parliament in enacting sec. 37*b* in so far as it relates to British Columbia in order to sustain the objection I am discussing.

The motion should be dismissed with costs.

Anglin, J.

ANGLIN, J.:—Although by his notice of appeal to the Court of Appeal for British Columbia the plaintiff nominally asked for an order directing judgment to be entered in his favour, or in the alternative remitting the action to the County Court to have damages assessed, the action, having been dismissed at the close of the plaintiff's case and without any evidence for the defence having been heard, practically the only relief open was a new trial. Substantially the plaintiff's motion to the Court of Appeal was for a new trial only, and the judgment of the Court of Appeal should, in my opinion, be regarded as a judgment upon a motion for a new trial within the meaning of that phrase in sec. 70 of the Supreme Court Act. The notice prescribed by sec. 70 not having been given, I think the appeal should, on this ground, be dismissed.

This disposition of the motion is quite consistent with the decisions in *Sedgewick* v. *Montreal L.H. and P. Co.*, 41 Can. S.C.R. 639 and *Jones* v. *Toronto and York Radial Railway Co.*, Cam. S.C. Prac. (2 ed.), p. 432.

I adhere to the view which I expressed in *Champion* v. *The World Building Co.*, 22 D.L.R. 465, 50 Can. S.C.R. 382, as to the construction of sec. 37*b* of the Supreme Court Act.

Appeal quashed.

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WERTH v. DAVIE.

Alberta Supreme Court, Harvey, C.J. November 3, 1916.

EXECUTION (§ I—2)—LAND TITLES ACT—FORECLOSURE—JUDGMENT FOR BALANCE.

The provision of sec. 62 of Land Titles Act, Alta. (amended 1916), that no execution shall issue after final judgment until encumbered or mortgaged land has been sold, or foreclosure ordered, and that levy shall then be made only for the balance due, does not apply to a judgment in favour of the vendor for balance of the purchase price, after the purchaser has forfeited all interest in the land by permitting the foreclosure of a mortgage assumed as part of the purchase price.

Statement.

ACTION to enforce judgment.

W. C. Fisher, for plaintiff.

A. M. Sinclair, for defendants.

HARVEY, C.J.:—On October 2, 1911, the plaintiff and defendant entered into an agreement for the sale and purchase of a portion of a lot in the city of Calgary for the price of $6,500, of which $1,000 was paid in cash. The payment of $2,500 was provided for by annual payments of $500 each on October 2 in each of the years 1912, 1913, 1914, 1915 and 1916, and after this provision the agreement contains the following:—

and the purchaser to assume a certain mortgage now existing and registered against the aforesaid property for the sum of $3,000 with interest at the rate of 8 per cent. per annum, payable half-yearly on the 14th days of August and February.

Then follows a covenant by the purchaser to pay "the said sum of money above mentioned together with the interest thereon at the rate of 8 per cent. per annum on the days and times and in the manner above mentioned." He also covenants to pay all taxes, etc., after the date of the agreement.

The last clause provides for the apportionment of insurance premiums, rents, water rates, taxes and "interest on above mentioned mortgage" from the date of the agreement.

The payments under the agreement became in default, and an action was brought and judgment secured for $1,240 for the payments due in 1914 and 1915 and interest, together with costs. The order for this judgment was made on September 22, 1916. In the meantime proceedings had been taken on the mortgage, which was also in default, and a final foreclosure and vesting order was made in favour of the mortgagee on September 27, 1916, 5 days after the other order.

By sec. 62 of the Land Titles Act it is provided that proceedings to enforce the covenants in a mortgage may be taken in the Courts, and by amendment of that section made at the last session of the legislature, being assented to on April 19, 1916 (Alta. 1916, ch. 3, sec. 15), it is provided that:—

Where any action or proceeding has before the date of the passing of this sub-section been taken, or shall thereafter be taken in any Court, either under the provisions of this section or to enforce the observance of the covenants, agreements, stipulations or conditions contained in any agreement for the sale of any land, and personal judgment has been or shall be obtained therein, no execution shall issue thereon until sale of the land mortgaged or encum-

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bered, or agreed to be sold has been had or foreclosure ordered, and levy shall then be made only for the amount of the judgment or mortgage debt remaining unsatisfied, with costs.

The plaintiff desires to issue execution, and wishes a direction to that effect.

On behalf of the plaintiff it is urged that the statute has been satisfied by the foreclosure order under the mortgage, but it seems clear to me that the sale or foreclosure referred to in the statute means a sale or foreclosure by the party who seeks to issue execution, for it limits the amount which he may recover to the deficiency. The meaning of this is quite clear in case of a sale though there seems difficulty in case of a foreclosure. The defendant likewise contends that as the provision for assuming the mortgage appears in the agreement after the provision for payment, it does not come into operation until all the payments are made. This argument appears to me as fallacious as the other. He agrees to assume the mortgage, and I see no reason why the agreement should not be effective according to the date of the written agreement. There is no suggestion of a postponement of its effect. Only by its being assumed at once could the vendor get the consideration of $6,500 which is specified as the purchase price. The interest in the mortgage could be paid only to the mortgagee, and the provision for adjustment shews that the agreement intends it to be assumed as of the date of the agreement. It was therefore the duty of the purchaser to have kept the mortgage in good standing, and it is through her default that there is now nothing that the judgment creditor can resort to by way of sale or foreclosure to satisfy his judgment in whole or in part. As, therefore, by means of the debtor's own default there is nothing to which the provisions of the Act can apply, effect must be given to the judgment as it stands. The result would be the same if it were considered in another way. The land is gone, the amount that can be realized from its sale is nothing; therefore there can be nothing to credit on the judgment debt, and the whole amount remains unsatisfied and the judgment creditor is therefore entitled to issue execution for the whole amount and I so order.

Judgment for plaintiff.

Re SOLICITORS.

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British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher, and McPhillips, JJ.A. November 7, 1916.

SOLICITORS (§ II A—22)—*Personal liability—"On behalf of our client".*]—Appeal from an order of Morrison, J., on a summary application to compel solicitors to perform an undertaking given at the hearing of an action. Affirmed by divided Court.

Joseph Martin, K.C., for appellant.

MACDONALD, C.J.A.:—The undertaking of solicitors sought to be enforced reads as follows:—

> On behalf of our client Gunn we undertake to have the agreement arranged between us executed by Skeffington or some third person acceptable to you and to pay you forthwith the cash payment of $300 as arranged. We may add that Skeffington was in to sign the papers to-day but our Mr. Killen being engaged in Court did not look over the agreement.

This undertaking was addressed by the appellants to McDougal & McIntyre, solicitors for the plaintiffs in an action of *Dragoylovich* v. *Wakeley*. The circumstances leading up to it are set forth in an affidavit of Mr. McDougal. The question for decision is as to whether or not this is to be regarded as the undertaking of the solicitors or the undertaking of the client Gunn.

The action above mentioned was brought against Gunn, Gray & Co. and Wakeley for an accounting alleging misappropriation of the plaintiffs' funds by Gray & Co., and Gunn, and breach of duty as plaintiff's agent by defendant Wakeley. An adjournment was taken to consider terms of settlement. The defendants Gray & Co. and Gunn were willing to pay the plaintiff $4,500 in settlement, which the plaintiff was willing to accept provided an agreement were entered into by Gunn guaranteed by Skeffington which would insure to the plaintiff the payment of the said sum of $4,500. Skeffington was a man of means and Gunn was a man of no means. The object of the settlement was perfectly clear. It was to secure to the plaintiff the said sum of $4,500 by the guarantee of Skeffington, or some other person acceptable to the solicitors for the plaintiff in that action.

The undertaking set out above does not purport to bind the other defendants.

If it binds Gunn only it is worthless because Gunn had already agreed to execute the document. He was a man of no means and it is impossible to support that plaintiff's solicitors intended to accept, and it is hardly reasonable to think that the defendants'

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solicitors intended them to accept, a document which was known to both to be worthless.

An undertaking of this sort is to be construed by reference to the intention of the parties to be deduced from the writing itself and the circumstances in which it was given.

The appellants rely on *Lewis* v. *Nicholson* (1852), 18 Q.B. 503 (118 E.R. 190); and *Downman* v. *Williams* (1845), 7 Q.B. 103 (115 E.R. 427). There were special circumstances in each of those cases which led the Court to the conclusion that it was not the intention of the parties that the person signing the contract should be personally bound. The earlier case of *Burrell* v. *Jones* (1819), 3 B. & Ald. 47 (106 E.R. 580), was not dissented from, and, in my opinion, that case in its facts and circumstances more nearly resembles the case at bar than do the first mentioned ones. The later cases of *Tanner* v. *Christian* (1855), 4 El. & Bl. 591 (119 E.R. 217); and *Paice* v. *Walker* (1870), 22 L.T. 547, support the conclusion to which the Judge has come, that the undertaking in question here was the personal undertaking of the appellants.

No question was raised by counsel here or below about the alternative remedy by action at law, nor was any objection raised in respect of the opportunity given the appellants to escape the consequences of failure to carry out their undertaking by paying the sum of $4,500 in manner specified in the order. The sole question before us was whether the undertaking was that of Gunn or that of appellants. I would dismiss the appeal.

MARTIN, J.A.:—In deciding the question of the personal liability of the solicitors on the undertaking before us, it is important to start right, and that start should be made by bearing in mind the decision of the King's Bench *in banco*, in *Iveson* v. *Conington* (1823), 1 L.J.K.B. 71, affirming Abbott, C.J., wherein it was said: "In general the undertaking of the attorney does not bind his client."

Campbell, C.J., said in a case where the same question arose:—

> It is always legitimate to look at all the co-existing circumstances in order to apply the language and to so construe the contract: but subsequent declarations shewing what the party supposed to be the effect of the contract are not admissible to construe it. *Lewis* v. *Nicholson* (1852), 18 Q.B. 503 (118 E.R. 190).

With these guides, I have examined many cases in addition to those cited, and the conclusion I have come to, not without

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hesitation, and largely caused by a direct conflict of testimony on essential points in the affidavits and depositions, is, that the undertaking is not to be construed as a personal one. Of course, as the same Judge above quoted also remarked, in language appropriate to the case at bar:—

> No authority on the construction of a contract can be precisely in point, unless the words of the contracts are the same; but it seems to me that the present contract resembles that in *Downman* v. *Williams* (1845) 7 Q.B. 103 (115 E.R. 427) which was held to be not a personal undertaking.

All the other Judges took this view, and Wightman, J., was of opinion that "on the whole I think the undertaking in this case more nearly resembles that in *Downman* v. *Williams*, than in any other decided case. The cases of *Burrell* v. *Jones* (1819), 3 B. & Ald. 47 (106 E.R. 580) *Hall* v. *Ashurst* (1833), 1 Cr. & M., 714, and *Watson* v. *Murrel* (1824), 1 Car. & P. 307, are clearly distinguishable for the reasons given by Lord Campbell. As Best, J., observed in *Burrell* v. *Jones*, the term "as solicitors" is merely descriptive of the character they fill, and which has induced them to undertake. In *Downman* v. *Williams*, Tindal, C.J., in giving the judgment of the Court says:—

> The very terms of the letter itself, I "undertake (on behalf of Messrs. Esdaile & Co.) to pay." would seem to us, in their natural meaning, to point rather to a promise made by one person as agent for another than as intending to bind the party speaking in the character of a principal; for, upon the latter supposition, there would appear to be no reason whatever for mentioning the name of the principal.

And later on he points out that if it is sought to change the effect of the letter, "we think the burden is imposed upon the plaintiff below of showing by clear proof, that there was no such agency." I have, as already noted, examined carefully the "co-existing circumstances" in vain to find any such proof as would remove the said burthen. What occurred in Court clearly did not do so in my opinion, because the undertaking was before the Court then in writing just as it is before us now, and subject to the same construction, so there was no ground for any uncertainty on that head, and the solicitor did not verbally expand his written undertaking but simply relied on it as he does now. I have already expressed my opinion on the subsequent events.

The case of *Allaway* v. *Duncan* (1867), 16 L.T. 264, not cited to us, is an instructive one (approving *Downman* v. *Williams*), wherein the words "I shall be prepared on his behalf," used by an attorney, were held not to fasten him with personal liability, Bovill, C.J., observing that where a—

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document is ambiguous in its terms and it is a doubtful matter to interpret (it) according to the meaning of the parties, it becomes . . the duty of the Court to put upon it the proper and strict meaning of the words.

The strongest case, I think, in favour of the respondent, *Ex parte Bentley* (1833), 2 L.J. Bk. 39, was not cited to us, where the opening words in the notice relied upon against the solicitor, Fisher, were "On behalf of J. A. Palmer, etc." (his client) and it was construed to be a personal promise because he later used the words "I am ready and hereby offer to allow and pay the costs, etc." which were held to be equivalent to saying "I have the money in my pocket, or in my power at this time and I am now ready to pay it over to you." *In the Matter of C.* (1908), 53 So. J. 119, is a somewhat similar case, though not so strong, because in reading the whole letter, and having regard to the dual undertaking, one branch of which (to make application to the magistrates) the solicitors alone could give, it was as Walton, J., observes, necessary to give it the personal construction in order "to give it any effect at all." I notice that in *Great North West Central Ry. Co.* v. *Charlebois*, [1899] A.C. 114, at 125, in the judgment of the Privy Council, it is said:—

> As between the company and Charlebois, Mr. Blake undertakes on behalf of the company that, directly they can float the bonds . . he (Charlebois) shall have a sufficient amount to secure him the balance. . .

Clearly Mr. Blake did not assume a personal obligation in giving that undertaking.

The lesson that one gathers from all the cases, with their often slightly varying language, is that it is sometimes hard to draw the line and that the safe thing to do is to follow the precedent set out in *Iveson* v. *Conington, supra.*

I only add that the jurisdiction of the Court in these matters has been lately reviewed in *United Mining and Finance Co.* v. *Becher*, [1910] 2 K.B. 296; [1911] 1 K.B. 840; and that *Mullins* v. *Howell* (1879), 11 Ch. D. 763, and *Reeves* v. *Reeves*, 16 O.L.R. 588, are instructive cases on undertakings which were impossible to carry into effect, enforcement in the former being refused because of a mistake on one side only.

GALLIHER, J.A.:—I agree in the conclusions arrived at by the trial Judge, and would dismiss the appeal.

MCPHILLIPS, J.A.:—After a careful examination of a large number of the authorities, I am of the opinion that the letter is a personal undertaking of the solicitors. I cannot say though that I arrived at this conclusion without some considerable

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hesitation, the more accentuated now by reason of the judgment of my brother Martin. The question, however, now to be determined is, whether it is an undertaking in respect of which the Court should exercise its summary jurisdiction? That which was agreed to be done was to obtain the execution of an agreement for sale of land by a Mr. Skeffington or some other acceptable person, and to pay forthwith the sum of $300. As to the $300, that sum has been paid, so that as to the only sum of money agreed to be paid there has been compliance with the undertaking. Had that amount not been paid unquestionably the summary jurisdiction of the Court would have been rightly exercisable in compelling payment thereof. The agreement for sale of land was prepared by McDougal & McIntyre, the plaintiff in the action being the vendor, Donald Gunn (one of the defendants in the action), and George H. Skeffington the purchasers (vendees) the purchase price being $4,500, the land being an undivided one-half interest in blocks 1, 2, 3, 4 and 5 in subdivision lettered A. of the north half of section 16, block 4, north range 6 west, in the District of New Westminster. It would appear that Mr. Skeffington was willing to execute the agreement, but, unfortunately, died, rendering this portion of the undertaking impossible. Later the agreement was executed by Donald Gunn and James Allan (in lieu of Skeffington) but Allan was not acceptable and that is the present situation. The order appealed from provided that the undertaking should be carried out and performed on or before May 1, 1916, and in the event of failure that the solicitors pay to the plaintiff in the action the $4,500 in the manner and in accordance with the terms of the agreement. It cannot be said that the solicitors gave any express undertaking to pay any money save the $300, which has been paid and at best the undertaking was to obtain execution of the agreement by Skeffington or some other acceptable person. The solicitors would appear to have acted in good faith in undertaking that Skeffington would execute the agreement and he was about to execute it, but the agreement as drawn had not been passed upon or approved by Killam & Beck and following that his death took place. *Peart* v. *Bushell* (1827), 2 Sim. 38, 40, is a case where the Court refused to exercise its summary jurisdiction to compel the vendor's solicitor to perform an undertaking given by him at the sale to do certain acts for clearing the title to the estate. The undertaking was to cause satisfaction to be entered

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up at the vendor's expense upon any judgments that might be found against one of the parties through whom the vendor's title was derived and to procure evidence of the deaths of certain other persons and a covenant for the production of certain deeds unless the originals were delivered up to the purchaser.

It is true that *Peart* v. *Bushell* was not followed in *United Mining and Financial Co.* v. *Becher*, [1910] 2 K.B. 296, the judgment being that of Hamilton, J. (now Lord Sumner). An appeal was brought from this judgment but it became unnecessary to proceed with same, see 80 L.J.K.B. 686. It will, however, be seen that Hamilton, J., was dealing with an express undertaking to repay a specific sum of money, a very different case to the case we have before us. In the present case the solicitors have not undertaken to pay the purchase price of the land. Further, it may well be that it will be impossible to produce a person who will be acceptable, to execute the agreement for sale. In my opinion the fullest extent of the order that could be made on summary proceedings would be an order to carry out and perform the undertaking in its terms but not with the added term, the payment of the $4,500 personally by the solicitors, with the result that in default of payment imprisonment would follow. This is not a case for the exercise of the extraordinary authority of the Court. It may seem to be unfortunate that this remedy is not available, but so it was in *Re Williams* (1849), 12 Beav. 510, 516. An action may be brought against the solicitors if it be advised, and in an action it can be determined what (if any) damages have been sustained in consequence of or by reason of the breach of the undertaking. It may well be that the damages might not be $4,500. See *Thompson* v. *Gordon* (1846), 15 L.J. Ex. 344.

The agreement for sale executed in accordance with the undertaking would not necessarily import that the $4,500 would be received.

It is most essential that solicitors be held in their undertakings and that they should practise their profession with a high sense of honour. Nevertheless, in all matters of personal undertakings they should be unambiguous in form and parties cannot be heard to complain if their reading of them be not always capable of being acceded to. Here we do not find any undertaking to pay this $4,500, and in my opinion it is not a proper case for the exercise of summary jurisdiction.

I would allow the appeal. *Appeal dismissed; Court divided.*

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Saskatchewan Supreme Court, Newlands, Lamont, Brown and McKay, JJ. January 6, 1917.

RAILWAYS (§ II D—70)—INJURY TO ANIMALS AT LARGE—OWNER'S NEGLIGENCE.

Where it is shewn that animals were at large, that they got upon railway property, and were injured thereon, not at an intersection with the highway, the railway company is liable under the Railway Act (R.S.C.1906, ch. 37, sec. 294), unless it can prove that the case falls within the provisions of sec. 295, or that the animals got at large through the negligence or wilful act or omission of the owner. An owner cannot be held guilty of negligence in allowing his animals to run at large where a valid by-law exists permitting him to do so.

[*Greenlaw* v. *Can. Nor. R. Co.*, 12 D.L.R. 402, followed. See annotation following.]

Statement.

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

P. M. Anderson, for appellant.

W. H. McEwen, for respondent.

The judgment of the Court was delivered by

Lamont, J.

LAMONT, J.:—The plaintiff lived on the N-W¼-15-19-17-W2nd, and owned the S-W¼-22 in the same township, part of which he used as a pasture field. This pasture field was fenced with a one strand barbed wire fence about 3 ft. high. In this fence were two gates, also of one-strand of barbed wire, with a pole at one end and a loop of wire to hold that pole to the gate-post. On February 20, 1915, four of the plaintiff's horses were in this pasture field and the gates were shut. The following morning the plaintiff found one of the gates open, and the pole and wire, which constituted the gate, lying unbroken on the ground. The horses were not in the field, but their tracks led through the open gate. The plaintiff found his horses on the right-of-way of the defendant's railway track, all injured; three of them so seriously that they died, and one injured in one of its hind legs. The tracks left by the horses shewed that, after leaving the pasture field, they got on the highway; this they followed until they came to the intersection of the railway track, when they turned onto the track, there being no cattle guards to prevent them from so doing. The place where the animals were injured was about half a mile from the intersection. To recover damages for the injury sustained by his horses, the plaintiff has brought this action. The trial Judge gave judgment for the defendant company on the ground that the fence and gates were not sufficient to keep the horses in the pasture, and that, therefore, the plaintiff was

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guilty of negligence in keeping his horses in a field with an insufficient fence. From that judgment this appeal is taken.

The questions raised in this appeal involve an examination of sec. 294 of the Railway Act. The first sub-section forbids animals being at large upon the highway within half a mile of the intersection of the highway and the railway at level rail, unless there is some person in charge of them. Sub-sec. 2 provides that if they are so at large they may be impounded. Sub-sec. 3, that if they are so at large and are injured at the intersection, the owner cannot recover.

Sub-sec. 4 (as amended 9-10 Edw. VII. ch. 50 sec. 8) and 5.

Under these sub-sections, it is sufficient to shew (*a*) that the animals were at large, (*b*) that they got upon the property of the company, and (*c*) that the plaintiff has suffered damage thereby. The railway company is, then, liable, unless the case falls within the provisions of sec. 295, or unless it is established that the animals got at large through the negligence or wilful act or omission of the owner, or of someone for whom he is responsible. MacMurchy & Denison's Railway Law of Canada, 2nd ed. (1911) at p. 492. Sec. 295 does not apply.

The only question, then, is: Did the defendants establish that the horses got at large through the negligence or wilful act or omission of the plaintiff?

By "negligence" here, I take it is meant that the plaintiff did not take the precautions to prevent his animals getting at large which an ordinarily cautious and prudent man would, under the circumstances, have taken; and by "wilful act or omission" is meant that he consciously either did, or omitted to do, something which he knew might result in his animals getting at large.

Early v. *C.N.R. Co.*, 21 D.L.R. 413, 8 S.L.R. 27; *Waite* v. *G.T.P. R. Co.*, 27 D.L.R. 549.

There is no evidence of any wilful act or omission on the part of the plaintiff.

Was he guilty of negligence? He could only be guilty of negligence if an ordinarily prudent man would have known that the gate through which the horses got at large was not sufficient to keep them in the pasture. Now, what is the evidence? All witnesses, those called by the defendant as well as those called

on behalf of the plaintiff, testified that the fence and gates were sufficient to keep in the pasture such horses as the plaintiff had, if the gates were kept shut. There was not one witness who testified that they were insufficient. The only evidence by which it was contended that negligence was established, was the admission of the plaintiff that the horses had previously got out of the field on two, or possibly three, occasions. On one of these occasions they got out because a party of hunters had driven through and left the gate open. How they got out on the other occasion or occasions is not shewn, but the plaintiff testified that he had never known horses to get out of the field excepting when someone left the gate open. If on February 20, they got at large by reason of someone other than the plaintiff or his agent leaving the gate open, the plaintiff was not guilty of any negligence. If they got at large by reason of some weakness in the fastening of the gate which enabled the horses themselves to open it, of which the plaintiff should have been aware, he would be negligent in placing his horses in a field with a gate so defective. As to how the gate became opened there is absolutely no evidence. Sub-sec. 4 places the onus of establishing negligence on the company. To satisfy this onus, in cases like the present, may be a difficult task, but as the statute has placed that burden upon the company it cannot escape liability unless it satisfies the onus, no matter how difficult the task may be. Under the circumstances of this case, I am, with great deference, of opinion that no facts have been proved from which it can be reasonably inferred that the horses themselves pushed open the gate and thereby got at large. The company, in my opinion, has failed to establish negligence on the part of the plaintiff.

The second point urged by the appellant was that, even if he was responsible for allowing his horses to get at large, he was still entitled to recover by reason of a by-law of the municipality allowing animals to run at large at that time of year. The by-law was proved. For the company, it was contended that the by-law could not annul the provisions of sub-sec. 1 of sec. 294, forbidding animals to be at large on the highway within half a mile of the intersection, unless they were in charge of someone.

It is true that sub-sec. 1 does so declare, and by sub-sec. 3, if the animals are at large, contrary to sub-sec. 1, and are killed

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at the intersection, the owner cannot recover. But, under sub-sec. 5, if they are not killed at the intersection the owner is not deprived of his right to recover. As the animals in question were not injured at the intersection, the prohibition in sub-sec. 1 has no effect upon the operation of the by-law.

In *Greenlaw* v. *C.N.R. Co.*, 12 D.L.R. 402, the plaintiff turned his cattle out to graze upon vacant land. There was a by-law permitting cattle to run at large. The plaintiff's cattle got on the company's property and were killed. It was unanimously held by the Court of Appeal in Manitoba that the plaintiff was entitled to recover; the principle upheld being that the plaintiff was not guilty of negligence in allowing his animals to be at large when their being at large was permitted by the by-law.

An attempt was made to distinguish the *Greenlaw* case from the one at bar on the ground that in the present case the animals got on the company's property at the intersection, while in the *Greenlaw* case they got on through a defective fence, and *dicta* found in two Ontario cases was cited in support of this distinction. Whether these *dicta* correctly interpreted the statute then in force I have not considered, for under the wording of the present Act it makes no difference where the animals got upon the company's property, provided they are not killed at the intersection.

In *Clare* v. *C.N.R. Co.*, 17 W.L.R. 536, the horse killed got onto the company's property at the intersection, and it was held that the owner, not being guilty of negligence or any wilful act or omission, had a right to recover.

I am, therefore, of opinion that, where there exists a valid by-law permitting animals to run at large in a municipality, an owner cannot be held to be guilty of negligence in allowing his animals to so run. It is not negligence to do that which is authorized by law.

The appeal, in my opinion, should be allowed and judgment entered for the plaintiff. The value of the animals is not in dispute. According to the evidence, the three animals killed were worth $170 each, while the damage to the fourth is put by the plaintiff at $50.

The plaintiff is, therefore, entitled to judgment for $560, with costs both in appeal and in the Court below.

Appeal allowed.

ANNOTATION: Railways — Animals at large through "wilful act or omission of owner." Annotation.

ALFRED B. MORINE, K.C.

In *Greenlaw* v. *Can. N. R. Co.* (1913), 12 D.L.R. 402, the Manitoba Court of Appeal decided that when an owner turns out his animals to run at large in a municipality where a by-law permits it, they are not at large by the "wilful act or omission of the owner," within the meaning of sec. 294 (4) of the Railway Act, 1906.

Richards, J.A., thought that "the intention of the Dominion legislation was to leave the expression to be interpreted by the provincial law in force where the killing (of the animals) occurred, and it would follow that, where they (the animals) were so lawfully at large under the provincial law, the mere letting of them at large would not, in itself, be a defence." He did not give any reason for his conclusion as to the intention of the Dominion legislature, admitting, however, that in the Railway Act itself there was no definition of "wilful." This construction of the statute would result in making the railway liable in one province or municipality, and not in another, according as each legislature or each municipality made a by-law. It cannot be acceded to that Parliament in passing the Railway Act intended to delegate power to subordinate bodies in respect of matters of such importance.

Perdue, J.A., thought that "wilful act" meant doing something which a reasonable man would not do, and that it was reasonable for the plaintiff to turn his animals at large a mile or two away from where they got upon the railway, when the municipal by-law permitted it. Here is a mixture of two qualities, legality and reasonableness. Apparently, no matter how "reasonable" it might be to turn animals at large, with reference to surrounding circumstances, the owner could not recover if a by-law permitting it were not in force, and, also, if a by-law were in force, that fact would enable the plaintiff to recover if his conduct in turning animals at large were not reasonable with regard to surrounding circumstances; that is to say, that if animals were turned at large 50 miles from a railway, the plaintiff could not recover if no by-law existed permitting the turning out, while if such by-law existed, the plaintiff could recover despite the fact that he had turned his animals at large within a mile of the railway. Really, what Perdue, J.A., says amounts to this, that any conduct which is legal is reasonable, and that one who does a reasonable act—*i.e.* a legal act—does not do a "wilful" act. Stated in this form, the untenable nature of the proposition is self-evident.

In *Early* v. *C.N.R. Co.*, 21 D.L.R. 413, the Supreme Court of Saskatchewan adopted the definitions given in the Manitoba case, but the horses sued for had been turned at large "deliberately and intentionally," and no by-law was proven, and so the Court held the act to be "wilful," though how it would be less "deliberate and intentional," and consequently not "wilful," if there had been a by-law, the Court did not point out.

In *Koch* v. *G.T.R. Branch Lines Co.*, *supra*, it was found, as a fact, that the horses killed got at large from an enclosure by unexplained causes, and it was not, therefore, necessary to construe "negligence or wilful act or omission," in the Railway Act, but the Supreme Court of Alberta nevertheless did so. Lamont, J., delivering the judgment of the Court, said, "where there exists a valid by-law *permitting* animals to run at large in a municipality, an owner cannot be held guilty of negligence (or wilful act or omission) in allowing

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his animals to so run. "It is not negligence to do that which is *authorised* by law." The two words italicised (by us) shew the confusion of thought in this dictum. The by-law "permits," it does not "authorise." A person is permitted to walk upon a sidewalk, under an overhanging stone about to be placed in the wall of a building, but if he sees that the stone is about to fall, and yet walks under it, a defence of contributory negligence would prevail; he was "permitted" to walk there, not "authorised."

"Wilful is a word of familiar use in every branch of the law, and although in some branches of law it may have a special meaning, it generally, as used in Courts of law, implies nothing blamable, but merely that the person of whose action or default the expression is used is a free agent, and that what has been done arises from the spontaneous action of his will. It amounts to nothing more than this, that he knows what he is doing, and intends to do what he is doing, and is a free agent." Per Bowen, L. J., in *Re Young and Harston*, 31 Ch. D. 168, 174.)

"Wilful misconduct," says Lord Bramwell "is something opposed to accidental or negligent," *Lewis* v. *G.W.R. Co.*, 52 L.T. 324; "Wilful neglect," said Mellor, J., in *R.* v. *Downes*, 1 Q.B.D. 25, "is purposely or intentionally to omit to do it;" "wilfully" is "purposely," "without reference to *bonâ fides*." (*Hutchinson* v. *Manchester R. Co.*, 15 M. & W. 314; *R.* v. *Price*, 11 A. & E. 727, 113 E.R. 590.)

Careful consideration of sec. 294 of the Railway Act, 1906, unprejudiced by local considerations and sympathies, carries conviction that "wilful," as used in the Act, means "intentional," as distinguished from "negligence," and carries in itself no imputation of blame or illegality, or any excuse for intentional acts permitted by local authority. Sec. 294 (1) provides that animals shall not be at large upon any highway, within half a mile of an intersection with a railway, unless in charge of a competent person; sub-sec. 2 provides for impounding; sub-sec. 3 negatives any right of action for killing or injuring animals so at large, at an intersection; sub-sec. 4 gives a right of action to an owner of animals killed on a company's property; it is a code in itself. (*Sporle* v. *G.T.P.R. Co.* (1914), 17 D.L.R. 367; *Koch* v. *G.T.P.R. Co.* (1917), *supra.*) Sub-sec. 5 provides that an owner who would otherwise have a right of action in respect of animals killed on the company's property shall not be deprived thereof by the fact that they were not in charge of a competent person; that is to say, that if animals at large upon the highway contrary to sub-sec. (1) get upon the property of the company, and are killed, the mere fact that they were not in charge of some competent person will not be a defence to an action, which can, however, be defended on the grounds set forth in sub-sec. 4. These grounds are: "such animal got at large through the (*a*) negligence or (*b*) wilful act or omission." Can it be said to be open to reasonable doubt that "wilful" here means "intentional," simply that and nothing more? If an owner purposely opens his gates, and lets his cattle out upon the highway, when a municipal by-law permits the running of animals at large, is his act less "wilful"—*i.e.* less "intentional"—than it would be if there were no such by-law? Has such by-law any meaning other than to give the municipality's consent to the running of animals at large? Having regard to the proximity of a railway, is the act of the owner who sets animals at large upon a highway, any more "reasonable" (if that word has anything to do with the matter) because the municipality says—"we've no objection?" In common sense, does not the owner take the risk

that his animals will stray and get upon railway property as much in one case as in another; it is not suggested, we hope, that the animals will take judicial notice of the non-existence of a by-law permitting them to run at large. What difference does it make to the company that a by-law permits, so far as the municipality is concerned, an owner to turn his animals out of his enclosure, if they get upon the company's property? In short, is not the meaning of the Railway Act in this respect very plain, that an owner has the choice of keeping his animals enclosed or of turning them at large at his own risk? Annotation.

We venture to suggest that when some case of the kind referred to reaches a higher Court, the preceding decisions will not be approved.

GLEN FALLS INSURANCE CO. v. ADAMS.

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Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Idington, Duff, Anglin and Brodeur, JJ. December 11, 1916.

APPEAL (§ II A—35)—JURISDICTIONAL AMOUNT—CONSOLIDATED ACTION.

Where there has been one action against three defendants, upon independant claims arising out of three separate contracts, and subsequently upon appeal judgment has been given in favour of the plaintiff, the judgment against each defendant being for less than $1,000, although the aggregate of judgments amounted to more than that amount, the defendants are in the same position as if separate actions had been brought against each, and the amount in each case being less than $1,000, there is no appeal to the Supreme Court of Canada.

[*Bennett* v. *Havelock Electric Light Co.*, 8 D.L.R. 954, 46 Can. S.C.R. 640, followed.]

MOTION to quash an appeal from the decision of the Appellate Division of the Supreme Court of Ontario reversing the judgment at the trial by which the plaintiff's action was dismissed. Statement.

Respondent's counsel claimed that the Court had no jurisdiction to entertain the appeal as under the circumstances, which are stated in the headnote, there was no sum exceeding $1,000 in controversy.

W. L. Scott, for the motion. *Leighton McCarthy*, K.C., *contra*.

FITZPATRICK, C.J.:—I concur in the opinion of Anglin, J. Fitzpatrick, C.J.

IDINGTON, J.:—I am unable to distinguish this case from that presented in the case of *Bennett* v. *Havelock Electric Light Co.*, 8 D.L.R. 954, 46 Can. S.C.R. 640, in relation to the right to appeal and therefore think following that decision the motion to quash must prevail with costs. Idington, J.

DUFF, J., concurred in the judgment quashing the appeal. Duff, J.

ANGLIN, J.:—Under the judgment of the Appellate Division the plaintiff has recovered against three defendants sued in one action upon independent claims arising out of three separate contracts for amounts each individually less than $1,000 but in the aggregate exceeding that sum. He had been allowed by Anglin, J.

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order of the Master in Chambers, presumably in order to save expense, to proceed with this single action, "setting out the separate amounts claimed . . as against each defendant respectively," instead of being obliged to discontinue it and commence a separate action against each defendant upon its own contract and then have the three actions consolidated. It was stated at Bar that this order was made in the exercise of power conferred by R.S.O. 1914, ch. 183, sec. 158, sub-sec. 1. But that provision would appear not to extend to actions brought upon separate and unconnected policies—it deals with "several actions brought for the recovery of money payable under *a contract of insurance*." Probably the order was made under the more comprehensive terms of the Ontario Consolidated Rule 320. The plaintiff was afterwards allowed to prosecute a single appeal from the judgment at the trial to the Appellate Division, and the judgment of that Court allows "the plaintiff's said appeal."

These facts, in my opinion, do not give jurisdiction to this Court to entertain the proposed appeals of the defendants. The recovery against each defendant is for a sum less than $1,000 and is upon a contract on which that defendant alone is liable. The appeal of each defendant is only against the judgment affecting it. It has no concern in the contract or liability of either of the other defendants. Though for convenience their appeals would, no doubt, be heard together, and probably upon a single appeal case, the appeal of each defendant is nevertheless a distinct and separate appeal in which the matter in controversy is its own liability and nothing else. I think the motion to quash must prevail. *Bennett* v. *Havelock Electric Light Co.*, 8 D.L.R. 954, 46 Can. S.C.R. 640, is a decision in point. Indeed, in that case the liability of the several defendants arose out of a single transaction and it was even contended that as directors, guilty of misfeasance, their liability was joint and several. Nevertheless an attempted joint appeal to this Court was quashed, the judgment of the Court of Appeal (reversing, as in this case, that of the trial Judge dismissing the action) having held each defendant liable only for $1,000 and costs. If there was not jurisdiction in that case there certainly cannot be in this.

Brodeur, J.

BRODEUR, J.:—I am unable to distinguish this case from the case of *Bennett* v. *Havelock Electric Light Co.*, 8 D.L.R. 954, 46

Can. S.C.R. 640, which was decided by this Court on February 22, 1912, and which is mentioned in Cameron's 2nd ed., p. 278.

In that case of *Bennett, supra*, an action had been instituted against several defendants as directors of the company respondent, asking that they be condemned to pay an amount of $4,700 being the amount of alleged secret and dishonest profits. The Divisional Court had ordered that the plaintiffs could recover against each of the defendants the sum of $1,000.

In the present case the insurance companies, defendants, were sued by virtue of different contracts for an alleged loss of the premises insured. The companies were allowed to plead separately and the cases were tried as one case in order to reduce the cost of "enquête" under the provisions of art. 158 of ch. 183 R.S.O. The amount to which each company was condemned was below $1,000.

What we should consider n this case in order to determine the jurisdiction in question is not the aggregate amount for which the respondents were sought to be made liable, but the position is the same as if proceedings had been taken separately against each of the defendants.

I have come to the conclusion that under the provisions of sec. 48, sub-sec. (*c*), the matter in controversy in the appeal does not exceed for each of the defendants the sum of $1,000, and that we have no jurisdiction.

The motion to quash should be granted. *Appeal quashed.*

JOHNSON v. LAFLAMME.

Quebec King's Bench, Sir Horace Archambeault, C.J., Lavergne, Cross, Carroll and Pelletier, JJ. June 27, 1916.

1. VENDOR AND PURCHASER (§ II—30)—RIGHT OF REDEMPTION—TIME.

Where property has been sold subject to a right of redemption within a certain time, it is sufficient to satisfy sec. 1550 C.C. (Que.) that the vendor, before the expiration of the period of delay, acquaint the purchaser of his intention to redeem, and no payment or tender of the amount due is necessary; an action to compel the return of the property need not be commenced until after the period of delay has expired.

[*Trudel* v. *Bouchard*, 27 L.C.J. 218; *Walker* v. *Sheppard*, 19 L.C.J. 103 distinguished; art. 1662 French Code, considered.]

2. VENDOR AND PURCHASER (§ II — 30) — REDEMPTION—CONDITIONS—REGISTRATION.

A vendor who stipulates for a right of redemption preserves only a "*jus ad rem*" to the property sold, and upon obtaining a discharge or retrocession from his buyer must by virtue of art. 2098, C.C. have these deeds registered, as they transfer the ownership.

[*Sirois* v. *Carrier*, 13 Que. K.B. 242, followed.]

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JOHNSON v. LAFLAMME.

Archambeault, C.J.

APPEAL from a judgment of the Superior Court in an action to compel the return of property sold with a right of redemption. Affirmed.

Crepeau & Cote, for appellant; *Girouard*, for respondent.

ARCHAMBEAULT, C.J.:—On October 20, 1904, one O. Laflamme sold a property to appellant for $600, with the right of redemption during a term of 10 years. In 1907, O. Laflamme transferred his right of redemption to the respondent herein. Before the expiry of the delay of redemption, on October 19, 1914, respondent, by notarial deed, notified appellant, that he intended to exercise his right of redemption, offering him at the same time the reimbursement of the purchase price, plus interest due. Appellant refused the offer and tender made and respondent then brought the present action which has been maintained by the Superior Court.

The first question to be decided is whether the action taken to obtain the return of a property sold with the right of redemption must be instituted within the delay stipulated for the redemption, or whether it suffices that the vendor should acquaint the purchaser within this delay of his intention to redeem the property saving his right to bring suit later after the expiry of the delay in order to have his rights recognized in the event of the purchaser refusing to return the property.

In the present instance, the delay of redemption expired on October 20; the tender was made the day before, on the 19th, but suit was only brought on February 1, following. Appellant contends that respondent has not brought his action in useful time, that is to say, before the expiry of the delay of redemption. He relies in support of his contention upon art. 1550 of the Civil Code; on a judgment of the Court of Review rendered at Montreal in 1874, in the case of *Walker* v. *Sheppard*, 19 L.C.J. 103; on a judgment of Jetté, J., rendered in 1883, in the case of *Trudel* v. *Bouchard*, 27 L.C.J. 218, and finally upon the opinion of Mr. Mignault in his Droit Civil Canadien (vol. 7, p. 161).

Article 1550 of our Civil Code declares that:—

faute par le vendeur d'avoir exercé son action de réméré dans le terme prescrit, l'acheteur demeure propriétaire irrévocable de la chose vendue.

The English version of the article reads as follows:—

If the seller fail to bring a suit for the enforcement of his right of redemption within the stipulated term, the buyer remains absolute owner of the thing sold.

There is no doubt but that art. 1550 seems at first sight to require the institution of a suit within this delay if the buyer would preserve his right of redemption. The English version especially seems to leave no doubt in this respect. The terms used "fail to bring a suit" could hardly be interpreted otherwise than as meaning that it is necessary to bring the suit within the stipulated term of redemption.

But this rule appears to me so contrary to all principles, and in such opposition to the doctrine universally recognized in France both by the Courts and by the writers, that I cannot arrive at the conclusion that this is our law on the subject. Art. 1550 is new law. Before the Code, the right of redemption was not lost by the expiry of the stipulated term, but subsisted until the purchaser had brought suit before the competent tribunal to have it declared that the term had lapsed. In their report, the codifiers first of all reproduce this disposition of the law as it then existed, then they suggest to alter this law and to adopt the rules of the Code Napoleon, declaring them to be far simpler and more just in their application and effects. The legislature accepted the suggestions of the codifiers, and these are reproduced in art. 1540 to 1551 of our Civil Code. Therefore, the rules of the French Civil Code on this subject have been incorporated in our Quebec Civil Code. Art. 1550 is drafted in exactly the same way as art. 1662 of the French Code. Now, in France, authors and jurisprudence agree in the view that art. 1662 does not require the vendor to bring judicial proceedings against the purchaser before the expiry of the delay, but that it simply means that before the expiry of this delay the vendor must acquaint the purchaser with his intention of enforcing his right of redemption. The words "faute d'avoir exercé son action de réméré" appearing in the Code are equivalent to this other expression "faute d'avoir usé du pacte de réméré." (Aubry et Rau, p. 409, n. 10; Dalloz, Codes annotés, art. 1662, No. 5.) When the codifiers suggested the introduction into our law of the French rule of law on this matter, they were certainly not ignorant of the interpretation which art. 1662 of the Code Napoleon received in France, hence, we must conclude that they desired the adoption of the provisions of the French law as interpreted by the jurisprudence doctrine.

This interpretation is, moreover, in accord with the principles

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governing the subject. The exercise of the right of redemption must be rendered as easy as possible. The sale with right of redemption is but a guarantee given by the vendor to his creditor. When the vendor offers to reimburse his creditor, his offer should be looked upon favourably, and the creditor cannot be allowed to refuse this offer, and his claim to keep the property cannot be countenanced, because the vendor has not appealed to the Courts to enforce his right within the delay stipulated for the exercise of this right. Courts have been instituted to compel the recognition of existing rights, not for the purpose of creating them.

It is true that the doctrine which I lay down is contrary to the English text of art. 1550, but this text is not in conformity with the French version as properly interpreted and, therefore, the English version cannot be a proper guide for us.

The judgment in the case of *Walker* v. *Sheppard*, 19 L.C.J. 103, was not based solely on the lack of a suit within the stipulated term, but appears based rather on the absence of tender and deposit. "Considering," says the judgment, "that the plaintiff has neither before suit nor during the pendency thereof tendered and deposited the purchase price." It is true that the judgment adds that not only should the suit have been brought within the stipulated term, but should have been returned into Court within this delay. But this last considerant added to a reason amply sufficient to justify the judgment has not the same force as if it were the sole reason of the judgment. In any event, it would be impossible for me to adopt this view for the reasons I have already given, even if it had been the only ground of the judgment of the Court of Review.

As to the judgment of Jetté, J., in *Trudel* v. *Bouchard*, 27 L.C.J. 218, he simply held, contrary to the opinion expressed by the Court of Review in *Walker* v. *Sheppard*, 19 L.C.J. 103, that it is not necessary that the action should be returned within the delay for redemption. In that case, the action was brought before the expiry of the delay, but returned after the delay, and the Court held that the action had been properly taken. The question of whether the action should be instituted within the delay of redemption did not arise in the case, was not discussed, nor decided.

The authority of Mr. Mignault certainly favours the contention of the appellant. Mr. Mignault lays it down absolutely that the action for the enforcement of the right for redemption must be instituted within the stipulated term. Besides the English text of art. 1550, he invokes in support of this view the provisions of art. 2101 C.C., which require that every judgment permitting the exercise of a right of redemption must be registered within 30 days after it is rendered. This provision, says Mr. Mignault, seems to indicate that the legislature when mentioning in art. 1550 the exercise of a right of redemption gave this expression its ordinary sense and, therefore, required that the action itself should be brought within this delay.

This deduction to my mind is not logical. Because the law requires the registration of a judgment pronouncing upon the redemption, it does not follow that when the legislature states that the vendor should exercise his right of redemption within the stipulated term, he meant thereby an action at law. When the action at law is taken, the judgment which upholds it must be registered for the information of third parties; but this registration is not necessary as between the vendor and the buyer. The latter may invoke and enforce his judgment against the buyer even if the judgment had not been registered.

In the second case, appellant contends that respondent has lost his right of redemption as a result of his not having made a legal tender in proper time. The protest which respondent served on appellant on October 19, 1914, states that the notary offered the appellant the amount due in current coin and value. Appellant contends this tender was not sufficient inasmuch as the law requires for the validity thereof, when made in money, that it should be made in current coin of legal denominations and that the enumeration and kind thereof be specified.

The question of the necessity of the tender in matters of redemption has been discussed in France. Three systems have been advocated by the authors. According to the first opinion, the vendor is obliged to make a proper tender to the buyer before the expiry of the stipulated term (2 Planiol, No. 1583). The second opinion, although requiring as a matter of principle proper tender, admits that the Courts may accept as sufficient a simple offer provided it be sincere and provided the vendor is in a position to fulfil it immediately (4 Aubry et Rau, No. 357).

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Finally, according to the third opinion, a tender is not necessary. It is sufficient for the vendor to declare to the buyer his will to redeem within the stipulated term. Laurent, Marcadé, Guillouard amongst others, share this view. Jurisprudence in France has always decided according to the views of Laurent. A simple declaration of intention, says the Court of Cassation, is sufficient because no provision of law obliges the vendor to make within the stipulated term either a payment or a tender. (Sirey, 1856-1-671; 1873-1-134.) It has even been held that where the deed of sale made the exercise of the right of redemption conditional upon the reimbursement within the delay stipulated, tender made within the delay will prevent the vendor from losing the benefit of the term even if this tender is irregular and not followed by a deposit. (Dalloz P. 1867-2-95.)

In this country, this question came up in the case of *Dorion* v. *St. Germain*, decided by this Court in 1871 against the contention of the appellant. 15 L.C.J. 316. It is quite true that only the costs were involved in that case, but the entire doctrine concerning tender and deposit in matters of redemption was discussed at length, and for this reason the case is well worth studying.

In the present case, the notary declares in his protest that he offered the appellant the amount due in capital and interest. Appellant refused this offer, for the moment at least. Respondent waited a month to see whether appellent persisted in his refusal. On November 18, as he had received no news, he informed the appellant by letter that the amount due was deposited with the Quebec Bank where appellant could obtain it on signing a discharge. Then, when he brought suit he deposited the amount with the clerk of the Court.

Under the circumstances, I am of the opinion that the contentions of appellant on both points are ill-founded and, consequently, I come to the conclusion that judgment of the Superior Court must be confirmed.

Carroll, J.

CARROLL, J.:—Appellant raises two grounds against respondent's action: firstly, that the action was not taken within the stipulated delay; secondly, that the offers were illegal and insufficient.

Appellant bases his first ground on art. 1550 C.C., and the English text thereof.

The French version of our Code reproduces textually art. 1662 C.N., and we are informed by the codifiers that they desired on this question to make our law similar to the French law. Now, all the commentators on the C.N. state that the expression "faute par le vendeur d'avoir exercé son action de réméré" does not mean that the right of redemption can only be exercised by means of an action at law.

And just as the C.N. used indifferently the expressions "exercer l'action de réméré" and "user de la faculté de réméré," our own Code also uses the words "exercer la faculté de réméré" (C.C. 1552). By using the words "exercer l'action de réméré," the legislator simply means "in default of the vendor having exercised his right to redeem." (19 Baudry-Lacantinerie, p. 649; 16 Duraton, No. 403:—Guillouard, de la Vente, No. 664.)

Does the text of art. 1550 C.C. justify the contentions of those who state that an action at law is required? I do not think so. Had the legislator intended that an action "at law" be brought within the term, he would have so stated in formal words and instead of writing "faute par le vendeur d'avoir exercé son action de réméré" he would have written "in default of the vendor exercising l'action en justice" or at least, "l'action de réméré." He would have used a general expression and not an expression which only concerns the person who desires to exercise the right of redemption. He would not have said "son action de réméré." The French legislator—for this text comes from the C.N.—does not draft laws in this manner. He does not enact that such and such a person is entitled to "his" possessory action or to "his" petitory action but that he is entitled to bring "a" possessory action or "a" petitory action.

The English translation of our Code has given to the word "action," the meaning of an action at law. By accepting this translation, we would not be giving effect to the spirit of the law. Besides, this interpretation would render impracticable the exercise of the right of redemption. The vendor has, until the very last minute of the delay, the right to make his tender. Let us suppose that he lives 100 miles away from the County Court of his district; he could up to the last minute make a proper tender to the buyer and yet he would be unable to bring his action at law.

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But, it is objected, art. 2101 C.C. requires the registration within 30 days of the judgment recognizing the exercise of the right of redemption. Now, such a judgment may be rendered 6 months or 6 years after the delay and the action at law under this system could, therefore, be brought 1 or 2 years after the expiry of the delay. What protection would third parties then have in transactions concerning immovables so affected. This difficulty requires a word of explanation.

It is quite true that art. 2101 of our Code does not appear in the C.N. and that is the reason which leads Mr. Mignault (vol. 7, p. 161) to decide in favour of the necessity of the action at law.

The substance of our art. 2101 is reproduced, however, in art. 4 of the French law of 1855. It is there enacted that the judgment granting the exercise of the right of redemption must be registered in the margin of the registration of the deed of sale. This provision has not caused the commentators on the C.N., who wrote subsequently to this law of registration, to give a different interpretation to art. 1662 C.N , textually reproduced in art. 1550.

If after the expiry of the delays, there be neither judgment nor authentic deed establishing a proper tender, third parties who have contracted in good faith with the purchaser under deed with right of redemption cannot be troubled as a result of a verbal declaration or of a deed under private writing to which they were not parties. The deed of sale with right of redemption must be registered. It confers upon the buyer a *jus in re*. Has the vendor under these circumstances a real right or a personal right? If his right be a real right, if he has never ceased to be the owner and if the exercise of the right of redemption does not retrocede to him the property of which he always remained the owner under suspensive condition, it is not necessary to register a discharge which the buyer, under the deed of redemption, would give to the vendor; for art. 2098 C.C. only requires the registration of a title conveying the ownership. If, on the contrary, the vendor only retained a personal right in the property sold with the faculty of redemption, the discharge or retrocession made by the buyer must be registered, for then we have a case of conveyance of ownership.

This difficulty has been the source of a controversy in France. Jurisprudence has followed Pothier and certain other authors

and considers the right of the vendor who stipulates the faculty of redemption as a simple personal right or *jus ad rem*. (Pothier, de la Vente, No. 387.) Most of the authors, on the other hand, consider the vendor as remaining the proprietor under suspensive condition. It is useless to give here the arguments in favour of and against these two theories. It is sufficient to say that the doctrine of Pothier and the French jurisprudence have been accepted by this Court in the case of *Sirois* v. *Carrier* (1904), 13 Que. K.B. 242, where it was held that the vendor who stipulates the right of redemption only preserves a *jus ad rem* to the property sold. We must, therefore, say that in our province such is our law and that a vendor obtaining a discharge or retrocession of his buyer is obliged, in virtue of art. 2098 C.C., to have these deeds registered as these carry a transfer of ownership. In any event, a third party contracting in good faith with the purchaser, who had granted a right of redemption, after the expiry of the delay granted to the vendor for the exercise of his rights need have no fear of eviction. The vendor under a right of redemption can become owner again at the expiry of the stipulated term; but if he fails to register his discharge or retrocession, although his deed will avail as between himself and his purchaser, it will not avail as against a third party who, finding no mention thereof at the registration office, will be justified in his belief that the buyer under a deed of redemption has become the irrevocable owner. The purchaser in the sale of redemption, once the delay is expired, remains proprietor, *ipso facto*. (Rolland de Villargues, vo Réméré, No. 47.) No judgment is necessary to pronounce upon this. No doubt, to facilitate transactions with third parties, it will be more prudent to establish the lapse of the right of redemption, but the buyer is not obliged to take any proceeding.

(The Judge concurred in the remarks of the Chief Justice as to the offer and tender.) On the whole, I would confirm.

CROSS, J., dissented. *Appeal dismissed.*

KNOTT v. TELEGRAM PRINTING CO.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron and Haggart, JJ.A. December 20, 1916.

LIBEL AND SLANDER (§ III A—95)—EXCESSIVE DAMAGES—NEW TRIAL.

A new trial should not be given in an action for libel merely because the damages awarded by the jury appear excessive, even though they were

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larger than the Court might have given, provided they are not so large that twelve sensible men could not reasonably have given them.

[*Praed* v. *Graham*, 24 Q.B.D. 53, followed. See also *Quillinan* v. *Stuart*, 30 D.L.R. 381, 36 O.L.R. 474.]

[Perdue and Cameron, JJ., give valuable and full consideration to the respective provinces of Judge and jury in libel actions, and as to the extent to which a Judge, in his charge, may deal with innuendoes and defamatory passages in the article complained of.]

Statement.

APPEAL by defendant from the judgment of Galt, J., in favour of the plaintiff, in a libel action. Affirmed.

Hoskin, K.C., and *Manning*, for appellant, defendant.

Phillipps, K.C., and *Rogers*, for respondent, plaintiff.

Howell, C.J.M.

HOWELL, C.J.M.:—The damage in this case, $11,500, seems very large and this is one of the grounds put forward for a new trial. The circulation of the newspaper is claimed to be over 40,000; the plaintiff is a merchant and a prominent man, and immediately after the publication he called at the defendant's office and saw the chief editor, who, it seems, did not pretend that there was any justification for the article, but declined to publish anything in the nature of an apology. Notice of action was served under the Act, and this action was commenced. The defendants pleaded the truth of the statement and fair comment. These pleas remained on the record until the trial actually commenced, when counsel for the defendants withdrew them.

I can find no excuse of any kind in the evidence for the publication. It appeared as an important news article, with prominent head-lines in the front page, the most noticeable part of the newspaper, and legal malice might well be inferred by the jury.

The question of granting a new trial because of excessive damage in a libel suit is discussed in *Praed* v. *Graham*, 24 Q B.D. 53 at 55, by the Master of the Rolls, Lord Esher. He also lays down the rule that, where the damages are larger than the Court would have given "but not so large that twelve sensible men could not reasonably have given them," then the Court ought not to interfere with the verdict.

I have not overlooked the remarks made in *Johnston* v. *Great Western R. Co.*, [1904] 2 K.B. 250, with reference to *Praed* v. *Graham*; but I cannot think that those remarks have any bearing on this case. I do not think on the ground of excessive damages that a new trial should be granted.

I agree on the other points taken with my brothers Perdue and Cameron, that the verdict should not be disturbed.

The appeal must be dismissed with costs.

RICHARDS, J.A. (dissenting):—The serious part of the libel complained of was that it (as alleged by the plaintiff) charged the plaintiff with attempting to extort money from parties requiring liquor licenses, by compelling them to pay for influence in getting such licenses issued. The article directly suggested such practices only against S. Hart Green But it is alleged that certain references to the plaintiff, in the article, suggest that he participated in such alleged attempts at extortion.

The article was such that the construction contended for by the plaintiff could certainly have been put upon it, though it could also have been held by the jury that the insinuations of extortion did not extend to the plaintiff, and that, as to him, the article contained only vulgar abuse, in calling him a "Grit heeler," a "Grit wheel horse" and "gum shoe Jack."

I express no opinion as to which meaning I would take from reading the language in question. But it undoubtedly was open to the jury to take either.

In charging the jury the trial Judge did not direct them, or suggest, that they should decide whether the charge of extortion extended to the plaintiff. He assumed throughout the charge that it did. He did tell them that it was open to them to say whether, or not, the article meant what was charged. But he did so on the assumption, as I read his charge, that the whole article did apply to the plaintiff.

In that respect there was, I think, with deference, a serious omission in the Judge's directions to the jury, as, if they, on being so directed, had chosen to take the view that the extortion charges did not refer to the plaintiff, they would not have been justified in bringing in very large damages. It is true that they would still have had to deal with the abusive epithets applied to the plaintiff. But no one can fancy damages, for such language alone, being greater than would be necessary to vindicate the plaintiff's character from the effect of such petty abuse.

It is only fair to the Judge to state that, so far as I can see, his attention was not called by anyone to the omission, from his charge, of the direction I have referred to.

A ground of appeal is that the damages were excessive. I cannot come to any other conclusion than that they were, whether the article does or does not bear the construction contended for

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by the plaintiff. It is very difficult in a case of defamation to say to what extent the plaintiff really was injured; and, for that reason, Courts have hesitated to substitute their views, as to quantum of damage, for those of juries.

There must, however, be some limit. I realize that the plaintiff must have suffered great, and apparently wholly undeserved, annoyance from the attack upon him, and I can appreciate that the refusal, or neglect, to apologize, and the pleading that the charges were true, were legitimate grounds for increasing what otherwise would have been proper to allow as damages. But, even then, I can see no justification for so big a verdict. Mr. Knott suffered no actual harm, or, at least, did not shew that he had.

Every case has to be judged by itself. Decisions were cited where Courts refused to interfere on the ground of the large amounts of verdicts in cases, not shewing, on the face of the reports, greater injury than that suffered here. I can only say, as to them, that perhaps there were matters not shewn in the reports, which affected the juries. At any rate, I feel bound to exercise my own intelligence in this case; and, so doing to the best of my capacity, I feel that the amount awarded was greater than twelve reasonable men should reasonably have awarded.

I think the verdict should be set aside and a new trial ordered. And, in doing so, I am influenced chiefly by the excessive (as it seems to me) amount of the verdict, though also to some extent by the omission, as explained above, of the Judge to direct the jury to consider whether the language of the article did, or did not, charge attempted extortion by the plaintiff. If, on their attention being drawn to that question, the jury had chosen to think that such charge did not extend to the plaintiff, only a comparatively small verdict (at the most) would have been justified.

Perdue, J.A.

PERDUE, J.A.:—This is an action of libel brought by the plaintiff against the defendants, who are the printers and publishers of a daily newspaper published in the City of Winnipeg and known as "The Winnipeg Telegram." The plaintiff is a merchant engaged in the wholesale fur business and resides in Winnipeg.

The alleged libel is set out in the second count of the statement of claim, which is as follows:—

On the third day of June, A.D. 1915, the defendant in the said "The Winnipeg Telegram" falsely and maliciously printed and published and caused to be printed and published of the plaintiff the words following:—

HOTEL MEN ARE HAVING TROUBLE WITH RENEWALS.

"SEEING" S. HART GREEN IN AN EFFORT TO PRESERVE THEIR LICENSES.

There is said to be a procession of anxious hotelmen and liquor dealers to the law offices of S. Hart Green these days. Not only are they anxious but all of them are more or less infuriated for they have been informed that they must "see Green" if they are to get their licenses renewed. Grit wheel horses have given them the tip that "Green can fix it." Incidentally there are additional tips that this energetic ex-Grit member for North Winnipeg is the "only one" with sufficient "influence" with the new government to get the licenses for the sale of liquor renewed just at present.

And rumors are numerous as to the size of the fees which S. Hart is said to be exacting as the price of his well-known skill with the Liberal leaders.

Hotelmen, too, are generally informed by these same tipsters that James Argue, ex-M.P.P., chief license inspector, is shortly to be removed, and that J. A. ("Jack") Knott, the well-known Grit heeler is to succeed him.

This combination of S. Hart and "Gum Shoe" Jack is certainly alarming the hotelmen and liquor store dealers of the city. Some of them do not hesitate to mention the sums they have been told are necessary to secure their licenses, and the amounts are well up towards four figures. Some assert they have paid up. What they are anxious to know is, whether the "goods can be delivered," even if they do "retain" the right Grit lawyer in the case. They think they are entitled to some guarantee. Some of them are threatening to call on Premier Norris and tell him what the gum shoe crowd is doing, to be sure it has his approval. The street gossip is very vigorous, and names, dates and amounts of money necessary to secure license renewals are freely being dealt with.

Not all seekers after renewals have so far "come across." According to the same gossip some of them have demurred to making the required payments, and in a number of cases the applications for license renewals have been held up, pending "further investigation."

The hotel and liquor men profess themselves sorely perplexed over the situation. They, with the rest of the public, were given to understand that, with the incoming of the new government, liquor licenses would be absolutely abolished. An era of total prohibition to extend all over the province was to be inaugurated. Now they are quietly informed that they can have their licenses renewed, but only on certain conditions, one of which is that they must "see Green."

Ordinarily, perhaps, they would not be averse to accepting the new conditions, but what guarantee, they ask, have they that even after they meet the requirements their licenses will not soon be revoked under a plea that the government is carrying out its pre-election policy. That's what makes many of them hesitate. The others—those who take no chances—are said to be docilely following instructions.

They are "seeing Green" and the path which leads to that astute lawyer-politician's office is said to be in danger of wearing out under the constant tread of the steady procession of anxious license holders.

The next 9 paragraphs set out the innuendoes which are of great length. Amongst other meanings ascribed to the article in question it was charged in the innuendoes that the plaintiff and S. Hart Green in combination were guilty of extortion and were

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using corrupt influence with persons in authority to prevent the issue of licenses until persons applying for licenses paid moneys to the plaintiff and said Green as a bribe, and that the plaintiff and S. Hart Green had entered into a combination for the purpose of endeavouring to exact from persons conducting hotels and liquor stores in Winnipeg moneys as the price of influence to obtain licenses and renewals of licenses to sell liquor. Meanings were also ascribed to the expressions "the well-known Grit heeler" and "Gum Shoe Jack," etc.

The defendants pleaded justification, that the words in their natural and ordinary meaning were true, that they were fair comment, that they were published in the public interest believing them to be true and without malice. These pleas the defendants withdrew at the commencement of the trial.

The action was tried before Galt, J., and a jury. The defendants were found guilty of libel and a verdict returned for $11,500.

The defendant appeals, principally on the ground that there was misdirection by the Judge and that the verdict was excessive. The main objection to the charge is a statement by the Judge on p. 266 of the record. After discussing at length the innuendo contained in par. 3 of the statement of claim, the Judge proceeds in these words:—

> Now that is a very long drawn out explanation of what was intended by the words in the article. It is quite possible that such an inference as that could be drawn from the words that were used in the article. I do not mean to say that word for word all of that might follow, but the general meaning set forth there in that innuendo, I should say, might clearly enough be drawn from the words used in the article, if you chose to draw that inference.
>
> We know what the defendants say, that the words do not mean any such thing as that at all, just a little vulgar abuse that this American editor that they had at that time chose to indulge in, and w were told by one or two others that every newspaperman has a right to indulge in towards the public, but I will say a little more about that later on. The general meaning is at all events that these two parties were extorting fees from hotelmen round here in order to get their licenses.

The defendant complains that in the last sentence of the passage quoted above, the Judge was giving the meaning or effect of the article, instead of leaving it to the jury to make that finding. The plaintiff contends that the Judge, who was then discussing the lengthy innuendo, summed up its general meaning in the sentence referred to. It is quite possible that the Judge was speaking of the meaning of the innuendo and not of the alleged libellous article.

But even if the statement was made with reference to the article itself, was the Judge exceeding his duties in making it?

The Judge properly told the jury that if they rejected the innuendo the plaintiff might fall back upon the article itself and urge that, without the innuendo, it is defamatory on the face of it apart from the meaning ascribed. See Odgers' Libel and Slander, 5th ed., 1911, p. 117. The question whether the words are capable of a defamatory meaning is for the Judge. The meaning conveyed by the whole passage is a question for the jury. He must always leave to the jury the question whether the words are or are not a libel. He may tell the jury his own view of the matter, but he should leave it to the jury to say whether the publication was a libel: *Darby* v. *Ouseley*, 1 H. & N. 1 at 13. In *Parmiter* v. *Coupland*, 6 M. & W. 105, Parke, B., said:—

> A publication, without justification or lawful excuse, which is calculated to injure the reputation of another, by exposing him to hatred, contempt, or ridicule, is a libel. Whether the particular publication, the subject of inquiry, is of that character, and would be likely to produce that effect, is a question upon which a jury is to exercise their judgment, and pronounce their opinion, as a question of fact. The Judge, as a matter of advice to them in deciding that question, might have given his own opinion as to the nature of the publication, but was not bound to do so as a matter of law.

In that case the objection to the charge was that the Judge had not stated to the jury that the publications amounted to libels.

In *Tuson* v. *Evans*, 12 A. & E. 733, 113 E.R. 991, a letter had been written by defendant characterizing the conduct of the plaintiff "as mean as it is dishonest." The defendant failed in his defence of privilege, and Maule, J., told the jury that the publication was a libel and that the only question was the amount of damage. A motion was made for a nonsuit and objection was taken to the above charge. The Court held that the Judge was right and the case had been properly left to the jury.

In *Baylis* v. *Lawrence*, 11 A. & E. 920, 113 E.R. 664, Patteson, J., said:—

> Here the Judge merely abstained from giving any opinion as to the publication. A Judge is, of course, not precluded from giving his opinion; but it is nowhere laid down that he is bound to do so.

In *Haire* v. *Wilson*, 9 B. & C. 643, 109 E.R. 239, Lord Tenterden, C.J., said:—

> If the Judge thought the tendency of the publication injurious to the plaintiff, he ought to have told the jury it was actionable, and that the plaintiff was entitled to a verdict.

The question is summed up by Mr. Bower in his Law of Action-

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able Defamation (1908), at p. 51: After shewing that it is a question of fact whether the article did nor did not bear the assigned sense (if any) and whether in such a signed sense, or in its primary sense it was or was not defamatory, he proceeds:—

> Provided that, where any such question of fact is left to the jury, it is the duty of the Judge to direct them as to what in law constitutes libel, or slander, as the case may be, and the Judge may, but is not bound to, express to them his own view of the meaning of the defamatory matter proved to have been published in the particular case.

In support of this proposition, the author refers to several of the cases above cited.

Now, the Judge did fully instruct the jury as to what constituted libel and as to their functions and duties. In several places in the charge I find that the jury were explicitly instructed by the Judge that it was for them to make the finding as to the meaning of the words, and for them to say whether the article was or was not defamatory.

I would refer to his instructions contained in the following pages of the record, 262, 263, 269, 275, 281, and at the close of the charge at p. 283. In his final instructions he said: "So you will notice and consider whether the meaning to be taken from this article as a whole is or is not defamatory of the plaintiff in the sense that has been shewn to you." He then gave the jury a copy of the pleadings so that they could see the article and the innuendoes.

In support of their objection to this part of the charge, defendants rely upon *Bray* v. *Ford*, [1896] A.C. 44; *Dakhyl* v. *Labouchere*, [1908] 2 K.B. 325*r*; and *Hunt* v. "*Star*," [1908] 2 K.B. 309. In the first case above referred to, the trial Judge directed the jury that the plaintiff, who was a solicitor, was entitled to charge an institution, of which he was occasionally a solicitor, and also a governor, the profit costs, which he might have charged if he had not been governor of the institution. It was held that this was a misdirection upon a point of law, and that it might have affected the jury in assessing the amount of the damages. I cannot see how this decision applies to the present case.

In *Dakhyl* v. *Labouchere*, *supra*, the defendant had published an article concerning the plaintiff, in which, amongst other things, it was stated, "He is a quack of the rankest species." The trial Judge told the jury that the term "quack" meant a pretender to

skill, which the pretender did not possess. It was held that there are other meanings of the word "quack" such as a person who, however skilled, lends himself to medical imposture, and that the jury had not the chance of affixing the proper meaning to the word, or of saying whether it fitted the plaintiff, if they followed the Judge's direction. There was also a misdirection on the plea of fair comment. A new trial was therefore granted. The only way in which this decision can apply to the present case would be in dealing with the admission of evidence as to the meaning of the words "Gum shoe" and "heeler," etc., which I will discuss later on.

In *Hunt* v. "*Star*," *supra*, the misdirection was that the question of fair comment had not been left to the jury as a separate issue. It has no bearing upon the present case.

In considering whether there has been misdirection, a single sentence has not to be separated from its context, unless it dominates the reasoning on which that part of the charge is based. *Blue & Deschamps* v. *Red Mountain R. Co.*, [1909] A.C. 361, at 368. In the present instance, the Judge was, as I have shewn, acting within his powers in giving his own view of the meaning of the article, the final decision on that point being left to the jury.

In another part of his charge the Judge said:—

> If it could be shewn that these words were published in a *bonâ fide* manner as fair comment, and that they were true, certainly the defendant would be entitled to your judgment, but as the case is before you now, these accusations are all admittedly false, so that you have to deal with a tissue of falsehoods that have been circulated about this plaintiff, Knott, not one of which is attempted to be justified before you in Court to-day.

The plaintiff alleged that the words were false. The article is lengthy and contains many allegations. There is no plea that they or any of them were true, or that they were privileged, or were fair comment, or that there was any other justificat on of them. Taking them with the rest of the charge, I cannot regard this as a substantial misdirection. The Judge's intention was to remind the jury that the falsity of the words was admitted, that the truth of them was not in issue, and that there was nothing set up which would justify or excuse the defendants in using them. It was proper for him to direct them upon these matters and I cannot say that in using the language above quoted he exceeded his function as presiding Judge summing up to the jury.

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Evidence was called for the plaintiff to shew the meaning of certain words used in the article, the more important being "Gum Shoe Jack," "Grit wheel horse" and "Grit heeler." No objection was taken by defendants' counsel as to the admission of evidence to prove the meaning of these words, and he himself called several witnesses on behalf of the defendant who gave evidence as to the meaning of the above expressions. Objection is now taken by the defendant on this appeal that the evidence was improperly admitted. I do not consider that the point is of importance. The words taken by themselves would only be terms of abuse and not necessarily actionable. The gist of the article is that a combination had been formed for the extortion of money from applicants for licenses and that the plaintiff was a member of that combination. It was open to the jury to place this meaning on the article itself and the abusive terms applied to the plaintiff would serve to throw light upon the animus with which the article was conceived and published.

The Judge read a quotation from King's Law of Defamation, p. 801. It is objected that the passage does not correctly set forth the law, in view of the decision of *Green* v. *Miller*, 33 Can. S.C.R. 193. But the passage from the text writer really deals with the rule to be observed by the Judge in admitting evidence of the meaning attached to words having an ambiguous meaning and with the question of the granting of a new trial by the Court.

In another part of the charge the Judge referred to "the kind of conduct that the defendant has been guilty of in addition to publishing this libel." Clearly the Judge intended to say "articl " or "alleged libel" but by a verbal slip said "libel." I am confident the jury was not misled. From the rest of the charge and particularly the concluding part they would understand that the question whether the article was a libel upon the plaintiff or not was left to be answered by them.

Prof. Allison was called by the defendant to give the meaning of the words "Gum Shoe," "heeler," etc. In cross-examination by plaintiff's counsel the main portion of the article referring to the combination of Green and the plaintiff was read to the witness and he was asked "what in your mind was the purpose and object of the combination of Green and Mr. Knott referred to in that article?" No objection was taken to the question, and the

witness answered, "they were conspiring together to extract money from hotel-keepers." The Judge read this part of the evidence to the jury and said: "Now, I am bound to tell you, gentlemen, that if that is a proper inference to draw from the article, unquestionably the defendants have been guilty of defamation, with libelling the plaintiff." The Judge does not say that the meaning given to the words by the defendants' own witness is the proper one to be taken from them, but that if it is the meaning intended by the words, then the article is defamatory. Again I would point out that the charge as a whole clearly left it to the jury to find the meaning of the article and to say whether it was libellous or not.

In my opinion no substantial wrong or miscarriage has been occasioned in the trial of this action through misdirection or the improper admission of evidence. I am of the opinion that notwithstanding the matters complained of, the jury would have found, and properly have found, that the article was a libel upon the plaintiff and would have rendered their verdict in his favour.

There remains the question of the damages. It is claimed that the damages are excessive and that upon this ground alone the defendants are entitled to a new trial.

In *Davis* v. *Shepstone*, 11 App. Cas. 187, Lord Herschell, in giving the judgment of the Privy Council, said:—

> The assessment of these (the damages) is peculiarly the province of the jury in an action of libel. The damages in such an action are not limited to the amount of pecuniary loss which the plaintiff is able to prove.

In *Praed* v. *Graham*, 24 Q.B.D. 53, Lord Esher gave the judgment of the Court of Appeal on an application for a new trial in an action of libel where the main ground was that the damages were excessive. Upon this point he said (p. 55):—

> If the Court, having fully considered the whole of the circumstances of the case, come to this conclusion only:—"We think that the damages are larger than we ourselves should have given, but not so large as that twelve sensible men could not reasonably have given them." then they ought not to interfere with the verdict. If, on the other hand, the Court thinks that, having regard to all the circumstances of the case, the damages are so excessive that no twelve men could reasonably have given them, then they ought to interefere with the verdict.

The damages awarded in this case are very large. But it must be taken into account that the defendants' newspaper had a great circulation, it being placed at about 44,000 at the time of the publication. In *De Crespigny* v. *Wellesley*, 5 Bing. 392, pp.

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402, 406 (130 E.R. 1112), Best, C.J., said that publication in a newspaper may

> circulate the calumny through every region of the globe. The effect of this is very different from that of the repetition of oral slander. In the latter case, what has been said is known only to a few persons . . But if the report is to be spread over the world by means of the press, the malignant falsehoods of the vilest of mankind, which would not receive the least credit where the author is known, would make an impression which it would require much time and trouble to erase, and which it would be difficult, if not impossible, ever completely to remove.

Further on the same eminent authority says:—

> Before he (the defendant) gave it general notoriety by circulating it in print, he should have been prepared to prove its truth to the letter; for he had no more right to take away the character of the plaintiff, without being able to prove the truth of the charge that he had made against him, than to take his property without being able to justify the act by which he possessed himself of it. Indeed, if we reflect on the degree of suffering occasioned by loss of character, and compare it with that occasioned by loss of property, the amount of the former injury far exceeds that of the latter.

Vindictive or exemplary damages may be awarded by the jury in a proper case where they desire to mark their sense of the defendant's conduct, and they may punish the defendant by awarding the plaintiff damages in excess of the amount which would be adequate compensation for the injury inflicted on his reputation. See Odgers on Libel and Slander, 5th ed., 374.

It would be difficult to find a case in which all the elements which tend to aggravate the damages more completely co-exist than in the one at bar. The plaintiff was at the time of the publication of the article, and had been for a considerable time, a merchant doing business in Winnipeg where the defendant's newspaper was published and had a very wide circulation. The article, in effect, charged him with conspiring with another person to wrongfully extort money. It is difficult to measure the injury to the plaintiff's reputation and standing caused by such an imputation. It was false and malicious. Its vindictive character was evidenced by the epithets applied to the plaintiff. Opportunity to retract was given to the defendants and refused by them. When the plaintiff brought the action the defendants set up justification and averred the truth of the statements contained in the article, and kept this defence upon the files of the Court up to the very commencement of the trial. Then that defence was withdrawn and no attempt was made to justify or excuse the publication. The verdict of the jury was unanimous and a rider

was added in these words: "We further desire to express our very strong disapproval of any such abuse of the liberty of the press." It is evident that the members of the jury desired to put a stop to the practice too often indulged in by certain newspapers of defaming and vilifying persons who hold opinions different from those advocated by such newspapers. Exemplary damages were, no doubt, given in the present case for the purpose of having a deterrent affect.

Although the verdict is extremely large, I cannot say, considering all the circumstances surrounding this case, that the damages are so excessive that no twelve men could reasonably have given them.

I would therefore affirm the judgment and dismiss the appeal with costs.

CAMERON, J.A.:—This is an action brought by the plaintiff against the defendant for falsely and maliciously printing and publishing a certain statement or article concerning the plaintiff which is set forth in the pleadings. Amongst other defences originally set up were those of justification and fair comment, which were withdrawn just before the trial. The action was tried before Galt, J., and a jury who returned a verdict for the plaintiff for $11,500.

The defendant company appeals against the judgment entered on the verdict asking that judgment be entered for the defendant or a new trial granted, on some 40 different grounds set forth in the *præcipe* on appeal.

A great deal of the argument for the defendant was directed to a minute examination and close criticism of the trial Judge's summing up to the jury. One particular passage in the trial Judge's charge was made the occasion of prolonged discussion and with that passage I propose to deal at some length in view of the importance it assumed during the argument.

In commencing his summing up the trial Judge gave various definitions of libel and explaining its legal consequences in terms to which no exception is taken. He then proceeded to point out that the article in question, the alleged libel, contained words requiring explanation and stated the law relating to innuendoes, pointing out, as set forth in Odgers on Libel, p. 116, as cited by him, the office of the innuendo, and that if the words are capable

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of bearing the meaning ascribed to them in the innuendo it must be left to the jury to say whether or not they were in fact so understood (p. 261). And, further, that if the words do not, in the opinion of the jury, bear the meaning so ascribed the plaintiff may fall back upon the words themselves. Expanding this with a further exposition to the jury that they, on the article itself, without the innuendo, may say, "Well, we (the jury) think that this is defamatory on the face of it, that it contains a defamatory statement against the plaintiff on the face of it, quite apart from the expanded meaning which the plaintiff's lawyer has chosen to give to the words themselves," p. 261. Then he calls attention to the evidence in respect of the meaning of certain words in the article, and says, "and therefore it will be open to you to take the article as it is with the explanations of those words that have been given before you and to say whether or not, without reference to the innuendoes in the pleadings at all, they do not really bear a defamatory accusation against the plaintiff."

He next proceeded to read the article and the first of the innuendoes laid in the statement of claim and comments thereon saying the general meaning set forth therein might clearly enough be drawn from the words used "if you chose to draw that inference." Next he states the defendant's version of the meaning, that it was merely a "little vulgar abuse," such as newspapers have the right to indulge in. He then concludes his observations on this branch by the statement, after thus stating the plaintiff's and the defendant's different versions, "The general meaning is at all events that these two parties were extorting fees from hotel keepers somewhere in order to get their licenses."

It is on these 25 words, occurring on p. 10 of a charge taking up about 25 typewritten pages and several thousands of words that the principal objection to the Judge's charge is rested. It was urged that this was giving a meaning to the article complained of and that it was an invasion therefore of the functions of the jury, whose sole province it is to determine that issue.

It was formerly the function of the Judge to define for the jury whether an article was libellous or not. Since Fox's Act, 32 Geo. III. ch. 60, the practice has been different. In *Parmiter* v. *Coupland*, 6 M. & W. 105, it was argued that the Judge mis-

directed the jury because he had not stated to the jury that the publications were libellous. The objection was not given effect to: *Baylis* v. *Lawrence*, 11 A. & E. 920 (113 E.R. 664).

It is interesting to note that sec. 2 of ch. 60 of 32 Geo. III. says:—

> Provided always, that on every such trial, the Court or Judge before whom such indictment or information shall be tried, shall, according to their or his discretion, give their or his opinion and directions to the jury on the matter in issue between the King and the defendant or defendants in like manner as in other criminal cases.

In *Hearne* v. *Stowell*, 12 A. & E. 719, Lord Denman said:—

> If he (the trial Judge) had told the jury that the paper proved was a libel, when the Court was of opinion that it was not, we should have been bound to set aside a verdict so obtained for misdirection.

In *Darby* v. *Ouseley*, (1856) 1 H. & N. 1, at 13, Pollock, C.B., said:—

> It is said the trial Judge was wrong in laying down that the question was one of damages only; but he stated his own view of the matter, he left it to the jury whether the publication was a libel.

In an earlier case, *Haire* v. *Wilson*, 9 B. & C. 643 (1829), Lord Tenterden said:—

> If the Judge thought the tendency of the publication injurious to the plaintiff he ought to have told the jury it was actionable, and that the plaintiff was entitled to a verdict.

Says Bower on Defamation, p 51:—

> That he is not bound to, but may express his personal opinion of the meaning of the defamatory matter, even when the question has been left to the jury, provided that it is made quite clear that the ultimate decision rests with them and not with him.

I refer also to the discussion in Odgers, 698.

Defendants' counsel argued strongly that this case comes directly within *Dakhyl* v. *Labouchere*, [1908] 2 K.B. 325. The alleged libel is set forth at pp. 325-6.

In my opinion the trial Judge did no more than express an opinion. He did not tell the jury that the meaning he gave the words was to be adopted by them. In fact, he had already stated repeatedly that it was their province to find the meaning and refrained from any attempt to exclude from their consideration any of the meanings ascribed to the words by the parties. No doubt the passage can be so emphasized, and particularly if isolated from what goes before and after, as to make it appear of dominating importance, but that it was so intended cannot be fairly or reasonably maintained.

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That the jury were expressly left free to adopt their own conclusion appears from subsequent passages in the summing up. I notice the allusions to the functions of the jury at pp. 268, 269 (in the extract read from King's Law of Defamation). At p. 270 he speaks of the evidence as to the meanings of the different words "given you by different witnesses. I will go very shortly over them because it is entirely for you gentlemen to say what inference should be drawn as to the meaning of the language used." Nothing surely could be more inclusive than that. Speaking of the evidence of the witness Porter, at p. 274, "Is that the kind of meaning that you would take out of the words used in any connection, in any connection at all?" And again, at p. 275, "It is entirely for you to say whether you give the slightest credence to such a story or such a meaning to be given to the word."

At p. 279, discussing Prof. Allison's evidence as to the meaning of the article, which he considered made a damaging accusation, the trial Judge says: "I am bound to tell you, gentlemen, if that is a proper inference to be drawn from the article," etc. And, at p. 281, in speaking of the evidence of the plaintiff's friends, he says the jury can take it into consideration "if you come to the conclusion that this was a defamatory libel upon the plaintiff." And he concludes at p. 283: "So you will retire and consider whether the meaning to be taken from this article as a whole is or is not defamatory of the plaintiff in the sense that has been shewn to you."

Now, it does seem to me clear that the trial Judge not only did not direct the jury to give their verdict on an interpretation of the article adopted by himself, but on the contrary, he left the jury entirely free and absolutely to their own discretion to determine the issue upon the whole of the evidence before them.

Attention was also drawn to the use by the trial Judge of the term "this libel," p. 280, as pre-determining the issue. In other words the learned Judge should have used the expression "this alleged libel." This is rather meticulous criticism. I notice that Lord Atkinson himself, at p. 327 in the *Dakhyl* case, uses the words "the libel."

Other expressions also were subjected to close criticism. At p. 274 the terms "tissue of falsehoods" and "accusation" are used in reference to the article, having in view the fact, to which

he called the jury's attention, that the defendant had filed defences of justification and fair comment and had withdrawn them only when the trial came on. The Judge's language, no doubt, was strong. "The falsehood of all defamatory words is presumed in the plaintiff's favour:" Odgers, 181. That being the presumption and the defence of the truth of the words having been made only to be abandoned, it was surely entirely within the province of the Judge to call attention to the facts.

On the whole, I see no sufficient ground for giving force to the foregoing objections. We are not to take isolated passages of a charge and set aside an expensive trial simply because some one of those passages, read independently, may indicate a misdirection. I refer to *Blue* v. *Red Mountain*, [1909] A.C. 361, 368. Of course if the passage objected to dominated the charge or a vital part of it it would be different. But it is not so. On the contrary, the one particular passage, the subject of complaint here, did not dominate but was subordinate to the very direct and positive statements preceding and following it. It is impossible to imagine that the jury did not fully realize their rights and powers and duties. The door for their deliberations was not closed by the trial Judge as was done in the *Dakhyl* case; on the contrary, it was left wide open.

An objection was taken to the notice given under our Act. I think it sufficient. Nobody has been misled or could be misled as might have occurred in some of the Ontario cases cited.

Objection was also taken to much of the evidence for the plaintiff. It was urged that in many instances the witnesses were asked and gave opinions as to the meaning of the article as a whole. Counsel for the plaintiff did, as I read the record, apparently make an attempt to do this in his examination of Mr. McQueen (p. 116), but was checked. The questions asked were confined to the words "gum shoe," "heeler," and the other words, having certain meanings when ordinarily used, but having other and different meanings, so it was asserted, in the article complained of. It was impossible for the meanings to be arrived at by the witnesses without their reading the article and considering them in their context. It is to be noted that counsel for the defendant did not hesitate to examine his own witnesses as to their opinions of the meaning of the article as a whole.

Where the defendant's words, if taken literally in the primary

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and obvious meaning, are harmless, it is still open to the plaintiff to shew from the surrounding circumstances, etc., that on the occasion in question they bore a secondary and defamatory meaning: Odgers, p. 128.

"Where the words are well known and perfectly intelligible English, evidence cannot be given to explain that meaning away unless it first in some way be shewn that that meaning is for once inapplicable." "But if with their ordinary meaning the words are perfectly good sense, as they stand, facts must be given in evidence to shew that they have conveyed a special meaning on this particular occasion. After that has been done a bystander may be asked 'What did you understand by the expression used?' But without such a foundation being laid, the question is not admissible." Odgers, p. 683, citing *Daines* v. *Hartley*, 3 Exch. 200, and other cases.

In the article here in question the words such as "gum shoe" as to which evidence was given are unintelligible and make no sense whatever as they stand. I see no reason to hold there was an insufficient foundation for the evidence then objected to. It seems to me quite admissible.

Strong objection was taken to the amount of the verdict. I must say that the amount strikes me as large. But the question of damages in a libel action is peculiarly one for the jury. It is a very difficult thing for Judges to lay down rules for fixing limitations to the verdicts of juries in libel actions, based on satisfactory reasoning. The famous case of *Jones* v. *Hulton*, [1910] A.C. 20, is most instructive. There the author of the article complained of and the editor of the newspaper stated they did not know of the existence of the plaintiff, and this was admitted at the time as true. Moreover, the defendants, upon complaint being made by the plaintiff of the publication, immediately published an apology and a disclaimer of any intention of referring to him. There was no justification pleaded and no defence save that the name used was fictitious and not that of the plaintiff. Yet the jury awarded a verdict of £1,750. The House of Lords refused to interfere, and the judgments delivered are in point. In this present case, the defendant pleaded the truth of the article complained of, only to withdraw the plea at the trial, and not only was no apology offered, but a determined

effort was made at the time to explain away the meaning of the article and lift it from the level of the defamatory to that of the merely abusive, and these facts may well have had an effect upon the jury when they were fixing the damages. And we are bound to give due attention to the deliberate finding of the jury expressed in these words:—

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> Your Lordship, in respect to the suit for libel, *J. A. Knott* v. *The Telegram Printing Co. Ltd.*, we, the jury, unanimously find the Telegram Printing Co. Ltd., guilty of libel and assess the damages for the plaintiff in the sum of $11,500. We further desire to express our very strong disapproval of any such abuse of the liberty of the press.

With respect to all the numerous objections taken on the ground of the improper admission of evidence or otherwise, I cannot see that it has been established that any substantial injustice has been done, such as ought to vitiate the trial.

I would therefore dismiss the appeal with costs.

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HAGGART J.A. (dissenting):—I will not discuss the question as to whether the article in question is libellous or as to how far it may be defamatory, because I am of opinion that the case should go back for trial by another jury.

The verdict appears to me to be vindictive, and far beyond what is warranted by the circumstances of the case. I do not think that 12 reasonable jurors, using the term "reasonable" in its best sense, would give such an excessive verdict.

Surely the character and size of the verdict is some test as to the reasonableness of the jury who rendered it. No more can be said in support of it than in support of a verdict five or ten times as large.

I know that Courts are reluctant to interfere with the measure adopted by a jury, but I think that the ends of justice would be attained by a much smaller amount.

It appears to me that the trial Judge laid undue stress on the fact that the defendants had put upon the record some pleas which they could not support by evidence. If the filing of such defences which cannot be proved is to be taken into account by all jurors in all cases, then our Courts would shew the recording of verdicts out of proportion to the merits of the case.

I would grant a new trial.

New trial refused.

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Saskatchewan District Court, Ouseley, J.D.C. December 9, 1916.

MECHANICS' LIENS (§ V—30)—"OWNER"—HOMESTEAD.

A homestead entrant is an "owner" within the meaning of sec. 4 of the Mechanics' Lien Act (Sask.), and a materialman is entitled to file a lien against the homestead for material furnished.

[Mechanics' Lien Act and Dominion Lands Act discussed.]

Statement. ACTION claiming a mechanics' lien for materials furnished to a homestead entrant.

D. Buckles and *A. McWilliam*, for plaintiffs.

Bothwell, for defendants.

Ouseley, J. OUSELEY, J.:—On November 8, 1915, the plaintiffs commenced an action, claiming a mechanics' lien against the lands of the defendant, Miller, and at the time the right of the mechanics' lien arose; *i.e.*, when the materials were sold by the plaintiffs to the defendant, Miller, was a homestead entrant to the south-east quarter of section five (5), township eleven (11), range twelve (12) west of the third (3rd) meridian. It is well to note here that the right of the plaintiff to mechanics' lien, if it existed at all, existed on October 7, 1915, and patent to the defendant's homestead did not issue to the defendant until October 22, 1915.

The action came on for trial before me at Swift Current and objection was then taken that the mechanics' lien was invalid because no mechanics' lien could be legally and validly filed against an unpatented homestead.

The question, therefore, which I have to decide is whether a materialman, under the Mechanics' Lien Act, where the materials in respect to which the lien arises were furnished to the homestead entrant under the Dominion Lands Act for the construction of a building upon such homestead prior to the issuance of patent can file a valid mechanics' lien against such land.

Under sec. 4 of the Mechanics' Lien Act any person who . . furnishes any material to be used in . . constructing . . any building . . for any owner shall by virtue thereof have a lien for the price of such . . materials upon the . . building . . and the land occupied thereby and enjoyed therewith . .

Under sec. 7 (1) the lien shall attach upon the estate or interest of the owner as defined by this Act . . in the building . . upon . . which the materials are placed or furnished to be used and the land occupied thereby or enjoyed therewith.

Under sec. 2 (3) "owner" extends to and includes any person . . having any interest or estate in the land upon . . which . . the materials are placed or furnished at his request, and upon whose credit or on whose behalf, or with whose privity or consent, or for whose direct benefit . . materials are placed or furnished.

It will be observed, therefore, that the material must be furnished "for an owner." (See sec. 4, *supra*.) The owner must have an estate or interest in the land, and the lien can attach only such estate or interest as the owner has.

The initial question which I must discuss is: "Has an entrant under the Dominion Lands Act any such estate or interest as is capable of being charged under the Mechanics' Lien Act?"

In the definition of the word "owner" as defined by the Mechanics' Lien Act it is only necessary that such party have "an estate or interest in the land." No attempt is made by the Act to define, extend or limit what that estate shall be, and the Act is silent as to whether a mere possessory title is sufficient, or whether such an estate must be an estate in fee. Turning to the Dominion Lands Act, ch. 20 of the Statutes of Canada (1908), we find that by sub-sec. 2 of sec. 11 of the Act that a homestead entrant who has made application for land then open to homestead entry, and has paid the set fee, and has been given a receipt for the same, which has been accepted by the local agent, that the receipt of the said application and of a fee constitute entry, and the receipt given to the applicant in Form "D" shall be a certificate of entry, and shall entitle the recipient to take, occupy, use and cultivate the land entered for, and to hold possession thereof to the exclusion of any other person, and to bring and maintain actions for trespass committed on the said land.

Reference may also be made to the case of *Smyth* v. *C.P.R. Co.*, 1 S.L.R. 165; Newlands, J., says:—

> The plaintiff's rights as a homesteader are set out in sec. 111 (now sec. 11) of the Dominion Lands Act, which reads as follows: "The entry for a homestead, and for its attached pre-emption, if any, shall entitle the recipient to take, occupy and cultivate, the land entered for, and to hold possession of the same to the exclusion of any other person whomsoever, and to bring and maintain actions for the trespass committed on the said land; the title to the land shall remain in the Crown until the issue of the patent therefor, and the land shall not be liable to be taken in execution before the issue of the patent." The plaintiff had, therefore, exclusive right to this quarter-section,

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and the defendants are trespassers since the time he gave them the first notice on June 2, 1906, and he is entitled to recover from them damages for the trespass committed.

The question of what estate was necessary in order to bring the party within the definition of "owner" in the Mechanics' Lien Act was also additionally noted by Ex-Chief-Justice Wetmore in the case of *Galvin-Walston Lumber Co.* v. *McKinnon*, 4 S.L.R. 68. In that action Wetmore, Ex-Chief-Justice, at p. 70, says:—

I do not wish to be understood as questioning the fact that a person in actual possession of real property has a title thereto as against all the world except the real owner. In *Asher* v. *Whitlock*, L.R. 1 Q.B. 6, Mellor, J., lays down that "possession is *primâ facie* evidence of seisin in fee," and, at p. 5, Cockburn, C.J., states: "I take it as clearly established that possession is good against all the world except the person who can shew a good title." And I am of opinion, too, that a person so actually in possession has a sufficient interest in the land to come within the meaning of "owner" as defined by sub-sec. 3 of sec. 2 of the Mechanics' Lien Act (1907), ch. 21. That sub-section is as follows: "Owner" shall extend to and include any person, firm, association, body corporate or politic, having any interest or estate in the lands upon or in respect of which the work or service is done or materials are placed or furnished at whose request or upon whose credit or on whose behalf or with whose privity or consent or for whose direct benefit any such work or service is performed or materials are placed or furnished, and all persons claiming under him or them whose rights are acquired after the work or service in respect of which the lien is claimed is commenced, or the materials furnished have been commenced to be furnished." But I am of opinion that this possession, so as to create *primâ facie* evidence of title, must be an actual possession; and, in order to amount to an interest which would support a lien under the Mechanics' Lien Act, the actual possession or interest would have to exist at the time the materials were ordered, because sec. 4 of the Act provides that the work has to be performed or materials are to be placed or furnished to be used in the making, constructing, etc., of any erection, building, etc., for any owner, contractor, or sub-contractor.

It seems clear to me that the then Chief Justice was prepared to hold that any person who was actually in possession of land had a sufficient interest in the land to come within the meaning of "owner" as defined in sub-sec. 3 of sec. 2 of the Mechanics' Lien Act, 1907, ch. 21, from which our present Act is copied, providing only that the party in possession was in actual possession of the land at the time the goods were purchased.

In addition to this authority, Wallace on Mechanics' Lien, 2nd ed., p. 95, has the following:—

A person in actual possession of land has a title thereto against all the world except the true owner, and has a sufficient interest to come within the meaning of "owner." (*Blight* v. *Ray*, 23 O.R. 415; *Reggan* v. *Manes*, 22 O.R. 443.)

At p. 96 he says: "A mere possessory interest, or even constructive possession, may suffice to create a lien." (*Christie* v. *Mead*, 8 C.L.T., 312; *Prutzman* v. *Bushong*, 83 Pa. 526.)

Turning again to the Dominion Lands Act (1908) we find that by sec. 19 it is enacted:—

> In the event of the death of an entrant for a homestead before the completion of the requirements for obtaining letter patent therefor, his legal representative shall only be required to fulfil the conditions set forth in sec. 16 of this Act as to the erection of a habitable building and as to cultivation in order to entitle him to obtain letters patent after the expiration of 3 years from the date of the entry for the homestead; or, that the legal representative may assign the homestead to a person eligible to obtain homestead entry.

By sec. 25 of the Dominion Lands Act, the entrant for a homestead, or, in the event of his death his legal representative, or his assignee, or in the event of his becoming insane or mentally incapable, his guardian, committee, or any person who in the event of his death would be his legal representative may, after the expiration of the period fixed by this Act for the completion of the requirements for obtaining letters patent for a homestead make application therefor, and upon proving to the satisfaction of the local agent, or the official acting for him, that the said requirements have been fulfilled, if proof is accepted by the commissioner of Dominion lands the entrant, or, in the event of his death, his legal representative or assignee, shall be entitled to letters patent.

It seems clear to me, and I so hold, that the sections of the Dominion Lands Act to which I have referred, together with the reported decisions, shew conclusively that the homestead entrant has such "an estate or interest" in the land entered upon by him so as to bring him within the definition of "owner" as defined by sub-sec. 3 of sec. 2, of the Mechanics' Lien Act because, both by the common law, as pointed out by Wetmore, C.J., in the *Galvin-Walston* case, 4 S.L.R. 68, and by Newlands, J., in *Smyth* v. *C.P.R.*, 1 S.L.R. 165, as well also by statute provided by section 11 of the Dominion Lands Act, the homestead entrant has the right of action for damages by trespass against any person wrongfully entering or trespassing on the land, and the Dominion Lands Act further recognizes the estate or interest of the homestead entrant by enacting that in the event of the death of the entrant that the estate which the deceased entrant had at the time of his decease should pass to his legal representative

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and that such legal representative may either complete the duties himself, and receive patent therefor, or may assign such estate to any person eligible for homestead entry.

Having arrived at the conclusion that a homestead entrant has such an "estate or interest" in the land as will bring him under the definition of the word "owner" as defined by the Act, the next question I must discuss is whether the Dominion Lands Act, either expressly, or by implication, prohibits a materialman from filing a mechanics' lien against the homestead entrant.

In discussing this question: At the outset I may say that I think it clear that unless the Dominion Lands Act prohibits it the materialman from whom the goods were purchased has two remedies against the debtor. In the first place, he can bring his action at common law and recover his judgment and issue executions for the amount of the purchase price of such material, or he can pursue his remedy under the statute as for a mechanics' lien against the property on which such material has been deposited to be used, or has actually been used, in the construction of a building.

A perusal of the Dominion Lands Act will shew that there is no direct prohibition which prevents a materialman from exercising the statutory right of filing a mechanics' lien, and the only question remaining is whether that right is prohibited by inference.

Sec. 29 of the Dominion Lands Act (1908) reads as follows:—

Except in so far as provision is hereinafter made respecting advances of seed grain or any indebtedness to the Crown, no charge of any nature may be created on a homestead, a purchased homestead or a pre-emption, but any charge heretofore created under the provisions of sec. 145, ch. 55, of the Revised Statutes (1906), or of the corresponding provisions of any previous Act respecting Dominion Lands shall continue to be recoverable in the manner provided by said ch. 55.

In construing this section it will be noticed that sec. 29 does not say that no debt against the land shall be created but only that no "charge" shall be created, and I think it clear from a perusal of the whole section that the word "charge" in sec. 29 must be read *sui generis* with those charges referred to in 145 of ch. 55 of R.S.C. (1906), and I am further convinced that the word "charge" in sec. 29 does not refer to any charge other then the charges referred to in ch. 55 of the Act of 1906.

Previous to the year 1908 the Dominion Lands Act provided as follows:—

If any person is desirous of assisting by advances in money intending settlers to place themselves on homestead lands in the Provinces of Manitoba, Saskatchewan, Alberta or in the North West Territories, and of securing such advances, such person may make application to the minister, stating the plan or project intended to be acted upon, the steps to be taken in furtherance thereof, and the amount to be advanced to such settlers; and the minister may sanction and authorize such plan or project, or refuse his sanction and authority thereto. (See sec. 145, ch. 55, R.S.C. (1906)).

By sub-sec. 1 of sec. 146 it was provided that a statement of expense was to be furnished to the minister or the local agent or homestead inspector. By sub-sec. 2 such statements must be verified, and the settler must make an acknowledgment under Form "S" of the statute, and thereby the amount of such advance, not exceeding the sum of $600 with interest thereon at 8% per annum, was made and charged upon the homestead. Sec. 147 provided a remedy for enforcing payment. Sub-sec. 2 of sec. 147 allowed additional charges to be created.

A perusal of secs. 145 to 158 of ch. 55 of the Act of 1906, both inclusive, will clearly indicate what charges are referred to in sec. 29 of the Act of 1908, and I am quite clear that they referred to no other charges whatsoever other than those allowed to be made under the provisions of the Act of 1906. I am, however, content to go further and hold that even if it could be contended that the word "charge" in sec. 29 refers to any charges other than those indicated in the Act of 1906, that the word "charge" means a charge made voluntarily by the homestead entrant, *i.e.*, a charge created by his voluntary act and with an intent on his part to charge his estate in the homestead. I do not think it was intended to cover any debt converted into either an execution or a mechanics' lien.

As I have already intimated, the materialman who supplied material to the homestead entrant, to be used in the construction of the building upon his homestead, can either sue for the contract price and obtain a judgment and issue an execution for the same, or he can pursue his remedy under the statute and file a mechanics' lien against the property. By sec. 11 of the Act it is enacted:—

When application is so made for land then open for homestead entry . . the acceptance by the local agent . . of the application . . shall entitle the recipient to take . . and cultivate the land . . and to bring and maintain actions for trespass committed on the said land, and the land shall not be liable to be taken in execution before the issue of letters patent therefor.

As I read this section, a permissive right is conferred upon the

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creditor to the homestead entrant to sue for the amount of goods sold, and obtain a judgment therefor and to issue an execution thereon, and the only disability which is imposed upon the creditor under the Act is that he is not allowed to take the land in execution until after the issuance of patent therefor.

It seems clear to me that if the legislature had intended to include by the words "no charge of any nature may be created upon a homestead" any indirect charge such as an execution or a mechanics' lien they would have used different phraseology and in making provision in sub-sec. 2 of sec. 11 that no land shall be taken in execution until after the issue of patent therefor, the legislature limited the word "charge" to the charges made by the homestead entrant voluntarily, either under his hand or under his hand and seal, and where there was an expressed intention by the homestead entrant to charge the land as security for the debt created, and the Dominion Parliament having recognised the right of the homestead entrant to charge the land by creating debts which might be turned into registered judgments, and not having specifically prevented a homestead entrant from creating debts which under the Mechanics' Lien Act might be converted into a claim for mechanics' lien against the property, recognized the right of the creditors of the homestead entrant to exercise his common law right of action of assumpsit, or the statutory right to convert that claim into the right of mechanics' lien against the homestead entrant's land.

A perusal of the Dominion Lands Act satisfies me that there is no provision in the Act which explicitly prohibits a creditor of the homestead entrant from filing a mechanics' lien, nor do these provisions inferentially prohibit that right.

The Dominion Lands Act having recognized the right of a judgment creditor to a homestead entrant to file an execution against the homestead, and as there is no provision in the Act preventing the materialman from exercising his co-relative right to file mechanics' lien against the homestead instead of taking his common law remedy, I am quite convinced that such a right exists.

The argument made that it will be idle to give a materialman a remedy in the mechanics' lien which might be rendered nugatory by reason of the fact that the holder of the mechanics' lien might

not be able to pursue his remedy, loses its weight when we consider that the same argument might be used against an execution creditor, because the execution creditor could not sell the homestead under his execution before the issuance of patent, and after the issue of the patent our Exemptions Act still protects the homesteader. Further, I do not think that the Dominion legislature intended to render nugatory the statutory remedy given by the province to materialmen and others who sold material to be used in the construction of a building on homestead entrants' land, and stronger grounds than those placed before me will have to be shewn before I would hold that the provisions of the Dominion Lands Act, as they stand at present, render nugatory the provincial Mechanics' Lien Act as regards to homesteads. In *Paige* v. *Peters*, 70 Wis. 178, it was expressly held that it was not the purpose of the federal statute to render state laws nugatory merely because the property sought to be charged with the lien was located upon the land belonging to the Federal Government.

By sec. 16 of the Dominion Lands Act every homestead entrant is required before the issue of letters patent to him of the land to have erected a habitable house on the land entered upon, and if a materialman sells lumber or other material with which to enable a homestead entrant to complete part of his duties, and such material is sold on credit, I think it only fair and equitable that the materialman should have his right to mechanics' lien action against the owner or entrant.

There will be judgment therefore for the plaintiff company with costs. If the parties cannot agree upon the terms of the order the matter can be taken up with me in Chambers, when further directions will be given. *Judgment for plaintiff.*

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Alberta Supreme Court, Appellate Division, Scott, Stuart, Beck and Hyndman, JJ. December 23, 1916.

1. APPEAL (§ II C I—50)—FROM SUMMARY CONVICTIONS—JURISDICTION.
Sec. 749 of the Criminal Code confers jurisdiction on District Courts in Alberta to hear appeals from summary convictions, and though the District Courts Act (Alberta) does not constitute such Courts for the hearing of appeals, they have jurisdiction under the first-named Act.
[Stuart, J., commented upon the different names given to the Courts for hearing appeals and speedy trials respectively.]

2. APPEAL (§ III E—91)—NOTICE—SERVICE—CRIM. CODE.
Service of notice of appeal from a conviction under sec. 750 (*b*) of the Criminal Code, need not be made upon the respondent and convicting

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Justices within the ten days within which the notice must be filed in the Appeal Court; the limit applies only to the filing of the notice.
[See annotation, 19 D.L.R. 323.]

CASE STATED by the Judge of a District Court in an appeal from a summary conviction.

C. F. P, Conybeare, K.C., for appellants; *R. A. Smith*, for respondent.

Scott, J.

SCOTT, J.:—This is a case stated by the Judge of the District Court of Lethbridge, the facts stated being as follows:—

The defendants were convicted before two of His Majesty's Justices of the Peace of being found without lawful excuse in a common gaming house, the conviction being made on September 5, 1916. The defendants appealed from the conviction. On the application to enter the appeal it was shewn that the informant was not served with the notice of appeal until September 21, 1916, being the 16th day after the conviction, and one of the convicting Justices was shewn to have been served within 10 days after the conviction and the other on September 22, 1916, being the 17th day after the conviction.

The questions submitted for the consideration of this Court are:—(1) Is the service upon the informant and the Justices who tried the case provided for in sub-sec. (*b*) of sec. 750 of the Criminal Code required to be within 10 days after the conviction or order complained of? (2) Has the District Court of the District of Lethbridge, as constituted under the Provisions of the Act of the Province of Alberta intituled An Act respecting District Courts, jurisdiction to entertain and decide appeals in criminal matters?

As to the first question, see sub-sec. (*b*) of sec. 750 R.S.C. ch. 146, and the amending statute 8-9, Edw. VII. ch. 9.

I think it may be assumed that where a right of appeal is given the acts required to be done by a party in order of entitle him to appeal must be done by him with reasonable strictness, and I also think that, on the other hand, a person does not forfeit his right of appeal unless he omits to do some act which he is expressly required to do in order to retain that right. I cannot avoid the conclusion that, upon a strict construction of this sub-section as it now stands, it does not provide that the notice of appeal shall be served upon the respondent and the convicting Justice within 10 days after the conviction, nor can I deduce from it that such is its intention. It must be assumed that

parliament, when amending it, had under consideration the sub-section as it then stood, and, if it was the intention that the notice should be so served, what would have been simpler and easier when providing for such service than merely to insert the words "and the Justice who tried the cases" after the word "respondent" where it first appeared therein? The complete remodelling of that portion of the sub-section appears to me to indicate an intention to change its effect.

I think it is not unreasonable to assume that parliament, in amending the sub-section in the manner in which it has been amended, may have intended that, in providing that the notice of appeal shall be filed within 10 days after the conviction and thereby fixing a time limit to the rights of appeal, was doing all that was necessary for that purpose as it would enable the party desiring to oppose an appeal to ascertain by searching in the clerk's office after the expiration of the 10 days, whether the right of appeal had ceased to exist.

Before the sub-section was amended the requirement that the respondent should be served with the notice within the 10 days was often an effectual bar to the right of appeal by a person convicted, owing to the impossibility of procuring service upon the respondent within that period. In many cases where informations were laid and convictions obtained by detectives and others engaged in ferreting out offences punishable on summary conviction the informant would not be a resident in the locality where the offence was committed and the charge heard, and would leave that locality immediately after the conviction and it would then be difficult, if not impossible, to procure service upon him within that period. This, to my mind, affords a strong reason why the time for service of the notice upon the person convicted should not be limited to that period, and if I am correct in my view as to the effect of the sub-section, it may have been the reason why service of the notice within that period is no longer required.

It is true that, if the notice is not required to be served within the 10 days, no time is fixed within which it must be served. If it is possible to do so, service should be effected a reasonable time before the time fixed for the hearing of the appeal in order that the respondent may be prepared for the hearing. If the appellant should be unable to procure service of the notice before

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the time fixed for the hearing I see no reason why he should not be at liberty to apply upon that ground to the Judge presiding at the sittings to adjourn the hearing until service can be procured. The Judge has power under sub-sec. 3 of sec. 751 to order such adjournment in a proper case.

As to the second question. Sec. 749 of the Criminal Code provides that in this province the Court for hearing appeals from summary convictions is the District Court at the sittings thereof which shall be held nearest to the place where the cause of the information or complaint arose.

It is true that the District Courts Act does not constitute Courts established under its provisions Courts for the hearing of appeals from summary convictions, but sec. 749 does constitute them such Courts and it was held by the Supreme Court of Canada in *Re Vancini*, 34 Can. S.C.R. 621, that where the Parliament of Canada has given jurisdiction to a Provincial Court to perform judicial functions in the adjudicating of matters over which that parliament has exclusive jurisdiction, no provincial legislation is necessary in order to enable effect to be given to such parliamentary enactments.

For the reasons I have stated I would answer the first question in the negative and the second question in the affirmative.

Beck, J.

BECK, J., concurred with SCOTT, J.

Stuart, J.

STUART, J.:—I agree with the views expressed by my brother Scott upon question 1 submitted in this case. Upon question 2 I also agree, but I desire to add a word. The duties of our District Court Judges in criminal matters are, so far as trials are concerned, confined to appeals from magistrates and speedy trials under part XVIII. of the Code. Under our present decision it is the ordinary District Court which has jurisdiction to hear the appeal. Under part XVIII. the "Judge" who may try a criminal case, after election, is the "Judge of the District Court" or "a Judge of the Supreme Court." By sec. 824 that Judge is constituted a Court of record which is given the name "the District Court Judge's Criminal Court." The jurisdiction is laid down in sec. 825. These latter provisions are, I think, exactly concurrent with the provisions of secs. 53 and 54 of our Provincial District Courts Act. It is a matter of curiosity to me to know why it was necessary to create two distinct Courts, one for appeals

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from magistrates called "the District Court," and the other for speedy trials called the District Court Judge's Criminal Court. The latter takes the place of the General Sessions of the Peace existing in Ontario. Yet the practice of allowing appeals from single Justices of the Peace arose in England by means of appeals to the General or Quarter Sessions of the Peace. Now, our appeals are to the "District Court" while our speedy trials, though existing only in cases where the General Sessions in Ontario have jurisdiction, are to a Court with a different name. This seems to me to be conducive to confusion. The only reason for it would seem to be that the District Court does sit at times and places specified by order in council, which therefore can be known to an appellant while the speedy trials Court has no definitely fixed times or places of sitting. But this could easily be remedied.

Hyndman, J.

HYNDMAN, J.:—This is a case stated for the opinion of the Court by Jackson, D.C.J., Lethbridge.

The defendants were convicted before McKenzie Walsh and Henry B. Hooper, two Justices of the Peace, for being found in a common gaming house without lawful excuse.

The defendants appealed, but on entering the appeal it was shewn that the notice required by sec. 750 of the Criminal Code had not been served until the 16th day after the date of the conviction on one of the Justices and the 10th day on the other.

It was objected that, (1) Under the provisions of the Criminal Code respecting appeals from summary conviction it was necessary that the informant and both Justices should have been served within 10 days from the date on which conviction was made, and, (2) That the District Court of the District of Lethbridge was not a competent Court to entertain the appeal inasmuch as it had not been constituted a Court for Criminal Jurisdiction of the Legislature of the Province of Alberta.

The learned District Court Judge reserved both questions for the consideration of this Court.

As to q. 1. Sec. 880 of the Code of 1892 corresponds to present sec. 750. It required a notice in writing to be given to the respondent "or" the Justice, within 10 days after the conviction or order, nothing being said about filing. This was afterwards amended by 4-5 Edw. VII. ch. 10, sec. 3, requiring appellant to

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file a notice in the office of the Clerk of the Court appealed to and serve the respondent with a copy, etc. "within 10 days after the conviction." In the Code of 1906 the corresponding sec. 750 required that notice should be filed, etc., *and* served on the "respondent, within 10 days. Again in 1909 (8-9 Edw. VII. ch. 9, sec. 2) sub-sec.(*b*) was amended requiring the notice to be filed in the office of the Clerk of the Court *and* served on the respondent or Justice, "within 10 days after the conviction" and lastly in 1913 (3-4 Geo. V. ch. 13, sec. 26), and stands at present as follows:—

(*b*) The appellant shall give notice of his intention to appeal by filing, in the office of the Clerk of the Court appealed to, a notice in writing setting forth with reasonable certainty the conviction or order appealed against, and the Court appealed to, within 10 days after the conviction or order complained of, and by serving the respondent and the Justice who tried the case each with a copy of such notice.

It will be observed that as this sub-section stood previously there was no difficulty in interpreting it as meaning that service on the respondent or Justice as well as filing within 10 days was a necessary preliminary. The last amendment very materially alters the reading of the sub-section by reason of the transposition of that part of it which relates to the time within which the notice must be filed. If it was the clear intention of parliament to require service as well as filing within 10 days it might easily have said it in such a way as to leave no room for doubt. They had before them the section as it stood and must be taken to have made the amendment with full knowledge of its working. There must have been some good reason for the change and in my opinion such alteration was made intentionally. I can conceive of instances where it might be quite impossible, inconvenient or expensive to serve the Justice or respondent or both within the time mentioned. The respondent is presumed to know the law, and if so, it does not appear to me to be a great hardship to expect him to take the precaution of searching in the office of the Clerk after the expiration of 10 days when if a notice had been filed he would see it, and if not there was an end of it. It is conceivable, of course, that an appellant might delay service until the very last day before the Court at which the appeal must be entered, but that hardship might in most instances be satisfactorily remedied by an adjournment of the hearing and also affect the question of costs.

In the case of *Rex* v. *Prokopate*, 18 D.L.R. 696, 23 Can. Cr. Cas. 189, it would appear that the point was not seriously raised or argued, the chief dispute being confined to what was the actual date of the conviction and it appears to have been taken for granted by all parties that such service was necessary. But in *Rex* v. *McDermott*, 19 D.L.R. 321, 23 Can. Cr. Cas. 252, the point was squarely before the Court and Newlands, J., after briefly referring to the several amendments of the sub-section, says, at p. 322:

> The ten days mentioned in the section is not the time therefore, in which the notice is to be served on the respondent, and it is not necessary for the purposes of this case for me to decide within what time such notice must be served. All I need to decide is that the notice was served on McDermott in sufficient time to perfect the appeal, and this is my opinion.

I think it not unreasonable to suppose that in making the last alteration the legislature had in view the fact that the Court is always open and available to the appellant, but that it might be impossible or very difficult for him to serve the Justice and respondent within the time limited for filing, and intended that the right of appeal should not be defeated on the ground of lack of service in such a case.

In my view of it then I do not think it a necessary preliminary to the appeal that it should be served within the 10 days, but that it may be affected at any time up to and including the day prior to the opening of the Court at which the appeal can be heard. Any hardship or expense incurred by reason of deliberate delay in service on the necessary parties can, I think, in most cases, be compensated for by adjournment or costs.

As to question 2 submitted in the stated case I concur with SCOTT, J.

I would answer the first question in the negative and the second in the affirmative.

Re J. McCARTHY & SONS CO., OF PRESCOTT, LTD.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., and Riddell, Lennox, and Masten, JJ. October 17, 1916.

APPEAL (§ I A—1)—FROM ORDERS UNDER WINDING-UP ACT—"FUTURE RIGHTS."

When "future rights," widely interpreted, are involved, an appeal lies, under sec. 101 of the Winding-up Act, R.S.C. 1906, ch. 144, from the order of a Judge under sec. 22, giving leave to bring an action against a company in the course of winding-up, and the appeal will be heard on its merit; the order permitting the appeal is itself unappealable, but if no appeal lies, the Appellate Court will, of its own motion, refuse to entertain it.

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RE J. MCCARTHY & SONS CO. OF PRESCOTT LIMITED.

Meredith, C.J.C.P.

APPEAL by the liquidator from an order of KELLY, J., made under sec. 22 of the Dominion Winding-up Act, R.S.C. 1906, ch. 144. Leave to appeal was given by an order of RIDDELL, J.

An objection that leave to appeal should not have been granted because none of the conditions named in sec. 101 of the Winding-up Act were present was argued before Meredith, C.J.C.P., Magee and Hodgins, JJ.A., and Lennox, J.

MEREDITH, C.J.C.P.:—The single question involved in this motion is: whether an appeal lies against an order, made under sec. 22 of the Winding-up Act, giving leave to bring an action against a company being wound up under its provisions.

The fact that leave to appeal may have been granted by a Judge, even if that leave had not been given, as it was given in this case, expressly for "what it might be worth only," cannot stand in the applicant's way, if there were no power to give such leave. An order giving leave to appeal, in such a case as this, is unappealable in cases in which there is power to give such leave; but where no appeal lies the order must be ineffectual; and this Court, of its own motion, should refuse to entertain the appeal; and should quash it and discharge the order.

Whether an appeal lies depends entirely upon the meaning of sec. 101 of the Winding-up Act: the jurisdiction is entirely statutory, and it is not suggested that any other enactment confers upon this Court any wider power than that, and the next following section of the Act, confer: and those sections give such a right of appeal, by leave, in the following cases only:—

"(*a*) if the question to be raised on the appeal involves future rights; or,

"(*b*) if the order or decision is likely to affect other cases of a similar nature in the winding-up proceedings; or,

"(*c*) if the amount involved in the appeal exceeds five hundred dollars; . . ."

The single question involved in this appeal, or affected by the order in question, is: whether the respondents should be restricted, in endeavouring to establish their claims against the company, to the general methods provided for in secs. 22 and 133 of the Winding-up Act, or be accorded the exceptional right of action, which sec. 22 also permits.

It is not suggested that the second of these requisites applies; there is no evidence of any other such cases in these particular

proceedings; and it is quite improbable that there should be any such.

Nor can it, reasonably, be said that an amount exceeding $500 is directly involved in the question of practice whether proof of a claim shall be made in the winding-up proceedings or in an action

So, too, it may be quite difficult to perceive how "future rights" are directly involved.

And so, having regard to similar words conferring similar rights contained in other enactments, and to the interpretations put upon them by the Courts, and especially by the Supreme Court of Canada, one might hesitate long before holding this case to be an appealable one, if the question had not arisen and been considered before, but it has so arisen and been decided in favour of a wide interpretation of the words "future rights," and in such a manner as, I think, requires us to hold that there is a right of appeal, whether it is put upon the ground of that which is indirectly involved, such as the amount claimed—$3,000—or the right of trial by ordinary methods involving future possible trial by jury and future unrestricted rights of appeal to this Court and to the Supreme Court of Canada, and other such like rights of the ordinary litigant.

So, having regard to such cases as *Re Union Fire Insurance Co.* (1886), 13 A.R. 268, and *Shoolbred* v. *Union Fire Insurance Co.* (1886), 14 S.C.R. 624, which was again before the Courts upon appeal, *In re Clarke and Union Fire Insurance Co.* (1889), 16 A.R. 161, and *Shoolbred* v. *Clarke, In re Union Fire Insurance Co.* (1890), 17 S.C.R. 265; and having regard to the practice since that case—of which the recent case of *Re Auto Top and Body Co. Limited* (1916), 10 O.W.N. 76, 129, and the older case of *Re Toronto Cream and Butter Co. Limited* (1909), 14 O.W.R. 81, afford instances quite in point—I am in favour of overruling the objection to the jurisdiction of this Court, and of the appeal being heard on its merits in due course.

The future rights referred to in the case of the *Union Fire Insurance Company* were only of the character of those involved in this appeal—see 13 A.R. at p. 295—though the order in question there was a winding-up order.

MAGEE, J.A., and LENNOX, J., concurred. Magee, J.A. Lennox, J.

HODGINS, J.A.:—The liquidator appeals from the order of Kelly, J., giving leave to the respondents to begin an action Hodgins, J.A.

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instead of proving their claim in the liquidation. Objection is taken to this appeal that, although leave was obtained from Riddell, J., he should not have granted it, because none of the three conditions named in sec. 101 of the Winding-up Act are present.

I am not sure that this objection is well-founded—the contemplated action involves over $3,000, and future rights are or may be involved—but I feel that the Court ought not to give effect to it. No appeal lies from an order granting leave to appeal: *Ex p. Stevenson*, [1892] 1 Q.B. 394, 609; *Re Central Bank of Canada* (1897), 17 P.R. 395.

But, if it is a question whether the conditions existed enabling the leave to be granted, then I think the Court appealed to should adopt the rule in *Gillett* v. *Lumsden*, [1905] A.C. 601, and followed in *Townsend* v. *Northern Crown Bank* (1913), 10 D.L.R. 652, and *Re Ketcheson and Canadian Northern Ontario R.W. Co.* (1913), 14 D.L.R. 542, 5 O.W.N. 271, 350, and treat the right to appeal as being established.

The decision from which the liquidator appeals was made by Kelly, J., notwithstanding the fact that an order under sec. 110 was made on the 15th February, 1916, "that all such powers as are conferred upon the Court by the Winding-up Act and amending Acts as may be necessary for the said winding-up of the said company be and the same are hereby delegated to the Local Master at Ottawa." It appears that no application was made to the Master to grant leave.

There is no doubt that after such an order of delegation great confusion would occur if motions were made in the winding-up to different Judges of the High Court instead of to the Referee, who, by special order of that Court, was directed to exercise its functions.

I do not think that an order under sec. 110 absolutely prevents the Court from exercising its powers except by way of appeal. But it seems reasonable that, save in exceptional cases, the parties should be required to seek necessary directions from the Referee in charge.

However, that will be considered when the appeal comes to be heard. The objection is overruled, and the appeal should be placed again upon the list.

Costs will be in the appeal. *Objection overruled.*

H. M. Mowat, K.C., for appellant.

G. H. Sedgewick, for respondent.

At the conclusion of the hearing, the judgment of the Court was delivered by MEREDITH, C.J.C.P.:—The learned Judge, whose order is now appealed against, seems to me to have proceeded upon a wrong principle in making that order, the effect of which would be, as it seems to me, to require, in treating all applicants alike, that leave to bring an action should be given in a great majority of cases of claims for debts, because the amount of the claim cannot fairly be made the guide; $100 may be as much to one litigant as $10,000 to another, and just as difficult questions of fact and law may be involved in the claim for the smaller as are involved in the claim for the larger amount; and there is nothing more than amount and ordinary questions of law and fact involved in the claim in question in this matter.

We had occasion recently to point to the very evident facts: that the plain words, as well as the plain purposes, of the Winding-up Act, require that, as far as possible, all proceedings affecting the winding-up of a company shall be taken in the winding-up matter, and that the bringing of an action should not be permitted unless some special circumstances make such an additional legal proceeding necessary or advisable for some very substantial reason.

To shew how imperative the Act is, it is worth while taking up the time required in the reading of three of its sections bearing directly upon the subject:—

Section 133: "All remedies sought or demanded for enforcing any claim for a debt, privilege, mortgage, lien or right of property upon, in or to any effects or property in the hands, possession or custody of a liquidator, may be obtained by an order of the Court on summary petition, and not by any action, suit, attachment, seizure or other proceeding of any kind whatsoever."

Section 22: "After the winding-up order is made, no suit, action or other proceeding shall be proceeded with or commenced against the company, except with the leave of the court and subject to such terms as the court imposes."

Section 23: "Every attachment, sequestration, distress or execution put in force against the estate or effects of the company after the making of the winding-up order shall be void."

The purpose of the Act is to wind up, finally, the affairs of

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the company as inexpensively and speedily as possible, in the interests of the creditors, and all others concerned in it, primarily; and, for the common good, all are equally deprived of some of their ordinary rights, including a right of action, and all that may follow upon that right, such as mode of trial, right of appeal, etc., and all are confined to the remedies which the Act provides or permits.

There are cases in which leave to bring an action, upon proper terms, should, indeed may necessarily, be granted: the case of *Jones and Others* v. *The Pacaya Rubber and Produce Co. Limited and Others* affords an instance. In delivering his judgment in *In re Pacaya Rubber and Produce Co. Limited*, [1913] 1 Ch. 218, Buckley, L.J., said of it: "Application was made for leave to continue the action, and on June 7, 1912, leave was given to the plaintiffs to proceed notwithstanding the winding-up order. That order was right, for the cancellation of the agreement which the plaintiffs sought could not have been obtained in the winding-up proceedings, but only in the action."

The case of *Thames Plate Glass Co.* v. *Land and Sea Telegraph Construction Co.*, L.R. 6 Ch. 643, does not aid this appeal. In that case Malins, V.-C., gave leave to proceed in an action for specific performance commenced before the winding-up order was made, but to proceed as far as answer only, originally: see *Thames Plate Glass Co.* v. *Land and Sea Telegraph Co.* (1870), L.R. 11 Eq. 248. When the answer was filed, the plaintiffs applied again to the same Judge for leave to proceed, offering to have the suit transferred to the Court of that Judge, in which Court the winding-up proceedings also were being carried on, and he gave leave. On appeal from that order the Court of Appeal refused to interfere. The order made in the appeal was: "Appeal dismissed with costs. The cause by consent to be transferred to the Vice-Chancellor Malins, and the parties to consent to an application to advance the cause."

The Court of Appeal of this Province, in the case of *Re Toronto Cream and Butter Co. Limited*, 14 O.W.R. 81, following the case of *Thames Plate Glass Co.* v. *Land and Sea Telegraph Construction Co.*, declined to interfere with an order made.

But in such cases as *In re Lundy Granite Co.* (1871), L.R. 6 Ch. 463, *In re David Lloyd & Co.* (1877), 6 Ch. D. 339, and *In re Henry Pound Son & Hutchins* (1889), 42 Ch.D. 402, among other

cases, orders respecting leave to proceed, made by the Judges in whose Courts the winding-up proceedings were being carried on, were reversed or varied.

In cases where the question is one merely of convenience, not involving any principle, the order made in the first instance may well be allowed to stand, but in cases such as this, in which first principles in dealing with an application for leave to proceed are involved, the appeal cannot be dismissed on the ground that a court of appeal will not interfere with the exercise of a discretion duly exercised.

On the merits of the appeal—the question whether leave to sue should or should not have been granted—cases such as *In re David Lloyd & Co.* are inapplicable, for two reasons: (1) in such cases the rights involved were rights of mortgagees and rights to distrain upon the property of the company; here the applicant is merely a simple creditor of the company; and (2) the Parliament of Canada, as it seems to me, in passing the Act now in question, plainly provided against the law, as laid down in those cases, being applied to winding-up proceedings in Canada: see sec. 133, which I have read.

Having regard to the fact that the *Lloyd* case was decided in the year 1877, and that the case *In re Longdendale Cotton Spinning Co.* (1878), L.R. 8 Ch. 150, was decided in the following year, and that the provisions of sec. 133 were first enacted in Canada in the year 1882, in sec. 43 of "An Act respecting Insolvent Banks, Insurance Companies, Loan Companies, Building Societies, and Trading Corporations," 45 Vict. ch. 23, it seems to me to be as plain as if the enactment had said so that the Courts here are not to exclude from the winding-up workshop such cases as had been by the Court in England excluded there, that the widest effect is to be given to the comprehensive words of the Act, for the purposes I have already mentioned.

Whether secs. 22 and 133 can be read together, as Lord Romilly, M.R., thought secs. 87 and 163 of the Imperial enactment might be—see *In re Lundy Granite Co.*—so that leave may be given to proceed or sue in a case coming within sec. 133—need not be considered; the claim in that case does not come within sec. 133; it could not, there was no such legislation there. An interesting discussion of the subject may be found in the case of *Stewart* v. *LePage*, 24 D.L.R. 554, 29 D.L.R. 607 and 53 S.C.R. 337; and the

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case of *Currie* v. *Consolidated Kent Collieries Corporation Limited*, [1906] 1 K.B. 134, shews that the Courts in England do make a substantial difference as to leave to proceed between voluntary and compulsory liquidation under the Imperial enactments.

We have no desire or intention to depart from the rule that an exercise of a discretion upon proper principles is not generally to be interfered with; we are endeavouring to apply to this matter the principle properly applicable to it, which I cannot think was done in making the order in appeal.

The appeal is allowed, the order appealed against discharged, and the motion for it dismissed. *Appeal allowed.*

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DESPINS v. THE KING.

Exchequer Court of Canada, Audette, J. December 23, 1916.

CROWN (§ II—20)—NEGLIGENCE—"PUBLIC WORK"—TUG.

A steam-tug engaged in serving government dredges employed in improving a ship channel is not a "public work" within the meaning of the Exchequer Court Act (R.S.C. ch. 140, sec. 20 (*c*)), to charge the Crown with liability for injuries resulting therefrom.

[*Paul* v. *The King*, 38 Can. S.C.R. 126, followed; *Chamberlin* v. *The King*, 42 Can. S.C.R. 350; *Hamburg American Packet Co.* v. *The King*, 39 Can. S.C.R. 621; *Olmstead* v. *The King*, 30 D.L.R. 345; *Piggott* v. *The King*, 32 D.L.R. 461, referred to.]

Statement.

PETITION OF RIGHT for damages arising out of a fatal accident charged to be due to the negligence of an employee of the Crown on a steam tug belonging to the Dominion Government.

L. P. Guillet, for suppliant; *F. Lefebvre*, for the defendant.

Audette, J.

AUDETTE, J.:—The suppliant, by his petition of right, seeks to recover the sum of $5,000, as representing alleged damages suffered from the death of his son by accident while in the employ of the Government of Canada.

On September 6, 1915, the tug "Becancour" was engaged serving Government dredges employed in digging the ship channel between Montreal and Quebec. The tug had been at anchor during the night about opposite Lanoraie, and in the early morning raised anchor and steamed to a scow which was also at anchor close by. The anchor of the tug had been raised by means of a winch and was hanging at the bow of the tug, the officer in charge of the same having directed that the anchor would be placed on deck after mooring at the scow. After mooring at the scow and while the crew was in the act of starting to heave the anchor on deck, Carpentier, one of the sailors who was usually attending to such work, had a block in his hands and was

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preparing to hook it to the anchor, when Despins, the suppliant's son, rushed up on deck and coming to Carpentier, took the block from him, and said, "I will attend to that work." He went over the railing, stood on the anchor and while in that position one of the sailors slightly loosened the winch to test it, and, the pawl being off, the anchor went down to the bottom carrying Despins with it. Despins was drowned despite the crew immediately throwing out a boat to rescue him.

This action is, in its very essence, one in tort for damages, and such an action does not lie against the Crown, except under special statutory authority, and the suppliant to succeed must necessarily bring his action within the ambit of sub-sec (*c*) of sec. 20 of the Exchequer Court Act. In other words, the accident must have happened: 1. On a public work. 2. There must be a servant or officer of the Crown who has been guilty of negligence while acting within the scope of his duties or employment; and, 3. The accident complained of must be the result of such negligence.

Following the decision in the case of *Paul* v. *The King*, 38 Can. S.C.R. 126, I must come to the conclusion that the accident did not happen *on* a public work. Having so found, it is unnecessary to consider whether or not the accident resulted from the negligence of an officer or servant of the Crown while acting in the scope of his duties or employment.

See also *Chamberlin* v. *The King*, 42 Can. S.C.R. 350; *Hamburg American Packet Co.* v. *The King*, 39 Can. S.C.R. 621; *Olmstead* v. *The King*, 30 D.L.R. 345; *Pigott* v. *The King*, 32 D.L.R. 461, and *Montgomery* v. *The King*, 15 Can. Ex. 374.

Having so found, I have come to the conclusion that the suppliant, under the circumstances of the case, is not entitled to the relief sought by his petition of right. *Petition dismissed.*

REX v. MOISAN.

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Quebec Court of Sessions, Hon. Chas. Langelier, J.S.P. November 27, 1916.

FORCIBLE ENTRY (§ I—1)—THREATS—EVIDENCE OF TITLE IN THE DEFENDANT NOT ADMISSIBLE.

To contitute the crime of forcible entry, actual violence is not necessary; if the threats were such as to create a terror which has induced the occupant to leave the premises, the offence is complete; evidence of title in the defendant is not admissible as an answer to the criminal charge.

Armand Lavergne, for the Crown.

L. A. Pouliot, for the defence.

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LANGELIER, J.:—The accused is prosecuted for having taken, with violence, the possession of a house, under sec. 102, sub-sec. 2 of the Criminal Code.

The facts proved were as follows:—

The complainant Walsh is an old man of 73 years of age who had been living for the last three years at No. 171 Dollard street in this city; the lease was in the name of his son Patrick, who resides near Montreal. Walsh has furnished the premises.

The accused, his son-in-law, with his wife, had lived with him for ten days, when on the 22nd inst. Moisan's wife asked him if he would not sell her his provisions. At that moment another daughter, Mrs. Bernier, came in and the old man invited Moisan to go upstairs with him in the garret. Then he told him if he would leave him room in the house he would give him his provisions. Moisan refused and ordered him to leave the house; that he was now the master. A row took place and Moisan abused Walsh. The latter took his valise and went away; while crossing the yard, his daughter threw him a horse collar and Moisan emptied his coal in the snow.

Walsh's wife had previously quit the house because he had asked her for her bank-book.

Nap. Walsh had a lease for the same house dated 26th June last and had transferred it to Moisan on the 21st of November, *with all the furniture and provisions without being obliged to render any account*, which belonged to his father.

The accused under oath admitted the facts proved by his father-in-law.

The question of title by the accused is not to be considered (*The Queen* v. *Cokeley*, 13 U.C.Q.B. p. 521).

Are the facts as proved of a nature to constitute a forcible entry?

The evidence has revealed a sad condition of affairs for Walsh: it is clear that his whole family had conspired to expel him from the house. His wife leaves him under the most futile pretence, after having sued him for neglect to provide, and withdrawn her action; his son Napoleon, without any warning transfers the lease to Moisan who, the next day, ordered the old man to quit and used violent language in doing so. Walsh, who is an old man, thought it wiser to go away.

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To constitute a forcible entry, physical violence is not necessary.

Roscoe's Criminal Evidence, 13th Ed., p. 436, says:—

"Where the party either by his behaviour or speech at the time of his entry, give those who are in possession just cause of fear that he will do them some bodily hurt if they don't give away to him, his entry is esteemed forcible."

Archbold's Criminal Evidence, p. 1111, says:—

"So an entry where personal violence is done to the prosecutor or even where it is accompanied by such threats of personal violence, actual or implied, as were likely to intimidate the prosecutor and to deter him from defending his possession is a forcible entry."

Bishop's Criminal Law, para. 507, says:—

"But though a man enter peaceably, yet, if he turns the party out of his possession by threats, it is a forcible entry."

Roscoe, already cited, says at p. 508:—

"The same circumstances of violence or terror which make an entry forcible will make a detainer forcible also."

Has the conduct of the accused been of a nature to intimidate Walsh?

I must take into consideration the age of the old man, abandoned by his wife and children: at a certain moment his son-in-law orders him out of the house with violent language. Walsh has certainly been intimidated and he left on account of the terror created by such intimidation. The accused is guilty.

Defendant convicted.

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Ontario Supreme Court, Middleton, J. June 24, 1916.

MASTER AND SERVANT (§ I C—10)—WRONGFUL DISCHARGE—MEASURE OF DAMAGES.

Profits derived from speculation or business ventures should not be deducted from the amount to which a servant would otherwise be entitled as compensation for damages sustained through the employer's breach of contract of employment.

ACTION upon a guaranty.

Statement.

Hamilton Cassels, K.C., for plaintiff.

Sir *George C. Gibbons*, K.C., for defendants.

MIDDLETON, J.:— The plaintiff was employed under a written agreement dated the 20th December, 1910, by the Dominion Linen Manufacturing Company Limited, as their

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general sales-manager, for the period of five years from the 1st January, 1911, at an annual salary of $5,000. The payment of this salary was guaranteed by Christopher Kloepfer and Robert Dodds. The company went into liquidation at the end of December, 1913, while the contract had yet two years to run. The defendants are the administrators of the estate of Christian Kloepfer, now deceased.

The plaintiff's right to recover is not disputed; the sole question is, what damages, if any, he is entitled to receive.

It appears that, in the course of the liquidation of the linen company, the plaintiff purchased certain of the assets of the company at a price of about $36,000, and that he was able to sell these assets in a comparatively short time by retail, so as to realise a profit of approximately $11,000. After this, he became a member of a syndicate which purchased the plant and factory premises of the linen company, and turned them over to a joint stock company, in which he purchased shares. He then became the sales-agent for the new company, upon a commission basis; but, unfortunately, owing to business depression and other circumstances, his expenses as sales-agent exceeded his receipts from commission.

It is argued for the defendants that, under these circumstances, the plaintiff is not entitled to recover damages, for the profits made upon his first venture, occupying less than three months, brought him a sum in excess of the salary he would receive during the two years yet to run of his contract; and further that, not having sought employment but having entered into business on his own account, he has precluded himself from recovering.

No English case has been cited dealing with the precise matter, but I think the principles laid down in many English cases indicate that the defence suggested is untenable.

Reliance is placed upon the statement found in Labatt's Master and Servant, 2nd ed., vol. 1, p. 1181, where it is said that "where the servant has entered into an independent business on his own account before the expiration of the stipulated term, the damages should be reduced by the amount of the profits derived therefrom."

This ignores the fact that the profits derived from a business conducted by the servant are derived from something essentially different from that which he undertook to perform under

his contract. In managing a business of his own he imperils his own capital and subjects himself to the responsibility and anxiety incident to the conduct of the business—things which are quite different from that which under his contract of employment he was obliged to render to the master.

The true principle to be derived from all the authorities is that explained in Macdonell's Law of Master and Servant, 2nd ed., p. 157, *et seq.* The damages are to be compensation for the actual loss sustained by the breach of contract. The servant on his part is not entitled to remain idle; he must make reasonable exertion and shew diligence in endeavouring to procure employment. The amount of wages which he would earn is not the measure of damages, but his probable loss; that is, the difference between the stipulated wages and the wages which he might reasonably be expected to earn by the exercise of ordinary diligence and exertion to obtain similar employment in which he would be called upon to render substantially similar services.

The fact that the servant is not bound to wait until the expiry of the term, but may at once sue for the damage sustained, and then call upon the Court to estimate his probable loss, upon the basis which I have indicated, goes to shew that any extraordinary profit which he may earn as the result of any business or speculation which he may undertake before the term has expired cannot be considered.

None of the cases cited by Mr. Labatt appear satisfactorily to apprehend the principle to be derived from the numerous English authorities. On the other hand, that principle seems to be clear and free from ambiguity. It is, that the damages are mitigated by the possibility of the discharged servant obtaining employment of equal or approximately equal value to that which he has lost. It is so put, for example, by Lord Esher in *Reid* v. *Explosives Co. Limited* (1887), 19 Q.B.D. 264, 267: "If from the time when the employment ceased onwards for a period equal to the time agreed on for notice of dismissal, he has had employment of equal value to that which he has lost, he has sustained no damage."

So also in *Brace* v. *Calder*, [1895] 2 Q.B. 253. A partnership was dissolved, the employee dismissed; but a new firm was formed which took over the business and offered a similar position to the employee. He could recover nominal damages only, for

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he had sustained no reasonable damage, by reason of the proffered employment.

In *Beckham* v. *Drake* (1849), 2 H.L.C. 579, 606, 607, Erle, J., said: "When a promise for continuing employment is broken by the master, it is the duty of the servant to use diligence to find another employment."

In *Hartland* v. *General Exchange Bank* (1866), 14 L.T.R. 863, Willes, J., instructed the jury that they were not to give the whole salary of a discharged bank manager, but "must reduce the amount by the probabilities of the plaintiff having other employment to fill up his time during that period. No doubt the position of manager of a bank was not to be got every day, and that they would consider. Still, they would also consider what might reasonably be deemed the value of his time."

In *Sowdon* v. *Mills* (1861), 30 L.J.Q.B. 175, Blackburn, J., *arguendo*, says: "If an action is brought by a servant for a wrongful dismissal soon after the dismissal, the Judge tells the jury they must speculate on the chance of his getting a new place and base their damages on that. If the action is delayed till the man has got a place, what was matter of speculation before becomes certainty then, and the jury calculate accordingly."

In *McKean* v. *Cowley* (1863), 7 L.T.R. 828, Bramwell, B., and Wilde, B., in a case in which no employment was obtained, did not allow the full wages, thinking there "should be set something for the saving of his time and labour by his not having had to earn it."

Where the servant does not seek new employment, his failure to do so does not deprive him of his rights, but the Court must mitigate the damages by estimating his chance of having obtained employment if he had sought it; and the same principle, I think, applies where the servant does not choose to remain in idleness, but undertakes an entirely different occupation, or enters upon business for himself.

Applying this principle to the case in hand, it is quite plain that it would not have been easy, and that perhaps it would have been impossible, for Mr. Cockburn to obtain as good a position as that which he lost. He was a specialist in the selling of linens. The only other linen factory in Ontario was a comparatively small institution. The employment he entered into, like his

speculation, was something entirely different from that which he was called upon to undertake to mitigate the damages.

There would have been considerable delay before he could expect to obtain such a position as he was called upon to accept, and I am satisfied that he would not have been able to obtain a position where he would be called upon to perform services that could fairly be compared with services that he had to render under the contract in question, at anything like the same salary.

Having regard to all the considerations that the cases I have cited, or any others I have been able to find, indicate ought to be borne in mind, I think the damages should be assessed at $4,000. *Judgment for plaintiff.*

INTERNATIONAL HARVESTER CO. v. HOGAN.

Alberta Supreme Court, Appellate Division, Scott, Beck and Hyndman, JJ. December 23, 1916.

EXECUTION (§ I—11)—VOLUNTEERS AND RESERVISTS ACT—ENACTMENT—JUDGMENT AS NEW DEBT.

Although a debt becomes merged in a judgment, the original debt is not detracted from, and therefore a proceeding to enforce a judgment for a debt, obtained on the day the Volunteers and Reservists Relief Act (Alta. Stat. 1916, ch. 6) came into force, is a proceeding for the enforcement of a debt due before the passing of the Act; and the defendant, a volunteer, is entitled to the protection afforded by the Act.

Statement.

APPEAL from 30 D.L.R. 790, allowing an appeal on an application for leave to sell goods under execution. Reversed.

J. E. Wallbridge, K.C., for appellant; *S. W. Field*, for respondent.

The judgment of the Court was delivered by

Scott, J.

SCOTT, J.:—Upon the hearing of the appeal it was agreed by counsel that it should be heard and determined upon the facts disclosed in the judgment in this case reported in 30 D.L.R. 790.

The material facts are that on April 19, 1916, the day on which the Volunteer and Reservists Relief Act (ch. 6 of 1916) came into force, the plaintiff recovered against the defendant the judgment upon which the execution issued. The defendant became a member of the reserve militia subsequent to the judgment. He claims the protection of the Act, sec. 3 of which provides, *inter alia*, that no person shall, after the passing of the Act, take any action or proceeding against any volunteer or reservist for the enforcement of payment of any debt, liability or obligation incurred before the passing of the Act until 1 year after the termination of the state of war referred to in the Act

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or until one year after the discharge of such volunteer or reservist whichever shall first happen.

The Master held that though a judgment merges and extinguishes the cause of action in respect of which it is obtained, it does not extinguish the debt, but determines that it exists, that the judgment is the same debt although it gives the judgment creditor a higher remedy, and that a sale under execution upon the judgment would be a proceeding to enforce payment of a debt incurred before the passing of the Act.

In his judgment on appeal from the Master, Ives, J., held that the judgment created a new debt, the old debt being gone by reason of its being merged in the payment, that the new debt is distinct from the original claim, and is not merely the evidence of the original claim, but is the substance of the claim itself, that by it the debtor is freed from the original liability, and is subjected to a new liability, and the creditor has obtained a fresh cause of action. He therefore held that as the judgment was obtained after the passing of the Act the defendant was not entitled to protection under it.

It appears to be well settled in England that upon a judgment recovered in an action for a debt the original cause of action is merged in the judgment.

In *King* v. *Hoare*, 13 M. & W. 494, Parke, B., says, at p. 504:—

> If there be a breach of contract, or wrong done, or any other cause of action by one against another, and judgment be recovered in a Court of Record, the judgment is a bar to the original cause of action, because it is thereby reduced to a certainty, and the object of the suit attained, so far as it can be at that stage; and it would be useless and vexatious to subject the defendant to another suit for the purpose of obtaining the same result. Hence the legal maxim "*transit in rem judicatam*"—the cause of action is changed into matter of record, which is of a higher nature, and the inferior remedy is merged in the higher. . . The judgment of a Court of record changes the nature of that cause of action, and prevents its being the subject of another suit, and the cause of action, being single, cannot afterwards be divided into two.

See Halsbury, vol. 18, p. 209.

The reason for and effect of the rule that the original cause of action is merged in the judgment recovered upon it is plainly stated by Parke, B., in his judgment which I have quoted, viz.: that it reduces the original cause of action to a certainty, that the object of the suit is attained so far as it can be at that stage and that it would be useless and vexatious to subject the defendant

to another suit for the same purpose, and I cannot see why the rule should be applicable for any other purpose.

The English cases bearing upon the question which I have been able to find are mainly cases which relate to the question of *res judicata*, and are therefore cases to which the reason for the rule is peculiarly applicable.

The effect of the recovery of judgment in an action is to my mind properly stated in 23 Cyc., p. 1105, as follows:

> But while the debt or claim in suit becomes merged in the judgment, and the judgment itself becomes thereafter a new liability and a fresh cause of action; yet as to the original debt the judgment neither creates, adds to or detracts from it; its only office is to declare the existence of the debt, fix its amount and secure to the creditor the means of enforcing its payment.

To hold that under the circumstances of the case the defendant is not entitled to the protection of the Act would in my opinion defeat its manifest intention.

I would therefore allow the appeal with costs.

Appeal allowed.

KILLELEAGH v. CITY OF BRANTFORD.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., and Riddell, Lennox and Masten, JJ. October 4, 1916.

MUNICIPAL CORPORATIONS (§ II G—260)—NOTICE OF INJURY—DESCRIPTION—SUFFICIENCY—MISTAKE.

It is not necessary that the notice of injury required under the Municipal Act, R.S.O. 1914, ch. 192, sec. 406 (4), should state the day on which the accident happened so long as it is given within seven days of the happening of the injury. An evident mistake in the description does not invalidate the notice when sufficient information is left therein to identify the place where the accident took place, and the mistake does not mislead the defendants.

Statement.

APPEAL by the defendants from the judgment of a County Court Judge in an action against the City of Brantford to recover damages for injury from a fall upon an icy sidewalk. Affirmed.

A. J. Wilkes, K.C., for appellants.

W. M. Charlton, for plaintiff, respondent.

The judgment of the Court was read by

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—In order that the plaintiff should recover in this action it was necessary that she should prove: (1) that the injuries she complained of were caused by the gross neglect of the defendants in their duty to keep the highways and bridges under their jurisdiction in repair; and (2) that notice of her claim and of the injury she complained of was given to

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the defendants, in writing, within seven days after the happening of the injury.

The plaintiff succeeded at the trial; and this appeal is brought against the judgment there directed to be entered in her favour, on the grounds: that the requisite notice was not given; and that the plaintiff's injury was not caused by the gross negligence of the defendants.

The objections to the notice are: (1) that it does not state the day on which the accident happened; and (2) that in it the accident is said to have happened on the south side of the street, whereas in fact it happened on the north side.

The statute does not expressly require that the time of the injury shall be stated in the notice; in regard to time it requires only that it shall be given "within seven days after the happening of the injury;" and in this case there is no suggestion that the defendants were in any manner prejudiced, or even inconvenienced, by the absence of a statement of the time when the accident happened; though in all well-drawn notices such information should be and is given.

The purpose of the Legislature in requiring notice to be given was not to defeat just claims on formal objections, but was that timely notice should be given of a claim intended to be made, so that the municipal corporation should have a fair opportunity for investigation of it. Having regard to the expressed requirements of the Act, and to the circumstances of this case, I am of opinion that the trial Judge was right in refusing to give effect to this objection to the plaintiff's claim: see *Bond* v. *Conmee* (1889), 16 A.R. 398.

The other objection to the notice is of even less weight. There is nothing to shew that the defendants were, or could have been, misled by the mistake in the points of the compass; they could not have been, because the notice indicates that it was on that side of the street on which the telephone poles are placed, and that is the north side. It was a case of a plainly mistaken description, which, being rejected for that reason, left sufficient information as to the place of the accident. The appeal fails on this point also.

Then was "gross negligence" proved? Fault is often found with the expression "gross negligence," as being something undefined and perhaps indefinable; but there is some certainty

regarding it in such a case as this, in that it means something more than mere default regarding the obligation in general which the statute imposes on municipal corporations, to keep highways and bridges in repair; for, after imposing such a general liability, an exception out of such liability is made in these words: "Except in case of gross negligence a corporation shall not be liable for a personal injury caused by snow or ice upon a sidewalk."

No exact measure can be given of negligence: generally one can say that it is a neglect of duty such as ordinarily does not happen; and perhaps as much can be said of gross negligence, that it is that negligence, greater than mere negligence, which would ordinarily be described as gross or by some like word. Not merely negligence with an expletive, in the correct meaning of that word, but perhaps negligence which, in describing it, would ordinarily call forth a preceding expletive, profane or otherwise, in its colloquial meaning.

In this case, the place where the accident happened was part of a sidewalk in the city of Brantford; and at this place it had been either so constructed as to be, or was allowed through disrepair to become, lower than the ground beside it, with the result that the water, from rain or melted snow, flowed upon the sidewalk, and there, freezing in cold weather, made a dangerous spot, unobservable when fresh snow had fallen, and so a dangerous place, something in the nature of a trap, sometimes.

If this improper state of affairs had arisen from ordinary wear and tear, and had been put right in a reasonable time, there would have been no neglect of the defendants' duty to keep this highway in repair; if that were not done, there would have been that "default" which makes corporations liable "for all damages sustained by any person by reason of such default."

To allow the sidewalk to remain in that condition through a whole winter's season would be taking more than a reasonable time to discover the disrepair and make the needed repair, though the highway was not a prominent one, and notwithstanding all other the defendants' obligations extending over many miles of many highways of all kinds, and the high rates of taxation to which the defendants are already driven by many other obligations of various kinds. To let such a state of disrepair continue for a whole year would unquestionably amount to negligence;

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whether it would amount to gross negligence need not be found, because, according to the evidence, the sidewalk had been left in that state of disrepair for three years, and according to the testimony of one of the witnesses the water ran down upon the sidewalk so that "there was quite a little river;" and that, no matter how slippery the sidewalks might be, she had never in 35 years known the defendants to sprinkle sand upon them in the highway in question, which is called Park avenue.

If one year's disrepair be enough to justify a charge of unquestionable negligence, three years' assuredly must justify a charge of gross negligence: must be default which ordinarily would be described with an adjective of more or less emphatic character, in all probability in many cases the colloquial profane expletive.

In my opinion the trial Judge was right in his finding that the defendants were guilty of gross negligence.

And the fact that, at the time when the plaintiff sustained her injury, weather conditions had made all walks slippery, and more or less dangerous, cannot relieve the defendants from liability for an accident happening upon the ice before formed owing to the gross negligence of the defendants: because nature made danger everywhere, because it increased, perhaps, the danger at this spot, is no good reason for relieving the defendants from liability for an injury caused by their neglect of duty, not by the weather conditions generally: rather because of such weather conditions, and their occasional recurrence, more care should be taken to have the sidewalks in repair, or if out of repair to mitigate the evil with a sprinkling of sand. It may be that if the plaintiff had not fallen at this spot she might have fallen and been injured worse somewhere else; and it is quite certain if, like some of the witnesses, she remained indoors on this slippery day, she could not have fallen where she did fall, but she had her work to do away from her home, and was not negligent in going out to do it; so these things cannot affect her right to recover in this action.

And I am of opinion that the trial Judge was right in finding: that the defendants' gross negligence was the proximate cause of the plaintiff's injury; and that she was not guilty of contributory negligence; and so I would dismiss the appeal.

Appeal dismissed.

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Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Anglin and Brodeur, JJ. June 19, 1916.

CROWN (§ II—20)—NEGLIGENCE—INJURY TO "PROPERTY ON PUBLIC WORK."
Except where so provided by statute, the Crown is not liable for wrongs committed by its servants; sec. 20 (*c*) of the Exchequer Court Act (R.S.C. 1906, ch. 140), imposes such liability when injury to a person or property on any public work results from negligence of any officer or servant of the Crown; when the thing injured is not on any public work, no such liability exists, even though the injury arose out of operations connected with such a work.

Statement.

APPEAL from a judgment of the Exchequer Court of Canada dismissing the suppliants' Petition of Right.

Servants of the Crown engaged in building a cement dock on the Detroit River caused damage to suppliants' dock adjoining the work by their blasting operations. The suppliants claimed damages by Petition of Right, which was dismissed by the Exchequer Court for want of jurisdiction. They then appealed to the Supreme Court of Canada.

W. L. Scott, for the appellants.

Newcombe, K.C., for the respondent.

Fitzpatrick, C.J.

FITZPATRICK, C.J.:—The appellants brought their Petition of Right to recover damages against the Crown for injuries alleged to have been caused to their dock through negligence in the course of the work of constructing a public dock 100 ft. from the premises of the petitioners.

The Exchequer Court Act provides, sec. 20 (so far as material):

The Exchequer Court shall also have exclusive original jurisdiction to hear and determine the following matters:—

(*a*) Every claim against the Crown for property taken for any public purpose;

(*b*) Every claim against the Crown for damage to property injuriously affected by the construction of any public work;

(*c*) Every claim against the Crown arising out of any death or injury to the person or to property on any public work resulting from the negligence of any officer or servant of the Crown, while acting within the scope of his duties or employment.

At the trial it was pointed out by the Judge of the Exchequer Court that, excepting by statute, the Crown was not liable for wrongs committed by its servants, and that sec. 20 (*c*) of the Exchequer Court Act, the only statutory provision imposing such liability, did so only in the case of injury to property on any public work.

The appellants now seek to rest their case upon sec. 20 (*b*) of the Act. This, however, is to confuse two kinds of action of

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entirely different nature. Paragraphs (*a*) and (*b*) of sec. 20 are dealing with questions of compensation, not of damages.

Compensation is the indemnity which the statute provides to the owner of lands which are compulsorily taken in, or injuriously affected by, the exercise of statutory powers.

For acts done in pursuance of statutory powers there can be no damages, for, the acts being made lawful by the statute, the doing of them can occasion no wrong. For loss occasioned by the doing of such acts compensation is the remedy provided by statute.

It is clear that in the case of a private company or individual committing such acts as those alleged in the petition of right, the appellants would have had their remedy in an action for damages. The Crown, however, cannot be sued for what would, between subjects be a wrong done, except in so far as provided by statute.

It follows that the appellants cannot establish a claim either to compensation under par. (*b*) or to damages under par. (*c*) of sec. 20 of the Exchequer Court Act, and their action accordingly fails.

The appeal must be dismissed with costs.

Davies, J.

DAVIES, J.:—I think this appeal must be dismissed with costs as being directly within the construction of the Exchequer Court Act laid down by this Court in the cases of *Paul* v. *The King*, 38 Can. S.C.R. 126 and *Chamberlin* v. *The King*, 42 Can. S.C.R. 350.

Idington, J.

IDINGTON, J.:—When the Petition of Right Act, 1875, 38 Vict. ch. 12, was passed, it recited the expediency of making provision for proceeding by way of petition of right, and to assimilate the proceedings on such petitions, as well as in suits by the Crown, to the course of practice and procedure in force in actions and suits between subject and subject.

It enacted by the first clause thereof that the petition should set forth with convenient certainty the facts entitling the suppliant to relief.

That held out a very comprehensive purpose of relief, but by sec. 8 there was, in a section that began in an equally comprehensive spirit outlining the practice and procedure to be applied, the following proviso:—

Nothing in this Act shall be construed to give to the subject any remedy against the Crown, in any case in which he would not have been entitled to such remedy in England under similar circumstances by the laws then in force there prior to the passing of the Imperial statute, 23 and 24 Victoria, chapter 34, intituled, "*An Act to amend the law relating to Petitions of Right to simplify the proceedings and to make provisions for the costs thereof.*"

It was intended by other parts of that Act to execute its purposes by and through the ordinary Courts of the province. In consequence of the establishment of this Court immediately after such enactment, combined with a power of exercising the functions of an exchequer Court, that Act was repealed by 39 Vict. ch. 27, sec. 1. And the jurisdiction to try such Petitions of Right was allotted to the Exchequer Court.

By sec. 19 of that statute, there was, amongst other things, enacted that it was not to give to the subject any remedy against the Crown save in such cases as embraced in above quoted proviso.

By the later development of the jurisdiction of the Exchequer Court, when separated from this Court, it so turned out that the limits of relief under the Petition of Right Act were confined to the jurisdiction given that Court.

Indeed, it has inadvertently, as I submit, been sometimes said that Court had been given not only a jurisdiction, but that its provisions created a right to relief as well as supplied a remedy.

The measure of relief intended by the Petition of Right Act was, I think, wider than that jurisdiction, but, inasmuch as the jurisdiction given in the Exchequer Court was the only jurisdiction to try any such claims, the only practical relief given was that assigned by the said Exchequer Court Act.

The result has been to limit by the jurisdiction given the only relief, and that is less than, though probably intended to be coterminous with, the relief given in the Imperial Act above quoted.

It would be impossible properly to extend the express language of the jurisdiction given, by means of any section denying the right to be greater than something else. The absurdity has continued for many years, and probably justice has often been thereby denied.

The sub-sec. (*c*) of sec. 2 of the Exchequer Court Act under which the appellant seeks relief reads as follows:—

(*c*) Every claim against the Crown arising out of any death or injury to the person or to property on any public work resulting from the negligence

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of any officer or servant of the Crown while acting within the scope of his duties or employment.

This case illustrates what a stupid enactment this is.

The words therein, "on any public work," rendered it impossible, in the case of *Chamberlin* v. *The King*, 42 Can. S.C.R. 350, for us to interfere, solely because the injury, if any, was done to property a long distance from the place where the public work existed from which it was said the cause of the destruction of suppliant's property originated.

The cause of the injury there in question was alleged to be the issuing of fire from an improperly constructed or guarded smoke stack.

The Court below had therein found there was, in fact, no well-grounded cause of complaint, but the suppliant had a right to have us rehear the case and determine the merits of the appeal if there had been jurisdiction in the exchequer Court. He was in law properly refused, and the decision was put, I suspect, upon the ground of jurisdiction alone not only as a proper way of disposing of the appeal, but a means of bringing home to others the actual condition of the law. The trial Judge herein has followed, properly as I conceive, that decision.

This case illustrates how absurd and barbarous the law is.

If counsel for the suppliant states correctly the facts, then the servants of the Crown negligently used dynamite in such a way as to blow up a pier belonging to the suppliant.

The property owned by the suppliant and by the Crown formed at the time parts of a long pier, of which it was desired by the Crown to destroy part of that which it had acquired, and, in doing so, unintentionally, I assume, destroyed part of that same work which had passed into the suppliant's possession. What right would any private owner ever imagine he could have to use dynamite under such circumstances until he had severed clearly and completely the connection between the properties so that there could be no risk of such consequences as alleged?

However that may be in fact, there can be no question that, under the plain language of the sub-section, dynamite or other explosive might be so used on such a property as to smash to pieces men and property lawfully beside it, and neither owner nor representative could recover for such damages.

The men guilty might be prosecuted criminally and sent to

prison, but civil damages there could be none recoverable under this sub-sec. (*c*).

And all that, I suspect, comes of someone confusing provisions relative to Crown property found in the statutes preceding this with other subject matters that had to be provided for.

Idington, J.

I cannot put the construction Mr. Scott asks us to put on the word "construction" in the preceding sub-section, and get out of the difficulty that way. It was destruction the respondent's servants were engaged in, and not even construction in a sense different from that for which I think the word stands as I read it in sub-sec. (*b*).

I respectfully submit that the sooner the probably misplaced words, "on any public work," are stricken out of sub-sec. (*c*) the better.

I think the appeal must be dismissed, but should we give costs? I think not.

Anglin, J.

ANGLIN, J.:—I respectfully concur in the reasons assigned by the Judge of the Exchequer Court for dismissing this action. Since the decisions in *Chamberlin* v. *The King*, 42 Can. S.C.R. 350, and *Paul* v. *The King*, 38 Can. S.C.R. 126; *Letourneux* v. *The King*, 33 Can. S.C.R. 335, is not authority for maintaining such an action. As to clause (*b*) of sec. 20 of the Exchequer Court Act, invoked in this Court by the suppliant, damage to property sustained in the course of construction of a public work through negligence or otherwise is not "damage to property injuriously affected by the construction" of such public work.

Brodeur, J.

BRODEUR, J.:—The claim made against the Crown may result from the negligence of its officers, but does not arise out of an injury "on any public work."

There has been a long series of decisions of this Court to the effect that the provisions of sec. 20, sub-sec. (*c*), of the Exchequer Court Act render the Crown liable for injury to property only when the property is situated on a public work. *City of Quebec* v. *The Queen*, 24 Can. S.C.R. 420; *Larose* v. *The King*, 31 Can. S.C.R. 206; *Paul* v. *The King*, 38 Can. S.C.R. 126; *Chamberlin* v. *The King*, *supra*.

It may be that the provisions of the section have not been given a very wide construction by those decisions, but the latter seem to have been accepted by parliament, since no legislation

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has ever been passed to extend the jurisdiction of the Exchequer Court to all claims for damages arising from the negligence of a servant of the Crown while acting within the scope of his duties on a public work.

Until such legislation is passed, we are bound by these decisions, and it is then necessary for the plaintiffs, if they sue for damages, to shew that the injury to their property has occurred on a public work.

Their appeal fails because they have been unable to prove such injury. *Appeal dismissed.*

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ROBICHON v. MONFETTE.

Quebec King's Bench, Sir Horace Archambeault, C.J., and Lavergne, Cross' Carroll and Pelletier, JJ. June 27, 1916.

LIBEL AND SLANDER (§ III A—95)—DAMAGES—CONFESSION OF JUDGMENT—REFUSAL TO ACCEPT.

In an action for damages for defamatory libel, the plaintiff has a right to adduce evidence to re-establish her good name and reputation, and is justified in refusing to accept a confession of judgment which denies all the allegations in the action; after notice of her refusal to accept the confession, if no defence is filed, the plaintiff may proceed *ex parte* to prove her claim as if no confession had been filed.

Statement.

APPEAL from the judgment of the Superior Court for the District of Three Rivers, rendered on December 15, 1915. Reversed.

Bureau, Bigué and Lajoie, for appellant; *Fortunat Lord*, K.C., for respondent.

The judgment of the Court was delivered by

Archambeault, C.J.

SIR HORACE ARCHAMBEAULT, C.J.:—The question is one of damages claimed for libel. The appellant complains of an article which the respondent caused to be published in the "Bien Public," of the City of Three Rivers, and which she contends was injurious and libellous in regard to her and to that of her family. She asks that the respondent should be condemned to pay her $1,900 for damages and that he should be sent to prison in default of payment of this amount or of any other sum which might be allowed by the judgment to be rendered.

The respondent appeared in the case and filed a certain confession of judgment with qualifications. He declares that he denies the truth of the allegations of the declaration but that, in order to purchase peace, he confesses judgment according to the conclusions taken against him.

The appellant has refused to accept this confession of judgment alleging, in substance, that the object of the action was not for the purpose of obtaining money indemnity but for the vindication and reparation to her honour and her good reputation. After the refusal to accept the confession of judgment had been served upon the respondent, the case was inscribed *ex parte* for proof and hearing upon the merits at the same time. The appellant wished to proceed with the adduction of evidence on the date fixed by the inscription but the respondent objected on the ground that he had filed a confession of judgment. The Court gave effect to the objection and refused the appellant the right of having her witnesses heard. The appellant then presented a petition for leave to appeal from this interlocutory judgment and her petition was granted.

We are now called upon to give a decision on this appeal. Art. 527 of the C.C.P. (Que.) allows a defendant to confess judgment for the whole or a part of the amount of the demand. But art. 530, implicitly admitting that the plaintiff may refuse to accept the confession of judgment by the defendant, declares that when a confession of judgment has not been accepted the action is continued in the ordinary course, adding that if the Court does not grant more to the plaintiff than the latter would have had upon the confession then the plaintiff cannot have a higher class of costs than if the confession of judgment had been accepted.

The wisdom of this disposition of art. 530 clearly appears in the present case. The published article complained of in the action is directed against the holders of licenses for hotels and taverns. The appellant follows the business of a licensed hotel-keeper. The incriminating article contains transparent allusions of an injurious character against the appellant and her family. It is stated that in the midst of the innumerable ruins heaped up by the infamous trade carried on by bar-keepers, these latter drive about in motor cars, their sons live in a scandalous abundance, their daughters ride on horseback with one leg on each side of the pony—like any sort of person that can be imagined. The article adds that there is a bar-keeper whose son has been sent to the penetentiary for 5 years, another who was fooling with a revolver, the bullets of the revolver having passed the brim of the hat of his friend, etc.

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The appellant alleges, in her declaration, that these injurious statements are directed against her and her family, and she adds that she has always carried on her business respectably and conscientiously, submitting scrupulously to all the requirements of the law; that she is a widow and the mother of a numerous family; that she has always enjoyed the esteem, the respect and the consideration of the public, and that she has need of it in order to gain a living for herself and her family; that the incriminating article is calumnious in regard to her and to the members of her family; that it was written and published by the respondent with the object of ruining her as well as her family in their credit, their honour and their reputation and to humiliate them in the eyes of the public; that this article is of a nature to do harm to her, as well as to her daughter and her son, to whom it makes allusion.

The confession of judgment denies the truth of the allegations of the declaration; it denies, in consequence, all the facts which I have just mentioned; it denies that the appellant is an honest mother of a family and that she has always enjoyed the esteem, the respect and the consideration of her fellow citizens; it denies that the respondent is the author of the incriminating article and that he can be held responsible for it. I consider that this document is an aggravation of the injury, and that the appellant was bound, in an action of the nature of that with which we are now concerned, to refuse to accept such a confession of judgment. A confession of judgment is not merely a consent that there may be a condemnation against the defendant; it must be an admission of the allegations necessary to obtain the conclusions of the declaration. Here the object of the action is to vindicate the honour and reputation of the appellant. The condemnation asked for is merely the punishment for the incriminating act. If this act is denied, and if it is not proved, the plaintiff has no right to the condemnation which she seeks.

It is said that the appellant ought to have had the confession of judgment filed by the respondent set aside, if that confession was not regular. I do not see the necessity of any such procedure. As I have already said, a plaintiff is not obliged to accept a confession of judgment made by a defendant and he has the right of proceeding with his case as if such confession of judgment had not been filed, after having given notice to the defendant of such

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refusal to accept. This is what the appellant did. She caused notice to be served on the respondent of her refusal to accept his confession of judgment; then she had an entry made of his default to plead, and she inscribed the case *ex parte*. If this inscription was not regularly made the respondent could have asked to have it set aside, but, from the time it remained in the record, the appellant had an absolute right to proceed to the adduction of evidence on the date fixed by the inscription. The appellant has the right to establish her good reputation and the publication of the injurious and libelous article of which she has complained. The respondent has but one means of preventing the taking of this evidence, that is by admitting the truth of the allegations of the plaintiff's declaration. By denying these allegations he obliges the plaintiff to establish that they are true. If she does not do so she will not be able to have the costs of the production of this evidence against the respondent, and that will be the penalty of her refusal to accept the confession of judgment filed.

For these reasons I am of opinion that the judgment complained of by the appellant is not well founded and that it ought to be reversed. *Appeal allowed.*

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Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Davies, Idington, Anglin and Brodeur, JJ. October 24, 1916.

ESCHEAT (§ I—1)—FEDERAL DOMAIN.

The right of escheat upon intestacy and failure of heirs, in respect of lands in Alberta, is a royalty reserved to the Dominion of Canada by 4 & 5 Edw. VII, ch. 3, sec. 21.

[See Annotation, 26 D.L.R., 137.]

Statement.

APPEAL from the judgment of the Exchequer Court of Canada, 26 D.L.R. 129, 15 Can. Ex. 403, maintaining the prayer of the information filed by the Attorney-General for Canada and declaring that the lands in question, upon the death of the owner intestate and without next of kin, escheated to the Crown in the right of the Dominion of Canada.

Frank Ford, K.C., for appellants; *W. D. Hogg*, K.C., for respondent.

Fitzpatrick, C.J.

FITZPATRICK, C.J.:—The Attorney-General for Canada by information filed in the Exchequer Court, claimed a declaration that certain lands in the Province of Alberta of which one Yard Rafstadt, who died intestate and without heirs, was formerly

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the owner had escheated to His Majesty in right of the Dominion of Canada.

The claim is similar to that put forward in the Privy Council in the appeal of *Att'y-Gen'l of Ontario* v. *Mercer*, 8 App. Cas. 767, by the Dominion Government in the name of the respondent. In that case the lands of which the deceased who died intestate and without heirs had been the owner were situate in the Province of Ontario. By the judgment it was held that lands escheated to the Crown for want of heirs belonged to the province and not to the Dominion. The ground of the decision was that although sec. 102 of the B.N.A. Act, 1867, imposed upon the Dominion the charge of the general public revenue as then existing of the provinces yet, by sec. 109, the casual revenue arising from lands escheated to the Crown after the Union was reserved to the provinces—the words "land, mines, minerals and royalties," therein, including, according to their true construction, royalties in respect of lands, such as escheats.

What is now the Province of Alberta was formerly a part of the North-West Territories under the sole authority of the Dominion Government. Up to the time of the establishment of the province, by the statute 4 & 5 Edw. VII., ch. 3, there could be no doubt to whom the lands and their revenues belonged. Lest there should be any doubt as to the position of the public lands in the Province of Alberta the Act by which it was established provided by sec. 21 that all Crown lands, mines, minerals and royalties incident thereto should continue to be vested in the Crown and administered by the Government of Canada for the purposes of Canada. The words are practically the same as those in sec. 109 of the B.N.A. Act, 1867, from which they are doubtless taken whereby the like reservation was made in favour of the provinces.

I do not myself understand how, in face of the decision of the Judicial Committee, it can be contended that the same words which were held to reserve to the provinces the casual revenue arising from lands escheated to the Crown should now receive the opposite meaning and be held not to include royalties in respect of lands such as escheats.

I am not sure that it is very necessary to deal with the arguments put forward on behalf of the province. They seem to be largely those urged and expressly negatived in the *Mercer* case,

8 App. Cas. 767. The present appellant in his factum claims that "the word 'royalties' has relation back only to mines and minerals." This was, perhaps, the main contention put forward by the Dominion in the *Mercer* case, and their Lordships say, at p. 779:—

> The question is whether the word "royalties" ought to be restrained to rights connected with mines and minerals only, to the exclusion of royalties, such as escheats, in respect of lands. Their Lordships find nothing in the subject, or the context, or in any other part of the Act, to justify such a restriction of its sense.

It is useless to ask us to find now that the word in the same subject and context has the opposite meaning to that placed upon it by their Lordships.

Judgment for the respondent on this appeal does not involve any decision as to the right of the legislature of the province to change the laws of inheritance. Lands escheat to the Crown for defect of heirs and this has nothing to do with the question who are a person's heirs. But, altering the law of inheritance is one thing and appropriating the right of the Dominion on failure of heirs is quite another thing. This is what has been done by the Alberta statute, ch. 5 of 1915. The statute in terms deals with property of a person dying "intestate and without leaving any next of kin or other person entitled thereto."

It is because there is no one who can claim the property that the Crown takes it. There is no possibility of getting at this property through the deceased. The Crown does not claim it by succession at all, but because there is no succession.

In the *Mercer* case, the Judicial Committee say:—

> Their Lordships are not now called upon to decide whether the word "royalties" in sec. 109 of the B.N.A. Act, 1867, extends to other royal rights besides those connected with "lands, mines and minerals."

It is not necessary in the present case either to decide this question. The right of the Crown to *bona vacantia* is a different one from the right to an escheat. No question as to the former right really arises in this case and I do not express any opinion as to whether it belongs to the Crown in the right of the Dominion or of the province. The question will have to be decided if necessary in a proper case.

I would dismiss the appeal with costs.

DAVIES, J., concurred with ANGLIN, J. Davies, J.

IDINGTON, J. (dissenting).—One Rafstadt the registered owner of a quarter section in Alberta who had obtained a certificate Idington, J.

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of title therefor, under the Land Titles Act, died intestate without leaving heirs at law or next of kin.

The land had been granted to him on July 25, 1911, by the Crown acting through the administration of the Department of the Interior of Canada.

The claim made that the said land escheated to and became vested in the respondent in right of the Dominion of Canada has been maintained by the Exchequer Court and the appellant, the administrator, having sold the land and administered the estate of deceased, has been ordered by said Court to account to the respondent in right of the Dominion. I respectfully submit that there seems to be thus presented a curious confusion of thought at the very threshold of this litigation.

If, as claimed by respondent and as held below, the Act, upon which the appellant acted as administrator, is *ultra vires*, then nothing which that Court can do, or we, in reviewing its action and maintaining same view can do, will be of any avail.

The title to the land is, in such view, in respondent or liable to become so vested upon inquisition duly found. The Crown certainly cannot desire that innocent persons purchasing from or claiming through the purchaser from the appellant should suffer loss, as they inevitably must when, if ever, it is finally determined that the Act apparently constituting the appellant owner was *ultra vires* and all it had done thereunder null and void.

If I were driven to entertain the same view I should feel much embarrassed in maintaining such a judgment fraught with such obvious consequences unless and until proper concurrent legislation had been enacted adopting and validating the appellant's sale and remitting the trial of the right to the proceeds to the Courts to determine.

However praiseworthy saving costs and going directly to the point may be as a rule, there are some cases where it cannot be done properly. And if the correct conclusion is as held below the proceedings herein should be stayed or the action dismissed.

The respondent can have no claim to money improperly received by appellant or any one else in Alberta unless under such circumstances that he can properly affirm the transaction and be no party to something detrimental to some of his subjects.

Passing that phase of this litigation and coming to the issue

attempted to be raised and decided herein, let us ask ourselves what an escheat is and consider the definition thereof as given in Stroud's Judicial Dictionary, vol. 2, p. 639, condensed from Coke upon Littleton, as follows:—

> Escheat is a word of art, and signifieth properly when, by accident, the lands fall to the lord of whom they are holden, in which case we say the fee is escheated.

Then let us bear in mind that the very basis of the argument in support of the view contended for by respondent herein is the tenure by which the land is assumed to have been held and that it has to be presumed a grant had been made by the lord of an estate which for want of heirs has come to an end, and by reason thereof the land has fallen to the lord who had made the grant. Such is the theory rested upon.

The respondent, it is claimed, must be held in this case to be the lord so entitled.

To make no doubt of the theory and its resting upon tenure as the basis of this claim we have but to consider the illustrations furnished by cases where the estate is held upon a copyhold tenure when the title escheats to the lord of the manor. See in Watson's "Compendium of Equity," the chapter on "Escheat and Forfeiture," p. 187, and cases cited there, especially *Walker* v. *Denne*, 2 Ves. 170, at p. 187, where Lord Loughborough, then Lord Chancellor, expressly says the title would not escheat to the Crown but to the lord of the manor. See also the more recent cases of *Weaver* v. *Maule*, 2 Russ. & M., 97; *Gallard* v. *Hawkins*, 27 Ch. D. 298, and especially at pages 306-7.

This last mentioned case brings forward another view, dealt with in Watson's work at pages 186-7, where it is explained that, until 47 & 48 Vict. ch. 71, equitable estates did not escheat to the Crown for they were not the subject of tenure and where there was a conveyance or devise in trust and there was no heir of the grantor or testator the trustee held for his own use absolutely.

The case of *Burgess* v. *Wheate*, 1 Eden 177, contains elaborate learning on the subject, and the much more recent case of *Cox* v. *Parker*, 22 Beav. 168, presents the law in a very concise judgment of Sir John Romilly, M.R.

These cases and many others make clear that the escheat of land is dependent on tenure and the title to the land only falls

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to the Crown in case by reason of the nature of the tenure thereof under the Crown such is the legal result when there is no one left to take the legal estate.

Let us now consider the nature of the tenure of the lands in question herein and see if and how it can ever produce such a result as contended for by respondent herein. If ever legislation could sweep away such a right as escheat in relation to land so far as dependent on tenure surely the enactment of 51 Vict. ch. 20, sec. 3, did so. It enacted as follows:—

3. Sec. 5 of the said Act is hereby repealed, and the following substituted therefor:

5. Land in the Territories shall go to the personal representatives of the deceased owner thereof in the same manner as personal estate now goes.

That was a comprehensive declaration of the Dominion parliament relative to the doctrine of tenure upon which alone the escheat of land so far as dependent on tenure could rest. It was an absolute renunciation by the respondent, by assenting thereto, of any such possible claim.

It was repeated in sec. 3 of the Land Titles Act of 1894.

And in the same session in which the Province of Alberta was created, and as declaratory of the policy of parliament in that regard, it was enacted by the respondent's assent given same day as the Alberta Act was assented to as follows:—

1. Upon the establishment of a province in any portion of the North-West Territories and the enactment by the legislature of that province of an Act relating to the registration of land titles, the Governor-in-Council may, by order, repeal the provisions of the Land Titles Act, 1894, and of any of its amending Acts in so far as they apply to the said province, and by such order, or by any subsequent order or orders, may adjust all questions arising between the Government of Canada and the Government of the province by reason of the provisions of this section being carried into effect.

In pursuance thereof the Alberta Legislature at its first session enacted a Land Titles Act carrying out the purpose so designed and by the language thereof put beyond doubt, so far as it could, the possibility of any such thing as escheat dependent on tenure (sec. 74).

Surely the respondent by acting upon this local legislation stipulated for in the enactment of parliament above quoted must be taken to have assented thereto as if bargained for when in pursuance thereof he by order-in-council repealed the Land Titles Act of 1894.

The grant in question herein was made in pursuance of that policy and registered in conformity therewith.

Does it not seem repugnant to reason that such a claim as escheat by virtue of tenure could be permitted to spring from such grants and rest upon such a foundation? That legislation by parliament and legislature adopted and carried into force by said order-in-council was, I submit, as absolute and final a renunciation by respondent in right of the Dominion as could be conceivable.

It is argued, however, that by reason of the Dominion having retained the control of the disposition of the Crown lands in Alberta, it must be taken to have intended to reserve to itself such incidental sources of revenue as might result from escheat.

The Alberta Act, by sec. 21 thereof, enacted as follows:—

21. All Crown lands, mines and minerals and royalties incident thereto, and the interest of the Crown in the waters within the province under the North-West Irrigation Act, 1898, shall continue to be vested in the Crown and administered by the Government of Canada for the purposes of Canada, subject to the provisions of any Act of the Parliament of Canada with respect to road allowances and roads or trails in force immediately before the coming into force of this Act, and shall apply to the said province with the substitution therein of the said province for the North-West Territories.

When we are called upon to interpret and construe this enactment I think we can refer not only to the whole scope of the Act but also as *in pari materiâ* the enactments passed in same session bearing upon the policy of parliament in its relation to the powers to be conferred upon the Alberta Legislature and especially that enactment already referred to which provided for that legislature carrying out the policy of parliament relative to the tenure of lands and their transmission in cases of intestates.

Having due regard not only to the Alberta Act itself but also these other enactments, it seems inconceivable that whatever parliament intended, it could ever have sought to reserve to the respondent in right of the Dominion any such thing as escheat dependent upon tenure of the land.

There remains, however, the question of the right of the Crown to become possessed of *bona vacantia* quite independently of tenure. That sometimes is spoken of as a right to an escheat.

Of the existence of that right, call it what we may, there can in light of the authorities such as *Taylor* v. *Haygarth*, 14 Sim. 8, and in *Re Bond; Paynes* v. *Att'y-Gen'l*, [1901] 1 Ch. 15; *Dyke* v. *Walford*, 5 Moo. P.C. 434, and *Re Barnett's Trusts*, [1902] 1 Ch. 847, be no doubt. Each is illustrative of the varying condition under which the right may exist.

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And if the respondent had sued appellant to recover the proceeds of the estate left after its due administration the question would arise whether such balance could be treated as *bona vacantia* falling to respondent in right of the Dominion or in right of the Province of Alberta.

Then we should have to consider the neat point in light of the following provision of the Alberta Act, 5 Edw. VII., ch. 3, sec. 3, as follows:—

> 3. The provisions of the B.N.A. Acts, 1867 to 1886, shall apply to the Province of Alberta in the same way and to the like extent as they apply to the provinces heretofore comprised in the Dominion, and if the said Province of Alberta had been one of the provinces originally united, except in so far as varied by this Act and except such provisions as are in terms made, or by reasonable intendment may be held to be, specially applicable to or only to affect one or more and not the whole of the said provinces.

Wherein do the provisions of the B.N.A. Acts differ from those thus made applicable to the Province of Alberta?

It is said the provisions of the sec. 21, above quoted, make a difference.

True, the management of the Crown domain is reserved as a matter of public policy for the Dominion, but how can that touch anything turning upon the right of the respondent to recover *bona vacantia* on behalf of the Dominion?

There is nothing in the language of sec. 21 reaching so far as to require such a meaning to be given it.

There may arise cases similar to that which enabled the Court dealing with the personal property in the hands of executors, in question in the case of *Taylor* v. *Haygarth*, 14 Sim. 8, cited above. Can it be said in such a case that *bona vacantia* derived from or being mere personal property is to be held recoverable by the respondent on behalf of the Dominion, instead of by him on behalf of the province?

Surely the reservation of the revenue from the sales and leasing of lands, mines and minerals is rather a shadowy foundation for such a claim. Yet there is nothing else in this Alberta Act distinguishing the status and powers of the new province from others in that regard which can be relied upon.

The right of the other provinces to escheat had been long determined in their favour by the case of the *Att'y-Gen'l for Ontario* v. *Mercer*, 8 App. Cas. 767, when the Alberta Act was passed and if there had been any such purpose as making a dis-

tinction in that regard against the new province it would have found expression in the Act in some more explicit way than by such indirect language as used in sec. 21.

And when the claim to *bona vacantia* is made how can it rest upon the single line, "All Crown lands, mines, minerals and royalties incidental thereto." for that is what the matter comes to?

There is nothing therein which in the remotest sense can extend to mere *bona vacantia* consisting of or derivable from personal property.

And with the claim thereto surely must fall also the claim to proceeds of real estate which had been declared at that time to become distributable as personal property.

And let us again observe the language of the first line of sec. 21 which defines nothing of that sort. Only the word "royalties" therein can be taken to have any possible semblance of meaning applicable to what is involved in the claim.

And these royalties are not presented as *jura regalia* but as "royalties incident thereto," *i.e.*, incident to the "Crown lands, mines and minerals."

In common parlance we all know how the term "royalties" is used relative to the timber dues and any shares of the minerals extracted under and by virtue of leases of mines or mining lands. How can such a term be made to have such an extended meaning as claimed herein?

The moment the lands are granted by the Crown they cease to be "Crown lands" and how a royalty can attach thereto puzzles one.

Again we must never forget that the whole subject of property and civil rights is relegated to the jurisdiction of the legislature of the province which can change the whole law of descent and constitute whomsoever or whatsoever it sees fit the heir at law or next of kin entitled to take the estate of an intestate or indeed if it saw fit could revoke the power to make a will and distribute the estates of deceased in such a way as it might determine.

To say that a legislature possessed of such plenary powers cannot enact such a law as declared by the judgment appealed from to be *ultra vires* seems to me somewhat remarkable.

I think the appeal should be allowed with costs throughout and the judgment appealed from be reversed.

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ANGLIN, J.:—In this proceeding the Government of Canada seeks to recover from the administrator of one Yard Rafstadt, who died in November, 1912, in the Province of Alberta, intestate and without heirs or next of kin, the proceeds left in his hands, after satisfying claims of creditors, of land granted to the intestate in 1911, by letters patent issued from the Department of the Interior of Canada, of which he died seised.

The substance of an arrangement between the parties is that, if, upon the death of Rafstadt, the Crown in right of the Dominion of Canada was entitled to the land owned by him, either as an escheat or as a *bona vacantia*, the net proceeds of the sale of such land in the hands of the administrator shall for all purposes be deemed the property of the Crown in right of the Dominion—that they shall represent the land.

A doubt was suggested as to the jurisdiction of the Exchequer Court to entertain this action on the ground that the money in question is in fact neither land escheated nor property of the Crown in right of the Dominion. The relief claimed by the information, however, is primarily a declaration that the land owned by Rafstadt upon his death "escheated to and became vested in His Majesty the King in right of the Dominion of Canada."

That relief may properly be claimed in the Exchequer Court under 9 & 10 Edw. VII., (D), ch. 18, sec. 2. The judgment has taken this declaratory form and a clause has been added, based upon the consent of parties, for the recovery by the Crown of the net proceeds of the sale held by the administrator.

The material facts were established by admissions and are fully stated in the judgment of the Judge of the Exchequer Court.

Counsel for the appellant urges several distinct grounds of appeal:—(1) That the right of property in the lands surrendered by the Hudson Bay Co. to Her late Majesty Queen Victoria, was never vested in the Crown in right of the Dominion of Canada; (2) That the right of escheat, if not vested in His Majesty in right of the United Kingdom, is vested in the Crown in right of the Province of Alberta; (3) That the reservation made by sec. 21 of the Alberta Act does not include the royalties of escheat or *bona vacantia;* (4) That under the Dominion Land Titles Act, 57 & 58 Vict., ch. 28 (1894), the holder of a certificate of title obtained not merely an estate in the land but

the full allodial rights therein and that it was, therefore, not subject to escheat; (5) That under sec. 3 of that Act providing that

> land in the Territories shall go to the personal representatives in the same manner as personal estate now goes, and be dealt with and distributed as personal estate,

the real property of a deceased owner became for all purposes personalty, and, while a case of *bona vacantia* might arise in respect of it, a case of escheat could not.

(1) I doubt if the appellant, claiming through a grant from the Canadian Government, should be heard to raise the first point, if it were otherwise tenable. But that all the property rights both of the Crown and of the company in those parts of the former Hudson Bay Lands which were not reserved for the company were vested in the Crown in right of the Dominion of Canada, is, I think, fully established. The original grant to the Hudson Bay Co.; the Rupert's Land Act, 31 & 32 Vict. (Imp.) ch. 105; the surrender by the Hudson Bay Co. to the Crown; the addresses of the Senate and House of Commons of Canada to Her Majesty; and the Imperial order-in-council passed pursuant to the Rupert's Land Act contain the history of the arrangement and the steps by which the territory that had formerly been held by the Hudson Bay Co. (saving the reserved sections) became vested in the Crown and subject to the legislative control of the Parliament of Canada.

That parliament exercised the power thus conferred upon it of legislating in regard to the Crown lands in the territory thus acquired. The first Dominion Lands Act, passed in 1872 (35 Vict. ch. 23), after designating them in the preamble as "certain of the public lands of the Dominion" enacted that the "lands in Manitoba and the North-West Territories . . . shall be styled and known as Dominion lands."

The Act further provided for the administration and alienation of these lands in a manner consistent only with the assertion of the existence in the Dominion of the fullest proprietary rights therein. These provisions are continued in R.S.C., 1886, ch. 54, and R.S.C., 1906, ch. 55, and it is under the authority of that legislation that the patent or grant to Yard Rafstadt issued. Sec. 21 of the Alberta Act (4 & 5 Edw. VII., ch. 3), may also, if necessary, be invoked as legislation, within the power conferred

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on the Dominion Parliament by the Rupert's Land Act, declaratory of the title and interest of the Crown in right of the Dominion in the public lands within the territorial limits of the Province of Alberta. On this branch of the case I concur in the conclusion reached by the learned Judge of the Exchequer Court.

(2) and (3) The second and third points can be conveniently dealt with together. By sec. 21 of the Alberta Act (4 & 5 Edw. VII., ch. 3), it is declared that

> All Crown lands, mines and minerals and royalties incident thereto . . shall continue to be vested in the Crown and administered by the Government of Canada for the purposes of Canada.

In *Att'y-Gen'l of Ontario* v. *Mercer*, 8 App. Cas. 767, the Judicial Committee considered the provisions of sec. 109 of the B.N.A. Act that

> All lands, mines, minerals and royalties belonging to the several provinces of Canada, Nova Scotia and New Brunswick at the Union . . shall belong to the several Provinces of Ontario, Quebec, Nova Scotia and New Brunswick in which the same are situated or arise.

Their Lordships held that "royalties" in this context includes escheat. After discussing the meaning of the term "royalties" and the nature of the objects which it covers, they say, at p. 779:—

> Their Lordships are not now called upon to decide whether the word "royalties" in section 109 of the British North America Act of 1867 extends to other royal rights besides those connected with "lands," "mines" and "minerals." The question is whether it ought to be restrained to rights connected with mines and minerals only, to the exclusion of royalties, such as escheats, in respect of lands. Their Lordships find nothing in the subject, or the context, or in any other part of the Act, to justify such a restriction of its sense.

The restriction of the reservation of royalties in the Alberta Act to those incident to Crown lands, mines and minerals does not distinguish the case at bar from the *Mercer* case, 8 App. Cas. 767, since their Lordships there proceeded on the assumption that only royalties "connected with lands, mines and minerals," are covered by sec. 109 of the B.N.A. Act (p. 779); nor does the omission of the words "in which the same are situated or arise" from the section of the Alberta Act render the decision in the *Mercer* case inapplicable. The right of escheat is a royalty incident to "Crown lands," or lands belonging to the Crown, and that royalty or right in respect to such lands in Alberta is declared by the Alberta Act to continue to be vested in the Crown for the purposes of Canada. I am, therefore, of the opinion

that escheats arising in the Province of Alberta at all events in respect of lands which belonged to the Crown at the date of the creation of that province were amongst the rights and sources of revenue excepted and reserved to the Dominion by sec. 21 of the Alberta Act.

(4) The grant by the Crown to the Hudson Bay Co. of the lands comprised in the territory granted to it was "in free and common soccage." All lands in that territory conveyed by the company to settlers or others prior to the surrender by the company to Her late Majesty Queen Victoria and the subsequent transfer to the Dominion were held by that tenure. By an Act of the Dominion Parliament passed in preparation for the assumption of control of Rupert's Land by Canada it was provided that

all the laws in force in Rupert's Land and in the North-Western Territory at the time of their admission into the Union shall, so far as they are consistent with the B.N.A. Act, 1867, with the terms and conditions of such admission approved of by the Queen under the 146th section thereof, and with this Act, remain in force until altered by the Parliament of Canada or by the Lieutenant-Governor under the authority of this Act (32 & 33 Vict. ch. 3, sec. 5).

This legislation, which left in force English law as it stood in 1670, the date of the Hudson Bay Co's charter, subject possibly to some question as to the portions of the region which may have been first occupied by French settlers (Clement on the Constitution (2nd ed.), p. 54, *n.* 4), was re-enacted after the actual admission of the territory into the Union (34 Vict. ch. 16). In 1886 the Dominion Parliament enacted that

All the laws of England relating to civil and criminal matters, as the same existed on July 15, 1870, shall be in force in the Territories in so far as the same are applicable to the Territories (49 Vict. ch. 25, sec. 3).

Since the statute of Charles II., free and common soccage has been the ordinary tenure on which freehold lands are held in England and it is the tenure prescribed in all the early colonial charters or patents in America (Blackstone, Lewis's edition, vol. 1, p. 78, *n.* 1). The habendum in the patent to Rafstadt, put in by consent, was "in fee simple," making it clear that his estate was a fee simple to be held in free and common soccage, to which the royalty of escheat has always been incident (11 Hals., p. 24).

In vol. 2 of his commentaries (Lewis's edition, at pp. 104-5), Blackstone wrote:—

1. Tenant in fee simple (or, as he is frequently styled, tenant in fee) is he that hath lands, tenements, or hereditaments, to hold to him and to his heirs forever; generally, absolutely and simply; without mentioning what

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heirs, but referring that to his own pleasure, or to the disposition of the law. The true meaning of the word fee (feodum) is the same with that of feud or fief, and in its original sense it is taken in contradiction to allodium which latter the writers on this subject define to be every man's own land, which he possesseth merely in his own right, without owing any rent or service to any superior. This is property in its highest degree; and the owner thereof hath *absolutum et directum dominium*, and therefore is said to be seised thereof absolutely in *dominico suo*, in his own demesne. But feodum, or fee, is that which is held of some superior, on condition of rendering him service; in which superior the ultimate property of the land resides. And therefore Sir Henry Spelman defines a feud or fee to be the right which the vassal or tenant hath in lands, to use the same, and take the profits thereof to him and his heirs, rendering to the lord his due services; the mere allodial property of the soil always remaining in the lord. This allodial property no subject in England has; it being a received, and now undeniable principle in the law, that all the lands in England are holden mediately or immediately of the king. The king therefore only hath *absolutum et directum dominium:* but all subjects' lands are in the nature of feodum or fee; whether derived to them by descent from their ancestors, or purchased for a valuable consideration; for they cannot come to any man by either of those ways, unless accompanied with those feudal clogs which were laid upon the first feudatory when it was originally granted. A subject therefore hath only the usufruct, and not the absolute property of the soil; or, as Sir Edward Coke expresses it, he hath *dominium utile*, but not *dominium directum*. And hence it is, that, in the most solemn acts of law, we express the strongest and highest estate that any subject can have by these words:—"he is seised thereof *in his demesne, 'as of fee.'*" It is a man's demesne, *dominicum*, or property, since it belongs to him and his heirs forever: yet this dominicum, property or demesne, is strictly not absolute or allodial, but qualified or feudal: it is his demesne, as of fee: that is, it is not purely and simple his own, since it is held of a superior lord, in whom the ultimate property resides.

In any part of the King's dominions where the English legal system prevails it would require legislation very clear and explicit indeed to take from the Crown its allodial interest and vest it in the subject. There is no such legislation in regard to land in Alberta, and, so far as it might affect the reservation in favour of the Dominion made by sec. 21 of the Alberta Act, provincial legislation intended to have that effect would be *ultra vires*.

The appellant invokes the provisions of the Dominion Land Titles Act, 1894 (57 & 58 Vict., ch. 28), making special reference to secs. 3, 4 and 10, as indicating the purpose of the Dominion Parliament to have been that in the North-West Territories a grant of land from the Crown followed by registration under the Land Titles Act should vest in the grantee the absolute or allodial title and that land so granted and registered should for all purposes be converted into and be subject to the incidents of personal property. But the definition in the Dominion Land Titles Act

of 1894 of the word "grant" as meaning "any grant from the Crown of land *whether in fee or for years*" the definition of the word "owner" as meaning "any person or body corporate entitled to *any freehold or other estate or interest in land*," the provision of sec. 56 that

> the land mentioned in any certificate of title granted under this Act shall by implication and without any special mention therein, unless the contrary is expressly declared, be subject to (*a*) any subsisting reservations or exceptions contained in the original grant from the Crown,

and the provision of sec. 57 that

> Every certificate of title granted under this Act shall . . be conclusive evidence . . that the person named therein is entitled to the land included in the same for the estate or interest therein specified, subject to the exceptions and reservations mentioned in the preceding section,

afford striking and, I think, conclusive, proof that it was not intended by this legislation to affect any such radical change as would be involved in vesting in the grantees of Crown lands in the North-West Territories (as they then were) not merely the fee simple of the lands granted—"the strongest and highest estate that any subject can have"—but also the allodial rights of the Crown. While sec. 4 dispenses with words of limitation in transfers and provides that, if used, they shall have the like force and meaning as if used in connection with personal property, this provision does not apply to Crown grants and the effect of a transfer is declared to be to pass "all such right and title *as the transferor has*"—not the allodial rights in the land. While sec. 10 speaks of an "absolute estate," it so denominates an estate in fee simple, which may not be reduced by words of limitation to a limited fee or fee-tail. Far from indicating an intention to confer an allodial interest on grantees of the Crown these sections evince an intention that the greatest estate of a subject—that in fee simple—shall be the nature of the holding.

This statute was repealed as to Alberta by order-in-council of July 22, 1906, authorized by statute 4 & 5 Edw. VII., ch. 18.

(4) and (5) Sec. 3 of the Act so repealed—reproduced in the Alberta Land Titles Act—is as follows:—

> Land in the Territories (Alberta) shall go to the personal representative of the deceased owner thereof in the same manner as personal estate now goes, and be dealt with and distributed as personal estate.

As originally introduced, in 1886 (49 Vict. ch. 26, sec. 5), the prototype of this provision read

> All lands in the Territories which by the common law are regarded as real estate shall be held to be chattels real and shall go to the executor or

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administrator of any person or persons dying, seised or possessed thereof as other personal estate now passes to the personal representative.

But this section was repealed in 1888 (51 Vict. ch. 20, sec. 3), and the provision then substituted read

> Land in the Territories shall go to the personal representative of the deceased owner thereof in the same manner as personal estate now goes.

No substantial change was made by the Act of 1894 (57 & 58 Vict., ch. 28, sec. 3, above quoted). The omission from these later enactments of the words "shall be held to be chattels real" is significant and shews that, at all events since 1888, whatever may have been the case under the Act of 1886, land is still land and it is only for purposes of descent and distribution that it is to be regarded as personalty. Otherwise it remains land and subject to all the incidents of land. On the death of an owner of land intestate and without heirs he leaves nothing to be dealt with as a subject of descent or distribution. On his death his estate in the land comes to an end and, *eo instanti*, the Crown, by virtue of the escheat, is seised of the land which had been his. There is nothing to pass to a personal representative.

The legislation relied upon is, no doubt, effective to convert into personalty, and to attach to it all the incidents of personalty for purposes of succession and distribution, whatever estate or interest the deceased owner held in his real property. But it leaves untouched the allodial interest or "ultimate property" which remained resident in the Crown after the grant of the fee and by virtue of which, on the death of the owner intestate and without heirs, the fee having determined, the Crown was again seised of the land as it had been before the grant. Nothing passed to the personal representative of the owner. There was nothing upon which the provisions of section 3 could operate. The owner's interest simply ceased to exist. As put in *Att'y-Gen'l of Ontario* v. *Mercer*, 8 App. Cas. 767, at p. 772,

> When there is no longer any tenant, the land returns by reason of tenure, to the lord by whom or by whose predecessors in title, the tenure was created . . The tenant's estate (subject to any charges upon it which he may have created) has come to an end and the lord is in by his own right.

While it is no doubt competent to the legislature of the Province of Alberta, subject to the restrictions of sec. 21 of the Alberta Act, to determine the tenure of land in that province and to amend the law of descent, it cannot deal with either of these matters so as to affect the rights by that section reserved to the Crown in

right of the Dominion, including *inter alia* the right of escheat. In so far as it may purport to do so ch. 5 of the Alberta statutes of 1915 is *ultra vires*.

I would, for these reasons, dismiss this appeal with costs.

BRODEUR, J. (dissenting):—For the reasons given by Idington, J., I am of opinion that this appeal should be allowed with costs throughout. *Appeal dismissed.*

GREAT WEST LUMBER CO. v. MURRIN & GRAY.

Alberta Supreme Court, Appellate Division, Scott, Stuart, Beck and McCarthy, JJ. December 23, 1916.

MORTGAGE (§ III—48)—IMPLIED COVENANT OF TRANSFEREE.

Under sec. 52 of the Land Titles Act (Alberta), in every transfer of land subject to mortgage, a binding covenant is implied, both with transferor and mortgagee, that the transferee will pay the mortgage, and the mortgagee may sue the transferee directly upon this covenant in default of payment.

[See Note following.]

Statement.

APPEAL by the plaintiff from a judgment of Ives, J., in an action on a covenant in a mortgage. Reversed.

F. S. Albright, for appellant.

A. A. McGilliviray, for respondent.

Scott, J.

SCOTT, J.:—In the fall of 1913 defendant Gray purchased from defendant Murrin his equity of redemption in a certain property in Red Deer, the negotiations for the purchase being carried on throughout by Gray with one Williver, the agent of Murrin, who appears to have absconded prior to that time. The price was fixed at $4,200, and Gray paid about $600, being the balance of the price over and above the balance unpaid upon 3 mortgages existing upon the property, one of them being held by the plaintiff company upon which this action is brought. On payment by Gray of the balance of the purchase money he went into possession, and Murrin by his attorney Payne, on October 17, 1913, executed a transfer to Gray which was registered on the following day, whereupon a certificate of title was issued to Gray.

This action is brought against Murrin upon his covenant contained in the mortgage and against Gray upon the covenant implied by sec. 52 of the "Land Titles Act." It is admitted that Murrin was never served with process in the action.

Gray, by his statement of defence, denies that he impliedly covenanted under that section to pay the moneys secured by the mortgage, and alleges that he agreed to purchase Murrin's equity

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of redemption in the lands for $600, it being expressly understood and agreed between them that he (Gray) would not and did not assume or agree to pay any of the mortgages thereon and that no transfer of the lands be registered, that he entered into possession of the lands and remained in possession thereof until April, 1914, when he abandoned same, that he did not register or authorize or acquiesce in the registry of the transfer to him, and that he had no knowledge of any instrument transferring the lands to him having been executed or registered.

The trial Judge has found that no transfer was asked for by Gray or delivered to him, that there was no evidence that it was ever seen or assented to by him, and that the assumption by him of the mortgages was directly opposed to his agreement with Welliver for the purchase, and there was no evidence of any variation of that agreement.

The trial Judge having in effect found that, under his agreement with Murrin through Welliver, Gray was not to assume or become liable for the payment of the mortgages on the property, if the evidence at the trial as to the existence of such an agreement was contradictory, the Court should not disturb that finding if there was sufficient evidence to support it.

The only evidence as to the agreement was that of Gray himself, and I extract portions of his evidence relating to it.

In his examination for discovery:—

"Q. Did you agree with Mr. Welliver or did he agree with you on behalf of Murrin that you would not assume the mortgage against the property? A. I never discussed it at all with him. Q. So there was not any agreement between you at all regarding it? A. No, no agreement."

Again in his evidence at the trial in reply to questions by his own counsel:—

"Q. Did Mr. Welliver try to sell the property to you? A. Yes. Q. Was he successful at first? A. No, when he mentioned these mortgages, I said I would have nothing to do with any mortgage whatsoever. Q. You objected to making any mortgage, that was the objection you raised? A. I refused to assume any mortgage, I never had my name on a mortgage, and was not going to start now. Q. You told this to Mr. Welliver? A. Yes. Q. What did he say? A. He dropped the matter, then he called

me up over the 'phone a number of times to call in and see him. I got him within a few days and I told him I refused to sign any mortgage. He said 'would you buy the equity?' I assumed this was the equity Murrin had in it. I said 'did I have to assume the mortgages' and he said 'only what you have to pay'."

And in his cross-examination:—

"Q. Excuse me if I appear obtuse, but I cannot understand what you expected the situation would be if you were not going to assume the mortgages. A. The situation was this, Mr. Murrin paid $500 for the property and after I had paid this equity that left $3,600, and the property was well worth that to anybody taking it over, they were getting the worth of their money. If I had been staying here things would have been different. Q. Did you expect that Murrin was going to pay the mortgages? A. I never expected that he would. Q. When you had paid these three cheques to Welliver you had paid all that was coming to Mr. Murrin? A. Yes. Q. You surely don't mean to suggest that you were to get $4,200 for $500 or $600? A. Oh, no. Q. Did you expect to pay these mortgages? A. No, I did not. If I had thought of that I would never have taken it over. Q. You mean to suggest that you thought you were getting a $4,200 property for $500 or $600? A. I don't think so. Q. You knew the mortgage would have to be paid by some one? A. They could take the property over if they wished, it was the same thing."

In addition to this Gray admits that the plaintiff company applied to him for payment of the mortgage, and that he promised to pay it, also that the Trusts & Guarantee Company, another mortgagee, wrote to him about its mortgage, that having written the company, it replied that it was willing to give an extension, an agreement for which was enclosed in the letter, and that he signed the agreement. He also admits that he paid the interest on the mortgages.

There is a strong presumption against such an agreement. It is clearly stated by Lord Chancellor Eldon in *Waring* v. *Ward*, 7 Vesey 332, [32 E.R. 136].

In view of the fact that Gray at the time he purchased the property was under the impression that he would not be personally liable for the payment of the mortgages, it appears to

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me extremely improbable that he would consider it necessary to expressly stipulate that he should not become liable for such payment.

Notwithstanding that Gray may not have had actual notice that the transfer had been made to him, his subsequent dealings with the property shew that he must have assumed that he had acquired the title to it.

In view of the defendant's evidence and conduct and the admissions made by him, I am of opinion that he has failed to establish the existence of any agreement to the effect that he should not be liable for the payment of the mortgage upon the property. Sec. 52 of the Land Titles Act provides that in every instrument transferring land for which a certificate of title is granted subject to a mortgage, there shall be implied a covenant by the transferee, both with the transferor and the mortgagee that the transferee will pay the money secured by the mortgage, and will indemnify and keep harmless the transferor from and against his liability in respect thereof.

Sec. 131 provides that every covenant and power declared to be implied in any instrument by virtue of the Act may be negatived or modified by express declaration in the instrument.

I here point out that sec. 69 of the Land Titles Act (R.S.C. ch. 110) which corresponds with sec. 52 of the present Act provided that the implied covenant by the transferee should be with the transferor alone, and that sec. 172 of that Act was identical with sec. 131 of the present Act. Sec. 172 was applicable and was intended to be applicable only to cases where the parties to the instrument were the only parties interested in the implied covenant, but I doubt whether sec. 131 should be held to be applicable to cases where a person who is not a party to the instrument is interested in the covenant as it appears to me that it would be unreasonable to hold that the right which the statute gives him to such a covenant should be nullified or the covenant negatived by others without his consent.

Even if sec. 131 should be held to be applicable to sec. 52 as amended, and that the vendor and purchaser can still deprive a mortgagee of the remedy given him by sec. 52, I think that the right to negative the covenant should be exercised only in the manner provided by the section. Surely a mortgagee is entitled to be placed in a position to enable him to ascertain with reason-

able certainty whether he has a right of action against a purchaser of the mortgaged premises and, if the vendor and purchaser can by a verbal agreement between them and without such a declaration in the transfer negative the covenant, the only means by which the mortgagee would have of ascertaining whether the purchaser is liable to him would be by bringing an action against him.

I would allow the appeal with costs and would direct that the judgment in the action be restored for the plaintiff against Gray for the amount due upon his mortgage with costs of suit.

Scott, J.

STUART, J.:—This case involves two somewhat difficult questions; 1st, the proper interpretation of the words of sec. 52, taken within sec. 131, of the Act; 2nd, the extent to which, if at all, the implied covenant created by sec. 52 as between the transferee and the mortgagee may be negatived by proof of an express oral agreement between the transferor and the transferee to which the mortgagee was not a party.

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In the Land Titles Act of 1894, sec. 52 of the present Act appeared as sec. 65. From 1894 to 1906, when the present Act was passed by the provincial legislature, the section read as follows:—

> In every instrument transferring land for which a certificate of title has been granted subject to mortgage or encumbrance there shall be implied the following covenant by the transferee, that is to say: that the transferee will pay the principal money, interest, annuity or rent charge secured by the mortgage or encumbrance after the rate and at the time specified in the instrument creating the same and will indemnify and keep harmless the transfer from and against the principal sum or other moneys secured by such instrument and from and against the liability in respect of any of the covenants therein contained or under this Act implied on the part of the transferor.

This enactment was obviously merely declaratory. The rule of equity had always been such in the case of a grant of land subject to an encumbrance. Unless a contrary intention appeared, the grantee was bound to indemnify the grantor against his liability, under his covenant, to the mortgagee. This right in the grantor to force the grantee to pay the mortgage debt was assignable by the grantor and the assignment could be made even before he had suffered damage by being himself obliged to pay. *Maloney* v. *Campbell*, 28 Can. S.C.R. 228. But any such assignment was of course subject to all equities existing or arising as between the grantor and the grantee prior to notice of the assign-

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ment. There was nothing in the statute of 1894 which impaired these very just principles of law.

But the legislature of Alberta in 1906 when in its 1st session it proceeded to pass a Land Titles Act ventured to attempt an improvement upon the section above quoted. After the words "there shall be implied the following covenant by the transferee" there were inserted the words "both with the transferor *and the mortgagee*."

What was ventured upon was, therefore, the creation by statute of a privity of contract between parties who had otherwise no privity with each other at all, who had not, indeed, any dealings with each other at all of any kind. More than this, the statute created in favour of the mortgagee a species of security in the shape of the covenant of the transferee, which he had not relied upon at all when advancing the money and which was then not even in existence.

Under the law as it stood before the amendment the transferee, the purchaser, of the land could rely upon any agreement or equity existing as between himself and the transferor if the mortgagee should secure an assignment of the transferor's rights and attempt to enforce them. In my opinion any statute which appears to alter this common law right—really an equitable right, but I speak of common law as opposed to statute law—ought to be very carefully and exactly construed. I do not mean that the Court should on account of its view of the injustice or bad policy of a statute which changes the common law, attempt to whittle down its plain meaning and so override the expressed will of the legislature. But certainly before allowing a purchaser to be deprived of the rights which the ordinary law gives him, the Court ought to be satisfied that the words of the statute do really and inevitably deprive him of those rights. Though it may seem that it was the intention to do so, yet, if the words of the statute, taken in their ordinary meaning without straining either one way or the other, do not effect that result then clearly the rights of the purchaser should stand as before.

For myself I doubt very much if the legislature really intended to create a new absolute right in the mortgagee which could not be affected in any way at all by any agreement or contrary evident intention as between the parties to the sale and transfer of the land.

But before we come to that point, let us examine the words of the section. First, the word "covenant" no doubt must be taken in its general meaning of "agreement" (see Stroud Jud. Dict., vol. 1, p. 429) because the form of transfer provided by the Act does not mention the necessity of a seal, and only refers to the transfer as being "signed" but not being "sealed." Again, though there is no mention of a seal in the form prescribed for a mortgage, the word "covenant" appears in the form.

In the next place it is to be observed that the form of transfer given is not framed as a deed or agreement *inter partes*. No doubt, as the transferee is mentioned in the document, and takes under it, he may be treated as a party to it although he is not required to sign it. But at any rate there is nothing in the form to suggest a mortgagee as being a party to it. As a matter of fact he is never a party, in the ordinary case at least, and in the present instance was not a party, to the transfer. Nor is he in any way referred to therein. Nevertheless the statute says that in the transfer there shall be implied a covenant by the transferee, who does not sign it with the mortgagee, who neither signs it, nor, at least in this present case, is mentioned in it.

Now, in the case of an ordinary contract, deed, or agreement, if a party to it, even though he signs it, expressly covenants or agrees with a person not a party to it that he will do a certain thing, the latter person cannot sue upon the covenant or agreement. In Anson on Contracts, 13th ed., p. 267, it is said: "A party cannot acquire rights under a contract to which he is not a party." And Leake, 6th ed., p. 296, says "a contract can create no right or liability in a person who is not a party to it."

But it may no doubt be answered, and I think it is perhaps quite a valid answer, that the effect of the section is to make the mortgagee a party by implication. He becomes impliedly mentioned as one of the persons with whom the transferee impliedly agrees that he will pay the money. And while the transferee does not sign the transfer, I suppose it might be said (although as to this one naturally has more hesitation) that the effect of the statute is that he has impliedly signed it. There is here of course a great deal of implication. It is here, however, that we are brought to the words of sec. 131 which reads as follows:—

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Every covenant and power declared to be implied in any instrument by virtue of this Act may be negatived or modified by express declaration in the instrument; and in any action for a supposed breach of any such covenant the covenant alleged to be broken may be set forth, and it shall be lawful to allege that the party against whom the action is so brought did so covenant precisely in the same manner as if the covenant had been expressed in words in the transfer or other instrument, any law or practice to the contrary notwithstanding; and every such implied covenant shall have the same force and effect and be enforced in the same manner *as if it had been set out at length in the transfer or other instrument;* and when any transfer or other instrument in accordance with this Act is executed by more parties than one such covenants as are by this Act to be implied in instruments of a like nature shall be construed to be several and not to bind the parties jointly.

I leave aside the 1st clause at present because it affects a question to be referred to hereafter. Now, it seems to me to be clear that the succeeding words cannot be given any greater effect than this, *viz.*, the transfer is to be treated in a Court of law exactly as if it had contained the words "and I (the transferee) agree and covenant with one John Smith, who is a mortgagee of the property hereby transferred, that I will pay him the mortgage moneys." Whether, indeed, it is proper to go so far may be doubtful because if such words were actually in the transfer it would not be possible to vary their effect by oral testimony except in case of fraud or mistake and one of the important points in this case, which however I think unnecessary to decide, is just exactly whether the implied covenant can be negatived by evidence of that kind. But at any rate I see nothing in sec. 131 which carries the matter further than would be the case if the words I have suggested were really in the transfer.

It must be remembered that the form of transfer does not permit of its being drawn as a deed *inter partes* so that John Smith could be called "the said party of the third part." True, the form does provide for a memorandum of the encumbrances to which the estate of the registered owner, the transferor, is subject and in this way the mortgagee ought to be mentioned at least by reference though generally, as in the present instance, he is not.

We see here again an example of the difficulties inevitably arising when an attempt is made to engraft upon a new statutory system of titles and conveyancing the rules which grew up under the common law system. We have a covenant by a person who does not sign the document in favour of a person who is not a party to it.

I do not think the Court is entitled to say that the real meaning and effect of the sections is that the transferee is bound in law to pay the mortgagee and that the latter may have an action of debt against him. The legislature did not adopt that simple course. If it had, it is certain that the well known phrase "unless a contrary intention appears" would have been inserted.

Instead of doing that, a pure statutory covenant or agreement is created, evidently, it seems to me, with the intention that it should be subject to the same rules of law as any other stipulation or agreement. The statute does not say that the implied covenant shall be absolutely binding at law no matter whether it is under seal or not, and no matter whether there is consideration for it or not. Section 131 merely says that it "shall have the same force and effect and be enforced in the same manner as if it had been set out at length in the transfer or other instrument." It seems to me that this clearly means that it is not to have any greater force and effect than it would have if it were set out at length in the transfer. It is to have exactly the same force and effect and a greater effect or a greater binding force is not the same effect or the same binding force. For this reason I am unable to conclude that the word "covenant" in sec. 52 is to be read as "binding covenant" because that would be giving the covenant, certainly in many instances, a greater force and effect than it would have if it had been set out at length in the transfer.

The proper enquiry therefore is, what remedy would the mortgagee have had if the so called implied covenant had been set forth at length in the transfer and there had been no such provision in sec. 52 at all? Whatever remedy he would have had in such a case I think secs. 52 and 131 will give him, but clearly I think they will give him no more.

If a mortgagee had attempted to proceed upon the strength of such words actually written in the transfer in my opinion he could not have succeeded. There was no consideration moving from the mortgagee for any such agreement. The agreement was not under seal. If recourse is again had here to the words "implied covenant" so as to suggest that a seal is *impliedly* there, then I think that is going too far. The form plainly and with the evident purpose of simplicity, omits all reference to

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a seal and I cannot bring myself to think that the "implication" is so pregnant a one. The extent of the implication is exactly set forth in sec. 131 and we are not entitled in my opinion to add to it.

But again, the transfer is not signed by the transferee. Could the mortgagee come into Court and sue the transferee upon a document which had not passed between them and one which the transferee had never signed? In my opinion he could not, and the statute gives the transfer no greater force or effect.

It is true that where a grantee accepts a deed and enters into possession he agrees to do what it is stipulated in the deed he should do, although he did not sign the deed, 13 Cyc., p. 555; Halsbury, vol. 10, p. 401. But I think this only applies in favour of the person from whom he has himself received and accepted some benefit, *i.e.*, the grantor, and cannot apply in favour of a person who was not actually a party to the transaction at all. And in any case this point would raise the question whether the defendant Gray had really accepted the transfer. It was registered apparently by the transferor. But I do not think we need to get to that point in the present case.

Then we must observe the concluding words of sec. 131: "And when any transfer or other instrument in accordance with this Act *is executed* by more parties than one such covenants as are by this Act to be implied in instruments of a like nature shall be construed to be several and not to bind the parties jointly." It seems to me to be a fair inference from these words that a person who is to be bound by an implied covenant must be one who had *executed* the transfer. Suppose there were two transferees. Would they be bound jointly or only severally? If they signed the transfer then, aside from the questions of a seal and of consideration, they would be bound severally, but if they did not sign it at all what would the position be? The concluding words of sec. 131 do not cover the case. I think the obvious reason of the matter is that they must sign before they are bound at all.

For these reasons I think a mortgagee gains nothing by secs. 52 and 131 unless he has the signature of the transferee and that either under seal or with a consideration moving from himself sufficient to give the agreement a binding force and effect; and that even then the agreement will operate in the same way but

to no greater extent than if it had been set forth at length in the transfer.

This is sufficient to justify a dismissal of the appeal. I prefer not to deal with the other question about rebutting the implied agreement by oral testimony because of the difficulty of applying sec. 131. But I think what I have said at least leads to this, that if the mortgagee is a party to the transfer by implication, as he must be to get any advantage from it at all, then he is a party for all purposes and whatever evidence could be adduced as against the vendor the transferor, could be adduced against him. Further than this I do not feel it necessary in the present case to go.

Stuart, J.

The appeal should be dismissed with costs.

BECK, J.:—The defendant Murrin was never served. The appeal is by the plaintiff against the learned Judge's decision refusing to give judgment against the defendant Gray whom the plaintiff claims is directly and personally liable to it as the transferee of land subject to a mortgage to the plaintiff by reason of the provision of sec. 52 of the Land Titles Act.

Beck, J.

In *Campbell* v. *Robinson* (1880) 27 Grant 634, Spragge, C., applying the principles laid down in *Waring* v. *Ward*, 7 Ves. Jun. 332, and *Jones* v. *Kearney*, 1 Dr & War. 135, held that when a mortgagor, who had covenanted for payment of the mortgage debt, sells his equity of redemption subject to the mortgage, he becomes a surety of the purchaser for the payment of such debt, and if the same is allowed to run into default he will be entitled to call upon his assignee to pay such debt.

A considerable number of cases in which *Campbell* v. *Robinson*, *supra*, is referred to will be found in Cameron's Index of Canad an Cases Judicially Noticed.

In *Fraser* v. *Fairbanks* (1893), 23 Can. S.C.R. 79, it was held that where the purchaser of the mortgaged property was made by the nominal purchaser expressly in trust for certain persons who, it was understood, intended to form a company to take over the property and before the transaction was completed, the company was formed and the vendor took shares in it, the nominal purchaser was not, but the company was bound to indemnify the owner.

In *British Canadian Loan Co.* v. *Tear* (1893), 23 O.R. 664, it was held that although, when a mortgagor conveys his equity

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of redemption, subject to the mortgage, there is an implied obligation on the part of the purchaser to indemnify the mortgagor against the mortgage debt, evidence is admissible of an express agreement between the parties to the contrary.

An implied contract is one which the law raises on the ground that in equity and justice the obligation ought to subsist *Moses* v. *Macferlan*, 2 Burr. 1005; Leake on Contracts, 6th ed., p. 42, 9 Cyc., tit. "Contract," p. 243. So that when such facts have been made to appear as would *primâ facie* raise the obligation further facts may always be proved to rebut this *primâ facie* presumption or in other words, all the facts relevant to the question may be proved in order to enable the Court to see whether on a complete view of them the obligation ought to be implied

In my opinion the framers of the Land Titles Act intended to do nothing more than to declare, with regard to the relationship between a purchaser of mortgaged property and his vendor, the then existing law, namely, that in such cases there was an implied covenant of indemnity. Mr. Justice Stuart seems to have been of this opinion in *Short* v. *Graham*, 7 W.L.R. 787, and that inasmuch as it was implied it might be rebutted; and that in addition to this, in order to avoid a circuit of action, they enacted what was not then the law, that the mortgagee might look to the purchaser directly; still leaving, however, the mortgagee dependent for his right of direct remedy on the existence of the implied covenant from the purchaser to the mortgagor.

In my opinion sec. 131, which provides that an implied covenant may be negatived or modified by express declaration *in the instrument*, does not exclude the admission of other evidence to rebut the implication or to shew that it does not arise.

I cannot refrain from expressing the opinion that the whole provision, both that declaring an implied covenant in favour of the transferor as well as that in favour of the mortgagee is ill-advised legislation. It would have been much better to have left the matter to be settled in each case according to the principles of equity. How, for instance, is the statutory implied covenant to be adapted to a case of a purchaser of a portion of the land? Is he liable at all? Is he liable for a portion of the mortgage moneys? If so, is the portion to be based upon the proportion of quantity or value of the proportion purchased? Again, our

statute makes the implied covenant applicable to the case not only of a mortgage but of an encumbrance, but an encumbrance under the Act is a special form of security which does not ordinarily contain any covenant for payment and therefore there is no personal liability on the part of the encumbrancer; why should the purchaser become personally liable where his vendor was not so liable? The South Australian Act and the Saskatchewan Act confine the liability under the implied covenant to the period during which the purchaser is the registered owner; does this mean that the purchaser may relieve himself of all liability whatever by transferring the land or that he is liable only for such sums as mature during his ownership? The statutory provision has created innumerable difficulties; the application of the equitable principles to the facts of any particular case were comparatively easy as applicable between the vendor and purchaser, a simpler method of avoiding circuity of action so as to enable the mortgagee to look to the purchaser directly in a proper case might have been intended. The whole section in my humble opinion ought to be repealed at the first opportunity. Such a provision was not thought proper in the English Land Transfer Acts 1875 and 1897. Hogg's Ownership and Encumbrance of Registered Land, p. 177.

On the facts of the present case the learned trial Judge came to the conclusion that the evidence shewed that the defendant Gray intended to buy only the "equity" in the property, not intending to become personally responsible for the payment of the amounts of the 3 mortgages upon the property, but intending to be free to preserve the property for himself by keeping up the interest and eventually paying the principal sums if he saw fit. I think the trial Judge's finding on the evidence was wrong for the reasons given by my brother Scott. I would allow the appeal with costs.

McCARTHY, J., concurred in the result. *Appeal allowed.*

McCarthy J.

Editor's Note.—The facts in this action are briefly these: The defendant Murrin sold, and the defendant Gray bought, a property at Red Deer, Alberta, subject to mortgage to the plaintiff. The action was brought to recover the amount of the mortgage, against Murrin as the mortgagor, and against Gray upon an implied covenant under sec. 52 of the Land Titles Act (Alberta).

Note.

The trial Judge found as a fact that Gray and Murrin had verbally agreed at the time of the sale that Gray was not to assume personal liability for the mortgage, and gave judgment in his favour. On the appeal, Scott

Note.

and Beck, JJ., reversed the finding on the question of fact, and judgment went for the plaintiff. Stuart, J., expressed no opinion on the question of fact, holding it to be unnecessary to do so, in view of the interpretation he placed on sec. 52.

This section says that in every transfer of land for which a certificate of title is granted subject to a mortgage there shall be implied a covenant by the transferee, both with the transferor and the mortgagee, that the transferee will pay the mortgage. Prior to 1906, the implied covenant was with the transferor only. Sec. 131 of the Act provided that the covenant might be negatived by express declaration in the instrument, and was the same before sec. 52 was amended. Scott and Beck, JJ., held that sec. 52 entitles a mortgagee to sue a transferee as on express covenant by him to pay the amount of the mortgage, but Scott, J., doubted that sec. 131 was applicable to a mortgage when the mortgagee did not sign the transfer, while Beck, J., who concurred with Scott, J., as to the effect of sec. 52, was of opinion, apparently, that sec. 131 applied to such mortgagees whether the mortgagee signed the transfer or not, but that it did not exclude relevant evidence other than a declaration in the transfer rebutting the implication arising under sec. 52; in other words, sec. 131 does not mean that the implied covenant shall *only* be negatived or modified by express declaration in the transfer.

Stuart, J., held that sec. 52 merely places a covenant in a transfer by implication as though it were written or printed in the document, and that if the mortgagee does not sign the transfer, which is not under seal, the mortgagee cannot sue the transferee for debt under the covenant, because there has been no privity of contract between them, and no consideration has passed from mortgagee to transferee. He declines to give any opinion as to the rebuttal of the implied covenant under sec. 52 in any other way than as provided in sec. 131, "because of the difficulty of applying the latter."

In the result, therefore, a majority of the Court of Appeal agreed only on one point of law and one of fact, *i.e.*, that under sec. 52 a transfer of land creates by implication a binding covenant between transferee and mortgagee to pay existing mortgages, and that the plaintiff did not prove an agreement between him and the transferor that he should not be liable for the mortgages.

The truth is, the Court seems to have considered that the legislature was not well-advised to make the amendment of 1906, and sought an escape from it which would have the effect of leaving the law as it was prior to the amendment. It cannot be said that the result is satisfactory; the arguments of the Judges are unconvincing. The legislature should try again.

Stuart, J., says that sec. 52 by creating an implied covenant with the transferor was merely declaring what was already law; "unless a contrary intention appeared, the grantee was bound to indemnify the grantor." But is that the same thing as "a covenant," especially in view of the provision of sec. 131 as to disclaimer. Equity permitted oral evidence to establish a contrary intention; would that be permissible as against a covenant, strictly so-called—a contract, under seal? If sec. 131 excludes all evidence of a contrary intention except a declaration in the transfer, the implied covenant given by sec. 52 seems a very different thing indeed from that which a transferor had under the doctrines of equity.

Stuart, J., disclaimed any desire to whittle down the words of a statute because he disagreed with its policy, but that seems precisely what he did when he said that the makers of the statute "ventured upon the creation of privity of contract between the transferee and the mortgagee," and then

made the statute meaningless by saying that the "covenant" is not binding if the mortgagee does not sign the transfer, which he obviously is not intended to do. Note.

Stuart, J., quotes Stroud's Judicial Dictionary, vol. 1, p. 429, 2nd ed., as authority for the statement that "covenant" no doubt must be taken in its general meaning of "agreement," because the form of transfer provided by the Act "does not provide for a seal." But the authority quoted says that "covenant, in its strict sense, means an agreement *under seal*," and in a statute it would, of course, be used in its strict sense. The presence of a seal on a deed could give no greater force than a statute to a covenant. Surely when the Act says a "covenant" shall be implied, it means that which is the only known legal definition of a covenant under such circumstances, a covenant in writing, signed and sealed; for that purpose, the statute placed the mortgagee just where he would be if he had signed and sealed the transfer. The maxim "the express mention of one thing implies the exclusion of another" would seem to apply to the suggestion that despite sec. 131, oral evidence could be given to shew that, in fact, the transferor and transferee had agreed that the latter should not be liable for mortgages on the land. If sec. 52 gives the mortgagee an implied covenant by the transferee, how could he be cut out of the benefit of it except by a declaration in the transfer? If oral evidence is acceptable to disclaim the covenant, by shewing what the transferor and transferee agreed to, how could a mortgagee entitled to the covenant be affected? The talk about the hardships of implying such a covenant, and limiting the right to disclaimer, has no force when it is recalled that the law places no restriction as to disclaimer upon transferor and transferee except that they shall state it in the transfer, where the mortgagee and those claiming under him can see it.

CITY OF QUEBEC v. BASTIEN. QUE. K. B.

Quebec King's Bench, Sir Horace Archambeault, C.J., and Trenholme, Lavergne, Cross, and Pelletier, JJ. June 27, 1916.

1. MUNICIPAL CORPORATIONS (§ II F—175)—AQUEDUCT—WATERS—RIPARIAN RIGHTS.

The sections of the charter of the City of Quebec authorizing it to construct aqueducts within a certain radius, and to take therefrom necessary water, do not authorize it to take water from a river to the damage of riparian owners without expropriating their rights.

2. MUNICIPAL CORPORATIONS (§ II G—260)—NOTICE OF INJURY—DIVERSION OF WATER.

Sec. 561 of the charter of the City of Quebec requires a notice to be given within 30 days in the case of a claim for damages resulting from accident; in an action for damages to a tannery by reducing the supply of water from a river used for power purposes, sec. 558 applies, and the 30 days' notice is unnecessary.

[Leave to appeal to Privy Council granted, Dec. 5, 1916.]

APPEAL from the judgment of Roy, J., of the Superior Court for the District of Quebec, of November 27, 1915. Affirmed. Statement.

L. A. Taschereau, K.C., and *J. E. Chapleau*, K.C., for appellant.

Chas. Angers, K.C., and *J. L. Larue*, for respondent.

LAVERGNE, J.:—The respondent is the owner of a tannery on the bank of the River St. Charles below the place where the Lavergne, J.

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City of Quebec has the intake for its waterworks. This tannery has been in existence for a very long time according to the evidence of certain of the witnesses; it would appear to have been there before the construction of the waterworks. This industry is operated by water-power, it had been previously operated by the predecessors in title of the respondent and afterwards by himself as lessee, and, finally, he became owner in 1909. It is a profitable industry returning substantial profits to the respondent and employing about 30 men. The motive force is obtained by means of a turbine and requires 36 c. ft. of water per second on an average, equivalent to about 36 steam horse-power.

The City of Quebec takes the water of the River St. Charles by means of three pipes; one of 18 inches, another of 30 inches and the last of 40 inches, constructed, the first in 1857, the second in 1885, and the last in 1913-1914.

Up to the time of the construction of this last pipe of 40 inches, there was no complaint on the part of the respondent; the quantity of water which was left to him was sufficient for the needs of his industry, but, being troubled by the installation of this last pipe, which was completed on January, 29, 1914, he informed the appellant that each trial of the last pipe forced him to interrupt the working of his tannery and that, this pipe being put into full use, the respondent would apparently be obliged to abandon his operations, unless he could obtain other motive power, that the damages already sustained were considerable, and that he would sustain more considerable damages in the future for which he would hold the appellant liable: finally, at the end of 30 days, he would look for justice being done.

The appellant took no measures to prevent the damages of which notice had been given and the respondent was obliged to institute his action in the month of August, 1914. He claims $1,145 damages, distributed in the following manner: $665 damages sustained in February and March of that year, when there was an experimental trial of the 40 inch pipe, and $480 for damages from July 14 to August 20.

The appellant, by exception to the form, invokes the want of previous notice of the action, a notice which it contends was necessary in virtue of the statute of 1907 (7 Edw. VII. ch. 62, sec. 45). This exception was dismissed.

The appellant then filed a defence to the merits alleging in

effect the following reasons: The respondent, when he established his industry, was aware that the intake of the appellant existed higher up the river; the 40-inch pipe had not increased the consumption of water which is practically the same as it was in the past, but the pressure only had been increased; the want of water at the respondent's factory was due to the extraordinary drought of the year 1914; finally, the respondent's dam was not tight and allowed the water to pass away in the same manner as if there had been no dam.

Three questions are presented in this case: (1) the question as to form: Was a notice necessary before suit? If that was so, is the protest of January 29 a sufficient notice? (2) Could the appellant, in virtue of its charter, take possession of the water of the River St. Charles and ruin the industries of riparian owners which were operated there by the necessary power, without making equitable compensation? (3) Then the question of damages: Did the taking of the waters cause the damages which are claimed by the respondent? The Superior Court has maintained the contentions of the respondent on all these points.

Was there need of a notice? Two Judges of the Superior Court have pronounced upon this point; the one who dismissed the exception to the form, and the one who rendered the final judgment. Upon this point, it is sec. 558 of the charter of the City of Quebec which applies, and this section does not require that any notice should be given. Sec. 561, which the appellant invokes, does not require notice except in the case of damages resulting from an accident. If sec. 561 had application to all actions for damages there could be no necessity for sec. 558.

It is contended by the appellant that the respondent should have given it notice within 30 days of the occurrence of the fact which caused the damages. Sec. 561 says, "from the day when the accident happened." Without any obligation to do so, in my opinion, on the part of the respondent he served a notarial notice upon the appellant, giving it the details of his claim in consequence of the facts causing the damages, which were the trials of the new pipe and the absorption of the flow of the river by the taking therefrom of water by the appellant.

This protest by the respondent indicated the particulars of his claim to the appellant, and that is all that sec. 561 requires,

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even in the case of accidents. This notice, even that provided by art. 5864 of the Revised Statutes, which is more imperative than sec. 561, has not been considered indispensable, if there has been no prejudice, in the case of the *City of Coaticook* v. *Laroche*, 24 Que K.B. 339.

In the present case the Judges of first instance have decided that, in this case, notice was not essentially necessary and have exercised their discretion in regard to the notice contained in the protest of January 29.

There can be no question of prescription in this case; the action was instituted on August 17, 1914, and served on August 20, and the damages claimed were caused on February 20 and August 20, consequently they could not have been prescribed. This point needs no further consideration.

The principal point in the case, that is to say, whether or not the appellant has the right to turn away or to take the waters of the River St. Charles without paying compensation in damages has not been invoked in the defence.

It is a mistake to say that the respondent does not make any claim except on account of the 40-inch pipe, because he sufficiently alleges that it is by the three pipes of the appellant that the respondent finds himself deprived of his hydraulic power for the operation of his tannery. The appellant cannot invoke any prescription and is has no title to the servitude which it claims in preference to all other interested parties.

The respondent bases his right upon art. 503 of the Civil Code, which reads as follows:—

> He whose land borders on a running stream, not forming part of the public domain, may make use of it as it passes, for the utility of his land, but in such manner as not to prevent the exercise of the same right by those to whom it belongs. . . He whose land is crossed by such stream may use it within the whole space of its course through the property, but subject to the obligation of allowing it to take its usual course when it leaves his land.

The respondent again bases his right upon the statute of 1857 (19 & 20 Vict. ch. 104), reproduced in art. 7295 of the Revised Statutes.

> 7295.—Every proprietor of land may improve any watercourse bordering upon, running along or passing across his property, and may turn the same to account by the construction of mills, manufactories, etc.

This right is clear and so long as it has not been alienated or expropriated, the riparian proprietor continues to have the actual enjoyment of it.

The appellant does not deny this right, but it contends that it is authorized by its charter to ignore it completely. Art. 407 of the Civil Code says:—

> No one can be compelled to give up his property, except for public utility and in consideration of a just indemnity previously paid.

This law is always in existence, even where there is a matter in question, for cities and towns, of utilizing waterworks.

The appellant relies upon sec. 520 of its charter which authorizes it to erect, construct, repair and maintain in the City of Quebec and outside of the city, for a distance of 50 miles, an aqueduct or aqueducts with their apparatus and accessories, for introducing, and transporting and conducting across the city and parts adjacent thereto of a sufficient quantity of good and salubrious water, and that it is authorized to take it and distribute it in virtue of that statute for the utility and supply of the inhabitants of the said city and localities adjacent thereto, etc., etc.

In the same section there is provided that there is an obligation on the part of the city to pay damages caused to buildings, lands, etc. Does the word "take" mean that it has the right to take, possess itself of all the waters of the River St. Charles without indemnifying those to whom it may cause damages?

By sec. 522 the city is again authorized to acquire, on payment of the value, all the immovables, usufructs and servitudes of which it may have need. Everything in this section and those which follow it indicate that it was intended to make the City of Quebec subject to the common law. It was given powers to construct within a radius of 50 miles around Quebec, one or several aqueducts and to take therefrom the necessary water; but, does that give it the right to deprive the riparian owners of rights which they may have in virtue of the common law, without indemnifying them in the case of damages being occasioned?

In reason, why should the City of Quebec have the right to take possession of all the waters of the River St. Charles to the detriment of all the riparian owners when it has the right to bring water within a radius of 50 miles around the City of Quebec, and when it is well known that water sources are to be found in great numbers within this district?

The interpretation given to this statute by the Superior Court is supported by jurisprudence, in a case decided by Mr. Justice

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Cazault, in which the judgment was affirmed on appeal, in 1895, and in another case decided by Andrews, J., in 1898.

The respondent has never lost the rights which are given to him by art. 503 of our Civil Code. I quite admit that, in virtue of its charter, the appellant could expropriate; but, without having recourse to this procedure, it cannot in any manner cause injury to the operation of the factory. It has the use of all its rights in the whole extent of a radius of 50 miles around Quebec and it might, without great expense, procure for itself all the water necessary for its needs without causing injury to any person whomsoever.

I think, therefore, for these reasons that the appeal should be dismissed with costs.

Archambeault, C.J. Trenholme, J. Pelletier, J.

ARCHAMBEAULT, C.J., TRENHOLME and PELLETIER, JJ., concurred.

Cross, J.

CROSS, J., dissented. *Appeal dismissed.*

SASK.

S. C.

WATERMAN CO. v. CANADIAN CREDIT MEN'S TRUST ASSOC.

Saskatchewan Supreme Court, Haultain, C.J., Lamont, Brown and Elwood, JJ. November 18, 1916.

ASSIGNMENTS FOR CREDITORS (§ III C—30)—DISTRIBUTION—CONTRACT AS TO SELLING PRICE.

An agreement not to sell certain goods except at retail and at a fixed price is not broken by a distribution of the goods at the said price amongst the creditors of the purchaser, by his assignee for the benefit of creditors.

Statement.

APPEAL from the judgment of Newlands, J., in which he refused the plaintiffs' application for an injunction restraining the defendants from dealing with some 76 fountain pens. Affirmed.

D. A. McNiven, for appellants.

F. L. Bastedo, for respondents.

The judgment of the Court was delivered by

Lamont, J.

LAMONT, J.:—By an agreement in writing, made November 11, 1911, the plaintiffs agreed to furnish to the Ware Stationery Co. of Regina, at regular wholesale list prices, fountain pens known as "Waterman Ideal Fountain Pens," to be sold by them only as licensees at retail in the regular course of business and at the full regular retail list prices established by the plaintiffs. The Ware Stationery Co. on their part agreed not to sell the said pens except at retail, nor to any person other than the plaintiffs, at less than the regular retail price, as established by the plaintiffs. On February 5, 1914, the Ware Stationery Co. made an assignment for the benefit of its creditors to the defendants as

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assignees. Among the goods of which the assignees took possession was a show-case containing 76 of these pens. The plaintiffs brought an action in the District Court to recover possession of the pens. The District Court Judge held that the plaintiffs had no property in the pens in question; that the property therein had wholly passed to the Ware Stationery Co., and that, therefore, the assignees were entitled to the possession thereof.

On appeal that decision was affirmed by this Court. The plaintiffs then brought this present action for the purpose of restraining the assignees from disposing of the pens in any other manner than that set out in the agreement with the Ware Stationery Co.

In his affidavit, Edward Barry, manager for the defendants, sets out as follows:—

That I attempted to make arrangements with several retail stationers in the City of Regina, for the purpose of disposing of the said pens at the regular retail prices through the medium of said stores, but was unable to come to any satisfactory arrangement owing entirely to the fact that the pens in question are of an earlier model than those now ordinarily sold and would not therefore be readily salable in comparison with new pens, and owing to the fact that the said pens are not in the best of condition, but need cleaning, polishing and a general overhauling. The above named defendant has no facilities whereby the said pens could be put in proper salable condition and even if that were done there would still be the difficulty of effecting sales owing to the style of the pens themselves. . .

That the estate of the Ware Stationery Co. is now in a position for a winding-up except for the question of distribution of the proceeds of the pens above mentioned.

That after exhaustive attempts and enquiries only two possible methods of disposing of the said pens are available to the above named defendant. The defendant sold all the balance of the stock in trade of the Ware Stationery Co. to A. E. Turner at a price of 26 cents on the dollar. The said pens can be sold to the said A. E. Turner at the said figure. In default of that arrangement, or in the alternative, it is proposed by the above named defendants to dispose of the said pens by dividing them *pro rata* amongst the creditors who have filed claims in the Ware Stationery estate, the pens to be taken by the various creditors and credits made on their claims corresponding to the full retail value of the pens by each individual creditor.

The plaintiffs object to either a sale to Turner at 26 cents on the dollar or to a distribution among the creditors.

In my opinion, the proposal of the assignees to distribute the pens *pro rata* among the creditors, who will take them at the regular retail price, is not a violation of the agreement. The gist of the agreement is that the Stationery Co. was not to sell at less than the fixed prices and was to sell by retail. This enabled the

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plaintiffs not only to control the prices as far as the Stationery Co. was concerned, but it prevented that company from selling a quantity of pens *en bloc* to a person or company who might put them on the market in competition with the plaintiffs, and who would not be under any obligation to maintain the list prices. This is in no way violated by the proposed distribution.

It was admitted in the argument that there are as many creditors as there are pens, and that, in reality, but few, if any, of the creditors will get more than one pen. The creditors are paying the full retail price.

It was contended that the agreement called for a sale in the regular course of business of the Stationery Co. over the counter. There is no obligation under the agreement to sell only to one who presents himself in person. Any one of these creditors, or any other person, could have written to the Stationery Co. and ordered a pen, and if he forwarded the list price along with the order the company could have sent him a pen without in any way violating the provisions of the agreement. That is in reality what is being done by the proposed distribution, which, in my opinion, is simply a sale to each of the creditors at the regular retail price.

I am, therefore, of opinion that the decision of Newlands, J., is right and should be affirmed. The appeal should be dismissed with costs. *Appeal dismissed.*

CAN.

Ex. C.

GENERAL PUBLIC ENTERPRISE CO. v. THE KING.

Exchequer Court of Canada, Audette, J. December 30, 1916.

CROWN (§ II—20)—COLLISION—"PUBLIC WORK"—DREDGE.

Except under special authority the Crown cannot be impleaded in the Courts, nor will an action in tort lie against it. The Crown is not responsible in damages for collision with a King's ship in the absence of any statutory provision therefor; a dredge moored to a wharf while engaged on a government contract is not a "public work" within the meaning of the Exchequer Court Act, R.S.C. ch. 140, sec. 20 (c).

[*Chamberlin* v. *The King*, 42 Can. S.C.R. 350; *Paul* v. *The King*, 38 Can. S.C.R. 126; *Hamburg American Packet Co.* v. *The King*, 39 Can. S.C.R. 621; *Piggott* v. *The King*, 32 D.L.R. 461; *Olmstead* v. *The King* 30 D.L.R. 345, referred to.]

Statement.

PETITION OF RIGHT for damages resulting from collision with a king's ship in the River St. Lawrence.

A. Marchand, for suppliant.

F. E. Meredith, K.C., and *J. Gosselin*, for respondent.

Audette, J.

AUDETTE, J.:—The suppliants brought their petition of right to recover the sum of $18,636.71, for alleged damages resulting

from a collision between their scow derrick or dredge, the "Horace D." and the respondent's railway ferry boat, the "Leonard," operating between Quebec and Levis, pending the construction and until the completion of the Quebec bridge.

At the opening of the case, it was ordered, both parties agreeing thereto, that the questions of law raised herein should be first disposed of before entering into the question of the quantum of the damages.

The collision in question happened on August 25, 1915, between 12.30 and 1, at noon. The weather was fine and clear, the wind blowing from the south-west at a velocity of 14 miles, as ascertained by the register of the director of the Quebec Observatory.

The suppliants, on the date of the accident, were engaged in the performance of a contract with the Crown consisting of repairing, raising and adding buttresses to the wharf called "Quebec Warehouse Wharf," the property of the respondent. Their scow or dredge, the "Horace D," was, at the time of the accident, moored at the face of the wharf, at the point marked "A.B." on plan, ex. No. 1. Part of the works consisted in removing the old superstructure of the wharf, and rebuilding it higher. Before starting to rebuild, it was necessary to send a diver down, at a given place, at the face of the wharf, to ascertain whether the foundation was strong enough to be built upon.

Between 12 and 1, noon, on the date of the accident, most of the crew of the "Horace D" were between the house or erection on the bridge of the "Horace D" and the wharf, and the river, to the north, was somewhat masked to their sight. They were all attracted at that spot by the preparations that were being made, by the diver and his help, in getting ready for their operation. However, the diver, Michaud, testified that he saw the "Leonard" leaving Quebec—remarking, that every one there could see her as well as he did—and when about to put on his accoutrement or diver's suit, seeing the "Leonard" arriving, he said to his attendant carrier, to wait until the "Leonard" had arrived before doing so. Samson, another man of the crew of the "Horace D," saw the "Leonard" when she was about half way crossing between Quebec and Levis.

The "Leonard" is a heavy steel vessel, 315 ft. in length, 50 odd ft. beam, 9 ft. of the hull out of water, with 45 ft. of frames in

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height, and used to ferry the cars of the Transcontinental Railway across the river. She is heavy and cumbersome to manœuvre.

The wharf and slip, on the Levis side to which the "Leonard" was daily mooring, belonged to the Commissioners of the Transcontinental Railway, as appears by ex. No. 9, filed herein. The captain of the "Leonard" testified he had no order preventing him to moor at his wharf on the day in question. It was the ferry wharf. The day before the accident, as testified to by Lessard, one of the witnesses heard herein, the "Horace D" had moved away on the arrival of the "Leonard."

When the "Leonard" loomed a few hundred feet away from the "Horace D," at the time of the accident, the tug, that was lying to the north side thereof, unfastened her mooring to the scow and steamed away; but the crew of the "Horace D," in their excitement, did not attempt to unfasten and move the "Horace D," but ran up the wharf.

In the meantime the "Leonard" was approaching. The captain hailed from the bridge—stopped his engines—but the wind and the ebbing tide, which was "then in its rage," as said by Captain Couette, drove the "Leonard" against the "Horace D." The usual manœuvre for the "Leonard" on arriving at the Levis Ferry wharf, was to warp the vessel around the corner of the wharf and steam in to her place indicated by the letters "C" and "D" on plan, ex. No. 1. The "Leonard," three-quarters port-a-back, struck the "Horace D" at the bow. The "Horace D" after the collision started leaking and 15 to 20 minutes afterwards sunk at the end of the wharf and drifted off, one of her ropes still holding her tied to the wharf and she was subsequently salved. Under these circumstances can the suppliant recover the damages claimed herein?

It is well settled law that the Crown cannot be impleaded in its own Court, and that an action in tort does not lie against the Crown, except under special statutory authority. Moreover, when a collision occurs between a ship belonging to a subject and one belonging to the King, the King's ship is not liable; and, in the absence of statutory provision therefor, no action will lie against the King for the negligence of his officers or servants on board the ship: *Paul* v. *The King*, 9 Can. Ex. 245, 38 Can. S.C.R. 126; *Young, Master of S.S. "Furnesia"* v. *The S.S. "Scotia,"* [1903] A.C. 501.

Having *in limine*, submitted the general principle established that no action will lie against the Crown for collision with the King's ship, in the absence of some statutory provision therefor, it remains to ascertain whether the suppliants can recover under the statutory provision of sec. 20 of the Exchequer Court Act.

It may, as a prelude, be stated that the case does not come within the ambit of sub-sec. (*f*) of sec. 20 of the Exchequer Court Act, since that section only applies to the Intercolonial Railway or the P.E.I. Railway—and that the "Leonard" is used in connection with the Transcontinental Railway.

Does the case come under sub-sec. (*c*) of the said sec. 20, repeatedly passed upon by this Court and the Supreme Court of Canada?

To bring this case within the provisions of sub-sec. (*c*) of sec. 20, the injury to property must be: (1) On a public work; (2) There must be some negligence of an officer or servant of the Crown acting within the scope of his duties or employment; and (3) The injury complained of must be the result of such negligence.

The injury complained of was suffered on the River St. Lawrence. The "Horace D" was not on a public work at the time of the accident. Having so found, it is unnecessary to consider whether or not there was any negligence of an officer or servant of the Crown acting within the scope of his duties or employment.

Therefore, placing upon the words "*on* a public work," of sub-sec. (*c*) of sec. 20, the narrow construction established by the cases of *Chamberlin* v. *The King*, 42 Can. S.C.R. 350, *Paul* v. *The King*, 38 Can. S.C.R. 126, *Hamburg American Packet Co.* v. *The King*, 39 Can S.C.R. 621, *Piggott* v. *The King*, 32 D.L.R. 461, and *Olmstead* v. *The King*, 30 D.L.R. 345, I must find that the suppliants are not entitled to recover.

Indeed, the rights of the parties herein must be measured by the statute and the question had simply to be answered: what does the Act provide?

There will be judgment declaring that the suppliants are not entitled to recover the relief sought by their petition of right, which stands dismissed.

Petition dismissed.

B. C.

S. C.

REX v. MAGNOLO.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, Galliher and McPhillips, JJ.A. November 25, 1915.

FORGERY (§ I—1)—CORROBORATION—DUPLICATING TICKETS—SIGNATURE.

A conviction for forgery will be quashed if there is no corroborative evidence under Cr. Code sec. 1002; quære, whether the false duplication of tickets or due bills with the exception of the signature appearing on the valid tickets is in itself a forgery.

[See Annotation on "Forgery" at end of this case.]

Statement.

CRIMINAL appeal by way of case stated from a conviction by Gregory, J., at the October (1915) Assizes at Vancouver. The accused was charged with forging a certain document, to wit, a ticket in the words and figures following, that is to say: "Good for 25 cents, L. Politano, 317 Powell Street," the said document being intended by him to be used as genuine, also that he did unlawfully utter the said forged document as if it were genuine. The accused was convicted on the first count of the indictment and judgment on the conviction was postponed until the following questions which were reserved for the opinion of the Court of Appeal be answered:—

"(1) Was there sufficient evidence adduced at the trial to convict the accused of the crime of forgery?

"(2) Is there any evidence of corroboration as outlined by section 1002 of the Criminal Code, subsection (*e*)?"

L. Politano, a grocer, carried on his business at 317 Powell Street, Vancouver. He issued 25-cent tickets for the convenience of his customers who on buying them could at any time receive their amount in goods at the store. On the front of the ticket was printed the words: "Good for 25 cents, L. Politano, 317 Powell Street," and in Politano's handwriting on the back was written his name, "L. Politano." The accused had bought these tickets on a number of occasions and used them at the store. It appeared from the evidence of Ralph B. Fathers, a boy of fourteen years, that the accused met him on the street in January, 1915, and handing him a ticket asked him to have 250 tickets like it printed for him. Witness had the tickets printed at Evans & Hastings, printers, on Seymour street, and brought them to the accused, who gave $1.50 for them. Three weeks later Fathers again saw the accused, who told him he had lost the tickets he had received from him before and wanted another "lot." Fathers had another "lot" printed but on bringing them for delivery the accused said he did not have the money to pay for them. Fathers then took

them back to the printers. In May, 1915, L. Politano had four Russians arrested for attempting to buy goods in his store with tickets that were not issued by him. These tickets were the same as the genuine tickets issued by Politano, except that they did not have his name written on the back. The accused on being arrested was brought to the police station, when on being confronted by the four Russians he jumped at one of them and said: "You stole my thing." Statement.

Robinson, for the accused: The accused was convicted of forgery. I contend, first, he was not guilty of forgery as the evidence does not justify the conviction; the document is not a forgery: see *Reg.* v. *John Smith* (1858), 27 L.J.M.C. 225. Secondly, there is no corroboration as required by section 1002 of the Code and therefore no forgery.

A. H. MacNeill, K.C., for the Crown: There was corroboration, first in the fact that three weeks after Fathers was asked to get the tickets printed for accused the accused again approached him to get another "lot" of tickets from the printer; secondly, when accused was arrested and taken to the station where he saw the four Russians who were uttering the tickets, he jumped at one of them and accused him of stealing his thing.

MACDONALD, C.J.A.:—I would answer the questions in favour of the accused. Macdonald, C.J.A.

IRVING, J.A.:—I would answer the second question in favour of the accused. I think there was a forgery. Irving, J.A.

MARTIN, J.A.:—I would answer the second question in favour of the accused. Without expressing any opinion on the very doubtful question of forgery, *solus*, the corroboration, it seems to me, does not go to the length required by the statute, in the lack of identification by the young boy, and in regard to the tickets that were given to him to be printed. But of course it follows that, failing corroboration, there was not sufficient evidence of forgery. Martin, J.A.

GALLIHER, J.A.:—I would answer the first question against the accused and the second question in favour of the accused. Galliher, J.A.

MCPHILLIPS, J.A.:—I would answer both questions in favour of the accused. In my opinion the essentials required to establish forgery under the Code were absent, but if I am in error in this, the evidence lacks the corroboration required. McPhillips, J.A.

Conviction quashed.

Annotation. **Annotation—Forgery (§ I—1)—The offence of forgery under the Criminal Code.**

FORGERY GENERALLY.

Every one who commits forgery of any document not specifically mentioned in Code secs. 468, 469 or 470 is guilty of an indictable offence and liable to seven years' imprisonment if the document forged purports to be genuine or was intended by the offender to be understood to be genuine or to be used as such. Cr. Code sec. 470 (*n*).

Secs. 468, 469 and 470 define the punishment for forgeries of a particular kind, the latter section including orders for money or goods, contracts, and receipts for money or goods. Sec. 469 provides a maximum of fourteen years' imprisonment for forgery of public registers not covered by sec. 468 and of personal property registrations. Sec. 468 specifies the more serious forgeries, which are punishable with imprisonment for life. This latter includes land registry documents, notarial documents, wills, registers of births, marriages and deaths, promissory notes, bills of exchange, cheques and bank notes.

A definition of forgery is given in Code sec. 466, which also deals with certain preparations for forgery, by declaring that the offence is complete as soon as the false document is made with knowledge of its falsity and with intent that it shall in any way be used or acted upon as genuine to the prejudice of anyone or with intent that some person should be induced by the belief that it is genuine, to do anything or refrain from doing anything, although the offender may not have intended that any *particular person* should use or act upon it as genuine or should be so induced.

Furthermore, the offence of forgery is complete although the false document may be incomplete or may not purport to be such a document as would be binding in law, if it be so made and is such as to indicate that it was intended to be acted on as genuine. Cr. Code sec. 466 (4). This legislation has to be borne in mind in considering the English authorities on forgery of promissory notes. *Ead* v. *The King*, 13 Can. Cr. Cas. 360.

For the offence of forgery there must be: (*a*) the making of a false document; (*b*) knowledge of its falsity; (*c*) the illegal intent.

The making of a false document includes the fraudulent alteration of it, for such alteration of a genuine instrument makes it a false instrument. *R.* v. *Bail* (1884), 7 Ont. R. 228.

And now, by statute (Cr. Code sec. 466 (2)), "making a false document" includes altering a genuine document in any material part, or making any material addition to it or adding to it any false date, attestation, seal or other thing which is material, or making any material alteration in it, either by erasure, obliteration, removal or otherwise.

Even before the Cr. Code it was held that it was not necessary that the writing charged to be forged should be such as would be effectual it it were a true and genuine writing. *R.* v. *Portis* (1876), 40 U.C.Q.B. 214.

The counterfeiting of any writing with a fraudulent intent,

whereby another may be prejudiced, is forgery at common law. 2 Russ. Cr. (4th ed.) 768; *Ex parte Cadby* (1886), 26 N.B.R. 452, 492; *R.* v. *Stewart* (1875), 25 U.C.C.P. 440; *R.* v. *Ward* (1727), 2 Ld. Raym. 1461. Annotation.

The counterfeiting of what purported to be only a copy of C.'s signature (as in a delivered telegram), may be a forgery. *R.* v. *Stewart* (1875), U.C.C.P. 440.

The execution of a deed by prisoner in the name of and representing himself to be another may be a forgery if done with intent to defraud, even though he had a power of attorney from such person, but fraudulently concealing the fact of his being only such attorney, and assuming to be the principal. *R.* v. *A. I. Gould* (1869), 20 U.C.C.P. 154.

As to the unlawful possession of forged bank-notes or the similitude of a bank note, see Code, secs. 550 and 551.

MAKING A FALSE DOCUMENT.

Cr. Code sec. 335 declares in sub-section (*f*) that "document" means any paper, parchment or other material used for writing or printing, marked with matter capable of being read, but does not include trade marks on articles of commerce, or inscriptions on stone or metal or other like material; and in sub-section (*j*) that "false document" means—

(i) a document, the whole or some material part of which purports to be made by or on behalf of any person who did not make or authorize the making thereof, or which, though made by, or by the authority of, the person who purports to make it, is falsely dated as to time or place of making, where either is material, or

(ii) a document, the whole or some material part of which purports to be made by or on behalf of some person who did not in fact exist, or

(iii) a document which is made in the name of an existing person, either by that person or by his authority, with the fraudulent intention that the document should pass as being made by some person, real or fictitious, other than the person who makes or authorizes it.

To constitute a false document it is not necessary that the fraudulent intention should appear on the face of the document, but it may be proved by external evidence. Code sec. 338.

The uttering of a false letter of introduction, the signature to which is forged, is an indictable offence under Code secs. 466 and 467, if the person uttering same knows it to be a false document, and to have been made with intent that it should be acted upon as genuine to the prejudice of any one. The first sub-section of Code sec. 466 extends the definition of forgery to cases not included in former statutory definitions in Canada of that term, and which would not be forgery at common law. *Re Abeel*, 8 Can. Cr. Cas. 189, 7 O.L.R. 327.

Code sec. 466, sub-sec. (1), is in the following terms: "Forgery is the making of a false document, knowing it to be false, with the intention that it shall in any way be used or acted upon

Annotation.

as genuine, to the prejudice of any one whether within Canada or not, or that some person should be induced by the belief that it is genuine, to do or refrain from doing anything, whether within Canada or not."

The officer of a company who fraudulently signs in the company's name a dividend check nominally in favour of a firm of which he is a member but really for his own benefit and appropriates the proceeds for his own use upon his own endorsation of the firm name, when neither he nor his firm have any claim to the dividends, may properly be charged either with embezzlement of the money or with theft of the check. The officer would be guilty of forgery in fraudulently signing the check really for his own purposes but purporting to be a dividend check and drawn upon an account kept with the company's bankers from which only dividend payments could properly be made. *R.* v *Rowe* (1903), 8 Can. Cr. Cas. 28; 2 O.W.R. 962

Where the prisoner was indicted for forging a note for $500, having changed a note of which he was the maker from $500 to $2,500, it was held to be a forgery of a note for $500, though the only fraud committed was on the endorser. *R.* v. *McNevin*, 2 R.L. (Que.) 711.

A contrivance (known as a "cut-out letter"), consisting of an addressed envelope with a stamp on it, which has been duly post-marked in passage through the post, if it is sent again through the post with an enclosure added, has been held to be a "forged or altered instrument" within sec. 38 of 24 & 25 Vict. c. 98 (the Forgery Act (Imp.) 1861. *R.* v. *Howse* (1912), 7 Cr. App. R. 103. The facts there were that four persons acted in combination to get a postmark on the envelopes and then to use the envelopes to enclose slips betting on horses after the results of the races were known. A postman in collusion was to receive the envelopes and pass them through the post without their being re-stamped. The conviction was for demanding money by virtue of a "forged or altered instrument," Avory, J., in delivering the judgment of the court (Alverstone, L.C.J., Pickford, J., and Avory, J.) said:

"The second point is that the envelope and betting slip are said not to constitute an instrument which had been forged or altered within s. 38 of the Forgery Act, 1861. This point would have been open to more argument had it not been for the case of *R.* v. *Riley*, [1896] 1 Q.B. 309, in which the Court of Crown Cases Reserved held that a telegram falsely dated as to the time at which it was despatched was a forged instrument. The judgment in that case covers the present one; Wills, J., said, [1896] 1 Q.B. 321: 'I cannot see anything in the nature of such a section which should make it necessary or desirable to restrict the application of the word "instrument" to writings of a formal character, and I think it is meant to include writings of every description if false and known to be false by the person who makes use of them for the purpose indicated.' If a telegram was held to be an instrument within that section, it is impossible to hold that an envelope, containing a betting slip, and addressed to a particular person, is not one.

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"The next question is whether it is a forged instrument. *R.* v. *Riley*, [1896] 1 Q.B. 321, is also an authority that it is, and so is the case of *R.* v. *Ritson*, L.R. 1 C.C.R. 200; 39 L.J.M.C. 10; 21 L.T. 437; 18 W.R. 73; 11 Cox C.C. 352 (1869). In that case a man was held to be guilty of forgery, who makes a deed in his own name, relating to his own property, if he puts a false date to it in order to give it a false operation. In that case Blackburn, J. (1 C.C.R. 204), adopted the definition of forgery contained in Bacon's Abridgment (tit. Forgery), which was as follows: 'The notion of forgery doth not so much consist in the counterfeiting of a man's hand and seal, but in the endeavouring to give an appearance of truth to a mere deceit and falsity, and either to impose that upon the world as the solemn act of another which he is in no way privy to, or at least to make a man's own act appear to have been done at a time when it was not done, and by force of such a falsity to give it an operation which in truth and justice it ought not to have.'" *R.* v. *Howse* (1912), 7 Cr. App. R. 103 at 106.

A man who procures a woman other than his lawful wife to sign a bar of dower as his wife, although she uses her own Christian name and not that of the lawful wife, in completing mortgage of his property in which his lawful wife would have a legal claim to inchoate dower is, under Code sec. 69, a party to her offence of forgery by making a false document knowing it to be false and with intent that it should be acted upon (Cr. Code sec. 466), and punishable as a principal. *United States* v *Ford*, 29 D.L.R. 80.

FICTITIOUS OR ASSUMED NAME.

To petition the provincial legislature, under assumed names, for an Act of incorporation is not a criminal offence. *Marsil* v. *Lanctot* (1914), 25 Can. Cr. Cas. 223, 28 D.L.R. 380.

Where a fictitious name is assumed for the purposes of a fraud, the offence of forgery may be proved, but not where the credit is given solely to the person without any regard to the name. R. v *Martin* (1880), 5 Q.B.D. 34; *Re Murphy* (1895), 2 Can. Cr. Cas. 578, 582, 26 O.R. 163: *R.* v. *Whyte* (1851), 5 Cox C.C. 290; *R.* v. *Wardell* (1862), 3 F. & F. 82.

Where a person passing under an assumed name falsely represents that he is in the employment of a certain firm, and that he is authorized to make a draft upon such firm, his signature in such assumed name to a draft upon the firm, and his fraudulent negotiation of it, constitute forgery, if the credit obtained in negotiating the bill was not personal to himself alone, without relation to his supposed employers, and if the false name, although that of a non-existent person, was assumed for the very purpose of perpetrating the fraud. *Re M. B. Lazier* (1899), 3 Can. Cr. Cas. 167, 26 Ont. App. R. 260.

In *R.* v. *Whyte* (1851), 5 Cox C. C. 290, the prisoner had purchased goods of a warehouseman and represented that he was in business with one Whiffen, under the firm name of Whiffen &

Annotation.

Co. Several bills for goods so purchased were met, but finally Whyte desired the warehouseman to draw on the firm for a certain bill of goods. This was done, and the bill was accepted by him in the name of the pretended firm. Talfourd, J., there said: "I think it will scarcely be sufficient to shew that the name of Whiffen was assumed for the purpose of fraud generally; it must have been taken for the specific object of passing off this bill; the carrying on business in the false name might be for the purpose of creating a false impression with a view to obtain credit. That might support a charge of obtaining money or goods by false pretences, but not a charge of forgery."

To sustain a conviction, it should appear either that the prisoner had not gone by the fictitious name before the signing, or that he had assumed the name for the purpose of committing the fraud. *R.* v. *Bontien*, Rus. & Ry. 260; *R.* v. *Peacock*, Rus. & Ry. 278; *R.* v. *Lockett*, 1 Leach C.C. 94; *R.* v. *Sheppard*, 1 Leach C.C. 226; *R.* v. *Francis*, Russ. & Ry. 209.

UNAUTHORIZED SIGNATURE "PER PROCURATION" OR OTHERWISE, FOR ANOTHER.

Every one is guilty of an indictable offence who, with intent to defraud and without lawful authority or excuse, makes or executes, draws, signs, accepts or endorses, in the name or on the account of another person, by procuration or otherwise, any document, or makes use of or utters any such document knowing it to be so made, executed, signed, accepted or endorsed, and is liable to the same punishment as if he had forged such document. Code sec. 477.

A partner who signs the firm's name which included his personal name and that of his partner in accepting a bill of exchange, with intent to defraud and without lawful authority or excuse, does so "by procuration or otherwise, for, in the name or on the account of" some "other person" within s. 24 of 25 Vict. c. 98, the Forgery Act, 1861 (Imp.) where he does so for the purpose of raising money for his own individual benefit and applying the proceeds to his own use without the partner's authorization; *R.* v. *Holden* (1911), 7 Cr. App. R. 93; but a different result might have followed had the firm name not been indicative of the persons, which was considered an important consideration in bringing the case within the wording of the English statute which was passed to overrule the decision in *R.* v. *White* (1847), 2 C. & K. 404. One partner was the general agent of the other, but was misusing an authority which, up to a certain point, he had. Although the name might be a partnership asset to which both partners have a right, that is no answer to the fact that what the accused was doing was not to use the partnership assets, but to write the name of himself and his partner (Holden & Fullerton) for which he had no authority under the circumstances, *R.* v. *Holden* (1911), 7 Cr. App. R. 93.

DUTY TO PROMPTLY REPUDIATE FORGED PAPER.

Though fraud or breach of trust may be ratified, forgery cannot be. *La Banque Jacques Cartier* v. *La Banque d'Epargne*, 13 App. Cas. 118; *Burton* v. *L. & N. W. Ry. Co.*, 6 L.T. Rep. 70; *Merchants Bank of Canada* v. *Lucas* (1890), 18 Can. S.C.R. 704,

affirming 15 Ont. App. 572, which reversed that of the Divisional Court, 13 O.R. 520. **Annotation.**

But a merchant whose name has been forged to a bill discounted with a bank and who receives formal notice of such discount from the bank is under a duty to give prompt notice of repudiation and his failure to do so may estop him from denying the signature. *Ewing* v. *Dominion Bank*, 35 Can. S.C.R. 133; leave to appeal refused. *Ewing* v. *Dominion Bank*, [1904] A.C. 806.

DESCRIBING INCOMPLETE DOCUMENT FORGED.

If a person is convicted on an indictment for forging a promissory note, and the fact in evidence was an incomplete note form which nevertheless under Code sec. 466 might be the subject of forgery, strict accuracy would require that the indictment be amended by calling the document an " incomplete promissory note" and setting forth in it a detailed description of the document. But if no question is raised on the trial when an amendment could have been ordered (Code sec. 898) the conviction will stand where the defendant made no application for particulars under sec. 859 and was not misled by the discrepancy, in calling the forged document a "promissory note." *Ead* v. *The King* (1908), 13 Can. Cr. Cas. 348, 360. Moreover the accused might plead autrefois convict if again indicted for forging an "incomplete promissory note" if it were in fact the same document, as the matter on which the accused was given in charge on the former trial would have been the same had "all proper amendments been made which might then have been made." (Code sec. 907). *Ead* v. *The King*, 13 Can. Cr. Cas. 348, 40 Can. S.C.R. 272.

EVIDENCE GENERALLY, IN FORGERY CASES.

On the trial of an indictment for forgery it is not necessary to prove an intent to defraud any particular person or that any particular person was defrauded; a general intent to defraud is sufficient. It is essential to prove that the defendant forged or altered the whole or part of the instrument in question or made some material alteration to such instrument. Such proof is given by calling witnesses to show that the part which is forged is in the handwriting of the defendant. This may be shown either by the admission of the defendant himself or by the evidence of persons acquainted with his handwriting either from having seen him write or from corresponding with him, or by the evidence of experts who are not acquainted with his handwriting but who, by comparing the alleged forgery with other writings, proved at the trial to be that of the defendant, can say that the alleged forgery is his work. 9 Hals. Laws of England, sec. 1493. It is for the Judge to decide whether a person tendered as a witness is qualified as an expert. *R.* v. *Silverlock*, [1894] 2 Q.B. 766, C.C.R.; *R.* v. *Wilbain* (1863), 9 Cox C.C. 448; *R.* v. *Harvey* (1869), 11 Cox C.C. 546.

Evidence must be given to show who was the person whose signature or writing is forged, or to show that there is no such person. If there is such a person, evidence must be given that

Annotation.

he did not write the alleged signature or writing. *R.* v. *Sponsonby*, 1 Leach 332; *R.* v. *Downes*, 1 Leach 334, *n.*

CORROBORATION.

No person accused of the offence of forgery under Code secs. 468 to 470 inclusive shall be convicted upon the evidence of one witness, unless such witness is corroborated "in some material particular by evidence implicating the accused." Cr. Code sec. 1002.

The corroboration required by sec. 1002 of the Code on a charge of forgery, is additional evidence that will fortify and strengthen the credibility of the main witness and justify the evidence being accepted and acted upon if it is believed and is otherwise sufficient. *R.* v. *Scheller*, 23 Can. Cr. Cas. 1, 16 D.L.R. 462.

If the accused gives evidence on his own behalf, his evidence may be looked at for this corroboration. *R.* v. *Wakelyn*, 21 Can. Cr. Cas. 111, 10 D.L.R. 455.

PRODUCING THE FORGED DOCUMENT.

The forged document must, if it is possible, be produced at the trial. If the document is in the prisoner's possession it may be obtained by means of a search warrant in cases in which a search warrant can be issued, as to which see Code sec. 629.

If possession of a forged instrument has been traced to the defendant and the prosecution are unable to obtain possession of it, a notice to produce the document should be served on the defendant a reasonable time before the commencement of the sittings of the Court at which he is tried, and if such notice is duly served and proof given of such service, the contents of the document can be proved by secondary evidence. *R.* v. *Hunter*, 4 C. & P. 128; *R.* v. *Howarth*, 4 C. & P. 254; *R.* v. *Fitzsimons* (1870), 18 W.R. 763, C.C.R. (Ireland).

If the document is proved to be lost, secondary evidence of its contents may be given. *R.* v. *Hall* (1872), 12 Cox C.C. 159.

The prisoner was committed by a Judge for extradition to a foreign state for the offence of forging tickets of admission to an entertainment. The evidence before the Judge consisted of a certified copy of the indictment of the prisoner in the foreign state, the information of a police detective taken before the Judge himself, and five depositions or affidavits sworn in the foreign state, consisting in great part merely of hearsay statements made by other persons to the deponents, not in the presence of the prisoner. These depositions proved some relevant facts, and raised a strong suspicion against the prisoner of having forged something, of having committed an offence which, if committed in Canada, would be forgery at common law, as well as under the Criminal Code 1892, ss. 419, 421, 423; but neither a genuine ticket nor one of those with the forging of which the prisoner was charged was produced with any of the depositions, nor produced or identified before the extradition Judge: Held, that there was no proper evidence of the commission of the alleged offence; and the prisoner was entitled to his discharge upon habeas corpus.

Annotation.

Re Harsha, 11 O.L.R., 457 and 494, 10 Can. Cr. Cas. 433, 11 Can. Cr. Cas. 62.

Where the basis of a charge of extradition is an alleged falsification of a written document, either the document itself must be produced or a foundation must be laid for secondary evidence of its contents; and a commitment for extradition is invalid as not disclosing a *primâ facie* case unless this has been done. *Re Johnston*, 12 Can. Cr. Cas. 559.

EXPERT TESTIMONY ON COMPARISON OF HANDWRITING.

By the Canada Evidence Act, R.S.C. 1906, ch. 145, it is provided (sec. 7) that—

"Where, in any trial or other proceeding, criminal or civil, it is intended by the prosecution or the defence, or by any party, to examine as witnesses professional or other experts entitled according to the law or practice to give opinion evidence, not more than five of such witnesses may be called upon either side without the leave of the Court or Judge or person presiding."

Such leave shall be applied for before the examination of any of the experts who may be examined without such leave. *Ibid.*

Comparison of a disputed writing with any writing proved to the satisfaction of the Court to be genuine shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the Court and jury as evidence of the genuineness or otherwise of the writing in dispute. Can. Evid. Act, sec. 8.

EXTRADITION FOR FORGERY.

Forgery and the utterance of forged paper are extraditable offences between the British possessions and the U.S.A. under the Ashburton Treaty. See *Re Abeel*, 8 Can. Cr. Cas. 189, 7 O.L.R. 327; *Re Harsha*, 11 Can. Cr. Cas. 62, 11 O.L.R. 594; *Re Hall*, 8 Ont. App. R. 31 and 135; *Ex parte Cadby*, 26 N.B.R. 452; *Re Murphy*, 2 Can. Cr. Cas. 578, 22 Ont. App. R. 386; *Re Lazier*, 26 Ont. App. R. 260; *Re Lee*, 5 Ont. R. 583; *Re Parker*, 19 Ont. R. 612; *Re Johnston*, 12 Can. Cr. Cas. 559; *United States* v. *Ford*, 29 D.L.R. 80.

UTTERING A FORGED DOCUMENT.

Code sec. 467 declares that every one is guilty of an indictable offence who, knowing a document to be forged, uses, deals with, or acts upon it, or attempts to use, deal with, or act upon it, or causes or attempts to cause any person to use, deal with, or act upon it, as if it were genuine, and is liable to the same punishment as if he had forged the document.

It is immaterial where the document was forged. Cr. Code sec. 467 (2), s. 424.

Every one is guilty of an indictable offence and liable to seven years' imprisonment who, being an officer having custody of the records of any Court, or being the deputy of any such officer, wilfully utters a false copy or certificate of any record; or, not being such officer or deputy fraudulently signs or certifies any copy of certificate of any record, or any copy of any certificate, as if he were such officer or deputy. Code sec. 482 (*c*).

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K. B.

PARISH OF ST. ELIZABETH v. LAVALLÉE.

Quebec King's Bench, Sir Horace Archambeault, C.J., Trenholme, Cross, Carroll and Pelletier, JJ. April 28, 1916.

MUNICIPAL CORPORATIONS (§ II E—150)—PROMISSORY NOTE—LIABILITY.

A municipal corporation cannot be held liable for the amount of a promissory note signed by its secretary-treasurer without evidence that the corporation authorized the signature or that the corporation has derived benefit from the signing of the note.

Statement.

APPEAL from the judgment of the Superior Court, maintaining an action against a municipal corporation, on a promissory note signed by its secretary, representing a loan of money. Reversed.

Tellier and *Ladouceur*, for appellant.

Ernest Hébert, K.C., for respondent.

Archambeault, C.J.

ARCHAMBEAULT, C.J.:—The Court of first instance has decided that the municipal council of the appellant had authorized its secretary, by resolution, to make a loan for the payment of all the accounts due by the corporation; that this resolution was within the powers of the council, in view of the fact that it dealt with a matter of ordinary administration; that it was merely in execution of this resolution that the secretary-treasurer had borrowed from the respondent the amount of the note, and that he had given this note as a recognition of this loan; that the secretary-treasurer had employed this amount to pay a portion of the debts of the corporation, and that the corporation had in this way received the benefit of the amount borrowed, and that it could not so enrich itself at the expense of the respondent, by refusing to reimburse him the amount of the note in question. The corporation complains of this judgment and asks us to reverse it.

In principle, there is no doubt that a municipal corporation may borrow for the purpose of paying the current debts of the corporation. This is purely an act of administration which is within the powers of the council, and which in no manner increases the obligations of the corporation. But did the council of the appellant corporation authorize its secretary-treasurer to make the loan in question? The respondent contends that this question must be answered affirmatively. In support of his contention he invokes a resolution which was proposed at the sitting of the council on February 25, 1913.

It appears from the minute-book of the council that at this sitting it was moved by Joseph Houle, one of the councillors,

seconded by Léon Gadoury, another councillor, that the secretary should be authorized to borrow money for the purpose of paying all the accounts. This resolution does not appear to have been adopted; the minute-book mentions its proposal, without adding that it was put to vote or adopted.

Joseph Gadoury, examined as a witness, tells us that the resolutions of the council were adopted at the next sitting. Nevertheless, there is no evidence that the resolution in question was, in fact, adopted at the next sitting of the council. All that we find in the record in this respect is the extract which I have mentioned above from the minute-book. This extract certainly does not prove that the municipal council of the appellant had authorized the loan which is now in question.

The respondent also contends that the appellant is liable because it did not repudiate the pretended authorization given by the council to Gadoury, nor the loan made by the latter. But there exists no proof that the municipal councillors had knowledge of the entry made by Gadoury in his minute-book, nor of the loan made by the respondent. One cannot repudiate an act of which he has no knowledge.

It remains to inquire whether the corporation has benefitted by the moneys borrowed by the respondent. There can be no doubt that it is liable if it had benefitted thereby. No one can enrich himself at the expense of another.

The question is one of proof of which the burden rested upon the respondent. (The Chief Justice, after making an examination of the evidence, declares that there was no necessity for borrowing to pay the current debts of the corporation; and that the $1,000 in question had been employed towards the discharge of personal obligations of the secretary-treasurer.)

The respondent, therefore, finds himself in this position:—that he loaned $1,000 to the secretary-treasurer of the appellant corporation, without Gadoury having received authority from the municipal council to make the loan; and that, on the other hand, the corporation had no need thereof and has not profited by the money loaned to Gadoury by the respondent.

It is much to be regretted that the respondent finds himself in this position; but he was wanting in prudence, and he is himself the author of his own misfortune. He ought not to have made

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the loan without assuring himself that it had been regularly authorized; or without himself seeing that the moneys were employed for the benefit of the corporation. The latter could not be held liable to reimburse a loan which it had not authorized and by which it had not profited.

For these reasons I am of the opinion that the judgment of the Court of first instance is not well founded, and that the claim of the respondent against the appellant ought to be dismissed.

CARROLL, J.:—It is with regret that I find myself forced to cause the loss to this honest but imprudent lender of the amount which he has loaned.

It appears that this resolution of February 2 was never adopted by the council. The secretary says that the custom was to adopt resolutions at the next following sitting of the council, but we have no proof that it was adopted at a subsequent sitting. What confirms the contention of the appellant on this point is that the mayor then in office was not aware of the loan made by the respondent to the secretary-treasurer.

There is no doubt that municipal councillors may borrow money for the expenses of administration, but I do not believe that a small municipality, with limited resources, could allow its council, in the space of 10 years, to borrow a sum of over $16,000. The secretary-treasurer had made a series of loans which he concealed from the mandataries of the corporation, that is to say, from the municipal councillors. Let us even suppose that the municipal councillors had authorized these loans by resolution, it is very doubtful whether this method would have been lawful. In any event it would have been upon the lenders to prove that the resources of the corporation and the extent of its business justified these loans as acts of simple administration. Municipal councils have, in such matters, limited powers. It is in the interest of the public that they should not go beyond them; in rural municipalities particularly, the farmers are even less likely or less inclined to notice what is taking place, it would be easy to run into debt on the municipal budget to an extent such as the ratepayers would never have consented to if they had knowledge of it. This is why the municipal by-law is the safeguard of the ratepayer. It notifies him of what is taking place. It must be promulgated; there is an appeal from the promulgation; resolu-

tions are not promulgated, they are given no publicity—unless as to those who are present at sittings of the council or who might be possessed of such vigilance or have such suspicions as might cause them to make examination of the books after each sitting, a thing which is not practicable.

Nevertheless, for the decision of this case it suffices to know that the resolution was not adopted, and, in order to succeed, the respondent was obliged to prove (because the burden of this proof was upon him), that the corporation had profited by the moneys which he had imprudently paid into the hands of the secretary-treasurer.

The latter tells us, it is true, that he made this loan for the business of the corporation, but, later on, he declared himself unable to say where this money had gone. At the time of the loan, his balance shewed a surplus, according to his own evidence. If he had a surplus, the loan was not of any use. Had he actually a surplus in his balance? It is difficult to say, because he mixed up in his credits his own money with the money which belonged to the corporation. Evidence that the corporation had benefitted by his loan has not been produced.

There remains the last question. The appellant has not repudiated the resolution of February 25. As I have already stated, the resolution was not adopted, and, as to keeping silence in regard to it, the respondent has not proved that even the councillors had knowledge of it. One cannot ratify by silence an act of which he is ignorant. I would reverse the judgment.

Judgment of the Court of Appeal:—

Considering that the promissory note payable to order signed by Joseph Gadoury, secretary-treasurer of the corporation, appellant, was never authorized by the latter;

Considering that there does not exist in the record any evidence that the said corporation has profited by the moneys obtained from the respondent by means of the said note payable to order;

Considering that the judgment rendered by the Superior Court, at Joliette, on November 6, 1915, condemning the appellant to pay to the respondent the amount of the said note payable to order, is not well founded; reverses and annuls the said judgment;

And, proceeding to render the judgment which the said Superior Court ought to have rendered, dismisses the action

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of the respondent, with costs of both Courts against the said respondent;

The Court, nevertheless, reserved the recourse of the respondent against the appellant, if it is established, later, after the settlement of accounts between the appellant corporation and Joseph Gadoury, that the said corporation has profited in whole or in part by the amount loaned by the respondent.

TRENHOLME, J., dissented. *Appeal allowed.*

ALTA.

S. C.

PROVINCIAL TREASURER OF ALBERTA v. TORONTO GENERAL TRUSTS CORPORATION.

Alberta Supreme Court, Hyndman, J. December 13, 1916.

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

Mortgages under the Alberta Land Titles Act to a person resident out of Alberta on land situated therein are property situate within the Province, and upon the death of the mortgagee are subject to duty under the Succession Duties Act (Alberta); the duplicate retained by the Registrar, under the Land Titles Act (Alberta) is the real security, not the duplicate retained by the mortgagee.

[*Ivey* v. *Commissioners of Taxation* (1903), 3 S.R.N.S.W. 184, followed.]

Statement.

CASE STATED as to whether certain mortgages are property upon which succession duty is payable.

W. G. Harrison, and *Turgeon*, of the Attorney-Gen'l's Dept., for plaintiff; *Frank Ford*, K.C., for defendant.

Hyndman, J.

HYNDMAN, J.:—This matter comes up upon a Special Case by leave of Ives, J., stated and agreed upon by W. G. Harrison, acting for the plaintiff, and Frank Ford, K.C., counsel for the defendant.

For clearness as to the facts I set out in full the material portion of the Special Case, as follows:—1. The defendant is the administrator, with the will annexed, of Richard Grigg, deceased, who died at the City of Ottawa in the Province of Ontario on or about January 5, 1916, and who had prior to and at the time of his death his domicile in the Province of Ontario. 2. The property passing by the will of the deceased is of an aggregate value sufficient to make such property as is situate within the Province of Alberta liable to pay succession duty under the Succession Duties Act (Stat. Alta.) at certain rates. 3. Part of the property left by the deceased and passing on his death consisted of mortgages secured upon lands in the Province of Alberta made in favour of the said Richard Grigg in his lifetime and made under the Land Titles Act. 4. The said mortgages were executed under the seal of the mortgagors and contain covenants for payment of principal,

interest, etc., as well as the statutory covenants provided for by the Land Titles Act. 5. A duplicate of each of the said mortgages was in the custody and possession of the deceased Richard Grigg at his place of business in the City of Ottawa in the Province of Ontario. The other duplicate of each of the said mortgages was registered in the proper Land Titles Office in the Province of Alberta under the provisions of the Land Titles Act. 6. It is agreed that the Court may without the necessity of evidence being adduced as to the law of Ontario decide whether by that law the mortgages in question herein are specialty debts.

The question submitted for the opinion of the Court is, are the mortgages above described property upon which succession duty is payable to the plaintiff?

It is agreed that neither side will ask for costs against the other.

Sec. 7 of ch. 5 of the Statutes of 1914 enacts:—

Save as otherwise provided, all property of any person, situate within the province, and passing on his death, shall be subject to succession duties at the rate or rates set forth in the following table (here follows the percentages, etc.).

In my opinion there is no doubt but that the mortgages in question are specialty debts and not contract debts, and therefore "*bona notabilia*" where they were conspicuous, that is within the jurisdiction within which the specialty was found. (*Commissioners of Stamps* v. *Hope*, [1891] A.C. 476, 482; Hanson's Death Duties, 6th ed., p. 113; *Treasurer of Ontario* v. *Patton*, 22 O.L.R. 184.)

Mr. Ford contends that the mortgages, the duplicates of the instruments retained by the registrar, constitute the real securities, and not the documents retained in the Land Titles Office, and relies on sec. 63 of the Land Titles Act (Alta. 1906, ch. 24, amended by 2-3 Geo. V. 1911-12, ch. 4, sec. 15(15)), the words of the section relied on being:—

Upon the production of any mortgage . . having endorsed thereon or attached thereto a receipt or acknowledgement in the form (I) in the schedule to this Act signed by the mortgagee . . and proved by the affidavit of an attesting witness discharging the whole or any part of the land comprised in such instrument . . or upon production of a receipt or acknowledgment in the said form (I) accompanied by evidence satisfactory to the registrar of the loss or destruction of the mortgage . . the registrar shall thereupon make an entry on the certificate of title noting that said mortgage . . is discharged . .

Standing alone, such a contention might be tenable, but it is

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necessary to go further and consider other sections of the Act and the Land Titles system generally. The question for decision is whether or not the mortgages mentioned in the admissions were property in the Province of Alberta at the time of the death of the deceased. The test of liability under the Succession Duties Act is the situation of the property, that is, whether it was in the Province of Ontario or in the Province of Alberta.

There is a very great difference between what is known as the old system of registration and the Torrens or new system. Registration under the old system was primarily for the purpose of putting intending purchasers and mortgagees on notice, and did not affect the estate or rights in the land. On the execution of a grant of land the grantee became seised of the estate intended to be passed, and registration was more or less a precaution. In the older provinces it is not an uncommon thing for owners of land to hold unregistered titles; but under the registration system in force in this province, registration is the outstanding feature and is that which gives validity and operation to instruments. Clause "R" of sec. 2 of the Land Titles Act defines the expression "instrument" as meaning amongst other things "mortgage" or "encumbrance." Clause "e" of the same section defines the expression "mortgage" as "Any charge on land created merely for the securing of any debt or loan. Sec. 23 of the Act enacts as follows:—

> Instruments registered in respect of or affecting the same land shall be entitled to priority the one over the other according to the time of registration and not according to the date of execution; and the registrar *upon registration thereof shall retain the same in his office, and so soon as registered every instrument shall become operative* according to the tenor and intent thereof, and shall thereupon create, transfer, surrender, charge or discharge, as the case may be, the land or the estate or interest therein mentioned in the instrument.

Sec. 60 in part enacts as follows:—

> Whenever any land for which a certificate of title has been granted is intended to be charged or made security in favour of any mortgagee, the mortgagor shall execute *a mortgage* in the form "N" in the schedule to this Act, or to the like effect, (and)—
>
> 61. A mortgage or encumbrance under this Act shall have effect as security but shall not operate as a transfer of the land thereby charged.

It will be noticed then that the instrument *when registered shall be retained by the registrar in his office*, and on becoming registered shall operate as a charge on the land. There is nothing in the Act strictly requiring that a mortgage must be registered

in duplicate, and this can be implied only from sec. 63; but I do not think any such inference should be held to alter the effect of sec. 60, which states in terms how the mortgage shall be created and what shall be done with the instrument creating it. I am inclined to the opinion that the filing of the mortgage in duplicate is optional with the mortgagee, and has sprung up really more as a matter of practice than a requirement of the Act, and that the practice was instituted for the convenience of mortgagees rather than supplying any need of the Torrens system. I do not think that the registrar could refuse to accept a single mortgage should it be tendered him for registration, and in that case when the time for discharge arrived the production of a discharge of mortgage is all that would be necessary, and all that could be demanded by the registrar. The real security is the mortgage registered and held in the Land Titles Office, just as the certificate of title entered and kept in the register, to my mind, is the essential evidence of title.

After a careful perusal of the Land Titles Act and the authorities, I feel convinced that the mortgage upon which the deceased would have to rely for the enforcement of his security would be the instrument registered with and retained by the registrar. (See Hogg's Australian Torrens System, 761). In *Ivey* v. *Commissioners of Taxation*, (1903), 3 S.R., N.S.W. 184, it was held by the Court of Appeal that a mortgage under the Real Property Act was situate in the State where registered, and they distinguish the case of *Commissioners of Taxation* v. *Armstrong*, (1901), 1 S.R., N.S.W. 48, pointing out that in the latter case the deed was executed at Common Law and not under the Act. No local or Canadian cases on this particular point, *i.e.*, the effect of the Land Titles Act, were cited to me on the argument, and I presume there are none reported.

But for the Land Titles Act I think my plain duty would be to answer the question in the negative under the authority of the *Hope* case, but coming to the conclusion I do with regard to the "situs" of mortgages registered under our Land Titles Act, I must answer the question submitted in the affirmative. In accordance with the agreement mentioned in the Special Case, there will be no costs to either party.

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CORONA LUMBER CO. Ltd. v. BRERETON.

Manitoba King's Bench, Metcalfe, J. December 18, 1916.

LEVY AND SEIZURE (§ III A—40)—ABANDONMENT OF POSSESSION BY OFFICER LEVYING.

A bailiff will be deemed to have abandoned the possession of seized goods if after seizure he permits the owner to transport and sell the goods, upon promising to pay the bailiff a portion of the proceeds.

Statement.

ISSUE to determine whether wheat, the proceeds of which were attached by garnishing order, was under seizure by sheriff.

H. F. Maulson, K.C., for plaintiffs.

G. A. Eakins, for defendant.

Metcalfe, J.

METCALFE, J.:—In the Fall of 1915, one R. J. Spratt, then sheriff of the Northern Judicial District, had several executions, including those of The Northern Elevator Co., and of the Corona Lumber Co., against the goods of one Brereton, a farmer living at a distance from Minnedosa. The sheriff sent to one Schank, his bailiff, a warrant to seize under the Northern Elevator Co. execution, on which there was owing about $2,000. By the letter enclosing the warrant he told Schank that the execution required a lot of attention: He warned him not to be put off in any way, and instructed him to put a man in possession as soon as the crop was ready.

Speaking of this and another execution, the letter closed with the admonition, "Look closely after these two executions."

While the letter enclosing the warrant bears date August 28, 1915, Schank, the bailiff, did not go out to make a seizure until about a month later. The delay is not explained.

The material witnesses say, in effect, as follows:—

Schank:—Am sheriff's bailiff. While driving out to Brereton's to make the seizure, met him on the highway about a mile from his farm. Told him I was going to seize the crop. Asked him if he would act as my deputy-bailiff. He said he would. I shewed him the warrant. I gave him a paper to put him in charge. The real reason I put him in charge was because I could not get a man to put into possession. I had to put Brereton in or stay there myself. Brereton owned a threshing machine. Made no arrangements as to threshing or hauling out. Grain was all cut and in stook. Came a big snow storm. Threshing delayed. Went there October 20. He had then just started to thresh. Had passed his place several times. Had 'phoned him several times.

About December 7 or 8, and after threshing, he came to me with cheque for $300 for part car of wheat. Cheque made out to him. Said it was deposit on car of grain. Said as soon as he got the returns he would pay me the balance of that car.

I thought there would be between 2 and 3 cars of wheat. 100 acres of wheat. Whole crop about 200 acres.

(Cross-examined). Took no bond or security. Think my reason for not putting man in possession was to save expense. Expected grain would be shipped from Bromley, near his farm. No station agent there, only an elevator. Did not notify Elevator Company of the seizure. Told Brereton to ship it out in Sheriff Spratt's name, or in my name. Yes, I swore an affidavit, January 12, 1916, that it was through an error on my part it was shipped out in Brereton's name. I meant through a mistake. Had all confidence in Brereton. When I shewed Brereton the warrant on the highway, he said he could not pay it all. I said "If not, pay as much as you can. We cannot get blood from a stone." He went on and I went to the farm. I looked over crop. I said to Sykes, the liveryman with me: "I seize all this crop for the Northern Elevator Co. execution." I said nothing to anyone on the premises other than Sykes. That is all I did. I then went home. I did not make an inventory. I knew when he brought me the cheque that he was shipping the wheat in his own name. I raised no objection. Felt sure he would ship the grain and bring in the money. Am not prepared to swear as to the details of any arrangement that I was to accept part of the execution.

Brereton:—Schank produced papers. Said he was acting under instructions from sheriff. He said he was going to seize the crop. He appointed me to look after the crop. Crop damaged. He said it was a little unreasonable to expect me to pay the whole of the claim out of the crop. I was to pay him a certain amount of money and as much more as I could pay. He said he was going down to seize crop. I agreed to take charge. When it became suitable to take the crop out I was to dipose of it and give him the money. He never made any other arrangements with me. $300 cheque was part of advance which I got on a car of wheat. Did not tell purchaser of wheat that the crop was under seizure. Shipped this and two other cars in my own name. One car before and one after. I got the returns. Did not hand them to Schank.

Smith (the present sheriff):—As sheriff, drove out to see Brereton in March last. He said wheat had all gone out in January; that he was to pay about $500 under an arrangement he had made with Schank. In presence of Schank, Brereton said that he had intended to pay $200 out of the other cars, but that he was disappointed in the returns.

Gourlay:—Am buyer for Canadian Elevator Co. at Bromley. Shipped three cars of wheat for Brereton; all in his own name. Had no intimation crop was under seizure. First car was shipped in November. The second car (the one in question, and numbered 70,136) was shipped in December. Third car was shipped in January or February. I gave him an advance of $500 on car 70,136; $200 in cash and $300 by a cheque or draft made out to him.

Raymer:—Am agent for Corona Co. Heard Brereton was moving his grain. 3 or 4 days before the garnishee proceedings I 'phoned Schank. Asked him if he had our execution. He said he had returned all papers to sheriff. I told him Brereton was moving his grain. He said he was not worrying about it.

Raymer, having telephoned to Schank and getting no satisfaction, then telephoned to his solicitors at Minnedosa, who interviewed the sheriff; the only definite information they got

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from the sheriff was that he had not seized under the Corona execution, and that there was probably no one in possession, other than Brereton. Thereupon they, on behalf of the Corona Lumber Co., garnisheed the balance owing from the Canadian Elevator Co., on this car No. 70,136.

The Canadian Elevator Co. having paid the money into Court, an issue was directed, wherein Spratt was made plaintiff and The Corona Co. defendant, the question to be tried being "whether the wheat, the proceeds of which were attached by the garnishing order issued herein by the judgment creditor, was under seizure by the claimant as sheriff, under a writ of execution against the judgment debtor then in his hands"

The matter coming before me for trial, it was agreed by counsel that it should be taken as though I were directed to find as of the date of the alleged attachment, which date was admitted as of December 18, 1915.

The chief points to consider are:—

1. Was there a seizure? 2. If so, was it abandoned?

It is difficult, if not impossible, to define a seizure. It is clear from the cases, to which I will hereafter refer, that the question is one of fact. Each case is binding only in so far as the facts are identical. Otherwise, only in so far as the facts approach those at issue, are the cases cited by counsel persuasive or instructive.

The case has been well argued and many cases cited, which I shall review, dealing as briefly as I may with the facts of each case and the finding of law upon those facts.

The officer on entering and seizing should take care to let it be known what goods he intends to seize, but, subject to this, he may seize part in the name of the whole. He should declare the full contents of the warrant so that the debtor may pay the amount—a mere entry without more is not a seizure. Having seized he makes an inventory, leaves a man in possession and then within a reasonable time either removes the goods off the premises, to a place of safety, until he can sell them or he sells them on the premises with the consent of the debtor or of the person on whose premises the goods are: Atkinson, 192.

A seizure of part of the goods in a house by virtue of a *fi. fa.* in the name of the holder is a good seizure of all. Mather, p. 82.

When the sheriff has seized under the writ, he is by law entitled

to remain in possession until the sum for which he is to levy has been satisfied: Mather, p. 99. Halsbury, vol. 14, para. 108.

The plaintiff's attorney went to the premises to distrain for rent. The tenant not being there, the attorney told the clerk that he was now on the premises to distrain for rent. The bailiff walked around the wharf and left notice of distress, signed by the landlord, and then walked away; left no one in possession. The tenant paid the arrears and brought action for excessive distress. Verdict going for the plaintiff, upon a motion for a new trial, Bayley, J., said: "Landlord's agents went upon the premises for the purpose of distraining Afterwards sent written notice of what they did. That is evidence against the landlord that he had actually made a distress The case is not a question as between the landlord and a third party, but between him and his tenant:" *Swann* v *Falmouth* (1828), 108 E.R. 1112, 8 B. & C. 456.

Judgment debtor's carriage was with carriage builders for repair. They had a lien. The bailiff came to seize Carriage builder would not deliver up till his bill was paid Bailiff said he had a writ of execution to seize: that the defendant must consider the omnibus in custody of the sheriff and that if he took it off the premises he must do so at his peril. Upon a motion for a new trial the first point urged was that there had been no seizure. Lord Denman, C.J., interjected during the argument:—

There will be no rule upon the first point. Any act done by a person having authority which distinctly indicates to the party that he intends to execute the writ is sufficient to constitute a seizure, and the parties here could have no doubt that the carriage was seized by the bailiff. *Balls* v. *Thick* (1845), 9 Jur. 304.

A bailiff went to the premises of the judgment debtor with a warrant to levy. Debtor invited him into his counting house. The bailiff produced the warrant without saying anything or doing anything more. At the defendant's request, he made out an account for debt and expenses. The debtor paid under protest. On motion to recover poundage and expenses, Bovill, C.J., says: "The facts fail to shew a seizure under the writ. The sheriff should make an actual seizure . . without saying what is a seizure, it is sufficient to say that there is not enough shewn here."

In all cases of arrest upon a *ca. sa* some act has been done

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towards the restraint of the person of the defendant. *Nash* v. *Dickenson* (1867), L.R. 2 C.P. 252.

A bailiff not only told the servants of the debtor that he had made a seizure of all the effects of the Duke of Newcastle, but he left a man in possession.

It is true he did not then make an inventory. On coming next day to do so he was notified of a sale of some of the goods.

It was held that the facts constituted a seizure. *Gladstone* v. *Padwick*, L.R. 6 Ex. 203.

A sheriff's officer had shewn the warrant to the debtor; explained its nature; and read over the principal parts. The debtor then took various items in writing. Sheriffs' officer told him he required immediate payment otherwise he would take proceedings and leave a man in possession. The debtor thereupon paid the claim including poundage. It was held that there had been a seizure upon the *fi. fa.* and that the sheriff was entitled to poundage. *Bissicks* v. *Bath* (1877), 3 Ex. Div. 174.

Re Davies, Ex parte Williams, cited in Halsbury, vol. 14, para. 108, is not in point. That decision was simply to the effect that the trustee in liquidation and already in possession was entitled to the goods as against the sheriff attempting then to seize under a *fi. fa.*

In *Mortimer* v. *Cragg* (referred to in above paragraph), the judgment debtor disputed the sheriff's right to poundage. Bramwell, L.J., said: "The test is, supposing the sheriff had not the authority of the Court, could an action of trespass be brought against him."

In *Wallbridge* v. *Hall*, 4 Man. L. R. 341, the sheriff had two *fi. fas.* against Baker, including one for the defendant Hall. He seized the goods of the plaintiff, but did not go into possession nor leave anyone in charge. He took a list and told the plaintiff not to remove the goods until he had put his claim into the sheriff's hands. The plaintiff did put in his claim and the sheriff interpleaded. After the plaintiff's examination on his affidavit, the sheriff withdrew from the seizure, and the plaintiff sued. Dubuc, J., at p. 344, says:—

> As to the question whether there was a trespass committed, the case of *Cameron* v. *Lount*, 4 U.C.Q.B. 275, seems to be very much in point. In that case the bailiff had received from the plaintiff a list of the goods and stock found on the farm, had told the plaintiff that he must not remove it, and

took a bond that it should be forthcoming. Robinson, C.J., held that, as the goods were neither removed, nor retained, nor handled, there had been no actual direct injury done to the plaintiff's goods, for which he could sue in trespass.

In *Pardee* v. *Glass*, 11 Ont. R. 275, it was held that, though there was what constituted a seizure by the sheriff, so as to entitle him to interplead, as he had not interfered with the possession of the goods, he was not liable in trespass, and the verdict in his favour was maintained.

In *Hartley* v. *Moxham*, 3 A. & E. N.S. 701, the defendant had locked up the plaintiff's goods in a room which he held of defendant, and in which the plaintiff had put them, kept the key and refused plaintiff access to them, saying that nothing should be removed till his (defendant's) bill was paid. It was held that there was not such a taking of the goods as would sustain an action of trespass.

Under these authorities, I think I might properly hold that in the cases before me there was no trespass committed.

In *Dodd* v. *Vail*, 9 D.L.R. 534, the bailiff found the wheat in stook and oats not cut. The judgment debtor not being at home, the bailiff made out and handed to the debtor's wife a signed notice shewing schedule of goods seized under execution, namely, 100 acres of wheat in stook. He left the premises and did nothing further.

Later, the debtor told the sheriff that the oats were cut and in stook. The sheriff said he would send out and seize them. The debtor asked him not to incur the additional expense; said he would admit the seizure of the grain. The sheriff told the debtor the oats were seized under the execution and took from him and another a bond reciting the seizure of the oats, conditioned on the delivery of the goods seized whenever the sheriff would so require. Later, on the same day, the sheriff was notified that claimants claimed an interest in the crop upon the defendant's farm The sheriff applied for interpleader. The Local Master made an interpleader order. The claimants appealed. It was contended the sheriff had no right to interplead, because of (1) No seizure; (2) Abandonment. Upon these facts Lamont, J., held that the sheriff was entitled to interplead. He cited Sask. r. 559.

Upon appeal, 10 D.L.R. 694, Haultain, C.J., delivered the judgment of the Court, confirming the judgment of Lamont, J. The learned Chief Justice says:—

I fully concur in the reasoning and decision of my brother Lamont. . . As between the plaintiff and defendant (the debtor) there was an effective seizure made, or in any event, what in the result was tantamount to an effective seizure.

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I think Schank is mistaken when he says that he arranged with Brereton to market the grain in either the sheriff's or Schank's name. Earlier in his evidence he said that he had made no arrangement with Brereton as to the threshing or hauling out. Brereton himself states that he was to dispose of the crop and give Schank the money. Schank knew that he was disposing of it and took no objection. Notwithstanding that Brereton had a threshing machine of his own, I cannot shut my eyes to the fact that there would be expense for men, fuel, oil and teams to thresh and market the grain. Schank made no provision for such. Further, there were other claims pressing which I think it was understood between Brereton and Schank that Brereton might pay out of the proceeds of the crop. As Brereton says, there was the Mortgage Company and that he had to live. While Schank made a pretence of seizure I think the real arrangement was that Brereton would thresh the crop and give the bailiff $500 or $600 and whatever more he could afford out of the crop according as the out-turns made this possible; that, satisfied that Brereton would, as Schank says, do what was right, he paid no further attention to the matter.

Considering all the circumstances of this case, I would hesitate to hold there was a seizure.

But, even if there were a seizure, was there an abandonment? Where sheriff has taken possession of effects under a *fi. fa.* his officer should continue in possession, or if he abandon it even necessarily for a time, he must clearly and satisfactorily account for so doing in order to sustain his right against others afterwards claiming under legal authority to seize the same goods. Mather's Sheriff Law, p. 99.

Possession must not be abandoned. Atkinson, 193.

Where a sheriff who has seized goods under a writ of *fi. fa.* goes out of possession, the question whether in so doing he has abandoned possession or not is always a question of fact. Mather, p. 100.

The officer should keep possession of the goods either by himself or some other person, as, upon an abandonment of the possession of the sheriff, the goods do not remain in the custody of the law, and are liable to be seized under another execution. Churchill, 211. Halsbury, vol. 14, para. 110.

A sheriff's officer informed the debtor that he had come to

levy on his property, but made no manual seizure except laying his hand on a table and saying, "I take this table," and then locked up the warrant in the table drawer, took the key and went away without leaving any person in possession.

Afterwards the landlord distrained for rent. The sheriff brought action. Lord Ellenborough, at 712, says:—

> The question is whether by quitting the premises after the seizure, and leaving no one in possession in charge of the goods, he did not relinquish possession. If he did, I am not aware of any case where, upon abandonment of the possession by the sheriff, the goods have still been taken to remain in the custody of the law, so as to make the party distraining them a trespasser. In this case what is there to shew a continuance of possession after the officer who made the seizure withdrew? Thereafter the possession, as soon as the sheriff abandoned it, reverted back to the original owner. *Blades v. Arundel* (1813), 1 M. & S. 711.

This case is cited in 11 Ruling Cases, p. 626, in support of the statement there made, "Where a sheriff retires from possession he is regarded as never having seized."

In *Ackland* v. *Paynter* (1820), 8 Price 95, it appeared that the landlord had distrained and left no one in possession. Afterwards the sheriff legally seized cattle. The landlord's servants drove cattle away. The sheriff brought action in trover to recover the cattle. The jury found for the defendants.

On motion for a new trial, it appeared from the Judge's report:—

1. That the bailiff had legally executed a *fi. fa.*

2. That the defendants drove and carried the cattle away.

3. That the tenant had notified the sheriff's officers of the distress.

4. Disregarding this, the sheriff's officers remained on the farm and in possession.

It appeared that the sheriff's officers had not permanently continued in possession, and particularly, that they were seen five or six miles distant from the tenant's farm on several occasions.

The Judge had directed the jury that the questions for their consideration would be:—

1. Were the goods actually and fairly taken in execution?

2. If so, was there an abandonment of possession by the bailiff's directing them?

3. That where for motives of compassion to the tenant, distress is concealed, it is not sufficient to preclude a judgment creditor,

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and that then would arise the other question whether the plaintiffs had not abandoned the levy made by them by absenting themselves as proved.

Garrow, B., during the argument, interposed, at p. 99:—

Blades v. *Arundel* certainly does not establish that an occasional absence will amount to an abandonment. Lord Ellenborough said in that case at Nisi Prius, that someone should be on the premises who might apprise others that there was an adverse possession, which a table, being a blind, deaf, and dumb representative of the sheriff, could not do. But surely a man might leave the premises on some occasions, as for food for instance.

Richards, L.C.B., p. 100, says:—

It is clear that after the levy was made the officers were absent; but it is not necessary for us in this case to inquire what period of absence would amount to an abandonment of possession. Any absence unless satisfactorily explained and accounted for would however be *primâ facie* evidence of an abandonment. It is clear the officer was absent for some time between the 9th and 13th. It then becomes a question of fact and having been so left to the jury, we ought not to disturb the verdict.

Graham, B.—

I do not mean to lay down the general proposition that a sheriff can in no case quit possession without any qualification, but I consider that to shew it not an abandonment, he ought to be able most clearly to account for it as being caused by some urgent necessity and to give very satisfactory evidence of that.

In *Balls* v. *Thick*, Coleridge, J., during the argument, says:—

In *Ackland* v. *Painter*, Richards, C.B., lays it down that the sheriff must remain in possession. He says any absence unless satisfactorily explained and accounted for would be *primâ facie* an abandonment.

That is a very sensible rule because it avoids all questions as to the length of absence which may constitute an abandonment.

In *McIntyre* v. *Stata and Crysler* (1855), 4 U.C.C.P. 248, the sheriff had seized under *fi. fa.* The landlord subsequently seized for rent. The sheriff brought an action of trover against Crysler (landlord) and Stata (his bailiff). The sheriff had seized the goods and Fetterly (execution debtor) had requested that they be left in his possession. The sheriff assented on condition that the goods be receipted by responsible persons, and that they should not be sold until just before the return of the writ. Fetterly procured another to join him in the receipt for the goods and the undertaking to deliver when requested by the sheriff. The bond further provided that the sheriff might sell the goods even after the return day of the writ and not be a trespasser or liable, and that Fetterly and the bondsman at all hazards were to keep the goods and to permit the sheriff or his officers to re-enter and carry away and sell

Afterwards the goods in question were seized and sold for rent while in the possession of Fetterly. Macaulay, C.J., said, at p. 250:—

> The plaintiff relinquished the actual possession upon receiving the undertaking of the debtor and his surety, and must have relied upon that for indemnity.

Speaking of the bond, he says:—

> The whole tenor . . repels the inference that the plaintiff was, or supposed he was, in actual possession. The bailees were not his mere servants or bailiffs, but clothed with exclusive and independent possession. In short, upon the security given that the goods should be forthcoming when requested, they were restored to the possession of the debtor.

McLean, J., said:—

> It appears to me that the goods were left in the possession of the owner when they were receipted by Fetterly and Bouck, who acknowledged to have received them from the sheriff and bound themselves to deliver them to him when requested. Sheriff did not constitute Fetterly and Bouck his officers to remain in custody and charge of the goods. On the contrary, these parties entered into a contract with the sheriff.

In *Anderson* v. *Henry*, 29 O.R. 719, where a bond was taken in the terms that the goods were to be held for the landlord's bailiff, it was held there was no abandonment, thus distinguishing the case from *McIntyre* v. *Stata*.

Hart v. *Reynolds*, 13 U.C.C.P. 501. In a contest between the sheriff and the landlord, Richards, C.B., at p. 505, says:—

> The bailiff after seizing merely took an inventory of the goods; left no one in possession and could not in any way that I can see have acquired a right to hold these goods as against the landlord's claim for rent; as against the landlord these goods were in the possession of the tenant and not in the custody of the law. The sheriff could not have brought an action for trespass against the tenant for using the horses on the premises, nor even for selling the goods.

In *Bagshawes* v. *Deacon* [1898,] 2 Q.B. 173, the sheriff had on July 10, seized under *fi. fa.* at suit of Deacon against Bagshawe, trading as Bagshawe & Co. Bagshawe informed sheriff's officer of an impending sale of his property to a trustee for the limited company (plaintiff in this action). He told the sheriff it would be inconvenient to have a man in possession, and paid part of the execution and promised the balance. He gave the sheriff a writing that in consideration of withdrawal of possession sheriff might re-enter. The sheriff then withdrew. The sale was completed to the limited company on July 12, and on July 13 the sheriff's officer again took possession. The limited company having claimed the goods, judgment was given for the limited company.

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In appeal, A. L. Smith, L.J., at p. 175, says:—

For what reason did the sheriff's officer go out? There was no need for him to go out, and it was not a case of any temporary necessity taking him away. I think the result of the evidence is that what induced him to go out was that the sale of the business . . might be carried through. Bagshawe told the sheriff that it would be inconvenient to have a man in possession because of the impending sale, and thereupon he withdrew. It is said that is not enough, and that it must be shewn that he had an intention to abandon possession . . The answer is that the sheriff did abandon possession. In my opinion the cases of *Ackland* v. *Paynter* and *Blades* v. *Arundale* shew that it is a question of fact whether a sheriff has abandoned possession.

Collins, L.J.—

The bailiff went out because possession was inconvenient to the execution debtor, and so they might dispose of the goods, which at that time were in the custody of the law. That alone is sufficient to shew that there was an abandonment. I am by no means satisfied that withdrawal as an act of mercy is not in itself an abandonment. The inclination of my opinion is in favour of the view that it is.

In the case of *Little* v. *Magle* (1914), 29 W.L.R. 596, the bailiff had notified Buffington (judgment debtor) that he seized the grain, then in stook, and had left the warrant with him. The bailiff then took a bond from Buffington for the delivery to the sheriff of the grain.

Wood, Dist. C.J., says:—

Here the bailiff having taken the bond paid no further attention. He did not remain in possession, and left no one in possession. Under these circumstances, but for *Dixon* v. *McKay*, 21 M.R. 762, I would have felt obliged to hold there had been an abandonment of possession and that would have been an end of the case.

With all respect, I think the learned Judge had misapplied the finding of Mr. Justice Richards in *Dixon* v. *McKay*. That judgment was, upon appeal, reversed, but upon another point. It may be that upon similar facts I ought to follow Mr. Justice Richards' statement of the law as to seizure. I will review the facts of that case shortly.

The seizure was of some old buildings built 19 years before by a squatter on government land situate in a wilderness. For some time before and at the time of seizure, the buildings were unoccupied and locked. The locality was still a wilderness. As Mr. Justice Richards says, at p. 767:—

He could not remove them without too great cost, and to put a man in possession would have entailed an outlay that would have served no purpose. He put up three written notices on the buildings stating that he seized them and mentioning the date when and place where he intended to sell. That seems to me to have been reasonably sufficient so as to constitute a seizure *as against Angus McKay*, whether it would or would not have

held the property as against a subsequent *bonâ fide* purchaser from the owner for value and without notice.

The notices of sale were put each on a separate building. . . . There is little doubt that such a notice put up in any place where it could be publicly seen in such a settlement would become known almost at once to everyone in the neighbourhood. . .

768. It would not pay to remove the buildings from the settlement. The bailiff probably found them practically unsaleable, and had to sell them for anything he could get.

To apply the finding of Mr. Justice Richards on those facts to the facts and circumstances of *Little* v. *Magle*, *supra*, or to the case at issue, is, I think, going altogether too far.

Here the wheat seized was valuable and readily marketable, Brereton received nearly $1,000 a car for three cars of wheat. What became of the remainder of the crop (about 100 acres) is not explained.

The wheat was sold and delivered by Brereton at various times during a period extending over three months with the knowledge of the bailiff and without objection on his part. The contest is not for the wheat itself but for moneys owing from the Elevator Company to Brereton.

If there were a seizure, which I have said I would hesitate to find, then I have no hesitation in finding an abandonment.

I find, therefore, that the wheat was not under seizure on the date of the alleged attachment. *Seizure annulled.*

MÉNARD v. LUSSIER.

Quebec Court of Review, Fortin, Guerin and Archer, JJ. March 30, 1916.

AUTOMOBILES (§ III B—200)—COLLISION—NEGLIGENCE OF OPERATOR.

The driver of a motor car who attempts to pass a vehicle ahead, does so at his own risk and peril, and is responsible for any collision that may occur.

Statement.

APPEAL from the judgment of the Superior Court on April 23, 1915. In an action for damages resulting from a collision between an automobile and an ordinary vehicle on the public road between Chambly and Marieville.

The facts of the case were as follows:—Plaintiff was travelling along the macadamised part of the road holding his right, followed by the motor car of the defendant, also on the macadamised part. The left part of the road had not been macadamised and simply constituted an ordinary earth country road where there was ample space to pass alongside plaintiff's vehicle. Defendant wishing to overtake plaintiff directed his car toward the earth road, but

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either on account of a rut or on account of lack of experience, his car went too near the ditch bordering the road, and to prevent falling in the ditch defendant turned to the right too sharply and struck plaintiff's vehicle; hence the action for $500. Defendant denied all responsibility but the Superior Court awarded $280 damages.

Defendant inscribed in Review.

Pelletier, Létourneau, Beaulieu & Mercier, for appellant; *T. Rhéaume*, K.C., for respondent.

Archer, J.

ARCHER, J.:—The proof shows that the defendant Lussier had the necessary space to overtake and pass plaintiff and that the accident could only occur through his fault. On the other hand, if there was not the necessary space to pass, he should not have attempted so to do.

Defendant contends that the plaintiff is at fault because he refused to allow him sufficient room on his left and this contrary to law.

Art. 1415 of the R.S.Q. 1909 says:

> Whenever a person operating a motor vehicle shall meet a horse or horses or other draught animals, or any vehicle, the person so operating such motor vehicle shall seasonably turn the same to the right of the centre of such highway so as to pass without interference. Any such person so operating a motor vehicle shall, on overtaking any such horse, draught animal or vehicle, pass on the left side thereof, and the rider or driver of such horse, draught animal or vehicle shall, as soon as practicable, turn to the right so as to allow free passage on the left. Any such person so operating a motor vehicle shall, at the intersection of public highways, keep to the right of the intersection of the centre of such highways when turning to the right or left. (6 Edw. VII., ch. 13, sec. 23.)

Assuming the plaintiff did not leave sufficient room to his left to allow the defendant to pass, did this justify the defendant in attempting to pass?

In my opinion there is no doubt that such an attempt would be made at the risk and peril of the defendant. I plaintiff refused to give him the right of way, defendant should have controlled himself and waited and possibly taken if necessary proceedings in virtue of art. 1405 R.S.Q. 1909.

It is also established that after the accident Lussier, the defendant, admitted his responsibility and, as stated in the judgment, if any doubt existed as to the facts of record these admissions made by Lussier must be taken into consideration. These admissions are in accordance with the facts proven. Nor must it

be forgotten that the burden of proof, that the damages claimed did not result from the negligence or fault of the driver of the motor car, lies upon the defendant. (Art. 1405 R.S.Q. 1909.)

We are of opinion to confirm the judgment with costs.

Appeal dismissed.

PALMER v. CITY of TORONTO.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., and Riddell, Lennox and Masten, JJ. October 4, 1916.

HIGHWAYS (§ I V A—154)—BRIDGES—SNOW AND ICE—MUNICIPAL LIABILITY. A municipal corporation, although required by the Municipal Act (R.S.O. 1914, ch. 192, sec. 460) to keep highways and bridges in a reasonably safe condition, is not liable for injuries sustained on account of snow and ice thereon, unless a reasonable opportunity for removing the same has been afforded.

Statement.

APPEAL by the defendants from the judgment of CLUTE, J. Reversed.

Irving S. Fairty, for appellants.

W. Proudfoot, K.C., for respondents.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—The plaintiffs' claim in this action is based altogether upon an alleged breach of the defendants' duty, under the provisions of the Municipal Act, to keep every highway and bridge, under their jurisdiction, in repair: and the liability, in like manner imposed upon them, "for all damages sustained by any person" through their "default" in that respect.

The duty is to keep such public ways reasonably sufficient for the purpose of the traffic over them; and the defendants are not to be held liable for such damages except upon reasonable proof of damages sustained through "such default."

Such a way may be out of repair, and damages may be sustained, without the municipality being in default. Reasonable opportunity must be afforded for the performance of the duty thus imposed. And when a "personal injury" is caused by snow or ice upon a sidewalk there is no such liability "except in case of gross negligence."

The female plaintiff's injury seems to have been caused by snow or ice upon the steps leading to and from a foot-bridge over a number of railway tracks, the bridge taking the place of "a level crossing," over them, for safety's sake. She ascended the steps on one side of the bridge, crossed it, and fell in descending the steps on the other side, when more than half way down.

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However sincere she may have been in giving her evidence, no reliance can be placed upon her statements as to the condition of the steps, because of her evident uncertainty respecting it, and because, in so far as they related to the depth of the snow, they differ widely from that of all the other witnesses. There could have been, and there was, but very little snow on the steps, going down which she fell, at the time that she fell. Her main witness—Dr. Mathieson—in answer to the question, "How deep was the snow?" said, "Can't tell you;" and to the question, "Quarter of an inch?" answered, "Possibly;" and then, in answer to the further question, "Just a thin covering?" said: "Well, enough to make the steps slippery." The driver of the ambulance which took the woman to the hospital, who was a witness for the plaintiffs, said, in regard to the condition of the steps: "It had been snowing and it had been trodden down on the steps," but that he "did not pay much attention to them," and that "there was a big crowd around, you could hardly see."

For the defence, a policeman, who was one of the first at the place after the accident and who procured the ambulance, testified positively that there was no ice upon the steps, and that, as to snow, there was a "very slight amount, nothing to speak of;" that the steps were not slippery; and that they were able to carry the heavy woman, on a stretcher, down the steps, "without the slightest danger of slipping;" and another witness, a sergeant of police, testified positively that at about one o'clock, less than an hour after the accident, there was only about one-half inch of slushy snow on the steps.

It was also proved beyond question that light snow had been falling all the morning; that the temperature was slightly above freezing at 8 o'clock and a few degrees below freezing when the next observation was recorded at noon; and one of the witnesses testified that the damage occurred a little before noon.

It was also proved beyond question: that the defendants had one man employed solely in keeping this bridge and its stairways safe and clean; that, though an old man, he was able for such work; and that, on the morning of the accident, three or four hours before it happened, he had swept down the steps upon which the woman afterwards fell: one witness saw him in the act, two others said that, from their condition when they saw them, they must have been swept that morning; indeed, it could not be

otherwise with the steps in the condition in which they saw them after the continuous fall of snow that morning, however light the falling snow may have been.

The man whose duty it was to keep the bridge and steps in order was away at his dinner when the accident happened; and died a few months afterwards and before his testimony could be taken in this action.

The trial Judge seems to have rejected all other evidence upon the subject of the condition of the steps in favour of the testimony of the witness Dr. Mathieson, and to have based his judgment upon that alone. That I should not have done: the circumstantial evidence and the probabilities of the case, as well as the direct testimony of the other witnesses, would have had much weight with me.

Dr. Mathieson was somewhat emphatic about the slippery and dangerous condition of the steps: he also was positive that there was ice and snow on the steps, and, in regard to the length of time it had been there, "hazarding a guess," put it at "three or four hours or may be longer." A witness may describe a place he has seen as dangerous, and, of course he may describe it as slippery: but his evidence is of no great weight until he has told why he so describes it, whether it proved slippery or dangerous to him, or whether he is merely expressing an opinion as to danger or slipperiness. It is to be regretted that this witness was not interrogated as to this, and perhaps asked whether, like the policeman, he had not been in the slightest danger of slipping either as a stretcher-bearer or otherwise, or had seen any one slip or in danger on the steps. So, too, it should be borne in mind that the witness attended the woman, as her surgeon, through all that she has suffered from this accident, and so, being human, could not but have some yearning for her success in this litigation; indeed I have no hesitation in saying that no man can read the evidence in the case alone without a strong feeling in her favour: a woman getting pretty well on in life, and who has, through her husband's earning powers, apparently until recently, been in comfortable circumstances, but now, owing to her husband having suffered a stroke of paralysis, is obliged to become the "bread-winner" in the toil of needle-work; and was in search of such work when this calamity happened; the witness would be an extraordinary man if his evidence could have been given in an entirely impartial manner.

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But, accepting his testimony to the fullest extent that it may be helpful to the plaintiffs, how can the judgment in their favour be upheld, unless we are to make the defendants substantially insurers of the safety of all who cross the bridge in question?

No fault is found with the construction of bridge or stairs: the "treads" are wood, and they and the "risers" of the usual width and height; there was a wooden hand-rail on each side of the stairs; and they seem to have been in themselves as free from objectionable qualities as such unenclosed stairs usually are. A man was kept constantly employed in the care of the bridge, a man capable of taking care of it, so far, at all events, as the removal of snow and ice was required; and there is no evidence that the man ever failed to perform his duties; on the contrary, it is clearly proved that, on the day in question, and at the place in question, he had done so; and that is supported by the witness Dr. Mathieson in his "hazarded guess" that the snow and ice, said by him to have been upon these steps, had been there three or four hours. In fact the steps were cleared off by this man just between three and four hours before the accident; and they were cleared off again by the man after his return from his dinner.

There was no suggestion of anything in the nature of a trap, or concealed danger: there was no suggestion that the step at which the accident happened was in any respect different from any other step; and, that being so, to make the defendants liable it must be found that failure to sweep the steps off oftener than once in every three or four hours, in weather conditions existing up to mid-day on the day of the accident, was "default" in the statute-imposed duty to keep this highway, among very many miles of other highways, in repair; a finding which no one could properly make: see *Crafter* v. *Metropolitan R.W. Co.* (1866), L.R. 1 C.P. 300.

The suggestion, if even suggestion it can be called, that sand should have been scattered upon the steps, has no kind of weight and is contrary to all the evidence bearing upon the subject: with light, wet snow continually falling, one might well doubt the sobriety of the caretaker of the bridge if he had been seen scattering sand upon, instead of, as he was seen, sweeping the steps clear of the soft snow, called by some of the witnesses "slush." Sand was provided, kept in a box under the bridge, by the defendants; but the time had not come when it should be used; there

was yet opportunity to clear off all the snow: sand would be needed only when ice or hard snow had been allowed to accumulate so as to prevent pedestrians having the benefit of walking on the bare boards free of such ice and snow.

The appeal must be allowed, and the action dismissed.

RIDDELL, J.:—In the city of Toronto there is an overhead foot-bridge across the Canadian Pacific Railway tracks, leading from Wallace avenue to Dundas street; this is owned and looked after by the city.

On the 13th December, 1915, the female plaintiff, a married woman of mature years and without physical disability, was crossing on this bridge about 12.30 p.m., when, by reason of the snow etc., she fell and sustained somewhat serious injury. At the trial before Mr. Justice Clute without a jury, my learned brother found in favour of the plaintiffs (both husband and wife sued), and awarded $1,000 to the wife and $100 to the husband.

The defendants now appeal.

It may be said at once that, if there is liability, no fault can be found with the quantum of damages awarded; but the defendants claim that there is no liability at all.

They contend that this foot-bridge was a sidewalk, and that consequently they cannot be liable except for "gross negligence:" Municipal Act, R.S.O. 1914, ch. 192, sec. 460 (3). In the view I take of this case, I do not think it necessary to decide as to this contention or to consider what is meant by "gross negligence" as distinguished from "negligence" *simpliciter*—whether the former is not just the same as the latter with a "vituperative epithet"— I made an attempt to consider the law in *Carlisle* v. *Grand Trunk R.W. Co.* (1912), 1 D.L.R. 130, 25 O.L.R. 372.

So far as I am concerned, the case will be considered as though the defendants should be held liable if the accident happened through their negligence, "gross" or simple.

Moreover, I accept the finding of fact of the learned trial Judge—"I am of opinion that the bridge, at the time the plaintiff received the injuries, was not reasonably safe for foot-passengers" —when explained by the sentence immediately following: "I have no reason to doubt, and I do not doubt, the correctness of the evidence given by Dr. Mathieson, and I find that the bridge was in the condition described by him, that it was unsafe for traffic at that time."

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Sub modo, also, I adopt my learned brother's statement of law, "that it was the duty of the city's servants to see that it was in a reasonably safe condition in order that a person might with reasonable safety use it."

This duty is subject to circumstances. It is not the duty of the city to have any highway for foot, horse or motor at all times such that "a person might with reasonable safety travel on it." Snow may fall, ice form, a torrential rain come, rendering a way unsafe for a time. The defendants are not liable for that—all that they can be called upon to do is to exercise due care in making and keeping their ways "reasonably safe."

The learned Judge having found "that the bridge was in the condition described by" Dr. Mathieson, it will be necessary to see precisely how he describes it. He says: "At that time, the steps were very slippery. There was ice and snow on the steps, without any protection whatever as regards putting sand on. I don't know whether they had been cleaned or not, but it was snow and ice, and the snow and ice had frozen on the steps."

On the evidence, the steps had about a quarter of an inch of snow, and were slippery and dangerous for that reason, unusually slippery.

But the conditions must be looked at. It is proved by a competent observer, whose duty it is to be accurate, that it snowed from the previous evening all day long till about 7.45 p.m., that until afternoon the snow was steady, a light snow, and that in the afternoon there were only flurries; the total fall for the day being two and a half inches.

The city had a man specially placed to look after this bridge. Unfortunately, he has since died, but it was proved that he had been seen sweeping the steps that morning about 8.15. It is plain that the bridge must have been swept at some time that morning, or there would have been more snow than the thin covering described by Dr. Mathieson; and it is most probable, almost certain, indeed, that it was swept immediately before the city employee went to his lunch at noon.

The suggestion that sand might have been used answers itself. The snow was soft, slushy; and under such conditions it is not thought wise to put sand on, at least till the snowfall stops. The learned Judge does not find against the city upon that ground.

On all the evidence I am unable to say that the city's man did not do his duty; and think the appeal should be allowed and the action dismissed. Costs to follow the event.

MASTEN, J.:—I think it is established by the evidence and is not inconsistent with the findings of fact by the trial Judge or with the evidence of Dr. Mathieson on which he largely relies:—

(1) That this foot-bridge was between 200 and 300 feet long, including the stairs by which it was approached.

(2) That the city employed a competent man whose sole duty it was to keep this bridge, including the steps, in proper condition for use as a passenger-bridge.

(3) That at 8.15 o'clock a.m., on the day of the accident, this man was seen engaged in clearing the snow from the stairs leading to the bridge.

(4) That, during the storm which then occurred, two and one-half inches of snow fell, and that the storm lasted from some time in the night before the accident till about the time when the accident occurred.

(5) That at the time of the accident there was about one-half an inch of snow on the steps where the plaintiff fell.

(6) As an inference from the above, that the steps were cleared some time between eight and nine o'clock on the morning of the accident, and that afterwards snow continued to fall.

I think, as a conclusion from the above facts, that the defendant corporation cannot be held guilty of negligence, gross or otherwise, and that the appeal should be allowed and the action dismissed.

Lennox, J.

LENNOX, J. (dissenting):—Counsel for the defendants assumed that the learned Judge based his findings solely upon the evidence of Dr. Mathieson, and argued that, even if this evidence can be taken as conclusive as to the condition of the stairway at the time of the accident, it does not establish actionable negligence.

The vital question is not, "How was the judgment arrived at or reasoned out?" but, "Is it supported by the evidence and right as a matter of law?" I would be slow in concluding that the experienced Judge who tried this action adopted wrong methods or failed to consider any question of fact involved in reaching a just determination of the issues: and, reading his reasons for judgment and the evidence, I am very far from concluding that he did. Whether he makes every step in the reasoning clear and

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positive beyond cavil is another, and comparatively unimportant, question: it is still for this Court, in a case tried by a Judge alone, to determine, was there evidence upon which the Judge might reasonably find the facts as he did?

It must be reasonably clear that the Judge erred as to his conclusions of fact before we disturb his judgment in this respect; I am not by any means satisfied that he did, and not much in sympathy with technical logic or finely spun verbal criticism in considering a Judge's reasons for judgment.

The learned Judge says: "I am of opinion that the bridge, at the time the plaintiff received the injuries, was not reasonably safe for foot-passengers. I have no reason to doubt, and I do not doubt, the correctness of the evidence given by Dr. Mathieson, and I find that the bridge was in the condition described by him, that it was unsafe for traffic at that time, and that it was the duty of the city's servants to see that it was in a reasonably safe condition in order that a person might with reasonable safety use it. . . . The evidence to a certain extent is contradictory, but I am satisfied that the bridge, by reason of neglect, was not in a reasonably safe condition, and I so find."

Can it be fairly said that this indicates that the Judge depended upon the evidence of Dr. Mathieson alone—though it would be competent and might be perfectly reasonable and proper for him to do so—or the evidence of the plaintiffs' witnesses alone, or that he accepted or acted upon the evidence of this witness as verbally accurate in every particular, or that he excluded the consideration of any of the evidence, or does the language quoted mean more or less than this: that, after searching out the evidence most likely to be unprejudiced and trustworthy, and sifting and weighing all the evidence, and finding the evidence, as he says, "to a certain extent contradictory" (though I fail to find substantial contradiction on any material question), the learned Judge regarded Dr. Mathieson as an honest and independent witness, and *the witness*, having regard to the time of the happening of the accident, best able to give an intelligent and accurate picture of actual conditions at the time the woman fell? And why not? With the exception of Ironsides, he is the only witness able to speak of the condition of the steps before the activity of Riddle had changed it all, when he returned from dinner; and Ironsides' evidence is the same in substance and effect as Dr. Mathieson's. Mathieson is the only

disinterested witness with the exception of Tweedie, of the Weather Records office. He is not contradicted by any one as to there being snow or the amount of snow or snow and slush upon the steps, or that it was slippery.

No, I am wrong; there was another early arrival, Mogford. He was the first of all, and was able to go up and down the lower 8 or 9 steps without slipping, but he again is in substantial agreement with Dr. Mathieson. There was, he says, a quarter of an inch of snow and snow-slush upon the steps; and Donald McDonald, the only other witness who saw the steps before Riddle cleaned them off in the afternoon, says there was half an inch. All the defendants' witnesses say there was very little snow falling in the forenoon. None of them say that snow upon steps does not create a slippery condition and increase the liability to accident—no respectable witness, I imagine, would care to say so.

Ironsides, the first on the scene, as I said, found the steps crowded with people and the snow trodden down. Mr. Tweedie says the warmth from people's boots might produce moisture. It takes a lot of light, fluffy snow, quite as much as two and a half inches, I would think, to produce even a quarter of an inch coating of tramped snow or snow mixed with water—spoken of as slush. I am not concerned as to how deep it was; neither is it of much importance, in the view I entertain, whether or not Riddle cleared off the steps at eight o'clock that morning. There is hardly a scintilla of proof that he did. A broom will not brush away snow trodden upon and beaten down for hours by people passing to and fro and up and down the steps; does not work automatically, and, even in the hands of a civic servant, is unlikely to develope perpetual motion. Who knows that he "finished his job," or if he removed what was there at eight o'clock—an hour fairly remote from the time of the accident—or that he removed the subsequent snow-fall, or that he was there at all during the four hours immediately preceding the time Mrs. Palmer sustained her injuries; and the conditions point rather the other way. But this is only in passing—my judgment would be the same in effect if it had been shewn beyond question that the snow was cleared away at about eight o'clock. I take the evidence as a whole, and practically the undisputed facts as a basis. These are: there was snow upon the steps, of the depth stated by the defendants'

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witnesses; it may have been partly melted or soft and slushy, it was tramped upon and packed; it is sworn that it was slippery; and not denied except argumentatively (by Mogford); it is universal knowledge that snow is slippery, and the occurrence was at a point of the highway of exceptional hazard; even under the most favourable circumstances, a quasi-dangerous place *per se*. Does this amount to actionable negligence? Also, but without deciding that it is so, I will assume for the time being that the contention that the stairway in question is "a sidewalk" within the meaning of sub-sec. (3) of sec. 460 of the Municipal Act, R.S.O. 1914, ch. 192, is well-founded; and upon this hypothesis the defendants are responsible only for "gross negligence."

It is quite clear, I think, that the Legislature did not intend that the statutory obligation of corporations to repair would be the same in all municipalities, or as to *all sidewalks* in the same municipality, or as to *all parts of the same sidewalk*; in other words, snow or ice upon a sidewalk at a certain point may be evidence of "gross negligence," and, with the same weather conditions, snow or ice at another point may not be evidence of negligence at all. Although not admitted to be the cause of the accident, it was not and could not be fairly argued that the condition of the steps was not the proximate cause of the accident; but it was strenuously urged that, even taking the condition to be as described by Dr. Mathieson—put forward as the extreme of the evidence—it is a condition for which they are not responsible in damages. I prefer to allow the defendants greater latitude, to regard the evidence of their two chief witnesses, as far as it goes, as substantially correct, and to decide upon a basis of non-controversial facts as above stated.

On this basis, is gross negligence established? Take weather conditions as described, an accident during or immediafely after a snow-storm, upon a level or nearly level sidewalk, lightly coated by the recently fallen snow. I am of opinion that the corporation would not be liable in this case. It is the case in question, minus Riddle and the 44 steps, but this may be a distinction *with* a difference.

Take an extreme the other way: a much-frequented thoroughfare and a smooth cement sidewalk down a sharp incline—say a drop of a foot in two—or a cross-scored or corrugated sidewalk will do as well; a thin coating of recently fallen snow; a place where it

is known that snow must come, but *when* is necessarily unknown; a man engaged to sweep it off, but only for a fraction of the traffic hours, and during the absence of this man, and at an hour when he was not engaged to be there; a woman, wearing rubbers and proceeding with due care, steps upon the snow-flakes, as she must, almost as they fall, and, by reason of the snow, is thrown down and injured; is the corporation in this case also exempt, or must the corporation make provision for reasonable safety commensurate with the obvious probability that accidents may otherwise occur? The woman might, perhaps, have gone another way, and the same may be said of Mrs. Palmer. She did not know that there was a bridge, but she was not forced to use it; she was only impliedly invited to do so.

When the defendants constructed or took control of this bridge—standing about 30 feet above the level and with 44 steps at either end—they were aware of the climatic conditions of this city, and knew that snow-storms were as inevitable as springtime and autumn, or summer and winter; that the steps would become smooth as a painted floor; that the outer edges would be rounded down and the steps gradually thinned and lowered towards the outer edge; knew that snow resting upon a smooth surface an eighth or a sixteenth of an inch or less in depth is *at least* as liable to cause a man to slip and fall as inches of snow; knew that, the conditions under foot being the same, the risk of slipping and falling while battling with a snow-storm or blinded by snow-flurries is greater than at any other time, and that *any snow at all*, however light or thin it may be, upon a stairway running down thirty feet on a drop of at least seven inches in ten—is necessarily a dangerous thing, and calculated to occasion casualties, and that the use of sand would mitigate, although it might not obviate, the risk; knew that it was impossible for one man, however diligent he might be, to keep this bridge and its stairways in a reasonably safe condition as regards snow and ice; and knew or ought to have known that, by the expenditure of a very moderate sum, less, far less, than the wage-account of Mr. Riddle for his seven years' service, these steps could be roofed and enclosed in a way to secure absolute immunity from the menace of snow or ice. In every case it is, of course, for municipal councils to determine, in the first instance, how their highways are to be constructed and maintained. If they fail in the performance of their statutory duty

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to keep them in repair, and personal injury results, they are liable in damages. The defendants have failed to discharge the duty imposed on them to keep their stairway-highway in repair and reasonably safe for people having occasion to use it. On the evidence of the defendants' own witness, it was in a distinctly dangerous condition at the time of the happening of the injury complained of, unless it can be said that snow and slush are not slippery, and slippery steps do not involve risk of injury to persons using them.

The defendants created the condition here complained of.

I am of opinion that, in this part of the Province, where snow and snow-storms are inevitable winter conditions, the defendants, maintaining a stairway-highway of the character by their foreman, Matthews, described, must be taken to have notice in advance that dangerous conditions must from time to time arise if the steps are allowed to become coated or covered with snow or ice, were called upon to exercise exceptional vigilance by reason of the exceptional and quasi-dangerous character of the structure they provided for public use, and were bound to take effective measures to prevent the occurrence of conditions such as confronted Mrs. Palmer and occasioned her injuries on the 13th December last.

The defendants wholly failed to discharge these obligations, and, whether the stairway is a sidewalk or not, were guilty of gross negligence.

The appeal should be dismissed. *Appeal allowed.*

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SMART HARDWARE CO. v. MELFORT.

Saskatchewan Supreme Court, Sir Frederick Haultain, C.J., Newlands, Elwood and McKay, JJ. January 6, 1917.

1. TAXES (§ III E—140)—CONFIRMATION OF RETURN—EFFECT.

The confirmation of a tax enforcement return by the District Court Judge under the Town Act (Sask.), vests the taxed land in the municipality subject to redemption, the municipality receiving the land for all taxes then overdue thereon, and assuming responsibility for all taxes against it subsequently to the taxes that have been confirmed; the municipality cannot afterwards seize other property for taxes included in the confirmation or overdue at that time.

2. TAXES (§ III E—140)—SEIZURE AND DISTRESS—AMOUNT DUE—VALUE OF GOODS.

Seizure for more than the amount of taxes really due does not render a distress void. Where the value of the goods seized greatly exceeded the amount due, and at the sale the amount received was much below the assumed value of the goods, distress was held valid upon sufficient goods at the price realized to pay the amount due, and the defendant

was held liable to pay the difference between the value of all the goods seized and the value which might properly have been seized.
[*Squire* v. *Mooney*, 30 U.C.Q.B. 531, applied.]

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SMART HARDWARE CO. v. MELFORT.

APPEAL by plaintiff from a judgment in an action for wrongful seizure for arrears of taxes.

Major Gregory, K.C., and *T. D. Brown*, for appellants; *J. F. Frame*, K.C., for respondent.

The judgment of the Court was delivered by

ELWOOD, J.

ELWOOD, J.:—This is an action brought by the plaintiff company, and alternatively by the plaintiff Smart, for damages for:—a. Wrongful seizure; b. Excessive seizure.

On May 10, 1915, the defendant seized a stock of hardware and other chattels, which had been the property of Sidney Smart for arrears of taxes. The amount seized was:—Taxes for 1912 and 1913, $3127.06; taxes for 1914, together with penalty to May 10, 1915, $3,754.47; total, $6,871.53.

After the seizure the defendant, at the request of the plaintiff Smart, abandoned the seizure. In the view that I take of this case, it is unnecessary that I should deal with the details surrounding that abandonment.

On May 17, 1915, a further seizure was made of the same property and for the same taxes. Between the former seizure and this one the plaintiff Smart transferred the property so seized to the plaintiff company.

During the year 1914 the defendant instituted proceedings for the confirmation of the tax enforcement return for taxes in arrears on January 1, 1914. In this return were included the above taxes for 1912 and 1913. The return was subsequently confirmed by the District Court Judge on March 1, 1915. Apparently, a copy of such adjudication was not forwarded by mail to the registrar of the land titles office, neither was a copy of the adjudication sent by mail to the persons mentioned in sec. 346 of the Town Act.

With the exception of the sum of $60.75 business tax, it was admitted on the argument before us that the taxes for 1914, above referred to, were taxes on the real estate covered by the tax enforcement return which was so confirmed by the District Court Judge. It was urged, on behalf of the appellants, that in consequence of the above confirmed return the defendant was precluded from collecting from the plaintiffs, or either of them,

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any of the above taxes; and that, even although some of the taxes could have been distrained for, yet, the distress having been made for more than was owing, the whole distress was void.

For the respondent it was contended that the adjudication by the District Court Judge not having been registered at the Land Titles Office and no notice having been given to the parties interested, it was of no effect.

Sec. 346 of the Town Act in part provides as follows:—

The effect of such adjudication when registered as hereinafter provided shall be to vest in the town the said lands subject however to redemption by the owners respectively of the said lands at any time within two years from the date of the adjudication as hereinafter set forth.

Sec. 346 (*b*) is as follows:—

In case a parcel of land included in the return has not been sold, the land may be redeemed on the terms of the preceding section at any time within two years of the date of confirmation of the return, exclusive of such date, by paying to the treasurer before 3 o'clock in the afternoon on the day fixed for redemption the amount above named.

Sec. 347*a*. in part is as follows:—

The council may fix a date within 2 years, but not less than 6 months, from the date of confirmation of the return at which it will offer for sale by public auction all unredeemed lands.

N.B.—Where the sale takes place within the period of redemption the notice shall contain these words: "The said lands are subject to redemption up to the day of 19." Where the sale is held after the expiry of the period of redemption the notice shall contain these words: "The town will furnish an absolute title to the said lands."

Sec. 349 is as follows:—

So soon as the said return has been confirmed by the Judge as provided by sec. 346 hereof, the treasurer of the town shall out of the general revenues of the town pay all taxes levied for school purposes which are shewn to be due on the several parcels of land in the said confirmed return; and thereafter while owned by the municipality, and each parcel of land shall be assessed in the name of the town for all taxes required to be levied as if the land were assessed to an ordinary individual.

The above sec. 349 is exactly the same as the similar section in the statutes of 1912 and 1913, except that between the words "municipality" and "each" the word "and" did not appear in the statutes of 1912-1913. It seems to me that, in order to make sense, the above section as it now reads should be read without the semi-colon after the word "return."

It will be noticed that the time for redemption is within two years of date of confirmation of the return, not of the registration of the adjudication. In my opinion the registration of the adjudication is only necessary for the purpose of enabling the munici-

pality to convey a good title to a purchaser, but that for all other purposes it is unnecessary. I am also of the opinion that the plain intention of the Act is that, as soon as the return is confirmes by the Judge, the municipality receives the land for all taxes then overdue with respect to the land, and assumes responsibility for all taxes assessed against the land subsequently to the taxes that have been so confirmed.

Sec. 349, above referred to, to my mind clearly indicates this to be the intention. It is quite true that the taxes for 1914 were apparently not included in the return in this case, but that, to my mind, does not affect the question. The intention of the Act apparently is that the return should be confirmed as soon as reasonably may be after January 1 in each year. For the purposes of the confirmation, the taxes are due on Jan. 1 in each year, and in any case in which there would be a confirmation there would, therefore, be taxes due at the date of the confirmation, but which would not be included in the confirmation.

The result of the confirmation is that the owner of the land, in respect to which the confirmation has been made, virtually loses his land, subject to redemption.

It will be noted by sec. 347*a*. that the council may fix a date, not less than 6 months after the confirmation, at which it will offer the land for sale, and, if the contention of the defendant were correct, the land might be sold by the municipality during the year that the confirmation was made and the owner still be liable for the taxes for that year.

I take it that, for the purposes of the Act, all taxes imposed subsequently to the return which is being confirmed, no matter what the actual date of the confirmation may be, are to be taken as taxes levied after the confirmation.

Having reached the above conclusion, the defendant had no right to seize for anything but the $60.75 business tax.

The next question to consider is: does the seizing for more than was due render the whole seizure void, or is it merely an excessive seizure?

In *Squire* v. *Mooney*, 30 U.C.Q.B. 531, at p. 535, Morrison, J., is reported as follows:—

As said by Draper, C.J., in *Corbett* v. *Johnston*, 11 C.P. 322. If he distrained at the same time for other sums not authorized by law, no case goes the length of deciding that the distress would have been invalid. The

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plaintiff, if he desired to relieve his goods, must have paid or tendered the three sums, and then he might have resisted payment of the residue and replevied his goods. . . His distraining without authority for other sums cannot vitiate the whole distress founded on the tax rolls.

The same statement of the law also appears in *Tancred* v. *Leyland*, 16 Q.B. 669, and *Skingley* v. *Surridge*, 11 M. & W. 503, 515, and *Pettit* v. *Kerr*, 5 Man. L.R. 359.

I am, therefore, of the opinion that the distress was not void, but merely an excessive one.

The trial Judge fixed the value of the goods distrained at $10,000. Apparently he reached that conclusion by taking the consideration which appeared on one of the bills of sale from Smart to the company. There were, however, two other bills of sale covering goods which were seized. These additional goods are sworn to have been of the value of $2,995 50; they, however, were transferred from Smart to the Smart Co. for $2,000, payable in stock of the company to that amount. I am of opinion, therefore, that the sum of $2,000 should be added to the $10,000 and that the total value of the goods seized should be $12,000. Of the goods seized, however, a cash register and a cement mixer were not sold, and in argument before us I gathered that these were still in the possession of the defendant, and that the defendant was prepared to turn them over to the plaintiff in case we should hold that the defendant had no right to seize, or that there had been an excessive distress. There is no evidence to shew the value of these two, there should therefore, in my opinion, be a reference to the local registrar to ascertain the fair value of the cement mixer and cash register.

The defendant was entitled to seize sufficient property to produce the $60.75 above mentioned, and the reasonable costs of seizure, possession and sale. The whole property seized produced at the sale $5,366.77. There should be a reference to the local registrar to ascertain what value of goods (estimating at the same ratio as the $12,000 is to $5,366.77) would be required to produce the said sum of $60.75, and the reasonable costs of seizure, posession money, sale and commission.

These costs will be estimated on the supposition that a sale could have been effected in the shortest time after seizure allowed by law. The value of the goods so found, together with the fair value of the cement mixer and cash register, in case they are

returned, will be deducted from the said sum of $12,000, and the plaintiff company should have judgment for the balance, together with its costs of the action, the counterclaim and this appeal.

The defendant is entitled to recover from the plaintiffs the defendant's costs occasioned exclusively by joining the plaintiff Smart. *Judgment accordingly.*

CHAPMAN v. McDONALD.

Nova Scotia Supreme Court, Ritchie, J. November 7, 1916.

CHATTEL MORTGAGE (§IV-45)—HIRE AGREEMENT—PRIORITIES.

A lessee of chattels, under an agreement to pay hire, accompanied by an option enabling the lessee to buy a similar chattel for a sum stated, can give a valid mortgage of the chattels if the agreement be not evidenced by a registered writing executed as provided by statute.

[*Guest* v. *Diack et al* (*infra*) distinguished. See also annotation following.]

It was agreed between the solicitor of the plaintiff and the solicitor of the defendant that this action be tried and disposed of on the following statement of facts.

Statement.

1. On and previous to July 3, 1911, the defendant, which was and is an incorporated company, was the owner of the property in question. 2. By an agreement, a copy of which is hereto annexed, dated July 3, 1911, the defendant disposed of the property to one Harry C. Miner. 3. Neither the said agreement of July 3, 1911, nor a true copy thereof was ever filed in the registry of deeds for the registration district in which the said H. C. Miner resided at the time of the execution thereof. 4. On October 26, 1915, the plaintiff became a *bonâ fide* mortgagee of the said property by a chattel mortgage bearing date that day to secure payment to him of the sum of $125 and the plaintiff took such chattel mortgage without notice of the defendant's right to the said property. The said chattel mortgage was filed in said registry as required by ch. 142 of R.S.N.S. 1900 on October 26, 1915. 5. Previous to January 12, 1916, the plaintiff had taken possession of the said property pursuant to the provisions of the said chattel mortgage. 6. On or about January 12, 1916, and while the said property was in possession of the plaintiff as aforesaid, the defendant took possession of the said property pursuant to the provisions of the said agreement and has kept possession of the piano ever since and these are the acts complained of in this action. 7. The defendant claims that the said agreement of July 3, 1911, was not such an agreement as is required

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to be filed by ch. 140 R.S.N.S., as amended by ch. 42 of the Acts of 1907 or by ch. 24 of the Acts of 1908. 8. If the Court shall be of opinion that the defendant's said contention is right judgment is to be entered for the defendant dismissing the action with costs, but if the Court shall be of opinion that the defendant's contention is wrong the Court is to find the value of the piano and the amount of damages to which the plaintiff is entitled for its detention and judgment is to be entered for the plaintiff for a return of the property or its value with damages for its detention and costs to be taxed.

The agreement under which defendant parted with the piano was as follows:—

This agreement made by and between J. A. McDonald Piano & Music Co., of Halifax, in the County of Halifax, merchants, hereinafter called the lessors, and Harry C. Miner, of Amherst, in the County of Cumberland, hereinafter called the lessee, witnesseth.

The lessors hereby demise, lease and rent to lessee one J. A. McDonald Co. Piano No. 12647 hereinafter called the "instrument" for the period of 44 months from the date hereof, for the consideration of the sum of $350 payable as follows: $10 cash and the balance $8 every month until the whole amount is paid with interest at 6% at the office of the lessors in Halifax, for which payment said lessee has given said lessors certain promissory notes bearing even date herewith as security.

And the said lessee hereby agrees to use instrument with all reasonable and proper care and pay for use thereof the said several sums above mentioned, in the manner and at the time specified, and to pay for said instrument in case of loss by fire or otherwise.

In case the said lessee shall fail to make said payments at the times and in the manner as above stated, or shall in any way violate any of the conditions herein, or in case the said lessee shall become insolvent or abscond from the province in which he resides, or shall in anywise become involved so that the said instrument is seized under execution or otherwise, or shall in any way become liable to seizure for the debt of the lessee, or to distress for rent, or if the lessee shall attempt to sell, dispose or mortgage the same, then and in every such case the lessors shall be entitled to take immediate possession of the said instrument, and all the

rights or claims of the said lessee to said instrument shall wholly cease and determine.

And it is further agreed by and between the said parties, that if the said lessee shall at any time within 44 months from this date, pay to the said lessors the sum of $350, the said lessors agree, on receipt of the said sum, to deliver to the said lessee one instrument equal in value to the above-named instrument, with a recipted bill of sale thereof notwithstanding any provisions herein contained, the said instrument shall remain the property of the said lessors until they otherwise hereafter dispose of it, and it is not to be removed from the present residence of the said lessee without full authority in writing from the said lessors.

It is further agreed that this agreement is subject to the approval of the said lessors, and that no agent has any right or authority to make any agreement or promise not contained above. The lessors will not recognize or carry out any undertaking not contained herein.

In witness whereof we have hereunto subscribed our names July 3, 1911.

A. G. MacKenzie, K.C., for plaintiff; *F. L. Milner*, K.C., for defendant.

RITCHIE, J.:—One Miner obtained a piano from the defendants under a hiring and purchasing agreement. Neither the agreement or a copy of it was filed in the registry of deeds. The agreement is dated July 3, 1911. On October 26, 1915, the plaintiff became a *bonâ fide* mortgagee of the piano under a chattel mortgage of that date. This mortgage was duly filed. The plaintiff took possession of the piano under the chattel mortgage after that, and while the plaintiff was in possession of the piano the defendant seized it under their hiring and purchasing agreement. Under the statute in that behalf every such agreement whereby the property or a lien thereon remains in the lessor or bargainor until payment in full must be filed in the registry of deeds, otherwise it is void against the mortgagees. In this case the agreement provides that the piano "shall remain the property of the lessors until they otherwise hereafter dispose of it." One of the contentions for the defendants is that this agreement is not within the statute and therefore was not required to be filed. This of course is an attempt to drive the proverbial coach and four

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through the statute, but this can sometimes be done. The accomplishment of the fact is said in an English authority to be the pride of competent conveyancers. In this case I think the attempt must fail From the admitted facts I draw the inference that this agreement was for the purpose of retaining the property in the defendants until the piano was paid for. I think that was the real feature of the transaction and the real intention of the parties. This must prevail over the form which has been used to get rid of the statute. The defendants could not "otherwise dispose of the property" during the currency of the lease, if the payments were duly made, but they could do so on default of any payment, in the meantime the title is kept in the defendants. That is what they were doing and that is the thing which the statute says cannot be effectively done unless the document is filed.

In Maxwell on Statutes, 5th ed., p. 188, it is said "and whether a document ought to be registered under the Bills of Sale Act is not concluded by its terms of form, but depends on the evidence as to the real nature of the transaction and the real intention of the parties. I refer to *Mellor* v. *Maas*, [1903] 1 K.B. 226. Affirmed in the House of Lords, [1905] A.C. 102, 72 L.J.K.B. 452. It was also contended for the defendants that the case comes within *Guest* v. *Diack*, 29 N.S.R. 504 *infra*, and therefore it was not necessary to file the agreement. The contention on the part of the plaintiff was that *Guest* v. *Diack* had no application in consequence of the amendment to the Act made by ch. 24 of the Acts of 1908. I am of opinion that the plaintiffs' contention on this point is sound and must prevail.

The remaining point made for the defendants is that because the defendants are a joint stock company, and because the expression "personal chattels" is declared not to include "shares or interests in the stock funds or securities of any government or municipal body or in the capital or property of any incorporated or joint stock company," the Act does not apply to this piano. Modern business is to a very large extent carried on by joint stock companies. It is unthinkable that it was the intention of the legislature to exclude such companies from the operation of the Act. Nothing short of very clear and explicit words would drive the Court to adopt a construction so at variance with the object which the legislature had in view. In this case I can find no

such words. On the contrary I think, having regard to ordinary rules of legal construction, that the words which I have quoted from the interpretation clause are not fairly capable of the construction contended for.

The plaintiff will have judgment with costs.

Judgment for plaintiff.

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(29 N.S.R. 504)

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Nova Scotia Supreme Court, Ritchie and Townshend, JJ., Graham, E.J., and Meagher and Henry, JJ. March 9, 1897.

Appeal from the judgment of Savary, C.C.J., in favour of plaintiff, for $250, and costs, in an action claiming damages for the wrongful and illegal taking and carrying away of a piano, which had been attached by plaintiff, as sheriff of the county of Yarmouth, under a writ issued at the suit of one Henry Burrill, against one William P. Stubbard, an absent or absconding debtor. The facts are fully stated in the judgments.

1897, January 21. C. S. Harrington, Q.C., in support of appeal. R.S.N.S. ch. 92, sec. 3. If, under the agreement, the chattel is not to be a subject of purchase, the agreement does not fall within sec. 3. We were justified in framing our agreement so as to take it out of the statute. *Ramsden* v. *Lupton*, L.R. 9 Q.B. 17. Sec. 3 cannot be made applicable to any kind of hiring. *Helby* v. *Matthews*, [1895] A.C. 471. The agreement had ceased to operate before the levy, and the property had reverted to Miller Bros. Since the sheriff is setting up title under an attachment, he must establish his right to hold the chattel under the Absconding Debtors Act.

He has not shewn that Stubbard was absent or absconding. *Mills* v. *McLean*, 1 R. & C. 379; *Hunt* v. *Soule*, 1 Thom. 206; *Parkes* v. *St. George*, 10 A.R. (Ont.) 496. The provision in the Act as to registration, does not mean filing, and there is no provision for registering documents of this nature. The attachment had been abandoned when the agent took possession. There was no removal or notorious change of possession. *Langtry* v. *Clark*, 27 O.R. 280; *Naylor* v. *Bell*, 2 R. & G. 444; *McIntyre* v. *State*, 4 U.C.C.P. 248. The damages are excessive.

1897, March 9. HENRY, J.:—This is an appeal from a decision of the County Court Judge for District No. 3, in favour of the plaintiff. The dispute is as to the ownership of a piano. This piano was the subject of an agreement in writing, under which it was delivered by defendant Diack, to one Stubbard, in Yarmouth. The negotiations leading up to the agreement were carried on between Diack and Stubbard. Diack owned the piano, but, as he was in debt to defendant Miller, he treated the transaction as one between Miller and Stubbard, had the agreement made and executed accordingly, and forwarded it to Miller in Halifax, who accepted it. Thereafter Diack acted as Miller's agent in receiving payments from Stubbard. Nothing turns upon the fact that Diack was the owner before the making of the agreement, because Stubbard took the piano under, and only by virtue of the agreement, treated Miller as owner, and made payments accordingly. The piano being in Stubbard's possession, was levied upon by the sheriff of Yarmouth, the plaintiff in this action, under a writ of attachment against Stubbard, as an absent or absconding debtor. It was afterwards seized and carried away by

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defendant Diack, acting as agent, for defendant Miller. For that taking this action was brought.

Questions were raised below as to the validity of the attachment proceedings. These questions were, I think, correctly disposed of by the trial Judge in favour of the plaintiff, and they do not call for further discussion now. Moreover, having regard to the view which I entertain as to the main question—the question of property—these other questions, even if they could be said to be novel or doubtful, which, I do not think is the case, are immaterial. The main question is that of ownership.

The agreement under which Stubbard obtained the possession and use of the piano is as follows:—

"This agreement, made by, and between Miller Bros., Middleton, Nova Scotia, merchants, hereinafter called the party of the first part, and W. P. Stubbard, of Yarmouth, N.S., hereinafter called the party of the second part. Witnesseth: The party of the first part hereby demises, leases, and rents to the party of the second part, one Wheelock piano, for the period of 30 months from the date hereof, for the consideration of the sum of $290, payable promptly at the office of the said Miller Bros., Middleton, N.S., as herein mentioned; at the rate of $10 per month, commencing June 4, 1892; for which payments, the said party of the second part has given to the said party of the first part certain promissory notes for $290, bearing even date herewith, and payable at $10 per month.

"And, the said party, of the second part, hereby agree to use said piano, with all reasonable and proper care, and pay for use thereof, the said several sums above mentioned, in the manner and at the times above specified.

"In case the said party of the second part shall fail to make said payments at the times, and in the manner above stated, or shall, in any way violate any of the conditions herein, or in case the said party of the second part, shall become insolvent, or abscond from the Province of Nova Scotia, or shall, in anywise become involved, so that the said piano shall become liable to seizure for debts of the party of the second part, or to distress for rent, or shall attempt to sell or dispose of the same, then, and in such case, the party of the first part shall be entitled to take immediate possession of the said piano, and all the rights of the party of the second part thereto, shall wholly cease and determine.

"And it is further agreed, by and between said parties, that if the said party of the second part, shall, at any time, within 30 months from this date pay to the said party of the first part the sum of $290, the said party of the first part, agrees, on receipt of said sum, to deliver to the said party of the second part, one piano, equal in value to the above named piano, with a receipted bill of sale thereof; and notwithstanding any provision herein contained, the said piano shall remain the property of the said party of the first part, until he otherwise hereafter dispose of it, and it is not to be removed from the present residence of the said party of the second part, without full authority in writing from the said party of the first part.

"In witness whereof, we have hereunto subscribed our names, and affixed our seals, this fourth day of March, 1892.

"Signed, sealed and delivered in presence of

"A. Diack	Miller Bros.	(Seal)
"Jos. D. Spencer.	W. P. Stubbard	(Seal)"

Defendant Miller and Diack, as his agent, defended the taking of the piano under this agreement.

If sec. 3, ch. 92 of the Revised Statutes, the Bills of Sale Act, is applicable to this agreement, the claim of defendant Miller, as owner must fail, because the provisions of that section were not complied with.

The question, therefore, is:—Does this enactment apply to the agreement in this case? I am of the opinion that it does not.

Before discussing this question, I have to call attention to a mistake in the use of the word "hirer" throughout the section. The context in each of the four cases where it is used shews that the owner or bailor of the thing hired, and not the hirer or bailee is meant. I shall deal with the case as if this mistake had not been made. It is first necessary to determine what kind or kinds of transactions are covered by this enactment.

It appears to be intended to cover all cases wherein it is sought to provide for the passing, in the future, of the legal property in goods, or chattels, which are delivered, in the present, by a bargainor or bailor, to a bargainee, or hirer under an agreement which provides for the acquisition of the legal property by the bargainee or hirer, upon his paying the price or value. If the transaction is a hiring under the terms of which the hirer, upon paying a certain amount as hire, is to become the legal owner of the thing hired, or is an agreement for sale, in which there is a present delivery to the bargainee, but, either the legal property is not to pass, or a lien is to remain in the bargainor, until the price is paid, it would appear to come under the statute. And, it may be that the enactment would cover a transaction in which, in connection with a hiring, there is an agreement providing for a future sale, by virtue of which the hirer, although not bound to do so, may by tendering a specified amount to the bailor, become entitled to the thing hired,—as to this, I express no opinion. My decision, in this case, depends, not upon any question as to the general scope of the enactment, but upon the simple consideration that this agreement does not contain any provision by which, under any circumstances, the hirer could at any time become entitled to the piano in question. Neither is it necessary to consider the question, whether in case of default in respect of the $10 monthly payment, and the resumption of the possession by the bailor, the hirer would by virtue of the agreement, be still liable to pay the amount remaining unpaid.

In the cases which come under the Act, the agreement provides upon certain conditions for the future passing of the property in the thing delivered, and for its retention by the bargainor or bailor in the meantime. The operation of the Act is simply to frustrate the postponement, and to cause the property to pass with the possession of the thing unless its provisions as to registration and otherwise are complied with.

What has to be specially noted is that the enactment applies exclusively to cases where the subject matter of the agreement, whether for hiring or sale, is the thing—the identical thing which, upon the carrying out of the agreement, is to become the property of the person into whose possession it is delivered under the agreement, or, putting the matter conversely, the Act applies only to cases where the thing which is in the future to become the property of the hirer or bargainee, is the identical thing, the delivery of which, to the hirer, or bargainee, accompanies the making of the agreement. This position calls for no argument. It is only necessary to read the enactment.

Now, let us see what, in this connection, were the rights of the hirer, under the agreement now in question.

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Upon payment of the whole of the amount, stipulated for, whether paid by the $10 monthly instalments or otherwise within the 30 months, he would become entitled, not to the piano in his possession, any more than to any other piano, or any other chattel of the defendant Miller, but only to demand a piano equal in value to the hired piano. According to this agreement, the property in the piano, was not, to use the words of the Act, to "remain in the hiror (bailor) lessor or bargainor, until the payment in full of such price or value," and then pass. It was not to be affected in any way whatever by the payment or by anything to be done under the agreement. It was not to go out of the bailor or bargainor at all.

But, the trial Judge says:—

"It is contended that the defendant, Miller, was, notwithstanding this agreement, and the delivery under it, never bound to sell this particular piano to Stubbard, but 'one piano equal in value to it.' I think, I can apply to this part of the agreement, the language of the Lord Chancellor Lord Hershell in *Helby* v. *Matthews*, [1895] A.C. 471. The substance must, of course, be ascertained by a consideration 'of the rights and obligations of the parties, to be derived from a consideration of the whole of the agreement. If Brewster agreed to buy the piano, the parties cannot, by calling it a hiring, or by any mere juggling with words, escape from the consequences of the contract into which they have entered.' So, here, the same piano expressed to have been hired, was, no doubt, the identical one sold, or to be sold, and the expression 'a piano equal in value,' is a 'mere juggling with words'."

I cannot agree that this dictum of Lord Hershell affords any authority for the use to which it is put in the decision appealed from. What Lord Hershell said is, and obviously was intended to be, little more than a truism: that is, that if the agreement, as a whole, amounted to an undertaking on the part of Brewster, to buy the piano, the parties could not by calling the transaction a hiring, prevent it from bringing Brewster under the operation of the words "a person having agreed to buy goods," as used in the Factors Act of 1889. If the law says that a certain agreement amounts to a sale, the parties cannot make it something else by calling it something else. Lord Hershell and his colleagues in the House of Lords held that there was no agreement to buy because Brewster was not bound, although he had an option to buy, and the remark which has been quoted appears to have been made only to guard against the idea that any particular words could control the substance of the agreement as shewn by it as a whole.

In that case the Court did not go outside the writing to determine what it meant. But, that case, nevertheless, has been relied upon as an authority for holding that the parties to an agreement in writing did not mean what they said in it, but meant something which they did not say.

Doubtless the project of frustrating a device which seems to have been resorted to for the purpose of keeping outside of the operation of the Act, appealed to the trial Judge, but I cannot agree that this project was possible for any Judge or any judicial Court. In seeking to apply the Act, we must see what the agreement means. That is, we must see what the rights of the parties are, independently of the Act, and then apply the Act or not, as the case may be. We cannot give the agreement one meaning as between the parties, and give it another or different meaning when we seek to apply the Act. We cannot make two different agreements out of one agreement.

Now, it cannot be pretended that the agreement in this case gave Stubbard

any right to become at any time whatever, the owner of the piano in question. It gave him only a right to acquire a piano of equal value. True, Miller might discharge his obligation in this respect by giving Stubbard this piano, but he could refuse to do so, and nevertheless fully perform his promise by giving him a different piano. If there were no such enactment as we are now dealing with, this position would not be thought worth discussion.

But, if we apply the statute to this agreement, we impose upon Miller a different obligation from that into which he entered. We force him to treat the piano in question as the property of Stubbard, in a case in which his agreement did not provide for its ever becoming the property of Stubbard, or of any one but himself. It would take legislation to accomplish this. The enactment relied upon, which is certainly exceptional, and goes a long way in overriding the rights of parties to agreements, does not even attempt it. And, though it be fairly manifest that the agreement was devised for the purpose of avoiding the Act, it does not follow that the Act is to be applied. The parties have a right to make an agreement which does not come under the Act. The Court has no power to apply the Act to an agreement which does not come under it.

I am of the opinion that the agreement in this case is not subject to the provisions of sec. 3, of the Bills of Sale Act, that the piano in question, was, at the time of the taking complained of by the plaintiff, the property of the defendant Miller, and that the appeal should, therefore, be allowed with costs, the judgment below reversed, and judgment entered for the defendants with costs.

Since writing the foregoing, I have had the opportunity of reading, and I have carefully read, the opinion of my brother Townshend. That opinion depends exclusively upon sec. 1 of the Act, and is based upon the position that, previously to the making of the written agreement between him and Miller, the property in the piano had passed to Stubbard.

As to this, excepting some expressions in the evidence of Diack, which, taken literally, would mean that he had sold the piano to Stubbard, but, which, under the circumstances, do not mean anything of the kind, the whole case shews that not only did the property never pass to Stubbard, but, that the passing of the property to him was the very thing which was carefully avoided throughout.

When Diack spoke of having sold the piano to Stubbard, it is clear that he meant only that Stubbard was to take the piano, and it is equally clear that the only terms upon which he got it were those of the agreement in which the previous negotiations culminated. And, it is to be noted here that the case for the plaintiff at the trial proceeded upon the ground that sec. 3 of the Act was not complied with, a position absolutely inconsistent with the idea that the property was already in Stubbard when the written agreement was executed; because, sec. 3 applies only to cases, in which, except for its operation, the property would remain in the bargainor or bailor. That is to say, the contention that Miller's title was bad, because sec. 3 was not complied with, involved the position that, but for the application of that section as contended for, the property would be in him.

I must say that I am unable to see upon what principle my brother sets aside the finding of the trial Judge, upon this branch of the case, and substitutes a finding of his own. The trial Judge not only found, as a matter of fact, that the piano was delivered to Stubbard, under the agreement

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by Diack, as Miller's agent, but, his decision is based upon that finding, and would have been impossible upon any different view of the facts.

Upon the hypothesis, however, that Stubbard had become the owner of the piano before the written agreement was entered into, while I do not wish to be understood as deciding the question, I do not dissent from the opinion, that, under the authority of the important decisions referred to by my brother Townshend, the transaction of which the written agreement was a part, might properly be held to amount to a bill of sale under sec. 1 of our Act, since the English Act (1878), and ours are identical in respect of the definition of bills of sale, so far as that matter is involved in the English decisions referred to.

RITCHIE, J., and GRAHAM, E.J., concurred.

TOWNSHEND and MEAGHER, JJ., dissented. *Appeal allowed.*

Annotation.

Annotation.

ALFRED B. MORINE, K.C.

In both the above actions the agreement to be construed was precisely the same in form. Upon the ground that an amendment to the Bills of Sale Act had altered the law applicable to such an agreement, the trial Judge in the second action declined to follow the ruling of the higher Courts in *Guest* v. *Diack, et al* (*supra*). A brief examination will, it is submitted, shew that the amendment referred to did not really alter the meaning of the statute, on the facts stated in *Chapman* v. *MacDonald* (*supra*).

When *Guest* v. *Diack* was decided (1897), the relevant part of the applicable statute (R.S.N.S., 1884, ch. 92) read as follows:—

"Every hiring, lease or agreement for the sale of goods or chattels, accompanied by an immediate delivery, and followed by an actual and continued change of possession, whereby it is agreed that the property in the goods and chattels, or in case of an agreement for sale, a lien thereon for the price or value thereof, or any portion thereof, shall remain in the hirer, lessor or bargainor, until the payment in full of such price or value by future payments or otherwise, shall be in writing . . and such agreement shall be registered . . otherwise the claim, lien charge or property . . shall be null and void . . as against creditors and subsequent purchasers and mortgagees (of the lessee)."

In delivering the judgment of the majority in *Guest* v. *Diack*, Henry, J., said: "The enactment applies exclusively to cases where the subject matter of the agreement is the identical thing which is to become the property of the person into whose possession it is delivered." The minority Judges assented to this statement of law, but dissented upon questions of fact. It may be said, then, broadly, that the Act was intended to apply to hire *and* purchase agreements, commonly so-called, under which chattels are let to hire upon the condition that when certain instalments have been paid the chattels hired shall become the property of the lessee. The Act provided that in such cases the agreement should be in writing, and be registered within the time limited, with the penalty that if possession of the chattels were given to and continued, and the agreement not made in writing, and registered, the property in the chattels should pass, in certain events, for the benefit of creditors, purchasers or mortgagees of the lessee.

The Act was amended in 1899, 1907 and 1908, and when *Chapman* v. *MacDonald* came to be decided, the relevant portion read as follows:—

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"8. (1) Every hiring, lease, bailment or bargain for the sale of personal chattels accompanied by an immediate delivery and followed by an actual and continued change of possession whereby it is agreed (*a*) that the property in the personal chattels or (*b*) in case of a bargain for sale that a lien thereon for the price thereof or any portion thereof, shall remain in the person letting to hire, the lessor, the bailor, or the bargainor, until payment in full of the hire, rental or price agreed upon by future payments or otherwise *and whether the personal chattels so delivered be the identical subject matter of the hiring, lease, bailment, or bargain for sale or otherwise.*"

By comparison of the quotations, it will be seen that the italicized words last preceding constitute the only change in the statute between the decisions above published of any significance in this connection. It is open to surmise that it was meant to meet the evasion, by the agreement in question in the above two actions, of the consequences of an unregistered hire and purchase agreement in ordinary form, as shewn in *Guest* v. *Diack*, and this surmise was the ground upon which the judgment of Ritchie, J., was given. Was the surmise legally justifiable?

Given a liberal construction, the amendment in question seems to provide merely that whether the chattel actually delivered in pursuance of the agreement be or be not the identical subject matter of the hiring, the same result shall follow upon the non-registration of an agreement to which the statute applies. But *Guest* v. *Diack* had decided that the statute did not apply to the agreement in that action when the chattel delivered *was* the identical subject matter of the agreement, and under the amendment if the chattel actually delivered thereunder had not been the identical subject matter of the agreement, the result would have been the same. In *Chapman* v. *MacDonald* also the chattel delivered was the identical subject matter of the agreement, and, therefore, the amendment did not affect the matter.

Endeavouring to construe the agreement before him, Ritchie, J., said: "From the admitted facts I draw the inference that this agreement was for the purpose of retaining the *property* in the defendants (lessors) until the piano was paid for." What he meant by this would perhaps be more precisely expressed in this way: "I draw the inference that the property in the piano was to remain in the lessors until the piano was paid for, and then pass to the lessees." But this action was upon a case stated, and the agreement itself was the only fact relevant to the question of the transfer of the property in evidence before the Judge, and as *Guest* v. *Diack* had expressly decided that no such inference could properly be drawn from the agreement, it was not open to Ritchie, J., to draw it. In that case, the Court had said: "According to this agreement, the property in the piano was not to be affected in any way whatever by anything to be done under the agreement." There was nothing in the amendment to the statute to affect this point.

The agreement in question says that the chattel let to hire shall remain the property of the lessors "until they hereafter otherwise dispose of it." Ritchie, J., said that the defendants could not "otherwise dispose of the property" during the currency of the lease if the payments were duly made. Is not this a confusion of ideas; the piano itself could not be disposed of during the hiring, but the property in it could be (*Re Davis*, 22 Q.B.D. 193). Can there be any doubt whatever that the lessors were legally capable of giving to a third party a good title to the particular piano possessed by the lessee

Annotation. under which, at the end of the period of letting, the new owner could take it. The lessee had an option to purchase—not this particular piano, but one of similar value, to be selected, apparently, by the lessor. An option to buy is not an agreement to buy; no property passes under it. (*Helby* v. *Matthews*, [1895] A.C. 471.) In this connection it is a curious fact that even with reference to a hire and purchase agreement of the usual type the N.S. statute does not say that a lessee can give a good title to a *bonâ fide* purchaser, &c., without notice, though that is very generally assumed. All that the statute says is, that the hiring, &c., shall be "evidenced" in writing, which shall be registered, and that if not registered, the agreement shall be null and void as against purchasers, &c. But even so, where does the lessee get a title to convey the property to a third party, or where does the third party get a title as against the lessor. The agreement is not a document on which the lessor's title depends; the chattels were his before the hiring, and the lessee has acquired no title to them. *Ex parte Crawcour*, 9 Ch. D. 419. If the agreement is binding on lessor to sell and lessee to buy, it is an agreement to buy, and under the Factors Act a lessee could give a good title to a *bonâ fide* purchaser for value, but not where the agreement was optional with either lessor or lessee or both. *Helby* v. *Matthews*, [1895] A.C. 471.

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Nova Scotia Supreme Court, Sir Wallace Graham, C.J., Russell and Drysdale, JJ., Ritchie, E.J., and Harris and Chisholm, JJ. January 9, 1917.

JUDICIAL SALE (§ II A—15)—ATTACKING VALIDITY—ESTOPPEL.

A claimant who accepts a share of the proceeds of land sold under order of Court, knowing the source from which it came, cannot afterwards attack the sale, upon the ground of irregularity.

[*Clark* v. *Phinney*, 25 Can. S.C.R. 633; *Swinfen* v. *Swinfen*, 24 Beav. 549, followed.]

Statement.

APPEAL by plaintiffs from the judgment of Longley, J., dismissing an action to set aside a sale of lands made under an order in a partition action under R.S.N.S. 1900, ch. 168. Affirmed.

W. H. Covert, K.C., for appellants; *W. E. Roscoe*, K.C., for respondents.

Drysdale, J.

DRYSDALE, J.:—In this action the plaintiffs attack the proceedings in a partition suit in this Court wherein the defendant Edwards was plaintiff and the plaintiff and others defendants. It seems in that suit, wherein partition of lands in Annapolis county was sought, or in the alternative a sale of such lands, the defendants were represented by a solicitor of Annapolis, Mr. Harris by name, and such proceedings were had that a decree or order in the suit was taken directing a sale of the lands as to which partition was sought. Mr. Harris, above referred to, as the solicitor of plaintiffs (the defendants in the partition suit) was a consenting party to the taking out of such order or decree and in due course the lands, the subject of this action, were sold under said order or decree, the proceeds being distributed amongst the interested parties mentioned in the said action including the now plaintiffs.

The plaintiffs admit receiving their portion arising from such sale and appropriating it to their own use. Notwithstanding this conceded state of facts plaintiffs now claim the right to repudiate the sale and all the proceedings in the former suit and the acts had therein and thereunder.

I am of opinion this cannot be done and that plaintiffs are estopped from taking such a course.

It is said the order or decree for sale in the partition suit was directed to be issued by a County Court Judge acting as a master of this Court and that such a master had no authority to grant or direct the issue of such an order or decree. Even if this were so the order seems to be issued in the cause in this Court in the ordinary way under the seal of the Court. It is common ground

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that it was so taken or issued by consent of all the parties and I think it is now too late to object that a master has no authority to direct such an issue. It was issued and acted on by consent of the parties to the suit, the land sold thereunder, and the proceeds divided among the parties, the plaintiffs receiving and keeping their share of such proceeds. *Clark* v. *Phinney*, 25 Can. S.C.R. 633, is, I think, a conclusive authority against the plaintiffs' right to now question the sale in or under the former suit. In that case I find cited with approval the following passage from an American authority:—

> It is a maxim of common honesty as well as of law that a party cannot have the price of land sold and the land itself. . Accordingly it has been ruled uniformly that if one receives the purchase money of land sold, he affirms the sale and he cannot claim against it whether it was void or only voidable (p. 647).

This strikes me as good sense and is, I think, good law. The plaintiffs by their solicitor in the former suit were parties and consenting parties to a sale. With full knowledge of the sale they took the proceeds, and I think it is not now open to them to question the sale in this suit.

I would dismiss the appeal with costs.

Russell, J.

RUSSELL, J., concurred.

Ritchie, E.J.

RITCHIE, E. J.:—I agree with my brother Drysdale.

Harris, J.

HARRIS, J.:—One William H. Edwards claimed to own a half interest in lands in which Irene Sabeans was interested and he brought an action against her and her husband for the partition of the property and also asked for the sale of the lands, in case the same could not be divided to advantage, and division of the proceeds. Mrs. Sabeans retained a solicitor and he consented to an order for sale. The property was sold on March 15, 1915, and Mrs. Sabeans, shortly afterwards, received from her solicitor one-half of the proceeds of the sale, and she still retains the money.

On February 23, 1916, the writ was issued to set aside the sale, and in May, 1916, the statement of claim was filed in which she claimed that the sale was void. In the defence filed in June, 1916, the defendants set up by way of estoppel the fact that Mrs. Sabeans had among other things received her share of the proceeds of the sale which she still retained, and on June 16, 1916, the plaintiffs filed a reply admitting the receipt of the money and that Mrs. Sabeans still retained the same, adding

"but are retaining the same subject to an order that may be made by this honourable Court in this action."

The sale is attacked on two grounds:—(1) That the consent order in the partition action was issued by Pelton, Co.J., as a Master and that he had no jurisdiction to issue it. (2) That the solicitor who consented to the order had been instructed to defend the action and not to agree to a sale and had no authority to consent to the order for sale.

As the solicitor's authority is questioned I quote all the evidence bearing on the matter.

The female plaintiff says that after being served with the writ in the partition action she came to Annapolis to employ a solicitor and was recommended to see Mr. Fred Harris. She interviewed him and she testifies as follows regarding what took place:—

I said "I came to get you to defend my case as Owen served a writ." I showed him my deed and he said, "Mr. Wade made this deed," and he went on because Mr. Wade made the deed.

On cross-examination she is thus reported:—

Q. You got some money from the sale of the property? A. Yes, $103.90 and some cents. Q. Who paid you that? A. It came from Mr. Harris. Q. After the business of the sale was over and the thing wound up Harris sent you your share? A. Yes, I had written to him not to sell before that. Q. Do you think you have given the amount correct? A. $109.90 and some cents. Q. When was that? A. About 2 months after the sale. Q. Do you know when the sale by the sheriff was? A. March 15, 1915. Q. You have that money still? A. Sure.

The trial of the present action took place on June 21, 1916. Mr. Harris, the solicitor, was not called as a witness. If Mrs. Sabeans has told all that took place at the first interview it is quite evident that her instructions were very general. On cross-examination she says that before she got the money she had written to Harris not to sell the property. There was no explanation as to when this letter was written, whether before or after the sale took place. It makes no difference in this case, in my opinion, whether the solicitor had authority to consent to the order or not, because Mrs. Sabeans, knowing that he had consented to the order for a sale accepted the proceeds of the sale and still retains the money.

In *Swinfen* v. *Swinfen*, 24 Beav. 549 (53 E.R. 470), the authority relied upon by the appellant as showing that an attorney has not by virtue of his office an implied authority to compromise an action, it was expressly decided that a client may become

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bound by a compromise entered into by his attorney without his authority by not repudiating it within a reasonable time.

In this case Mrs. Sabeans received her share of the proceeds of the sale from her solicitor about May 15, 1915, and she still retains the money and, so far as the case shows, there was no repudiation of the act of the solicitor until the action was brought on February 23, 1916. In my opinion there was such an acquiescence here as to estop Mrs. Sabeans from raising any question as to the authority of the solicitor.

The other question, I think, turns upon the application of the same principles. There is no doubt that the consent order in the partition action should have been initialled by a Judge of this Court and that the Master had no jurisdiction to grant the order. It is not covered by O. 54 B. But the plaintiff got and still retains the proceeds of the sale and she is estopped from claiming that the sale was void.

In the case of *Clark* v. *Phinney*, 25 Can. S.C.R. 633, Sedgewick, J., at page 647, said in a somewhat similar case:—

> We are of opinion that the appellants taking the money referred to, knowing the source from which it came, that it was a portion of the purchase money paid by the respondent whose title to the lands in question they now seek to impeach, are now precluded from asserting the contrary (pp. 647-8).

In *Maple* v. *Kussait*, 53 Pa. St. Rep. 348, Strong, J., said:—

> It is a maxim of common honesty as well as of law that a party cannot have the price of land sold and the land itself. . . If one receive the purchase money of land sold he affirms the sale and he cannot claim against it whether it was void or only voidable.

Sedgewick, J., cites this paragraph in *Clark* v. *Phinney*, *supra*, apparently with approval.

In *Walker* v. *Mulvean*, 76 Ill. 19, where the plaintiffs had received and retained the proceeds of the sale, Scott, J., said:—

> In the view we have taken the plaintiffs in error are estopped to deny the validity of the sale upon any ground, either as to the juridsiction of the Court to pronounce the decree or for any irregularity that intervened.

In *Deford* v. *Mercer*, 24 Iowa 118, where it was sought to set aside a sale and the party attacking it had received and retained the proceeds, Dillon, C.J., said:—

> Under the circumstances if there is anything well founded in conscience or in law it is that they are estopped in equity from claiming the land after having voluntarily accepted the money which arose from or was the product of the sale of the land . . It will be seen that this principle of estoppel is not limited as contended for by the appellant's counsel to cases of voidable sales, but extends to cases where the sale is void.

In *Penn* v. *Heisey*, 19 Ill. 295, Breese, J., said:—

It is a principle that though in general estoppels are odious as preventing a party from stating the truth, yet they are favoured when they promote equity. Com. Dig. tit. "Estoppel." The application of this principle does not depend, as we understand it, upon any supposed distinction between a void and a voidable sale. If the sale be one or the other receiving the money or its proceeds in other valuable property with a knowledge of the facts touches the conscience of the party and therefore establishes the right of the party claiming under such a sale in one case as well as the other.

See also Bigelow on Estoppel, 6th ed. p. 746; Freeman on Void Judicial Sales, par. 50.

In *Smith* v. *Baker*, L.R. 8 C.P. 350, Honyman, J., said, at 357:

A man cannot at the same time blow hot and cold. He cannot say at one time that the transaction is valid, and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and at another time say it is void for the purpose of securing some further advantage.

In *Roe* v. *Mutual Loan Fund*, 19 Q.B.D. 347, at 350, Lord Esher, M.R., adopted what Honyman, J., had said in the above case and added:—

I base my judgment on this, that the bankruptcy proceeded on the basis that the bill of sale was valid, and that this was with the knowledge and acquiescence and for the benefit of the plaintiff, who thereby affirmed that the bill of sale was valid, and cannot now be heard to say that it was invalid in order to obtain a further advantage.

In *Birmingham* v. *Kirwan*, 2 Sch. & Lef. 449, Lord Redesdale said: "The general rule is that a person cannot accept and reject the same instrument."

In *Lovitt* v. *The King*, 43 Can. S.C.R. 106, at 140, Duff, J., said:

There is a doctrine of the law that one may not approbate and reprobate, play fast and loose, gain an advantage by assuming one position and escape the correlative burden by assuming another and inconsistent position.

The law of estoppel is conducive to honesty and fair dealing. A man should not be permitted to insist on opposite and repugnant rights. The doctrine of course debars the truth in the particular case, yet, as was said by the Supreme Court of the United States in *Van Rensslaer* v. *Kearney*, 11 How. 326:—"It imposes silence on the party only when in conscience and honesty he should not be allowed to speak."

The plaintiff having taken and retained her share of the proceeds of the sale is, in my opinion, estopped from setting up that the order for the sale was invalid.

Both appeals should, I think, be dismissed with costs.

CHISHOLM, J.:—I concur in the opinion of my brother Drysdale. Chisholm, J.

GRAHAM, C.J.:—I take no part in the decision as the case was not fully argued before me. Graham, C.J.

Appeal dismissed.

CAN.

Ex. C.

PEARSON v. THE KING.

Exchequer Court of Canada, Audette, J. December 30, 1916.

CROWN (§ II—20)—BUILDING CONTRACT—SUB-CONTRACTOR—ASSIGNMENT—PRIVITY.

Under a building or construction contract the Crown is not bound to pay any claim asserted by a mere sub-contractor, although the Crown has consented to the contract being sublet. Where the Crown declines to assent to any assignment, there can be no implied assignment raised upon a consent to sublet, so as to establish privity between the Crown and a third person to whom the original contractor has sublet the execution of the contract.

Statement. PETITION OF RIGHT for damages for alleged breach of contract by the Crown. Dismissed.

M. B. Peacock, for suppliant; *J. Muir*, K.C., for respondent.

Audette, J. AUDETTE, J.:—The suppliant, by his petition of right, seeks to recover the sum of $15,000 for loss and damage alleged to have been suffered by him as the result, *inter alia*, of improper classification and estimates allowed by the chief engineer upon his (Pearson) works while engaged in the performance of his sub-contract for the construction of part of a highway known as sec. 4 of the Castle-Vermillion Highway in the Rocky Mountain Park, from Station 120+00 to Station 478+60, in the Rocky Mountains, in the Province of Alberta.

In the course of the year 1914, B. J. Reddick, of Calgary, tendered for the works in question herein, and his tender being accepted, entered into a contract with the Crown to perform the same under the indenture filed of record herein as exhibit 1.

Reddick had another contract in respect of what he called the Banff road of Banff section, and he made a deposit of $1,000 with respect to the 2 contracts.

Subsequently to signing his Castle-Vermillion contract with the government, Reddick applied to the Crown for leave to assign that contract. The Crown, while refusing him this leave to assign, as it had the right under the contract, allowed him to sub-let the same. Therefore, on July 30, 1914, Reddick did sub-let the contract to the suppliant herein, as appears by ex. 3 filed herein. And it is here well to note that the contract was so sub-let upon the suppliant paying Reddick 15% of the net profits on the work. In other words, giving that profit when realized on the performance of the contract, the price or remuneration as between Reddick and himself, would be different from that of the original contract. A clause, indeed, which will also tend to shew, at least

under one aspect, the difference between the assignment and the sub-letting of a contract.

All moneys paid by the Crown monthly or otherwise under the progress estimates, were so paid to Reddick with whom alone the Crown was dealing.

Reddick, in his evidence, states he received all the cheques from the Crown, coming as payment under the present contract. He cashed the cheques at a bank, and deposited the proceeds thereof at the Union Bank to the credit of the suppliant, and he adds, Pearson did all the work and he received all the moneys.

There is a balance still due under the contract, as returned and certified to by the chief engineer and Reddick exacts that that amount be paid over to him, as in the past, he being the party to the contract with the government. He further says that the balance should come to him, to protect himself under his contract with Pearson, and he is satisfied to pay the suppliant that balance without exacting his 15% out of the profits—without asking any profit.

Now, for one to sub-let or to allow another to do all or part of the work which he had contracted to do, is indeed quite different from an assignment where the liabilities imposed or rights acquired thereunder are transferred to a person who was not a party to the original contract. And Reddick by his contract with the Crown was prohibited from assigning without written consent of the Minister. And, indeed, a transfer or assignment of liabilities constitutes, in reality, a new contract and strictly is not an assignment at all. Hals. Laws of England, vol. 7, p. 494 *et seq.*

The prices in sub-letting a contract might be entirely different from those of the contract, while in the case of an assignment they must be the same.

In the case where the contractor sub-lets, while he can lawfully claim payment for the work so sub-let, if properly done, on the other hand he is liable for the defaults of the sub-contractor.

The Crown paid back to Reddick the sum of $1,000—the security deposited by him under both contracts. All of this going to shew that all relations, with respect to this contract, were directly as between Reddick and the Crown. The suppliant was not known or recognized. The bond was given by Reddick who remained liable and answerable to the Crown for the due performance of the contract.

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Audette, J.

Under the circumstances above mentioned, I must come to the conclusion that there is no privity of contract as between the suppliant and the Crown and his action fails. *Hampton* v. *Glamorgan County Council*, 113 L.T. 112.

Having so found it becomes unnecessary to decide the other questions raised by the pleadings herein.

There will be judgment declaring that the suppliant is not entitled to the relief sought by his petition of right, which stands dismissed. *Petition dismissed.*

ONT.

S. C.

NIAGARA GRAIN and FEED CO. v. RENO.

Ontario Supreme Court, Meredith, C.J.O., and Maclaren, Magee and Hodgins JJ.A. November 8, 1916.

SALE (§ II C—35)—WARRANTY OR CONDITION—AS TO QUALITY—INSPECTION.

A representation that a car-load of hay is all of a particular quality is a condition, not only a warranty, and a purchaser is justified in refusing the hay upon discovery that it is not of the quality represented, notwithstanding that after partially examining it in the car he took delivery, and resold it, the inferiority not being apparent until the hay was unloaded.

Statement.

APPEAL by the defendant from the judgment of Coatsworth, Jun.Co.C.J., in favour of the plaintiffs, in an action to recover $225.06, the price paid to the defendant for a car-load of hay, as No. 1 timothy, upon the ground that the hay delivered was not according to contract. Affirmed.

F. D. Davis, for appellant.

Harcourt Ferguson, for respondents.

The judgment of the Court was delivered by

Maclaren, J.A.

MACLAREN, J.A.:—The defendant alleges that the plaintiffs, after inspection, accepted the hay, informed the defendant that they had done so, paid for it, and resold it; and contends that they were thereby estopped from rejecting the hay and suing for a return of the money they had paid.

From the evidence it appears that the hay arrived at Toronto on the 24th December, 1915; that the plaintiffs opened the car-doors and found that the hay which could be seen from there was No. 1 timothy; and that they resold the car-load as such. They paid the defendant's draft for $173.83 which was attached to the bill of lading, and also paid the freight. The defendant says that he was in the plaintiffs' office on the 27th December, and asked about this hay. The plaintiffs' manager says he then

asked the defendant if the whole car-load was as good as what was in the door-ways; that the defendant told him it was; and that he then said in reply, "It will be all right."

The defendant's evidence as to what took place at this interview is, that the above question was not asked, and that the manager's statement as to its being all right was voluntary and unqualified.

The trial Judge does not expressly say which of these statements he believed, but from his conclusion he must have accepted the version given by the plaintiffs' manager. This is the only point as to which there was any dispute concerning the facts.

The railway company on instructions placed the car upon the siding of the plaintiffs' purchasers, who proceeded on the 30th December to unload the hay. They found that whereas the 18 or 20 bales visible from the door-ways were No. 1 timothy, the remainder of the car-load was so inferior as to reduce the average of the whole car to No. 3. They at once notified the plaintiffs of the fact, and that they refused to accept. The plaintiffs on the 31st December wired the defendant of the result of the inspection, and that they would reject unless the price was reduced. The defendant did not make any reply. The plaintiffs had the hay examined by the Government inspector, who graded it as No. 3 timothy. They then notified the defendant that the hay was at his risk, and brought their action. The price of hay having risen largely before the trial, an order for its sale was obtained, and the net proceeds, $210, were paid into Court.

It was strongly urged on behalf of the defendant that the plaintiffs' action should be dismissed, and that, even if the hay was only No. 3, the plaintiffs had no right to reject or to recover back the money paid, but that their rights at the highest were to have sold the hay and sued for the difference.

I am of opinion that the representation that the hay was No. 1 timothy was not a mere *warranty* in the narrow sense of that term, but that it was what is known in law as a *condition*, and that its breach gave to the plaintiffs the right to reject in case that right was exercised within a reasonable time.

Pollock says in his work on Contracts, 8th ed., p. 563: "The so-called implied warranties of *quality*, fitness, and condition of goods sold are really conditions; if the goods tendered in the per-

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formance of the contract do not satisfy these conditions, they may be rejected. But the buyer may, if he thinks fit, accept the goods and claim damages for the defect; in other words, he may treat the breach of condition as a breach of warranty." See also Halsbury's Laws of England, vol. 25, p. 154, and note (*p*).

The law upon this subject was fully discussed and very clearly laid down in a recent English case, *Wallis Son & Wells* v. *Pratt & Haynes*, [1910] 2 K.B. 1003, in a dissenting judgment by Fletcher Moulton, L.J., which was approved and adopted by the House of Lords, [1911] A.C. 394. It arose from a contract for the sale of common English sainfoin seed "without any warranty express or implied," where the vendor supplied a different and inferior but indistinguishable article known as giant sainfoin seed, which the purchaser accepted and sowed, not discovering the difference until it grew up. The Lord Justice points out (pp. 1012, 1013) the difference between a condition, which is vital and goes to the substance of the contract, and a warranty, which is not so vital that a failure to perform it does not go to the substance of the contract. In the former case the purchaser has (if he takes the proper steps) the alternative remedy pointed out by Pollock; in the latter he is not entitled to reject, but is limited to his claim for damages for the breach.

I do not think the fact of the plaintiffs having resold the hay precludes them from rejecting. The defendant was aware that they were buying to sell again; and, if the resale, inspection, and rejection took place within a reasonable time, the plaintiffs were entitled to exercise this right. The plaintiffs might even have first sold the hay and then purchased from the defendant or some other vendor to implement their contract, without imperilling their rights. One must look at all the facts. In this case the hay arrived in Toronto on the 24th December; Christmas and a Sunday immediately followed. The car was moved to North Toronto, and the hay inspected on the 30th, and the next day the plaintiffs wired the defendant the result of the inspection and their rejection.

In the circumstances, this was, in my judgment, within a reasonable time.

I am consequently of opinion that the appeal should be dismissed.

Appeal dismissed.

CONSOLIDATED INVESTMENTS LTD. v. ACRES.

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Alberta Supreme Court, Harvey, C.J., and Beck and Walsh, JJ. February 1, 1917.

VENDOR AND PURCHASER (§ I E—25)—RESCISSION—DELAY—JUS TERTII.

Delay in repudiating a contract for the sale of land after discovery of misrepresentation will not prejudice a party seeking rescission, if he has done nothing to affirm the contract after the discovery, and the rights of innocent third parties are not affected by the delay.

[*Clough* v. *London & North Western R. Co.*, L.R. 7, Ex. 26, followed.]

Statement.

APPEAL by defendant from a judgment of Crawford Co. J. Reversed.

Steer, for appellant; *Geo. H. Van Allen*, for respondent.

The judgment of the Court was delivered by

Walsh, J.

WALSH, J.:—This is a vendor's specific performance action, with a defence and counter claim for rescission based upon misrepresentation. Crawford, Co. J., who tried the case, held, without deciding whether or not the representations complained of were in fact made, that even if they were, the defendant had so unreasonably delayed in repudiating the contract after discovery of the truth as to disentitle himself to rescission, and for this reason dismissed the counterclaim and decreed specific performance. With respect, I think that his judgment cannot be sustained upon this ground either upon the facts or upon the law.

In the first place, as to the facts. The agreement in question was made in October, 1912, when the initial cash payment was made, the rest of the purchase money being in 3 equal instalments, 6, 12, and 18 months respectively thereafter. The defendant says that he discovered, in the spring of 1913, that the representations upon which he relied in entering into this contract were untrue, and because of that he refused to make any further payments under it. A refusal to pay imports something more than a mere determination not to do so; it means the communication of that intention to the party claiming or entitled to payment. The case does not rest there, however. Mr. Simons, the president of the plaintiff, says that the plaintiff wrote letters to the defendant demanding payment and that replies were received from him that he refused to pay. While the evidence of neither of these witnesses is as clear upon the point as it might be, I think that not only the fair but the proper inference to draw from it is that payment of each instalment was demanded as it fell due and refused upon this ground, which, of course, was a repudiation, and as the defendant's discovery was made just about the date of the

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maturity of the 1st of these instalments, namely, in the spring of 1913, the repudiation was practically made upon discovery.

Apart from that, as a matter of law, the defendant was not bound to disaffirm the contract immediately upon the discovery of these misrepresentations. That gave him the right to either affirm or disaffirm it. Until he decided to avoid it, it remained binding, but he had a right to keep his election open so long as he did nothing in the meantime to affirm the contract, subject to this, that delay in disaffirming might be treated as some evidence, and a long delay as conclusive evidence, of his election to affirm, and, further, that if the position of the parties had been affected by the delay or the right of an innocent third party had arisen during the delay, his right of rescission could not be exercised. This, I think, is a fair statement of the principles laid down in the leading case of *Clough* v. *London & N. W. R. Co.*, L.R. 7 Ex. 26, which though decided in the Exchequer Chamber in 1871 has been adopted by the highest Courts as correctly enunciating the law upon the subject, *e. g.*, the House of Lords in *Aaron's Reef* v. *Twiss*, [1896] A.C. 273 and the Privy Council in *United Shoe Machinery Co. of Canada* v. *Brunet*, [1909] A.C. 330. The result of the authorities, including *Clough* v. *London and North Western*, and *Aaron's Reef* v. *Twiss*, *supra*, and *Lindsay Petroleum Co.* v. *Hurd*, L.R. 5 P.C. 221, and *Redgrave* v. *Hurd*, 20 Ch. D. 1, is thus stated in 20 Hals., p. 752, par. 1771:—

> Delay (or laches) is not, *per se*, a defence to proceedings for rescission. No representee is either punished for, or prejudiced by, mere dilatoriness or inaction. The importance of delay lies in its risks and possible results. With other facts, or even without them, if it is very great, it may constitute evidence of affirmation; and, in any case, it gives scope and opportunity for alteration of the subject-matter of the contract, or for intervention of the *jus tertii*. Acquiescence, if it amounts to affirmation, is a defence; if otherwise, it is not.

Here there is no suggestion of an alteration in the subject matter of the contract or of the intervention of the *jus tertii*. There is at most a delay from the spring of 1913 until November, 1914, when the defence and counterclaim was filed, demands for payment in the interim having been met by refusals to pay. In my judgment the defendants cannot upon these facts be said to have by his delay affirmed this contract after discovering the misrepresentations of which he now complains.

The plaintiff's contention that it was necessary for the defendant to prove some positive act of repudiation before action

brought to rescind is met not only by proof to which I have referred that such repudiation was in fact made, but also by the judgment in *Clough* v. *London & N. W.*, *supra*. Mr. Bower, in his work on Actionable Misrepresentations on page 244, par. 267, says:—

> Though in some of the authorities there are loose expressions to be found suggestive of the idea that it is a part of the representee's burden of proof to establish that some notice or act of repudiation was given or done by him before commencing the proceedings it is clear that this is not so and that the action itself is sufficient to signify his election. The onus is on the representor to prove by way of affirmative defence a previous election on the representee's part to adhere to the contract and not on the representee to prove a previous election to avoid it.

And for this *Clough* v. *London & N. W.*, *supra*, and *Capel* v. *Sim's Ships Composition Co.*, 58 L.T. 807, at 811, 812, are cited as authority.

One of the misrepresentations alleged is that the property is within the 4 mile circle from the Edmonton post office. The evidence offered in support of this allegation is that of the defendant and his brother taken under commission in Ontario without any cross-examination, the plaintiff though notified having decided not to be represented upon the taking of their evidence. Both of these witnesses swore plainly and distinctly to the statement that the plaintiff's agent, whose persuasion led them into this contract and who was none less than its president Simons, in the course of the conversation which resulted in the contract, represented to the defendant that this lot was within 4 miles of the post office. Simons says that he did not do so. The learned trial Judge did not have the advantage of seeing the defendant and his brother, but Simons gave his evidence before him. He reserved judgment and in his written reasons for judgment he said:—

> I would find it very hard to determine the question whether or not these representations were actually made. . . I cannot come to any conviction as to whether or not these representations were made by Mr. Simons.

And so he made no finding upon that disputed question of fact. It is therefore necessary that we should do so. The burden of proving that this representation was made rests upon the defendant. The preponderance of evidence is with him, being two witnesses against one. One of these witnesses is greatly interested, he being the defendant, but equally so is the plaintiff's only witness, its president. The argument against the defend-

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ant's other witness is that he is the defendant's brother and that he is prejudiced against the plaintiff by reason of the fact that he at the same time bought land in this same subdivision from the plaintiff under a contract for the rescission of which he has since obtained a judgment of some Ontario Court (see 8 O.W.N. 193). I think the probabilities are in favour of the truthfulness of the defendant's story. Simons visited him at his home in Ontario and there induced him to agree to pay $665 for a lot with a frontage of 33 or 50 feet situate practically 4½ miles from the centre of the city beyond the city limits in what then was and still is country pure and simple, respecting which he, the defendant, knew absolutely nothing except what Simons told him. I should say that Simons must have told him a pretty alluring tale to persuade him into such a contract, an element in which would doubtless be its distance from the centre of the city, which Simons would naturally be inclined to cut down as much as possible. The defendant and his brother speak from their memory of this particular conversation; Simons does not, but says that his selling arguments were reiterated so many times (he says later that he made from 150 to 200 sales), that it would not be possible for him to forget them. He wrote letters to the defendant immediately after his return with a view, I should say, to further sales to him in this subdivision, for in the first of these he expressed the opinion that:

> your holdings in Connaught Crescent will establish business relations between yourself and Consolidated Investments, Ltd., that will be of mutual advantage for years to come.

These letters contain statements which impress me with the idea that he was not as conservative in his statements to prospective purchasers as he said in his evidence at the trial that he was. For instance, on October 31, 1912, he wrote:—

> The car line to Laurier Park next spring is an absolute certainty and will then be carried across Connaught Crescent to the Country Club.

And the fact is, as admitted by Simons, that this car line has not yet been built. He repeats this in his letter of December 30, 1912, and makes references to the Country Club which strike me as extravagant. His letter of January 8, 1913, contains statements which appear to me to be overdrawn, such as that:

> building permits for the first 3 days in 1913 were greater than those of any 3 months in 1911; already over $10,000,000 of building permits have been issued for this year and it is estimated that the permits for the year will aggregate $30,000,000.

I think that a man who would write in the strain of these

letters would not be likely to be too exact in his statements by the spoken word. Crawford, Co.J., with the advantage of seeing him, could not make up his mind whether to believe or disbelieve him, and so we must consider his evidence just as we do that of the defendant and his witnesses.

There is no doubt but that representations respecting the property were made by Simons which led the defendant into this contract. It was his duty to make these representations in terms so clear and distinct that the defendant could not have misunderstood them, for it is obvious that in buying the property he was relying upon what Simons told him of it and upon that alone. I am satisfied that his references to its location were made in such terms as led the defendant to understand that it was within the four mile limit. They may have been so made inadvertently and quite honestly, as defendant's counsel seems to have admitted in the Court below was the case. This, however, is immaterial, for rescission will be granted as readily for an innocent as for a fraudulent misrepresentation. I think, therefore, we must find as a fact that it was made. It was admittedly untrue. Simons admits that the 4 mile circle from 1st street and Jasper Ave. cuts the N.E. corner of the subdivision; the post office is still farther from this property and this lot is some distance beyond the N.E. corner of the subdivision. I should say it is approximately 4½ miles from the post office to this lot judging from the plan on file and Simons says that that is the case. There can be no question as to the materiality of this representation.

In view of the finding upon this point it is unnecessary for us to consider the other misrepresentations complained of or to deal with the questions as to the plaintiff's title that were raised before us.

The appeal should be allowed with costs and the action dismissed with costs and judgment directed to be entered for the rescission of the agreement with costs and for the repayment by the plaintiff to the defendant of $224 with interest at 5 per cent. from the date of its payment. October 2, 1912, to November 23, 1914, the date of the filing of the counterclaim and from that date at the contract rate of 8 per cent. and declaring that the defendant is entitled to a lien for the same upon the land in question. *Appeal allowed.*

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REX v. MANSHRICK.

Manitoba Court of Appeal, Howell C.J.M., and Richards, Perdue, Cameron and Haggart, JJ.A. November 23, 1916.

1. SEDITION (§ I—5)—INTENT—QUESTION FOR JURY.
On a charge under Cr. Code sec. 134, of speaking seditious words the question of seditious intent is one for the jury.
[*R.* v. *Felton*, 25 Can. Cr. Cas. 207, 28 D.L.R. 372; *R.* v. *Cohen*, 25 Can. Cr. Cas. 302, 28 D.L.R. 74, referred to.]

2. SEDITION (§ I—5)—REPETITION—EVIDENCE—NEW TRIAL.
A new trial will not be granted in respect of a conviction for uttering seditious words, because of the prosecution eliciting on cross-examination of defendant's witness that the persons to whom the words were uttered had repeated them to the witness on an occasion when the accused was not present.

Statement.

CROWN case reserved and motion by leave of the trial Judge to move for a new trial, following a conviction for sedition.

The accused was tried at the Morden Assizes, Southern Judicial District, before a judge of the King's Bench and a jury, on November 1st, 2nd, 3rd, 1916, for speaking seditious words.

The first count of the indictment stated that the accused on or about July 29th, 1916, at the Rural Municipality of Winchester, Manitoba, spoke seditious words, to wit:—When referring to the Canadian soldiers who had gone to the present war, and of which soldiers Edward Briggs said to the said Albert R. Manshrick, "You know Ab. a good many of those boys will never come back," the said Albert R. Manshrick spoke as follows: "I hope to God none of them comes back."

The accused was found guilty on the first count.

The second count of the indictment stated that the accused, on or about July 13th, 1916, at the said Rural Municipality of Winchester, spoke seditious words, to wit: When referring to the Germans passing through Belgium in the present war, said of the Belgians, "It serves them right, let them suffer, if they had let the Germans come through there would have been none of them hurt," and when one Robert Franklin said to the said Albert R. Manshrick of the Germans in reply "Then probably they would have driven the French into the sea and been here to-day, taxed us 50% and taken our farms," the said Albert R. Manshrick said "Well even so, let them come, it would be all right." The accused was also found guilty on the second count.

The third count of the indictment stated that the accused on or about May 10th, 1915, at the said Rural Municipality of Winchester, spoke seditious words to wit: When referring to the sinking of the ship Lusitania by the Germans the said Albert R.

Manshrick spoke as follows: "It shews what the boys can do and I would like to have been there to have helped them do it."

To this count the jury returned a verdict of not guilty.

The case reserved certified that at the close of the case for the Crown, counsel for accused asked that case be withdrawn from the jury on the ground that there was no evidence of seditious intent and on the ground that there had been wrongful admission of evidence elicited on behalf of the Crown. The trial Judge refused to withdraw the case from the jury, stating that the points would be reserved to be included in a reserved case if same were asked for at the close of the whole case. Defence then proceeded with its evidence. At the conclusion of the trial, counsel for accused asked the trial Judge to state a reserved case upon the ground that there was no evidence of seditious intent, and on the ground that there had been wrongful admission of evidence elicited by the Crown from Crown witnesses, and in the cross-examination of one A. H. Atkinson. This motion was granted and at request of counsel the trial Judge agreed that the reserved case should include all matters and questions that counsel for the accused should desire to have mentioned therein. Application to state reserved case was subsequently made before the trial Judge by counsel for accused in presence of counsel for the Crown, but counsel being unable to agree upon statement of facts they consented that the case should consist of the evidence of the Crown witnesses, the evidence of said Atkinson and the evidence of the accused and a transcript of said evidence was made part of the case together with a copy of the charge to the jury.

In addition to reserving the questions which here follow, the trial Judge gave leave to the accused to apply to the Court to quash the conviction or for a new trial on any other ground not contained in the questions reserved.

The questions reserved are:—

1. Was I wrong in admitting evidence by Briggs and Coombs of repetition by them to persons when the accused was not present of words alleged by Briggs and Coombs to have been spoken by the accused, and set out in the first count of the indictment?

2. Was I wrong in admitting evidence by Atkinson on cross-examination by the Crown in which he repeated words alleged to have been spoken by the accused and which he alleged were told to him by Briggs and Coombs?

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3. Was I wrong in not withdrawing the case from the jury and discharging the prisoner at the close of the case for the Crown?

4. Was I wrong in not directing the jury that there was no evidence of seditious intent and to bring in a verdict of not guilty?

5. Was there mis-direction or non-direction in my charge to the jury in the following respects:—

(*a*) In not directing the jury that there was no evidence of seditious intent and to acquit the accused?

(*b*) In not directing the jury that the evidence and circumstances disclosed no evidence of seditious intent, and to bring in a verdict of not guilty on the first and second counts or either of them?

(*c*) In my definition of seditious words and seditious intent?

The charge to the jury was as follows:—

Gentlemen of the jury; It is seldom in the activities of our Courts that juries are called upon to decide cases of this kind. They arise out of the conditions that exist to-day, the horrifying conditions of the terrible war with which the world is afflicted. Possibly were it not for that these cases would not arise. This is the first within my experience in this province. The case has dragged out at very great length and a great deal of extraneous matter has been brought into it, matter that is not evidence and has no bearing upon the case and I would ask you to dismiss from your minds any matter that does not pertain to the three charges contained in the three counts of the indictment. Counsel has told you that there should not be any prejudice in the minds of the jurors. I would ask you, gentlemen, to divest your thoughts of any prejudice. We are very liable, we are only human, and we are British subjects, and we are very liable to entertain a prejudice against the Germans, anything and everything German, a German article, or a German individual and perhaps we have good reason to have that prejudice. I think we can strike out the word perhaps. I think we have every reason in the world to be prejudiced against the German nation but that is no reason for you as jurymen and this as a Court of British justice to allow that to enter into this case. There has been evidence brought out of the accused having German blood in his veins. Because of that fact you will not consider him guilty. You will treat him as one of ourselves. As a British subject he is entitled to

that protection while he is in our midst. But even if he were not, if he were a German subject, he is entitled to the same fair play upon his trial.

Now in this case there are two matters of the greatest importance. First, you are to consider and decide whether the words which are charged in this indictment were spoken by the accused. That is one simple question that you have to decide. And having decided it, should you find that the accused did utter these words, it is your duty to decide whether or not they had a seditious intention.

Now, in the first place, let us deal with the indictment and review the evidence briefly for and against the utterance of the words. As I have stated, there are three counts, three charges in the indictment. The first is that the accused, when referring to the Canadian soldiers who had gone to the present war and of which soldiers Edward Briggs said to the accused, "You know Ab. a good many of these boys will never come back," the said Albert R. Manshrick spoke as follows: "I hope to God none of them comes back." Now, gentlemen, do you think that the accused made use of that language? Does the evidence satisfy you? On that point we have the evidence of Mr. Briggs and Mr. Coombes. If you believe the evidence of these two witnesses then of course you must find that the words were spoken. As against the evidence of Mr. Briggs and Mr. Coombes you have only the evidence of the accused himself. It has been suggested by counsel for the defence that Mr. Briggs' evidence is not to be relied upon, that he contradicted himself and as a matter of fact he is charged by the counsel with wilful perjury. Well, gentlemen, you have seen these witnesses in the box, you have seen Mr. Briggs and Mr. Coombs, and one of the principal means of judging the value of evidence is by the demeanour of the witnesses in the box. It is for you to judge. They are placed in the box within your full view. You look at the men and you judge of them by their language and by their demeanour in the box. Now, did either of these two men, Mr. Briggs or Mr. Coombes, impress you as men who have come into the witness box with the intention of perjuring themselves and sending this man to gaol or at least making an effort to have you find this man guilty of the offences with which he is charged. Of course, you are the judges. If you believe these two men then it

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is your bounden duty to say so by your verdict. If you believe these two men as against the evidence of the accused, then it is your bounden duty to say that he did make use of this expression. You have the evidence of Briggs and Coombes against the evidence of the accused.

If you find these words were uttered and that none of the words in the other counts of the indictment were uttered you may find a verdict of guilty on the first count of the indictment and if you find that these words were not sufficiently proved to your satisfaction you may find not guilty on that count.

Now the second count is, "That Albert R. Manshrick, on or about the 13th day of July, in the year of Our Lord 1916, at the Rural Municipality of Winchester, in the Southern Judicial District, in the Province of Manitoba, spoke seditious words, to wit, when referring to the Germans passing throught Belgium in the present war, the said Albert R. Manshrick said of the Belgians, "It serves them right, let them suffer, if they had let the Germans come through there would have been none of them hurt," and when one Robert Franklin said to the said Albert R. Manshrick of the Germans in reply, "Then probably they would have driven the French into the sea and been here to-day, taxed us 50% and taken our farms," the said Albert R. Manshrick said, "Well even so let them come, it would be all right."

Now you have the evidence on that count of the indictment. You have the evidence of the witnesses Franklin and Weidenheimer and if you believe these witnesses it will be your duty to find that the accused did make use of these words. Now you have his own evidence. There is only his own evidence against it. You have his version of it. He does admit that he made use of language to the affect, "that even if they did, if the Germans did come, and the price of goods would be raised 50%—that was his understanding, according to his evidence, of the remarks that were made by Mr. Franklin—even if they did come and raise the price of goods 50%, we can manufacture our own goods. That is the version given. As against that you have the evidence, as I have stated, of the witnesses Franklin and Weidenheimer. It is possible of course that the accused may have misunderstood them, may have misunderstood the remarks of Mr. Franklin. He may have thought that he was referring to the price of goods.

But even if he made use of that kind of language you might take into consideration the effect of that, his remark, "It would be all right, even if they do come we can manufacture our own goods." It is for you to say what value you place on that explanation.

And the third count is the remarks that were made in the presence of his farm labourer Wintle, in referring to the sinking of the Lusitania by the Germans, that the accused spoke as follows: "It shews what the boys can do and I would like to have been there to have helped them do it." Well, gentlemen, you have heard very many complimentary remarks and kind things said about the accused. Do you think it is possible, judging from the man's demeanour in the box, judging from his character generally, do you think it is possible that a man in the possession of his senses, would make use of and suggest, that horrible, that wicked expression of such a horrible thought, even if he ever entertained the thought? The Germans have been guilty of many atrocities, they are a nation we can hardly understand from our best view of them. But this man has lived amongst us the better part of his life. Do you think he made use of this expression? You have the evidence of the witness and of the accused. He says he never made such a remark. The witness Scott does not and cannot contradict it because the other witness says that the conversation took place upon the 15th of May. The witness Scott says he was there in the month of August when he heard the conversation at the dinner table but yet the conversation at the dinner table which Mr. Scott verifies is so inconsistent with his previous expressions as stated by the witness Wintle as to be difficult to believe that he made use of them. He says that he wished he had been there the day of this diabolical act to assist in the torpedoing of this boat. Do you think that a man with a Canadian wife and children of his own is capable of this terrible expression? You are the judges and he is responsible for his words. If you find that he did make use of that expression it is your bounden duty to say so.

If you find that the accused did not make use of any of the expressions charged in the indictment or if the evidence does not satisfy you that these words were made use of at all, then that settles the case. Your verdict will be not guilty. You need not consider it any further.

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If you find that the words charged in the first count were not used you will find him not guilty on the first and the same will apply to the second and third counts. If you find that the words were used in the second and the third you can find him guilty on the second and third.

But you have to go a little further than to find if he has made use of these expressions. Disloyalty and expressions of disloyalty may not be seditious. We know that expressions of disloyalty have been made use of and that those who have made use of them, if Germans, have been interned and the Courts have not interfered. You must go further than the making use of the words. Were the words used with intent? There must be intent as there is no crime without an intention. It is impossible. There must be a criminal intent, and we can only judge of the intent by the man's actions. You are the judges. It is for you to say.

I will endeavour to explain to you what the law is as clearly as I can. "Everyone is guilty of an indictable offence who speaks any seditious words or publishes any seditious libel." Here of course the only part of the section that is applicable is the speaking of seditious words. Now what are seditious words? Seditious words are, "Words expressive of a seditious intention." That does not help us very much. Now, gentlemen, the law has been interpreted to you by counsel on both sides. But I would ask you to forget all about the counsel's interpretation of the law and take it from me and if I am wrong no harm will be done. I will be corrected. You need not pay any attention to either Mr. Trueman's or Mr. McLeod's interpretation of the law. You will take it from me. The test is this: "Was the language calculated, or was it not, to promote public disorder?" Now, was the language made use of by this accused? If you find that the language was used, then was it made use of to promote public disorder? I cannot find any better language or interpretation of it than that.—"Are they calculated". It is not what the accused intended, it is not, was it his intention that this should create public disorder, but would that be the natural result and if that is the natural result of such, that is sufficient to constitute the offence. The law presumes that he intended the natural consequences of his acts, in this case the consequence of his words, when, if the words were calculated, independent of the fact

altogether of whether they did create this public disorder—when there is no evidence that they did create any public disorder. That has nothing to do with the offence. Were they calculated to create this public disorder? If you think that these words were calculated to create public disorder then the law presumes that he intended the consequences of his expressions, the consequences of the language that he made use of.

Now, gentlemen, I think that is about all I have to say to you. The evidence is really very short. I have gone into it briefly. As I have already said, there is a great deal of extraneous matter that has nothing to do with this case whatsoever. There is a great deal of evidence shewing the kind hearted nature and good character of the accused. That may be a mitigating circumstance but has nothing to do with the charges against him and nothing to do with your duty. Your duty as sworn jurymen is simply to judge of this case according to the evidence that has been placed before you regardless of what the results may be. There is no sentimentality in the jury box, no more than on the Judge's bench. You must not be governed by sentiment, you must be governed by hard facts. You have sworn to do your duty and you will do that duty irrespective of what these sentiments may be.

If there is any reasonable doubt in your minds as to the intention, or any reasonable doubt that these words were made use of—if there is a possibility that these witnesses, in their patriotic zeal and full fledged loyalty, might have misunderstood the accused—Briggs in particular says that he went there to test this man's loyalty, that after his having found out that fact, that he drove him into making use of expressions that he otherwise would not have made use of—if you think that is possible, give him the benefit of it, if he was provoked to make use of this language, provoked by these gentlemen who approached him in aid of the Patriotic Fund. And while mentioning this patriotic fund, a great deal of weight and a great deal of evidence has been attached to his refusal, intimating that this has been strong evidence of his disloyalty. Gentlemen, I am sure I need not warn you not to be guided by anything of that kind. He is entitled to his own opinion as to how he is to spend his money. He is entitled to refuse any appeal for patriotic aid. That is his own business. We have nothing to do with it. Because he refused to contribute, do not, on that account, find him guilty

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of the offences with which he is charged. Pay no attention to that part of it. Be governed solely by the evidence. Did he or did he not make use of the language attributed to him and with which he is charged, and if he did, were these words calculated to create public disorder.

You are the sole judges in the matter, gentlemen. The responsibility is entirely yours and I am convinced that you will do what is right in the matter. You may retire and consider your verdict.

You may take the indictment with you. Do not make any memoranda on it. You can take it in order to read the different charges.

The jury found the accused guilty on the first two counts, and not guilty on the third.

W. H. Trueman, K.C., for accused.

A. McLeod, K.C., for the Crown.

Howell, C.J.M.

HOWELL, C.J. said that a new trial would not be ordered because of the admission of Atkinson's evidence.

Upon the question as to whether or not there was evidence of seditious intent he believed there was, and that the question was properly left to the jury.

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

CAMERON and HAGGART, JJ.A., concurred.

Richards, J.A.

RICHARDS, J.A.:—Section 132 of the Code may have eliminated the necessity of proving seditious intent. If it is necessary to prove it I will say that if I had been a juror I would have found the accused not guilty. I, however, think the question was one for the jury. I also think that the charge was fair.

Perdue, J.A.

PERDUE, J.A., dissented, holding that there was no evidence of seditious intent. *Conviction affirmed.*

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Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Lennox, and Masten, JJ. November 3, 1916.

MASTER AND SERVANT (§ II A—35)—HEALTH AND SANITATION—NEGLIGENCE—PROXIMATE CAUSE.

If the negligence of a master causes a decrease in the disease-resisting power of a servant, the master is only liable for damage caused to the servant by an ailment when the negligence is shown to be the proximate cause thereof.

Statement.

APPEAL by the defendants from the judgment of Latchford, J., upon the findings of a jury, in favour of the plaintiff, for the

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recovery from the defendants of $3,000 damages and the costs of the action.

The plaintiff worked for the defendants in their factory from 1888 to 1914, with two short intervals. His claim was for injury to his health by reason of the insanitary condition of the factory.

Statement.

The questions left to the jury and their answers were as follows:—

1. Was the disease from which the plaintiff suffers the reasonable and probable consequence of any negligence on the part of the defendants? A. Yes.

2. If so, in what did such negligence consist? (Answer fully). A. By not taking proper and reasonable precautions by some mechanical or other device for disposing of fumes and dust.

3. Did the plaintiff voluntarily incur the risks incident to his employment with the defendants? A. No.

4. What is the amount of the damages sustained by the plaintiff? A. $3,000.

H. E. Rose, K.C., for appellants.

T. N. Phelan, for plaintiff, respondent.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—A perusal of all of the reporter's notes of the trial of this action makes it very plain that, excepting in one respect, nothing was left unsaid upon the argument of this appeal that could be helpful to either party, and that the ground taken by Mr. Phelan in the plaintiff's behalf then—differing from that taken at the trial—and that ground only, gave any support to an argument in favour of the plaintiff's right to recover in this action; and that the most that could be made of that ground was made by him in the plaintiff's behalf. Yet I am of the opinion that the action is a hopeless one, if it be dealt with, as it must be, according to the law only.

The plaintiff is by trade a jewellery polisher, and as such worked for the defendants, and those whom they succeeded in carrying on the business which is now carried on by them, from the year 1888 to the year 1914, with the exception of one or two intervals of comparatively short duration; certainly one beginning in the year 1896 and lasting a year and a half, owing to illness from which, as he testified, he had recovered so well that before going back to the work of his trade again he had worked "with pick and shovel for two months." This illness he described in

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examination in chief as "inflammation of the stomach." Throughout his employment by the defendants, and those whom they succeeded in the business, the plaintiff seems to have had, as he certainly had most of the time, the position of foreman of the polishers.

He left the defendants' employment finally in the year 1914, in consequence of a hæmorrhage of the lungs; and then, as he testified, for the first time learned that he had that wide-spread disease now-a-days commonly called tuberculosis, but better defined in this case by the older name consumption or phthisis, the seat of the disease being in his lungs; and he is now said to be in an advanced stage of that disease.

The case was tried by a jury, and they found that this disease was "the reasonable and probable consequence" of the negligence of the defendants in "not taking proper and reasonable precautions by some mechanical or other device for disposing of fumes and dust."

For the defendants it is now contended that no evidence was adduced at the trial upon which reasonable men could find that the plaintiff's present state of illness was caused by the breach of any duty the defendants owed to him. No observation was made regarding the peculiar form of the verdict.

The ground which Mr. Phelan now takes in support of the verdict is not that the disease was directly lodged in the plaintiff's body through any want of care on the defendants' part, but that their business was carried on in breach of their duty to take reasonable care of their servants, and that that breach of duty, as found by the jury, was so long-continued as to lower the man's vitality, and in consequence of such lowered vitality the germs of this disease were able to find a lodgment in his body and to begin and carry on to its present stage their destructive work, and all also that may follow.

The proposition put plainly is this: that in all cases in which the negligence of a master lowers the disease-resisting power of a servant, the master is answerable in damages for the loss sustained by the servant through any and every ailment that flesh is heir to, attributable to impaired resisting power so caused.

Speaking generally, perhaps no fault can be found with that proposition, provided that the negligence is the proximate, not a

remote, cause of the injury; the difficulty lies in the proof, which should be convincing.

Such cases as *Morrison* v. *Père Marquette R.R. Co.*, 12 D.L.R. 344, *Coyle or Brown* v. *John Watson Limited*, [1915] A.C. 1, and *Glasgow Coal Co.* v. *Welsh*, [1916] 2 A.C. 1, are cases of proof: see also *Kerr or Lendrum* v. *Ayr Steam Shipping Co.*, [1915] A.C. 217; the disease followed hard upon the negligence which quickly caused the physical depression; but there may be cases in which proof may be impossible, and this case may be one of them, or may be one in which complete proof would shew no cause of action. However that may be, it is quite certain that the plaintiff might have given much more evidence than was adduced in his behalf on this question. And I must add that cases decided under workmen's compensation legislation must be applied with care to such a case as this, in which common law rights only are involved, it being said in the highest British tribunal that "the distinction of proximate from remote cause is not to be vigorously pressed in the application of the Workmen's Compensation Act."

In all cases tried by a jury there must be such evidence, on the question of proximate cause as well as of negligence, that reasonable men could conscientiously find both; and short of such evidence the action should be dismissed without going to the jury for determination in any respect; and, having regard to the great number of other possible causes, in such a case as this, there should be no laxity in the performance of the duties of the trial Judge upon the question whether there is or is not evidence to go to the jury.

If the plaintiff in such a case as this can recover, so, too, could a plaintiff, no matter what the injury said to have been sustained through the lowered resistance might be, whether headache, stomachache, typhoid fever, or any other of the thousand and one possible injurious effects; and if, upon evidence such as that adduced in this case, a plaintiff could always go to a generally sympathetic jury, cases of this kind would be very numerous; yet the plaintiff has not been able to point to a successful one.

The defendants contend that there was no evidence to go to the jury either upon the question of negligence or of the proximate

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cause of the plaintiff's condition; but, as the latter is perhaps the stronger of these two grounds of appeal—at all events has throughout been treated as such—it may be as well to deal with it first.

The first thing that strikes me as to it is the paucity of the testimony, in the plaintiff's behalf, adduced with a view to connecting the admitted illness with the alleged cause of it. The plaintiff's family physician alone was called to give professional evidence upon the subject; and he was not asked even to state that, in his opinion, the negligence complained of was the cause of the plaintiff's present diseased condition. In the circumstances of the case, and having regard to the nature of the disease, it is hardly possible that any intelligent, truthful person could say more than this witness did in his patient's behalf: that the things complained of by the plaintiff would make one more liable to the disease by producing an irritated condition of the throat and that they would interfere with normal resistance, and that the evidence which struck him most was the quantity of dust, and people expectorating who had tuberculosis, that allowing that sputum to dry and become mixed with the dust is an ideal condition for producing tuberculosis and is recognised as the most common cause. But the jury have not found in the plaintiff's favour in the latter respect, though it was alleged as a distinct cause of action; and the evidence did not warrant any such finding; it was, that the floors were swept daily at noon after being first sprinkled with water.

The physician who attended the plaintiff in his illness in 1896-7 was not called to say whether or not it was tubercular in character, though the uncontradicted testimony of a professional witness called for the defence was, as common knowledge is, that the disease the plaintiff now suffers from may be very long-continued or of short duration—from thirty years to a few days this witness said—before causing death in cases where it so ends. It will not do to say that the plaintiff was not called upon to prove a negative; he was relying entirely upon circumstantial evidence, and in his own interests should have excluded as many other possibilities as he could; and, being bound to prove a cause of action arising within six years, should have given evidence upon this subject, and doubtless would have given it if helpful to him.

The evidence at the trial was directed chiefly to gases given

off by chemicals used in the defendants' trade, and dust from a polishing powder also used in the trade, and to the means of carrying off these gases and such dust.

In regard to the gases, the testimony of an eminent chemist called as a witness for the defendants was, speaking generally, that they were practically harmless, as used properly in this trade, and could not well be charged with having any part in bringing about the plaintiff's present condition. And perhaps it may be taken for granted that, if these gases had such an effect as some of the witnesses described, upon human beings, they could hardly have given much aid to a mere germ struggling to penetrate the human being's mucous membrane; and certain it is that some statistics shew that the death-rate of chemists from tuberculosis is extraordinarily low. And in passing I may say that this witness testified that it was impossible that any one could be "lock-jawed," as one of the plaintiff's witnesses testified he was, by the chemical fumes.

So, too, it is common knowledge, in these days, that inanimate dirt does not breed disease, nor is it the lurking place of the germs of disease; but that such germs are bred in animate beings and distributed by those who are possessed of them; and so none, no matter who or what or where they are, can be sure of avoiding them. Also, it is impossible for any reasonable person to say more than it may be that lowered resistance caused by some of the things complained of, or caused by other of very many things which might have a depressing physical defect, may have been a cause of the plaintiff's present diseased condition—and may not have been. Whether too remote a cause in such a case as this need not be considered until proved to be more than a possible or probable cause.

So, too, such evidence as there was upon the subject indicated that the death-rate from tuberculosis of the persons employed in this factory, while the plaintiff was employed there, was a good deal below the death-rate from the same cause throughout the Province.

Therefore, if the jury meant that lack of proper and reasonable precautions by some mechanical device for disposing of fumes and dust was the proximate cause of the plaintiff's disease, I have no hesitation in saying that there was no evidence upon which

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reasonable men could so find: see *Finlay* v. *Guardians of Tullamore Union*, [1914] 2 I.R. 233.

I am also of opinion that there was no evidence upon which reasonable men could find the defendants guilty of actionable negligence towards the plaintiff.

No witness who had any special, or general, knowledge of the subject was called to condemn the defendants' workshop or the manner in which their work, as far as they had control over it, was carried on. Only the plaintiff and two other workmen gave evidence in the plaintiff's behalf on the subject. For nearly a quarter of a century the plaintiff worked there, much if not all of the time as foreman of the work in regard to which the most fault is found by the plaintiff's witnesses; the dust from the polishing. Some complaints were made by him, but few, and chiefly about the misconduct of his fellow-workmen; and it may be added that a good deal of that which is now complained of is attributable to such misconduct, and some was such as the plaintiff himself, as foreman of polishers, would be answerable for.

No action was brought or claim made for the illness of 1896, though he then had a right of action if he now have one. It was always open to him to leave, or to threaten to leave, his employment, as he doubtless would have done if, during all these years, his employers had been guilty of wronging him, and wronging him in a manner that was undermining his health and strength. In this country, in these days, it is not true, and it is doubly unjust, to say that a workman is not a free man because he is in fear of losing his employment or in fear of his master's ill-will if he left or complained. It might just as well be said of the employer that he is not a free man because of fear of losing his workmen, if not more than that, suffering from their ill-will. So, too, it was always open to the plaintiff to complain to the medical officer of health, secretly if he chose, in order to have the premises examined under the provisions of the Public Health Act, so much relied upon by him now.

A master is not bound to provide all the latest devices for the care or benefit of those he employs; he is bound to take reasonable means to protect them from injury in his service; and, if a manufacturing company, such as the defendants are, should take care to have the advice of men as competent as the witnesses

Dr. Ellis and Dr. Ferguson, as to the proper methods of carrying on their business in regard to fumes and dust, and their effect upon the workmen, and should, in good faith, act in accordance with that advice, they assuredly do take reasonable means for the protection of their workmen; and no jury should be permitted to find that they did not, even if a case should arise in which it turned out that such means were not sufficient to prevent a particular injury. The question as to the gases and dust and their effect upon human beings cannot be answered out of common knowledge, but need to be dealt with by those skilled in chemistry and pathology.

In this case such advice was not obtained or sought beforehand, but, these same persons now testifying to the sufficiency of the means which were adopted, is a jury to be permitted to say, without any like evidence to the contrary, in effect, that the defendants must adopt some other method as well as pay $3,000 damages, and without having that which is commonly called "the proof of the pudding"—proof that any disease was really caused by present conditions?

I am in favour of allowing the appeal and directing that the action be dismissed.

Before parting with the case, I feel in duty bound again to call attention to the unwisdom of departing from the usual and well-understood questions submitted to the jury in negligence cases. No point has been raised in this respect—it hardly could be, as all alike are accountable for the form of the questions; all alike having apparently approved of them; at all events no one seems to have disapproved. Yet I feel bound to say that if I had been upon the jury I should not have understood just what the words, "the reasonable and probable consequences" of the "negligence," meant. "A probable consequence" would be plain, but would not be enough, nor would "a reasonable consequence," even if one knew just what was meant by the words "reasonable consequence." "Reasonable" and "probable" are words quite appropriate to some actions, as, for instance, actions for malicious prosecution, but they seem to me to be inappropriate here. "The consequence," if sufficient emphasis were put on the word "the," would be nearer the mark; but why not, "Was any negligence of the defendants the proximate cause of the plaintiff's disease?"

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No one can reasonably deny that in this case, as in all cases of tuberculosis, there is, in one sense, but one cause of it—the germ; but that also, in another sense, there are many, very many, "probable" causes and "reasonable" causes for lowered vitality, but so there may be many of infection without lowered vitality.

LENNOX, J.

LENNOX, J.:—If this is to be treated as a common law action, we have to consider whether, upon the evidence, twelve or ten reasonable men could fairly answer "No" to the question: "Did the plaintiff voluntarily incur the risks incident to his employment with the defendants?" And I am strongly of opinion that the evidence did not support this finding. When the plaintiff returned from England and re-entered the defendants' service, he had consulted with and been advised by his physician as to the probable or possible effect of his doing so, and, with this and his own knowledge of the conditions existing in the defendants' factory, it is quite impossible for any one who looks at the matter fairly and dispassionately to say that he did not then and thereafter know and appreciate and voluntarily assume the risks, if any, he was liable to encounter in the defendants' service. The fact, if it is a fact, that he made occasional complaints does not weaken, but rather emphasises, this conclusion: *Thomas* v. *Quartermaine* (1887), 18 Q.B.D. 685.

The maxim *volenti non fit injuria* does not apply where the plaintiff can establish a cause of action arising out of a breach of a statutory duty: *Baddeley* v. *Earl Granville*, 19 Q.B.D. 423; and Mr. Phelan contends that the Public Health Act, R.S.O. 1914, ch. 218, confers a right of action upon persons injured through infraction of its provisions. It may be so. It is a question in each case whether the Legislature so intended or not.

The Imperial Public Health Act, 1875 (38 & 39 Vict. ch. 35, sec. 66), provided that the position of fire-plugs was to be indicated. No penalty was imposed for default, and in *Dawson & Co.* v. *Bingley Urban Council*, [1911] 2 K.B. 149, it was held that the statute gave a right of action to a party injured. On the other hand, a penalty does not necessarily import a right of action as well, especially if the only penalty is a fine: *Institute of Patent Agents* v. *Lockwood*, [1894] A.C. 347; and again a penalty is not inconsistent with there being a right of action under the statute: *Clarke* v. *Holmes* (1862), 7 H. & N. 937. Section 66

of the Imperial Public Health Act, above referred to, was an enactment primarily for the benefit of the public generally. There is more ground for inferring that a statute securing the safety of a class, even with express penal provisions, also confers a right of action. The question generally, including statutes involving distinct criminal liability, is discussed and cases collected in Halsbury's Laws of England, vol. 21, p. 420 *et seq.*, and the distinction between protection of the public generally and protection of a class is dealt with at pp. 422-3. It is a very interesting question; but, in the view I entertain of this action, it is not necessary for me to decide, and I do not propose to indicate an opinion, as to whether the plaintiff has or has not an independent statutory right of action under the Public Health Act. Statutes are not unalterable, and the point now raised may never have to be determined.

I am of opinion that, whether the remedy is at common law or under the statute, the judgment cannot be upheld, for the plaintiff has failed to shew, rather he has failed to give *evidence*, that the disease he is suffering from, tuberculosis, was occasioned by the defendants' negligence or the alleged condition of their factory or their system of carrying on their operations or business therein. The point is not that, upon the evidence as to how the disease was contracted, I would have come to a different conclusion; it is, and I say it with great respect, that *there was no evidence* as to how or through what agency the disease was contracted—nothing to connect the plaintiff's injuries with the defendants' acts or omissions, assuming that the defendants were negligent. Mr. Phelan's contention that it was not necessary to shew that the germs of tuberculosis were taken into the plaintiff's system in the factory, that he was only called upon to shew that the conditions there lowered the plaintiff's vitality, that the lowered vitality exposed him to attack, and the disease and the defendants' liability resulted, was ingenious, and well and logically reasoned out, and, granted that there was evidence to support the predicated facts, is, I would think, a correct expression of the law. The defendants would in that case be responsible for the natural sequence of events—the negligence would be the efficient cause of it all. Negligence may be the effective cause of an injury, although it may not be the proximate cause at the time: *Romney Marsh Lords Bailiff-Jurats* v. *Trinity House Corporation*

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(1872), L.R. 7 Ex. 247 (Ex. Ch.) It is the effective cause when it has brought about the injury as a direct and natural consequence; and, when the negligence is established as the cause, liability follows for all the natural consequences of it: *Sneesby* v. *Lancashire and Yorkshire R.W. Co.* (1875), 1 Q.B.D. 42 (C.A.); *Habach* v. *Warner* (1623), Cro. Jac. 665; *Smith* v. *London and South-Western R.W. Co.* (1870), L.R. 6 C.P. 14. The fault is not in the argument but the premises, the lack of evidence, not merely the weakness or uncertainty, but absence of evidence, to connect the plaintiff's condition with the defendants' negligence. There must be something beyond mere conjecture, a link strong or weak to connect cause and event. It is not enough to establish a possibility and stop there.

I cannot but regret the result, particularly in this case, where the plaintiff's long service with the same employers indicates a man of exceptionally good character. Sympathy for a deserving man so dreadfully afflicted is inevitable, but impulse must be subjugated in determining the rights of litigants.

The appeal should be allowed and the action dismissed, and with costs if asked.

Riddell, J.

RIDDELL, J.:— I agree in the result.

Masten, J.

MASTEN, J.:—This case was presented before us with great skill and ability by counsel on both sides, and the Court has thereby been greatly aided in reaching a conclusion.

I am of opinion that the appeal must be allowed, and base my opinion on the absence of evidence to establish a causal connection between the alleged failure of the defendants to furnish "proper and reasonable precautions by some mechanical or other device for disposing of fumes and dirt," and the condition of ill-health from which the plaintiff is suffering as a result.

On the argument before us, counsel for the plaintiff very ably and ingeniously put his case on the footing, not that there was evidence that the plaintiff became infected with the germs of tuberculosis in the defendants' factory through the conditions there existing, but on the ground that by such conditions the plaintiff's vitality was lowered and his vigour so undermined that he became incapable of resisting the inroads of these ever-present bacilli; in other words, that the defendants deprived the plaintiff of the power of saving himself. The jury were asked: "1. Was the disease from which the plaintiff suffers the reason-

able and probable consequence of any negligence on the part of the defendants? A. Yes."

I can find no evidence to support that finding. Assuming that the defendants' factory came within the purview of the Public Health Act, R.S.O. 1914, ch. 218, secs. 73 and 74, clause (*i*), as a factory which was not ventilated in such a manner as to render harmless as far as practicable any gases, vapours, dust or other impurities generated therein which are injurious or dangerous to health, and that a condition existed in the factory which was a nuisance, yet there is no proof that such nuisance occasioned the plaintiff's present condition. The most that can be said is, that while the plaintiff was working in a place where this nuisance existed he sickened.

It is a case of two things occurring simultaneously and in juxtaposition, without any proof that the one is the cause of the other.

Not only is there no evidence that the plaintiff's condition was the result of conditions in the factory, but the one admitted fact points strongly in the opposite direction, viz., that from 1898 till 1912, during a period of fourteen years, the plaintiff worked in this very factory and was throughout in good health.

I refer to the plaintiff's evidence at pp. 8 and 9, where he says:—

"Q. And your condition from 1897 until 1912, fifteen years—what was your condition of health? A. Good.

"Q. Ever have any illness during that period at all? A. Only simple things.

"Q. What is that? A. No illness; not until these pains started.

"Q. Any cough? A. Yes; the cough started with the pain about 1912."

And at pp. 19 and 20 as follows:—

"Q. How long were you there, after your return from England, before you thought your health was at all impaired? A. 1912 and 1913 was the worst for the pains.

"Q. Did you work from 1898 to 1912 or 1913 without observing that either the fumes or the dust or anything else had affected your health? A. Yes.

"Q. So it was only in 1912 or 1913 that you observed any ill effect from the work you had been doing or the conditions that existed? A. Yes.

"Q. During all those years, 1898 to 1912—that is, fourteen

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years—you worked down there without thinking that your health was being impaired to any extent? A. Yes."

It is suggested that about 1912 the conditions changed so that the alleged harmful conditions became more accentuated; but I fail to find evidence to support such a contention.

It thus appears that not only is there no evidence that the conditions complained of by the plaintiff produced tuberculosis in his system or lowered his vitality so that he was unable to resist the disease, but, on the contrary, the evidence is that for fourteen years he retained good health under these same conditions; and, that being so, I fail to see how, in the absence of any positive and direct proof, there is any basis on which the jury could attribute to these conditions the disease which he first contracted after the lapse of fourteen years. If the facts so warranted, evidence might have been given that these conditions had produced an abnormal number of cases of tuberculosis among the other 250 employees of the establishment, but no such evidence is adduced.

It therefore seems to me that there is no evidence on which the jury could reasonably find that the disease from which the plaintiff suffers is the reasonable and probable consequence of any negligence on the part of the defendants.

The appeal must be allowed and the action dismissed.

Appeal allowed.

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ARSENAULT v. PIUSE.

Quebec Superior Court, McCorkill, J. August 15, 1916.

MILITIA (§ I—5)—ENLISTMENT OF MINORS—HABEAS CORPUS.

Under art. 243 C. C. (Que.) a son remains subject to the parents' authority until majority or emancipation, and though under the Militia Act (R.S.C. 1906, ch. 41) all male inhabitants of Canada between 18 and 60 years of age are liable to serve in the militia, the minor son of a person domiciled in Quebec cannot enlist voluntarily in the active militia without the consent of his father; and upon the application of the father will be discharged upon *habeas corpus* proceedings if he has so enlisted.

[*Hollnow* v. *Cotton* (1882), 9 Q.L.R. 105, distinguished; see also *Re Fournier* post.]

Statement.

HABEAS CORPUS for the release of petitioner's son, a minor, from military service. Granted.

A. Lavergne, for petitioner; *G. Barclay*, for respondent.

McCorkill, J.

MCCORKILL, J.:—Adélard Arsenault, son of the petitioner, aged over 18 years, enlisted on April 26 last, with the petitioner's consent, as a bandsman or bugler in the 189th Battalion, which is being organized and recruited for service overseas, and which

is now at Valcartier Camp. The headquarters of this battalion, prior to about June 1, was at Fraserville, district of Kamouraska.

Petitioner has applied for the issue of a writ of *habeas corpus ad subjiciendum* addressed to the respondent, who is the commanding officer of the 189th Battalion, requiring him to produce the person of his said son before one of the Judges of the Superior Court of this district, and to show cause and justify, to the satisfaction of the Judge, why he detained his said son; and in default thereof, that his son be set at liberty.

The grounds for the petitioner's demand are set forth in the following paragraphs:—

That his said son has been enlisted under false representations, under the express promise that he would not serve outside the country, and that, without this promise, your petitioner would never have given his consent to the enlistment of his said son.

That the 189th Regiment is leaving in a short time for Europe, and that said A. Arsenault is detained against his will and against the consent of your petitioner;

Moreover, said A. Arsenault is unfit for military service, he has already been refused and he cannot pass medical examination considering his bad health, and more especially because he is suffering from tuberculosis and has not the thumb and the forefinger of the right hand.

This petition was supported by the affidavit of the petitioner and the *habeas corpus* prayed for was ordered to issue.

With the return of the writ of *habeas corpus* the respondent declared in writing that he does not illegally detain said A. Arsenault, and that he is merely the officer commanding the regiment in which the said A. Arsenault enlisted, of his own free will, and voluntarily contracted with His Majesty the King to serve as a soldier subject to military law.

In answer to this declaration of the respondent petitioner alleged: That his said son was and is a minor, subject to the paternal authority of petitioner, and that he, personally, was incapable, without the consent and approval of petitioner, of consenting to enlist as a soldier in said battalion; that the petitioner never consented to his son's enlistment, except under the express condition set forth in a writing, as follows:—

Enlistment in the bugle band of the 189th Regiment, Fraserville, P.Q.

Conditions: I, the undersigned, bind myself to be a member of the 189th Regiment of Fraserville, but to be a member of the band or Bugle Company only, for service here in Canada; and if I wish to go overseas with this Regiment, I will be free to go or not. (Signed)

That said condition of home service in the band was merely

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a subterfuge to procure his son's subsequent enlistment in the 189th Battalion for service overseas; that, because of the illness and infirmity of his said son, he never passed the medical examination required by par. 243 of the King's Regulations for the Canadian Militia; that the respondent had no right or authority to administer oath to soldiers, as he had never taken the oath required under par. 248 of said King's Regulations; that A. Arsenault was therefore never legally sworn and cannot be considered a duly enlisted soldier; that the 189th Battalion has no legal existence; that A. Arsenault has often demanded his liberation from said military service, under par. 322, sec. 9, of said Regulations; that the respondent was specially put in default by a letter of July 6, 1916 (the original of which is in the respondent's possession), to grant to the petitioner's said son, his liberty and discharge from said service; that the respondent entirely ignored said demands; that petitioner's son is, therefore, liable to military service which would certainly be fatal to him, considering his poor health and infirmity; that said A. Arsenault is being deprived of his liberty as a British subject, against his will and against the will and without the consent of the petitioner, at Valcartier Camp, and that the only remedy which petitioner has of obtaining his said son's release and discharge therefrom, is by means of a writ of *habeas corpus ad subjiciendum*. And he concludes that a writ of *habeas corpus* be issued in this case, addressed to the respondent who is illegally detaining said minor soldier, requiring him to shew cause for said detention; that the enrolment of said A. Arsenault as a soldier in the 189th Battalion be declared null, void, and of no effect, and that he be set at liberty, with costs.

In answer to the petitioner's reply to the respondent's declaration, the respondent alleges:—that the petitioner's consent was unnecessary to the enlistment of his said son; that the son was examined and passed as medically fit by the regimental doctor and by a medical board; and he denies all the other allegations of said reply.

It appears that Major Fecteau, second in command of the 189th Battalion, dictated to one of the clerks of said battalion the conditions of enrolment as a bandsman or bugler for service in Canada, as above-mentioned. They were typewritten on a sheet of foolscap. On the reverse side of the sheet appear the

names and signatures of several persons, including that of the petitioner's son. At the bottom of the page are written the names, as witnesses, of the following soldiers: Emile Costin, etc.

This document clearly shews that plaintiff's son consented to become a member of the band of the 189th Battalion for service in Canada (*pour devoir en Canada*).

Subsequently, on March 30, the boy signed a regular enlistment contract, which said nothing about service in Canada; it was, in fact, for service overseas in the present European war. Major Fecteau and other soldiers explained that this system was adopted because they were more likely to get men to sign for overseas service, after they had first become identified with, and were in the ranks of the battalion for service in Canada, at Fraserville, where the recruiting was then in progress.

At the argument, the respondent's counsel strongly objected, supported by authority, that, this being a military matter, this Court should not interfere with the enlistment, unless and until the petitioner has exhausted all reasonable proceedings to obtain the liberation of his son, before the military authorities.

In a case of *Holbrow* v. *Cotton* (1882), 9 Q.L.R. 105, it was held that: "All matters of complaint of a purely military character are to be confined to the military authorities."

The late Meredith, J., who rendered the judgment in the case, remarked:—

> As between the parties in this cause, it appears to me unimportant for what purpose he enlisted. As soon as he did enlist and received the Queen's pay, he became subject to military discipline, whether he discharged the ordinary duties of a soldier or was otherwise employed by the military authorities. It was also contended by the plaintiff that he was not subject to military discipline, because he had not been legally sworn, the officer by whom he was sworn having been sworn by an officer who, himself, had not been sworn. (Identical with one of the petitioner's objections in this case. The Judge proceeds.) I do not think that objection of any importance although it might be different if the object of these proceedings were to compel the plaintiff to remain a soldier.

Is the question involved in this case of a purely military character or, using the words of Meredith, J., does it involve the question of Arsenault being compelled to remain a soldier? Apparently, a vast distinction was made between a question of discipline and duty in a regiment and the compelling of a soldier to remain in the regiment against his consent.

A large number of authorities are cited by the distinguished

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Judge, in the course of his judgment notes, in support of his holding that the civil Courts should not interfere in military matters, if they merely involve a question of discipline.

This case involves the question of the liberty of a British subject. It answers exactly to the exception made by Meredith, J., in the words: "It might be different, if the object of these proceedings were to compel the plaintiff to remain a soldier."

Without at the moment pronouncing upon petitioner's right, as the father of the soldier in question, to petition on his behalf, I am of opinion that he was quite within his rights in applying, in the first instance, for redress to the Superior Court, by way of a writ of *habeas corpus*. The questions involved in the case are not of a purely military character, and it will be seen in discussing the question of the petitioner's right to move on behalf of his son, that a military Court would be quite incompetent to adjudicate thereon.

Petitioner contends that, as his son is only 19 years of age, he could not enlist for military service, abroad or at home, without his (petitioner's) consent. Respondent answers the father's consent was unnecessary. Both parties rely on sec. 10 of the Militia Act, R.S.C. 1906, ch. 41, which reads as follows:—

All the male inhabitants of Canada, of the age of eighteen years and upwards, and under sixty, not exempt or disqualified by law, and being British subjects, shall be liable to service in the Militia; Provided that the Governor-General may require all the male inhabitants of Canada capable of bearing arms, to serve in the case of a *levée en masse*. Nothing in this section shall prevent any male inhabitant of Canada, under the age of eighteen years, enlisting as a bugler, trumpeter or drummer.

Petitioner cites sec. 92 of the B.N.A. Act, sub-sec. 13:—

In each province the legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated; that is to say: . .

13. Property and civil rights in the Province.

Respondent relies on sec. 91 of the same Act, which has reference to the powers of the Dominion Parliament; it reads:—

. . The exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated; that is to say: . . 7. Militia, Military and Naval Service, and Defence.

Among the civil rights which come within the jurisdiction of the Legislature of the Province of Quebec are those mentioned in our Civil Code; one of them is dealt with under the title "Of Paternal Authority." Art. 243 C.C. enacts that "the son re-

mains subject to the parent's authority until his majority or his emancipation," and 244 C.C. declares that "an unemancipated minor cannot leave his father's house without his permission."

Respondent contends that sec. 91, sub-sec. 7. of the B.N.A. Act, and sec. 10 of the Militia Act create an exception to this rule, and that the parents' consent is not necessary for military service.

Petitioner's counsel does not deny that such an exception is established under these authorities, but only when there is a *levée en masse*, and compulsory service has been called for, as mentioned in the proviso of the section; that is:—

Provided that the Governor-General may require all the male inhabitants of Canada, capable of bearing arms, to serve in the case of a *levée en masse*.

There is a vast difference between voluntary service and compulsory service. If the government of the day finds it necessary to make every one, who is fit, between the ages of 18 and 60, to do military service, minors between 18 and 21 years of age are subject to such service, even as against the wishes of their parents, as their wills must be subordinate to the public interest. There is no such reason for the subordination of their wills where the public interest is not involved, and where their minor sons, over 18 years of age, are not required, by law or by the Governor-General, to render service. I am of opinion, therefore, that the petitioner's consent, that his son should enlist for overseas service, was absolutely necessary.

The detention of the petitioner's son being unjustifiable and illegal, because the petitioner never consented to it, he should be granted his liberty and be discharged from further military service; and judgment, therefore, goes in favour of the petitioner. The writ is maintained and the respondent is ordered to forthwith discharge the soldier in question from further military service in the 189th Battalion. *Writ granted.*

ADVANCE RUMELY THRESHER CO. v. LACLAIR.

Alberta Supreme Court, Appellate Division, Scott, Stuart, Beck and Walsh, JJ. December 3, 1916.

1. MOTIONS AND ORDERS (§ I—4)—AFFIDAVIT—PERSONAL KNOWLEDGE—AGENT OF CORPORATION.

An affidavit in support of a motion for judgment under r. 275 (Alta.) is not defective because "on the merits" is added to the denial of any defence; a manager of a company can as such have such personal knowledge as the rule requires although he may not have been an actual witness to all the transactions involved in a debt.

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2. PLEADING (§ III D—325)—AFFIDAVIT OF DEFENCE TO MOTION FOR JUDGMENT—SUFFICIENCY.

The grounds of defence must be disclosed in an affidavit under r. 276 (Alta.) on the hearing of a motion for judgment, and a mere statement that the defendant has a good defence on the merits is not sufficient.

APPEAL by defendants from an order of Hyndman, J., dismissing an appeal from a Master's order. Affirmed.

A. M. Sinclair for appellants; *A. H. Clarke*, K.C., for respondent.

The judgment of the Court was delivered by

Stuart, J.

STUART, J.:—This is an appeal from an order of Hyndman, J., in Chambers dismissing an appeal from the Master's order giving the plaintiffs leave to enter final judgment for the amount of their claim.

The plaintiffs' claim alleges that by an agreement in writing dated September 24, 1913, the defendant agreed to purchase from a company called the Rumely Products Co. (Inc.) certain machinery for the sum of $3,906.50, payable $500 in cash, $1,703.50 on November 1, 1914, and $1,703 on November 1, 1915, with interest at 7% before maturity and 10% after maturity until paid It further alleges that by an agreement in writing of December 18, 1913, the defendants agreed to purchase from the Rumely Products Co. certain other machinery for the sum of $3,600 and the delivery back of a certain engine, the money to be paid in 4 equal annual instalments on the 1st days of November in 1914, 1915, 1916, and 1917, with interest as in the other case. It is alleged further that by an agreement in writing of August 15, 1914, the defendants agreed to purchase from the same company certain machinery for the sum of $1,660, payable in certain small instalments with interest as before. It further alleged that by an agreement of October 6, 1914, the defendants agreed to purchase from the same company a plow for the sum of $104.50, payable on October 1, 1915, with interest as before.

The claim also alleged the delivery of the machinery referred to and the signing by the defendants of promissory notes for various payments agreed upon, and that the defendants made waiver of presentment and notice of dishonour. The claim then alleged that before the maturity of the various notes the Rumely Products Co. did for valuable consideration, negotiate the said notes to the M. Rumely Co. (Inc.) and assigned to that company all its right, title and interest in the agreements of purchase,

It further alleged that by virtue of an order of a Judge of the District Court of the United States for the District of Indiana, in a certain action wherein the M. Rumely Co. were defendants, one Finley P. Mount was appointed receiver of that company, that by a bill of sale dated May 29, 1915, the M. Rumely Co. for valuable consideration did sell, transfer, assign and deliver to the plaintiff company as receiver for the M. Rumely Co. all the assets of the latter company including notes, bills, drafts, and bills of sale, etc., and that notice of this assignment was given to the defendants. It also alleges a similar assignment by Mount to the plaintiffs and notice thereof to the defendants. The claim then set forth certain payments made by the defendants and the various defaults in payment made by them and also that by virtue of an acceleration clause in the agreements above referred all the notes and moneys secured thereby had become due and payable. The pleading then closes by claiming judgment for 11 different sums in respect of the various payments agreed to be made and the notes given therefor.

The defendants in the defence deny specifically all the allegations of the statement of claim. Then in the alternative the defendants alleged that they were induced to enter into the various agreements by misrepresentation of the agent or agents of the Rumely Products Co., but the misrepresentations are not specified at all. In the further alternative they allege that the covenants, stipulations and conditions contained in the agreements are under all the facts and circumstances of the case unreasonable, and not binding upon the defendants, but no particular covenant or condition is specified as being unreasonable. In the further alternative the defendants allege what are apparently supposed violations of warranties either expressed or implied in regard to the condition, construction and workmanship of the material. The defendants also plead the Farm Machinery Act, and that they have made payment for the notes.

By counterclaim the defendant asks for damages for misrepresentation and breach of contract in the sum of $3,000.

On June 16, 1916, the plaintiffs gave notice of motion for leave to sign judgment, and also in the alternative for directions and particulars, and for an extension of time to file a reply to the defence to the counterclaim. This motion was supported by an

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affidavit of one Benedict, who stated that he was the manager of the plaintiff company for the Province of Alberta, with his office at Calgary, and that he had a personal knowledge of the matters deposed to. He then stated that the plaintiff company was incorporated in Indiana, where its head office was, and that it was registered in Alberta. He then goes on and repeats in detail the allegations of the statement of claim with respect of course to many of which he really could not have had much if any actual personal knowledge. He then swears "that there is now due and owing by the defendants to the plaintiff the sum of $7,032.43 of which amount the sum of $4,430.29 is past due and in arrears." The explanation of the apparent inconsistency in this statement no doubt is that the whole sum was due by virtue of the acceleration clause, but that the smaller sum was overdue aside from that. He also swears that he had considerable business negotiations with the defendants, and that neither of them had ever made any complaint about misrepresentations nor about the material, construction or design of the machinery or about defects therein, but on the contrary had spoken of the machinery working satisfactorily. He states also that there had been negotiations with the giving of security by the defendants in view, but these had gone off through the final refusal of the defendants to sign, and also that subsequently to the issue of the statement of claim the defendant A. T. Laclair had offered to pay $1,000 on account and execute the security if an extension of time for the balance were given, which offer was refused by the plaintiffs. Finally he swears that in his belief the defendants have no defence to the action on the merits, and that the defence which has been filed on their behalf has been filed for the purpose of delay only.

Upon the return of the motion the defendants filed no affidavit at all, contenting themselves with objecting to the sufficiency of the plaintiff's material, and asking for a cross-examination of Benedict. This examination took place, and thereafter Benedict made another affidavit in which he swears that he had had several interviews and telephone conversations with the defendant A. T. Laclair, and that in conversation both before and after commencement of the action A. T. Laclair had in deponent's office promised to pay the balance during the fall of 1915 provided an extension of time were granted upon all past due paper until

that time, and that A. T. Laclair had at least on two occasions at personal interviews and once over the telephone promised to give an assignment of a chattel mortgage as security for the balance remaining after the payment of the $1,000.

The defendants at last filed an affidavit in answer to the last affidavit of Benedict. In this A. T. Laclair states that he had several interviews with Benedict with reference to settlement, and without prejudice promised to pay the plaintiff $1,000 in cash "and the balance of the indebtedness would be due in the fall," that he had made this offer *bonâ fide* and to prevent litigation, that he had not promised to pay the full balance not falling due in the fall of 1916 in the fall of that year, and denies Benedict's allegations in that regard. He denies that he had promised to give collateral security, states that Benedict had tried to get him to sign a transfer of mortgage without success, that it is not true that he had never made any complaint about the machinery, and that he has "since" been compelled to buy other machinery "which would perform work which the plaintiff's machinery could not perform." He concludes by stating "I have a good defence to this action on the merits."

Rule 276 says that:—

upon the hearing of the motion unless the defendant by affidavit or his *viva voce* evidence or otherwise shall satisfy the Judge that he has a good defence to the action on the merits or disclose such facts as may be deemed sufficient to entitle him to defend or shall bring into Court the amount verified, the Judge may direct that judgment be entered accordingly.

One point involved in the appeal is whether the defendants have complied with this rule. In my opinion there is nothing in the affidavit of the defendant A. T. Laclair which complies with the rule. The mere statement that he has a good defence on the merits, though it may suffice to support an application for security for costs is not enough to obtain unconditional leave to defend. The defence must be *disclosed* by the evidence either by affidavit or by *viva voce* evidence or otherwise. The affidavit merely denies the making of certain statements or offers which were advanced by the plaintiff as evidence of admission of liability and also denies the absence of complaints about the machine. It sets forth no complaint and no ground of complaint. It does not pretend to verify the allegations of the defence, neither the denials nor the affirmations therein. The peculiar paragraph wherein it is stated that the deponent A. T. Laclair has "since

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been compelled to purchase other machinery which could perform the work which the plaintiff's machinery could not perform" is not, in my opinion, sufficient to raise "a fair probability of a defence" which, no doubt, would be enough (*Manger* v. *Cash*, 5 T.L.R. 271). The defendant's affidavit must "condescend to particulars," "sufficient facts and particulars must be given to shew that there is a *bonâ fide* defence" Annual Pr. 1917, p. 167, *Wallingford* v. *Mutual Society*, 5 App. Cas. 685, at 704.

The only other material to which the defendant can have recourse is the cross-examination of Benedict on his affidavit. A perusal of that examination shews that it does not contain a single statement which would raise any doubt as to the truth of the essential allegations in the statement of claim or suggest any ground of defence. Indeed, the real purpose of the cross-examination was a different one altogether. That purpose obviously was to shew that Benedict could not properly make the affidavit which he did make. It revealed that he had spoken upon information and belief in many respects, but that is a matter to be dealt with on the other branch of the case. It revealed no facts at all which could be said to suggest "a fair or reasonable ground of defence."

I think, therefore, the defendants have not complied with the terms of r. 276.

Next we come to the objection that the plaintiffs in launching their motion have not themselves complied with the terms of r. 275. That rule says that the affidavits in support of the motion for judgment must be made by the plaintiff himself or "any other person who can swear positively to the debt," and it must verify the cause of action and amount claimed, and state that in the belief of the deponent there is no defence thereto.

The affidavit of Benedict states that in his belief there is no defence to the action "on the merits." I was at first inclined to think that the addition of the words "on the merits," which are not in the rule, rendered the affidavit defective, but no point was made of this on the argument, and in an Irish case, *Manning* v. *Moriarty*, 12 L.R. Ir., 372, it was decided this was not fatal to the application. For myself I see no reason why it should be.

The deponent Benedict stated that he was manager for Alberta of the plaintiff company. I think that fact itself is sufficient to

give him authority to make the affidavit. It was contended, however, that he had no personal knowledge of the matters deposed to. That depends, of course, on what exactly is meant by personal knowledge. I do not think it means that he must have been an actual witness of the execution of all the documents he refers to in his affidavit. He does produce the agreements and the notes with what purports to be the defendants' signature upon them. He does swear to conversations with one of the defendants in which there was a tacit admission of the signatures. Upon such an application as this I think that is sufficient. Neither do I think it necessary that the deponent should have personally conducted all collections and bookkeeping of the company in order to sufficiently verify the debt. He, as manager of the company, has access to all the books of account. That is surely sufficient to shew his means of knowledge and justifies his making such an affidavit. The promissory notes are produced and bear what purports to be proper endorsements from the Rumely Products Co. to the M. Rumely Co. and from the latter to the plaintiffs. The only possibility of a defence in these circumstances would lie in a contention that the plaintiffs are not the holders of the notes. This seems to be clearly met by the fact that the defendants by negotiations with the plaintiffs for a settlement recognized that the plaintiffs were the holders.

It was also contended that the Master had no jurisdiction to give leave to enter final judgment. This question was dealt with by the Chief Justice in *Polson Iron Works* v. *Munns*, 24 D.L.R. 18 (annotated). I think that decision was correct. It is to be remembered that the jurisdiction of the Master is not given by statute although the office is provided for in that way. The jurisdiction is given by the Rules of Court which are the rules of procedure only. It simply amounts to this, that by rules of procedure certain matters are referred to the Master to decide. The judgment entered is not the judgment of the Master, but the judgment of the Court arrived at by means of certain rules of procedure. These matters can always be taken to a Judge if any party so desires, and the hearing by the Judge though called an appeal is really merely a review and a rehearing. In this case the decision of the Master was confirmed by a Judge, and even another affidavit was introduced before the Judge for the first time. In view of the decision in *Polson Iron Works* v. *Munns*,

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and of these considerations I have mentioned, it would appear that we ought to hear no more of this objection.

The appeal should be dismissed with costs.

Appeal dismissed.

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CARRUTHERS v. SCHMIDT.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Davies, Idington, Anglin and Brodeur, JJ. October 24, 1916.

CONTRACTS (§ I E—67)—PAROL EVIDENCE—COMMERCIAL MATTERS—BROKER'S TRANSACTIONS.

In making purchases and sales of goods for clients, brokers act as agents, and the transactions are not contracts for the sale of goods, which are required to be proved by writing, but are such commercial matters as may be proved, under the Civil Code (Que.), by parol evidence.

Statement.

APPEAL from the judgment of the Court of King's Bench, appeal side, 24 D.L.R. 729, 24 Que. K.B. 151, affirming the judgment of the Superior Court, District of Montreal, by which the plaintiffs' action was dismissed with costs. Reversed.

The plaintiffs, who were brokers and members of the Montreal Corn Exchange, were instructed by the defendant to purchase oats for future delivery and sale on his account in anticipation of a rise in the market. The plaintiffs carried out several transactions, according to alleged instructions, which resulted in a net loss, and brought the action to recover the balance claimed to be due on settlements and for commission and outlay for freight and storage charges. The action was dismissed by the Superior Court on the ground that the plaintiffs had failed to adduce evidence of any memorandum in writing signed by the defendant, or by the customary brokers' bought-and-sold notes, shewing the actual purchase of the oats and their authority to make the purchases and sales on the defendant's account. This decision was affirmed by the judgment now appealed from.

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

R. C. Smith, K.C., and *George H. Montgomery*, K.C., for appellants; *A. W. Atwater*, K.C., and *Mailhiot*, for respondent.

Fitzpatrick, C.J.

FITZPATRICK, C.J.:—The only point for our decision in this case is whether the plaintiff, the present appellant, was entitled to give oral evidence as to the transactions which the respondent commissioned them to carry out on his behalf.

In a number of similar cases, including the case in the Privy Council of *Forget* v. *Baxter*, [1900] A.C. 467, it has been pointed out that the onus is upon the plaintiff to prove, first, a mandate

from the defendant to act for him in the several transactions which the plaintiff claims to have carried out on his behalf; and, secondly, the due execution of that mandate.

Arts. 1233 and 1235 of the Civil Code, which are both in section III. of ch. 9, are, so far as is material, as follows:—

1233. Proof may be made by testimony—

(1) Of all facts concerning commercial matters.

(7) In cases in which there is a commencement of proof in writing.

In all other matters proof must be made by writing or by oath of the adverse party.

The whole, nevertheless, subject to the exceptions and limitations specially declared in this section and to the provisions contained in article 1690.

1235. In commercial matters . . no action or exception can be maintained against any party or his representatives unless there is a writing signed by the former, in the following cases—

(4) Upon any contract for the sale of goods unless the buyer has accepted or received part of the goods or given something in earnest to bind the bargain.

As stated by the Chief Justice, delivering the judgment appealed from, it has been held by the Courts of the Province of Quebec in similar cases that though the broker's authority may be proved by verbal testimony, yet art. 1235 C.C. requires the purchase made thereunder to be proved by writing. I must with reluctance dissent from the latter of these propositions. The Chief Justice quotes the late Cross, J., saying in the case of *Trenholme* v. *McLennan*, 24 L.C. Jur. 305:—

The plaintiff as a broker could by written contract, made out and evidenced by his own signature, bind two parties to a sale made by the one to the other through him, but when he attempts to bind one of the parties to himself, he requires, besides the verbal testimony as to his instructions, written evidence to establish the purchase, and this he cannot make for himself as against the party who instructed him to effect the purchase.

Art. 1235 C.C. does not, however, say that there must be written evidence to establish the purchase; it says no action can be maintained against any party upon any contract for the sale of goods unless there is a writing signed by him. Now what writing can it be suggested the respondent could have given in a case like the present? No writing by him could be required for the purpose of the purchase which he had authorized the broker to make. Art. 1235 C.C. is really only effective when the relations between the parties are those of seller and buyer and there is here no dispute between such; it is a question between principal and agent. Again I think it is necessary to distinguish between proving the purchase and proving the contract for sale; art. 1235

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C.C. is referring to executory not executed contracts such as are here in question.

I am assuming that the facts are as above stated and I desire to add that this judgment applies only in such cases. I say this because, though I have not gone at any length into the facts of the case, yet I see that in par. 22 of the amended declaration it is alleged that on the arrival of a quantity of oats at Montreal "the defendant failed to take delivery and to pay therefor." Any case in which the respondent is sued as a purchaser for failure to carry out his contract is governed by art. 1235 C.C. and is not within this judgment.

Subject to this reservation I am of opinion that it was competent to the plaintiff appellant to give oral evidence under the provisions of art. 1233 C.C. The appeal must be allowed and the action referred back for further hearing and decision.

Davies, J.

DAVIES, J.:—I concur in the opinion stated by the Chief Justice.

Idington, J.

IDINGTON, J.:—In an action like this by a broker for services rendered to a client in buying and selling grain for him I do not think the art. 1235 C.C. must necessarily have any application.

The action is not within the express language of the article. It relates to executed or alleged executed contracts wherein the delivery not only of the part, but of the whole has taken place within the meaning of what such parties as these concerned herein attach to the word.

It is not suggested that there had been any failure of respondent to reap what he bargained for by reason of any default on the part of the appellant to procure the contracts or any of them in writing. I can conceive of a broker in failing to get for his client a written contract thereby leading him to make a loss. In such a case the question might come up under art. 1235 C.C.

There seems nothing of that sort in the alleged transactions in question. They have all been fully executed or their existence denied.

There is nothing illegal in carrying on business by means of mere oral bargains. People may be foolish in not reducing their contract to writing but the contract once executed it matters not in the commercial world whether in fact reduced to writing or not.

I think the appeal must be allowed with costs.

ANGLIN, J.:—With very great respect I am of the opinion that there has been in this case a misconception of the purview and effect of art. 1235 (4) C.C.

It should be noted that although this provision deals with contracts for the sale of goods it is in the form of the fourth section of the English Statute of Frauds ("no action should be brought, etc.") rather than in that of the old 17th section ("no contract shall be good"). The difference in effect between these two provisions is illustrated in the well known case of *Leroux* v. *Brown*, 12 C.B. 801.

An action such as this to recover an agent's commission and outlay on sales and purchases of goods is not, in my opinion, an action upon the contracts for the sales or purchases and therefore is not within clause 4 of art. 1235 C.C. Moreover, while it might be a defence to such an action that the contracts made by the agent on behalf of his principal were unenforceable because not provable under art. 1235 and that the agent had, therefore, not earned his commission, and was not entitled to re-imbursement of his outlay, no such question can arise in the case of executed contracts such as we are dealing with. Indeed, in an action upon the contract itself, where it has been executed, the statute will not afford a defence. *Green* v. *Saddington*, 7 E. & B. 503; *Seaman* v. *Price*, 2 Bing. 437; Addison on Contracts (11th ed.) p. 26; 4 A. & E. Encycl., p. 982. I am unable to distinguish the decision of the Court of Queen's Bench in *Trenholme* v. *McLennan*, 24 L.C. Jur. 305, and I am, with great respect, of the opinion that it must be overruled.

The appeal should be allowed with costs.

BRODEUR, J.:—The appellants are brokers and members of the Montreal Corn Exchange and they claim from the respondent a sum of nearly $25,000 for the difference between the purchase and the sale price of oats made by them on behalf of the respondent.

The only question at issue before this Court is the admissibility of parol evidence.

The trial Judge decided that the transactions could not, on the authority of article 1235 of the Civil Code and of a judgment rendered by the Court of Queen's Bench in the case of *Trenholme* v. *McLennan*, 24 L.C. Jur. 305, be proved.

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That decision of the trial Judge was confirmed by the Court of King's Bench, Trenholme and Cross, JJ., dissenting.

The appellant claims that the relations of the parties are those of principal and agent, and not of vendor and purchaser, that the Statute of Frauds does not apply and that the question of admissibility of evidence is ruled by the provisions of art. 1233 of the Civil Code.

There is no divergence of opinion between the parties as to the evidence of the contract of agency. They all admit that the plaintiff could prove by oral testimony the contract by which he was commissioned to buy and sell the goods in question. *Forget* v. *Baxter*, [1900] A.C. 467, is authority for the proposition that the transactions by a broker in respect of sales and purchases of shares are "commercial matters within article 1233 of the Civil Code and might be established by parol evidence."

In the case of *Trenholme* v. *McLennan*, 24 L.C. Jur. 305, so much relied on by the respondent, the same proposition was also declared.

There is then no question as to the right of the plaintiff to prove by oral evidence his contract of agency.

But it is contended that if the transactions of the agent cover sales of goods, then a written contract or a memorandum as required by art. 1235 (4) of the Civil Code, or the Statute of Frauds, is required.

I must say, in the first place, that the relations of the parties are not those of vendor and purchaser, but those of principal and agent.

It is not alleged in the action that the plaintiff sold goods to the defendant, but that the plaintiff in execution of his mandate bought and sold goods on behalf of the respondent. If the plaintiff can prove by witnesses that he was duly authorized or instructed by the defendant to purchase and sell oats, it seems to me that he has established all the facts which are necessary for the existence of their contractual relations. I do not see how it is possible to separate those relations.

The Statute of Frauds and the provisions of art. 1235 (4) C.C. provide that in commercial matters no action can be maintained unless there is a writing signed by the defendant upon any *contract for the sale of goods*. It has reference to actions taken

by the vendor against the purchaser, but it has no reference to instructions or mandate given by a person to purchase goods.

It is a well established rule of law that authority for an agent to sign a memorandum need not be given in writing. It may be given in any way in which an authority is conferred by law on an agent. It has been decided in England in the case of *Rochefoucauld* v. *Boustead*, [1897] 1 Ch. 196, that an agent to whom land purchased on behalf of his principal has been conveyed will not be permitted to plead the statute against the principal for whom he is trustee and the latter may give parol evidence of the trust.

Applying that decision to the facts in this case, it shews that Schmidt could by parol evidence establish that those sales of goods were made on his behalf. If he can prove that himself by parol evidence, why should not the plaintiff have the same power?

I have given much consideration to the case of *Trenholme* v. *McLennan*, 24 L.C. Jur. 305, and especially to that part of the judgment where it is stated that

> the plaintiff as a broker could by a written contract made out and evidenced by his own signature bind two parties to a sale made by the one to the other through him, but when he attempts to bind one of the parties to himself, he requires, besides the verbal testimony as to his instructions, written evidence to establish the purchase and this he cannot make for himself as against the parties who instructed him to effect the purchase.

What are the instructions which the broker received and which he has proved? It was to buy and sell goods for the principal. That was the contract alleged; that was a contract proved, and I do not see how those instructions can be disjoined as it has been done in that case of *Trenholme* v. *McLennan*, 24 L.C. Jur. 305.

I may add that this question has also come up before the Courts in the United States and they have invariably decided with one exception that oral evidence could be made of the mandate alleged by the broker. *Holden* v. *Starks*, 159 Mass. 503; *Bibb* v. *Allen*, 149 U.S.R. 481; *Wilson* v. *Mason*, 158 Ill. 304; A. & E. Encycl. of Law (2 ed.), p. 984.

The fact that the contract entered into by the parties is not enforceable under the Statute of Frauds because not in writing does not affect the right of the broker to recover for his services.

I am of opinion that this appeal should be allowed with costs of this Court and the Court below and that the plaintiff should be permitted to adduce verbal evidence of the alleged mandate and of its execution. *Appeal allowed.*

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Ex. C.

ARSENAULT v. THE KING.

Exchequer Court of Canada, Audette, J. December 23, 1916.

1. CROWN (§ II—20)—DAMAGE TO WHARF—NAVIGABLE RIVER—TRESPASSER.
The Crown is not liable to a person having no permission to erect a wharf in navigable and tidal waters between high and low water mark for undermining such wharf, by work done for the improvement of navigation.

2. WATERS (§ I C—40) — WHARF — NAVIGABLE RIVER — TRESPASS — NUISANCE.
A person who constructs a wharf upon the foreshore between high and low water mark in navigable waters, without the authority of the Crown, is a trespasser, and the wharf is a public nuisance.

Statement.

PETITION OF RIGHT for damages to a wharf alleged to have been occasioned by a steam-dredge belonging to the Dominion of Canada. Dismissed.

N. A. Macmillan, K.C., for suppliant; *J. A. Gillies*, for respondent.

Audette, J.

AUDETTE, J.:—The suppliant, by his petition of right, seeks to recover the sum of $1,900 as representing certain alleged damages to his wharf, at Alder Point, on the shore of Little Bras d'Or, Cape Breton, N.S.

He alleges that, in 1912, while the Government dredge "Cape Breton" was engaged dredging the channel at Little Bras d'Or gut, in close proximity to his wharf, through the negligence of the respondent's servants and agents in charge of the dredge, his wharf was damaged, *inter alia*, by the bucket of the dredge coming into contact therewith and hooking some timber of the outer wall of the wharf, the whole resulting in his suffering damage to the amount claimed.

The action is in its very essence one in tort, and such an action does not lie against the Crown, except under special statutory authority; and, the suppliant, to succeed, must bring his case within the ambit of either sub-sec. (*b*) or sub-sec. (*c*) of sec. 20 of the Exchequer Court Act.

If the suppliant seeks to rest his case under sub-sec. (*b*) of sec. 20, I must answer his contention by the decision in the case of *Piggott* v. *The King*, 32 D.L.R. 461, wherein the Chief Justice of Canada says:—

> Paragraphs (*a*) and (*b*) of sec. 20 are dealing with questions of compensation, not of damages.
>
> Compensation is the indemnity which the statute provides to the owner of lands which are compulsorily taken in, or injuriously affected by, the exercise of statutory powers.

Therefore it obviously follows that the case does not come

under sub-sec. (*b*) of sec. 20. Does the case come under sub-sec. (*c*) repeatedly passed upon by this Court and the Supreme Court of Canada?

To bring this case within the provisions of sub-sec. (*c*) of sec. 20, the injury to property must be: 1. On a public work; 2. There must be some negligence of an officer or servant of the Crown acting within the scope of his duties or employment; and 3. The injury must be the result of such negligence.

The wharf in question, taking the measurement from the suppliant's written argument, is given at 126 ft. long, with a width of 40 ft., half of which is built on the foreshore, the suppliant's title taking him to the high water mark only.

The damaged part of the suppliant's wharf is erected on the foreshore between high and low water mark. He has no grant from the provincial government for the bed of the foreshore, and he has no permission to build a wharf, or to put up erections of any kind between high and low water mark; and that right, the property being in tidal and navigable waters, can only be obtained from the Federal Crown under the provisions of ch. 115, R.S.C. 1906, as amended by 9-10 Edw. VII., ch. 44.

The question of prescription or of the Statute of Limitations does not arise, the suppliant not having been in possession long enough as against the Crown.

Furthermore, the suppliant who by his petition of right claims damages to his wharf to the amount of $1,900 cannot contend, as he does, that his case is "*settled*" by the last paragraph of sec. 4, of 9-10 Edw. VII. ch. 44 (above cited as amending ch. 115, R.S.C. 1906), which reads as follows:—

> The foregoing provision of this section shall not apply to small wharves not costing *more than $1,000* or groynes or other bank or beach protection works, or boat houses, *which do not interfere with navigation.*

This is mere irony. It is not in the mouth of the suppliant who has been heard as a witness, and adduced evidence by other witnesses, to prove on the one hand that he suffered damages to his wharf in the sum of $1,900, and on the other hand say I do not come within the ambit of ch. 115, R.S.C. 1906, as amended by 9-10 Edw. VII., because my wharf did not cost more than $1,000. *Qui approbat non reprobat.*

However, this last objection is also unfounded in view of the words of the statute in respect of these small wharves, "*which*

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do not interfere with navigation." And assuming the Crown did damage this wharf in the course of enlarging the channel opposite the suppliant's property, on the space between high and low water mark, these works and such damage, if any, would establish beyond question that the wharf is an interference with navigation, which is a right paramount and superior to all on navigable waters.

It is well said by Strong, J., in the case of *Wood* v. *Esson*, 9 Can. S.C.R. 239, 243, "that nothing short of legislative sanction can take from anything which hinders navigation the character of a nuisance." This language is quoted with approval by Martin, J., in the case of *Kennedy* v. *Surrey*, 10 Can. Ex. 29 at 40.

Is the Crown liable as against a person having no permission or authority from the Federal Government, to erect a wharf in navigable and tidal waters between high and low water, for undermining, by work done in the interests of navigation, such wharf, an unauthorized erection on the foreshore?

In the *Thames Conservators* v. *Smeed*, [1897] 2 Q.B. 334, A. L. Smith, L.J., expressed the opinion that *primâ facie* the words "bed of the Thames," denote "that portion of the river which in the ordinary and regular course of nature is covered by the waters of the river." And see per Chitty, L.J., at p. 353.

If that definition is adopted here, the suppliant is in no better position than an encroacher upon a highway whose right has not ripened into adverse possession under the statute and whose erections are therefore nuisances which can be abated. Smith, L.J., at p. 343 of the case last mentioned, says that dredging powers were given to the Thames Conservators for navigation purposes without compensation to private owners for having their rights interfered with. *A fortiori* would it not appear that if *lawful owners* cannot claim compensation for damage done under an Act not giving them compensation, one whose asserted right has not ripened into possession cannot? In short, can one who is still in the category of a trespasser or maintainer of nuisance claim damages for the removal of the nuisance?

In the case of *Dimes* v. *Petley* (1850), 15 Q.B. 276, it was held that the defendant could not maintain an action for damages against the owner of a ship which damaged his wharf, the wharf being an obstruction to navigation, although it was held that

the plaintiff could not abate the nuisance unless it did him a special injury. Applying the first principle to the suppliant's case, can it not be said that if the suppliant built out his wharf so near the channel as to make it liable to injury whenever the channel required to be dredged, his own act was the *fons et origo malorum*? How can the Court give damages to a suppliant who comes into Court as a trespasser whose grievance arises from his own original wrong in encroaching upon the rights of the public? See on this point the later case of *Liverpool, etc., S.S. Co.* v. *Mersey Trading Co.*, [1908] 2 Ch. 460, 473.

In the result it must be found that the wharf in question suffered from toredo worms, from the large clampers of ice hitting it, as shewn in the evidence, and also that the dredging made by the Crown, for the want of a longer slope, has provoked sliding of earth which has undermined the front of the wharf—that part erected between high and low water.

This injury caused by undermining is a damage that is recoverable against the Crown only if it can be brought within the provisions of sub-sec. (*c*) of sec. 20 of the Exchequer Court Act, as above mentioned.

The injury complained of did not happen *on* a public work, and following the decision in *Chamberlin* v. *The King*, 42 Can. S.C.R. 350; *Paul* v. *The King*, 38 Can. S.C.R. 126; *Hamburg American Packet Co.* v. *The King*, 39 Can. S.C.R. 621; and *Olmstead* v. *The King*, 30 D.L.R. 345, I must find that the suppliant is therefore not entitled to recover.

The case of *Letourneux* v. *The King*, 33 Can. S.C.R. 335, and *Price* v. *The King*, 10 Can. Ex. 105, relied upon by the suppliant's counsel, have since been overruled by the decisions of the Supreme Court of Canada cited above.

For judicial observations upon the merits of sec. 20 of the Exchequer Court Act, see comments by Idington and Brodeur and Davies, JJ., in *Piggott* v. *The King*, 32 D.L.R. 461; and *Chamberlin* v. *The King*, *supra*.

This narrow construction of sub-sec. (*c*) of sec. 20 of the Exchequer Court Act is now finally accepted and maybe the whole trouble arose in the confusion and error of the draughtsman who undertook the drawing of the section. Should not the words "on any public work," in sub-sec. (*c*) of sec. 20, have been placed

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at the end of par. c. instead of where they are? In the result the Crown would in such a case have been liable in a rational manner for damages resulting from the negligence of its servants acting within the scope of the duties and employment *on* a public work, and it would not be necessary that the injury be suffered *on* the public work.

Under the circumstances, following the decisions above cited, the damages claimed not having been suffered *on* a public work, it must be found the suppliant is not entitled to the relief sought by his petition of right. *Petition dismissed.*

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GORDON v. GORDON.

Ontario Supreme Court, Meredith, C.J.C.P., and Riddell, Middleton, and Masten, JJ. November 3, 1916.

DIVORCE AND SEPARATION (§ VIII A—80)—SEPARATION DEED—ADULTERY —"ENTITLING TO DIVORCE."

Adultery does not, in Ontario, entitle to divorce, which can only be granted by the Parliament of Canada; therefore a separation allowance under deed is receivable by a wife guilty of adultery subsequent to the execution thereof despite a condition therein that it shall cease if she be guilty of any act which would "entitle" the husband to obtain a dissolution of marriage.

Statement.

APPEAL by the defendant from the judgment of Denton, Jun. Co.Ct.J., in favour of the plaintiff, for the recovery of money payable under a separation deed, the plaintiff being the wife of the defendant. Affirmed.

George Wilkie, for appellant.

J. E. Lawson, for plaintiff, respondent.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P. (at the conclusion of the argument for the appellant):—The point involved in this case is a simple one. The plaintiff, who is the wife of the defendant, has sued him for money payable by him to her under the separation deed in question.

The only defence to the action set up, or relied upon, is, that the plaintiff was guilty of adultery after the deed was made, and before the payments sued for became due. For the purposes of the action such guilt is admitted.

The deed provides that "in case the said marriage should at any time hereafter be dissolved upon the petition of the said Albert Edward Gordon, or in case the said Edna Gordon shall be guilty of any act which would entitle the said Albert Edwin Gordon to obtain a dissolution of the said marriage, then and in

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such case the said annual payment and allowance shall cease and determine and these presents shall become void." And we are asked by the defendant, who is appealing against a judgment in the plaintiff's favour pronounced at the trial of this action, to hold as a matter of law, that is, of interpretation of the deed, that the words "any act which would entitle the said Albert Edwin Gordon to obtain a dissolution of the said marriage" mean no more than "shall commit adultery;" that the parties must have meant that the deed was to become inoperative, in so far as it is beneficial to the plaintiff, if she did not remain chaste.

But why? Much has been contended for, but the contention has not gone as far as that the terms "entitled to dissolution of marriage" and "shall commit adultery" are synonymous; nor can I think that any one, literate or illiterate, would misuse the one in an effort to express the other. Whether the effect of the one, in any particular circumstances, would be the same as the other, is quite another thing. The words, "entitle . . . to . . . a dissolution of the said marriage," are the controlling words.

It is said that modesty might have prevented the use of the word "adultery." If it did, and resulted in the use of other words having a different meaning, still the plain meaning of the words used, and that only, must be given to them, unless and until by reformation the proper words should be inserted in lieu of the words used.

But the defendant is hard driven in resorting to such a contention. The deed was drawn by solicitors of good standing, and it is unimaginable to me that they, or any solicitor, could be so moved by this imaginary modesty to sacrifice a client's interests, and misstate the agreement of the parties, in abstaining from inserting the well known *dum casta* clause, if adultery had been meant, the clause which commonly forms part of separation deeds and of divorce decrees: see *Ollier* v. *Ollier*, [1914] P. 240.

It is idle, as far as I am concerned, to contend that adultery "entitles" husband or wife to a "dissolution of the marriage" in this Province. Nothing entitles any one to such a divorce. There is no law of the Province under which a divorce *â vinculo matrimonii* can be had; special and particular legislation is passed in each case. A new law must be made before any such divorce can be had, and there is just as much legislative power to make

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such a law for any other cause, or for no cause, as there is to make it for adultery of man or woman.

To sustain a defence based upon the words "entitled to a dissolution of the marriage," it is incumbent on the defendant to prove that he is so entitled; and that he has not done; and, for all that appears at present, cannot do.

But it is said that, as the deed provides for two cases, the one dissolution of marriage and the other entitled to dissolution of marriage, we are bound to give some effectual meaning to the latter case different from that attributable to the former—that the parties must have meant different things—and, that being so, we must read the later words as meaning "or if the wife shall commit adultery," because there is no other reasonable meaning that can be attributed to them. I am unable to give anything like unqualified assent to either of these contentions. To do so as to the first, would be to assent to the proposition that tautology is impossible, and that superfluous words are unknown in documents such as that in question, at all events when drawn by reputable lawyers; in favour of which proposition the most that can be said is: Would that it were so! It is however right to say that in such a case as this, if reasonable meaning can be given to the later words beyond that which the earlier words convey, such meaning should be given to them. But no such case arises here. The later words plainly carry a meaning, and can have an effect, different from the earlier, in more than one substantial way, as has been pointed out more than once during the argument; so I shall now take up time in repeating but one:—If the parties were or should be domiciled in any Christian country so as to give the Courts of such a country a right to decree dissolution of the marriage, and the husband should become entitled to a dissolution of the marriage there, on the ground of adultery, or indeed on any ground founded on an act of which she was guilty, he would have a good defence to such an action as this, if he had not, in some manner under such laws, disentitled himself to it.

I, therefore, concur with the learned trial Judge in the conclusion which he reached, and, in the main, upon the ground traversed by him in reaching that conclusion; and would have been content to have said so and no more, but that Mr. Wilkie's

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earnest and protracted argument seems to me to have earned—well, some more superfluous words.

The appeal should be dismissed.

RIDDELL and MIDDLETON, JJ., concurred.

MASTEN, J.:—At one period in this argument I felt a difficulty in agreeing with the views just expressed, for one reason only. It seemed to me that the result of the judgment now being pronounced might be that no meaning or effect whatever would be given to the latter half of the clause upon which reliance is placed by this appellant. That clause reads as follows: "It is further provided that in case the said marriage should at any time hereafter be dissolved upon the petition of the said Albert Edward Gordon, or in case the said Edna Gordon shall be guilty of any act which would entitle the said Albert Edwin Gordon to obtain a dissolution of the said marriage, then and in such case the said annual payment and allowance shall cease and determine and these presents shall become void." If adultery did not entitle to the divorce nothing else would, and the clause would be meaningless. But it now seems to me that that difficulty is got over in this way: Assuming that the application is made for the divorce, and that Parliament declares that the applicant is entitled to a divorce, then such ascertainment that he was so entitled to a divorce would relate back to the time when he became so entitled; and, therefore, effect can be given to the latter half of the clause without offending the rule that some effect is to be given to every portion of the agreement.

For that reason, I agree in the judgment just proposed.

Appeal dismissed.

CANADIAN NORTHERN R. CO. v. KETCHESON.

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Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Idington, Duff, Anglin and Brodeur, JJ. October 13, 1914.

ARBITRATION (§ III—15)—SUFFICIENCY OF AWARD—VALUE OF LAND—EVIDENCE—CONCLUSIVENESS—EXPROPRIATION UNDER RAILWAY ACT, R.S.C. 1906, CH. 37.

Statement.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Ontario, 13 D.L.R. 854, 29 O.L.R. 339, 16 Can. Ry. Cas. 286, affirming an award of arbitrators under the Railway Act of Canada, for damages sustained by the respondents by reason of their farm being crossed by the railway of the appellant company. Affirmed.

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Idington, J.

FITZPATRICK, C.J.:—I would dismiss the appeal with costs. I agree with Idington, J.

IDINGTON, J.:—I am unable to see how we can properly interfere with the findings of the majority of the arbitrators so far as maintained by the Court of Appeal for Ontario.

There is the concurrent testimony of a large number of witnesses asserting that the selling value of the lands in question has been depreciated by the construction of the appellant's works, to the sum of $4,000 or over, and as against that not a single witness ventures to say that the depreciation of selling value is less than $4,000.

The arbitrators have had the advantage which local knowledge and their personal inspection gave as a means of checking these estimates, and when the value of the land taken is deducted from the amount they have allowed they have reduced these estimates nearly 25%.

How can we, not possessing the advantages thus had by the arbitrators, venture to say that such reduction is not enough to allow for prejudice or exaggeration on the part of the witnesses? I respectfully submit that to ask to do so is rather a bold proposition. If there had been contradictory evidence adduced by appellant giving any lower estimates we might have been furnished with some ground of excuse for interfering. In the absence of such evidence the fair presumption is that the appellant could get none.

Then the statement of what has been paid in other cases does not seem to serve any good purpose without our possessing means of such fair and reasonable comparison as to make it serviceable. Again, it is complained that those valuing are to be held to be experts, and that no more than five such could be called without a previous or earlier application than was made for such purposes. But suppose all the later evidence of same character is stricken out, how does that, under such circumstances, advance the appellant's cause? Moreover, I am far from saying that evidence of farmers giving their personal knowledge of values derived from local means of information is to be treated as evidence under the Acts invoked, or that the slip (if such) of counsel in failing to make his motion at the earliest stage is fatal to the right to ask the arbitrators to exercise a discretion the statute gives.

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And as to the details gone into showing in what way the bucolic mind might operate in a given case to which it has often to be applied in choosing a farm, it does not appear that such details operated to the detriment of appellant.

The result rather seems to have been to ameliorate the condition of things which the opinion evidence as to selling value standing alone might have produced.

The appeal should be dismissed with costs.

Anglin, J.

ANGLIN, J.:—The arbitrators appear to have reached their conclusion, allowing the sum of $3,328 as damages, chiefly by capitalizing an amount which they found would represent the annual loss that the respondents will sustain owing to the time which will be taken up in driving cattle, and horses, and drawing gravel, farm implements, wagons, etc., across the railway, injury caused by smoke and cinders, the clearing out of a ditch and the flooding of some two acres of land. The farm consists of 200 acres, of which the company has actually taken 2.16 acres, for which $216 was allowed by the arbitrators. They also allowed $75 for the construction of a bridge. These items, with the capitalized sum of $3,037 above referred to, make up the amount of their award.

About 75 acres of the land, and the farm buildings, lie south of the right of way; about 125 acres north of it. On these 125 acres there is a valuable gravel deposit covering about 12 acres, a bush which furnishes a part of the fuel used in the respondent's farm houses, and the principal pasture fields of the farm. The water supply for the live stock is the Bay of Quinte on which the farm fronts to the south. While the resultant damage is chiefly to the northern 125 acres, the use of the farm as a whole is, no doubt, materially affected. Calculated on the whole area of the farm, the depreciation is allowed at $17.64 per acre; on the basis of 125 acres only being injuriously affected, it would be $26.62 per acre. The land is valued by some of the plaintiff's witnesses at $70 an acre, and the whole property, buildings included, at from $19,000 to $20,000 before the railway went through. These are outside figures. The assessment of the land, sworn to be from two-thirds to three-fourths of its actual value, was $7,200, or $36 an acre before the railway was built, and $6,650, or $33.25 an acre, afterwards. The reduction in the whole assessment

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subsequent to the building of the railway was only $550. *Primâ facie*, the amount of the award appears to be much too large. The Appellate Division, while disapproving of the capitalization of annual loss as the basis of an award, held that the general evidence of depreciation to which the arbitrators had referred as justifying an allowance of even larger damages, warranted a dismissal of the company's appeal from the award.

On the arbitration the respondents called 12 witnesses, from whom they obtained opinion evidence, general and detailed, as to the depreciation in the value of their property caused by the railway crossing it. After the examination of the first of these witnesses (Donald Gunn), had been concluded, counsel for the respondents made application to the Board to be allowed to call more than 5 such expert witnesses. Permission to do so was granted against the protest of counsel for the company's appeal. Under the Canada Evidence Act such an application must be made before the first expert witness has been examined. (R.S.C., ch. 145, sec. 7.) Under the corresponding provision of the Ontario Evidence Act, 9 Edw. VII., ch. 43, sec. 10, where a similar course was taken on the trial of a case without jury, a Divisional Court held that there had been a mistrial, and set aside the judgment, *Rice* v. *Sockett*, 8 D.L.R. 84, 27 O.L.R. 410. This objection, though taken in the Appellate Division in the present case, was not given effect to. It is not even noticed in the judgment of that Court delivered by Hodgins, J. I am, with respect, unable to concur in this disposition of it. But, in view of the fact that under the Railway Act, sec. 209, the Court is required upon the hearing of an appeal from an award to "decide any question of fact upon the evidence taken before the arbitrators as in the case of original jurisdiction."

I think the proper course when such an objection is properly taken on an appeal from an award under the Railway Act is not to set aside the award, but to eliminate from the evidence all testimony which was improperly introduced and to determine, as in a case of original jurisdiction (but see *Atlantic & N.W.R. Co.* v. *Wood*, [1895] A.C. 257) what the award should be on the remaining testimony.

Of course, it is impossible to tell what weight the arbitrators attached to the evidence which, in following this course, will be disregarded, or how it affected their conclusion. Their finding

cannot, therefore, be given the same weight and importance which we should otherwise attach to it.

Dealing with the case in this manner, I find that the 5 witnesses who first gave expert opinion evidence for the respondents were Gunn, Wilson, H. Finkel, Vandervoort and Boyd. Their entire testimony is to be considered, as is that of Meyers, Blanchard, Feeney, Bates and Davis, who deposed only to facts and were not asked to give opinion evidence. But from the testimony of Gay, Hogle, Ostrom, Potter, Denyes, Allen and M. Finkle must be eliminated everything in the nature of expert or opinion evidence, except in so far as the appellant may desire to rely upon it.

No doubt Gunn, Wilson, Vandervoort, H. Finkle and Boyd all swear that in their opinion the depreciation in the value has been at least $4,000 (Finkle puts it at $3,450, treating the cattle passes as sufficient and available), and, as Hodgins, J.A., points out, the appellant failed to call any witnesses to contradict this testimony, on which, with other evidence of the same character given by Gay, Hogle, Ostrom, Potter, Denyes and M. Finkle, the Appellate Division chiefly relied. Yet we have the undoubted fact, to quote from the opinion of Hodgins, J.A., that:—

> these views represent more a consensus of opinion educated upon the subject and backed up by general agreement than the individual views of men who have independently arrived at a conclusion,

and still more cogent facts that the assessment of the entire property was $9,000 in 1909 and $8,490 in 1911 and 1912.

The assessor, Merritt, called by the respondents, swears that these figures represent from two-thirds to three-fourths of the actual value of the property. Elsewhere he says that they are from 20% to 25% below the actual value. He also states that it is his idea that the depreciation in the value of the Ketcheson farm occasioned by the railway crossing it is one-fifth, although he had made no detailed estimate in arriving at this result. He did not attend the meetings at which other witnesses for the claimants had canvassed the questions of value and depreciation.

Taking the view of Merritt's evidence most favourable to the respondents, the value of the farm and building would be $13,500, of which one-fifth—$2,700—would represent the depreciation caused by the railway. In his capacity as assessor he estimated the depreciation at $550. Treating this estimate as also made on the two-thirds basis of the assessment, the actual depreciation

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would be $775. Yet when this same witness was before the arbitrators he swore to a depreciation of $4,000, and in supporting that estimate valued the property at from $19,000 to $20,000. Another witness for the claimants, Donald Gunn, placed the value of the farm and buildings at $14,000 without the railway.

There is little doubt that in reaching their conclusions, the arbitrators treated the cattle passes provided by the railway company as practically of no use whatever to the respondents and awarded damages on the basis that they could not be used at any season of the year. This constitutes the chief ground of complaint against the award on behalf of the company. While I am not satisfied that the passes cannot be made use of for cattle, if they are properly drained and kept clear of mud, I am by no means convinced that a single expenditure of about $186 will, as contended by counsel, put them in such a condition that they can be used thereafter without further trouble. There is a mass of evidence in the record that they are so situated that they are subject to being filled up to an extent which renders them unavailable for cattle.

Fred F. Clarke, a witness for the company says on cross-examination:—

Q. Is there any provision made as the railway is now constructed for the passage of the water from the land north of the track, other than these two railway culverts or cattle passes? A. No other provision. Q. No separate drainage provision? A. No. Q. So that the cattle pass as now constructed must be used both for cattle and drainage? A. Yes. Q. What is the condition of these cattle passes now, are they open? A. The cattle pass is pretty well filled up. The east one is pretty well filled up with mud and the west one with water. Q. How much is the east one filled? A. About 3½ feet. Q. About 3½ feet of the 5 feet 8 inches is filled with mud? A. Yes. Q. Is there any water? A. No water lying on top of the mud. Q. And the west cattle pass? A. Water. Q. Any mud? A. No, I can strike the rock with a stick. Q. What depth of the water is there? A. About 3 feet. Q. So that either one of the cattle passes would be useless for cattle now? A. They could not go through. Q. Has there ever been a time since the railway was constructed to your knowledge that the cattle could go through? A. Not to my knowledge.

Henry Dredge, another witness for the appellant, says:—

Q. Is that not a fact, they have been filled nearly to the top with water and ice and snow and mud? A. Yes.

In view of this evidence, which is corroborative of much that was adduced on behalf of respondents, I find it difficult to give the contention of the appellant in regard to the cattle passes the effect which I would otherwise be disposed to give to it. I think

it will be necessary for the respondents to clear out these passes once or twice a year or oftener, and probably also the ditch, which it is admitted must be constructed to carry off the water coming through them. When there is much water to be taken care of, the passes probably cannot be used at all. Indeed, they were placed where they are, not so much to suit the convenience of the respondents in using them as cattle passes, as to carry off the water from the northern part of the lands and to avoid the necessity of other drainage works being provided by or at the expense of the railway company. Moreover, on the whole evidence it would seem that the passes are not high enough to serve for horses. While some allowance should, no doubt, be made for them, because they can probably be used for cattle during parts of the year after they have been cleaned out, they cannot be deemed sufficient to obviate the necessity at any and all times of using the ordinary farm crossings over the railway tracks for the passage of cattle and they will probably never serve for the passage of horses.

Taking all these matters into account and dealing with the case upon the evidence properly before us, I am of the opinion that the sum awarded should be reduced from $3,328 to $2,700. I have reached this conclusion with some hesitation because of the affirmance of the award by the Appellate Division. But that Court proceeded in part upon evidence which I think cannot be taken into account, and it was probably more influenced by the findings of the arbitrators than it would have been had it dealt with the case on the footing that that evidence should have been excluded. The award thus reduced may still be too large, but if it is, the appellant is itself to blame because of its failure to adduce any evidence to meet that of the respondents on the question of the amount of depreciation and because it allowed this case to go before the arbitrators with the evidence in a most unsatisfactory state as to the usefulness and availability of the cattle passes.

BRODEUR, J.:—This is a question of expropriation and of compensation under the Railway Act. Brodeur, J.

The respondents are the owners of a farm which was to be crossed by the appellant company. The arbitrators estimated the value of the land taken, and there is no dispute as to that part

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of the award. But the dispute is as to the value of the damages suffered by the respondents for the severance of their farm.

The majority of the arbitrators proceeded in computing the inconvenience which would result to the owners. They capitalized different items of damages and awarded a sum a little over $3,000. They added, however, that:—

> Taking the evidence as to the value of the farm and the depreciation thereto by reason of the railway, there is ample evidence to support a finding of $4,000 in favour of the landowners, but the arbitrators have placed their findings at $3,328 after considering the general evidence as to capitalization of the annual loss as well as depreciation as to the value of the farm.

In other words, their finding is based upon the capitalization of the annual loss and also depreciation as to the value of the farm.

There is ample evidence to support those two findings. The Court of Appeal proceeded on the ground that the market value of the farm was depreciated to the same extent as the amount found by the arbitrators.

The main objection made by the appellants against that award and that judgment is that in building their railway they made a subway crossing for the use of cattle and that, however, the arbitrators proceeded to grant damages as if no such subway had been constructed.

The Railway Act provides that the compensation should be determined at the time the notice for expropriation is given. When the notice of expropriation was given it was not mentioned that any such subway would be built and the company never contracted the obligation to maintain such a subway. The arbitrators also were powerless to force the railway company to make such a construction. So we have to dispose of this case and of the amount of damages incurred, of the value of the farm, as of the date at which the notice of expropriation was given. The evidence shews that the market value of the farm is to be depreciated to the extent of the amount awarded and I do not see any reason why this judgment of the Court of Appeal should be disturbed. The appeal should be dismissed with costs.

Duff, J.

DUFF, J.:—I think this appeal should be dismissed with costs.

Appeal dismissed.

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Ontario Supreme Court, Meredith, C.J.C.P., and Riddell, Lennox and Masten, JJ. November 3, 1916.

1. APPEAL (§ VII M—659)—CONCLUSIVENESS OF AWARD—VALUE—EVIDENCE.

The Appellate Court will not interfere with the award of an arbitrator when the evidence of value is conflicting and evenly divided.

[*Lake Erie & North. R. Co.* v. *Muir*, 32 D.L.R. 252; *Can. North. R. Co.* v. *Billings*, 31 D.L.R. 687; *Can. North. R. Co.* v. *Ketcheson*, 32 D.L.R. 629, followed.]

2. ARBITRATION (§ III—15)—AWARD—REASONS OMITTED—SETTING ASIDE—SUPPLEMENTING.

The omission of an arbitrator to set out his reasons for his award, as required by sec. 4 of the Municipal Act (R.S.O. 1914, ch. 199), when he proceeds partly on a view of the premises or upon some special knowledge or skill possessed by him, is not a ground for setting aside the award, but it should be supplemented in that respect.

Statement.

APPEAL from an award of the Official Arbitrator for the City of Toronto upon an arbitration fixing the compensation to be paid by the city corporation for lands expropriated for public park and boulevard purposes. Affirmed.

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

Irving S. Fairty and *C. M. Colquhoun*, for respondent.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P. The arbitrator is one who, if it be true that experience teaches, ought to be well-educated in the subject of land values in and about Toronto; from teaching not only had in his office of Official Arbitrator, though that has been great, but also, and doubtless more so, in his office of head of the Court of Revision, under the Assessment Act, of the same municipality: and, as some evidence that he is not quite one-sided in his judgment of values, it is but fair to say: that at least as many appeals come to us from his awards, on the ground of over-estimation of values as of under-estimation of them.

Then the testimony given in the arbitration proceedings, in so far as it related to estimations of value, was of even more than the usual divergent character, running to extremes which seem to me to be well described by the word "wild."

The arbitration also was one of more than even the usual protracted character of arbitrations in which "potentialities," expectations, dreams, or whatever else they may be called, are made to absorb the whole, or the greater part, of the attention of those concerned: the arbitrator had several views of the place and all its surroundings; and has dealt, in a thorough manner, with all the evidence adduced and all the contentions made on each side, even some which seem to be of a far-fetched character.

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In these circumstances, we are asked, in the midst of conflicting opinions pretty evenly balanced as to value, greatly to increase the compensation awarded; and that we are asked upon a number of grounds, which, as it seems to me, may be all comprised in the single demand for more, because the arbitrator has not given enough. Certainly, if upon the whole evidence, properly considered, as we must consider it—whatever the arbitrator may have done or left undone, if anything—we are unable to say that the compensation awarded is inadequate, then this appeal must be dismissed. The onus of convincing us of inadequacy is upon the appellant.

The main contention made for the appellant seems to me to be this, in short: that the arbitrator ought to have accepted the testimony of the appellant's main witness, and to have based his award upon it: but, giving the fullest credit to this witness for sincerity, I am unable to perceive any very substantial reason for according any special weight to it: it is self-evident that the witness was an advocate-witness: and, as it seems to me, he was a witness carried away by his enthusiasm for the cause of the appellant, in whose service he was enlisted: and, it may be added, in another case, recently before us, he in evidence excused the neglect of his own business, by his interest and services in this arbitration. But it does not need any such circumstance to prove his enthusiasm for the appellant's cause.

On the other hand, one of the main witnesses, of the land agent witness character, was a gentleman very largely interested, pecuniarily and in spirit, in the public parks scheme of which the taking of these lands forms a part; and a very important part so far as this witness is concerned, because the land in question lies on each side of a highway lying between the splendid High Park of the municipality and the Humber river, a highway running through lands in which this witness is very largely personally concerned; and the lands in question so lying at the head of that highway—its portal—would give to the highway a bad "pair of black eyes" if, instead of being "beautified" for park purposes, they should be turned into grimy factory-grounds.

As I have said, the opinions as to value were pretty evenly divided, and some of them go to extremes for which there is really no foundation except perhaps in dreams or desires: and, that being so, it is out of the question for us to interfere with the

award upon such evidence only. Conflicting, evenly divided, evidence, a ton of which seems to me to be less helpful than an ounce of dependable fact.

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Then, apart from such evidence, what is there to go upon? There are a number of indisputable facts of more or less weight which make against the appellant: such as the price he paid for the lands in question, and other lands, not many years ago, a price which was a "mere song" in comparison with the sum he asks us to award him; such as the assessment of the lands always at a "mere song" value from the time of his purchase until they were taken for park purposes, as I have mentioned; such as that the only evidence given of any offer for, or proposed sale of, the lands in question, being evidence of an offer to sell to the respondents' witness, to whom I have referred as being so much interested in the acquisition of the land, at $1 000 an acre, less than one-fourth of the sum per acre awarded, and an offer which he declined at that price. The appellant denied that he was a party to that offer; but, whether he was or not, what difference does it make? We are not so much concerned with what the appellant offered or did not offer; we are mainly concerned in what the lands could have been sold for; and, this offer being one made and rejected in good faith, it shews that at that time the man who most wished, and needed, it would not give $1,000 an acre for it: such as, that for several years before being taken by the respondents, it was placarded "for sale" by a Toronto land agent without having induced a bid of any kind for the purchase of it or any inquiry respecting it, except from two boys who wished to "camp" upon it for a short time: it is quite immaterial that the owner did not give his consent to his lands being so offered for sale; the offer as an inducement to communications with the land agent respecting the purchase of it was just the same: and, if a desirable purchaser had been thus procured, the sale would have been made just the same: and such as the need of extensive and costly filling-in and protection against flooding, work needed before the lands could be useful for any money-making purpose.

These facts seem to me to go a long way towards a complete answer to the contentions made for the appellant; such contentions as that the lands in question were admirable sites for factories; and were really the only sites available at the time when they were taken by the respondents. With me it is another case of an ounce of

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fact outweighing an overflow of conflicting interested opinions as to value. In saying interested opinions, I intend to embrace land agents generally, whose interests are best served by high prices, even though bubble prices, and activity in land speculations. If these sites were all that were then left to the great, for Canada, industrial city of Toronto, how is it possible that they were not sought for: that, though advertised, no inquiries regarding them were made? It is but a fanciful notion, quite devoid of any foundation in fact or in reason. As long, and as frequently, as factories come, places will be found for them at reasonable prices. No one has ever heard of the desire for, or the straining after, new factories having been crushed or curbed by want of sites. The conversion of the Ashbridge Bay lands, in Toronto, into such sites, is some evidence of this fact: a conversion about to be undertaken when these lands were acquired by the corporation, and which Ashbridge Bay lands, if they had not been taken by the corporation, would have left the locality open to private enterprise.

A still more unsubstantial contention is made in regard to the money-making adaptability of these lands to private enterprise, as places of amusement. There is said to have been only one in Toronto until very recent years, when another on the outskirts entered the field, but failed. I am obliged to say that contentions such as that, in the circumstances of this case, seem to me to be but a waste of time, and the more so as the value of the lands for such an exceptional purpose is about the same as that for the common and general purpose of industrial enterprise.

Then it was said that the arbitrator had taken an isolated case of a sale in a different locality as his sole guide in fixing compensation in this case. If he had done so, in this case and all its circumstances and evidence, I should have felt obliged to say that experience does not always teach wisdom. But no one knows better than this Official Arbitrator how little generally, and how much very occasionally, a single sale may prove. Those who lay out lands into town lots do not always luxuriate in the wealth which the sale of all of them, at the same price as one may have brought, would have given them; whilst, on the other hand, in a quick market the price of one lot may well prove the value of another or others just like it. That which the appellant contends that the arbitrator did, I have stated: that which the arbitrator did was:

to state that the sale of the Kodak lands, which were further away from the lands in question than the lands embraced in another sale he was discussing, might be "looked at as having some bearing on at any rate the value of the easterly portion" of the "lands in question:" and in saying that, and no more, he said something to which no reasonable objection can be made.

These observations apply also to the appellant's contention that the price of the Chapman land should be the guide. Very far from overlooking this transaction, the arbitrator gave it due consideration, mentioning it in his reasons for his award: and, having been, as I understood counsel to say, one of the arbitrators in the fixing the price of that property, he was especially well-qualified to determine how much bearing that transaction should have upon the question of value involved in this case.

It was said for the appellant that everything that happened affecting the value of the lands after they were taken must be excluded in fixing the compensation, and the arbitrator seems to have firmly held to that view; so I desire merely to say that that view may, and should not, be carried too far. In case of reinstatement it may not be applicable. But this case is not one of this character; these lands were held solely for the purpose of making money out of them in a sale or sales of them; so the question is, how much would they, sold to the best advantage, with all their possibilities, have brought by sale at the time when the respondents took them? And there being no market price proved or provable, it is quite proper to take into consideration, for what it may be worth, the fact that many persons at that time believed that that which has happened since, and which greatly affects the saleable character of the lands, would happen as predicted, a belief which may have affected the price of land.

The arbitrator went very carefully and fully into the subject of expenditure needed to make the lands in question suitable for factory sites; and he made an estimation of it with which I am unable to find fault, in the appellant's favour: but, on the other hand, he seems to me to have failed to take into consideration two things of some importance: the cost of maintaining a breakwater or dyke against river floods, and the possibility of flooding over or through the dyke or breakwater, such as sometimes happens in this Province.

My own impression, from all the evidence, is, that the appel-

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lant's greatest aid in increasing the value of his lands was the need of them for the purposes to which they are about to be put; and I cannot help saying that he has had the benefit of that aid to the fullest extent in the high price he is to get in the compensation awarded to him.

Upon the whole case, I can find no good reason for saying that the appellant should have been awarded greater compensation: and so would dismiss the appeal.

Since the foregoing opinion was written, through the courtesy of the Chief Justice of Ontario, our attention has been drawn to several cases of appeals against awards of compensation for lands taken under the provisions of the Railway Act, and we have been furnished with copies of the opinions of the Judges of the Supreme Court of Canada expressed in them; but they do not seem to me to require any change in the views already expressed by me in this case: and I mention them mainly so that it may plainly appear that, though not referred to upon the argument, nothing that was said in them has been overlooked.

All cases such as this depend much, if not altogether, upon questions of fact, and so any other case is of little, if any, authoritative value: each must be decided upon its own facts, and care must be taken not to decide any case upon the facts of some other case in attempting to follow, or to give effect to, the views expressed by some other Court or Judge.

The general principles applicable to the fixing of compensation for lands taken are well-settled, no difficulty lies in that direction; much difficulty generally lies in the estimation of such compensation amidst a great diversity of facts and circumstances, possibilities and probabilities, and the widest of conflicting opinions as to value.

There can be no doubt as to what our powers and duties are upon an appeal such as this: they are fixed by statute,* and cannot be added to or taken from by opinion or adjudication. An appeal lies against such an award as this just as if it were an appealable judgment of a Judge; and, in order that the appellate Court may deal more fully and better with all questions arising upon the arbitration, the Official Arbitrator is required to state his reasons

*The Municipal Arbitrations Act, R.S.O. 1914, ch. 199, sec. 7, provides: "The award may be appealed against to a Divisional Court in the same manner as the decision of a Judge of the Supreme Court sitting in Court is appealed from. . . ."

for the award he has made; and, when the award is based on any special knowledge he may have, he must inform the appellate Court of it so that it too may have, as far as possible, that advantage.

No Court could be justified in giving effect to the arbitrator's judgment without exercising its own judgment on all points involved in the case. No Court could be justified in failing to hear the case as carefully and fully as if it were being heard for the first time: but that in no way prevents or is inconsistent with giving due weight to any advantages the arbitrator may have had over those which the Court may have in coming to a right conclusion, nor from declining to interfere with the award unless well-convinced of some error in it.

It was, of course, a slip of the tongue, or of the memory, to say that the award stands on the same footing as, or should be treated as if, a verdict of a jury. There is no appeal in this Province against the verdict of a jury; there is an appeal against a judgment of a Judge, and against such an award as this, expressly given. There is a wide difference between a verdict and an award.

In regard to the adding of any arbitrary amount to any sum fixed by the arbitrator, it is impossible for me to think that any Judge has expressed the opinion that, after full compensation has been allowed, anything in the nature of a bonus addition is to be made to the sum of the full compensation. When power to take lands is given, it is usual for some one to contend and urge that something more than full compensation should be paid to the land-owner, whether 10, 20, 30, 40, or 50 per cent.: but invariably the Legislature has refused to sanction any such addition or to allow to the land-owner anything but compensation: therefore for the Courts to do so would be legislation, not adjudication, and legislation of a most flagrant character. Even if it could be that any Court should so decree, I cannot see how any juror-arbitrator, having regard for his oath of office, could give effect to it, could do otherwise than obey the statute, and let the Court take the responsibility of giving the bonus addition.

In the case upon this point to which the Chief Justice has directed our attention, I find nothing to warrant a contention that anything more than compensation should be awarded. In that case the arbitrator had added 10 per cent. to a sum estimated by him, not, as I understand it, as a bonus, but as part of the

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compensation, and a part not included in the estimated sum; that is to say, that, having taken into account certain more easily calculated amounts of compensation, for other things not easily calculated and not included in the calculated amount, 10 per cent. was added as a reasonable valuation of these things. In principle that is not wrong: whether right or wrong in that particular case as a matter of fact is unimportant in this case, for in that respect that case has no authoritative effect upon any other.

In this case full compensation has been awarded by the arbitrator; and so there could be no justification for adding a farthing to the amount awarded, unless taken off first for the pleasure of adding it again.

And it should be added that, though mentioned in the reasons for appeal, the point that 10 per cent. should be added was not contended for or even mentioned by either counsel of the two heard on the appellant's behalf. In this case, instead of adding anything for contingencies, it would be much fairer to take off a large sum, for no one can doubt that, had the respondents not taken the lands, they would still be on the appellant's hands, burdened with the depressing effect of the war upon land speculations.

And I may add that no rule or practice of adding 10 per cent. or any other fixed amount prevails, or has prevailed, in this Province; but such a method of computation has been more than once disapproved.

A ground of appeal which was both stated in the notice of the appeal and mentioned in the argument was: that the arbitrator had not set out in his reasons for his award the information which sec. 4 of the Municipal Arbitrations Act requires; but the Act does not require it except where the arbitrator proceeds partly on a view or upon any special knowledge or skill possessed by him: and so, where not so set out, no special advantage in either way is to be attributed to him: and, if the point had been well taken, the case could not be one for setting aside the award, but would be one for having it supplemented in that respect.

Masten, J.

MASTEN, J.:—This is an appeal from the award of P. H. Drayton, Official Arbitrator, dated the 22nd December, 1915, by which he awarded payment by the Corporation of the City of Toronto to the claimant of the sum of $52,550, with legal interest

from the time of taking possession, as full compensation for the taking of the lands and premises in question. The appellant contends that the sum so awarded is insufficient, and seeks to have it increased. The grounds set forth in the notice of appeal are as follows:—

"1. That the award is against law and evidence and the weight of evidence.

"2. That the learned arbitrator failed to distinguish between the value of the evidence of properly qualified experts and the evidence of those who undertook to pass judgment upon the evidence that had already been given, and who had no knowledge of the conditions and values in the neighbourhood of the properties expropriated.

'3. That the learned arbitrator erred in holding that the evidence as to the values of the surrounding property had no bearing on the value of the property expropriated, and based his award on the sale-price of another manufacturing site situated over three miles away.

"4. That the learned arbitrator failed to pay proper consideration to the fact that the property, having a frontage on the Humber river of about 880 feet, had a value for amusement purposes, and also failed even to consider the evidence submitted that excursion amusement business could be profitably conducted.

"5. That the learned arbitrator had ignored the evidence shewing the small sum that would be required to be expended (upon the admission of both parties) to make the Watson property available for industrial or any other purpose.

"6. That the learned arbitrator did not consider the great potential value of the property for industrial purposes, nor the great scarcity of such sites at the date of expropriation.

"7. That the learned arbitrator failed to give weight to the evidence as to the enhanced value for either industrial or amusement purposes caused by the large extent of river frontage, and did not consider the evidence as to leases and values of river frontage in the immediate vicinity.

"8. That the learned arbitrator failed to give any consideration to the fact that this property, at the date of the expropriating by-law, was practically the only available site for manufacturing purposes with a river frontage.

"9. That he had ignored or had failed to consider the reason-

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able allowance that should be made upon the compulsory acquisition of the property against the will of the owner, and that the by-law expropriating the property was passed in pursuance of an agreement between one Home Smith and the Corporation of the City of Toronto, in pursuance of his private scheme.

"10. That the learned arbitrator had ignored every potentiality the property possessed, and had erred in suggesting that it would be a long time before the lands would be available for industrial purposes, without any evidence before him.

"11. That the said arbitrator was a salaried official of the corporation, being, in fact, the Chairman of the Court of Revision, and that, since the commencement of this arbitration, he had been subjected to vicious attacks by the Mayor, Aldermen, and officers of the city, as was evidenced by the newspaper reports and criticisms published during the progress of the said arbitration and after the evidence was concluded but before judgment was delivered, which attacks were calculated to affect the mind and judgment of the arbitrator, and that by reason thereof the said arbitrator had failed to give proper consideration to the evidence adduced; and therefore a reconsideration of values was justified."

Were I sitting as the judge of first instance determining the matter, I would, as the evidence at present appeals to me, award to the claimant a larger sum; but that is a very different thing from saying, when sitting in an appellate tribunal, that the award of the arbitrator is incorrect and should be set aside. On the contrary, the opinion at which the arbitrator arrived, after viewing the property and after listening at length to all the evidence adduced before him and seeing the witnesses, is, considering his extensive experience and local knowledge of values in the city of Toronto, more likely to be right than any opinion I could form by reading the record before this Court.

In the present case the appeal is not based on any misconduct of the arbitrator, on any improper admission or rejection of evidence, nor on any omission to value some element or thing that should have been considered, nor is it said that the arbitrator has otherwise acted upon an erroneous principle. On the argument in this Court the appellant contended that the arbitrator misapprehended the true effect of the evidence and the weight which ought to be accorded to the testimony of the various wit-

nesses; and, as a particular example, counsel urged that too great weight was given to one particular phase of the testimony (the sale to the Kodak company) and too little weight attached to another phase of the testimony (the Chapman award). It thus becomes a question of the quantum of the award and the weight of evidence, in a case where the award must depend upon an opinion or estimate, the amount of compensation not being accurately demonstrable.

The function and duty of an appellate Court, under such circumstances, and the principle upon which it acts, has recently been the subject of very considerable discussion in the Supreme Court of Canada, and I have had the opportunity of reading in manuscript some of the judgments upon the matter recently given out, and which are not yet reported in the regular reports.

I cannot more accurately express the view which, under the circumstances here existing, I entertain, than by quoting the language of Mr. Justice Davies in the case of *Lake Erie and Northern R. Co.* v. *Muir*, 32 D.L.R. 252. That was an appeal from the judgment of this Court (*Re Muir and Lake Erie and Northern R. Co.* (1914), 20 D.L.R. 687, 32 O.L.R. 150) increasing the compensation which had been directed by the majority of the arbitrators to be paid by the railway company to Muir. The arbitrators allowed to the claimant the sum of $4,250. This Court did not accept either the award of the arbitrators or that of the dissenting arbitrator, but assessed the damages at $6,897.50. In that case the lands, in the same way as here, were vacant lands. After discussing the facts, Mr. Justice Davies proceeds as follows: "In a mere question of valuation alone where no legal principle is involved and no legal error shewn, I do not think the Court should, except in a demonstrable case of injustice, substitute their own opinion for that of the arbitrators, more especially in a case such as this, where a view and inspection of the lands taken and left seems essential to enable a fair valuation to be made. The Court is to 'examine into the justice of the award given by the arbitrators on its merits, on the facts as well as the law:' *Atlantic and North-West R.W. Co.* v. *Wood*, [1895] A.C. 257, at p. 263. But this does not mean that they are entirely to supersede the arbitrators and to substitute their own valuation for those of the arbitrators in a case where, in my humble

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judgment, not possessing the great advantage of a view of the premises, they are not as well able to form as fair and reasonable a valuation as are the arbitrators. In short, as the Privy Council say in the case above cited, they are to 'review the judgment of the arbitrators as they would that of a subordinate court in a case of original jurisdiction, where review is provided for.' I confess that, sitting here in a court of appeal, although I have gone over the evidence carefully and had the advantage of hearing the views of the contestants, ably presented by counsel and explained by maps and plans and coloured sketches, I do not feel myself competent to form a judgment which I should substitute for that of the arbitrators on a mere question of the valuation of a right of access to the river. The question therefore in my judgment simply resolves itself into a question of quantum, and, as stated by Fitzpatrick, C.J., in a recent judgment delivered by him in the appeal to this Court of *Canadian Northern R. Co.* v. *Billings*, 31 D.L.R. 687, at 694, 'In cases of this nature the Court, as in reviewing the verdict of a jury or a report of referees upon questions of fact, will not reverse unless there is such a plain and decided preponderance of evidence against the finding of the arbitrators or commissioners as to border strongly on the conclusive.'"

He then distinguishes the case of *James Bay R.W. Co.* v. *Armstrong*, [1909] A.C. 624, and proceeds: "It seems to me, in considering these appeals, now becoming so very numerous, from the awards of arbitrators, that in cases where it is not shewn that these arbitrators have erred in omitting to value some element or thing they should have considered, or that they have improperly considered some element or thing they should not, or that they have in their valuation acted upon some error or wrong principle, which satisfies the court that the award is either insufficient or excessive, the court of appeal should not interfere. That is only another way of saying that in a pure matter of the valuation, not involving principles or demonstrable errors, the courts should not substitute their own valuations for that of the arbitrators, unless indeed there is such a plain and decided preponderance of evidence against the finding of the arbitrators as to border strongly on the conclusive. And I would the more strongly submit that such rule be followed in cases where

the evidence can only be properly appreciated from a knowledge of the locality gained by seeing and inspecting the lands taken and their surroundings."

The views so expressed by Mr. Justice Davies appear to have the concurrence of the majority of the Supreme Court, as illustrated by the cases of *Can. North. Ont. R. Co.* v. *Billings*, 31 D.L.R 687; *Can. North, Ont. R. Co.* v. *Ketcheson*, 32 D.L.R. 629; and *Toronto Eastern R. Co.* v. *Ruddy*;* and to be in accord with the views of the Privy Council as expressed in *Atlantic and North-West R.W. Co.* v. *Wood*, [1895] A.C. at p. 263. In any case, they appear to me to be binding upon us, in the circumstances of the present case.

The cases above referred to were decided under the Railway Act. In the present instance the authority and jurisdiction of the appellate Court is determined by sec. 7 of R.S.O. 1914, ch. 199, the Municipal Arbitrations Act, which reads as follows: "7. The award may be appealed against to a Divisional Court in the same manner as the decision of a Judge of the Supreme Court sitting in Court is appealed from, and shall be binding and conclusive upon all parties to the reference unless appealed from within six weeks after notice that it has been filed."

In my opinion, the principles above laid down in railway cases apply at least as strongly, and perhaps more strongly, to an appeal under the Act respecting Municipal Arbitrations.

For these reasons, no case having been made which demonstrates in any conclusive manner that the finding of the arbitrator is erroneous, I would base my conclusion, on this phase of the appeal, upon the plain footing that it is not a case where the appellate Court ought to interfere with the finding of the arbitrator.

With respect to the possibilities of use of the lands in question as an amusement park, such a use appears on the evidence to be not only less likely but to give to the lands a less value than its application to an industrial use. Consequently, it does not appear to me to advance the claimant's case to consider and discuss that phase of the matter.

No doubt, the evidence supporting this contention was admissible; but, when the lands have been valued on the higher

* See, in the Appellate Division, Ontario, (1915), 7 O.W.N. 796.

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footing, I fail to see what advantage can accrue from discussing a valuation on a lower basis.

Two further points remain for consideration.

By his 9th ground of appeal, the appellant submits that the learned arbitrator ignored or failed to consider the reasonable allowance that should be made upon the compulsory acquisition of property against the will of the owner. I take it that this refers to what is sometimes known as the 10 per cent. rule; that is, the method of computing the compensation by first ascertaining the market value of the property and then adding 10 per cent. for compulsory taking. That rule appears to have received the sanction of the Supreme Court of Canada in the case of *The King* v. *Hunting Barrow & Bell* (not yet reported). (See 32 D.L.R. 331).

But the point was not discussed before us on the argument, and nothing has appeared to indicate that the arbitrator did not apply the rule when computing the allowance which he made.

Lastly, it was argued that the award was bad because the arbitrator viewed the property and failed to put in writing, as part of his reasons, a statement of the facts observed by him and relied on in whole or in part as the basis of his award.

Section 4 of the Municipal Arbitrations Act, R.S.O. 1914, ch. 199, provides: "Where the Official Arbitrator proceeds partly on view or upon any special knowledge or skill possessed by himself he shall put in writing as part of his reasons a statement of such matter sufficiently full to allow the Divisional Court to determine the weight which should be attached to it."

In the present case it does not appear whether or not the arbitrator did in fact rely upon any new facts discovered by him when viewing the property. In a case where it appears reasonable to suppose that advantage would result therefrom, I would think that the determination of the appeal should be held over, and that the arbitrator should be requested to supplement his reasons; but, where the subject-matter is vacant land, which has, I doubt not, been frequently viewed by every member of this Court, and where, so far as I can see, nothing new can have been gained by the arbitrator on his view, it appears to me to be an idle waste of time and costs to refer the matter back to the arbitrator for any such statement by him.

I would therefore dismiss the appeal with costs.

Riddell, J.
Lennox, J.

RIDDELL and LENNOX, JJ., concurred. *Appeal dismissed.*

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Quebec King's Bench, Sir Horace Archambeault, C.J., Lavergne, Cross, Carroll and Pelletier, JJ. April 28, 1916.

1. LANDLORD AND TENANT (§ III C—70)—LESSOR'S DUTY AS TO REPAIRS—DEFECTS.

A lessor is obliged to provide against defects in the leased premises which prevent the enjoyment by the lessee, even those that are hidden (art. C.C. 1614), but is not liable for damages through defects of which he was ignorant when the lease was made unless they have afterwards been made known to him, and he has neglected to make repairs, or they were known or ought to have been known to the lessee at the making of the lease.

2. LANDLORD AND TENANT (§ III D—95)—REDUCTION IN RENT—FLOODING—VIS MAJOR.

A lessor who has been deprived of the use of a portion of the leased premises, by flooding through *vis major*, is entitled to a diminution of rent.

Statement.

Two judgments were rendered by the Superior Court (Demers, J.) on April 28, 1915. The first granting damages to the respondent is reversed; the second, granting him a reduction in rent, is affirmed.

Elliott, David and Malhiot, for appellant; *Brossard and Pépin*, for respondent.

Carroll, J.

CARROLL, J.:—This is a controversy between landlord and tenant. On February 9, 1912, the appellant leased to the respondent a shop situated in Maisonneuve. This shop was built in the autumn of 1911, and, in the winter of 1912, Bénard was to pay an annual rent of $2,200 for the shop and the basement.

On April 1, 1912, there was a flooding of the premises caused by the rise of the waters of the St. Lawrence. Damages resulted which were paid for by the appellant upon an action instituted by the respondent. The latter, having stored merchandise in the basement, placed the goods elsewhere during the repairs which the appellant was having made to this basement by her architect, Doran, acting in concert with Francis and Archibald, engineer experts, chosen by the appellant to oversee the execution of the works and, if possible, to make the basement proof against flooding. These works were executed during the summer months, and Bénard took possession of the basement on August 1, 1912. He replaced his merchandise there.

About April 1, 1913, there was another flooding which filled the whole of the basement. Bénard now claims damages from Lady Hingston to the amount of $9,542.55, and he asks, by another action, that there should be a reduction of his rent.

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The two actions were maintained, $7,399.05 being granted for damages to the merchandise; $440 being granted as reduction in rent, from May 1, 1913, to April 1, 1914, and $525 from April 1, 1914, to May 1, 1915, $45 per month for the 3 years which would follow, and $50 per month for the 4 last years, reserving, nevertheless, to the appellant, the privilege of making the basement habitable.

These two judgments are now submitted for consideration by us.

The action for damages is based upon art. 1614 of the Civil Code.

That article, which makes the lessor liable even for hidden defects of the premises leased, is the same as the old French law. The lessor is obliged to provide for the lessee the enjoyment of the property leased and, if he does not do so, the lessee has the right to have the lease resiliated or to obtain a reduction of the rent, but, as to damages, it is necessary that the lessee should have put the lessor in default to remedy the defects.

It appears to me that, according to our law, the lessor cannot be held liable for damages in consequence of defects of which he was ignorant when the lease was made, when they have not been made known to him and when he has not been put in default to repair them.

In France there is a difference of opinion upon this question. Certain authors hold the lessor liable for all the damages sustained by the lessee, whether or not he has been placed in default. This difference of opinion is explained by the drafting of art. 1721 of the Code Napoléon, which differs from our Code. This article reads as follows:—

> There is warranty in favour of the lessee for all vices or defects of the thing leased, which prevent it being used, even where the lessor may not have been aware of them at the time of the lease. If, on account of such vices or defects, there results some loss to the lessee the lessor is obliged to indemnify him.

This last phrase has not been reproduced in our art. 1614. And Troplong, commenting on the second part of art. 1721, of the C.N., says:—

> But are these damages and interests due in every case, that is to say whether the lessor was aware of the defect in the thing, or whether he did not know about it? At the first glance it would appear that it is incontestable that the answer should be in the affirmative, and, to give it colour, it suffices

to connect the second paragraph of art. 1721 with the first. But let us beware of this appearance; it is deceptive.

We have spoken several times of the affinity of the principles of sale to the principles of lease. Well, in the contract of sale, the seller is not liable for the damages and interests except when he was aware of the latent vice; he is not liable therefor when the defect was not within his knowledge. Why should it be otherwise in the contract of lease?

According to our law, it appears to me that, in regard to this matter, we ought to assimilate the principles regulating leases to the principles regulating sales, and that arts. 1523 to 1528 of the Civil Code ought to be applied.

Even under art. 1721 of the C.N., Duvergier, Duranton, Marcadé, Pont and Agnel are of the opinion of Troplong. Aubry and Rau and Laurent are of the contrary opinion. But, as I have said, these authors rely upon the last paragraph of art. 1721 of the C.N.

The obligation of warranty on account of damages ceases, in my opinion, to have effect in two cases: 1. When the lessee was aware of the latent vices of the thing leased; 2. When he had not made known to the lessor what repairs there were to be made to the property leased.

On the first point I might cite Dalloz, 1849, p. 272, where the Court of Appeal of Paris lays down the principle in regard to the matter:—

Considering, it says, that the flooding of the cellar of which the lessee complains is a circumstance inherent to the locality in which the house is situated and existing from time immemorial during every rising of the waters of the Seine; that the appellant might and ought to have known this general condition of affairs, notorious, and that in accepting the premises with this natural inconvenience he is estopped from any action in warranty against the lessor, having then consented to take them in the conditions in which they were found.

This decision is approved by Agnel, "Code des Propriétaire et Locataire" (9th ed. p. 172, No. 357).

Agnel, reproducing Pothier, goes further and, at No. 354, he declares that, as to vices which existed from the time of the lease, there must be certain distinctions made. When the lessor had knowledge of the vice, there can be no doubt that there was a question of fraud. The lessor, in his opinion, would also be liable, without having positive knowledge of the vice, if he had good cause to suspect it or if, from his position, he should have been aware of it. Except in such cases, the lessor, who was not aware, nor ought to have been aware, of the vice of the thing leased, is

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not obliged to indemnify the lessee in regard to the loss which he has sustained in consequence of such vice; he is not obliged to do more than to take back the thing which he has leased and to give a discharge for the rent.

Agnel cites Pothier, Nos. 118 to 120, in support of the principle which he lays down.

In the present case the respondent himself tells us that there is no question of *vis major*, because there had already been, since 1886, four inundations at Maisonneuve, where the level of the land is very low. Bénard resided at Maisonneuve itself and, consequently, knew of the situation of the premises.

The appellant has not the technical knowledge requisite to be responsible for the repairs which, necessarily, were obliged to be left to the discretion of persons of experience. She selected the best professionals of Montreal, and she reposed confidence in their judgment.

Bénard relies upon a report made by the engineer Marius Dufresne, on May 18, 1912. This report, which was prepared by a person named Dufort, a young engineer, suggested certain means to be taken for rendering the basement free from leakage; but it was never submitted to the appellant who was never placed in default to accept or refuse the suggestions which were contained therein. This report was only produced in an action brought in the month of September, 1912, and the repairs had been completed in the month of August, 1912.

Bénard having taken possession of the leased premises in the condition in which they were—has he not acquiesced in the manner in which the repairs were made, and, if he has not acquiesced in respect thereto, as he contends, how does it happen that he has not asked that the suggestions of his own engineer should have been carried out?

It appears to me that this is an unanswerable argument against his action, which ought not to be maintained.

With regard to his demand for reduction of rent I think that the judgment is correct.

It is sufficient for me, on this subject, to cite Duvergier, vol. 3, No. 315, where it is said:—

> The enjoyment of the thing leased is the object of the contract. When it is taken away from the lessee in whole or in part, the contract ceases to receive its execution so far as he is concerned. On his part it is right that

he should be discharged in the same proportion from the performance of his obligations, that is to say, that he should be relieved from the payment of all or a portion of the price.

And, at No. 330:—

The obligation to pay the price, I have already shewn, arises from the fact of the enjoyment on the part of the lessee. When that enjoyment is interfered with from any cause whatever the price ceases to be due.

CROSS, J.:—The appellant has been held to have failed to make good her obligations as lessor, and judgment has been given against her in the Superior Court for $7,399.05. From that judgment she has brought up this appeal, and the main question for decision is whether the flooding is to be considered a case of *force majeure*, as asserted for the appellant, or something resulting from failure on her part to make good her obligations as lessor, as contended by the respondent and held by the Superior Court. The respondent had been in business as a retail dry goods merchant in the locality and had proposed to the appellant that she should erect a building on some low-lying vacant land nearby, with the view of his becoming her tenant of part of it. Accordingly, a lease for a term of 10 years was entered into, and in it the leased subject is described as follows:—

A shop to be occupied as a departmental store, with the basement below it, which shop is situated on the northeast corner of St. Catherine and Lasalle Sts, in the said City of Maisonneuve, and in a building to be erected upon lots 103, 104, 105, 106 and 107 of the official subdivision of lot No. 8, as shewn on the plan and book of reference of the incorporated Village of Hochelaga, as the whole appears upon the plan, sketch and specifications of the said shop prepared by W. Doran, architect, of the City of Montreal.

In April, 1912, when the term of the lease commenced, and the respondent was about to go into occupation, water came into the basement. It came with such force as to break and burst up the cement floor. That and other difficulties gave rise to a first law-suit between the parties, which was in part decided in the respondent's favour.

The appellant relaid the basement floor, but, this time, put French drains under it to drain off water, such as had caused the mischief, into a well or sump from which the water was to be lifted and sent into the street drain by a pump operated by hydraulic power and set into action automatically whenever the water would rise to a certain height in the well or sump. The site of the building is low and boggy. Water gathers on the land in spring and in times of heavy rain. The basement floor is lower than the street drain. In the pipe which carries waste-water

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from the building to the street drain there was a valve so adjusted that when water was penned back in the street-drain it would close by action of the water, and so prevent the water from flowing back from the drain into the building.

On March 31, there had been an exceptionally great fall of rain; over three inches. At night an ice-jam appears to have formed in the River St. Lawrence. The police constable of the locality, in the early hours of the morning of the 1st April, found that the water of the river was overflowing its banks and he began to warn people by telephone. The respondent was told and went to the leased premises at about 6 or 7 o'clock and found, at that hour, that there was about one foot in depth of water in the basement, that the water was perceptibly rising and that he could see it coming in through the bottom of a portion of the wall where the masonry was visible—elsewhere the wall was boarded over—as water could run through a willow basket, according to his description. He proceeded to take his goods out of the basement, and took out about $2,100 worth from about $12,000 worth which were in the basement. At about 9 o'clock in the forenoon, the water in the basement was about 5 feet deep and was flowing in from the yard by the doorway leading to the basement. At that hour, water was coming up through the manhole of the street drain and was at about the same level in the River St. Lawrence. It is to be observed that, between the building and the river, there was all the distance from St. Catherine street to Notre Dame street, plus the distance from Notre Dame street to the river.

The pretensions of the respondent are, in substance, that a basement, in the locality in question, could have been made water-tight; that the work and installation provided to that end by the appellant were defective, and, as regards the rising of the water due to the ice-jam in the St. Lawrence, that such occurrence had happened before and should have been provided against by the appellant.

At the hearing, I was impressed by the consideration that as the appellant had taken upon herself to erect the building and make the basement of it in such low-lying ground, she should, because of having made a basement at such a low level, be held responsible for damage therein by moisture or water, even if the wetting happened in a purely fortuitous way. But the respondent has not taken that ground and could not well do so in view of his having

himself suggested the erection of the building on the site in question and taken knowledge of the plans.

His case accordingly rests upon the two contentions which he specifically pleads, namely, that the appellant's contrivances for keeping away the water were defective, and that the appellant was under obligation to protect him from river flooding.

The first contention would, of course, establish the respondent's case, if, in fact, the damage is attributable to the defects, but if the damage was caused by the overflow of water from the River St. Lawrence, the appellant would be responsible only if the respondent is right in his contention that, because, once in every 6 or 8 years the St. Lawrence water overflows the river bank in consequence of an ice-jam and floods some cellars, a lessor is responsible in damages to his tenant for such flooding, as being something likely to happen and which she should have guarded against.

Now, the respondent undertook at the trial to prove by testimony of skilled persons, wherein the appellant's protective contrivances were defective. The testimony is to the effect that at three or four places there were holes in the cement floor which permitted water to escape upwards from the French drains, whereas it was said that the cement floor should have been water-tight everywhere, and there should have been a tarred water-proof *chemise* on the walls extending from the floor 2 feet upwards all around the cellar so that the floor and sides would form a water-tight basin like a pot. It was also said that the masonry walls, though of good quality, were easily permeable by water and that the side-walls of the outside stairway, which leads down to the basement, had parted from the main wall leaving a crack through which water could run.

These witnesses agree that the method of disposing of the water by collecting it by French drains into a sump and pumping it thence into the street-drain is a right method, and also approve of the device of a closing valve to prevent back-flow from the drain. I have difficulty in understanding how there is to be a water-tight covering over everything such as is suggested. It would seem necessary that the pump and the well should be accessible.

Skilled witnesses examined for the appellant are against the idea of the water-tight basin, and the fact of the bursting-up of

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the first cement floor, where no provision was made for disposal of water from below, seems to confirm the soundness of their view. Besides, when the respondent's skilled witnesses say that, had their views of what was necessary been carried out, the basement would have been water-tight. I do not understand them to mean that this basement would have remained dry if the water of the St. Lawrence river were to rise to the level of the ceiling of the basement as it did. A chemise 2 feet high would not keep out water 6 feet high. It would seem that, though at 7 o'clock the water in the basement was still coming in through the foundation walls, at about 9 o'clock it was pouring in through the door from the surface of the adjacent lands.

I find nothing in the evidence about the action of the pump or about the effect which the surcharge of water in the street-drain would have on the pump. It is clear that the pump would have had to work not only against a greater head of water but also against water under pressure in the street-drain. It is also clear that it was out of the question that the pump could keep down the water in the basement when it was flowing in at the door.

One cannot distinguish between the damage caused by the water which came through the foundations and that caused by the water which flowed in by the door, so that if the appellant is responsible for the former in consequence of defective equipment, she can say that the same damage would have been caused anyway by water which came in at the door.

While the first cause was operating, and before it is shown to have caused actual damage, the second one supervened and overwhelmed it. It may be observed here that, in law, the debtor of an obligation who, in consequence of antecedent *mise en demeure*, would be responsible for loss even caused by fortuitous event, is relieved if he can shew that the thing would likewise have perished if it had been in possession of the creditor: Art. 1200, C.C. That rule is of general application and has been applied to relieve a carrier, even when otherwise at fault. Decisions are noted in Am. and English Ency. of Law, Verbis "Act of God," 2nd ed., p. 597.

In these circumstances, I consider that if the appellant is to be held responsible it must be held that she is responsible for not having protected the basement from the flood, in other words,

that she is responsible for damage caused to her lessee by the raising and penning back of the water by the ice-jam in the river, a cause which is known to operate once in the course of several years, though, of course, it cannot be known or anticipated whether the water will rise high enough to cause damage.

I consider that counsels for the respondent err when they reason that, because it is known that ice-jams from time to time cause the water of the St. Lawrence to overflow its banks, the appellant in this case is to be held responsible for damage caused in that way. That reasoning presupposes that the height of the water of such a flood is a thing which is known or can be estimated in advance, but that is a mistake. A land-owner, in proceeding to build, proceeds on the assumption that the municipal authority in making a street sewer has provided a means by which drainage water and freshets can be got rid of.

In this case, the drain which was to carry the water away did not act or acted in the opposite of the intended way. That is a circumstance which helps us to see that, though river floods were known to be things which might be expected to occur, this particular flood was of proportions which could not have been foreseen. It was therefore, as regards extent and gravity, not only extraordinary, but unprecedented, two characteristics well described by White, J., in *Corporation of D'Israeli* v. *Champoux*, 4 R. de J. 300. The simultaneous action of the ice-jam and of the heavy rainfall was a thing which no one would have anticipated.

Floods caused by ice-jams are erratic. Of two such one may act quite unlike the other, and, largely for that reason, they are very commonly used as typical illustrations of *vis major*. They may be foreseen in a sense, but may at the same time be fortuitous and unprecedented,Larombière, art. 1148, C.N., No. 3—Pand. Fr., Bail—No. 1021.

As stated in Laws of England, Vo. "Contract" at No. 878.

The occurrence need not be too unique, nor need it be one that happens for the first time; it is enough that it is extraordinary, and such as could not reasonably be anticipated.

The owner of land near a river is not chargeable with negligence for having built upon it and let to tenants.

It is not to be expected that such lands are to be left vacant. And, in case of lease, the tenant's knowledge of the existence of

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the cause of possible damage relieves the lessor from his obligation, D.P. 1900, 1, 507; D.P. 97, 1,314, note.

I have eliminated any question of responsibility on the part of the appellant on the possible ground of her having erected the building on an unsuitable site or in an unsuitable position as regards level because of the respondent's own consent to the site and approval of the plans as above mentioned.

It is appropriate to make a brief reference to the judgment for $203.59, given in the first action taken by the respondent lest it should be supposed that we are now contradicting what was then decided.

The part of the demand in that action, which was sustained, was for loss of occupation of the basement because of its not having been completed and ready for occupation at the commencement of the term of the lease, and because of delay caused afterwards by defective flooring in the basement.

It was proved in that action that the basement floor as first laid had no provision for drawing off water from below it, and as a consequence, when the subsoil became charged with water, there was an upward pressure which burst up the floor and left an accumulation of broken cement and mud in the cellar.

Filling around the foundation had also been done in winter, and the frozen filling material when the spring thaw came on helped to give passage to the water through or under the foundations and basement floor.

The appellant, in those circumstances, could not make out a defence of *force majeure*. The significant difference is that in that case the leakage was from below, whereas in this case there was an inflow from the street surface and adjacent land brought about by a flood.

I consider that the defence of *vis major* has been made out, and that there should be judgment for the appellant, dismissing the action with costs, less one-half costs of enquete and of printing evidence.

2nd Appeal. In the circumstances disclosed in what is said in the other appeal, the respondent took this action to have the rental stated in the lease reduced by two-fifths because of loss of use of the basement.

He alleges that the basement is exposed to flooding, and is

damp and unsuitable for his trade. The lease is for 10 years from May 1, 1912, with an option to the lessee to cancel it at the end of 5 years. The covenanted rental is $22,200 payable in sums of $166.66 2-3 per month for the first 3 years, $183.33 1-3 per month for the next 3 years and $200 per month for the remaining 4 years.

The Superior Court has reduced the rent by $440, for the 11 months between May 1, 1913, and April 7, 1914, and by $520 for the 13 months between April 1, 1914, and May 1, 1915. The judgment contains a recital to the effect that the respondent has a right to have these reductions made and further to have the rent reduced by $45 per month for three years from May 1, 1915, and by $50 per month for the 4 last years of the term, but it does not adjudge that the monthly reductions of $45 and $50 per month shall be made. The recital is:—

Considering that the defendant ought not to be deprived of the right to make the apartment perfectly habitable and that it is better to reserve to the plaintiff his recourse for the future.

As to this future period the adjudication is:—

Réserve au demandeur son recours pour l'avenir au cas où la défenderesse ne remédierait pas à l'état de chose actuel.

By his action the respondent tendered a surrender of the basement (except the furnace room). It will be observed that the judgment has not given effect to that offer of surrender, but proceeds on the footing that he is to continue lessee of it.

The grounds of defence pleaded by the appellant are in substance the same as those pleaded in the action of damages, but with the added ground that the declaration does not disclose a case for asking for diminution of rent on any ground recognized by the Code. Her conclusions offer a cancellation of the lease.

In appeal, the appellant in substance complains that this action and the action in damages rest upon the same ground and that there has been an illegal splitting up of the respondent's claims for the purpose of taking separate suits, a procedure which has operated to the appellant's prejudice in that she is twice punished, namely in damages for the flooding in one action and in reduction of rent for the same flooding in the other action.

Besides also complaining that the judgment is not well grounded in fact, she also contends that it has gone *ultra petita* and that the action is wrongly brought as for a reduction of rent.

The building had not yet been erected when the lease was

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made. As things have turned out, the basement is not fit for the use intended to be made of it. The building is on such a low and swampy site that there can be no assurance that the basement will be otherwise than damp and liable to receive occasional inflow of water.

The Superior Court was right in concluding that the respondent was entitled to some relief. I further consider that the relief could be asked for by way of reduction of rental. That is in effect a form of damages.

It is true that in general the ground of a reduction of rental is destruction or expropriation of part of the subject leased. But in art. 1634 C.C. there is also recognized a right to claim diminution in case of loss of enjoyment of part of the leased subject.

The respondent ought to have taken but one action, but, in the absence of a preliminary pleading complaining of the multiplying of actions, I would say that the objection could not afterwards be made a ground to ask for dismissal of the action, but should be treated only as affecting costs, seeing that the two actions were tried together.

I do however consider that, upon the issues joined, the Superior Court should have decided the whole controversy instead of having left the greater portion of it open in the way above pointed out, provided the Court had before it materials upon which it could fix a reduction without doing injustice. *Wills* v. *Central Ry. Co.*, 20 D.L.R. 943.

The reservation of recourse, I would say with deference, is the more unsatisfactory in that, taken with the recital which precedes it, it would seem to make the reductions of $45 and $50 per month binding upon the appellant, unless she puts the basement in perfect order, whereas the respondent need not be satisfied with them, unless he so pleases.

The appellant might well have claimed that the demand for reduction of rental should have been adjudicated upon once for all: *Chaudière Machine and Foundry Co.* v. *Canada Atlantic Ry. Co.*, 33 Can. S.C.R. 11; *Dorchester Electric Co.* v. *Roy*, 12 D.L.R. 767, 22 Que. K.B. 265; *Central Ry. Co.* v. *Wills*, 23 Que. K.B. 126 (affirmed in 19 D.L.R. 174, 24 Que K.B. 102). But the appellant does not definitely take that objection on this appeal. Then again, I find no evidence directed to the point of establishing

what deduction in rental should be made in consideration of loss of use of the part of the basement which the respondent offers to surrender.

The testimony of record relates to the rental value of the basement as a whole, whereas the respondent proposes to retain the exclusive use of the furnaces and furnace-room and he does not say what he proposes to do with the covenant of the lease which provides that the basement and the store in rear are to be heated by the same furnace system which heats the ground floor.

It would therefore seen inevitable that the Court should have left the parties to their recourse in their future relations, but I do not find evidence upon which the Superior Court could say that the diminution should be $45 and $50 per month as declared.

I would dismiss the appeal, but I would at the same time strike out the finding respecting the diminutions of $45 and $50 per month.

Judgment on the action in damages:

Considering that the plaintiff-respondent himself proposed to the appellant that she should erect the shop in question on the site on which the same was afterwards built with the view that he (the respondent) would become lessee thereof and that the plans of the building were mentioned in the lease as those according to which the building was to be erected;

Considering that the loss and damages for the amount of which the present action is taken were caused by irresistible force, to wit, by a flood brought about by the water of the River St. Lawrence having been made to rise and overflow its banks, by an ice-jam in the said river on April 1, 1913, and by rainfall of exceptional volume which occurred on the preceding day and contributed with the ice-jam to cause the flooding;

Considering that the respondent had in previous years carried on business in the locality in question and knew that lands at that place were exposed to flooding by overflow of the waters of the said river on isolated occasions in spring in the course of each period of several years;

Considering that the appellant (defendant) is not obliged to warrant the respondent against damage caused as aforesaid and that the said loss and damages are not attributable to fault on the part of the appellant;

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Considering that there is error in the judgment appealed from, to wit: the judgment rendered by the Superior Court at Montreal, on April 28, 1915, whereby the respondent's action was maintained;

Doth maintain the appeal, doth reverse and set aside the said judgment appealed from, and, now giving the judgment which the said Superior Court ought to have pronounced, doth dismiss the action of the plaintiff-respondent with costs in the Superior Court and of the present appeal.

Judgment on the action for diminution of rent:

Considering that there is no error in the judgment appealed from, to wit, the judgment pronounced by the Superior Court at Montreal, on April 28, 1915;

Considering, however, that the parties should have the benefit, if any, of the respondent's offer of return of the basement of the store in question;

Doth without fixing any amount or rate of monthly reduction of rental for the remaining 8 years of the term of the lease, seeing the reserve of recourse in respect thereof by the said judgment, grant acte of the respondent's tender of restoration of the said basement (saving however the case of the appellant rendering the same acceptable for the purposes of the lease as provided for by the said judgment) and doth dismiss the appeal and confirm the said judgment with costs in the Superior Court and in appeal in favour of the respondent.

[Appealed to Canada Supreme Court.]

CAN.

Ex. C.

THE KING v. WOODLOCK.

Exchequer Court of Canada, Audette, J. November 18, 1915.

DAMAGES (§ III L—240)—EXPROPRIATION—VALUE OF FARM.

In fixing the amount of compensation for a farm expropriated for public purposes, all elements which tend to make it especially valuable to the owner as a farm should be taken into consideration.

[See also *The King* v. *McLaughlin*, 26 D.L.R. 373.]

Statement.

INFORMATION exhibited by the Att'y-Gen'l for the Dominion of Canada to have the value of certain lands, expropriated for the purposes of the Valcartier Training Camp, determined by the Court.

G. G. Stuart, K.C., for plaintiff, *L. A. Cannon*, K.C., for defendant.

AUDETTE, J.:—This is an information exhibited by the Att'y-Gen'l of Canada, whereby it appears, *inter alia*, that certain lands belonging to the defendant were taken and expropriated, under the provisions of the Expropriation Act (R.S.C. 1906, ch. 143) for the purposes of a public work of Canada, namely, "The Valcartier Training Camp," by depositing a plan and description of such lands, on September 15, 1913, and August 31, 1914, in the office of the Registrar of Deeds for the County or Registration division of Quebec.

The defendant remained in possession of his property up to September 16, 1914. The lands so expropriated are severally described in par. 2 of the information and are composed of a farm with buildings thereon erected and a wood-lot. The title is admitted.

The Crown, by the information, offers for the farm, containing an area of 126 acres, with the buildings thereon erected, the sum of $2,575, and for the wood-lot, containing an area of about 85 acres, the sum of $425, making in all for the two lots the sum of $3,000.

The defendant by his amended plea claims the sum of $15,250.40.

On behalf of the defendant, witness Gilfoy valued the farm, exclusive of buildings, at the sum of $4,920, and the wood-lot at $1,800, the lake at $1,500, and thought that the land upon the farm was worth $30 an acre. Robert Hayes and John Corrigan value the farm at $5,226 without buildings, adding that the land varied in quality for different areas, together with $1,000 for the lake and $1,845 for the wood-lot. Morris King places a value of $5,950 upon the farm, exclusive of buildings, but inclusive of the lake which he values at $1,500, and $2,900 for the wood-lot. And James McCartney values the farm, exclusive of buildings, at the sum of $5,226, and the wood-lot at $1,800. There is also on behalf of the defendant evidence in respect of the lake and the buildings on the farm, together with the evidence of the defendant himself with respect to his loss and damage.

I may be permitted here to make a casual observation with respect to the defendant's evidence. It is this. Farmers when valuing a farm are in the habit of treating it as a whole, not separating the buildings from the land. An inflation of the true value

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of the land, *per se*, may very naturally result from this unusual method of valuation, which is a departure from the usual course.

On behalf of the Crown, witness Powell values the farm and wood-lot at $3,000. This witness, who admits he has no experience in real estate, bases his valuation upon a list shewn to him and purporting to contain the prices at which certain properties in the neighbourhood had been sold but of which he had no knowledge. Witness John Jack, values the farm as a whole at $3,000 to $3,500, and the wood-lot at $900, and the buildings upon the land at $150. But taking the special circumstances of this case in consideration he would allow the sum of $5,030 for the land and all damages. Witness Perry in the result, came to the same conclusion, and placed a value for the land and all damages at the sum of $5,030. Col. William McBain values the farm in September, 1913, at the sum of $2,800, but in view of the unusual and special circumstances of this case would put a value of $4,500 for the farm, the wood-lot and all damages.

The lands in question became vested in the Crown on September 15, 1913, and the defendant was allowed to remain in possession until September 15, 1914. At 4 o'clock on September 14, 1914, he received notification that he had till 6 o'clock on the 15th to move out of his property, as artillery firing would take place on Wednesday, September 16, from 9 a.m. to 5 p.m. and that it was important he should move out, so as not to be within the fire zone. He moved out within the 26 hours. The notice, which is filed, as ex. F., also states—"We only require possession for a few weeks and if you wish to return to the holding, arrangement can be made to give you possession through the winter."

The defendant continued to retain possession of his property after September, 1913, put in his crops and in September, 1914, had only gathered part of his oats, vegetables and potatoes. On receipt of the last notice, he cut his cattle loose, and vacated that property within 26 hours left him. He claims having suffered thereby losses and damages with respect to his furniture, oats, vegetables in the ground, fowls and turkeys, that his cows, pigs and sheep went back and lost in weight when he came to sell, and the rent he is now paying for the house he occupies. He further claims for extra labour occasioned from the fact that his present residence is away from the farm, and in respect to

his agricultural implements, which he says he cannot sell, they being second hand and the neighbouring farmers who might be purchasers being in the same plight as he is himself.

While the defendant is clearly entitled to damages in respect of his crops, his moving, etc., there is obviously a great deal of what he claims which does not constitute the legal elements of compensation—and no accurate or reliable accounts of his business have been produced. However, for all damages suffered by him in respect of his crops, moving, etc., I will allow the sum of $1,000, *The King* v. *Thompson*, 11 Can. Ex. 162.

With respect to the value of his farm, very conflicting evidence has been adduced. However, upon taking in consideration the unusual and special circumstances of the case, the Crown's witnesses increased their valuation in such a manner that it makes it possible to reconcile the evidence as a whole, notwithstanding the numerous purchases made by the Crown of some of the neighbouring properties for sums very much lower.

The defendant's farm is an average farm in Valcartier with also average buildings. The soil is very sandy, and while some parts of the farm are fair, other parts are poor and covered with moss.

The defendant is rather advanced in age—he has lived on the farm all his life and his father lived there before him. Where, indeed, the property has thus been occupied by the owner as his home, and he has no need nor wish to sell, the compensation should be assessed on a liberal basis.

For the farm and the buildings thereon erected I will allow $30 an acre, which is a high price for farms in that locality, making for the 126 acres, the sum of $3,780.

Coming to the valuation of the lake, one must guard against being carried away by "fish stories" and bear in mind that the trout did not spawn in the Woodlock lake. But it must be admitted that such a lake, small as it is, with part of the Griffin lake, is of a most appreciable value on a farm, for watering cattle and other general purposes. Just as much as a small water-course or a well is very valuable on a farm. To the $30 an acre already allowed, I will add $4 an acre as representing the additional value given to the farm by these two lakes, amounting to the sum of $504.

Coming to the valuation of the wood-lot, it must be stated *in*

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limine that much of the evidence adduced in this respect—all of the defendant's evidence—has been upon a wrong basis, upon a wrong principle. It is indeed useless to juggle with figures and measure every stick of wood upon the lot, estimate the number of cords of wood upon the same, and upon that basis estimate the profits that can be realized out of the lot, to fix the value of the same according to such profits. In other words, it would mean that a lumber merchant buying timber limits would have to pay to the owner of the limits as the value thereof, the value of land together with all the foreseen profits he could realize out of the timber upon the limits; in the result leaving to the purchaser all the labour and giving all his prospective profits to the owner of the limits. Stating the proposition is solving it, because it is against common sense and no man with a slight gift of business acumen would or could become a purchaser under such circumstances.

What is sought in the present case is the market value of such a wood-lot, as a whole, as it stood at the date of expropriation; *The King* v. *Kendall*, 8 D.L.R. 900, 14 Can. Ex. 71 (confirmed on appeal to the Supreme Court of Canada); *The King* v. *New Brunswick R. Co.*, 14 Can. Ex. 491. A deal of evidence has been adduced in that respect, and while I think a lot of that kind is not worth more than $200 to $500, I have evidence on behalf of the Crown, which induced me to allow the sum of $900 together with the sum of $150 for the buildings thereon erected.

In recapitulation, the assessment of the compensation is as follows:—For the farm, and the buildings thereon erected, an average price of $30 an acre for 126 acres, $3,780; the lakes, an additional value of $4 an acre upon the whole farm, *i.e.*, $504; the damages to the crops, etc., and in moving, etc., $1,000; for the wood-lot, $900; the buildings on the wood-lot, $150 = $6,334. To this amount should be added 10% for compulsory taking—the defendant neither needing nor wishing to sell, $633.40—making in all the sum of $6.967.40, with interest thereon from the date at which the Crown took possession, namely, September 16, 1914.

Under the proper appreciation of all the circumstances of the case, it is thought that $6,967.40 is an amount representing a very liberal, fair and just compensation to the defendant.

It would be wrong to be carried away with the impression that the defendant has not been properly treated by the authorities. Indeed, there would go to mitigate against his extravagant claim and the alleged feeling of annoyance for want of considerate treatment the obvious fact that the defendant has been allowed to remain in possession of his property until some time in August, 1914, although his property had been expropriated in September, 1913, and that he was still in possession on September 15, 1914. He was at that time quite aware, he admits, that the camp was in operation and that he expected to move any day. He was again reminded at the end of August, 1914, as appears by exs. 3 and 4, that his property had been expropriated and that it was required for the camp. The advisement to remove on short notice he received in September was by no means a first notice, nor was it given in a harsh or inconsiderate manner. Quite to the contrary it is intimated to him that his property is required for a few weeks for artillery practice, and that if he wished to return to his holding arrangement can be made to give him possession through the winter.

Then properties have been acquired in the neighbourhood for camp purposes at prices which by comparison go to make the defendant's claim obviously extravagant. Moreover, it must not be overlooked that we are now living in a time of war and that the duty cast upon the State to train its soldiers within as short a time as possible is a duty which is clearly paramount to all other interests.

There will be judgment as follows, to wit:—1. The lands and real property expropriated herein are declared vested in the Crown, as of September 15, 1913. 2. The compensation for the lands and real property so expropriated with all damages arising, or resulting from the said expropriation are hereby fixed at the sum of $6,967.40, with interest thereon at the rate of 5% per annum from September 16, 1914, to the date hereof. 3. The defendant is entitled to recover and be paid by the plaintiff the said sum of $6,967.40 with interest as above mentioned, upon giving to the Crown a good and sufficient title, free from all incumbrances whatsoever, the whole in full satisfaction for the lands taken and all damages resulting from the said expropriation. 4. The defendant is also entitled to the costs of the action.

Judgment accordingly.

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S. C.

FORRESTER v. ELVES.

Alberta Supreme Court, Scott, Stuart, Beck, and McCarthy, JJ.
May 10, 1916.

EXECUTION (§ II—15)—CROPS—PRIORITIES—INTERPLEADER.

A sale of a share or interest in a growing crop, in good faith and for valuable consideration, is valid as against an execution creditor, even though the execution was in the sheriff's hands prior to the sale, this fact being unknown to the purchaser.

[*Haydon* v. *Crawford*, 3 U.C.Q.B. (O.S.) 583; *Jacobsen* v. *International Harvester Co.*, 28 D.L.R. 582, considered.]

Statement. APPEAL by stated case from a judgment of Walsh, J., in an interpleader action. Affirmed.

P. W. L. Clark, for appellant; *S. D. Skene*, for respondents.

The judgment of the Court was delivered by

Beck, J. BECK, J.:—This is a proceeding in the nature of an interpleader. No issue was formulated, but the facts were agreed upon and put in the form of a stated case.

I take this opportunity of saying that, in my opinion, the following of the traditional practice of the Court of Chancery, in sending a precise issue for trial in a Common Law Court before a jury, should, in view of the manifold interests that may be created in property under our advanced and often intricate system of business and of the administration of both legal and equitable rights in the same Court and in the same proceedings, be largely modified; and instead of precise issue, an inquiry should be directed to ascertain the rights of the respective parties or at least that the greatest care should be used to make the issue multiple and distributive so that this end will be accomplished. Instances of what appeared to be injustices resulting from too great precision in the issue will be found by reference to Cababe on Interpleader, 3rd ed., pp. 71 *et seq.*, and *Flude* v. *Goldberg*, [1916] 1 K.B. 662 n.

In the present case, no formal issue was directed; so that the question was at large before the Judge of first instance and also before us.

The stated case came first before Clarry, M., who decided in favour of the claimant and an appeal to Walsh, J., was dismissed. This is a further appeal. No reasons for judgment below were given.

Briefly the facts are as follows:—Pratt, the execution debtor, owning a farm, leased it, on March 23, 1915, to one Branson for 8 months from April 1, 1915, the rent being "one-third share or

portion of the whole crop of the different kinds and qualities which shall be grown upon the leased premises . . such share to be delivered on the day of threshing and said threshing shall be done on or before October 15."

The execution of the execution creditors was placed in the sheriff's hands on March 9, 1915.

On August 3, 1915, *before the crop was cut*, the claimant, Forrester, purchased Pratt's interest in the crop for $800, taking a bill of sale therefor, which was duly registered on August 4, 1915. Forrester had then no notice of the execution.

On September 29, 1915, *before the claimant had obtained delivery of his share of the crop*, the sheriff seized what he claimed to be the execution debtor's one-third interest in the crop. I gather that there has not yet been any actual division of the crop. It is admitted that at least a part of the $800 the consideration for the sale of the one-third interest in the crop from Pratt to Forrester represented a past due debt owing by Pratt to Forrester.

In a case decided at the present sittings of this Court, *Jacobsen* v. *International Harvester Co.*, 28 D.L.R. 582, we have decided that a present assignment of property not then in existence, that is, a crop of grain not yet sown, is effective to attach itself to the property *eo instanti* that it comes into existence, that is, that the crop is sown, in such sense that it comes into existence subjected to the assignment, so that there is no interval of time when an execution against the assignor coming in after the assignment could attach. Other questions arise in the present case.

In *Haydon* v. *Crawford*, 3 U.C.Q.B. (O.S.) 583, it was held in a case where the tenant was to deliver one-half of the wheat to be raised by him on the farm as rent that the relationship was simply that of landlord and tenant, the rent being payable in kind and uncertain in amount, instead of a fixed sum of money; that no *legal* property in any wheat raised on the farm could vest in the landlord until the tenant had threshed and divided it and delivered to him his portion; that if the tenant should fail to deliver to the landlord his share of the wheat, the landlord would have his remedy as upon other covenants, but the tenant might, before division, legally alienate the whole and might maintain trespass against anyone, even against his landlord, who should wrongfully interfere with his possession of the field and the grain growing in it.

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Although this case has been followed, *e.g.*, in *Campbell* v. *McKinnon*, 14 Man. L.R. 421, *Robinson* v. *Lott*, 2 S.L.R. 276, I doubt very much whether it should be followed in a Court administering a complete system of jurisprudence embracing what was formerly law and equity, for it seems to be the more reasonable conclusion that, where a landlord is to be entitled to a portion of the produce of his own land as compensation for its use by a tenant, he by virtue of the contract in that respect acquired an interest in the entire crop in its undivided state, which may be sold or encumbered by the landlord and in respect of which, in the event of a threatened removal by the tenant, he might obtain an injunction on the ground of his actual interest and not merely on the ground of the removal or diminution of the property subject to distress. If the view I have suggested is correct—I do not intend to assert that it is—then Pratt, the execution debtor, being an owner of an interest in the prospective crop, that interest became bound under our r. 609 by the execution. "Growing crops which are *fructus industriales*, and which, as emblements, would pass to the personal representative, and not to the heir, of the judgment debtor can be seized under a *fieri facias*." Hals Laws of England, vol. 14, tit. "Execution," p. 45; *Cochlin* v. *Massey-Harris Co.*, 23 D.L.R. 397, 8 A.L.R. 392.

The same rule, however, proceeds to say that goods shall not be bound "so as to prejudice the title to such goods acquired by any person in good faith and for valuable consideration, unless such person had, at the time when he acquired his title, notice that such writ had been delivered to the sheriff and remained in his hands unexecuted."

It is admitted that the claimant was a purchaser of Pratt's interest in the farm in good faith and for available consideration. He therefore took what was purchased by him free from execution.

If on the other hand, the law should still stand as decided in *Haydon* v. *Crawford*, *supra*, the execution creditor cannot succeed, because, at the time of the seizure, the conditions there stated as precedent to the existence of any property in any portion of the grain in Pratt, the landlord and execution debtor had not arisen, that is, there had not been a separation, appropriation and acceptance of any portion by Pratt, and the sheriff, under the execution, had no right to interfere in any way with the crop

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or any part of it. And in this view the principle decided in *Jacobsen & Weitzer* v. *International Harvester Co.*, 28 D.L.R. 582, would apply and *eo instanti* that the one-third share of the grain was so separated, appropriated and accepted, the bill of sale from Pratt to the claimant Elves would attach, so as to prevent the execution attaching.

Exception was taken to claimant's right on the ground that the transaction gave him a preference over the other creditors of Pratt. It is questionable whether that ground is open in such a proceeding as this, though it may in view of the Creditors Relief Act; but the facts at all events are not sufficient to sustain the objection. The only evidence that the claimant was a creditor is the admission that some part at least of the consideration was a past due debt. This, I think, is insufficient. There is, furthermore, no satisfactory evidence that Pratt was in insolvent circumstances or unable to pay his debts in full, etc., at the date of the transaction. Even if these things were established, it would seem that the transaction would be protected under sec. 45 and perhaps under sec. 48 of the Assignment Act (1907, ch. 6).

The appeal should for the reasons given be dismissed with costs.

There are some questions between the sheriff, the execution creditor, the execution debtor, and the claimants arising as a result of this decision which will probably call for the decision of a *Judge* and which can be dealt with as a continuation of the proceedings of which the stated case was a part.

Appeal dismissed.

FABRY v. FINLAY.

QUE.
C. R.

Quebec Court of Review, Sir F. X. Lemieux, A.C.J., Pouliot and Dorion, JJ. March 31, 1916.

ALIENS (§ III—19)—ENEMY RESIDENTS—CIVIL RIGHTS—ACTIONS.

An alien subject of a country at war with Great Britain resident in Canada, peacefully carrying on his ordinary vocation, is not under disabilities in the civil Courts, but may sue in his own name, or may assign his claim, and the assignee may recover judgment.

[See annotation 23 D.L.R. 375.]

Statement.

ACTION to recover a claim of $200 due on February 8, 1914, transferred to the plaintiff in March, 1915, by one Mundheim, a German subject. The defendant contested the action on the ground that the transfer of this claim to the plaintiff could not confer upon the latter greater rights than those of the trans-

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feror; that the transferor was to the knowledge of the plaintiff a German subject, a suspected spy under arrest since September, 1914, and a prisoner of war by reason of numerous suspicious and hostile acts.

The Superior Court, Cannon, J., on November 10, 1915, dismissed the plea, and held that the amount claimed was exigible, and that Mundheim at the time of the transfer of his claim to plaintiff was a resident in the Province of Quebec, and there peacefully carrying on his ordinary occupation. The defendant inscribed in review.

Alleyn Taschereau, for defendant, appellant.

Moraud & Savard, for plaintiff, respondent.

Lemieux, A.C.J.

LEMIEUX, A.C.J.:—The question to be decided concerns the right or civil status in our country of an alien subject of a country at war with Great Britain. In olden times, the rule of international public law in England concerning the juridical status of aliens, subjects of enemy countries, was as follows:—

> An alien of enemy nationality could not claim the benefit of the common law. He could be apprehended and imprisoned. All benefits of the law of England were denied him and he had no redress against torts done to his prejudice.

For a long time, however, the rigor of this rule of international law was tempered by royal ordinances

> to exonerate alien enemies who have been allowed to remain in the country and are of good behaviour, from the disabilities of enemies.

In other words, the rights and remedies at law of alien enemies living peacefully are no longer suppressed, extinguished or suspended.

At the outbreak of the present war, a proclamation in the name of His Majesty was published in Canada. Its contents are in harmony with the modern principles of law modifying the old international law. This proclamation is dated August 7, 1914. The second proclamation of August 15, 1914, completing the first, enacts that all persons in Canada of German or Austro-Hungarian nationality shall, so long as they shall peacefully exercise their ordinary vocation, continue to enjoy the protection of our laws and shall be entitled to the respect and consideration granted to peaceful citizens obedient to the law; and that they shall be neither placed under arrest or detention, nor molested, unless there be reasonable cause to believe that they are engaged in spying, etc. This proclamation after enumerating the officials

authorized to arrest German subjects contravening the laws of the proclamation adds that such officers are authorized to liberate any person so placed under arrest in the good faith of whom they can rely, on such person subscribing or undertaking to report from time to time to such officer and to faithfully respect and observe the laws of the United Kingdom and of Canada.

Mundheim was arrested immediately after the declaration of war. The reason for his arrest, and the arrest itself, have not been properly proven. Proof thereof is made verbally without the production of any document by an officer who calls himself "officer of the Internment Office in Quebec." This officer did not establish his quality to testify as to the arrest and the reason thereof. He was unable to swear that Mundheim was a prisoner of war and could only say that he had been informed of this fact. He does not even state what the cause of the arrest was. He further stated that 30 days after his arrest Mundheim was released on parole, and adds that again he was arrested in June, 1915, but for what reason he cannot tell. He adds that his record does not even disclose the fact that Mundheim is a German.

But even admitting that Mundheim was arrested and detained on account of reasonable suspicion that he committed hostile acts, that he acted as a spy, supplied, or attempted to supply information to the enemy, or because he had violated some law, order-in-council or proclamation, t must not be forgotten that he was subsequently released on parole by the military authorities. This release by the authorities specially entrusted with the duty of maintaining the peace and of protecting subjects of His Majesty establishes of necessity that the suspicions concerning Mundheim were groundless, that his arrest was unjustifiable or, at least, that Mundheim had rebutted the presumptions which militated against him. The military authorities would never have released an enemy subject unless convinced that the individual in question offered no danger to public security and the peace of the King's subjects. Otherwise, the authorities would have acted in a grossly imprudent, not to say criminal manner in releasing a reputedly dangerous enemy.

The conduct of the authorities, therefore, inclines us to believe that Mundheim, although an alien subject of an hostile country, was peacefully following, as he stated himself, his ordinary

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occupation, and that there was no reasonable cause justifying his apprehension and detention or molestation in any way inasmuch as he was not a spy and had committed no act prejudicial to public security. In other terms, his release establishes that he had cleared himself of the charges laid at his door and that his arrest was not justifiable.

If Mundheim was peacefully carrying on his ordinary occupation, he was not to be molested and could exercise all his personal rights like any other citizen. Now, the transfer by Mundheim of his claim against Finlay was made on March 9, 1915, at which time he was in the full enjoyment of his liberty, which had been granted him by the military authorities in conformity with the royal proclamation. And for this reason, Finlay's plea cannot be received.

But the case also presents itself under another aspect; Finlay alleges that Fabry, transferee, knew at the time of the transfer that Mundheim was a German and a prisoner of war. This fact has not been established. Fabry appears to be the legal holder in good faith of the claim. There is no proof that Fabry and Mundheim conspired to make a simulated transfer with a view of eluding the law and conferring upon Mundheim benefits of which he would have been deprived before the Courts.

When the claim in question was transferred to Fabry, the latter had reason to believe that Mundheim was a peaceful citizen in the enjoyment of his ordinary right, since he was living as a free citizen, and since the authorities had not deemed it necessary to deprive him of this liberty. We would require far different circumstances to compel us to deny the claim of a citizen in the full exercise of his rights on the ground that the claim upon which he sues was obtained from an alien enemy. To admit the contrary theory would expose the King's subjects to a denial of justice and other serious inconveniences.

The Court of Appeal quite recently decided a case far less favourable than the present one wherein an Austro-Hungarian by name *Harasymczuk* sued the *Montreal, Light, Heat & Power Company* for $1,000 (25 Que. K.B. 252) damages as a result of the death of his minor son. The Court held that plaintiff was entitled to sue in spite of the fact that he was a prisoner of war, seeing his internment was for the purpose of insuring his livelihood. Judgment must be confirmed.

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POULIOT, J.:—The action alleges that the plaintiff, as standing in the rights of one Mundheim, of Quebec, is entitled to receive from the defendant the amount of a claim originally due by the latter to Mundheim and duly transferred to Fabry.

Defendant Finlay pleads that Mundheim is an enemy subject under arrest and a prisoner of war, that he has a residence in Germany, that he is carrying on business with Germany and that, consequently, he could not validly transfer his claim to Fabry; hence, that the latter has no more right than Mundheim to obtain recovery thereof.

In the absence of any allegation to the contrary in the plea Fabry cannot be presumed to be an enemy, and he undoubtedly has the right to institute an action at law.

In the case of *De Korarijouk* v. *B. & A. Asbestos Co.*, 16 P.R. Que. 213, on October 11, 1914, I ordered the suspension of the case until the end of the war on the ground that the petitioner was domiciled in Austria-Hungary, and that the fact of her residence in an enemy country rather than her nationality placed her in the light of an enemy of His Majesty and deprived her of the *jus standi in judicio* before our Civil Courts.

It has not been established in this case that Mundheim was domiciled in an enemy country or that he was carrying on business with Germany. And even supposing that his domicile was Germany, the record shews that at the time of the loan and transfer he resided at Quebec.

The Privy Council in *Robson* v. *Premier Oil & Pipe Line Co.*, [1915] 2 Ch. 124, stated that all relations, commercial or otherwise, between citizens of two belligerent countries, susceptible of benefiting the enemy country or of prejudicing the Empire, is inconsistent with the state of war existing between the two countries and is prohibited. There is no doubt but that Falconbridge, J., in January last at Toronto, applied this rule in the case of *White Co., ès qualité*, transferee of *Dickerhoff, Raffloer Co. of Canada* v. *Eaton Co.*, when he suspended the action until peace should be declared. (Reversed by Appellate Court, 30 D.L.R. 459.) It would appear by the report of the *Gazette* that although the *Dickerhoff, Raffloer Co.* could not be considered as an enemy within the meaning of the Federal proclamation, a fear that part of the claim of $7,000 should benefit enemy creditors was relied upon to justify the decree.

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In *Princess Thurn and Taxis* v. *Moffitt*, [1915] 1 Ch. 58, the right of the plaintiff to sue was recognized although she became by marriage an enemy of the British Crown. This was the case of an American lady who in 1911 married in Pennsylvania a Hungarian, Prince Victor of Thurn. Suit was brought against Josephine Moffitt to prevent the continuation of a libel uttered by the defendant who claimed that she was herself the true wife of Prince Victor, whom she had married according the the laws of the State of New Jersey in 1906.

Subsequent to the institution of the action, the Princess of Thurn registered herself as a Hungarian subject in virtue of the dispositions of the Imperial statute, 4 & 5 Geo. V. (1915), sec. 12.

The defendant prayed for the suspension of the proceedings alleging that the plaintiff, being an alien enemy, could not demand and obtain the injunction prayed for.

Sargant, J., held that notwithstanding the state of war and notwithstanding the fact that the plaintiff's husband had not registered, his wife who resided at the time of the declaration of war in the Empire and had always resided therein and had registered, was entitled to invoke before the Courts the personal rights which she claimed for her own protection. The fact that she registered in accordance with law placed her, the Judge considered, under the protection of the British laws.

Hall, International Law (6th ed., Atlay, p. 388):—

> When persons are allowed to remain either for a specified time after the commencement of the war, or during good behaviour, they are exonerated from the disabilities of enemies for such time as they in fact stay and they are placed in the same position as the other foreigners, except that they cannot carry on a direct trade in their own or other enemy vessels with the enemy country.

Wells v. *Williams*, 1 Salk. 46 (91 E.R. 45).

Where a registered enemy is protected by the law, he has, as a necessary result, the right to sue. "Right to sue is said to be consequential on the right of protection" says Bacon's Abridgment, vcl. Alien.

"An alien, that is in league," says Lord Coke, "shall maintain personal actions, but he cannot maintain real or mixed actions."

In *Bechoff and David* v. *Bubna* ((1915), 31 Times L.R. 248), it was held that an alien enemy who did not reside or carry on business in an enemy country but resided in an allied or neutral country could sue before the English Courts.

Hence, if an alien residing in a neutral country may sue before the Courts of the Empire, *a fortiori* may he do so when residing in the Empire even though he be interned. The law's object is to prevent the money of a subject of His Majesty from benefitting the enemy, which is hardly to be feared, when his place of business is within the limits of the Empire. The important factor is the residence and business domicile of a plaintiff, not his nationality. Needless to say, this protection, and consequently the right to sue, would disappear the moment the alien attempted to return to the enemy country.

Wolf v. *Carr, Parker and Co.*, 31 Times L.R. 407. The danger to the State is assuredly less to be feared when the alien is interned in a concentration camp. It would be a strange system that would recognize the right of an alien enemy residing in a neutral country to sue before our Courts but would deny him this right for the simple reason of internment within the Empire. The internment in itself does not constitute an act hostile to the State. It is merely a preventive police measure, a measure of security often adopted at the demand of the alien himself for his own protection.

An alien interned may be considered as a prisoner of war but that does not necessarily make of him a militant enemy. He is rather detained under the protection of the King as saith Heath, J., in *Sparenburg* v. *Bannatyne*, 1 Bos. and P. 163, 126 E.R. 837. If he conspires against the life of the King, he is guilty of high treason. If he be killed, murder has been committed against him. An enemy interned, even though he be considered as a prisoner of war, does not become by the mere fact of his internment *ex lege;* he retains all his civil rights saving those taken away specially by law, such as carrying on commerce with the enemy.

This question, of primary importance in the present instance, was passed upon by the Privy Council in the case of *Schaffenius* v. *Goldberg* on appeal from [1916], 1 K.B. 284 (85 L.J.R. March, 1916), where the right of the alien enemy to prosecute before the Courts was confirmed and maintained.

The interment of an alien enemy as a civilian prisoner of war does not operate as a revocation of the licence to remain commercant in the country.

Lord Cozens-Hardy supposes the case of an officer released on parole who owns a ring or jewel of great value which he offers for sale and the jeweller to whom he entrusts it is so dishonest as to

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refuse to return to him either the price or the object itself. There can be no question says he, but that the Court will admit his right to claim the jewel in question or the value thereof. And, added Harrington, J.:—

Notwithstanding the internment, the license to remain in the country carries with it the right of prosecuting an action in the Courts of this country, although an alien has no right to question by *habeas corpus* the authority of the Crown to intern him.

Even supposing the records should disclose sufficient and legal proof that Mundheim was of German origin, that at the time of the transfer of the claim he was released on parole and, therefore, *constructively interned*, he would not be thereby *ex lege*, that is to say, deprived of his civil rights allowed him by the protection of the British laws; he is, therefore, entitled to exercise them. Hence, his transferee, Fabry, who is vested with all the rights of the transferor, can recover from the defendant the amount claimed by his action.

The judgment of the Superior Court must, therefore, stand.

Appeal dismissed.

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Ontario Supreme Court, Appellate Division, Meredith C.J.C.P., Riddell, Lennox and Masten, JJ. October 20, 1916.

AUTOMOBILES (§ III C—310)—LIABILITY WHEN CAR OPERATED BY ANOTHER —"STOLEN IT."

An employee in a repair shop who takes a motor vehicle from the shop to test it by driving upon the highway, and after so testing it continues to drive it for his own pleasure, has not "stolen it from the owner" within the meaning of sec. 19 of the Motor Vehicles Act, R.S.O. 1914, ch. 207, as amended by 4 Geo. V. ch. 36, sec. 3; nor is the employee guilty of "theft of a motor car" under sec. 285 (B) of the Criminal Code, as enacted in 9 & 10 Edw. VII., ch. 11.

Statement.

APPEAL by the plaintiff from the judgment of KELLY, J., 37 O.L.R. 529. Reversed.

E. F. Singer, for appellant.

T. N. Phelan, for defendant, respondent.

The statutory provisions discussed in the argument and judgments are the following:—

Section 19 of the Motor Vehicles Act, R.S.O. 1914, ch. 207, as amended by 4 Geo. V. ch. 36, sec. 3: "The owner of a motor vehicle shall be responsible for any violation of this Act or of any regulation prescribed by the Lieutenant-Governor in Council, unless at the time of such violation the motor vehicle was in the possession of a person, not being in the employ of the owner, who had stolen it from the owner."

Section 285 of the Criminal Code, R.S.C. 1906, ch. 146, as amended by 9 & 10 Edw. VII. ch. 13, sec. 1: "Every one is guilty of an indictable offence and liable to two years' imprisonment who, having the charge of any carriage

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MEREDITH, C.J.C.P.:—Though this case was one intended by the parties to be tried by a jury, when it came on for trial, and was tried, the important questions of fact: whether the driver of car, at the time when the plaintiff was injured, was in the "employ" of the owner of it, and whether such driver had "stolen" the car, were, apparently with the concurrence of all concerned, withdrawn from the jury and left to be determined by the Judge who presided at the trial: and fault is now found, on the one side or the other, with the findings of both jury and Judge.

The defendant, in endeavouring to support the judgment in his favour, in case the trial Judge's finding in his favour is reversed, contends that there was no evidence upon which the jury could properly find that any negligence of the driver of the car was the cause of the plaintiff's injury; a very belated contention, the case having gone to the jury not only on the question of negligence, but also of what is sometimes called ultimate negligence, without any objection, of any kind, by any one—a course which a perusal of the evidence shews was a proper one.

There was evidence upon which reasonable men could very well have found, as the jury in this case did find, on each question of negligence. The evidence for the plaintiff was, substantially, this: that the driver was endeavouring to pass a street car, whilst it was yet moving, in order that he should not be obliged to stop whilst the street car was stopped for the purpose of letting down and taking up passengers, an act very far from being unheard of in motor car drivers; that the plaintiff—a boy—was crossing the street in an ordinary manner, and that the danger of the driver running him down was so plain, whilst car and boy were yet some distance apart, that onlookers rushed out and shouted to the

or motor vehicle, automobile, or other vehicle, by wanton or furious driving, or racing or other wilful misconduct, or by wilful neglect, does or causes to be done any bodily harm to any person."

Section 285 B of the Code, as enacted by 9 & 10 Edw. VII. ch. 11: "Every one who takes or causes to be taken from a garage, stable, stand, or other building or place, any automobile or motor car with intent to operate or drive or use or cause or permit the same to be operated or driven or used without the consent of the owner shall be liable, on summary conviction, to a fine not exceeding $50 and costs or to imprisonment for a term not exceeding thirty days."

The words "Theft of motor car" are in a marginal note.

Section 347 of the Code, defining "theft or stealing," is, so far as applicable, set out in the judgment of MASTEN, J.

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driver to stop, but he did not. The evidence for the defendant was substantially this: that, whilst the car was being driven carefully, at moderate speed, the plaintiff ran out from the sidewalk and into the fender of the car just behind the front wheel; and that the car was stopped in a distance of about six feet—not that it could have been so stopped, but that it actually was.

There were very direct conflicts of testimony, as these questions and answers taken from the testimony of the driver, and of his friend and companion, who was in the front seat of the car with him, shew:—

"Q. We have had two witnesses here this morning who swore that this child ran across the street from the east side of the street, got past in front of your car and was hit on the west side of your car. What do you say about that? A. I cannot help it if they did not tell the truth.

"Q. No, don't comment on their evidence. Is that the fact or is it not? A. No, it is not.

"Q. The child that came in contact with your car, you say, came from the sidewalk on the west side of the street? A. From the west side of the street, yes.

"Q. Now, then, how far away was that child from you when you first saw it, and where was it when you first saw it? A. There was several playing on the sidewalk: playing all around.

"Q. On which sidewalk? A. On the west sidewalk.

"Q. And what happened? A. They were playing there, and all at once this child ran off and ran right into the car.

"Q. Did the car hit the child or did the child hit the car? A. Well, according to that, the child hit the car.

"Q. And where did the child hit the car? A. Right at the back of the front wheel. Hit the fender at the back of the front wheel."

That from the driver's testimony; this from his companion's:—

"Q. There were witnesses here this morning who said the child ran from the east side of the street, across the street, and in front of the automobile before it was hit. What do you say about that? A. No, the child ran from the west side.

"Q. And how far away were you from the child when it ran north? A. Well, wouldn't be very far. Just two or three feet, I guess.

"Q. Well, indicate by an object here? A. Well, we were going along and the child just ran at the side."

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The judgment against the defendant cannot be disturbed on this ground—that there is no evidence to support the jury's findings.

Then it is sought to upset it on the ground that the car was not "stolen from the owner" at the time of the plaintiff's injury; the trial Judge having found that it was: that finding being, in view of the case of *Downs* v. *Fisher*, 23 D.L.R. 726, and the amendment to the Motor Vehicles Act, made in the year 1914—4 Geo. V. ch. 36, sec. 3 (O.)—enough to sustain the jury's verdict.

The facts, bearing upon this question, are simple and not disputed: the car was left for repair, by the owner of it, at the shop of the employers of the man who was driving it when the plaintiff was injured; and it was this man's duty, as foreman of the shop, to see that the car was repaired, and for that purpose it was necessary, or proper, that he should run it in the public streets to some extent; but, having done that, instead of returning the car to the shop, he went home in it, to lunch, and, on his way back to the shop after lunching, brought his wife and his brother-in-law and his wife, on their way into town, back with him in the car, and the accident happened when the four of them were thus in the car.

The trial Judge rejected this contention, holding that, in these circumstances, the driver had "stolen" the car: but I am quite unable to agree in any such finding; indeed, if the man were on trial for larceny before me, upon the same evidence, I should tell the jury that there was no evidence upon which they could find him guilty, that is, no evidence of a guilty intent: whilst, if the case went to the jury, can it be doubted that the man would be acquitted promptly? And, in this connection, it may be mentioned that the defendant and the driver had long been acquainted with one another, and so much so that even in the witness-box the defendant called him by his nickname "Bert," and also admitted that but for this action he would never have thought of charging him with stealing the car.

The laws of England were at one time extremely severe—perhaps necessarily so—upon thieves; but I cannot believe that, even in their severest days, the driver of this car could, in the circumstances of this case, have been found guilty of the felony of larceny, and have been made subject to its extreme punishment.

No one could properly desire to make too little of the wrong

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of any one in making use of the property of another against his will or without his leave; but it must not be forgotten that in the every-day small affairs of most men there is a good deal of giving and taking by tacit, as well as expressed, leave; and that the *animus furandi*, an intention to steal, is an essential part of the crime of theft; as the *mens rea*, a guilty mind, is still, generally speaking, a necessary part of a crime.

The middle way between too much harshness and too much leniency, in such cases as this, seems to me to have been well chosen by Parliament in its somewhat recent legislation directly in point. It has made it a minor offence, punishable—on summary conviction only—by fine, not exceeding $50, or imprisonment, not exceeding thirty days: 9 & 10 Edw. VII. ch. 11: to take a motor car for use without the consent of the owner.

To say that this legislation makes the taker a thief, guilty of a crime which was formerly called a felony, is to say something which, it seems to me, the enactment itself refutes: if it were theft, what need for the enactment? The whole subject of that crime and its punishment, great or small, was already covered by the other provisions of the Criminal Code. And why not call it theft, if theft it were to be made by Act of Parliament?

A marginal note to the statute cannot make white black, even if indeed it can be made use of at all in the interpretation of the enactment. There are some interesting observations upon the subject of the use and effect of marginal notes to statutes contained in the report of the argument of the case of *Attorney-General* v. *Great Eastern R.W. Co.* (1879), 11 Ch. D. 449, 460, 461, 465, some of which are as follows: "Bramwell, L.J.:—"I thought you could not properly look at the marginal note of an Act of Parliament. Some of the marginal notes are grossly inaccurate." James, L.J.:—"What authority has the Master of the Rolls for saying that the Courts do look at the marginal notes?" Baggallay, L.J.:—"I never knew an amendment set down or discussed upon the marginal note to a clause. The House of Commons never has anything to do with the amendment of the marginal note. I never knew a marginal note considered by the House of Commons." James, L.J.:—"Is it not merely an abstract of the clause intended to catch the eye?"

And it is to be observed that, though Parliament has expressly made the preamble of every Act "a part thereof, intended to

assist in explaining the purport and object of the Act"—Interpretation Act, R.S.C. 1906, ch. 1, sec. 14—it has done nothing for the marginal note.

Without making, or being able to make, any distinction between a temporary theft of the car and a theft of any part of the gasoline in it for the purpose of running it and with which it was run, I have no difficulty in reaching the conclusion that the tiral Judge erred in this respect; that he should not have found that the car was "stolen."

This leaves but two controlling points undisposed of: that is, the contention of the plaintiff that the driver of the car was "in the employ of the owner" of it; and so the owner is answerable for his negligence; or, at least, that fact takes the case out of the amendment to the Motor Vehicles Act, in so far as it relieves an owner from liability, and leaves the defendant liable even if the car had been stolen.

The finding that the car had not been stolen gives the plaintiff the verdict, and so it is not essential that these things be now considered; but, as he relies upon them as sufficient grounds for his action, and as the trial Judge has, in part, dealt with them, it may be better to deal with them here also.

That the plaintiff is not entitled to recover on the ground that his injury was caused by the negligence of a servant of the defendant in the course of his employment is obvious; no such relationship existed, and, if it had, the injury was not caused by him in the course of his employment: see *Halparin* v. *Bulling* (1914), 20 D.L.R. 598, 50 Can. S.C.R. 471.

Upon the other question, the trial Judge found that the driver was not in the "employ" of the defendant within the meaning of the words "in the employ of the owner" contained in the amendment to the Act; and in that I am quite in agreement with him.

The interpretations already put upon the 19th section of the Act have assuredly gone to the widest extent possible; to carry them further, in making the words "in the employ of the owner" apply to the owners of the repair-shop in which the car in question was repaired, and to all the workmen in it, would be going far beyond the ordinary meaning, and any reasonable application, of the words.

The word "employ" is, in these days, in this country, sometimes used as a noun, and as a word synonymous with the words

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"employment" and "service;" and in that sense it plainly seems to me to have been used in the enactment in question. Generally the owner of a car is not to be liable for the acts of a thief of it unless that thief was some one in his service.

The result is that the plaintiff is entitled to recover in this action, under sec. 19 of the Motor Vehicles Act, because the driver of the car had not stolen it from the owner, and so the owner is not made, by the amendment to the section, exempt from its provisions.

The appeal must be allowed, and judgment entered for the plaintiff, and damages in the amount assessed by the jury.

Riddell, J.

RIDDELL, J.:—The defendant bought a motor car from the Andersons Limited, in May, 1915, and was thereafter to take the car to them if and when it required repairs or adjustment; and this was done on several occasions. In September, the car was not working right, and he took it to the Andersons' garage and left it, with instructions to repair it. Sheppard, Andersons' foreman, was the person to whom the defendant spoke, and he agreed to have the work done by noon.

The trouble was found to be in the transmission; Sheppard had it fixed by one of his men, and then took the car out to try it. He went up the hill, and, finding the car all right, went home with it, some miles from the garage. After lunch he took his wife, his brother-in-law and his wife into the car to take them down town. He intended to drop them on the way to the garage.

With the car thus loaded, he drove it so negligently that an accident happened; the plaintiff, a child walking across the street, was struck by the car and injured.

At the trial, before my brother Kelly and a jury at Toronto, the jury found that the accident was due to the negligence of Sheppard, and assessed the damages at $800. No reasonable complaint can be made in respect of either finding. Mr. Justice Kelly, however, was of opinion that the defendant, the owner of the car, could not be held liable under the circumstances.

The plaintiff now appeals.

In the case of *Downs* v. *Fisher*, 23 D.L.R. 726, this Court held: (1) driving a motor vehicle on the highway negligently was a violation of the Motor Vehicles Act, R.S.O. 1914, ch. 207—see sec. 11 (2); (2) that, under sec. 19, the owner of such a vehicle was liable for the negligence of any one driving the car (an exception

being made of the case in which the car had been stolen—this in deference to the opinion of the majority of the Court in *Cillis* v. *Oakley*, 20 D.L.R. 550, 31 O.L.R. 603, and to reconcile that case with *Lowry* v. *Thompson*, 15 D.L.R. 463, 29 O.L.R. 478).

The Legislature, since the occurrence of the accident considered in *Downs* v. *Fisher*, passed the amending statute (1914) 4 Geo. V. ch. 36, sec. 3. It is beyond question that the defendant is liable unless he can make his case come within this amendment, that is, he is liable for the violation of the Act, "unless at the time of such violation the motor vehicle was in the possession of a person, not being in the employ of the owner, who had stolen it from the owner."

The owner is liable for a violation of the Act when the car is in his own possession, that of any one in his employ (even if that person has stolen it), or of any one not an employee who has not stolen "it," i.e., the car, not the gasoline or the use of the car, from the owner.

This very stringent legislation makes the ownership of a motor vehicle distinctly more dangerous than the ownership of a rattlesnake. The Legislature has thought that it is better that the comparatively few who own automobiles should be liable for the mishaps caused by their machines than that the many not so fortunate, who may be injured by them, should have to look to some unknown person for compensation.

I agree with the learned trial Judge that Sheppard was not in the employ of the defendant. None of the fairly numerous cases in which one person hires and pays a servant who, nevertheless, is in law the servant of another, has any application.

The defendant made a contract with the Andersons company, through Sheppard as their agent, not with Sheppard as the other contracting party. Sheppard saw to it that the work was done, but the work so done by Sheppard and his man was the company's work which the company had undertaken to do, not the defendant's work. The company had undertaken to do the work, not to supply the defendant with a man to do the work for him as his servant. The distinction between the two cases is discussed in *Lavere* v. *Smith's Falls Public Hospital*, 26 D.L.R. 346, 35 O.L.R. 98.

The point upon which this case must turn is: had Sheppard stolen the car from the defendant? My learned brother Kelly

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considers that he had, but I am unable to agree. An article is "stolen" when some one has committed the act of "stealing" with reference to it, and not otherwise. "Stealing" is defined by the Code, sec. 347, as "the act of fraudulently and without colour of right taking" etc., etc. This is not very dissimilar to Bracton's "*contractatio fraudulenta,*" the common law "*cum animo furandi,*" the civil law "*lucri causa;*" what a few years ago we called "felonious intent." Unless the recent Dominion statute (1910) 9 & 10 Edw. VII. ch. 11 makes a change, no one would consider that what Sheppard did was done "fraudulently." He took the machine intending to use it for a time and to return it to the owner, not to make it his own even temporarily. In *Rex* v. *Philipps* (1801), 2 East P.C. 662, the prisoners had taken horses and ridden them for thirty miles, leaving them with hostlers and walking away. They were arrested after walking away some fourteen miles. It was held that, as they did not intend to make the horses their own, but only to use them to save themselves labour in travelling, this was not *animo furandi*. Mr. Justice Grose thought the act was felony, because they did not intend to return the horses. If they had intended to return the horses when they took them, and did not at any time change this intention, no one would say that the act was *animo furandi* or "fraudulently taking away."

Many like cases are to be found in Russell on Crimes and Misdemeanours, vol. 2, ch. 10; Crankshaw's Criminal Code of Canada, 4th ed., p. 397 *et seq.*

It remains to be considered whether the amendment to the Criminal Code, 9 & 10 Edw. VII. ch. 11, makes a difference.

It may be at once admitted that the Parliament of Canada can make any act a "theft" or "stealing;" but, before we brand an act which would otherwise be but a civil trespass with such a name, and brand its perpetrator as a "thief," the legislation must be clear and unmistakable. The Act provides that "every one who takes . . . from a garage . . . any automobile or motor car with intent to . . . drive . . . the same . . . without the consent of the owner shall be liable, on summary conviction, to a fine . . . or to imprisonment for a term not exceeding thirty days."

Assuming that it could be said that Sheppard intended to drive the car "without the consent of the owner" (and I should

hesitate long before finding that there was not implied consent of the owner for Sheppard to drive the car so far as was reasonably necessary to test it, and that is all, on the evidence, that Sheppard intended when he first took the car), I do not think that act was "stealing." No doubt, some one, clerk, printer, or some one else, has placed a marginal note to this provision, "Theft of motor car;" but marginal notes are no part of the statute, however convenient they may be for purpose of reference.

The statute is not an amendment of the larceny or theft part of the Code, but an addition to a section dealing with injury caused by negligent driving of carriages and motor vehicles; and there is nothing to indicate that Parliament intended the new offence to be "a theft."

The act of clerk, printer, or even the Minister of Justice, in making the marginal note the title of the section in certain publications of the Department of Justice is of no consequence. Clerks, printers, Ministers, Departments, cannot legislate in such matters.

I think Sheppard cannot be said to have "stolen" the car, even if he was (as it is said he was) convicted of an offence under 9 & 10 Edw. VII. ch. 11 (Code, sec. 285 B).

The appeal should be allowed, and judgment entered for the plaintiff for $800 and costs of action and appeal.

LENNOX, J.:—I agree. Lennox, J.

MASTEN, J.:—I have had the opportunity of perusing the judgments of my Lord the Chief Justice and of my brother Riddell, and agree in the several conclusions reached by them, but desire to add a few words relative to the temporary conversion to his own use by Sheppard of the defendant's car by using it on his own affairs to go home, some 4 or 5 miles, and to bring his wife and relatives back to town. His act, in my opinion, approaches perilously near to the crime of theft or stealing, as defined by sec. 347 of the Criminal Code. That section, in so far as it is relevant to the circumstances here before us, defines theft as follows:— Masten, J.

"Theft or stealing is the act of fraudulently and without colour of right taking, or fraudulently and without colour of right converting to the use of any person, anything capable of being stolen with intent,—

"(*a*) To deprive the owner, or any person having any special property or interest therein, temporarily or absolutely of such thing or of such property or interest; or, . . .

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"(*d*) To deal with it in such a manner that it cannot be restored in the condition in which it was at the time of such taking and conversion.

"2. Theft is committed when the offender moves the thing . . . or begins to cause it to become movable, with intent to steal it.

"3. The taking or conversion may be fraudulent, although effected without secrecy or attempt at concealment.

"4. It is immaterial whether the thing converted was taken for the purpose of conversion, or whether it was, at the time of the conversion, in the lawful possession of the person converting."

From this definition it will be seen that theft under our Code is not restricted to what, under the common law, constituted larceny, and that the circumstances of the present case present many of the elements of theft as above defined. Sheppard temporarily converted to his own use the defendant's motor, and he knew at the time that he was so depriving him of his property. The motor was to have been repaired and ready for delivery to Beal at twelve o'clock; Beal went up to get it between twelve and one o'clock, and found that Sheppard had it out and away. It was not brought back to the garage till nearly three o'clock. Sheppard dealt with the car in such a manner that technically it could not be restored in the condition in which it was at the time of his taking it. Every motor, when it is originally turned out of the shop, new, possesses the capacity of running a certain number of miles or hundreds of miles before it is worn out. Every mile that it is run exhausts so much of its running capacity. When Sheppard took this motor car out and ran it eight or ten miles he exhausted that much of the running capacity of the car, which could not be restored. It may be suggested that Sheppard did not steal because he used the defendant's car "with colour of right;" that is, in an honest belief in a state of facts which, if it existed, would be a legal justification or excuse; but I do not think that the facts bear this out. Sheppard himself was examined as a witness at the trial, and says that, after repairing the car, it was necessary to take it out and test it to see that the repairs were satisfactory and that it was running right. To make this test he took it to a hill known as Pellatt's hill. The car ran up the hill in a satisfactory manner, and thereupon the test was complete. In his evidence Sheppard says:—

"Q. Then, when you got up to Pellatt's hill and found the car was all right, did you bring it back to the garage? A. No.

"Q. What should you have done after you found the car tested all right? A. Well, I should have brought it right back again to them.

"Q. I said what should you have done? A. I should have brought it back, I guess.

"Q. Well, did you bring it back to the garage? A. No.

"Q. What did you do? A. I went home to lunch with it."

My opinion is that he assumed that this trivial use of the car would not be objected to by the owner; and that, while he had no legal right, he was not morally wrong in doing what he did; but that did not give him "a colour of right:" *Rex* v. *Johnson* (1904), 8 Can. Crim. Cas. 123; *Rex* v. *Watier* (1910), 17 Can. Crim. Cas. 9.

But, in my opinion, there is lacking one element essential to the crime of theft, viz., a criminal mind on the part of Sheppard. The statute says that a theft or stealing is the act of *fraudulently* converting to the use of any person the thing stolen; and this accords with the underlying principle of law that a person cannot, except under special statutory authority, be convicted and punished in a criminal proceeding unless it can be shewn that he had a guilty mind: *Chisholm* v. *Doulton* (1889), 22 Q.B.D. 736.

While sec. 347 has made important changes in the common law, and has made that theft which was not theft before, the element to which I have just adverted seems to me to be still an essential element in establishing theft. No doubt, Sheppard intended to take the car and use it for his own purposes, but I do not think that he took it fraudulently, or that there was in his mind any evil intention at the moment he took it. Such intent is an inference of fact, depending on all the circumstances of any particular case.

In the present case Beal says:—

"Q. You told me the reason you were annoyed was that you wanted your car, not that you had any objection to his being out in your car. That is right? A. Yes."

And further on:—

"Q. You prosecuted him because you were going to be sued? A. Yes.

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"Q. You would never have prosecuted him otherwise, would you? A. No, I don't suppose I would."

The inference which I draw from all the facts and circumstances in this case is, that, when Sheppard, having completed his test of the car at Pellatt's hill, started home for lunch, he had no guilty intention of infringing Beal's legal rights or otherwise injuring him, but assumed, unwarrantably perhaps, but honestly, that there would be no objection on Beal's part to what he was doing.

I have emphasised this phase of the case lest by any chance the judgment now pronounced might be taken to lend countenance to the contention that the temporary taking and using of another's car, though unauthorised, cannot be theft. He who does such an act incurs grave risk of that liability, and, speaking for myself, slight circumstances would be sufficient to convince me that there was such a blameworthy condition of mind on the part of the taker as made the act a theft; but I do not find such circumstances here.

For the reasons here assigned, I am of opinion that what was done by Sheppard was not theft of Beal's car within the Criminal Code; and, for the same reason, coupled with the reasons set forth by my learned brothers, in which I concur, I think that the defendant is not entitled to the benefit of the Ontario statute 4 Geo. V. ch. 36, sec. 3. If that Act read, "unless at the time of such violation the motor vehicle was in the possession of some person other than the owner without his consent express or implied, not being a person in the employ of the owner," it would more nearly accord with the principles of law which have obtained in this Province. But with the policy of the statute this Court has nothing to do.

I therefore agree in allowing the appeal. *Appeal allowed.*

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EX. C.

THE KING v. PETERS.

Exchequer Court of Canada, Audette, J. September 7, 1915.

1. EMINENT DOMAIN (§ III E—165)—COMPENSATION—CLOSED DOWN MILL—INDUSTRIAL SITE.

The amount of compensation allowed for expropriation of a mill property, which has been closed down for a number of years and the buildings on which are in a dilapidated condition, should not be estimated as if the mill were a going concern, although its situation should be considered if it makes the property especially valuable for industrial purposes.

2. DAMAGES (§ III L—240)—EXPROPRIATION—VALUE OF BUILDING.
Where the expropriation of land results in the demolition of a substantial portion of a building on the land the remaining portion of that building is worth nothing, as such, and the full market value, estimated at what it would cost to put up new buildings, should be paid.

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INFORMATION by the Attorney-General of Canada, for the expropriation of certain lands for the National Transcontinental Railway in the Province of Quebec.

Statement.

E. Belleau, K.C., and *A. R. Holden*, K.C., for plaintiff; *F. W. Hibbard*, K.C., and *G. F. Gibson*, K.C., for the defendants.

AUDETTE, J.:—This is an information exhibited by the Att'y-Gen'l of Canada, whereby it appears, among other things, that a certain piece or tract of land, belonging to the defendants, was taken and expropriated, under the authority and provisions of 3 Edw. VII., ch 71, for the purposes of the National Transcontinental Railway, by depositing, on December 11, 1913, a plan and description of the said land, with the Registrar of Deeds, in the city of Quebec.

Audette, J.

The defendants' title is not contested.

The Crown, by the information, offered the sum of $44,911, and the defendants claim the sum of $119,780.

By this expropriation the Crown has taken a strip of land fronting on Prince Edward St., 259 ft. and 5 inches by 60 ft. in depth, containing an area of 15,570 ft.—the same being portions of lots 576A, and 577, of the official cadastre of St. Roch's Ward of the City of Quebec. This strip of land forms part of an old saw-mill property extending from Prince Edward street to the St. Charles River, including the water lot therein, on the above mentioned width of 259 feet and 5 inches, bounded on the north-east by Grant St., and by the Drolet foundry to the west.

Upon the whole property, which is composed of 111,800 ft., are erected a planing mill, saw-mill, engine room, boiler house, office and lean-to along part of the fence which, in the course of the evidence, is also called sheds. This saw-mill was built between the years 1861 and 1863—and the office, which was long ago used as a residence, was erected about the middle of the last century. The line of expropriation takes the larger part of the planing-mill and about 4½ ft. of the front of the office.

Accompanied by counsel for both parties, I have had the advantage of viewing the premises and of going through the buildings in question.

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Mr. S. Peters, the father, who built the mill, died in 1895, leaving Mrs. Peters, his wife, the usufructuary legatee of the estate, who continued to carry on the business, through her son Albert, as manager and agent, up to 1904, when the business failed, and since that date the property never yielded any revenue. The mill has practically been closed from 1904 to the date of the expropriation, with the obvious result, like all other properties unused, that it is now in a very bad state. It was with a sad and painful impression I came out of the premises, having witnessed the ruins of what had been a large business undertaking. The floors of the mill buildings are literally all gone—rotten and unfit to be used with any degree of safety. Excepting the engine, the machinery is all rusted—large scales of rust falling off upon touching it.

There is upon this point very conflicting evidence indeed, and had I not the advantage of viewing the premises, I would decidedly have experienced great difficulty in reconciling such evidence—arriving at a proper appreciation of the state of the buildings upon the property. We have evidence on record estimating these buildings and machinery at inconceivably high figures, down to that evidence which says that the machinery is obsolete and only fit for scrap.

All of this is said with the view of stating that the value of this property as a whole is not of itself to be approached as a saw-mill only, because *per se* and as such it has no market value that would appeal to a purchaser. The property has a great value because of its situation for industrial purposes of many kinds, but no more for a saw-mill than any other industries. It has the railway on one side and can be served by spurs, and it is bounded by the River St. Charles. The defendants are owners of the water lots, upon which are still seen the remains of old wharves, also in a state of ruin. This property has an especial value by its potential prospective capabilities; but not on account of the buildings thereon erected. And that class of evidence establishing the value of the land taken, and the damages resulting from the expropriation at the sum of $164,952.36, as shown by ex. P—involving the taking down of all the buildings and erecting them for the purposes of a saw-mill further back on the property, cannot be adopted as a scheme that any man with a capital to be invested would follow. That valuation is made, as witness Lamonde states, upon the

value of a mill to be operated; but we must face the facts as they are. What we are seeking is the value of the property as it stood, on the date of the expropriation, after the business had failed and the mill been closed down for 10 or 11 years. And that witness adds: In 1913, the market value (*la valeur marchande*) of the Peters property was stopped and cannot say what it was worth at the time. The land, of itself, on account of the situation is valuable; but the buildings standing upon it in their dilapidated state do not add much, if any, value to it, as some of the witnesses so truly said.

A deal of evidence has been adduced, reckoning the damages at very high figures on the replacement basis, or under what is known as the reinstatement doctrine. But such basis or doctrine does not obtain in the case of an industry which had been closed down for ten or eleven years. It was not a going concern at the date of the expropriation.

As appears by exs. A, B, and C, there has been some correspondence, or options given, in respect of this property. Mr. Lockwell, by ex. A, offered $2 a foot for the whole property, land and buildings, and this offer was refused. By ex. B, it will appear that the estate, through Mrs. A. Peters, on April 18, 1912, offered the whole property, land and buildings, at $2.50 a foot, and the same appears also by the option given to Mr. Dobell. It will be noticed that the owners themselves appear to have been acting upon the view above enunciated, and that is the market value of this property is to be approached as a whole and not as a saw-mill —or in other words, the land not distinguished from the buildings, and all erections thereon. They were willing to part with the whole property, lands and buildings, at $2.50 a foot and they could not find a purchaser at that price—$2 a foot was the only offer.

Undoubtedly, when a strip of land is taken upon the front of a property, as in the present case, and where the street upon which it is abutting is taken away, destroying access to that street, bad as it was with railway tracks upon it, it is a different proposition. And in a case of that kind, a fair and liberal price should be paid the owners for the land taken, for the buildings affected by the expropriation and for all damages resulting from such taking.

Every subject holds his property subject to the paramount

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right of "eminent domain" enjoyed by the State; but the compensation which is guaranteed to the owner, whose property is so taken for public purposes, is its fair market value at the date of the expropriation. *Dodge* v. *The King*, 38 Can. S.C.R. 149. And the best method of ascertaining such value is to test it by the sales of property in the neighbourhood.

Prices from $1 to $3.50 per sq. ft. have been placed upon the land expropriated. The officers of the Transcontinental Railway seem, however, to have established the market price of the land, taken under similar circumstances, by what they have paid in the neighbourhood. They seem to have paid $2.08 a foot to the Stadacona Co., and to the Dorchester Electric Co., $2.05 a foot, exclusive of buildings.

I therefore think that the 15,570 ft. expropriated should be valued or assessed at $2.08 per foot, which equals $32,385.60.

Coming to the planing mill, it must be said that after taking about 33 feet of it, the remaining part is worth nothing, and the full market value thereof must be paid. It is valued as high as $20,050, and for reconstruction at $30,000, by some of the witnesses, and by others at $3,000, and $8,700, respectively. Witness Ratté says it could be built for $8,700 and he would build it for that. And other witnesses say this building could be put up at 11c. per cu. ft. Therefore, the value placed upon it, as it stood, at the date of the expropriation, by witness Giroux at $9,792 seems about right, although in my estimation, on the liberal side; and I adopt that valuation, exclusive of the machinery, as fair and just and place it in round figures at $9,800.

For the removal of the machinery from the planing-mill and placing it in its present state somewhere upon the property, or in a planing-mill erected upon the property, $2,250. But its ultimate fate is to be sold for what it is worth, and that is very little.

Coming now to the building used for the office, while different valuations have been placed upon it, one cannot value it without some hesitation. It is in a very bad state of dilapidation, as will be partially seen by reference to ex. No. 4, a photograph of the front and one gable of the building. Mr. Gignace placed a value upon the same of $5,000, but he qualifies it by adding for the proprietor—and his valuation, like that of witness Lamonde, is with respect to a mill to be operated.

The market value of that building is very small. With 4½ ft. taken from the front and the legal space for light taken over and above those 4½ ft., one must arrive at the conclusion that the building must be taken down. I assess the value of the same at the sum of $3,000.

For the sheds or lean-to, the boundary fence of the property forming the back part thereof, a value has been placed upon the same of $1,500 when new. Like the rest of the property, they shew great age and are in a very poor state of repairs. I allow for the same, in the state in which they stood at the date of the expropriation, $600.

The defendants have been deprived of the use of Prince Edward St.—and their property, which formerly was fronting upon that street, is now fronting upon the right of way of the railway, leaving them without any exit or issue direct from the front of their property upon Prince Edward St. Then there would be the legal space for light, if the defendants cared to build on the southern part of the property. It is true the former use of that street by the defendants was not one without serious inconvenience. Indeed, all the trains coming out and going to the C.P.R. station were passing upon that street, upon which the railway tracks were laid. From the northeast side of their property, adjoining Grant St., there is another source of damage, and that is, to cross Prince Edward St. from north to south and return they will have to pass over 5 or 6 double tracks instead of one track as formerly, and there will be gates on each side of the right of way to control the traffic, resulting obviously to the detriment of the defendants when using the same. However, a new road 75 ft. wide will be opened from Grant St. to Ramsay St., with the object of relieving the traffic. This road starts about opposite the yard-gate of the defendants' property on Grant St. This last street will go to mitigate and set off to a large extent the damages above referred to, but not altogether, and a certain amount should be allowed to cover generally this damage to the property. For the amount of the damages resulting from the taking away of Prince Edward St., and the additional obstacles placed in the operation of Grant St., which are not quite set off by the new proposed road, I will allow 2% on the value of the balance of the property; that is, deducting 15,570 feet from the total area of 111,800 and

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calculated at $2.08 per foot—in round figures $4,000; making in all $52,035.60.

To this amount should be added 10% to cover the compulsory taking of this piece or parcel of land in the manner mentioned, against the will or desire of the owners—covering also all other incidental legal elements of compensation which may have been omitted, $5,203.56, which equals $57,239.16.

The wood-yard or piling ground, on the south side of Prince Edward St., forms no part of the present claim by the defendants, as their counsel clearly stated during the argument that they did not claim any injury to the piling ground at all.

Therefore, there will be judgment, as follows:—1. The land and property expropriated are declared vested in the Crown from the date of the expropriation. 2. The compensation is hereby assessed at the sum of $57,239.16, with interest thereon from December 11, 1913, to the date hereof. The estate of Peters, the defendants herein, are entitled to be paid by the plaintiff, the said compensation moneys, with interest as above mentioned, upon their giving to the Crown a good and sufficient title free from all mortgages, hypothecs, encumbrances whatsoever—with leave reserved to all parties to apply to this Court in case any difficulty arises with respect to the distribution of the said moneys. 3. The defendants are also entitled to the costs of the action.

Judgment accordingly.

ALTA.

S. C.

SECORD v. CITY OF EDMONTON.

Alberta Supreme Court, Harvey, C.J., and Stuart, Beck and Ives, JJ. December 15, 1916.

DAMAGES (§ III L 5—279)—VALUE OF PROPERTY AFFECTED BY CHANGING STREET GRADE.

The compensation for damages to property caused by lowering the grade of a street must not be limited to the present use but to the present value.

[*Cedars Rapids* v. *Lacoste* (1914), 16 D.L.R. 168, followed.]

Statement.

APPEAL by defendants from a judgment awarding damages on account of the grade of a street being changed.

Frank Ford, K.C., for plaintiff, respondent.

J. C. F. Bown, for defendant, appellant.

The judgment of the Court was delivered by

Harvey, C.J.

HARVEY, C.J.:—The plaintiff is the owner of a block of lots which he claims have been injuriously affected by reason of the

grade in the street on one side of the lots being changed by the defendants.

The defendants appeal from the judgment awarding him damages, basing the appeal on two grounds only: (1) That no right of damages exists, it being a first establishment of a grade by the defendants; and (2) that there is no damage shewn to the plaintiff in his present use of the land, and therefore he is not entitled to damages.

On the argument the Court intimated that the facts at least, if not also the law, were against the appellants' contention on the first ground, and it is unnecessary to add anything further. The property consists of 6 lots having a frontage of 300 feet on 105th street and a depth of 150 feet along 99th ave. The plaintiff is using the property as a place of residence with a frontage on the avenue, the house being on the front lots, leaving the 3 back lots as grounds in the rear. As the plaintiff in the use of the land has no need or desire to enter on the 105th St. side on which the grade had been lowered, the trial Judge was of opinion that the property is not injuriously affected for its present use, but that as it might at some future time be differently used and the 3 rear lots required to be used separately, in which event an entrance on 105th St. would be required, there was damage for which the plaintiff was entitled to compensation.

I am of opinion that this rather than the contention of the defendants is the correct view to be taken. In *Cedars Rapids* v. *Lacoste* (1914), 16 D.L.R. 168, the Judicial Committee of the Privy Council stated the two following propositions as applicable in fixing compensation (at p. 171):—

> 1. The value to be paid for is the value to the owner as it existed at the date of the taking, not the value to the taker. 2. The value to the owner consists in all advantages which the land possesses, present or future, but it is the *present value* alone of such advantages that falls to be determined.

In that case the compensation was for the whole value, but the same principle applies when the compensation is only for a partial value by reason of damage.

It is clear therefore that the compensation must not be limited to present uses though it must be limited to present values. It is not to be fixed at what the property may become worth when changes arise in the future, but it is to be fixed at it present worth which will naturally depend on probable future changes. It seems

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clear that, if the property in question were put on the market, prospective purchasers would take into consideration the value of the rear lots if severed and sold apart from the lots on which the house stands and consequently that is a matter for consideration in arriving at the amount of compensation.

No question is raised on the appeal as to the amount of the damages allowed.

I would dismiss the appeal with costs. *Appeal dismissed.*

QUE.

K. B.

BELANGER v. UNION ABITIBI MINING CO.

Quebec King's Bench (Appeal Side), Sir Horace Archambeault, C.J., Trenholme, Cross, Carroll and Pelletier, JJ. April 28, 1916.

CORPORATIONS AND COMPANIES (§ VI E—341)—STAY OF PROCEEDINGS—RESOLUTION—VALIDITY.

Where a petition has been made to the Court to wind up a company, in pursuance of a resolution passed at a special meeting, and where actions are pending seeking the annulment of the resolution, as being fraudulent and illegal, the Court will hold the petition in suspense until the other actions have been decided by the proper Courts.

Statement.

APPEAL from the judgment of the Superior Court in a demand for winding-up a company. Reversed.

The company had been formed to operate a gold mine in the Abitibi region. Its capital of $2,000,000 was divided in 2,000,000 shares of $1 each, of which 1,700,000 were allotted between 2,000 shareholders. Four of the directors sold to the company their prospector's rights for $2,000 cash and $160,000 in shares; two other directors sold their rights for $400 cash and $275,000 in shares. The company also sold $180,000 at 80% to Beaudin Ltd.

On November 30, 1914, at a special meeting of shareholders, a resolution was carried by about 600,000 shares against 300,000 shares demanding the winding-up of the company. But the appellant, a shareholder, intervened and contested the demand. The Board of Directors also intervened and opposed the demand.

At that time actions were pending before the Courts for the annulment of the resolution passed at the meeting of November 30, 1914, and to obtain the reimbursement from the old directors, on allegations of fraud and illegality, of the moneys and shares which they had received as the purchase price of their prospectors' rights.

Audet and Brosseau, for appellant; *Pelletier, Létourneau, Beaulieu & Mercier*, for respondent.

The judgment of the Court was delivered by

PELLETIER, J.:—This is a demand for the winding-up of the Union Abitibi Mining Co. The demand was granted and we are requested to reverse the judgment.

The record discloses a rather extraordinary state of things. In the first place one is tempted to ask why this winding-up? Generally an insolvent company is wound-up in order to realize the assets, pay the debts and distribute the proceeds to the interested parties.

Here the trial Judge who ordered the winding-up declares as follows:—

> Considering that the assets of the company-petitioner, if such they may be called, are illusory and cannot be realised upon; . . that the properties of the company consist in mining lots, that is to say in rocky mountains which cannot yield any material, unless they contain gold veins which nobody has as yet ever seen, and that the machinery brought for the purpose of excavation and crushing of the quartz, as well as the buildings erected are destined to perish of old age and cannot even be sold as old material as nobody is willing to buy them on account of the excessive cost of transportation.

If all this is true in fact evidently there would be nothing to pay even the liquidator. As a matter of fact, is this correct? Yes and no. If the liquidation now takes place the prophecy of the trial Judge will be fulfilled to the letter; and then who will pay the liquidator? Those evidently, if any, who have other projects and another interest than that of distributing assets. We shall see that this interest exists and that it is easily ascertainable. On the other hand I hasten to say that if the liquidation at the present moment would not yield $20 a careful examination of the record has left me strongly under the impression that not only is it possible but probable that the company will prosper on condition it be not killed simply because it is a trifle sick. (The Judge examined the facts concerning the struggle between the shareholders, the old Board of Directors and the new Board, and inclined to the belief that the latter had good reasons to hold the demand for winding-up).

What precedes is but a preliminary survey and cannot prevent the petitioners in winding-up from obtaining judgment if, according to law, they are entitled to it; but the law in its great wisdom in this regard has granted the Court a wide discretion in its powers of refusing or suspending the liquidation and allows it to render any decree which may under the circumstances seem just.

QUE.

K. B.

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Pelletier, J.

It is for the petitioners to convince us that the liquidation is necessary by giving sound reasons in support of their demand. Now what are the reasons alleged. Briefly they are as follows:— 1. It is the company itself which asks for the winding-up. 2. The company owes $15,000. Payment thereof has been requested and has not been made. Therefore it is insolvent. 3. The capital is impaired to an extent of over 25% and it is not probable that this 25% can be restored within a year. 4. It is expedient and just that the company should be put into liquidation.

In order to properly examine these various reasons we should be turning in a vicious circle did we not place in a very clear light the situation of those whom I call the alleged majority in value who are the movers of this petition?

These gentlemen who pray for a winding-up, who voted in favour of the resolution at the meeting of November 30, represent about 600,000 shares. At the general meeting the vote was in round numbers 600,000 shares against 300,000 shares.

Primâ facie, how are these 600,000 shares held? (The Judge went into the facts to shew that this majority was made up of the shares sold to the old directors for their prospectors' rights which sales are contested before the Courts).

In view of these facts let us now examine the various grounds invoked in support of the petition.

1. It is the company itself which requests this winding-up by virtue of a resolution in November, 1914. I must say that the 600,000 shares of which I have just spoken, in spite of all the protests of the majority in number, forced the carrying of this resolution of November 30. In the second place this resolution is badly premised and I have no hesitation in stating that it is founded on erroneous representations.

Without submitting any statement of the assets and liabilities of the Company, the resolution states that the company owes $15,000, which it does not pay. We shall soon see that the company does not owe this amount nor even one-half of it, and that it is very doubtful whether it owes at this moment a single cent of this amount.

Then the law requires that before such a serious decision is arrived at, the notice calling the shareholders to attend the meeting, should state specifically the object of this meeting. Now

the notice of convocation makes no reference whatsoever to a resolution that should be submitted for the winding-up of the company.

Respondents answer that the shareholders knew that the question of liquidation would come up. That is no answer. In the first place, it is not established that the shareholders knew it, and even if a few shareholders did know or might have had reason to know, this did not do away with the mandatory requirement of the law ordering the insertion, in the notice of the meeting, of the object of the meeting.

Furthermore, not only was the vote at the meeting practically carried by the 600,000 shares, not only does the meeting appear tainted with illegalities but an action has been taken to annul this resolution of November 30 and this action is pending before our Courts, and it does seem to me that it would be only just and proper to wait, before going further, until this controversy has been decided. Let us suppose that the action in annulment should succeed and *primâ facie* it appears well-founded, then the company would have been liquidated in virtue of an absolutely illegal resolution, for the judgment to be rendered on the suit would retroact and would leave nothing subsisting of what was done on November 30, 1914. Yet, we are asked, notwithstanding the pendency of this suit, to order the liquidation on this extremely fragile ground.

Were there need of haste, and were the liquidation necessary to safeguard serious interests the question might be doubtful; but it surely ill-becomes those who state that there is nothing to liquidate, to request the winding-up before the Courts have pronounced on the question of whether the ground which they allege is well-founded or not.

We are also referred to another resolution of the month of April, 1915; but this resolution is subsequent to the petition for winding-up and moreover it has been carried by the same shareholders who deemed it proper to have themselves elected as a new directorate in order to disavow the attorneys of the old directorate which was suing them to compel the return of the 600,000 shares and moneys which it is alleged they obtained illegally. Moreover, this new resolution is also attacked in another action still pending.

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2. We are told that the company is insolvent and in support thereof are referred to the $15,000 which it has not paid. (The Judge then goes into the question of fact regarding this $15,000, and comes to the conclusion that the company had hardly any debts and was not insolvent.) I therefore conclude that the second ground has no better foundation than the first one.

3. The ground based on the impairment of the capital is a question of fact which of necessity must follow the fate of the two preceding questions.

4. The fourth ground is that it is expedient and just that the company should be put in liquidation.

After what has preceded it appears to me difficult to arrive at this conclusion. We are told that the actions taken are fantastic; that they are a form of persecution. If they be so, let the respondents have them dismissed by the competent tribunal. A defendant who is sued, always considers that the plaintiff is wrong in so doing, but only final judgment can discern which of the two opinions is the correct one. I understand full well that the defendants would prefer to have these actions entrusted to a liquidator chosen by the very parties who are interested in having them withdrawn or dismissed. We are assured that the liquidator will faithfully perform his duties. That is possible, but it is also possible, not to say probable, that the principals with their "majority" in "value" and their "claims" shall constitute an agent ready to follow their instructions and their ideas.

Even if the liquidator faithfully performed his duties, the company in the interval would be dead and buried. As I said at the beginning, we are faced with a singular state of things.

A pretended majority in value wishes to wind up the company. The right of this pretended majority to act is called in question by pending proceedings. Now we are asked to declare *pendente lite* that these acts which are attacked as illegal in the proper method before the proper Court will first of all produce their effects and then subsequently the Courts may ascertain whether they were irregular or illegal. This is against all common sense and logic, and I cannot help being under the impression that a certain number of those interested parties, from whom the company demand an accounting, reason to themselves as follows:—Let us throttle the company and then it will be unable to ask us any accounting.

In my opinion the fact that those shareholders which *primâ facie* may be called legitimate shareholders, are making such desperate efforts to keep the company going, that they are ready to invest further capital and that they come before us at their risk and peril to prevent this liquidation, demonstrates clearly their good faith, and it is impossible to refuse to come to their assistance.

It was clearly admitted at the bar that in some of the actions to which I have referred no plea was ever filed, that they were inscribed for judgment *ex parte*, and that adjournments were obtained in order that the liquidation might be decreed before judgment was rendered on the actions themselves. The very *raison d'etre* of the petition for winding-up seems in dire peril.

The Union Abitibi Co. may be before us without any right whatsoever. If the holders of the shares which carried the resolution had no right to vote, then everything would fall to the ground, and we would be face to face with a petitioner, the name and the quality of which would have been usurped. The respondents contend that the powers of their counsel cannot be called into the question. But they forget that this is not a case of disavowal. It is sufficient to answer that the attorneys have based their petition for winding-up on a resolution of which the legality and existence have been called in question in a suit still pending.

I am doubtful as to whether we should adjudicate immediately on the merits of the winding-up order. I believe it preferable to quash the order for winding-up and order that the petition remain in suspense until the suits above referred to have been brought to a conclusion by the interested parties in order that we may know eventually by the judgment to be rendered the rights of the parties.

As the appellant succeeds he is entitled to his costs of appeal, but here again arises the question as against whom they should be awarded. For the moment they are awarded against the respondent which is nominally before us, but I am of opinion that we should reserve the right of proceeding for these costs against the defendant in the actions now pending, in the event of its being shewn that they took this petition in virtue of a resolution shown to be without legal existence. *Appeal allowed.*

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S. C.

Re TORONTO AND HAMILTON HIGHWAY COMMISSION AND CRABB.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Magee and Hodgins, JJ.A. and Lennox, J. October 6, 1916.

1. BOARDS (§ I—1)—HIGHWAYS—EXPROPRIATION—VALIDITY OF AWARD.
The members of the Ontario Railway and Municipal Board in fixing the amount of compensation allowed for land expropriated under the Toronto and Hamilton Highway Commission Act, act as judges rather than arbitrators merely, and the fact that they allowed another member of the board who had not heard the evidence to read it and express his views regarding the case is no ground for vitiating the award.

2. APPEAL (§ VII M 8—655)—REVIEW OF AWARD—CONCLUSIVENESS.
The Appellate Court will not set aside an award of the Ontario Railway and Municipal Board, unless it is convinced that some substantial injustice has been done.

Statement.

APPLICATION for leave to appeal, under sec. 32 of the Public Works Act, R.S.O. 1914, ch. 35, from an award or decision of the Ontario Railway and Municipal Board; and motion for leave to cross-appeal.

W. Laidlaw, K.C., for the claimant.

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

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—The one substantial purpose of this motion, for leave to appeal against an award of the Ontario Railway and Municipal Board, is that the compensation awarded to the applicant may be increased; and the prolonged argument in support of it was directed mainly and properly to that subject, and the evidence bearing upon the several items of the applicant's claim was referred to at great length for the purpose of shewing that there had been an under-estimation of the applicant's losses upon all of the items of his claim: and in taking that course Mr. Laidlaw was right, because, unless we are convinced that there is good ground for thinking that some substantial injustice may have been done to the applicant in the amount awarded to him, leave to appeal ought not to be given: if full compensation has been awarded, the means by which that end was accomplished, whether regular or irregular, are unimportant to the parties concerned. The final result of an appeal such as this, in which all that could be said on each side has been said, should be the fixing of the proper amount of compensation finally in this Court, if the Board has failed in its efforts to do so: if the Board has succeeded, nothing can be gained by giving leave to appeal.

And, having given careful attention and consideration to all that was urged against the award, in respect of the amount awarded especially—and very much was said—I am fully con-

vinced that the Board dealt with the applicant's claim, in all its particulars, in not only a fair but in a generous manner; indeed the more that was said, and the more consideration given, the more convinced one became that if there be cause for complaint as to the sum awarded it is not on the applicant's side.

One cannot, having regard to the evidence and all the circumstances of the case, but think that if the land had the extravagant value put upon it by the owner, and by some of his witnesses, such value would be largely attributable directly to the new road in question bringing it, in time and comfort of travelling, so very much nearer to Hamilton and Toronto, and so available as homes, temporary or permanent, for those engaged in business in one or other, or both, of those places; and so, if such values were real, instead of paying compensation, the builders of the road should receive it, or at least some expression of appreciation.

But such values are not real, they are, I find upon the whole evidence, but fanciful: the belief that they exist being born of the desire that they should, for the advantage it would be to them who dream such dreams, and sometimes speculate on the chances of such things coming true.

As the Board did, so do I, place much more dependence upon the testimony of the witness Flett, and the actual pertinent facts deposed to by him, than upon the evidence of any land speculator who had no dealings in lands in the locality; naturally such witnesses take exalted views of the speculative value of properties; they are sellers, and their whole happiness depends upon high prices.

Mr. Laidlaw has entirely failed to convince me that any injustice has been done to the applicant in the amount awarded to him, and so it becomes unnecessary to consider any question of irregularity in the making of the award, for the reasons I have already stated.

But in regard to the matter relied upon by him as vitiating the award altogether, I feel bound to add that I am not yet able to agree with him. The Board is composed of persons occupying positions analagous to those of judges rather than of arbitrators merely; and it is not suggested that they heard any evidence behind the back of either party; the most that can be said is that they—that is, those members of the Board who heard the evidence and made the award—allowed another member of the

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Board, who had not heard the evidence, or taken part in the inquiry before, to read the evidence and to express some of his views regarding the case to them. Whether the Board was within its powers under the 9th, or under the 52nd, section of the Ontario Railway and Municipal Board Act, R.S.O. 1914, ch. 186, need not be considered, and so should not be; but it is only fair to add that if every Judge's judgment were vitiated because he discussed the case with some other Judge a good many judgments existing as valid and unimpeachable ought to fall; and that if such discussions were prohibited many more judgments might fall in an appellate Court because of a defect which must have been detected if the subject had been so discussed.

The motion for leave to cross-appeal was, I understood, born of the motion for leave to appeal, and is to die a natural death if that motion be now strangled; both must accordingly be dismissed.

But the dismissal should be only on the respondents carrying out, if the applicant desires it, their offer to connect together the tile drains on each side of the new road by means of water-tight pipes under or through the road. The Board seems to have been under the impression that there was no flow of water from those above to those below where the road now is, and so such a connection would answer no useful purpose; but there is a possibility that it might, and the land-owner should have the benefit of the doubt; and counsel's rejection of the offer, at one time, is not sufficient reason for depriving the land-owner of another chance to accept it: see the Ontario Public Works Act, sec. 38.

Magee, J.A.

MAGEE, J.A., agreed in the result.

Hodgins, J.A.

HODGINS, J.A.:—This was an application by the land-owner, under sec. 32 of the Public Works Act (R.S.O. 1914, ch. 35), for leave to appeal. The reasons for the application were very fully discussed, so that the Court in fact considered the matter as if leave had been granted. In addition to this, a very full brief of argument and evidence has been submitted by Mr. Laidlaw.

A question was raised by him that, under the Public Works Act, when the Ontario Railway and Municipal Board acts in fixing compensation, it does so through its members as arbitrators. By the Toronto and Hamilton Highway Commission Act (5 Geo. V. ch. 18, sec. 10) the Commission may expropriate land, and "shall have and may exercise the like powers and shall proceed in

the manner provided by the Ontario Public Works Act, where the Minister of Public Works takes land or property for the use of Ontario and the provisions of that Act shall *mutatis mutandis* apply." In the course of carrying out that Act, the Ontario Railway and Municipal Board have many duties cast upon them of finally settling disputes. The work is a public one, and the Province of Ontario and the various municipalities contribute towards its cost, and they are interested in the amount paid to the different land-owners.

The sections of the Public Works Act giving rise to the contention set up are the following:—

"27. The Minister and the owner may agree upon the amount of the compensation, or either party may give notice in writing to the other that he requires the amount of such compensation to be determined by arbitration under the provisions of this Act."

"29. Where the Minister gives notice to the owner, either before or after the service of the appointment upon him, that he desires that the compensation shall be determined by the Ontario Railway and Municipal Board instead of by the Judge, the Chairman of the Board shall give the appointment upon the like application and shall have power to give like directions as the Judge might have given under the next preceding section and the proceedings shall thereafter be taken before the Board."

"31. The provisions of the Ontario Railway and Municipal Board Act shall apply to proceedings taken before that Board under this Act."

"32.—(1) Where the amount of the claim exceeds $500, the Minister or the claimant may by leave of the Appellate Division appeal to that Court from any determination or order of the Judge or of the Board under this Act as to compensation.

"(2) The leave may be granted on such terms as to the appellant giving security for costs and otherwise as the Court may deem just.

"(3) The practice and procedure as to the appeal and incidental thereto shall be the same *mutatis mutandis* as upon an appeal from a County Court.

"(4) The decision of the Appellate Division shall be final.

"(5) Section 48 of the Ontario Railway and Municipal Board Act, 1906, shall not apply to any appeal under this section."

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These provisions seem to lay down a very clear procedure. The parties may agree, or, if they do not, either party may give notice that he requires the compensation to be determined by arbitration. If, however, the Minister—or in this case the Commission—before or after service on him of the County Court Judge's appointment at the instance of the land-owner—gives notice that he desires that the compensation shall be determined by the Ontario Railway and Municipal Board, instead of by the County Court Judge, then the Chairman of the Board gives a new appointment, and the proceedings are thereafter to be taken before the Board. In that case, by sec. 31, the provisions of the Ontario Railway and Municipal Board Act apply, except sec. 48, under which an appeal would be limited to questions of law.

I cannot take all this as meaning that the proceedings before the Board are other than according to its powers under its own Act. In that case it is not an arbitration. If it were otherwise, why would the provisions of the Arbitration Act be excluded? They apply when the County Court Judge officiates. He deals with the matter as an arbitrator, as he does in certain claims for compensation under the Municipal Act. But the Board has its own procedure, and carries it on more as a Court and not as if its members were sitting as a board of arbitration.

It is no unusual thing for claims against the Crown to be fixed by a Court instead of by arbitrators.

To deal with the matter as suggested by counsel for the land-owner would, I fear, lead to complications and reduce the powers of the Board in many respects. In the Ontario Railway and Municipal Board Act (R.S.O. 1914, ch. 186) special provisions are found which are necessary if the Board is to accomplish its work, such as secs. 6, 7, 8, 9, and 10. These sections fix the quorum of the Board, enable the Vice-Chairman to act for the Chairman, and authorise any member to be detailed to report upon matters pending before the Board. Section 21, sub-sec. 4, and sec. 38, practically confer upon the Board the status and powers of a Court. Section 22 gives it exclusive powers in matters properly before it, and enables the Crown to be represented before it or before a Divisional Court upon any appeal.

It is the provisions of this Act which are specifically applied to the process of fixing the compensation in this case, and I am wholly unable to see why they should be considered as nullified

either by the fact that it is usual for compensation to be determined by arbitration or because in one event that would be the course followed under the Highway Act.

I have heard and read with care the very complete arguments submitted, and can find no real reason why the amount fixed, taken in connection with the undertaking given at the hearing, should be interfered with. The only point as to which I had a doubt, namely, the setting off the special benefit against the capital value of the frontage tax, is, I think, satisfied by considering the incidence of the tax. Properties fronting on the new road, and those benefited by it, are to be assessed. Access is a special benefit, and I can understand why its value might be set off as direct, while the advantage gained by proximity, though paid for by assessment, might still be general in its effect.

Hodgins, J.A.

The application for leave should be dismissed with costs.

LENNOX, J.:—I agree in the conclusion reached by the learned Chief Justice as to the disposal to be made of these applications; but, with the very greatest respect, I am not at present able to agree that the action of the two members of the Board in submitting the evidence to the third and consulting with him was proper or justifiable. *Motions dismissed.*

Lennox, J.

SHARKEY v. YORKSHIRE INS. CO.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Davies, Idington, Duff, Anglin and Brodeur, JJ. December 11, 1916.

INSURANCE (§ VI B—275)—TERMS OF POLICY AND APPLICATION.
The term of insurance must, as against the insured, be found in the policy, unaided by anything in the application or proposal.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario, 31 D.L.R. 435, 37 O.L.R. 344, reversing the judgment at the trial in favour of the plaintiff. Affirmed.

Statement.

Sir George C. Gibbons, K.C., for appellant.

G. F. Macdonnell and *Oscar H. King*, for respondents.

FITZPATRICK, C.J.:—I find myself obliged, though with great reluctance, to concur in dismissing this appeal.

Fitzpatrick, C.J.

The proposal was for an insurance for the season against the death of a stallion from accident or disease and I cannot see what right the respondent company had to insert without notice the provision in the policy limiting the liability to death from accident or disease occurring or contracted after the commence-

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ment of the company's liability. The provision was of great importance involving, of course, in this case the whole liability under the insurance.

In the proposal the appellant declared, as was no doubt the fact, that the horse was then in perfect health, and it was examined and reported on by the inspecting veterinarian on behalf of the company. The policy was issued within ten days after. Counsel for the respondent said that this provision was the only way in which live stock insurance companies could protect themselves. I cannot in the least understand what he meant. There is no reason why they should not insure in accordance with their own form of proposal against death from disease whenever contracted, whilst the risk of disease being contracted during the few days elapsing between the dates of the proposal and the policy would hardly, one may suppose, have been sufficient to deter them from accepting the insurance. Of course they were at liberty to make this or any other stipulation they pleased provided they did so in a proper manner and with due notice to the insured. What they were not at liberty to do was to accept the proposal, declare it to be the basis of the policy and then surreptitiously introduce a limitation of their liability and deliver the policy leaving the insured to suppose she had such an insurance as she applied for. It is precisely to guard against such practices that the Insurance Act (R.S.O. ch. 183) by the 8th Statutory Condition in sec. 194 provides:—

> After application for insurance it shall be deemed that any policy sent to the assured is intended to be in accordance with the terms of the application, *unless the company points out in writing the particulars* wherein the policy differs from the application.

This may have been done; the company should have had an opportunity to prove it.

Unfortunately the appellant has not raised this point and since it is not pleaded this Court cannot give any effect to it.

The appeal must therefore be dismissed.

Davies, J.

DAVIES, J.:—The real substantive question in dispute here is the exact time when "the liability of the company commenced" under the policy. Sir George Gibbons contended strongly that it began at noon on the date of the execution of the policy by the company, 7th June, and that as the sickness and death of the stallion insured happened after that date the company

was liable to pay. The Court of Appeal, on the contrary, held that, on the true construction of the policy itself, the company's liability did not commence until after delivery and acceptance of the policy and that as at that time, on the 8th June, the horse was "sick unto death" and actually died within a few hours afterwards, no liability on the part of the company attached.

The language of the policy reads as follows:—

If after receipt hereof and payment by the insured to the company of the undernoted premium for an insurance up to noon on the date of expiry of this policy, any animal described in the schedule below, shall during that period die from any accident or disease hereby insured against as after mentioned, and occurring or contracted after the commencement of the company's liability hereunder, and otherwise defined in the aforesaid proposal the company shall be liable to pay.

The date of the expiry of the policy was stated in the policy as September 7, 1915. Sir George contended that although no specified term was mentioned in the policy itself, the proposal or application made by the plaintiff had written on its margin by the plaintiff's agent in pencil the words "term 3 months" and that as the expiry of the policy was definitely fixed as September 7 in the policy, it must be construed once it came into operation as covering the whole period of 3 months and definitely fixing the commencement of defendants' liability as arising on June 7. But while the insurance statute, ch. 183, R.S.O., in sec. 156 enacts "that the proposal or application of the assured shall not *as against him* be deemed a part of or be considered the contract of insurance" (except in a case not arising here) it is manifest that if the plaintiff himself invokes the terms of that proposal or application as definitely fixing the time from which the policy was to run, the Court must look at the whole of that document and not at a part only. So looking, we find the application, which was dated May 29, expressly providing: "The company's liability commences after payment of the premium and receipt of policy or protection note by the insured."

In this case there was no protection note and the plaintiff did not receive her policy or pay her premium until the afternoon of June 8. The horse died a few hours after such delivery, of a disease which it had contracted before such delivery, and if the application can under the circumstances I mention be referred to, it would conclusively settle when the company's liability commenced.

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Davies, J.

Apart from that, however, I concur with the reasons given by the Judges of the Appellate Division that the language of the policy itself apart from the application settles the question. I have already quoted it.

As I construe that language, it covers insurance not for a period of 3 months, but for such period from a time after delivery to and receipt by the insured of the policy up to the date of its expiry. No question arises as to this time of delivery. The insurance covers the period between those dates and the date the policy expires. The death of the animal must occur during that period, from a disease occurring or contracted after the commencement of the company's liability, and that liability, I hold under the words of the policy, did not commence until the delivery of the policy.

I would therefore dismiss the appeal.

Idington, J.

IDINGTON, J.:—The appellant sues upon a policy of insurance issued by respondent, insuring her against loss by death of a stallion from accident or disease.

The operative covenant sued upon is as follows:—

> Now this policy witnesseth, that if after receipt hereof and payment by the insured to the company of the undernoted premium for an insurance up to noon on the date of the expiry of this policy, any animal described in the schedule below, shall during that period die from any accident or disease hereby insured against as after mentioned, and occurring or contracted after the commencement of the company's liability hereunder, and otherwise defined in the aforesaid proposal the company shall be liable to pay to the insured, after receipt of proof satisfactory to the directors, two-thirds of the loss which the said insured shall so suffer, but *pro ratâ* only with other existing insurance or sums recoverable from other parties and not exceeding the amount for which such animal is insured.

The stallion died from a disease clearly contracted before the payment of the premium and before the delivery of the policy.

I am unable to expand the tolerably clear and explicit terms of this covenant whereby its operation is directed to something happening after its receipt and the payment of the premium, to cover a death which did not result from a disease contracted after the commencement of the company's liability thereunder, but from a disease contracted before the commencement of such liability.

The argument that the premium was obviously to cover 3 months and that as the policy was to expire on a day named which would make the policy operate retroactively a day or more

before the time when its very clear terms indicate that it was the intention of the contracting parties that it should only begin to run after both the delivery of the policy and payment of the premium, seems clearly untenable.

The same line of argument, if maintained, might render the company liable to pay in case of the death of an animal weeks before the delivery of the policy or payment of the premium, which might well happen if the animal were at a long distance from the insured and insurer. Such policies might exist and be effective as in analogous cases in marine insurance. It all depends on the form of the contract.

It is idle to rely upon dicta from authors or Judges in relation to contracts in a form that lent another possible meaning than that which can fairly be put upon this one.

As I read this contract it does not offend in its operative part against the clauses in the Insurance Act relied on by counsel for the appellant.

The recital, however, in this policy, I may be permitted to suggest, is not what I could rely upon as a compliance with sec. 156 of the Insurance Act. Indeed, I think it unjustifiable but I cannot in this case see how I can, save by discarding it, give any effect to the section.

If we tried to go further, as invited by the argument of counsel, in the way of applying sub-sec. 1 of sec. 156, we could only destroy the contract but would be unable to construct another unless by unduly straining that clearly intended by the language used.

If, for example, the policy had been delivered, then even without payment, we might have an arguable case presented by virtue of sub-sec. 1 of sec. 159, whereby to set up or make operative the contract so amended by that sub-section. I pass no opinion thereon—indeed have none—and am merely trying to illustrate what may, by virtue of the statute, be possible, but here is impossible.

The appeal must be dismissed with costs.

Duff, J.

DUFF, J.:—The language of the policy does not appear to admit of more than one construction; and one of the conditions of responsibility laid down is that the "accident or disease" shall occur or be contracted after the commencement of the "company's liability" under the policy and the "company's

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liability" does not commence before the payment of the premium. "Otherwise defined in the aforesaid proposal" upon which counsel for the appellant to some extent relies, is an adjective clause qualifying "accident or disease." In the contract now before us there is apparently no subject-matter to which these words can apply; but the form is a general form and the words might find their application where risks insured against fall within table four, and they are no doubt also intended to provide for special cases to which the form does not itself in terms refer.

Anglin, J.

ANGLIN, J.:—In view of the explicit directions of sub-sec. 1 of sec. 156 and of sub-sec. 1 of sec. 193 of the Insurance Act (R.S.O. 1914, ch. 164) and of the express prohibition of the sub-sec. 3 of the former section I am, with the appellant, unable to understand the reference of the learned Chief Justice of the Common Pleas to the proposal or application made by the assured for the purpose of defining the term of the contract of insurance sued upon, or for that of interpreting the phrase, "commencement of the company's liability" used in the policy. With respect, I am of the opinion that, under the statutory provisions above cited, the term of the insurance must, as against the insured at all events, be found in the language of the policy itself unaided by anything in the application or proposal for insurance. That, I think, is the clear effect of the legislation to which I have referred. Although the insured is not debarred from invoking the application in so far as he can derive aid therefrom in other respects, inasmuch as the statute by sub-sec. 1 of sec. 193 (made applicable by sec. 235) requires that "the term of the insurance" shall appear on the face of the policy, I doubt whether even he can invoke the application to extend the term as stated in the policy.

With the other Judges of the Appellate Division I find it unnecessary to resort at all to the application in order to ascertain the beginning of the term of the insurance. With them I find the beginning of that term fixed in the policy as to the occurrence of death to be the time of the receipt of the policy and payment of premium, and as to the accident or disease occasioning the death to be "the commencement of the company's liability hereunder," *i.e.*, under the policy. Sir George Gibbons argued that the use of these two distinct phrases indicates that "the

commencement of liability" was meant to describe a moment of time different from and necessarily earlier than that at which the contract was made by delivery of the policy. Inasmuch as by sec. 159 of the statute the contract of insurance when delivered is "as binding on the insurer as if the premium had been paid" and this "notwithstanding any agreement, condition or stipulation to the contrary," the risk attached from the moment of the delivery of the policy although the premium was not paid until afterwards. The contention that the use of two distinct descriptive phrases necessarily excludes an intention thereby to refer to the same event proceeds on the assumption that the policy was framed by a skilled draughtsman. A very cursory perusal of the document suffices to dispel any such illusion. Brief as the operative clause is, tautology is perhaps its most striking feature. It is, therefore, not surprising to find in it the same idea expressed—the same thing described—in different language.

Delivery of the policy took place on June 8, before the death of the animal insured, but after it had contracted the disease which proved fatal. That disease, however, had only manifested itself on the morning of the 8th and the case proceeds on the footing that it was then first contracted. The policy bears date June 7 and was certainly executed on or before that day. The date of expiry of the risk is stated on the face of the policy to be September 7 and in a table of "risks," likewise printed on the face of the policy, we find the item: "Stallions as against death from accident or disease during the currency of the policy." It is at least questionable whether the adjectival phrase, "during the currency of the policy," in this item qualifies the words "accident or disease." I think it does not, but applies only to the word "death." At all events it should not in the case of disease be read as meaning disease first contracted during the currency of the policy. But I cannot think that this somewhat vague clause can affect the clear and explicit limitation of the risk in the operative provision of the policy to death from a "disease contracted after the commencement of the company's liability hereunder." The question is purely one of interpretation of the latter phrase.

Now there can be no doubt that there was no liability of the company before the delivery of the policy. Up to that moment

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there was no contract of insurance. The company might have entirely declined the risk. The applicant might have refused to accept the policy or to pay the premium. By force of the statute liability began upon delivery of the policy, though it should not otherwise have arisen until payment of the premium. Granted that it was possible for the parties to have provided by express stipulation on the face of the policy that the risk should be deemed to have attached before delivery, they have not done so. Sir George Gibbons contended that it sufficiently appears that the premium paid to and accepted by the company was based on a full 3 months' risk. I find nothing in the policy to indicate that to be the fact—nothing which justifies a conclusion that upon a basis either of contract or of estoppel the respondent should be held to have undertaken a risk or liability antedating the delivery of the policy. It is true that on the application—not in its body but in a marginal note on the upper left-hand corner—we find the words "term 3 mos." But, while that is so, we also find in the body of the same document this clause:—"The company's liability commences after payment of the premium and receipt of policy or protection note by the insured."

It is this latter clause which is referred to by the learned Chief Justice of the Common Pleas as an aid in determining the limitation of the risk and defining "the commencement of the company's liability" as against the insured. While in my opinion it may not be so used on behalf of the insurer, on the other hand if, notwithstanding the explicit requirement of sub-sec. 1 of sec. 193 that the term of the insurance shall appear on the face of the policy, the insured may invoke the application in support of his contention that the risk was for a full period of 3 months (necessarily beginning on June 7 since the date of its expiry is fixed as September 7) he must take that document as a whole and cannot escape the effect of its very clear and precise provision fixing the commencement of the risk as, in the absence of a protection note, the time of receipt of the policy. In the light of this provision the marginal note on the application form, "term 3 mos.", must, I think, be regarded as a classification of the risk rather than as intended to define its precise duration. In this view the 8th statutory condition, which might otherwise, though not invoked by the appellant, present a somewhat formidable difficulty to the respondents (see *Laforest* v. *Factories Ins. Co.*, 30 D.L.R

265, 53 Can. S.C.R. 296), is inapplicable to this marginal note on the application.

On the whole case the conclusion reached in the Appellate Division seems to me to be right. The appeal should be dismissed with costs.

BRODEUR, J.:—The application for insurance in this case is dated May 29, 1915, and was a proposal applying to the respondent for insurance on a horse for a sum of $1,000.

In the body of the application there was a note that the company's liability would commence after the payment of the premium and the receipt of the policy by the insured.

No payment was made by the applicant when the application was signed. The policy was issued by the company in Montreal on June 7, 1915, and was mailed to their agent in Petrolia, the place of residence of the appellant. It appears that on the morning of the 8th the horse became sick. In the afternoon of the same day the policy was delivered and the premium paid and a few hours after the horse died. The policy contained the following provision:—

> If after receipt hereof and payment by the insured to the company of the undernoted premium for an insurance up to noon on the date of expiry of this policy, any animal described in the schedule below shall during that period die from any accident or disease hereby insured against as after mentioned, and occurring or contracted after the commencement of the company's liability hereunder, and otherwise defined in the aforesaid proposal the company shall be liable to pay, etc.

When the policy was issued on June 7 the horse was in good health; when it was delivered, however, it had become sick and the question is whether the company's liability began on the date of the policy or when the premium was paid and the policy delivered.

The stipulation above quoted shews that there was no liability on the part of the company until the policy was delivered. Then if the sickness existed at the time of the delivery of the policy the company would not be liable because it was formally stated that if the horse dies from a disease contracted before the delivery of the policy there will be no liability. That contract could not in my opinion be construed in any other way.

It was contended, however, by Sir George Gibbons in his argument that if the horse died before the delivery of the policy there would be no liability; but if the horse simply took sick

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before the delivery then, in such a case, the company would be responsible for the amount of insurance.

I am unable to find any such distinction in the clause above quoted. It seems to me clear that the liability begins at the time of the delivery of the policy and at the time of the payment of the premium and the condition of the policy was that if the horse died before the delivery of the policy or the payment of the premium, or if he died after, but from a disease which had been contracted before the delivery of the policy, then in such case the loss would be not for the insurance company but for the owner of the horse.

It may be then, as a result of that construction, that the plaintiff was not fully insured for the 3 months which she contemplated; but we have a declaration in the application itself that the policy would not be in force before it was delivered and before the premium was paid. The appellant was aware of that condition, because it was on the document which she signed.

I am unable to come to any other conclusion than that the action of the plaintiff was properly dismissed by the Appellate Division and that this appeal should be dismissed.

Appeal dismissed.

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Quebec Superior Court, Sir Francois Lemieux, C.J. October 10, 1916.

1. HABEAS CORPUS (§ I B—7)—WHEN PROPER REMEDY—UNLAWFUL DETENTION.

The military discipline and control to which a soldier enlisted for active service is subject, along with his fellow soldiers, is not in law a detention or restraint upon liberty upon which to base a habeas corpus application made by the soldier's parent or other person having civil control over him during his minority for the purpose of having the soldier released from military service which he had voluntarily entered during minority.

2. MILITIA (§ I—5)—OVERSEAS SERVICE—ENLISTMENT WHILE UNDER EIGHTEEN.

A minor under eighteen years, who understands the nature and consequences of enlistment and who is certified by the proper authorities to be qualified, may waive the exemption in favour of youths under 18 contained in the Canadian order-in-council of August 20, 1915, and his enlistment for overseas service will be valid without his father's consent.

Statement.

THIS is a writ of *habeas corpus* issued at the instance of Alfred Fournier, father of Felix Pierre Alphonse Fournier, a private in the 171st Battalion of the Canadian Expeditionary Forces heretofore stationed at the Valcartier military camp. The writ is directed to Sir William Price, O.C., requesting him to surrender before a Judge of the Superior Court the person of Fournier, jr.,

that the latter be freed or discharged from service: (1) because he enlisted while yet under the age of 21 years and without the consent of his father; (2) because, being a minor and having his domicile at his father's (83 C.C.) he could not leave his said father's residence without permission of the latter who is vested with legal authority over his children until they reach the age of majority.

Statement.

Respondent, Sir William Price, pleaded that private Fournier was not illegally detained in the battalion, having, on the contrary, voluntarily enlisted to serve as a soldier His Majesty the King, under military law; that respondent himself, being a soldier of His Majesty, was subservient to the same law and neither right nor authority to relieve a soldier from his duties and obligations.

The facts following were adduced in evidence:—

Private Fournier enlisted on the 17th January, 1916. At that date, he was 17 years and 10 months; although he then represented himself as being 18 years and 10 months. From the date of his enlistment up to the issuing of the *habeas corpus*, on the 7th Sept. ult., Fournier formed part of the battalion, acting as drummer in the military band. He has always since received his regular pay of $1.10 per diem. Upon two occasions, he sent to his mother sums of money totalling $30 for household purposes, which fact his father became aware of.

Fournier's engagement was absolutely voluntary as he has never been detained in the battalion against his will. Fournier did enlist without his father's knowledge or consent. However, the father soon became aware of his son's move and, for upwards of eight months took no step, except finally the present *habeas corpus*, to have said enlistment set aside and his son discharged. He gives for reason of his protracted silence, the paltry excuse that he was told by certain people that he could not succeed in getting back his son.

Through the present writ of *habeas corpus* and the procedure accompanying the same, petitioner requests that the enlistment be declared illegal and of no effect and that his son be set at liberty, such engagement having been entered into by a minor under 18 years, without the consent of his father.

LEMIEUX, C.J.:—The chief points to elucidate in this matter are the following:— Lemieux, C.J.

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1. What is the object or the nature of the writ of *habeas corpus*?

2. Is the enlistment in an expeditionary corps of a minor 18 years old or under, voluntarily subscribed to by him but without his father's consent, valid according to public law, to civil law and to constitutional law?

1. WHAT IS THE OBJECT OR NATURE OF THE WRIT OF HABEAS CORPUS?

The law (art. 1114 C.P.) enacts that any person who is confined or restrained of his liberty otherwise than under any order in civil matters may apply to the Court for a writ addressed to the person under whose custody he is so confined or restrained, ordering the latter person to bring him forthwith before the Court together with the cause of his detention in order to examine whether such detention is justifiable.

It follows that the writ of *habeas corpus* is a proceeding which secures and guarantees, in the most efficient manner, the liberty of the individual. Nobody can avail himself of the privilege so imparted unless he be actually deprived of his liberty. A person is deprived or restrained of his liberty whenever he is kept or held against his will in any place or is illegally detained or sequestrated. Liberty is the right to freely dispose of one's own self, it is the faculty to act untrammelled or unfettered by arbitrary authority or tyrannical laws.

As a matter of fact, is the soldier deprived of his liberty owing to the circumstance that he is submitted to military discipline? In other words, is discipline a restraint upon the liberty of the soldier?

It would, forsooth, sound anomalous to be told that the soldier, officer or private, over or under 18 years of age, who does secure peace and liberty to his country, is not a free man because, by virtue of his enlistment and of military regulations, he is bound to a certain discipline which the very interest of efficient military service commands.

Without a doubt, the soldier's goings and comings, whether in time of war or of peace, in military camps or elsewhere, are, to some extent, curtailed, for motives of public and moral order and to the great advantage of the army, either through the necessities of discipline or through formalities of a technical nature; but such formalities or discipline do not amount to what in law is termed a detention or a restraint upon liberty. Those are

mere consequences of a contract entered into for the public good. Such is the case for the diverse callings of life purporting, all of them, duties and obligations which may be likened to so many hindrances to individual liberty. Any one who hires his services surrenders more or less of his liberty; he is, while the contract lasts, the liegeman of the employer.

Though liberty be of supreme importance, however, many are the circumstances when it must make way to public interest. For instance, it is generally considered an imposition to be subpœnæd as a witness and detained before the Courts or to be called upon to sit on a jury for days, but such responsibilities cannot be evaded for the reason that they are prescribed in furtherance of public weal.

Without further comment, we are inclined to believe that private Fournier is not illegally detained or deprived of his liberty because he must comply with military discipline.

Let us deal with the first question: what is the object of the writ of *habeas corpus*?

Enlistment is a contract of the subject with his King for the defence of the country. The said contract is not void for the simple reason that it is entered into by a minor; at the most, would it be, according to our Code, as hereinafter established, annullable through the ordinary course.

It is a well settled canon of law that the writ of *habeas corpus* is not granted to the father, guardian or to whomsoever it may be to question or try the validity of contracts nor to uphold parental authority, in a case where it is not evident that the minor child is detained against his will and suasion.

The question has already come up and was ably debated in all its legal aspects in the noted case of *Stoppellben* v. *Hull* (2 Que. L.R. 255 and 3 Que. L.R. 136), which fairly settles jurisprudence on that particular point.

That case was heard by very eminent magistrates: in the Superior Court by Mr. Justice Wilfrid Dorion and in Review by three former Chief Justices of this Province, Sirs. Wm. Collis Meredith, Andrew Stuart and Louis Napoleon Casault.

All said Judges were unanimous in holding "that the object of *habeas corpus* is to see that no person is deprived of his liberty illegally or against his will and not to determine the respective rights of parties over one another, and it cannot, therefore, be

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used by a father to enforce his right to have the custody of his child."

Following is the legal doctrine laid down by Mr. Justice Wilfrid Dorion:—

"This proceeding is a special one, created by statute, and derived from English law. Its object, as I understand it, is to see that no person is deprived of his liberty illegally or against his will, and not to determine the respective rights of parties over one another.

"There are exceptions to the absolute right of the father to get his children to live with him—some are to be found in articles 214 and 215 of the Code. The dispositions of the Code relating to *habeas corpus* do not authorize a Judge or the Court to try such questions. All that we have to decide is whether the person alleged to be illegally or unjustly detained against his will is really so detained or not, and if so, to set him at liberty.

"It has been held in England, in the United States and lately in Montreal by the Justices of the Court of Queen's Bench, in the case of one Décaray, that the tribunal could not, under the writ of *habeas corpus*, force a married woman to go back with her husband against her will. I am not, therefore, disposed (states the learned Judge) to divert the writ of *habeas corpus* from its proper object and to ignore the principle which has always been acted upon."

Here is the opinion of Mr. Justice Meredith on the question at issue:—

"We can see no reason to doubt the correctness of the judgment so rendered, and in view of the particular circumstances of this case and for the reasons already explained, we deem it our duty to confirm it."

Mr. Justice Stuart entertained the same view, saying that, "the right of the father, under the Code, to have the custody of his children cannot be enforced by this remedy, unless they are detained from him against his will."

Mr. Justice Casault also spoke to the same effect.

As can be seen, all the Judges in that case of *Stoppellben* were governed by the doctrine followed in England and the United States that the writ of *habeas corpus* cannot be allowed to try rights of guardianship or the right of property (Church, *Habeas Corpus*, p. 138).

It is equally in relying on the *Stoppellben* case that Mr. Justice Charland expressed a similar opinion in *Re Reilly* v. *Grenier* (33 L.C.J. p. 1).

In *Re Lorenz* v. *Lorenz* (28 Que. S.C. 330) Chief Justice Davidson delivered an elaborate judgment which sums up the jurisprudence on the question, holding that the recourse of the *habeas corpus* is not granted to the father or guardian of a minor child too young to exercise a choice of domicile and who is being detained illegally, for instance through kidnapping or sequestration.

In the present matter, *habeas corpus* was resorted to not only to bolster up paternal authority but to set aside the enlistment, *i.e.*, a contract freely entered into by a minor in the circumstances above set forth. Such is not the purpose or the *raison d'être* of that prerogative writ.

We could, without going further, decide the matter at issue, but, out of courtesy for the petitioners' attorneys in this and several other similar cases, I think proper to dispose of the several grounds and reasons urged in support of the petitions.

Petitioner contends that enlistment changes the domicile of the son which, according to art. 83 C.C., must be the father's; that the son thus leaves the paternal residence which he is not allowed to do without the father's permission; that the son escapes paternal control which must endure until his majority, according to articles 243 and 244 C.C., and that the enlistment is null because it violates so many legal dispositions and more specially because it was made without the father's consent.

The legislature has vested in the father, according to the expression of an author, a sort of magistracy in his own house. In other words, laws replete with wisdom have been passed to countenance or buttress paternal authority in the interest of the child and for its very protection.

But is such authority or control, albeit judicious from both a moral and civil standpoint, so extensive and absolute that the minor child is never to be allowed to escape therefrom, to a certain extent, under circumstances strongly savouring of public interest and national duty?

We are thus brought to view the matter from the standpoints of public, civil and constitutional laws and to decide whether

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the enlistment of a minor in an expeditionary corps in time of war is valid or not.

From the standpoint of public law, we are told that: "La puissance paternelle doit être reconnue, protégée, assistée dans son exercice par le législateur, mais aussi contrôlée et limitée pour ne pas dégénérer en abus. Ses attributs, ses moyens et sanction varieront d'ailleurs tout naturellement avec les circonstances contingentes de temps et de lieu." (Fuzier-Herman, Vo. Puissance Paternelle, No. 2.)

Pothier, the mentor of all jurists, says: "De la puissance paternelle naît le droit qu'ont les pères et mères de retenir leurs enfants auprès d'eux ou de les envoyer dans tel collège ou autre endroit où ils jugent à propos de les envoyer pour leur éducation; de là il suit qu'on enfant soumis à la puissance paternelle ne peut entrer dans aucun état ni se faire novice pour la profession religieuse contre le consentement de ses père et mère sous la puissance desquels il est.

"Mais il faut excepter de notre règle le service du roi auquel les enfants de famille peuvent valablement s'engager contre le consentement de leurs père et mère. L'intérêt public l'emporte sur l'intérêt particulier." (Pothier, de la Puissance Paternelle, pp. 50 et 51.)

It is in accordance with that principle that Bourjon, a very creditable author, pretends that children belong more to the state than to their respective fathers. (Droit Commun, t. I., p. 34.)

The same rule was similarly construed in England where enlightened Judges such as Best have held: "that by the general policy of the law of England, the parental authority continues until the child attains the age of 21 years; but the same policy also requires that a minor shall be at liberty to contract an engagement to serve the state. When such an engagement is contracted, it becomes inconsistent with the duties which he owes to the public that the parental authority should continue. The parental authority is, however, suspended but not destroyed. When the reason for its suspension ceases, the parental authority returns. This is perfectly consistent with the opinions of Lord Kenyon, C.J., and Lawrence, J., in *Rex* v. *Roach*, 6 Term. Rep. 247, 101 E.R. 536, and with the general rule laid down by the present Lord Chief Justice in *Rex* v. *Inhabitants of Wilmington* (1 B. & C. Reports, 349)." [Durnford & East's Reports, p. 672.]

It has often been decided in England and in the United States as well "that enlistment, as a general rule, is not like ordinary contracts voidable by a minor. At common law, an enlistment is not voidable either by the infant or by his parents or guardian." (A. & E. Encyc. "Military Law," p. 124.)

"There is no doubt," says Hurd, *habeas corpus*, p. 543, "that the father is entitled to the custody of the child but it is not an absolute rule, and it may be controlled by certain considerations."

"A minor who enlists in the military or naval service of his country ceases to be a part of his father's family and puts himself under the control of others and is consequently emancipated so long as such service continues; and as the parents' right of control is suspended, it follows that all the bounties, price money and wages earned during the period of enlistment belong to the minor." (21 A. & E. Encyc. "Parent & Child," sec. 5.)

The English common law, which is followed in the United States, is to the effect that by reason of public interest, *pro bono publico*, a minor is at liberty to enter into a contract to serve the state and, during such service, parental authority is suspended though not annihilated.

We find very elaborate American decisions to the same effect under laws almost identical to ours.

It has been adjudged, time and again, that the father's consent is not requisite to the son's enlistment.

" . . . The parent's consent is not required. It is not optional with him whether his son shall do military duty between eighteen and twenty-one. He cannot control the military service in one country rather than another. He cannot make a contract of enlistment for his son nor compel him to enlist. So his assent to or dissent from the son's enlistment cannot affect its validity." (A. & E. Annotated Cases, vol. 28, p. 1273.)

We find, in the Pandects (IV. p. 328, art. 374), that under the old law, the father vainly sought the discharge of his minor son in age to bear arms and who had enlisted voluntarily. He was not listened to.

The exception brought to the rule of the Civil Code, if exception there be, in connection with the voluntary enlistment of a minor, is fully justified, in the eyes of the law, by the favour with which the defence of the country is looked upon. Most of the writers who hold to that doctrine have referred at length to the

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old maxim: "Salus populi suprema lex" which causes Broom, Legal Maxims, p. 1, to remark that, "under the implied assent of every member of society, his own individual welfare shall in cases of necessity yield to that of the community; liberty and life shall, under certain circumstances, be placed in jeopardy or in sacrifice for the public good."

It is by virtue of such doctrine that Mr. Justice Bruneau has recently held, *Re Amesse* v. *Desrosiers*, 50 Que. S.C. 243, that, in time of war, a minor has a right to enlist voluntarily for military service without the consent of his father, according to federal laws as well as to orders and regulations of the Governor-General in Council.

We are of opinion that the minor who, during war, enters the King's service and voluntarily enlists for the defence of the flag, the peace of the country and the triumph of a just cause, makes a special contract of a public nature, a contract which does not come within the ordinary prescriptions of the Civil Code and that such enlistment is valid to all legal intents and purposes, if the soldier is able-bodied and otherwise physically fit and has been certified by the proper military authorities, qualified for service.

Let us now look at the question from the standpoint of civil law, which only tends to strengthen the above impression.

According to our Code, the minor has a right to make all contracts without his father's assistance, which is required solely in the interest of the minor less he be misled. Therefore, such assistance or authority becomes useless whenever the minor betters his condition or does not suffer prejudice in contracting (II. Pothier, p. 3.)

It is an established rule that a minor may, without the authority of his father or guardian, better his situation. As a matter of fact, the minor cannot be relieved from a contract by reason of his minority but only by reason of the prejudice he sustains.

Such faculty vested by law in the minor to make all contracts and engagements which are favourable to him curtails, to a certain extent, paternal authority and equally deters the minor from his father's domicile. Such paternal authority again loses of its prestige when the minor is a trader as he is then empowered to transact all his business without his father's control, in view of the enactment that the minor engaged in trade is deemed of age for the purposes of his said trade (323).

Jurisprudence is agreed that the minor who has attained the age of discretion has almost invariably the choice of his domicile unless such choice be detrimental to the child. Such jurisprudence goes to shew that parental authority is far from absolute, that it is rather limited in scope and was decreed in the interest of the child (*Verrier* v. *Mulvena*, 7 Que. P.R. 417.)

Furthermore, the law (art. 304) empowers the minor 14 years old to bring alone an action to recover his wages whatever the amount, and he may also, upon being authorized by a Judge, bring all actions relating to any contract of hire he has entered into. The foregoing is indeed a progressive law. At first, it denied the minor all rights whatever. Later, it allowed him to sue for his wages up to the amount of $50, and finally such restriction is removed and no limit fixed.

The minor's right to bring action implies the inference that he may, unassisted, agree to the contract of which the action is the outcome. So much so that it has been held that the minor's wages cannot be seized by the father's creditors. If the son has the right to legally bind himself without paternal assistance, we must take for granted that he does not always come under his father's authority, as it follows that he may contract in Montreal while residing in Quebec and *vice versa*, *i.e.*, he may remove to the place where his contract requires him to, provided always such contract be not contrary to the material or moral welfare of the minor.

Our law is in perfect harmony with usage and the customs of the country where, every year, thousands of youths between 18 and 21 years, are hired to perform dangerous work in lumber operations, powder mills, navigation, etc., without their parents' consent. The judicial archives would fail to disclose one single case of *habeas corpus* addressed to a lumber dealer, munition manufacturer or boat captain requesting them to discharge the minors in their employ, on the ground that they were hired without their parents' consent.

If, according to art. 304, the minor is authorized to assume all engagements beneficial to him though oftentimes relating to rather trivial objects, *a fortiori* should he be allowed to enter into a military engagement which decidedly is honourable, betokens patriotism, bravery and a sense of duty, which largely contrib-

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ute towards procuring safety to the family, peace to the community and independence and liberty to the country at large.

The minor may be relieved for cause of lesion alleged and proved as lesion is never presumed. In the present instance, lesion has neither been alleged nor established. Enlistment with its usual consequences, drawbacks, etc., cannot cause a soldier what in legal parlance is termed "lesion."

Even in supposing that the minor's enlistment would require the father's consent, it is established that the said father has tacitly agreed thereto in failing to protest during over eight months, while he was aware of his son's doings and of the contract entered into, and also in accepting, twice, through his wife, a total sum of $30 out of his son's pay.

Upon the whole, after a careful scrutinizing study of the question, we find, as well by virtue of public law as in the light of civil law, that private Fournier's enlistment in every way complies with all necessary legal requirements.

Another of petitioner's contentions is that private Fournier's enlistment in the Expeditionary Forces, *i.e.*, in a corps which is to be sent abroad and merged with the English troops, is null, seeing that the Canadian Parliament is not vested with the necessary power or jurisdiction to create or organize such expeditionary forces and is legally empowered but to deal with the defence of the country.

And we have been cited section 91 of the B.N.A. Act which reads as follows: "It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons to make laws for the peace, order and good government of Canada. . . . The exclusive authority of the Parliament of Canada extends to all matters concerning . . . 7—Militia, military and naval service and defence."

Such is the section of our constitution pointed to when it is contended that militia and military service are to be made use of for the defence of the country only and not to act as an auxiliary force for the benefit of another country.

On the other hand, the Militia Act (R.S.C. ch. 41, sec. 69) enacts that the Governor-in-Council may place the militia or any part thereof on active service anywhere in Canada and also beyond Canada, for the defence thereof, at any time when it appears advisable so to do by reason of emergency.

On this particular point, it will not be amiss to repeat with the most noteworthy of our public men, among whom are authorities of some repute on constitutional law, that from the moment Great Britain is at war, her colonies are equally at war. The fact that the Allies have captured all of Germany's colonies since the opening of hostilities is a striking case in point.

In my humble opinion, the defence of Canada implies not only the power to safeguard the territory itself and the lives and property of Canadians, it further includes the faculty recognized in international law to prevent, by all legitimate means, the invasion, ruin and sacking of the country, in attacking the enemy in his own country, pursuing him everywhere, destroying his resources, giving him no rest until he be reduced to utter powerlessness. The very legitimate necessity of opposing an onslaught quite naturally justifies the attack of the enemy in his own country or wherever he may seek refuge. It often is by taking the offensive, attacking and invading, that the defence of one's own country may be better attended to. It would indeed be imprudent, if not utterly reckless, for a country at war, to be content with a defensive strategy and to refrain from hostilities until the country were invaded and sacked.

Surely, it is useless to insist; it is obvious that Canada has the unquestionable constitutional right to raise troops and to send them overseas for the defence of the Empire, which defence embraces and guarantees that of Canada herself. The enlistment in an expeditionary corps is therefore legal and valid.

The legal point involved has, needless to say, no connection whatever with the question of determining whether it is a wise and judicious course for Canada to participate in the Imperial wars without at the same time being allowed to participate in the Imperial war councils. Such question belongs to the political sphere and it behooves not the tribunal to deal with it.

Let us now examine—

2. THE CONSTITUTIONAL LAW.

Respondent, Sir William Price, in support of his contention touching the legality of enlistment, has cited: (1) section 91 above quoted of the B.N.A. Act empowering Parliament with exclusive legislative authority in connection with militia, naval and military service and defence; (2) an order in council of date the 20th

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August, 1915, issuing regulations as to enlistment in the Expeditionary Forces, and fixing the eligible age as between 18 and 45, enacting, further, that enlistment is a valid contract although entered into by a person under 21 years, also that boys of good character under 18 years of age may be specially employed as bandsmen, drummers, buglers or trumpeters, but no boy under 18 years of age will be enlisted without the consent of his parents or guardian.

The respondent stated that such order in council had been passed by virtue of section 6, ch. 2, 5 Geo. V. (Can.), which enacts that the Governor in Council shall have power to do and authorize and to make, from time to time, such orders and regulations as he may, by reason of the existence of real or apprehended war, invasion or insurrection, deem necessary or advisable for the security, defence, peace, order and welfare of Canada.

Petitioner contends that such order in council is *ultra vires* inasmuch as it interferes with parental authority which is governed by the dispositions of the Civil Code.

The Canadian Parliament alone has jurisdiction over matters relating to militia and the military service. The constitution, in conferring on Parliament such absolute authority as to militia, the military service and the right to legislate thereon, has also empowered the said Parliament with the means required to bring about an efficient service. The authorization to do something implies the use or exercise of such powers as are necessary to attain the particular purpose aimed at. Thus the federal government alone has, by virtue of the above mentioned orders in council, due authority to determine the age and other qualifications required for enlistment in the Canadian Expeditionary Forces. In such a case, age is a material condition as regards efficiency in the service. If it were not competent for the government to pass such orders and regulations as to age, etc., how would it be known at what particular age one could enlist for home service or in the Canadian Expeditionary Forces, considering that the Provinces have no right to legislate upon the subject.

The order in council placing the enlistment age between 18 and 45 is in every respect in sympathy with the spirit of the constitution, in no way derogates from the prescriptions of the Civil Code and does not constitute an excess of jurisdiction.

Fournier, at the time of his enlistment, in January, 1916, was 17 years and 10 months old. He became of age for enlistment purposes, *i.e.*, he reached his eighteenth year last March. From that date until the 7th September, he has willingly served as bandsman-drummer, never complained of his contract and never thought himself deprived of his liberty. Brought before the Court, he utters no complaint, merely stating that he would as lief go home.

Fournier therefore has, since reaching his 18th year, ratified his contract just as his father has sanctioned it, as has already been explained.

The order in council does not mean to prohibit and does not, in fact, prohibit, under pain of nullity, the enlistment of boys under 18 years of age, but merely provides an exemption in their favour, in view of the fact that before 18 years they are not presumed to be fit for military service. On that score, it may be remarked that the order in council is more in the nature of a military regulation fixing the age for enlistment upon which the authorities may base all calculations, etc. But if a minor under 18 years, who understands the nature and consequences of enlistment, is certified by the proper authorities to be qualified, his enlistment is valid.

We have stated that the order in council provides an exemption in favour of such minor, but if he volunteers his services and they are accepted, he thereby waives the said exemption as he undoubtedly has a perfect right to do by virtue of section 14 of the Militia Act which reads: "Exemption shall not prevent any person from serving in the militia if he desires to serve and is not disabled by bodily or mental infirmity."

Howbeit, the enlistment in question is certainly not null *ab initio*, neither could it be annulled on a writ of *habeas corpus*, but rather through the ordinary action at law.

It is therefore adjudged that private Fournier's enlistment is, as well according to the Civil Code, public law and the B.N.A. Act, as by virtue of subsequent statutory legislation, valid and binding and constitutes a contract proper as between His Majesty, the King, and one of his subjects, which said contract it behooves not courts of justice to set aside on a writ of *habeas corpus*. The said writ is dismissed.

Habeas corpus dismissed.

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CAMPBELL v. DOUGLAS.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Davies, Idington, Anglin and Brodeur, JJ. October 10, 1916.

MORTGAGE (§ III—47)—INDEMNITY BY PURCHASER—RELATIONSHIP—PAROL EVIDENCE.

The rule that the purchaser of an equity of redemption is bound to indemnify the vendor against his liability for the mortgage debt does not apply when the purchaser is merely a nominee or agent; and parol evidence is admissible to prove this relationship.

Statement. APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario, 25 D.L.R. 436, 34 O.L.R. 580, reversing the judgment at the trial in favour of the plaintiff. Affirmed.

J. R. Osborne, for appellant; *Hogg*, K.C., for respondents.

Fitzpatrick, C.J. FITZPATRICK, C.J.:—I am of opinion that this appeal should be dismissed.

In stating the nature of the claim, I cannot do better than quote the words of the Master of the Rolls in the comparatively recent case of *Mills* v. *United Counties Bank, Ltd.*, [1912] 1 Ch. 231 at 236:

> The claim is based on this ground. It is said that, according to the settled law of the Court, a purchaser of an equity of redemption is bound under an implied obligation, or, as it is sometimes put, an obligation of conscience, to indemnify the vendor against the liability on the mortgage debt; and, in an ordinary case, that is, I think, obviously according to justice and common sense. If a property is worth £10,000 and is subject to a mortgage of £5,000, and the purchaser only pays the vendor £5,000 and gets the property, it would be almost shocking to say that in that case the vendor would be liable on the covenant to pay the full sum of £5,000 to the first mortgagee, and that the purchaser was under no obligation to indemnify him.

Now, I doubt whether the proposition is of so general and unqualified a character as contended for. It is to be noticed that in the example given by the Master of the Rolls, he is speaking of a case where the property in the hands of the purchaser is sufficient to answer the mortgage debt. The same assumption is made in other cases where the doctrine has been discussed. But, if we remember that, as the Courts hold, the obligation is one of conscience alone, can it be said that the obligation holds equally good where the pledge has proved worthless or indeed to be worth no more than the purchaser paid?

Again, Moulton, L.J., in the case above referred to, speaking of the doctrine of *Waring* v. *Ward*, 7 Ves. 332, that there is an implied covenant, says:—

> It relates, I think, to every case where you can reasonably imply that

it was the intention of the parties that that should be done, but I doubt whether it applies to any other case.

Now, can we reasonably imply that it was the intention of the respondent, who was not in reality the purchaser, to indemnify the appellant against the mortgages?

This, perhaps, brings us to the point of the case on which the judgment appealed from proceeds, viz., that this is not a simple case as between the appellant and respondent of the relation of vendor and purchaser. I agree with the Court that the circumstances and nature of the transaction are such as to rebut the implication of an unqualified personal liability on the part of the respondent. Fitzpatrick, C.J.

The Courts are not, in my opinion, called upon in such cases to inquire too particularly into transactions often of a complicated nature, and, to consider whether they establish a case in which the expressed agreements between the parties ought to be supplemented by implied ones.

It is, of course, always open to a vendor to secure himself properly on a sale of the property, and, though there may be cases in which it is so clearly a matter of conscience for the purchaser to indemnify him that the Court will imply a covenant where none was expressed, yet I do not think such implication of liability is to be lightly made.

The transactions out of which the claim arises seem to have been of the usual character of speculation in inflated values during a land boom. In these there are purchases, mortgages, exchanges, resales, shuffling of every description, until the speculation collapses, when disputes arise over the damages, which the Courts are called on to unravel. Whilst the parties are entitled to the protection of any legal rights they may have, these are not cases in which the law need be strained for their relief.

DAVIES, J.:—I am of opinion that this appeal should be dismissed for the reasons given by Hodgins, J.A., speaking for the majority of that Court, in which reasons I concur. Davies, J.

IDINGTON, J.:—The appellant conveyed certain lands to the late C. A. Douglas, and claims that he is entitled to recover from his grantee's representatives, now respondents, the amount of certain mortgages which existed upon the property conveyed at the time when the grant was made, because the conveyances described the property as subject to these mortgages, and then Idington, J.

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added "the assumption of which mortgages is part of the consideration herein."

The grantee never executed the conveyance, and, therefore, his representatives cannot be held liable at common law.

The definition of a covenant in Comyn's Digest, A. 2, vol. 3, p. 263, deals with what may amount to a covenant on the assumption that the covenanter had executed the deed.

This is not the deed of an alleged covenantor. Any relief, therefore, that the appellant, whose deed it is, can have must rest upon equity. To understand what that equity may be, we find the following in the deed in question:—

> Witnesseth that, in consideration of an exchange of lands and the sum of $1 of lawful money of Canada, now paid by the said party of the second part to the said party of the first part (the receipt whereof is hereby by him acknowledged), he the said party of the first part doth grant unto the said party of the second part in fee simple all and singular,

and then follows the description of the lands and mortgages ending as already stated.

When we try to get the meaning out of this, in order to do equity, we find there never was any exchange of lands between the grantor and grantee, and we are told that the transaction referred to was one between one Power and the grantor in this deed. How can that found any equity entitling appellant to the relief claimed as against this grantee or his representatives?

And when the relation of the parties is further investigated, the matter becomes, if possible, more hopeless, for it turns out that all the grantee had to do with the matter was that Power, who seems to have been a speculator who had resorted to this grantee for advances on more than one occasion, and had, in the result, transferred to him, obviously as security, a number of properties on such terms as, if possible, to give their transaction the form of sale or a conditional sale. It is one of these properties which the grantee was asked to release and substitute therefor the lands now in question. To accommodate appellant and Power he assented. Hence this conveyance to him.

At the time when this conveyance was made the time limited for Power to redeem had not expired. I need not follow the remarkable complications that existed beyond all this, for I am unable to find any equity upon which appellant can rest and establish a claim to recover from a man who never was either a

purchaser from him or covenantor bound to him. Whether appellant might have found other equities of which something could have been made by bringing all the parties, including deceased, before the Court, we need not trouble ourselves to consider, for no such claim is made.

On the case made, the appeal seems to me hopeless.

The contention that we must presume Power would make, and made default, does not seem to render the appellant's case any better.

The many cases where Courts of equity have enforced obligations resting upon a purchaser as against those claiming under him, where obviously the prospective or subordinate purchaser (which shall we call this man?) has claimed, to enjoy the property, and been held bound in such case to implement the obligations of the purchaser, do not seem to me to furnish as a precedent anything like this case. Here the property evidently was not worth holding on to or asserting any claim to. The whole of the dealings between Power and the deceased Douglas seem to have been in equities, and no obligation is shewn binding Douglas to Power to assume and pay the mortgages.

I think the appeal should be dismissed with costs.

Anglin, J.

ANGLIN, J.:—Notwithstanding Mr. Osborne's forceful argument in support of the contrary view taken by Magee, J.A., who dissented in the Appellate Division, I agree with the Judges who formed the majority of that Court that, read in the light of the circumstances as disclosed by the evidence, in my opinion properly received, the recital in the description of the property in the deed from Campbell to Douglas, that the assumption of mortgages upon the property conveyed was part of the consideration for the transfer, does not amount to a covenant by the grantee to indemnify the grantor against such mortgages. That consideration is stated elsewhere in the deed to be "an exchange of lands and the sum of $1." The portion of it of which the assumption of the mortgages formed part, *i.e.*, the exchange of lands, was made between Campbell and Power. Douglas was not a party to it. He took the conveyance of the property given in exchange by Campbell merely as Power's nominee, and not as purchaser, or beneficial owner, but as security and as a mortgagee. As is pointed out by Hodgins, J.A., *Small* v.

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Thompson, 28 Can. S.C.R. 219, cited by the trial Judge, was a clear case of express covenant.

Having "regard to all the circumstances of the case and to all the relations subsisting between the parties," as we must, it is, I think, clear that they had no intention that Douglas should assume liability to indemnify Campbell. No reasonable implication of such an intention can arise. In its absence, the essential basis of the equitable obligation alternatively relied on by the appellant is lacking. *Mills* v. *United Counties Bank*, 81 L.J. Ch. 210, at 215, [1912] 1 Ch. 231. Resembling it very closely in its facts, the case at bar seems to me to be not distinguishable in principle from *Walker* v. *Dickson*, 20 A.R. (Ont.) 96, which, I may be permitted to say with respect, was, in my opinion, well decided.

During the argument it occurred to me that the appellant might invoke the doctrine of estoppel. But, on further consideration, I am satisfied that two essential elements of an estoppel are not present. The respondent neither uttered any word nor did any act inconsistent with his true position in regard to the property, or which would justify the appellant in assuming that he took the conveyance instead of Power, with whom Campbell had made the agreement for exchange, otherwise than as Power's nominee, and for security. The appellant did not change his position to his prejudice in consequence of the deed being made to Douglas. He still retains any rights against Power which the agreement for exchange gave him.

I would dismiss the appeal with costs.

Brodeur, J.

BRODEUR, J.:—I am of opinion that this appeal should be dismissed with costs. *Appeal dismissed.*

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K.B.

BROWN v. LAMARRE.

Quebec King's Bench, Sir Horace Archambeault, C.J., Lavergne, Cross, Carroll and Pelletier, JJ. March 6, 1916.

LANDLORD AND TENANT (§ III C—70)—TENANT'S REPAIRS—DEFECTIVE YARD —INJURY TO CHILD.

A tenant bound under a lease to make tenant's repairs, and under which the lessor is relieved from making any repairs whatever, has no cause of action against the landlord for injuries to her infant child caused by its tripping over a loose board in the floor of a yard used in common by all the tenants.

Statement.

APPEAL from the judgment of the Court of Review reversing the judgment of DEMERS, J. Affirmed.

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Statement.

The plaintiff alleged that she leased a dwelling from the former owner under whom the property was held by the respondents and had the right to the common use of a yard with other lessees. Her daughter, a minor, in running in front of her mother, caught her foot on a plank forming part of the wooden pavement which covered the yard; she fell and, in falling, fractured her spinal column. She was rendered infirm for life. The planks of the pavement were broken, disjointed and in bad repair. She based her action upon this negligence of the landlord and claimed from their representatives, in her capacity of tutrix to her minor child, the sum of $10,000 damages.

The defence was, in effect, a general denial.

The Superior Court, finding the owner in fault, condemned the respondents to pay $1,100 damages.

The Court of Review, finding no evidence to shew that the accident occurred by the fault of the respondents, reversed the judgment of the Superior Court and dismissed the action. The Court of King's Bench affirmed the latter judgment. The decision of the case, as well in the Superior Court as in the Court of Review, proceeded upon questions of fact and evidence solely, but on the appeal there was a question of law decided as follows:—

"Considering moreover that even if the disability of the said Evélina Dinelle had been caused or aggravated by the accident in question, the accident would be the result of facts or circumstances for which the respondents would not be responsible."

Pélissier, Wilson & St. Pierre, for appellant.

A. P. Mathieu, for respondents.

Pelletier, J.

PELLETIER, J.:—On April 15, 1915, the child, 9 years of age, Evélina Dinelle, had a fall in a passage paved with wood and communicating with a house which the appellant, the mother of this child, had leased from the former owner of the premises from whom the respondents acquired them.

The mother of the child instituted an action against the respondents in the first place for about $500, and she recovered judgment for nearly $300. This judgment was affirmed on review.

After this first success in an action brought in her own name, the plaintiff, appellant, obtained an order appointing her tutrix

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of her daughter and she has now brought an action for $10,000 damages as the result of the same accident.

There might, perhaps, be asked the question here, whether or not she could have two actions like these which she has instituted, or whether the rights of action had not been merged in the same proceedings. But this question is not raised by the defence.

At the time of the first action the respondents appear to have limited their reasons for defence to the question as to whether there was liability in the circumstances. The Superior Court and the Court of Review came to the conclusion that there was liability.

But now, when they are sued for the amount of $10,000, the defendants appear to have better realized their position; they have presented a defence which is much more energetic and much more serious than that filed at the time of the first action; they have sought for and found witnesses who have given evidence of a nature to cast considerable doubts as to whether the claim is well founded.

Three questions present themselves. The first question is whether the fall of young Evélina Dinelle took place as was pretended, and whether she was injured so seriously as was alleged.

The second question is whether, assuming that this fall took place in the manner alleged, the accident was the cause of the condition in which the child is now found.

The third question is whether the respondents are liable for the condition of the premises which caused the falling of the child.

(Here follows an examination of the evidence as to the facts. The Judge arrives at the conclusion that there was no evidence that the present condition of the child is due, altogether or in part, to the accident in question.)

Whatever there may be in all that precedes, I think that there is another insurmountable obstacle in the way of the plaintiff in obtaining judgment in her favour in the present case.

The plaintiff occupies the premises in question in virtue of a lease made in the month of February, 1911, which was granted by Joseph Langlois, the predecessor in title of the respondents. It is upon this lease that she sues: she alleges it and produces it

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herself. Now, in this lease, the plaintiff is personally bound to make the tenant's repairs. By another clause of the same lease, the lessor, Langlois, and, in consequence, his representatives, the respondents, are relieved from the obligation of making any repairs whatever, not even the greater repairs.

Did the plank, which was too loose—on which the child, Evélina Dinelle, fell—form part of the leased premises? If it did not form part of the premises the question is settled. If it did form part, is there here presented to us the question of repairs incumbent upon the tenant or of greater repairs? If it was part of the tenant's repairs it was the plaintiff's duty personally to have seen that it was made, and it was upon her, rather than upon the respondents, that lay the obligation of repairing this plank and of adjusting it more solidly. If it was a greater repair, the respondents were not obliged to make it.

The plaintiff, in her capacity as tutrix to her child, would not, in these circumstances, have any recourse except against herself personally, as the tenant obliged to make the necessary repairs.

On the whole, I have arrived at the conclusion that the judgment of the Court of Review should be confirmed and modified by adding thereto a "considérant" to the effect that there was no liability on the part of the respondents in existence, even if the disability of the child had been caused or merely aggravated in consequence of the facts which we have before us.

ARCHAMBEAULT, C.J., and LAVERGNE, J., dissented.

Archambeault, C.J. Lavergne, J.

Appeal dismissed.

McCARTHY v. CITY of REGINA and the REGINA BOARD OF P. S. TRUSTEES.
(Bartz Case)

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Saskatchewan Supreme Court, Haultain, C.J., and Newlands, Lamont, Brown, Elwood and McKay, JJ. January 6, 1917.

1. SCHOOLS (§ IV—74)—ASSESSMENTS—SEPARATE SCHOOLS.
Where the minority ratepayers in a district have established a separate school under the School Act (Sask. stats., 1915, ch. 23, sec. 39), all the ratepayers of the same religious denomination in the district are bound to contribute to the support of such school; a ratepayer of the same religion cannot elect to be a supporter of another school.
[See also *Regina* v. *Gratton*, 21 D.L.R. 162, 50 Can. S.C.R. 589.]

2. CONSTITUTIONAL LAW (§ II A—154)—PROVINCIAL POWERS—SCHOOLS—DENOMINATIONAL PRIVILEGES.
The jurisdiction of the Provincial Legislature over education is absolute unless it invades certain rights and privileges reserved by sec. 93 of the B.N.A. Act; and even if sec. 17 of the Saskatchewan Act (4 and 5, Edw. VII, ch. 42, Can.) is *ultra vires* of the Parliament of Canada,

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the Provincial Legislature would still have power to enact sec. 39 of the School Act, which does not prejudicially affect any right or privilege with respect to separate schools under chs. 29 and 30 of the North-West Territories ordinances, existing at the date of the passing of the Saskatchewan Act, and so does not conflict with sec. 93 of the B.N.A. Act. [*Ottawa Separate School Trustees* v. *Mackell*, 32 D.L.R. 1; *Winnipeg* v. *Barrett*, [1892] A.C. 445, referred to. See also 32 D.L.R. 10 and annotation in 24 D.L.R. 492.]

APPEAL from a judgment of the Local Government Board (Sask.). Affirmed.

A. R. Tingley, for respondent; *G. H. Barr*, for appellant.

Haultain, C.J.

HAULTAIN, C.J.:—The Regina Public School District No. 4 of Saskatchewan is a "town district" under sec. 2 (8) of the School Act (ch. 23 of the statutes of Saskatchewan of 1915), that is to say, it is a school district situated within the limits of the City of Regina. The Gratton Separate School District No. 13 of Saskatchewan is a minority or separate school district established therein by the Roman Catholic ratepayers.

Sec. 34 of the School Assessment Act (ch. 25 of the Sask. Statutes 1915) provides for the assessment and levy of school rates in "town districts" as follows:—

34 (1) In town districts the city or town municipality, within which the district is situated in whole or in part, shall assess and levy in each year such rates as shall be sufficient to meet the sums required to be raised within the municipality for school purposes for the year; and all the provisions of the City Act or the Town Act, as the case may be, with reference to assessment and taxation shall, so far as may be applicable, apply to such rates.

Sec. 385 of the City Act (ch. 16 of the statutes (Sask.) 1915) enacts as follows:—

385. Subject to the other provisions of this Act the municipal and school taxes of the city shall be levied upon (1) lands; (2) businesses; (3) income; and (4) special franchises.

One Bartz is the owner of certain land in the City of Regina which is liable to taxation under the City Act. In the year 1915, Bartz, who is admitted to be a Roman Catholic, was assessed by the city for municipal and school taxes in respect of the land above mentioned, and was on his own request entered on the assessment roll as a public school supporter. (See form of assessment roll in sec. 390 of the City Act.)

From this assessment the respondent McCarthy appealed to the Court of Revision under sec. 394 of the City Act, on the ground that Bartz being a Roman Catholic should be assessed as a separate school supporter. The Court of Revision did not allow this appeal, and McCarthy then appealed from the Court of

Revision to the Local Government Board, under sec. 412 of the City Act. The Local Government Board allowed the appeal, and held that Bartz, being a Roman Catholic, must be assessed as a separate school supporter.

The appellants now appeal from that decision.

The first question to be considered is whether the provisions of the several Acts above cited leave it optional with a ratepayer of the same religious faith as the minority of ratepayers establishing a separate school to support that school or not.

It was argued on behalf of the appellant that sec. 39 of the School Act, Sask. Stats. 1915, ch. 23, does not give a majority of the minority in any district the power to compel the minority to support a separate school. The foundation of the right to separate, he says, is conscientious objection or religious scruple, and the individual conscience must be the final arbiter.

It was also argued that "the ratepayers establishing such separate school" mentioned in sec. 39 mean the ratepayers voting for the erection of the separate school district under sec. 41, and do not include the ratepayers voting against it.

We are fortunately not left to decide this point on the bare language of sec. 39, the School Act, ch. 23, Sask. stats. 1915. The various provisions of the City Act, the School Act and the School Assessment Act as amended by sec. 11 of ch. 25 of the statutes of 1916 relating to assessment and taxation for school purposes, all, in my opinion, point conclusively to an intention of the legislature to establish majority rule within a minority, either Protestant or Roman Catholic, establishing a separate school. Secs. 41, 44 and 45 of the School Assessment Act, and secs. 390, 394, and 409 (4) of the City Act all seem to me to impose an unqualified liability to taxation for separate school purposes upon every ratepayer in the municipality who is of the same religious faith as the ratepayers who established such separate school. Sec. 394 of the City Act gives a right to appeal to the Court of revision to any ratepayer "who thinks that any person who should be assessed as a public school supporter has been assessed as a separate school supporter or *vice versa*." Sec. 409 (4) of the same Act provides that:—

> The assessors shall accept the statement of any ratepayer, or a statement made on behalf of any ratepayer by his written authority, that he is a supporter of public schools or of separate schools, as the case may be, and such

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statement shall be sufficient *primâ facie* evidence for entering opposite the name of such person in the assessment roll the letters P.S.S. or S.S.S. as the case may be, and in the absence of any such statement the assessor shall make such entries in accordance with his belief.

Sec. 394 first appeared on our statute book in its present form in the City Act of 1908, the right of appeal with regard to assessment for school purposes being then given specifically for the first time. That statute also provided for the first time for a column in the assessment roll to indicate whether a ratepayer was a public or separate school supporter, and sub-sec. 4 of sec. 409 of the present (1915) City Act was first enacted as sub-sec. 4 of sec. 301 of the City Act of 1908. Whatever argument might have been founded on the school and municipal legislation prior to 1908, it seems to me to be quite clear that the legislation of that year, as re-enacted in 1915 and of 1915 made the support of a separate school incumbent upon every ratepayer belonging to the minority on whose behalf the separate school was established.

I therefore concur with the decision of the Local Government Board on this point.

The next point raised by the appellant is stated in his notice of appeal, as follows:—

> Further, and in the alternative, if, in the opinion of this honourable Court, the said judgment (*i.e.*, the judgment of the Local Government Board) is a correct interpretation of such statutes, and such statutes are within the competence of the Saskatchewan Legislature under the provisions of the Saskatchewan Act, being 4-5 Edw. VII., ch. 42, and particularly sec. 17 thereof, then it is submitted that such last mentioned Act, in so far as it purports to give to the legislature of the Province of Saskatchewan jurisdiction to enact legislation depriving any ratepayer whose lands are situate within a public school district within which a separate school has been established of the right to support with his taxes such public school regardless of what his religious faith may be, or, in so far as it purports to place it beyond the competence of the Saskatchewan Legislature to enact laws requiring all ratepayers to be taxed for the support of the public school, is beyond the competence of the Parliament of the Dominion of Canada, under the provisions of the Imperial statutes and order-in-council by which that portion of the Dominion of Canada, now comprising the Province of Saskatchewan, was admitted into and became a part of the Dominion of Canada on July 15th, 1870; namely, the B.N.A. Act, 1867, 30 Vict. ch. 3, Rupert's Land Act, 1868, 31-32 Victoria, ch. 105, and the Imperial order-in-council passed in pursuance thereof, and dated June 23, 1870, admitting Rupert's Land and the North-West Territory into the union; or under the provisions of the B.N.A. Act, 1871.

The question whether the statutes under consideration are within the competence of the Saskatchewan legislature under sec. 17 of the Saskatchewan Act (4-5 Edw. VII., ch. 42) was not argued.

Sec. 17 enacts that sec. 93 of the British North America Act, 1867, shall apply to the province with certain modifications.

For convenience of reference I will set out sec. 93 as so modified:

93. In and for the said province the legislature may exclusively make laws in relation to education subject and according to the following provisions:

(1) Nothing in any such law shall prejudicially affect any right or privilege with respect to separate schools which any class of persons have at the date of the passing of this Act, under the terms of chapters 29 and 30 of the ordinances of the North-West Territories, passed in the year 1901, or with respect to religious instructions in any public or separate school as provided for in the said ordinances.

(2) In the appropriation by the legislature or distribution by the Government of the province of any moneys for the support of schools organized and carried on in accordance with the said ch. 29, or any Act passed in amendment thereof or in substitution therefor, there shall be no discrimination, against schools of any class described in the said ch. 29.

(3) Where in any province a system of separate or dissentient schools exist by law at the Union or is thereafter established by the legislature of the province, an appeal shall lie to the Governor-General-in-Council from any Act or decision of any provincial authority affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education.

(4) In case any such provincial law, as from time to time seems to the Governor-General-in-Council requisite for the due execution of the provisions of this section, is not made, or in case any decision of the Governor-General-in-Council on any appeal under this sec. is not duly executed by the proper provincial authority in that behalf, then and in every such case, and as far only as the circumstances of each case requires, the Parliament of Canada may make remedial laws for the due execution of the provisions of this section and of any decision of the Governor-General-in-Council under this section.

(5) Where the expression "by law" is employed in par. 3 hereof it shall be held to mean the law as set out in the said chapters 29 and 30 and the expression "at the Union" shall mean September 1, 1905.

As the point was not pressed, it will be necessary for me to do little more than to express the opinion that nothing in any of the provincial statutes under consideration prejudicially affects any right or privilege with respect to separate schools which any class of persons had at the date of the passing of the Saskatchewan Act, July 20, 1905, under the terms of the ordinances mentioned therein. The School Ordinance, No. 29 of 1901, secs. 41-45, is identical in language with secs. 39, 40, 41, 42, and 44 of the School Act of 1915, with the exception that sub-sec. 2 of sec. 45 of the School Ordinance is taken out of the School Act and re-enacted in the School Assessment Act (sec. 45 (2)).

The sources of the rights or privileges with respect to separate schools in Saskatchewan are the ordinances above mentioned, and

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the class of persons to which such rights or privileges are reserved is the minority of the ratepayers, whether Protestant or Roman Catholic, within any public school district. The right or privilege is to establish a separate school and to be liable only to taxation in respect thereof. The right to pay taxes to the public schools instead of to the separate school is not a right or privilege reserved to the minority. Even if that right existed on July 20, 1905, the taking of it away by later provincial legislation is not an invasion of any of the rights or privileges reserved by the Saskatchewan Act. It might have been a right enjoyed at the time by individual members of the minority, but they are not a class of persons within the meaning of the Saskatchewan Act or sec. 93 of the B.N.A. Act, 1867. *Ottawa S.S. Trustees* v. *Mackell*, 32 D.L.R. 1, [1917] A.C. 62.

The further question raised under this branch of the case is that sec. 17 of the Saskatchewan Act is beyond the powers of the Parliament of Canada.

This raises an interesting question as to the power of Parliament under the B.N.A. Act, 1871, to establish a province with more restricted or different powers from those granted to a province under the original Act of 1867. As Clement, J., in the last edition of his work on the Canadian Constitution says, this is perhaps a debatable question so far as the restrictive clauses in the Alberta and Saskatchewan Acts are concerned. But, in my opinion, it is not necessary for us to consider this question, because if the appellant's contention is correct, he has no basis upon which to found any objection to the legislation now under review.

Let us assume, for the sake of argument, that the appellant's contention *is* correct; then, the constitutional provisions with regard to education will be found in sec. 93 of the B.N.A. Act, 1867, and "at the Union" will mean July 15, 1870.

What right or privilege with regard to denominational schools did any class of persons have by law in the area included in this province on July 15, 1870? At that date there was no law or regulation or ordinance relating to education in force in the North-West Territories. There were, therefore, no rights or privileges with respect to denominational schools existing by law at the Union which could be prejudicially affected by subsequent provincial legislation. On this assumption, then, the province started out with an absolutely free hand with regard to education,

and the legislation under review is clearly within its powers and cannot be attacked in the Courts under sub-sec. (1) of sec. 93.

This conclusion seems to be supported by the opinion expressed by the Judicial Committee of the Privy Council in *City of Winnipeg* v. *Barrett*, [1892] A.C. 445.

In the Manitoba Act (33 Vict. ch. 3, Canada) the following sub-section was substituted for sub-sec. 1 of sec. 93 of the B.N.A. Act, 1867:—

(1) Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law or practice in the province at the union.

The decision turned upon the words "or practice" which do not occur in the B.N.A. Act, 1867, or in the Saskatchewan Act, but in the course of their judgment their Lordships said, at p. 453:—

What then was the state of things when Manitoba was admitted to the Union? On this point there is no dispute. It is agreed that there was no law or regulation or ordinance with respect to education in force at the time. There were, therefore, no rights or privileges with respect to denominational schools existing by law.

As I have already pointed out, there was a similar "state of things" in this portion of the Dominion on July 15, 1870.

The appellant, then, is forced into one or other of two positions. If he relies on the B.N.A. Act, 1867, he is confronted with the provincial legislation of 1908 and 1915 which is clearly within the powers of the Provincial Legislature, and under which a system of separate schools has been established by the legislature of the province. If he relies on the Saskatchewan Act, he is confronted with the same legislation, which, in my opinion, deliberately adopts the system of separate schools and separate school rights which was imposed upon the province by the Saskatchewan Act. In either case, what has been deliberately given cannot be taken away; at least, if it is taken away, the remedial action of the Governor-General-in-Council and the Parliament of Canada may be invoked by a Protestant or Roman Catholic minority whose rights or privileges under the provincial statutes of 1915 have been affected.

If the Saskatchewan Act is within the powers of parliament, a recourse to the Courts will also be open to any class of persons whose right or privilege with respect to separate schools, as provided for in sec. 17, may be prejudicially affected.

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For the reasons above stated, I think that the appeal should be dismissed with costs.

BROWN, ELWOOD and MCKAY, JJ., concurred.

NEWLANDS, J.:—This is an appeal from the Local Government Board against the decision of that Board, that a Roman Catholic ratepayer in the City of Regina can only be assessed as a supporter of separate schools and cannot, at his own request, be assessed as a supporter of public schools.

Counsel for appellant, the Public School District of Regina, which had been added by order, based his appeal upon two grounds:—1. That after the establishment of a separate school, it was only the ratepayers who established the school, *i.e.*, those voting for such establishment, who were liable "only to such rates as they impose upon themselves in respect thereof." That as to all other Roman Catholic ratepayers it was a matter of the individual conscience whether he should support separate schools or not. 2. That the Dominion Parliament had no power to impose the restriction contained in sec. 17 of the Saskatchewan Act as to separate schools.

The first point depends upon the construction to be put upon sec. 39 of the School Act (ch. 23, Sask. stats. 1915), which is as follows:—

> 39. The minority of the ratepayers in any district, whether Protestant or Roman Catholic, may establish a separate school therein; and in such case the ratepayers establishing such Protestant or Roman Catholic separate school shall be liable only to assessments of such rates as they impose upon themselves in respect thereof.

This section is similar to sec. 36 of ch. 75 of the R. Ordinances of the Territories (1898), and the same section as has been in the school ordinance since 1893.

Under this section, the minority in a public school district, whether Protestant or Roman Catholic, have the power to establish a separate school. The formation of the school is commenced by a petition signed by three resident ratepayers of the religious faith indicated in the name of the proposed district; a vote is then taken for or against the erection of a separate school district, and those entitled to vote are ratepayers in the district of the same religious faith, Protestant or Roman Catholic, as the petitioners. The proceedings subsequent to the posting of a notice calling the meeting are the same as in the formation of public schools.

Upon the result of the vote at this meeting, therefore, depends the formation of a separate school district. If the vote is favourable, a separate school district is formed, if adverse, a district is not formed.

The formation of a separate school district is not, therefore, a right which the individual ratepayers of the minority of their religious faith—in this case Roman Catholics—have, but it is a question which these ratepayers as a class must decide by their votes. Such a school district can, therefore, be formed only by the religious minority in question as a class.

Can it, then, be argued that such a district is established only by those voting in favour of it? There being no individual right to form such a school district, how can it be said that the individuals voting for the formation of the district are the ones who established it? The minority voting are bound by the vote of those in the majority, if they decide not to form such a district, and are they not equally bound where the majority vote is in favour of forming the district? Otherwise what is the object of taking a vote? Surely it is to decide whether the religious minority as a class will establish a separate school district, and surely when that vote is favourable, that whole class is bound, as it would be bound if the vote was unfavourable.

I am, therefore, of the opinion that it cannot be said that only the ratepayers voting for the establishment of a separate school district are the ratepayers who established that district.

It will be noted that only the "resident" ratepayers are entitled to sign the petition asking for the establishment of the district. If the appellant's interpretation of the Act was correct, non-resident ratepayers of the religious faith of the minority should not be assessed in that district, but should remain ratepayers in the public school district.

It was argued by the appellant that the word "ratepayers" in this part of the section meant only the ratepayers voting for the establishment of the separate school district. No such interpretation can, in my opinion, be given to this section. The first part of the section says:—"The minority of the ratepayers in any organized public school district, whether Protestant or Roman Catholic, may establish a separate school therein and in such case the ratepayers establishing, etc." The "ratepayers" mentioned

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in the second part of the section must certainly refer back to the ratepayers first mentioned, *i.e.*, the ratepayers who may establish the separate school, and as they can only establish it as a class, by the vote of the majority of them, then the ratepayers who are to be assessed must be the same, *i.e.*, the ratepayers of that class, in this case Roman Catholic.

Such ratepayers are only liable to such rates as they impose upon themselves. They are not, therefore, liable to public school rates, and as there is nothing in the Act which allows them to withdraw from the liability to pay rates to the separate school, they must continue as such ratepayers during the existence of such separate school district.

The second ground of appeal, that the Dominion Parliament had no power to impose upon this province the restriction contained in sec. 17 of the Saskatchewan Act, is based upon the argument that the B.N.A. Act as a whole must apply to a new province; that it can neither be taken from nor added to by the Dominion Parliament.

It is, I think, unnecessary for us to decide this question because it is only an academic question in so far as it affects the school question in this province.

Under the B.N.A. Act, if there are no separate schools in a province at the union, then the legislature is free to act upon this question as it sees fit, and if they establish such schools they cannot afterwards take away such rights; and, if there are such schools, at the Union, then the province cannot take away the right of the minority to them.

Now, if the date of the Union, in so far as Saskatchewan is concerned, is 1870, when these Territories were purchased by Canada from the Hudson Bay Co., though there were no separate schools in existence at that date they were afterwards established by the legislature of the Territories, and if, on the other hand, the date of the Union is the date Saskatchewan was made a province, then separate schools were in existence, having been established by the legislature of the Territories. In either instance, the Province of Saskatchewan would not, under the B.N.A. Act, have the power to take such right away from the minority; and if, for any reason, neither of the above propositions are correct, then the legislature of Saskatchewan by passing the Schools Act

in 1915, which was a consolidation of all the School Acts in force, conferred the right of separate schools upon the minority, and, under the B.N.A. Act, they cannot take away that right.

The appeal should, therefore, be dismissed with costs.

LAMONT, J.:—This is an appeal by the Public School Board and City of Regina from the decision of the Local Government Board holding that, in a school district in which there was established both a public and a separate school, it was obligatory on the part of the ratepayers of the religious faith of the minority to support the separate school.

The facts are all admitted. Regina Public School District is a school district established under the School Act, and Gratton Separate School District is a Roman Catholic School district therein. Both of the said districts are within the City of Regina, and are what is known as "town districts." A. Bartz is a ratepayer of Regina belonging to the Roman Catholic faith. In 1915 he was assessed as a separate school supporter, but at his own written request was entered on the assessment roll for 1916 as a supporter of the public school by the city assessor.

The question is: Is a ratepayer of the Roman Catholic faith, in a district where there is a R.C. separate school, under obligation to support that school, or may he, if he so desire, be rated as a supporter of the public school?

Sec. 39 of the School Act, which is merely a re-enactment of sec. 41 of the School Ordinance of the North-West Territories, is as follows: (See judgment of Newlands, J.), and secs 40 and 41 read:—

40. The petition for the erection of a separate school district shall be signed by three resident ratepayers of the religious faith indicated in the name of the proposed district, and shall be in the form prescribed by the minister.

41. The persons qualified to vote for or against the erection of a separate school district shall be the ratepayers in the district of the same religious faith, Protestant or Roman Catholic, as the petitioners.

Mr. Barr, who argued the appeal for the appellants, admitted that the "minority of the ratepayers" to whom the right to establish a separate school was given, by sec. 39, meant all the ratepayers of the religious faith of the minority as a class, and that the right of any ratepayer to vote for or against the establishing of such school district depended upon his being of the minority faith.

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A perusal of the sections above quoted places this beyond doubt. So far the respondent and the appellants are agreed.

The latter clause of sec. 39 provides:—

> And in such case the ratepayers establishing such Protestant or Roman Catholic separate school shall be liable only to assessments of such rates as they impose upon themselves in respect thereof.

As to the meaning to be given to this clause there is a decided difference of opinion. The respondent claims that the word "ratepayers" in this clause has exactly the same meaning as the word "ratepayers" in the first line of the section, and that the clause means that all the ratepayers of the class establishing a separate school shall be liable to such rates as they impose upon themselves for the upkeep of the school, and that these rates will be determined, as in the case of a public school district, by a majority of the ratepayers thereof.

On behalf of the appellants it was argued that the word "ratepayers" in this clause does not mean the ratepayers of the minority as a class, as in the first part of the section, but means the ratepayers as individuals, and, therefore, the only taxpayers of the class establishing the separate school who are liable to pay rates therefor are those who consent as individuals to pay these rates, for only those consenting can be said to impose such rates upon themselves. And it was further argued that, as consent is necessary, every ratepayer of the faith of the minority can choose whether he will or will not support the school.

In my opinion the language of sec. 39 is not reasonably open to the construction sought to be put upon it by the appellants. The ratepayers referred to in the latter part of the section, who are to be liable only to the rates which they impose upon themselves, are, by the express wording of the clause, "the ratepayers establishing such Protestant or Roman Catholic separate school." But the ratepayers who establish such separate school, and who alone have the right to do so, it is admitted are the ratepayers of the minority as a class, *i.e.*, all the ratepayers of that class.

It is a rule of construction that a word in an Act of Parliament should be given the same meaning throughout, unless some clear reason appears for giving it a different meaning.

In the case of *Re National Savings Bank Assoc.* (1866), 1 Ch. App. 547, at pp. 549 and 550, Turner, L.J., said:—

> I do not consider that it would be at all consistent with the law or with the course of this Court to put a different construction upon the same word

in different parts of an Act of Parliament without finding some very clear reason for doing so.

Primâ facie, therefore, the word "ratepayers" in the latter part of sec. 39 should be given the meaning which it admittedly bears in the first part. No valid reason, in my opinion, has been shown for giving it any other. I am therefore of opinion that in a district in which a separate school has been established by a minority, either Protestant or Roman Catholic, the ratepayers of the religious faith of that minority are under obligation to be rated as supporters of the separate school. The test to be applied to determine whether any ratepayer is a public or separate school supporter is: Is he of the religious faith of the minority? Whether he is or is not is a question of fact which, in case of dispute, may be established as any other fact.

It was contended on behalf of the appellants that as the legislature in 1913 had passed an amendment to the School Act expressly declaring that all ratepayers of the faith of the minority shall be assessable for separate school purposes, it was to be taken as an indication that in the opinion of the legislature such had not been the law theretofore. And, further, that as the legislature in 1916 had repealed this amendment, the repeal indicated an intention to give a liberty of choice to the ratepayers of the minority faith.

The answer to this argument is to be found in secs. 18 and 19 of the Interpretation Act, which read:—

18. The repeal or amendment of any Act shall not be deemed to be or to involve any declaration whatsoever as to the previous state of the law.

19. The amendment of any Act shall not be deemed to be or to involve a declaration that the law under such Act was or was considered by the legislature to have been different from the law as it has become under such Act as so amended.

The amendment of 1913 carried the law no further than did sec. 39 itself, and its repeal did not alter the effect of that section. Both the amendment and its repeal left the law as it originally stood; the amendment merely said in other words what had already been expressed in sec. 39, although perhaps in less definite language.

It was further contended that if sec. 39, in its true interpretation, obliges all ratepayers of the minority faith to support the separate school once it is established, then sec. 17 of the Saskatchewan Act in so far as it differs from sec. 93 of the B.N.A. Act (1867) was *ultra vires* of the Parliament of Canada.

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Just what bearing this can have upon the appeal before us, I am at a loss to discover. The validity of this portion of the Saskatchewan Act can only be material if, without it, the provincial legislature would not have jurisdiction to enact sec. 39 of the School Act.

Sec. 93 of the B.N.A. Act in part reads as follows:—

93 In and for each Province the Legislature may exclusively make laws in relation to education subject and according to the following provisions:

1. Nothing in any such law shall prejudicially affect any rights or privilege with respect to denominational schools which any class of persons have by law in the Province at the Union.

And sec. 17 of the Saskatchewan Act reads:—

17. Sec. 93 of the B.N.A. Act, 1867, shall apply to the said province with the substitution for par. (1) of the said sec. 93 the following paragraph:

(1) Nothing in any such law shall prejudicially affect any right or privilege with respect to separate schools which any class of persons have at the date of the passing of this Act, under the terms of chapters 29 and 30 of the Ordinances of the North-West Territories passed in the year 1901 or with respect to religious instruction in any public or separate school as provided for in the said ordinances.

The effect of sub-sec. 1 in each of these sections is to place a limitation upon the legislative jurisdiction of the province in reference to education. If the whole of sub-sec. 1 of sec. 17 were eliminated, the result would simply be to eliminate the restrictions placed by that sub-section upon the legislative jurisdiction of the province. This would enlarge rather than restrict the jurisdiction of the legislature, but would not affect its right to enact sec. 39. The jurisdiction of the legislature over education is absolute, unless it invades protected rights and privileges.

Sec. 39 does not prejudicially affect any right or privilege with respect to separate schools which a class of persons had under chapters 29 and 30 of the Ordinances of the North-West Territories at the date of the passing of the Saskatchewan Act. It merely continues and confirms the rights then existing. Moreover, even if we were to assume, as contended by Mr. Barr, that the date of the Union was July 15, 1870, and also that sec. 17 of the Saskatchewan Act was *ultra vires*, no facts whatever are shewn from which it could be inferred that sec. 39 invaded any right or privilege protected by sec. 93 of the B.N.A. Act of 1867. The question, therefore, whether or not the Parliament of Canada exceeded its legislative jurisdiction is not material to this appeal.

A rather far-fetched argument was advanced, to the effect that the date of the Union referred to in sec. 93 of the B.N.A. Act was July 15, 1870, and that, at that date, there were not only no schools in the Territories which now comprise this province, but also no law relating to schools, that a settler in this territory could not, therefore, have been compelled to pay any taxes to a separate school, and that this exemption was a right, although a negative one, which was protected by sec. 93. How an exemption from taxation, when there was no law imposing taxation, can be said to be a right or privilege with respect to denominational schools which a class of persons had *by law*, passes my comprehension.

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

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(Neida Case)

Saskatchewan Supreme Court, Sir Frederick Haultain, C.J., Newlands, Lamont, Brown, Elwood and McKay, JJ. January 6, 1917.

SCHOOLS (§ IV—74)—ASSESSMENTS—SEPARATE SCHOOLS.

A ratepayer not of the same religious denomination as the minority of the ratepayers who have established a separate district school is to be assessed as a public and not a separate school supporter.

APPEAL from a decision of the Local Government Board. Affirmed. Statement.

A. R. Tingley, for appellants.

G. H. Barr, for respondents.

HAULTAIN, C.J.:—I agree with my brother Lamont. Haultain, C.J.

The admission that Neida is not a Roman Catholic, in my opinion, makes it perfectly clear that he cannot escape taxation as a public school supporter. He is not a member of the minority of the ratepayers in the Regina School District who established a separate school therein, and he is consequently not entitled to the immunity from taxation for general school purposes which is granted by sec. 39 of the School Act to the members of that minority.

The appeal should be dismissed with costs.

LAMONT, J.:—This is an appeal by J. A. McCarthy from a decision of the Local Government Board holding that a ratepayer not of the religious faith of the minority which has established Lamont, J.

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Lamont, J.

a separate school within the City of Regina must be rated as a public school supporter. The appeal must be dismissed.

Under the School Act, the right to establish a separate school is given to the ratepayers who are of the religious faith of the minority, whether Protestant or Roman Catholic. But for this privilege, all ratepayers would be under obligation to support the public school. Only those to whom the right of separation is given can escape the general obligation to support the public school.

In this case, Nick Nieda is not a Roman Catholic, which class alone constitutes the minority in the district in question. Although not a Roman Catholic he desires to be assessed as a separate school supporter. Not being of the religious faith of the minority which has established the separate school he cannot exercise the right granted only to such minority, and cannot escape the obligation of being assessed for the support of the public school.

The appeal will be dismissed with costs.

Newlands, J.
Brown, J.
Elwood, J.
McKay, J.

NEWLANDS, BROWN, ELWOOD and MCKAY, JJ., concurred.

Appeal dismissed.

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WHITNEY v. GREAT NORTHERN INS. CO.

Alberta Supreme Court, Scott, Stuart, Beck and McCarthy, JJ. January 13, 1917.

INSURANCE (§ V B—195)—ESTOPPEL—AS TO ACTS OF AGENT—MISREPRESENTATION.

An insurance agent who negligently fills in an application for insurance without asking necessary and material questions, and induces the applicant to sign the application without reading it, assuring him that "it is all right," is bound to communicate the facts and circumstances to his principal, and his knowledge will be imparted to it; by issuing the policy and retaining the premium, the principal is estopped from setting up misrepresentation in the application.

[*Bawden* v. *London, Edinburgh and Glasgow Ass. Co.*, [1892] 2 Q.B. 534, applied; *Lamothe* v. *North Am. Life Ass. Co.*, 16 Que. K.B. 178, 39 Can. S.C.R. 323, considered.]

Statement.

APPEAL by defendant from a judgment of Walsh, J., whereby he allowed the plaintiff's claim upon an insurance policy issued by the defendant upon a certain stallion. Affirmed.

G. H. Ross, K.C., for appellants.

W. S. Ball, for respondent.

Stuart, J.

STUART, J.:—The amount of the policy was $800, but owing to a provision in it that no more than two-thirds of the actual cost

of the animal could be recovered the judgment was entered for the sum of $533.33.

The defence pleaded is that in the application for the insurance the plaintiff had erroneously stated that he had paid $1,500 for the animal whereas in fact he had only paid $800 for him.

Clause 22 of the policy reads:—

> The company shall not be liable for loss in any case where it shall be found that the material statements set forth in the application upon which acceptance of risk was based were untrue or that any fraud was practised by the insured or that the live stock was described otherwise than they really were to the prejudice of the company or if the insured misrepresents or omitted to communicate any circumstances which is material to be known to the company in order to enable it to judge of the risk it undertakes in procuring said contract of indemnity, etc.

The agent who canvassed the plaintiff for the insurance was one Luckwell. There was some attempt upon the argument before us to contend that he was not the defendant's agent at all. But the trial Judge has found this fact against the defendant, and was undoubtedly correct in so doing. The form of application is a printed one. On its back the first printed line is, "Agents do not fill out this side." The blanks below are filled up with a typewriter while all the rest of the application is done in pen and ink and in Luckwell's hand. The last line on the back of the form is "Luckwell, Local Agent." Luckwell's name is there in typewriting, and was quite evidently filled in by the company's officers. It is therefore difficult to see how it can be successfully contended that Luckwell was not the company's agent in canvassing for the insurance. It was suggested that it was the company's practice to send these forms out wholesale to be used by any one who cared to do so, and that persons taking them and using them in securing applications and sending them in were not to be considered the company's agents. This would, of course, be a convenient scheme for avoiding responsibility for the acts of agents, and I do not think it ought to receive any countenance from the Court.

The defendant did not call Luckwell at the trial nor give any explanation of their omission to do so other than the suggestion that he was not their agent at all.

The facts regarding the application were therefore told entirely by the plaintiff whose evidence was uncontradicted and was accepted by the trial Judge as true. He stated that Luckwell had never asked him what he had paid for the horse, but that he

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had asked him its value, which he had given as $1,500, that he, Luckwell, had filled up all the answers himself, a thing which is obvious from a comparison of the handwriting of the signatures with that on the answers, and that he, the plaintiff, had signed the application without reading it over because Luckwell had told him to do so saying that it was all right. He stated that the time when he signed the proof of loss was the first time the price paid had been mentioned to him. In that document the price paid was stated to be $800 which was the fact.

The application consists of two forms—one a general application form and the other a document called "Description for pedigreed stock application."

In each of these documents the price paid is stated to be $1,500. But in each the figures bear an alteration. In the first it is clear that "$1,000" was written before it was changed to $1,500. There is a slight indication that before $1,000 was written the figures were $800, but this is rather obscure and it is unsafe, I think, to conclude that $800 ever was actually written there without some better examination than the naked eye affords. In the second document it is difficult to judge with certainty what the previous figures were.

The application has at its foot a long closely printed part containing a number of involved stipulations, the last of which reads:—

> It is agreed and understood that any persons other than the applicant who fills out this application, or any part thereof, or signs the same as a witness, shall in doing so be deemed agent of the applicant and not agent of the company.

I am inclined to agree with the trial Judge that the statement of the actual price paid was a material fact within the meaning of cl. 22 of the policy. Value is largely a matter of opinion, and I think the company were entitled to form their own opinion on that question. In order to be able to do so they asked various questions, one of which was what had actually been paid for the animal. That was an actual fact which would be of great assistance to the company, when considering the application, in deciding upon the value of the horse. I do not think it is enough to say that the Court can decide without hesitation from the evidence that the value was $1,500. That, I think, is not the point. Before deciding to enter into the contract the company had a right

to decide what facts would be material in their minds in influencing them as to their action. I do not think the Court should say to them "you had no right to be curious about the price the applicant had paid, as long as he stated correctly the value as we judge that to be." Certainly with a statement of value at $1,500 a statement of price paid at $800 would have looked rather peculiar to any one considering the application and would have suggested the necessity for an explanation. But in the view I take of the case it is perhaps unnecessary to express a final opinion on the point of materiality.

The trial Judge took the view that the plaintiff was not bound by the stipulation in the application to the effect that the agent having filled up the application was to be deemed to be the agent of the applicant inasmuch as the clause had not been brought to his attention, and was printed in very small type at the foot of a long clause containing numerous conditions.

It seems to me, however, that it is impossible merely for the reasons given to relieve the respondent from the effect of this clause. Indeed, it would seem that the situation would have been the same even if the clause had not been there. Where an applicant allows the agent to fill in the answers and signs the application without taking the trouble to read it to see if the answers are correct it would appear to be only just that to that extent the agent should be treated as the agent of the applicant.

This seems to be the result of the decision in *Lamothe* v. *North American Life Ass. Co.*, 16 Que. K.B. 178, a decision of the Court of King's Bench of Quebec and affirmed in 39 Can. S.C.R. 323. Of course the oral judgment of the Chief Justice in the Supreme Court leaves open the suggestion that the Court may not have intended to confirm all the statements of law laid down by Carroll, J., in the Court below. But those statements are strongly confirmed by the cases cited in the judgment, viz., *Biggar* v. *Rock Life Ass. Co.*, [1902] 1 K.B. 516, and *New York Life Ins. Co.* v. *Fletcher*, 117 U.S. 519, the latter a decision of the Supreme Court of the United States.

The only way by which it would appear possible for the respondent to hold his judgment is by an application of the ordinary rule that notice to an agent is notice to the principal where it is the agent's duty to communicate the fact to the principal.

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This principle was applied in *Bawden* v. *London, Edinburgh and Glasgow Ass. Co.*, [1892] 2 Q.B. 534, in a very strong judgment in the Court of Appeal where the applicant for accident insurance had only one eye to the knowledge of the agent though the contrary was at least impliedly stated in the application or proposal. The knowledge of the agent was there imputed to the principal. A similar view was taken by Bray, J., in *Holdsworth* v. *Lancashire and Yorkshire Insurance Co.*, 23 T.L.R. 521.

In MacGillivray on Insurance Law (1912), at p. 355, it is stated:—

> As to the rule which imputes the knowledge of an agent to his principal this does not apply (1) where there is no duty to communicate the matter; (2) where the knowledge is acquired by the agent otherwise than in the course of his agency; (3) where the agent is acting in fraud of his principal for his own private ends.

See also p. 358 where *Naughter* v. *Ottawa Agricultural Ins. Co.*, 43 U.C.Q.B. 121, is cited.

In the present case there is no evidence that Luckwell, the agent, knew that the applicant had only paid $800 for the horse, although I am bound to say that the suspicion suggested by an examination of the documents that at one time $800 was written and afterwards corrected tends to arouse my curiosity on that point. But I think we must assume from the evidence that Luckwell did not know, at least did not learn from the plaintiff that $800 was all that was paid. It would at any rate lie upon the plaintiff to prove knowledge in Luckwell of that fact, and this was not done.

But the facts that Luckwell did know were that he had never asked the plaintiff what he had paid for the horse, that he had filled the answers up himself and that the plaintiff had signed without reading them upon his assurance that they were all right.

Can it be said that there was no duty owed to the company by Luckwell to communicate these facts to his principals? In my opinion it was the agent's duty to communicate to his principals all the material facts surrounding the obtaining and filling up of the application.

If there was any fraud on the part of Luckwell or if he acted merely for his own private ends as the agent seems to have acted in *Lamothe* v. *North American Life Ass. Co.*, *supra*, it was the duty of the defendant to shew those facts. There is no evidence that

Luckwell acted either fraudulently or merely for his own private ends. He may have been merely negligent and may have merely taken a wrong view of the seriousness and materiality of the question to which he wrote a wrong answer. Of course there is an evident distinction between the facts connected with the very subject-matter of the risk and facts connected with the preparation and taking of the application. But I can see no reason for treating the former as the only ones which it is the duty of the agent to communicate to his principal. Surely it is the duty of an agent when he forwards an application which he knows has not been read over by the applicant before signing it, which he has in fact signed simply because the agent told him it was all right, to communicate these facts to his principal. Would not any careful agent either see that the applicant did read and understand it or else tell his principal that the applicant had signed it with his eyes shut and had trusted the agent implicitly?

In the circumstances I think the knowledge of Luckwell must be imputed to the company and the company must be taken to have known (1) that the plaintiff had not been asked what the horse cost; (2) that he had not read the application at all, and (3) that he had signed it upon the agent's assurance that it was all right. This may be forcing the company to cling to its agent rather than, as said in the *Bawden* case, to throw him over and disavow him. But I see no reason why a company should not be forced to be careful in the selection of their agents and to give them specific instructions as to their duties. Apparently the company desires to get all the advantages of agencies without incurring any of the obligations that the employment of agents involves.

There is no doubt that the agent does not cease for every purpose to be the agent of the company even where he does do something as agent for the applicant. Qua agent for the company he knows perfectly well what he has done, qua agent for the applicant.

This question of the knowledge of the agent which has been acquired in the course of the agency being imputed to the principal does not seem to have been brought up squarely in the *Lamothe* case.

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The opinion expressed by Field, J., in the case cited from the United States Supreme Court in the following words:—

> Where an agent is apparently acting for his principal but is really acting for himself or third persons and against his principal there is no agency in respect of that transaction. The fraud could not be perpetrated by the agent alone. The aid of the insured either as an accomplice or as an instrument was essential.

cannot be applied here. There is nothing to shew that Luckwell was acting against his principal or really for himself or for third persons. Nor do I think the use of the words "or an instrument" a happy one. If the applicant is not an innocent instrument then he is an accomplice. If he is an innocent one, as he was here, I see no reason why he should be associated with either the negligence or even fraud of the agent in the sense of being himself practically to blame for it. The applicant is not bound to look after the interests of the company. The agent was appointed for that purpose.

I conclude then that the company must be held to have had knowledge of the facts that Luckwell had never asked the price paid for the horse, that the plaintiff had never read the application and that he had signed it on the assurance of Luckwell that it was all right. Only upon the assumption that Luckwell owed no duty to the company to tell them of these facts can the company escape from this imputed knowledge. But for myself I think the duty was there, with the consequent result.

Knowing, therefore, that their applicant had signed his application without reading it, that he had not been asked the price paid for the horse, that he had signed on Luckwell's assurance that it was all right, the company issued the policy to him and that without sending him a copy of the application he had signed. They took his premium and allowed him to think that his policy was regularly issued. In the circumstances I think they must be said both to have waived the materiality of the price paid for the horse and to be estopped from insisting upon Luckwell's agency for the plaintiff under the last clause of the application.

I would, therefore, dismiss the appeal with costs.

Scott, J.

SCOTT, J., concurred with STUART, J.

Beck, J.

BECK, J.:—The defence says that the plaintiff in his application stated that the price paid by him for the stallion was $1,500 whereas in fact the price paid was $800 and that the application

provided that any false or erroneous statement made by the plaintiff that might be of material interest to the company in forming its decision as to the acceptance of the application should be a bar to any claim that might be made under the policy. There is such a provision in the application. The condition of the policy already quoted was not set up in the defence.

The application is for indemnity for loss for death, not injury, "in accordance with this application and the conditions of the company's contract." The application contains the words: "I hereby answer the following questions and the truthfulness of the answers I hereby warrant." The policy, however, is expressed to be in consideration of the representations made in the applications for this policy and in accordance with the stated conditions herein printed, all of which are made part of this contract.

The application and the policy must be read together; and where there is inconsistency or even without inconsistency a difference in the provisions relating to any item of the contract the policy as being the later must, except where it is a case for rectification, be looked to for the governing provision—especially so, where, as here, the application is not attached to the policy nor the insured provided with a copy.

The policy, by reason of its terms, in my opinion, reduces all statements in the application from the rank of warranties to that of representations (see 19 Cyc. 681) and warranties differ from representations, in that the falsity of a representation will defeat the contract only when it is material, as representations are merely inducements to the making of the contract while in the case of a warranty the statement is made material by the very language of contract, so that a misrepresentation of a matter warranted is a breach of the contract itself: (19 Cyc. 683).

Furthermore, the condition No. 22 to which I have referred deals with the question of misstatements of fact and under its terms a misstatement must be material in order to avoid the policy. This must be taken, in my opinion, to be in substitution for and in restriction, of the wider provision of the application.

The terms of the policy being the language of the company must be taken most strongly against them and if there is any ambiguity in it it must be taken more strongly against the company: *Anderson* v. *Fitzgerald* (1853), 4 H.L.C. 484; Porter on Insurance, 4th ed., pp. 34 *et seq.*

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In this view, what, in my opinion, we have to do is to take condition 22 and see whether or not there has been a breach of it or rather whether the defendant company has established that the plaintiff committed a breach of it, that is, having regard to the facts of the present case, whether the company has proved that the insured made a material misstatement of fact in his application.

Whether a statement is material is a question of fact depending upon the facts and circumstances of the particular case and the question is not whether it may or might have been material, but whether it was in fact material and the burden of shewing materiality is on the company. See cases cited in MacGillivray on Insurance, p. 315.

Much of the evidence is merely hypothetical. What I gather is that Walker, the company's manager, while saying that he was not in a position to say what he would have done if he had known that the purchase price was $800: but the value was honestly $1,500 went to the fullest limit of what he would have done on behalf of the company when he says: "It could cause us to look into the question." There is no evidence that, had he looked into the question and found the truth to be that the true value was $1,500, leading one to believe that he would have departed from the ordinary practice of the company and insured for two-thirds of the actual value. This view of his evidence is strengthened by a letter written by the secretary of the company to the Union Bank of Canada after the proofs of loss had been filed—the bank apparently being interested—in which he makes no suggestion of objection to pay on the ground of misstatement but claims only that the company is liable to pay only two-thirds of the purchase price. This letter coming from the head office of the company before rejection of the claim is much more reliable than any inconsistent evidence of the manager after the matter had got into litigation. In my opinion, therefore, the company has failed to prove, what it did not indeed plead, a breach of the condition to which he may perhaps be taken to have intended to rely upon. Except on this question of materiality I agree with Stuart, J. I therefore agree in the disposition of the appeal made by him.

McCarthy, J.

MCCARTHY, J., concurred with BECK, J.

Appeal dismissed.

THIBAULT v. COULOMBE.

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Quebec Court of Review, Sir F. X. Lemieux, C.J., McCorkill and Drouin, JJ. June 30, 1916.

1. DEEDS (§ II A—15)—EASEMENT — PASSAGE — "WITHOUT CAUSING DAMAGE."

The words "without causing damage," in a deed creating a servitude of passage, mean that the grantee of way over a property to the advantage of his own must exercise his right in a reasonable and prudent manner so as to cause as little damage as possible.

2. CANCELLATION OF INSTRUMENTS (§ I—5)—IMPROBATION—PRODUCTION OF DOCUMENT.

Improbation proceedings should only be commenced when it is contended that the allegations in the document are false, or that the signatures are false; when the contention is merely that an alleged copy of the document is not a true copy, the proper proceeding would be to compel production of the instrument filed.

Statement.

PLAINTIFF alleged the establishment of a servitude of passage on his land in 1874 to the advantage of defendant's property; but that, according to terms of the deed creating the servitude, it was to be exercised without causing any damage; that the defendant misused this privilege by passing and repassing nearly all over his property, even across the cultivated parts thereof, by leaving gates open, etc.

Defendant denied the abuses charged and took improbation proceedings against the copy of the deed creating the servitude alleging that this copy was not in conformity with the original minute.

The Superior Court, Flynn, J., on April 6, 1916, condemned the defendant to $20 damages for improper use of the right of passage and dismissed without costs his improbation proceedings.

Defendant inscribed in review.

M. Rousseau, K.C., for defendant, appellant.

Omer Berube, for plaintiff, respondent.

Lemieux, C.J.

LEMIEUX, C.J.:—Defendant inscribes in review on two grounds: (1) because the evidence does not justify a condemnation in damages (2), because he was condemned to pay his own costs on an inscription in improbation made by him against a copy of the deed creating the servitude filed by plaintiff.

The notarial deed of December 2, 1874, creating in favour of the land owned by the defendant a right of passage over the property of the plaintiff, stated that this right of passage should be exercised without causing any damage. These words "without causing any damage" mean that the defendant shall use this right of passage in a careful and prudent way (*en bon père de*

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famille), that he shall not abuse or misuse this privilege. The words do not mean that he in favour of whom the right of passage was granted shall pass or must pass without causing any inconvenience or deterioration to the land which is bound to bear the serviture; for a right of passage either on foot or by vehicle always leaves certain inevitable traces—the tracks of the wheels, of the horses and of the pedestrians and the wear and tear resulting to the road.

Now, the trial Judge has found that the defendant used this right of passage improperly and that the misuse, for instance, consisted in leaving open the gates which allowed animals to enter on plaintiff's property, in exercising this right of passage over an extent of territory greater than was necessary. The evidence shews that the right of passage could be properly exercised over a strip of land 6 ft. in width. The defendant, however, passed and repassed on a width of 15 ft. which bear the unmistakable traces of his passage. Furthermore, it was established that the defendant had, at the rear of plaintiff's property, wheeled his vehicles in the grain and hay of the plaintiff, thereby causing him damage.

I consider that the Judge properly held that these facts constituted an abuse and that the right of passage was improperly used and the condemnation in damages to the amount of $20 appears to us very reasonable.

Defendant complains that his improbation proceedings against the copy of the deed creating the servitude was dismissed by the Superior Court, each party paying his costs, and contends that the judgment is erroneous and that these proceedings should have been maintained with costs in his favour. Defendant did not take proceedings in improbation against the deed creating the servitude, that is to say, against the original minute thereof. He did not contend that the essential allegations in the deed were false or that the signatures were false. His only contention was that the copy filed by plaintiff was not a true copy of the minute.

We are of the opinion that the Superior Court very wisely held that improbation proceedings were not necessary in this case, and the Court would have been more logical in dismissing these proceedings with costs against defendant.

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If, as alleged by defendant, the copy was not a true copy, he could have produced a true copy himself and if plaintiff had persisted on relying on the copy he himself had filed, then the defendant could have compelled by the proceedings recognized by law the production of the deed by the notary who drafted it or by the custodian of his repertory.

Plaintiff, immediately after the filing of the improbation proceedings, declared that he did not intend relying on the copy he had filed and which he held from his predecessor in title; and the Court rendering judgment was guided by a true copy of the original minute.

Andrews, J., in the case of *Miller* v. *Tapp*, 9 Que. S.C. 263, basing his judgment on art. 1215 of the C.C. and on Pothier (Obligations No. 765), held that where the original title subsists copies thereof are but evidence of what the original contains and, hence, there can be no question as to the reliance to be placed in the contents of a copy when the original title still exists for if any doubt arises as to the contents of the copy, verification may be immediately had from the original deed.

In *Dufresne* v. *Lalonde*, 21 L.C.J. 905, Rainville, J., held:—

that the correctness of a duly certified copy of a notarial act may be attacked otherwise than by an inscription *en faux* and when the procedure by way of such inscription is unnecessary, it ought to be rejected.

The Superior Court in dismissing the improbation proceedings has properly applied the law and the doctrine. The decision as to the costs may possibly be equitable but for our part we should have dismissed it with costs; this shews that the defendant has no reason to complain of the judgment ordering each party to pay his own costs.

Malouin, J., has quite recently applied the same principles in the case of *La Société de beurre de Saint Narcisse* v. *Demers*, 49 Que. S.C. 404.

The judgment is unanimously confirmed.

Appeal dismissed

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K. B.

BERNIER v. DURAND AND PAGEAU.

Quebec King's Bench, Appeal Side, Sir Horace Archambeault, C.J., Lavergne, Cross, Carroll and Pelletier, JJ. June 27, 1916.

1. FIXTURES (§ I—1)—HOW RENDERED—OWNERSHIP.
In order to convert a moveable object into an immoveable, and attach it to the realty, the person converting must be the owner of both the moveable and the realty.
[*Waterous Engine Works Co.* v. *Banque d' Hochelaga*, 5 Que. Q.B. 125, affirmed by 27 Can. S.C.R. 406, followed.]

2. SALE (§ I C—15)—CONDITIONAL SALE—FIXTURE—MORTGAGE.
Under a deed of sale stipulating that the vendor shall remain the owner of the thing sold until paid for in full, the vendor remains the sole owner, and the buyer cannot legally immobilise the object purchased or grant a hypothec to a creditor.

Statement. APPEAL from the judgment of the Superior Court on January 10, 1916. Reversed.

Moraud & Savard, for appellant.

Joseph Turcotte, K.C., and *H. M. O'Sullivan*, for respondent.

The judgment of the Court was delivered by

Carroll, J. CARROLL, J.:—The appellants sold to Pageau a gasoline engine and a circular saw. The deed of sale stipulated that the vendor shall remain owner of the things sold until paid for in full. Pageau immobilised this gasoline engine and saw in his plant at Lorette.

Subsequently to this immobilisation Durand lent Pageau $1,000 and to guarantee the reimbursement of the loan obtained a hypothec on the plant. As Pageau made default to pay the instalments as they fell due, the appellant (the vendor) removed from the plant the gasoline engine and the saw.

Durand, the hypothecary creditor, then brought suit against the appellant to compel the return of this motor and saw to the plant in the same state and condition as they were before their removal. The action is contested by the appellant who contends that she remained proprietor of the engine and saw.

The Superior Court maintained the action on the ground that the sale was simply an ordinary sale subject only to a resolutory clause, and held that as the engine sold had been immobilised by destination, that is to say incorporated into the realty, Durand's hypothecary claim affected the machines.

Two questions arise, which, in my opinion, must be decided in favour of appellant: (1) Can the proprietor of a plant, who is not at the same time the owner of a moveable object legally incorporate this moveable object into his immoveable property and grant a hypothec on the whole? (2) Do contracts of the nature of the one

recited above constitute an ordinary sale on credit or a sale under suspensive condition? Article 379 C.C. says:—

Moveable things which a proprietor has placed on his real property for a permanency or which he has incorporated therewith, are immoveable by their destination so long as they remain there.

Thus, within these restrictions, the following and other like objects are immoveable: (1) Presses, boilers, stills, vats and tuns; (2) All utensils necessary for working forges, paper mills and other manufactories. Manure, and the straw and other substances intended for manure, are likewise immoveable by destination.

The phraseology of art. 324 of the Code Napoleon differs slightly but the sense is the same.

Commentators are unanimous in declaring that in order to give a moveable object the character of an immoveable by destination, one must be at the same time owner of the realty and owner of the moveable object destined to become immoveable. (Huc. vol. 4, No. 20).

This Court has applied this doctrine in the case of *Waterous Engine Works Co.* v. *Banque d'Hochelaga*, 5 Que. Q.B. 125, which judgment was confirmed by the Supreme Court, 27 Can. S.C.R. 406.

There can be no difficulty on this point.

The second question is this: Did the purchaser, under the contract of sale in issue herein, become owner in such a way that he could immobilise the gasoline motor sold him?

The Court below held that the sale was one with resolutory condition.

These contracts are of a common occurrence in the trade, and as is well known the resolutory condition always tacitly forms part of the contract. It is therefore useless for the parties to insert it in so many words as this would confer upon them no greater rights than if no mention thereof were made at all.

This effect of this clause is rather to suspend the transfer of the ownership, as held by this Court in *Filiatrault* v. *Goldie*, 2 Que. Q.B. 368. Laurent, vol. 24, No. 4, says:—

Faut-il conclure que la translation de la propriété est de l'essence de la vente? Non. La loi ne le dit pas; et cela ne résulte pas des principes. Les orateurs du Tribunal invoquent le droit naturel, c'est-à-dire la volonté des parties contractantes. Les parties peuvent stipuler que la propriété ne sera transférée que lorsque l'acheteur aura payé le prix.

(The Court also referred to a decision of the Court of Appeals of Lyon, reported Sirey 1890-2-113, where the question arose as to a gas engine leased to a manufacturer.)

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The principles laid down in that case may properly be applied to the present one.

Prof. Appleton of the Faculty of Law of Lyon, commenting upon this decision, says:—

> Quand bien même on devrait considérer le contrat comme une vente pure et simple, si les parties étaient expressément convenues que la propriété ne serait transmise qu'après le paiement intégral du prix, il faudrait nécessairement donner effet à leur volonté. En effet, l'art. 1583, C. Civ. d'après lequel la vente est parfaite et la propriété acquise de droit à l'acheteur dès qu'on est convenu de la chose et du prix, ne constitue pas à coup sûr une disposition d'ordre public à laquelle il ne serait pas permis de déroger, et, d'autre part, il n'y a sans doute rien d'illicite dans la convention qui retarde la translation de propriété jusqu' après le paiement du prix.

But it is objected: The creditor who lent in good faith is entitled to believe that the object immobilised belongs to the owner of the realty, and the vendor of an object which may be destined to become immobilised should take the necessary precautions to warn the creditor of the risk he may run.

Quite evidently there are two people to be protected: on the one hand the unpaid vendor who helps the purchaser by selling to him things which the purchaser could not obtain if he were obliged to pay cash, and on the other hand the hypothecary creditors in good faith.

An easy solution of this unfortunate state of affairs would result from the adoption in our law of art. 20 of the Registration Law of Belgium. The vendor, under the Belgian law, may preserve during the space of 2 years his privilege, if he causes it to be registered, even though the buyer immobilises the objects purchased.

We should adopt this system as the rights of everybody would then be fully protected.

But until this is done, we are bound to hold that where the vendor and purchaser agree that a moveable object shall only become the property of the purchaser after the entire purchase price has been paid, they make an agreement which is valid, and must have its effect even against third parties who may be hypothecary creditors.

The vendor remains the sole owner and the buyer cannot illegally immobilise the object purchased nor grant a hypothec to a lender.

For these reasons I am of opinion to allow the appeal.

Appeal allowed.

TILBURY GAS CO. v. MAPLE CITY OIL AND GAS CO. IMP.

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Judicial Committee of the Privy Council, The Lord Chancellor, Viscount Haldane, Lord Atkinson and Lord Shaw. November 2, 1916.

CONTRACTS (§ II D 1—157)—*Agreement to supply gas—Extent of supply—Pressure and regularity.*]—Appeal from 27 D.L.R. 199, 35 O.L.R. 186. Affirmed.

The judgment of the Board was delivered by

LORD SHAW:—This is an appeal by the Tilbury Town Gas Company from a judgment of the Appellate Division of the Supreme Court of Ontario, 27 D.L.R. 199, 35 O.L.R. 186, dated December 21, 1915. That judgment allowed the appeal of the defendant company from the judgment of Lennox, J., in favour of the plaintiff company, dated February 10, 1915.

The business of the plaintiff company is that of distributing and selling natural gas. This gas is found in considerable quantities in what is known as the Tilbury Field in the County of Kent, Ontario. For the purposes of its business of distribution and sale the plaintiff company obtained a supply of gas from the Maple City Oil and Gas Co. The Maple Company conducted boring operations, gathered the gas, and delivered the same into the pipeage system of the plaintiffs, all under an agreement of, *inter alia*, purchase and sale. The agreement is dated July 22, 1912.

The question in the case depends for its solution upon the proper construction to be given to certain clauses of that document. These clauses are as follows:—(See 27 D.L.R. 201-2, 35 O.L.R. 199.)

By clause 2 of the agreement the Tilbury company agrees with the Maple City company "to pay to the Maple City company for such natural gas supplied and delivered as aforesaid into pipe-lines or piping of the Tilbury company" a price at the rate of 7 cents per 1,000 c.ft. of gas.

By clause 3 of the agreement it was provided as follows:—(See 27 D.L.R. 202, 35 O.L.R. 199.)

It was further provided by clause 5 of the agreement that, in the event of the Maple City company "failing to produce, supply, and deliver natural gas as aforesaid to the Tilbury company when the same might be obtained and delivered in merchantable quantities from the lands," then the Tilbury company might, in its option, itself bore or operate for the gas and deliver the

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same into its own pipeage, the Tilbury company being entitled to be indemnified for the costs incidental to these operations.

In the course of the development of this gas-field other companies have appeared, and various contracts have been made. The respondent company, namely, the Glenwood Natural Gas Co. Limited, has been formed, and also another company called the Southern Ontario Gas Co. Both of these companies came into existence in December, 1912. The Southern Ontario company was incorporated for the purpose of supplying the cities of London and St. Thomas, places at a considerable distance from the Tilbury field. The Glenwood company was formed for the purpose of conducting the operations of mining and production in order to supply the Southern Ontario company's demands.

About the same time the Glenwood company, by the purchase of stock, obtained a controlling interest in the Maple City company, and in the beginning of the following year it purchased the fee of two of the three farms which the Maple City company held under leasehold and used as the ground of their mining operations. The purchase by the Glenwood company was made subject to the interests of the Maple City company under these leases. It is alleged that the Glenwood company used all the right thus amassed by it by endeavouring to undermine the rights of the Tilbury company so as to prevent them from obtaining delivery of a sufficient supply of natural gas from the Maple City company. It is admitted that the Glenwood company's pecuniary interests might be in this direction, because the natural gas thus diverted might be sold by it to the Southern Ontario company at 8 cents, and not 7 cents, per 1,000 c.ft.

It is in these circumstances that the action was brought, and the claim set forth in the writ is against the defendants "for an injunction restraining them from connecting up the wells of the defendant, the Maple City Oil and Gas Co. Limited, with the pipe line of the Southern Ontario Gas Co. Limited." Certain declarations are also asked for, but these declarations are simply an affirmance of the rights, such as they are, of the parties under the agreement founded on. The question before the Board, as was admitted, is whether an injunction of the kind claimed should, in the circumstances, be granted.

While the agreement and arrangements above sketched have been made between and among the respondent companies, it is

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admitted that the plaintiffs, the Tilbury company, can claim no power of interference with these, except in so far as they form a violation of the rights to gas supply from the Maple City company under the agreement founded on. It is accordingly of vital importance to note what the admitted facts with regard to that supply are. It appears from the proceedings, and it was admitted with candour at their Lordships' Bar, that up till now there has been a full and regular and continuous supply of gas to the Tilbury company. It was further admitted that that supply had, up to date, largely exceeded in quantity their requirements from day to day, or month to month, and that there was accordingly a large available surplus. With regard to the immediate future, it was further admitted that the rate of yield and the effect of mining operations conducted in different portions of the field was a matter of considerable speculation, and it was not in fact established by the evidence that the immediate future of the required supply under the contract was imperilled.

In this state of facts their Lordships are of opinion that an injunction is not warranted by law.

It was argued that, under the terms of the agreement, the Tilbury company is entitled to a supply of all the gas which these fields produce, except such amount thereof as the Tilbury company may expressly dispense with. This is the view taken by the Judge who tried the case. As he puts it: "The agreement requires the Maple City Company to so act as to secure as far as possible a permanent or quasi-permanent source of supply of gas for the Tilbury company." And with regard to the surplus, his view is that, if the Maple City company "in working out the agreement should find itself liable to sustain a loss by reason of a temporary surplus of gas, which the Tilbury company, after notice and the lapse of a reasonable time is unable or unwilling to take, it may be that in such a case the Maple City could for the time being dispose of this surplus elsewhere."

Their Lordships find themselves quite unable to accept this view of the agreement founded on. Under clause 1 of that agreement the obligations of the Maple City company are to bore or operate for supply and delivery of natural gas to the Tilbury company, to the full extent of their requirements at all times. This obligation extends not only to the lands now held, but to

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those "which may hereafter be held" by the Maple City company: and with regard to the Tilbury company requirements for the supply or marketing or sale extends to all franchises or agreements which that company may acquire or have from time to time. The true point of the case is:—what is the meaning of the phrase "to the full extent of their [that is, the Tilbury company] requirements at all times?" In their Lordships' view, this applies to the needs of their actual business from time to time. Those needs might decline; or, in view of the possible extensions of the Tilbury company by the acquirement of new franchises, they might be enlarged. It would be practically impossible for that company to say what, if its business develops, would be its needs in the future. This is true; but when the agreement refers to the requirements from time to time, this in their Lordships' opinion applies to the needs actually arising or in immediate prospect in the course of the going business; and the word "requirements" should not be construed as signifying the presentation of a request or demand. Such a request or demand might be far in excess of the business needs and might create at the will of the Tilbury company a monopoly by way of reserve against an unknown future.

This view is confirmed by the language of sec. 3 of the contract under which the Maple City company agrees to produce, supply, and deliver, to the Tilbury company "sufficient natural gas with sufficient pressure and regularity of delivery from time to time required for the purposes aforesaid continuously." But it is also clear that no monopoly was meant to be created, and that the parties fully contemplated the case of production in excess of the Tilbury company's requirements from time to time. For the clause proceeds to bind the Maple City company not to allow gas to be taken from the lands except subject to the rights of the Tilbury company, and after the Tilbury company shall be supplied.

It thus appears quite plain that the development of the field was contemplated, and that the position of the Tilbury company was, that this development might take place, and supplies be made to other customers, so long as priority was given to the requirements of the Tilbury company. In short, the agreement does not provide for a monopoly of the entire production of the field, but it does provide for priority of supply therefrom. Nor,

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in the view taken by the Board, does the agreement sanction the idea of a monopoly subject to a power of dispensation by the appellants at their option, without which dispensation the field could not be developed or other supplies made.

In the opinion of their Lordships, the agreement not having created any monopoly as argued, and it not having been established that the true right of the Tilbury company (namely, to a priority in full satisfaction of its requirements) having been invaded or immediately threatened, no case has arisen which would warrant a Court of law in granting the injunction claimed.

In the opinion of the Board, the correct view of the case has been adopted by the Judges of the Appellate Division of the Supreme Court. Their Lordships also agree with the observations made by Hodgins, J.A., that, the requirements of the Tilbury company

> Do not consistently with the concluding part of clause 3, as it seems to me, compel that company to store up all its assets in order to be able at some indefinite future time to meet any possible demand which may be made upon it by the respondents.

Their Lordships also agree with the Judge in his view that the plaintiffs are only entitled to

> What they actually require and demand from time to time, and not to the creation and preservation of a reserve fund of untapped or unexhausted gas which, in the meantime, costs them nothing, although it might cost the Maple City company a very considerable expenditure, and the enforced retention would deprive them of the right given by the contract of selling "subject to the right of the Tilbury company." That expression would be meaningless if its import was that what they could sell would be nothing at all because of possible demands in the future.

Their Lordships will humbly advise His Majesty that the appeal be refused with costs. *Appeal dismissed.*

Re O'NEIL AND CITY OF TORONTO.

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Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Lennox and Masten, JJ. June 15, 1916.

DAMAGES (§ III L 2—236)—*Municipal expropriation of land —Owner, lessee, and sub-lessee—Severance—Incidental damages.*] —Appeal by the Corporation of the City of Toronto from an award of the Official Arbitrator for the city.

Mrs. Gibson, the owner of the lot at the north-east corner of Gerrard and Parliament streets, let to O'Neil for 21 years from the 1st May, 1911, at a rental of $1,000 per annum for the first 15 years and $1,200 thereafter, payable by monthly instal-

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ments in advance; the lessee to expend at least $2,500 in improvements, keep in repair, etc.

O'Neil proposed to build a moving picture theatre, and to let the property for the remainder of the term (except one day) to Wagner & Hallat, who intended to run the theatre.

On the 4th February, 1913, O'Neil's agents reduced the terms of the proposed lease to writing; Wagner & Hallat to pay $400 a month from and after the 1st May, 1913, or such time as the theatre should be ready.

The former building was pulled down, and preparations made to build, when, on the 21st April, 1913, the city council passed a by-law to expropriate a quadrant of 20 foot radius from the corner. This made it impossible to build a theatre of quite the same dimensions; but O'Neil and Wagner & Hallat entered into a formal lease for the remainder of the term (except one day), the lessees to pay $400 rent per month in advance, repair, etc., from the 1st May, 1913, the lessor to build with due diligence a theatre as near like that as formerly proposed as the altered and diminished property would allow, and also a billiard-room.

The lessor transferred to the lessees all his claim for damages and compensation against the city corporation, except his claim for "increased cost of the proposed building caused by the rounding of the corner," the lessees accepting "the demise of the said premises subject to the by-law passed for such expropriation, but to be subrogated in respect thereto to such rights (excepting as aforesaid) as the lessor has or may or can have or claim."

In February, 1914, a notice to arbitrate was served on O'Neil, and the matter came before the Official Arbitrator, Mr. Drayton, who, on the 4th March, 1916, made his award, awarding Mrs. Gibson $665.16, O'Neil $1,900, Wagner & Hallat $4,130: in all, $6,695.16, with interest on the first and on part of the third sum from the date of the by-law.

Irving S. Fairty, for appellants; *A. C. McMaster*, for respondent O'Neil, and *S. W. McKeown*, for the respondents Wagner & Hallat; *Strachan Johnston*, K.C., for Grace N. Gibson.

RIDDELL, J.:—It is obvious that the elements of damages and compensation are: (1) the value of the land taken; (2) damages for severance, if any (sec. 325 (4) of the Municipal Act, R.S.O. 1914, ch. 192); and (3) other damages.

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The arbitrator has allowed the value of the land taken at $1,700, and I see no reason to quarrel with this estimate, and indeed it is not seriously complained of.

Mrs. Gibson, until the termination of the lease, will receive the same rental, so that during the currency of the lease she does not immediately suffer. At the end of the term she receives back her land (less $1,700 worth) and a building less by some square feet than that she should have had but for the expropriation proceedings. There is no evidence to shew how much less valuable the building she will receive will be than that which she expected; but it is reasonably manifest that the building to be put up will cost about $12,000. The amount of land actually taken by the city is only 86 sq. ft., *i.e.*, (20^2) 400 less $400 \times \frac{3.14159}{4}$ and the whole area of the lot is about 2,320 square feet; so that, if the value of the building is proportionate to the amount of space covered, the actual building would be worth some $450 less than that expected. It might indeed cost more, but it would not be so valuable. In the absence of any evidence to the contrary, I think we may take the prospective loss to Mrs. Gibson at $1,700 plus $450=$2,150.

The loss at the 1st May, 1913, was the present worth of $2,150 at that date; taking money at 5 per cent., that will be $850.83, of which $672.74 is attributable to the land alone.

For severance there can be no claim by Mrs. Gibson; there is no evidence that the remainder of the land is rendered at all less valuable by the severance; and she has no incidental damages. The result is that she is entitled to $850.83.

O'Neil, had he not assigned his claim to Wagner & Hallat, would have been entitled to the remainder of the value of the land, *i.e.*, $1,700 less $672.74=$1,027.26; that sum, however, goes now to Wagner & Hallat.

For severance he cannot claim; he receives as much rent for the smaller property as for the whole.

His incidental damages are serious and some of them fixed by agreement on the part of the city.

The item $1,900 allowed to O'Neil, expense occasioned by rounding the corner, is too high.

The small items allowed at $126 (with the exception of, say,

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not more than $20) are not attributable to any act of the city. There was nothing whatever to prevent O'Neil from appointing the Official Arbitrator at once after the passage of the by-law and proceeding with the reference and with the building operations at the same time. As to the extra cla'm made by Skipper Bros. for erecting the new building, the architect, Thompson, could not tell how it was made up. He suggested that they had originally tendered too low, and had increased the amount owing to the difference between winter and summer building. He admitted expensive alterations in design, and also very greatly increased expense owing to having to abandon the old foundations which came to be upon he city property. There was no application for tenders from other builders If O'Neil had built in the summer of 1913, the expense of $233.66 or at least $200 of it would not have been incurred; and Thompson shews that the $60 will not be paid if the contractor gets the lumber which is taken down. On the other hand, if O'Neil had built in the winter of 1913-14 the contractor would rever to winter prices, and the $60 for hoarding might be proper. The charges for the other small items, excepting something for lighting, would not be incurred. In any case, the bulk of the extra sum claimed (without tenders) includes, approximately, steel work along Gerrard street front $100 and mason work in foundation walls $300 (see exhibit 15). This item should be reduced by $400, and the allowance should be: Extra cost of rounding corner (material $850, architect's fees (which I would have allowed at $150 but for compromise agreement) $300, extra payment for building, including necessary expenditure occasioned by delay $350, total $1,500.

As to the tenants Wagner & Hallat, they lose only floor space for the term of their lease, but they plainly fixed the amount of that loss by agreeing to pay the rent as of the whole building originally contemplated, in consideration of receiving the claim of their landlord against the city. That amount, as we have seen, is $1,027.26.

It was agreed that they should have something for delay. The arbitrator has allowed $1,000; I think $100 would be sufficient.

The result will be that there should be paid to Mrs. Gibson $850.83, to O'Neil $1,500.00, and to Wagner & Hallat $1,127.26= $3,478.09, with interest upon the first and $1,027.26 of the third sum at 5 per cent. from the 1st May, 1913.

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While there is no formal appeal by Mrs. Gibson, she should, if necessary, be allowed to appeal, *nunc pro tunc*, and then she should have no costs: if, however, she is content with the existing award, her costs should be paid by the city—and in any case those of the city should be paid by the other respondents.

The above results may be "proved" in this way. The amount to be paid by the city must be the same as though there were no leases at all and Mrs. Gibson were owner in possession. She would get: (1) The value of the land *quâ* land $1,700.00; (2) Severance $0.00; (3) Damages. The extra cost of a new building, etc. $1,500.00; loss of advantage of covenant by O'Neil to build, $850.83, less $672.74=$178.09; and also the $100 allowed for delay, $100.00—$1,778.09; total $3,478.09.

MEREDITH, C.J.C.P., and LENNOX, J., concurred.

MASTEN, J.:—I have had the opportunity of perusing the reasons for judgment prepared by my brother Riddell.

I agree with the tiem of $1,700 allowed for loss of land, and also that there is no damage to the freehold by severance. I also agree in the reduction of the item of $1,900 to $1,500, being allowance for expense occasioned by rounding the corner.

I am unable to see that as against the city Wagner & Hallat fixed the amount of their loss because they bought O'Neil's claim for damages, in consideration of agreeing to pay the rent on the basis originally contemplated.

I think the three last items mentioned in the reasons for judgment of the learned arbitrator are excessive and are computed upon a wrong principle. The arbitrator is entitled to receive and consider evidence shewing the market value of the property before and after the expropriation. He is also entitled, in the case of a property of this kind, as a separate and independent line of inquiry, to receive and consider evidence as to the earning value of the property when applied to the most profitable use to which it can be put, and the result reached from each inquiry checks the other. But he is not entitled to use both these methods and make allowance on both footings in respect to the same property.

For this reason, I would eliminate the item of $2,096 allowed by the arbitrator in respect of floor space.

With respect to the sum of $1,000 for delay allowed by the arbitrator; this item seems to me rather large, but necessarily the allowance must be based on an estimate which cannot be

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accurately calculated, and it appears to me that the estimate of the arbitrator is nearer the correct allowance than the sum of $100 which my learned brother had proposed to allow. Where an allowance of this kind is based upon an estimation, I feel great reluctance in interfering with the judgment of so experienced and competent an arbitrator. I should add, however, that in this particular case I concur in the allowance made by the arbitrator because I think that an interference with the premises of the character here described is bound to interfere gravely with, if not wholly to prevent, their use for any practically useful purpose for a period of two or three months. Theoretically it may be possible that it should not amount to more than a two weeks' interference, but practically such an alteration and interference with premises is bound to create a very great damage in connection with any operations, whether as a going business or in the way of building, which may be proceeding upon the premises.

I would, therefore, make the allowance as follows: To Mrs. Gibson, $850.83; O'Neil $1,500; Wagner & Hallat $2,027.26—$4,378.09, with interest as proposed. *Award varied.*

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MACKENZIE, MANN & CO. v. EASTERN TRUST CO.

Judicial Committee of the Privy Council, Lord Buckmaster, L.C., Viscount Haldane, Lord Dunedin, Lord Parker of Waddington, and Sir Arthur Channel. December 5, 1916.

JUDGMENT (§ I G—55)—*Variation of decree by Privy Council—Railways—Accounts.* [See *Eastern Trust Co.* v. *Mackenzie*, 22 D.L.R. 410, [1915] A.C. 750.]

The judgment of the Board was delivered by

LORD BUCKMASTER, L.C.:—In this case their Lordships think that they are bound to give effect to the arrangement that was made on the previous hearing, and they realise that the order-in-council of April 29, 1915, that was then drawn up, did not carry into effect that arrangement. It is therefore necessary that the order should be varied, and their Lordships propose to vary it in the terms hereinafter referred to. If there be anything to be said on these terms afterwards their Lordships will hear either party in the matter, but their Lordships think that the following variation of the order ought to be made.

There ought to be a declaration that the account (*a*) directed by par. 8 of the decree dated March 13, 1905, be proceeded with

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as far as may be necessary to ascertain whether there may be any, and what, balance due from the partnership to the N.S. Southern R. Co., in respect of the profits on rails referred to in par. 6 of that decree after allowing for moneys paid out of these profits in aid of the project or undertaking of the company, but nothing contained in this declaration is to prejudice any set-off or cross-claim or any application which may be made for further accounts on further consideration of the action in the Court below. The decree dated March 14, 1916, ought to be affirmed, except in so far as it may be affected, if at all, in consequence of this declaration, and if and in so far as so affected it ought to be varied accordingly. There will of course be liberty to apply to the Court below. This declaration is not to affect payments made or to be made by any person under par. 3 of the decree, dated March 14, 1916, to the receiver, and it necessarily follows that the distribution of the assets by the receiver, ordered by pars. 4 and 5. of the decree, must be stayed until after the account (*a*) has been taken.

In regard to the costs, their Lordships are of opinion that the costs of the whole of the hearing up to the appeal to this Board ought to be paid as they were directed to be paid by the Court through which the proceedings have passed, because it was the duty of the appellants, if they desired to have this order varied, to have taken the point at the earliest possible moment and not to have proceeded to challenge the effect of the order-in-council of April 29, 1915, through the Court below when the referee was perfectly right in the view he took of that order. The costs of this appeal are costs as to which their Lordships think it not desirable that any order should be made. Each party, therefore, will bear their own costs. And their Lordships will humbly advise His Majesty accordingly.

Judgment accordingly.

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REX v. BEDFORD.

Ontario Supreme Court, Riddell, J. May 8, 1916.

INTOXICATING LIQUORS (§ III A—55)—*Temperance Act—Search-warrant—Grounds for suspicion—Conviction.*]—Motion by the defendant to quash a search-warrant and a Police Magistrate's conviction of the defendant for unlawfully keeping intoxicating liquor for sale in his hotel in the town of Goderich, in the

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county of Huron, contrary to the provisions of Part II. of the Canada Temperance Act, R.S.C. 1906, ch. 152, in force in that county.

Loftus E. Dancey, for defendant.

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

RIDDELL, J.:—John Bedford is the proprietor of the Bedford House, a commercial hotel in Goderich, in the county of Huron. That county has the fortune, good or bad, to be under the Canada Temperance Act, and John thought that in a "Scott Act county" the proper course was to keep the door of his bar-room shut, locked and bolted—so far the Court is entirely with him. But, unfortunately, the door occasionally relaxed, and certain known persons were allowed inside, which was the *fons et origo mali* to the defendant.

Suspicion was raised that more than water was being consumed within the room so closed and tyled—a search-warrant was issued, and the "whisky detective" entrusted with its execution: he made a search, but found nothing in the way of liquor. It was said by counsel on the argument that it is the custom in that town for some publicans to carry their supply on their persons, which are, of course, sacred from intrusion under a search-warrant —there is, however, no evidence in this case of any liquor being so carried by Bedford, it is not even alleged that his pockets exhibited any suspicious bulge such as might be caused by a flask, whether the unassuming four ounce "pocket-pistol" or the quart-size "family friend."

What the detective did find, however, induced the Inspector to lay an information for unlawfully keeping "intoxicating liquor for sale, contrary to the provisions of Part II. of the Canada Temperance Act."

Bedford was convicted (for a second offence) and sentenced to pay a fine of $100 and costs $9.39, or to be confined for 30 days in gaol.

A motion is now made (1) to quash the search-warrant and (2) to quash the conviction.

Several of the grounds are the same as those taken in *Rex* v. *Swarts*, decided by me on the 6th instant (*post*); and, for reasons set out in that case (which I do not repeat), these grounds are insufficient.

Here the reasons for suspicion are "that the deponent knows

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that intoxicating liquor is being brought to the said hotel and persons are resorting there, as the deponent has good reason to believe, for the purpose of drinking the same." It is impossible, I think, to say that the magistrate could not consider the above as reasonable grounds of suspicion. The search-warrant should not be quashed.

Then as to the conviction, the detective went to the hotel, saw men in what had been "drinking rooms" in non-prohibition days; the bar-room door was locked, but opened to let in certain persons, and then bolted again—the detective, as he went in, saw one Captain McK. with a glass to his mouth—a whisky-glass, which is said to be quite different from a wine-glass or a water-glass—standing at the bar, then taking some water in the glass and drinking it. He thought that this was a drink of whisky followed by a "chaser," and his suspicions were confirmed by the smell of the glass, which he seized at once and smelt. There were in the bar four glasses of this size, apparently with thicker bottoms to make the drink look bigger, and all smelt of whisky—the detective knows and cannot be mistaken. It was not the smell of "temperance wine," which, the expert says, "has a sweeter smell than whisky or beer." The other whisky-glasses smelt very much stronger of whisky than that the Captain had been using.

Captain McK. could not detect any smell of whisky when he took his drink; "but," he says, "it would have to be strong before I could notice it." Bedford himself, being asked if the four glasses smelt of whisky when the officer looked under the bar, says, "I don't think he did, for they were washed out and put on the bar."

Then, just before the officer went into the bar-room, he heard the cash register within ring; and two men came out—when he went in he saw the register displaying fifty cents, the customary price for two drinks. Bedford says that this was for two "quarters" he took out of his vest pocket, but cannot remember who gave them to him—he can give no reason for putting them in the register at that time or at all.

Some of the witnesses called drank only water, they do not say why they had to go to the bar-room for that innocuous fluid—it may possibly have been "fire-water," although it is not proved that it was. One took only a harmless wine: and none would swear that he had "liquor." It is of course notorious that in Scott

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Act counties a terminology comes into use unknown elsewhere—e.g., I have heard one witness call white-wheat whisky by the name of "pop-pop,"—but there is here no direct evidence of any one to whom liquor was sold by the defendant.

There has been, in some cases in the past, in our own as well as in other Courts, a display of judicial nescience which seems to go to a great length—e.g., in a liquor case one of our Judges was unable to find proof of intoxication in the evidence of witnesses who swore that the person charged was "full," as they did not say whether he was full "of spirituous liquor, pop, water, or wind" (*per* O'Connor, J., in *Regina* v. *Kennedy* (1885), 10 O.R. 396, at p. 400). But there is nothing to prevent a magistrate, at least when sitting as a judge of fact, from exercising his common sense and using every-day knowledge.

A tavern-keeper who keeps his bar-room bolted, to be opened to admit such persons as he chooses, who keeps whisky-glasses all smelling of whisky (most of them very strongly), who rings up the price of two drinks in his bolted bar-room just before two men come out of it and who can give no reason why he should, one of whose customers is seen to take a drink from one of the whisky-glasses followed by a drink of water—cannot complain if the magistrate comes to the conclusion that he was selling whisky or "liquor"—men have suffered long terms of imprisonment on less evidence.

The motion must be dismissed with costs. *Motion dismissed.*

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McCLURE v. VILLAGE OF LENNOXVILLE.

Quebec Court of Review, Fortin, Guerin and Archer, JJ. May 31, 1916.

INTOXICATING LIQUORS (§ II A—35)—*License — Renewal — Confirmation of certificate—Mandamus.*]—Appeal from the judgment of Hutchinson, J., Superior Court, on a petition for a writ of mandamus. Affirmed.

The petitioner was the holder of a hotel license in the village of Lennoxville expiring on May 1, 1916. On February 21, 1916, he filed with the secretary-treasurer of the municipal council the certificate required by law for the renewal of his license. On the same day, the secretary-treasurer gave a public notice that such application had been made and that the same would be taken in consideration on Monday, March 6, following. On March 2, the petitioner was notified by the secretary-treasurer that a peti-

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tion had been filed with him by Rev. Burt and others praying the council not to grant him a license and that his application and the petition would be taken into consideration together. The grounds of the petition were of a general character, to wit: There were public rumours that the house has not been run as it should be; there have been many more cases of drunkenness in and about the premises than in the past; there have been brawls and noise, disturbing to the neighbourhood; one license was sufficient for Lennoxville.

On March 6, at the meeting of the council, it was moved by councillor Page, seconded by councillor McKindsey: "That the petition of Rev. H. C. Burt and R. V. E. Wright and others be granted."

It was moved in amendment by councillor McMurray, seconded by councillor Bergeron: "That the petition of Rev. H. C. Burt and R. V. E. Wright, of M. C. Martin and others be not granted."

The amendment was lost by 4 against 3; and the principal motion was carried on the same division.

Thereupon the petitioner presented to the Superior Court a petition for a writ of mandamus to enforce the granting of the confirmation of his certificate by the council, alleging that there was nothing in the petition to justify this latter to refuse this confirmation. Moreover, it alleges that the council did not take into consideration the application of the petitioner and did not decide as to the granting or refusal thereof; and also that the council had no right to proceed as it has done on March 6, inasmuch as the notice of said meeting was not given, at least, fourteen clear days before the holding of said meeting.

The respondent inscribed in law against this petition.

The Superior Court, considering arts. 933, 934 of the License Law, R.S.Q. 1909, and art. 164 of the Municipal Code, maintained this inscription in law.

L. C. Belanger, K.C., for petitioner.

Fraser & Rugg, for defendant.

The judgment of the Court of Review was delivered by

ARCHER, J.:—I am of opinion that the Superior Court was right in maintaining the inscripion in law. The allegations of the petition did not justify the conclusions of the petition.

The petitioner admits that his request for the confirmation of

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his certificate had not been taken into consideration. He also admits that the delays to take it in consideration had not expired.

True it is that the petition of Rev. M. Burt and others should not have been taken into consideration, but though the resolution passed by the council at that meeting may be illegal, it did not justify the plaintiff petitioner to take present proceedings.

Had the council of the village of Lennoxville neglected to take into consideration his application in due time, the plaintiff would have had a recourse. The proceedings were premature, and moreover the allegations of the petition cannot justify the conclusions.

I am to confirm the judgment with costs. *Appeal dismissed.*

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REX v. SWARTS.

Ontario Supreme Court, Riddell, J. May 6, 1916.

INTOXICATING LIQUORS (§ II A—55)—*Temperance Act—Search Warrant—Causes of suspicion—Sufficiency—Names of persons giving information—Jurisdiction of police magistrate.*]—Motion by the defendant to quash a search-warrant, a magistrate's conviction of the defendant for unlawfully bringing intoxicating liquor into the county of Huron, contrary to the Canada Temperance Act, and an order for the destruction of the liquor found upon the premises.

Loftus E. Dancy, for defendant.

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

RIDDELL, J.:—William T. Pellow, who had been employed by the Citizens' Social Service League of Goderich for the purpose of enforcing the Canada Temperance Act in the county of Huron, was duly appointed constable for the county.

Having his suspicions of Clarence Swarts, the son of a hotel-keeper, but living in his own house, Pellow swore to an information "that he hath just and reasonable cause to suspect and doth suspect that intoxicating liquor is kept for sale in violation of Part II. of the Canada Temperance Act in the dwelling-house occupied by Clarence Swarts. . . . The grounds of such suspicion are that the deponent is told on reliable authority that a package or box was taken into said dwelling-house last night which there is ground to believe contained intoxicating liquors."

Under the provisions of the Act, R.S.C. 1906, ch. 152, sec. 136, the Police Magistrate issued a search-warrant and placed

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it in the hands of Pellow, who proceeded to search the house of Swarts.

He asked Mrs. Swarts (her husband was not at home) for a box or trunk which came on the previous night. She said it was upstairs—he went upstairs and found the trunk, locked—he found also that there were two bottles of whisky open in the house. He took away the trunk and opened it—he found three cases of whisky, Hiram Walker & Co. Imperial, 1910, unopened, and a fourth case containing an assortment of London Dry gin, Fine Old Scotch whisky, Old Vatted Glenlivet whisky, and Sanderson's Mountain Dew, eight bottles—this case was open and there were two wrappers indicating that there had been two other bottles in this case. He found also a box of cigars, but it is not contended that it plays any part in the case. Swarts never came to claim the articles. Three dozen and eight bottles of liquor having been found in this way, the Inspector laid an information for unlawfully bringing intoxicating liquor into the county of Huron, contrary to the provisions of Part II. of the Canada Temperance Act.

The defendant appeared before the Police Magistrate, Pellow gave evidence of the facts above set out, and a drayman, Tait, proved that the trunk had been brought by him for Swarts from the Grand Trunk Railway station, to which it had come as baggage; the baggageman at the station could not tell whence the trunk came; and there the prosecution rested.

It is said that the magistrate thought sufficient had been proved to put the defendant upon his defence under sec. 141 of the Act; and that the defendant, against the advice of his counsel, insisted on giving evidence.

It may well be that, had the defendant not given evidence, there would have been no proof of the offence of bringing liquor into the county, and that he would have been acquitted—but he did give evidence, and I am (as was the Police Magistrate) entitled to look at that evidence in deciding the case.

Nor is he advanced by the fact that sec. 141 could not be invoked in a case of this kind, it being specifically applicable only to prosecutions "for the sale or barter or other unlawful disposal of intoxicating liquor," which this was not.

He might have refused to give evidence, as his counsel advised; but he chose his own course and must abide the consequences.

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The defendant proved that he had brought the liquor from Guelph into the county of Huron; and the Police Magistrate convicted. The Police Magistrate then gave an order for the destruction of the liquor, under sec. 137.

A motion is now made to quash search-warrant, conviction, and order for destruction.

The first ground advanced for quashing the search-warrant is, that the "reasonable cause to suspect" is not set out in the information.

My learned brother Sutherland in the case of *Rex* v. *Bender* (1916), 26 Can. Cr. Cas. 393, 36 O.L.R. 378, a similar case, held that, if the information does not disclose "facts and circumstances shewing the causes of suspicion," the warrant must be deemed to have been improperly issued and must be quashed. In this the learned Judge followed *Rex* v. *Kehr* (1906), 11 Can. Cr. Cas. 52, 11 O.L.R. 517. In the *Kehr* case, however, the statute was imperative that the form must be followed; here the form *may* be followed, not *must* be followed.

In *Ex p. Coffon* (1905), 11 Can. Crim. Cas. 48, the complaint was laid on information and belief, and the causes of suspicion were not disclosed—and the Supreme Court of New Brunswick held that the magistrate in such a case should examine the complainant and witnesses *ex parte* under oath, and should not grant a warrant of arrest unless he should entertain the like suspicion—this was of course not an application for a search-warrant.

Rex v. *Townsend* (*No. 2*) (1906), 11 Can. Crim. Cas. 115, *Regina* v. *Walker* (1887), 13 O.R. 83, and other cases, have been cited; but I do not analyse them, considering myself bound by the decision of my learned brother that the causes of suspicion must appear in the information.

In the present case, the causes are set out; these might not be sufficient for some magistrates, but I cannot say that a magistrate was necessarily wrong in considering that what the information disclosed gave him reasonable cause to suspect a violation of the Act. It is the magistrate that is to decide whether there is disclosed reasonable cause to suspect; and, unless he is clearly wrong, his decision should not be interfered with.

It is argued that the name of the person who told Pellow should have been disclosed, and such cases as *Gibbons* v. *Spalding* (1843), 11 M. & W. 173, *Gilbert* v. *Stiles* (1889), 13 P.R. 121 (cases of

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ca. re.), *Ex p. Grundy* (1906), 12 Can. Crim. Cas. 65, *Rex* v. *Lorrimer* (1909), 14 Can. Crim. Cas. 430 (warrant of arrest, &c.) are cited. But here we are concerned with suspicion only, and I see no reason for compelling the informant to disclose the names of *his* informants, unless the magistrate saw fit to do so.

As to the conviction, it is said, first, that there was no adjudication and note—this is without foundation, as at the close of the evidence a sufficient note is to be found (even if that is now necessary).

Then it is said that the informant was given the warrant, that he made the search and that the conviction is based on evidence so obtained. *Ex p. McCleave* (1900), 5 Can. Crim. Cas. 115, Supreme Court of New Brunswick, I do not pretend to understand; but against it may be placed *Regina* v. *Heffernan* (1887), 13 O.R. 616, and *Ex p. Dewar* (1909), 15 Can. Crim. Cas. 273, Supreme Court of New Brunswick (which I follow), and which decide that this objection is without force.

The next objection is that there is no evidence upon which a conviction could be founded.

It was proved that the defendant brought 46 bottles of liquor into the county; this is against the prohibition of sec. 117* (*c*): "No person shall . . . bring . . . into any such county . . . any intoxicating liquor."

The defendant contends that he is saved by sec. 117 (2): "Paragraph (*c*) . . . shall not apply to any intoxicating liquor sent, shipped, brought or carried to any person . . . for his . . . personal or family use . . ." But this saving clause does not cover the case of a person bringing into the county liquor not *to* any one but *for* himself.

Moreover, the Police Magistrate was not bound, believing part of the defendant's evidence, to believe the remainder—he might accept the inculpatory and reject the exculpatory part: *Rex* v. *Van Norman* (1909), 19 O.L.R. 447.

Considering the large quantity of liquor, the secret manner in which it was brought from the station to the home, and all the other facts of the case, I think the Police Magistrate had the right to find as he did.

*The section referred to is, by 7 & 8 Edw. VII. ch. 71, sec. 1, substituted for sec. 117 of R.S.C. 1906, ch. 152.

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The order to destroy naturally and properly follows such a conviction: sec. 137.

The application must be refused with costs.

Even had I been obliged to quash the search-warrant, it is plain on the authorities that the conviction and destruction order would not be thereby affected. *Motion dismissed.*

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PEARCE v. CITY OF CALGARY.

Supreme Court of Canada before the Registrar. July 15, 1915.

APPEAL (§ II A—35)—*Jurisdiction of Canada Supreme Court—How affected by provincial statute—Assessment and taxation—Finality—Supreme Court Act, R.S.C. 1906, ch. 139, sec. 41.*]—Motion before the Registrar in Chambers, to affirm the jurisdiction of the Supreme Court of Canada to entertain an appeal from the judgment of Carpenter, J., of the District Court for the District of Calgary, in Alberta, reducing the assessment of the property of the appellant by varying the decision in respect thereof by the Court of Revision of the City of Calgary. The city assessor of the City of Calgary assessed real estate in the city belonging to the appellant, at a total value of $236,595, which, on his appeal, pursuant to the provisions of the city charter, to the city council sitting as a Court of Revision, was reduced to $201,107. On a further appeal to the District Judge the assessment was further reduced to the sum of $168,595 by the judgment from which an appeal is now sought to the Supreme Court of Canada direct from the decision of the District Judge.

Crysler, K.C., in support of the motion; *Fisher, contra.*

THE REGISTRAR:—This is an application to affirm the jurisdiction of the Supreme Court of Canada to entertain an appeal direct from the decision of the District Judge of the District of Calgary, in Alberta. The facts are as follows: One William Pearce, the owner of property in Calgary, Alta., having appealed respecting the assessment of his property there from the decision of the Court of Revision to the Judge of the District Court, and being dissatisfied with the decision rendered on that appeal, now desires to appeal direct therefrom to the Supreme Court of Canada under the provisions of sec. 41 of the Supreme Court Act. I have to determine whether or not there is jurisdiction in this Court to hear such an appeal, there being involved the assessment of property of a value much in excess of $10,000.

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A charter was granted to the City of Calgary by an ordinance of the North-West Territories, ch. 33, of the Ordinances of 1893. By sec. 40 of that ordinance provision is made for assessment appeals by which the roll shall be revised by the city council as a Court of Revision. The decision of that Court was declared to be final, subject to an appeal to the Judge of the Supreme Court of the North-West Territories having jurisdiction in the City of Calgary; sec. 41 of the ordinance gave an appeal from this Judge to the Supreme Court *en banc*.

In 1909, by ch. 9 of the statutes of Alberta, a general Act was passed applicable to all cities having a municipal charter by which an appeal from the Court of Revision was made to lie to the Judge of the District Court of the district in which the city or town affected was situated, but this statute made no reference to appeals to the Supreme Court *en banc* nor to sec. 41, sub-sec. 6, which gave such an appeal from the Supreme Court Judge. In 1913, by ch. 27, sec. 7, of the statutes of Alberta, this sub-sec. (6) was struck out and sec. 41 was amended in the following manner. The section formerly provided that:—

> if any person is dissatisfied with a decision of the Court of Revision he may appeal therefrom to the Judge of the Supreme Court having jurisdiction in the City of Calgary.

By the amendment the following words were added, after the word "Calgary," "and his decision shall be final and conclusive in all matters adjudicated upon," and, by the same Act, sub-sec. 6 of sec. 41, which provided for an appeal to the Supreme Court *en banc* was repealed. I take it that the effect of this legislation was to provide that, after 1913, assessment appeals from the Court of Revision had to be taken to the Judge of the District Court and that his decision was final so far as provincial legislation was concerned. This, however, could not oust the jurisdiction of the Dominion Parliament. In *The Crown Grain Co.* v. *Day*, [1908] A.C. 504, it was held that provincial legislation could not provide that, in mechanics' lien cases, there should be no further appeal beyond the provincial Court of Queen's Bench, in Manitoba.

The Supreme Court Act, by sec. 41, gives an appeal in the following language:—

> An appeal shall lie to the Supreme Court from the judgment of any Court of last resort created under provincial legislation to adjudicate con-

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cerning the assessment of property for provincial or municipal purposes in cases where the person or persons presiding over such Court is or are by provincial or municipal authority authorised to adjudicate and the judgment appealed from involves the assessment of property at a value of not less than $10,000.

Previous to the R.S.C., 1906, ch. 139, the clause of the former Supreme Court Act dealing with assessment appeals, instead of the words in the present section "by provincial or municipal authority authorized to adjudicate," had the words "appointed by provincial or municipal authority" and it was held by this Court in the case of *City of Toronto* v. *Toronto R. Co.*, 27 Can. S.C.R. 640, that where, in the Province of Ontario, an appeal lay from the Court of Revision to a board of County Court Judges, and it was desired to take an appeal from such board to the Supreme Court of Canada, that no appeal lay under the section in question, as it then stood, as the County Court Judges were not appointed by provincial or municipal authority but by Dominion authority. Since the R.S.C. 1906, came into force this decision has no further application and jurisdiction has been exercised in a number of cases: *Canadian Niagara Power Co.* v. *Township of Stamford*, 50 Can. S.C.R. 168; *Re Heinze, Fleitmann* v. *The King*, 52 Can. S.C.R. 15, 26 D.L.R. 211.

I am of opinion that the District Judge who heard the appeal from the Court of Revision in the present case was a "Court of last resort created under provincial legislation" within the meaning of sec. 41 of the Supreme Court Act.

Under these circumstances the motion should be granted and the jurisdiction of the Supreme Court of Canada to entertain the appeal should be affirmed. *Motion granted.*

On November 2, 1915, the appeal to the Supreme Court of Canada was heard on the merits, the Judges present being Fitzpatrick, C.J., and Davies, Idington, Duff, and Anglin, JJ., and judgment was reserved.

Chrysler, K.C., for appellant.

C. J. Ford, for respondent.

[On November 15, 1915, judgment was delivered allowing the appeal with costs, the Chief Justice and Davies, J., dissenting. By this judgment, on a view by the majority of the Judges of the evidence as to the value of the property in question, the amount of the assessment thereon was further reduced. *See* 23 D.L.R. 296, 9 W.W.R., 195, 668.]

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Ontario Supreme Court, Boyd, C. April 25, 1916.

DISORDERLY HOUSES (§ I—1)—"*House of ill-fame*"—*Magistrate's conviction—Jurisdiction—Power to amend.*]—Motion on behalf of the defendant to quash a conviction made by Rupert E. Kingsford, P.M., in and for the City of Toronto.

The conviction was for that the defendant, "within six months ending on the 30th day of March, A.D. 1916, in the said city of Toronto, unlawfully did keep a certain house of ill-fame situate and known as number 336 Adelaide street west, in the said city of Toronto, contrary to the form of the statute in such case made and provided."

Ross, for defendant; *Cartwright*, K.C., for Att'y-Gen'l.

BOYD, C.:—The English language is, unfortunately, well supplied with synonymous terms descriptive of a house of prostitution—e.g., disorderly house, house of ill-fame, brothel, bawdy-house—and these have been rather promiscuously used in Canadian statutes. For instance, in C.S.C. ch. 105, sec. 1, sub-sec. 7 (1859), the collocation is "disorderly house, house of ill-fame or bawdy-house." In R.S.C. 1886, ch. 157, sec. 8 (*j*), it is enlarged to "disorderly houses, bawdy-houses, or houses of ill-fame, or houses for the resort of prostitutes." In R.S.O. 1897, in the Municipal Act, ch. 223, it is shortened to "disorderly houses and houses of ill-fame:" sec. 549 (3). The course of more modern criminal legislation may be noted. The Criminal Code, sec. 774, gives absolute jurisdiction to magistrates in case of a person charged with keeping a disorderly house, house of ill-fame, or bawdy-house. To this number, the marginal annotation is, "Absolute jurisdiction in respect to houses of ill-fame." This section 774 was changed by the statute of 1909, 8 & 9 Edw. VII. ch. 9, and the jurisdiction was as to one charged with keeping a disorderly house or being an inmate of a common bawdy-house. "House of ill-fame" is dropped as being surplusage, but the old word still clings to the marginal note, which is, "Absolute jurisdiction in respect to houses of ill-fame." This note is, of course, not of authority, but it serves to indicate which is the fact, that "house of ill-fame" is the same as "bawdy-house" and is included in "disorderly-house"—a term to which the Legislature have attached a more comprehensive meaning, and have in effect eliminated the term "house of ill-fame" in reference to "vag-

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rancy." This is carried out by repealing paragraphs (*j*) and (*k*) of sec. 238 of the Criminal Code by 5 Geo. V. ch. 12, sec. 7 (1915); and, by sec. 8 (bringing into it intermediate amendments), it provides that the magistrate can hear and determine as to any one charged with keeping a disorderly house under sec. 228 of the Code. That section enables him to deal with one who "keeps any disorderly house, that is to say, any common bawdy-house."

By sec. 225 of the Code, a common bawdy-house is "a house . . . . or place of any kind kept for purposes of prostitution." Now that is precisely the meaning of the term used in the information and conviction in this case. And the evidence amply supports the charge that the place in question was kept and used by the defendant for purposes of prostitution. I cannot see why this should not be read as a good conviction in respect of an offence committed, no matter by what one of many synonyms it may be designated. The defendant was well aware of what was charged; she appeared and made defence and offered evidence. If any superficial error be attributed in the way the charge was formulated, that is venial and susceptible of amendment according to the facts proved. The Code recognises that popular language may be used in indictments, and good sense would extend the same to summary proceedings: Criminal Code, sec. 852.

It was urged that an amendment was not permissible, and *Rex* v. *Hayes* (1903), 6 Can. Crim. Cas. 357, 5 O.L.R. 198, was cited; but there the charge involved matters of substance and not of form. The ample power of amendment as to indictments does not in terms apply to summary proceedings; had this offence as stated been prosecuted by indictment, I cannot doubt that its form of expressing the offence would have been amendable, and sec. 791 of the Code would seem to assimilate the proceedings to those on an indictment. Again, sec. 1124 of the Criminal Code, not cited before me, appears to apply exactly to a proper amendment here by describing the offence as "keeping a disorderly house, to wit, a house of ill-fame."

The phrase "keeper of a house of ill-fame" does not now designate the offence in the terms of the Criminal Code, but it still designates an indictable offence at common law and a criminal offence according to the ordinary language of the people. The statutory change is one of form and not of substance, and now-a-

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days, even in criminal law, the Court will see to it that form does not predominate over substance. See *Regina* v. *McNamara* (1891), 20 O.R. 489.

It was said in argument that a decision of my brother Middleton, on the 11th April, in *Rex* v. *McKenzie*, unreported, is against my conclusion. I have conferred with that learned Judge, and I find that he entirely concurs with the present judgment (see sec. 32 of the Judicature Act).

And the judgment is that the conviction should be amended as indicated and affirmed with costs.

Re WINDING-UP ACT AND ALBERTA LOAN & INV. CO.

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Alberta Supreme Court, Harvey, C.J. December 12, 1916.

CORPORATIONS AND COMPANIES (§ VI A—313)—*Winding-up Act, R.S.C. 1906, ch. 144, sec. 110—Practice—Contributories—Reference to Master.*]—Question referred to a Judge as to jurisdiction of Master.

W. D. Gow, for liquidators; *A. M. Sinclair*, for proposed contributories.

HARVEY, C.J.:—In the winding-up proceedings herein a general order for reference was made to the Master in Chambers directing him to take all the proceedings necessary for the winding-up. On the settling of the list of contributories certain proposed contributories objected that the Master has no jurisdiction to determine the issues and the Master has referred the question to a Judge for determination.

The reference to the Master is made under the authority of sec. 110 of The Winding-up Act. Under the provisions of the Act there is conferred upon the Court the power to settle the list of contributories and there is necessarily involved in that the determination of all the facts that must be determined in order to settle the list. It would therefore appear clear by the terms of the section that this power may be referred or delegated to an officer of the Court and the jurisdiction which that officer thereby gets is by virtue of such delegation under the authority of the Act, and not by virtue of any general power or jurisdiction which he possessed. It is urged that the words: "According to the practice and procedure of the Court" limit the jurisdiction to such matters as by the practice and procedure of the Court are ordinarily referred to the Master. I think, however, this is

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not the proper interpretation of the words. The words appear to me to have reference to form rather than to substance. They indicate the manner in which powers are to be referred rather than the powers themselves that are to be delegated because the section is perfectly clear in stating that any powers of the Judge may be delegated. Those powers may be delegated to any officer of the Court whether according to the usual practice and procedure of the Court such officer is in the habit of exercising similar jurisdictions or not.

The right of appeal which is expressly given supports the view that a wide jurisdiction was intended to be allowed to be created in the officer to whom the power might be delegated.

I am of the opinion, therefore, that the Master in this case has power to settle the list of contributories it being one of the ordinary matters to be dealt with in a winding-up proceeding.

Jurisdiction sustained.

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REX v. SINCLAIR.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee and Hodgins, JJ.A., and Riddell, J. November 8, 1916.

APPEAL (§ I A—1)—*From summary conviction—Petit theft—Quashing.*]—Appeal by the defendant (by leave of Kelly, J.), from the order of Clute, J., 31 D.L.R. 265, 36 O.L.R. 510, dismissing the defendant's motion to quash his conviction by the Police Magistrate for the City of Toronto on the 17th March, 1916. The defendant was charged before the magistrate with the theft of $5, was tried summarily under sec. 777 (5) of the Criminal Code, and convicted.

J. G. O'Donoghue, for the appellant.

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

The judgment of the Court was delivered by MEREDITH, C.J.O.:—The motion before Clute, J., and the appeal are misconceived, as the summary convictions provisions of the Criminal Code do not apply to a prosecution under the sub-section referred to. It is only where the trial has taken place before two magistrates that an appeal lies in the same manner as from a summary conviction under Part XV. (sec. 797*). The only appeal which

*Section 797 of the Criminal Code, R.S.C. 1906, ch. 146, was repealed by 3 & 4 Geo. V. ch. 13, and the following substituted:—

797. When any of the offences mentioned in paragraphs (*a*) or (*f*) of section 773 is tried in any of the Provinces under this Part before two Justices

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lies in a case such as this is that given by sec. 1013 of the Criminal Code, which provides that "an appeal from the verdict or judgment of any Court or Judge having jurisdiction in criminal cases, or of a magistrate proceeding under section 777, on the trial of any person for an indictable offence, shall lie upon the application of such person if convicted, to the Court of Appeal in the cases hereinafter provided for, and in no others."

The appeal must therefore be quashed.

The same conclusion was reached in *Regina* v. *Racine* (1900), Q.R. 9 Q.B. 134, 3 Can. Crim. Cas. 446. *Appeal quashed.*

CITY OF CALGARY v. CANADIAN WESTERN NATURAL GAS CO.

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Alberta Supreme Court, Appellate Division, Harvey, C.J., Scott, Stuart, and Beck, JJ. December 15, 1916.

[*City of Calgary* v. *Canadian Western Natural Gas Co.*, 25 D.L.R. 807, varied.]

MUNICIPAL CORPORATIONS (§ II F—174)—*Gas franchises—"Exclusive" grant—Territorial limit.*]—Appeal from 25 D.L.R. 807. Varied.

An action was brought by the City of Calgary for a declaration whether or not—

(1) The franchises, rights, etc., granted to one Dingman, (who was the assignor to the defendant company), under contract made between him and the City Council of Calgary in 1905, to bore and dig for natural gas, to lay mains and pipes in the streets of the city, were limited to, and do not extend beyond the area of the said city as shown on plans of record in 1905, or whether such franchise and rights extended so as to apply to new streets in newly acquired areas, subsequent to 1905;

(2) Whether or not the said franchise, rights and privileges granted to the said Dingman (and assigned by him to defendant company), are exclusive as against the plaintiff city.

Upon the first point the four Judges of the Court of Appeal, Harvey, C.J., Scott, Stuart and Beck, JJ., decided that the rights of the company were not confined to the area of the city as it

of the Peace sitting together, an appeal shall lie from a conviction for the offence in the same manner as from summary convictions under Part XV. and all provisions of that Part relating to appeals shall apply to every such appeal.

2. The provisions of sec. 1124 shall apply to convictions or orders made under the provisions of this part.

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existed at the time of the contract, but extended so as to apply to streets in territory annexed from time to time during the period of the franchise. The Judges arrived at this conclusion, however, on different grounds.

Harvey, C.J., and Beck, J., based their decision upon the apparent intention of the parties, to be gathered from a perusal of the whole contract, that upon the growth of the city's area the rights and privileges of the company should extend to streets in the newly acquired sections. Harvey, C.J., cited *City of Toronto* v. *Toronto Ry. Co.*, 29 D.L.R. 1, in support of this view.

Stuart, J., expressly disagreed with the Chief Justice, upon the ground of his decision. He held, however, that by the wording of a further agreement, dated in 1911, after all the territorial extensions to the city had been made, establishing new rates for the supply of gas "*to the inhabitants of the city*," the city impliedly agreed that in the original contract the words "the City of Calgary" should be given a new and wider meaning. Scott, J., concurred with him. Stuart, J., admitted the narrowness of the point upon which he based his decision.

In the result, therefore, the first question upon which a declaration was sought was answered in the negative. As the four Judges divided evenly on the grounds for their decision, and as Stuart and Scott, JJ., expressly disagreed with the ground upon which the Chief Justice and Beck, J., rested, no proposition of law can be formulated as the finding of the Court.

The second question upon which a declaration was sought, whether the franchise, rights and privileges granted to the defendant company are exclusive as against the plaintiff (the city), was based upon an apparent desire by the City of Calgary itself to enter upon the operation of boring for wells and supplying gas to its inhabitants. Upon this point the Chief Justice, Stuart and Scott, J., concurred; ruling that the question was governed by the express wording of the "granting clause," which manifested no intention to exclude the city from exercising as a municipal enterprise rights similar to those granted to the company. Beck, J., dissented from the majority of the Court upon this question.

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