# Dominion Law Reports

CITED "D.L.R."

A NEW ANNOTATED SERIES OF REPORTS COMPRISING EVERY CASE REPORTED IN THE COURTS OF EVERY PROVINCE, AND ALSO ALL THE CASES DECIDED IN THE SUPREME COURT OF CANADA, EXCHEQUER COURT AND THE RAILWAY COMMISSION, TOGETHER WITH CANADIAN CASES APPEALED TO THE PRIVY COUNCIL

---

## VOL. 4

---


EDITED BY

W. J. TREMEEAR

C. B. LABATT *and*

EDWIN BELL

ASSISTED BY A STAFF OF EDITORS

---

CONSULTING EDITOR

E. DOUGLAS ARMOUR, K.C.


---


TORONTO:

CANADA LAW BOOK CO., LIMITED

32-34 TORONTO STREET

1912

# CASES REPORTED

## IN THIS VOLUME

# TABLE OF ANNOTATIONS

*(Alphabetically arranged.)*

# TABLE OF CASES CITED

# TABLE OF STATUTES

# CONCURRENT CITATIONS

Table of Citations of Concurrent Reports shewing where cases also reported in other publications may be found in the Dominion Law Reports

*(See also Concurrent Citations in preceding volumes.)*

| *Volume and page of other Reports.* | *Same case in Dominion Law Reports.* | *Volume and page of other Reports.* | *Same case in Dominion Law Reports.* |
|---|---|---|---|
| [1912] A.C. 355 | 4 D.L.R. 116 | 26 O.L.R. 427 | 4 D.L.R. 589 |
| [1912] A.C. 571 | 3 D.L.R. 509 | 3 O.W.N. 584 | 4 D.L.R. 169 |
| [1912] A.C. 546 | 4 D.L.R. 306 | 3 O.W.N. 761 | 4 D.L.R. 561 |
| [1912] A.C. 590 | 4 D.L.R. 253 | 3 O.W.N. 765 | 4 D.L.R. 66 |
| 17 B.C.R. 130 | 4 D.L.R. 27 | 3 O.W.N. 779 | 4 D.L.R. 357 |
| 17 B.C.R. 150 | 4 D.L.R. 443 | 3 O.W.N. 817 | 4 D.L.R. 259 |
| 17 B.C.R. 170 | 4 D.L.R. 157 | 3 O.W.N. 832 | 4 D.L.R. 721 |
| 13 Can.R.Cas. 367 | 2 D.L.R. 114 | 3 O.W.N. 864 | 4 D.L.R. 857 |
| 13 Can.R.Cas. 176 | 4 D.L.R. 239 | 3 O.W.N. 909 | 4 D.L.R. 731 |
| 10 E.L.R. 298 | 4 D.L.R. 836 | 3 O.W.N. 915 | 4 D.L.R. 319 |
| 10 E.L.R. 521 | 4 D.L.R. 502 | 3 O.W.N. 936 | 4 D.L.R. 803 |
| 11 E.L.R 33 | 1 D.L.R. 481 | 3 O.W.N. 941 | 4 D.L.R. 229 |
| 11 E.L.R. 136 | 4 D.L.R. 691 | 3 O.W.N. 973 | 4 D.L.R. 789 |
| 11 E.L.R. 585 | 2 D.L.R. 835 | 3 O.W.N. 977 | 4 D.L.R. 56 |
| 22 Man. L.R. 175 | 4 D.L.R. 413 | 3 O.W.N. 1003 | 4 D.L.R. 567 |
| 22 Man. L.R. 305 | 4 D.L.R. 379 | 3 O.W.N. 1011 | 4 D.L.R. 737 |
| 22 Man. L.R. 330 | 4 D.L.R. 175 | 3 O.W.N. 1027 | 4 D.L.R. 39 |
| 26 O.L.R. 10 | 2 D.L.R. 854 | 3 O.W.N. 1066 | 4 D.L.R. 345 |
| 26 O.L.R. 16 | 4 D.L.R. 356 | 3 O.W.N. 1089 | 4 D.L.R. 278 |
| 26 O.L.R. 29 | 2 D.L.R. 843 | 3 O.W.N. 1099 | 4 D.L.R. 760 |
| 26 O.L.R. 43 | 2 D.L.R. 859 | 3 O.W.N. 1105 | 4 D.L.R. 91 |
| 26 O.L.R. 48 | 2 D.L.R. 866 | 3 O.W.N. 1109 | 4 D.L.R. 626 |
| 26 O.L.R. 55 | 3 D.L.R. 668 | 3 O.W.N. 1112 | 4 D.L.R. 66 |
| 26 O.L.R. 75 | 4 D.L.R. 721 | 3 O.W.N. 1163 | 4 D.L.R. 870 |
| 26 O.L.R. 87 | 4 D.L.R. 731 | 3 O.W.N. 1167 | 4 D.L.R. 850 |
| 26 O.L.R. 94 | 4 D.L.R. 319 | 3 O.W.N. 1191 | 4 D.L.R. 585 |
| 26 O.L.R. 117 | 4 D.L.R. 229 | 3 O.W.N. 1233 | 4 D.L.R. 764 |
| 26 O.L.R. 121 | 4 D.L.R. 789 | 3 O.W.N. 1337 | 4 D.L.R. 827 |
| 26 O.L.R. 136 | 4 D.L.R. 56 | 3 O.W.N. 1341 | 4 D.L.R. 595 |
| 26 O.L.R. 154 | 4 D.L.R. 563 | 3 O.W.N. 1351 | 4 D.L.R. 351 |
| 26 O.L.R. 163 | 4 D.L.R. 737 | 3 O.W.N. 1362 | 4 D.L.R. 641 |
| 26 O.L.R. 183 | 3 D.L.R. 577 | 3 O.W.N. 1368 | 4 D.L.R. 591 |
| 26 O.L.R. 204 | 4 D.L.R. 39 | 3 O.W.N. 1384 | 4 D.L.R. 727 |
| 26 O.L.R. 225 | 3 D.L.R. 561 | 3 O.W.N. 1388 | 4 D.L.R. 82 |
| 26 O.L.R. 246 | 4 D.L.R. 345 | 3 O.W.N. 1395 | 4 D.L.R. 221 |
| 26 O.L.R. 263 | 4 D.L.R. 278 | 3 O.W.N. 1414 | 4 D.L.R. 844 |
| 26 O.L.R. 291 | 4 D.L.R. 91 | 3 O.W.N. 1424 | 4 D.L.R. 352 |
| 26 O.L.R. 294 | 4 D.L.R. 626 | 3 O.W.N. 1440 | 4 D.L.R. 611 |
| 26 O.L.R. 303 | 4 D.L.R. 66 | 3 O.W.N. 1453 | 4 D.L.R. 86 |
| 26 O.L.R. 332 | 2 D.L.R. 900 | 3 O.W.N. 1455 | 4 D.L.R. 19 |
| 26 O.L.R. 377 | 4 D.L.R. 764 | 3 O.W.N. 1458 | 4 D.L.R. 3 |

| *Volume and page of other Reports.* | *Same case in Dominion Law Reports.* | *Volume and page of other Reports.* | *Same case in Dominion Law Reports.* |
|---|---|---|---|
| 3 O.W.N. 1469 | 4 D.L.R. 210 | 21 O.W.R. 954 | 4 D.L.R. 626 |
| 3 O.W.N. 1521 | 4 D.L.R. 99 | 21 O.W.R. 961 | 4 D.L.R. 91 |
| 3 O.W.N. 1526 | 4 D.L.R. 643 | 22 O.W.R. 9 | 4 D.L.R. 850 |
| 3 O.W.N. 1527 | 4 D.L.R. 94 | 22 O.W.R. 34 | 4 D.L.R. 764 |
| 3 O.W.N. 1529 | 4 D.L.R. 274 | 22 O.W.R. 42 | 4 D.L.R. 585 |
| 3 O.W.N. 1532 | 4 D.L.R. 341 | 22 O.W.R. 50 | 4 D.L.R. 278 |
| 3 O.W.N. 1534 | 4 D.L.R. 224 | 22 O.W.R. 81 | 4 D.L.R. 366 |
| 3 O.W.N. 1564 | 4 D.L.R. 621 | 22 O.W.R. 84 | 4 D.L.R. 193 |
| 3 O.W.N. 1567 | 4 D.L.R. 624 | 22 O.W.R. 127 | 4 D.L.R. 25 |
| 3 O.W.N. 1569 | 4 D.L.R. 114 | 22 O.W.R. 147 | 4 D.L.R. 767 |
| 3 O.W.N. 1375 | 4 D.L.R. 663 | 22 O.W.R. 152 | 4 D.L.R. 159 |
| 3 O.W.N. 1580 | 4 D.L.R. 164 | 22 O.W.R. 156 | 4 D.L.R. 217 |
| 3 O.W.N. 1583 | 4 D.L.R. 335 | 22 O.W.R. 161 | 4 D.L.R. 576 |
| 3 O.W.N. 1585 | 4 D.L.R. 151 | 22 O.W.R. 191 | 4 D.L.R. 682 |
| 3 O.W.N. 1588 | 4 D.L.R. 213 | 22 O.W.R. 200 | 4 D.L.R. 291 |
| 3 O.W.N. 1605 | 4 D.L.R. 170 | 22 O.W.R. 203 | 4 D.L.R. 22 |
| 3 O.W.N. 1615 | 4 D.L.R. 301 | 22 O.W.R. 206 | 4 D.L.R. 753 |
| 3 O.W.N. 1623 | 4 D.L.R. 847 | 22 O.W.R. 215 | 4 D.L.R. 173 |
| 3 O.W.N. 1626 | 4 D.L.R. 687 | 22 O.W.R. 217 | 4 D.L.R. 589 |
| 3 O.W.N. 1628 | 4 D.L.R. 662 | 22 O.W.R. 224 | 4 D.L.R. 89 |
| 3 O.W.N. 1250 | 4 D.L.R. 767 | 22 O.W.R. 232 | 4 D.L.R. 330 |
| 3 O.W.N. 1252 | 4 D.L.R. 159 | 22 O.W.R. 235 | 4 D.L.R. 315 |
| 3 O.W.N. 1262 | 4 D.L.R. 63 | 22 O.W.R. 238 | 4 D.L.R. 827 |
| 3 O.W.N. 1267 | 4 D.L.R. 25 | 22 O.W.R. 282 | 4 D.L.R. 595 |
| 3 O.W.N. 1269 | 4 D.L.R. 193 | 22 O.W.R. 296 | 4 D.L.R. 591 |
| 3 O.W.N. 1272 | 4 D.L.R. 366 | 22 O.W.R. 326 | 4 D.L.R. 352 |
| 3 O.W.N. 1274 | 4 D.L.R. 217 | 22 O.W.R. 330 | 4 D.L.R. 150 |
| 3 O.W.N. 1287 | 4 D.L.R. 293 | 22 O.W.R. 351 | 4 D.L.R. 640 |
| 3 O.W.N. 1289 | 4 D.L.R. 22 | 22 O.W.R. 326 | 4 D.L.R. 641 |
| 3 O.W.N. 1292 | 4 D.L.R. 589 | 22 O.W.R. 403 | 4 D.L.R. 351 |
| 3 O.W.N. 1293 | 4 D.L.R. 173 | 22 O.W.R. 474 | 4 D.L.R. 844 |
| 3 O.W.N. 1296 | 4 D.L.R. 682 | 22 O.W.R. 481 | 4 D.L.R. 221 |
| 3 O.W.N. 1307 | 4 D.L.R. 753 | 22 O.W.R. 534 | 4 D.L.R. 250 |
| 3 O.W.N. 1309 | 4 D.L.R. 576 | 22 O.W.R. 540 | 4 D.L.R. 611 |
| 3 O.W.N. 1324 | 4 D.L.R. 89 | 22 O.W.R. 558 | 4 D.L.R. 19 |
| 3 O.W.N. 1327 | 4 D.L.R. 330 | 22 O.W.R. 563 | 4 D.L.R. 82 |
| 3 O.W.N. 1329 | 4 D.L.R. 315 | 22 O.W.R. 577 | 4 D.L.R. 3 |
| 21 O.W.R. 376 | 4 D.L.R. 857 | 22 O.W.R. 601 | 4 D.L.R. 210 |
| 21 O.W.R. 559 | 4 D.L.R. 229 | 22 O.W.R. 690 | 4 D.L.R. 274 |
| 21 O.W.R. 583 | 4 D.L.R. 259 | 22 O.W.R. 734 | 4 D.L.R. 224 |
| 21 O.W.R. 618 | 4 D.L.R. 356 | 22 O.W.R. 736 | 4 D.L.R. 341 |
| 21 O.W.R. 674 | 4 D.L.R. 721 | 22 O.W.R. 738 | 4 D.L.R. 114 |
| 21 O.W.R. 705 | 4 D.L.R. 39 | 22 O.W.R. 743 | 4 D.L.R. 663 |
| 21 O.W.R. 757 | 4 D.L.R. 66 | 22 O.W.R. 748 | 4 D.L.R. 335 |
| 21 O.W.R. 785 | 4 D.L.R. 789 | 22 O.W.R. 751 | 4 D.L.R. 164 |
| 21 O.W.R. 800 | 4 D.L.R. 56 | 22 O.W.R. 767 | 4 D.L.R. 151 |
| 21 O.W.R. 813 | 4 D.L.R. 870 | 22 O.W.R. 786 | 4 D.L.R. 213 |
| 21 O.W.R. 860 | 4 D.L.R. 567 | 22 O.W.R. 834 | 4 D.L.R. 170 |
| 21 O.W.R. 901 | 4 D.L.R. 345 | 22 O.W.R. 842 | 4 D.L.R. 847 |

| *Volume and page of other Reports.* | *Same case in Dominion Law Reports.* | *Volume and page of other Reports.* | *Same case in Dominion Law Reports.* |
|---|---|---|---|
| 22 O.W.R. 846 | 4 D.L.R. 687 | 21 W.L.R. 283 | 4 D.L.R. 6 |
| 22 O.W.R. 847 | 4 D.L.R. 662 | 21 W.L.R. 287 | 4 D.L.R. 134 |
| 22 O.W.R. 857 | 4 D.L.R. 621 | 21 W.L.R. 298 | 4 D.L.R. 143 |
| 22 O.W.R. 860 | 4 D.L.R. 624 | 21 W.L.R. 299 | 4 D.L.R. 407 |
| 22 O.W.R. 863 | 4 D.L.R. 99 | 21 W.L.R. 313 | 4 D.L.R. 175 |
| 22 O.W.R. 868 | 4 D.L.R. 643 | 21 W.L.R. 335 | 4 D.L.R. 527 |
| 41 Que. S.C. 236 | 4 D.L.R. 772 | 21 W.L.R. 351 | 4 D.L.R. 379 |
| 41 Que. S.C. 241 | 4 D.L.R. 668 | 21 W.L.R. 401 | 4 D.L.R. 450 |
| 41 Que. S.C. 430 | 4 D.L.R. 162 | 21 W.L.R. 408 | 4 D.L.R. 400 |
| 41 Que. S.C. 481 | 4 D.L.R. 712 | 21 W.L.R. 418 | 4 D.L.R. 105 |
| 41 Que. S.C. 500 | 4 D.L.R. 776 | 21 W.L.R. 460 | 4 D.L.R. 529 |
| 41 Que. S.C. 519 | 4 D.L.R. 640 | 21 W.L.R. 471 | 4 D.L.R. 108 |
| 41 Que. S.C. 521 | 4 D.L.R. 614 | 21 W.L.R. 493 | 4 D.L.R. 295 |
| 41 Que. S.C. 530 | 4 D.L.R. 819 | 21 W.L.R. 499 | 4 D.L.R. 312 |
| 41 Que. S.C. 541 | 4 D.L.R. 833 | 21 W.L.R. 517 | 4 D.L.R. 491 |
| 28 Times L.R. 467 | 4 D.L.R. 306 | 21 W.L.R. 525 | 4 D.L.R. 147 |
| 28 Times L.R. 488 | 4 D.L.R. 253 | 21 W.L.R. 549 | 4 D.L.R. 337 |
| 20 W.L.R. 180 | 4 D.L.R. 375 | 21 W.L.R. 561 | 4 D.L.R. 172 |
| 20 W.L.R. 192 | 4 D.L.R. 388 | 21 W.L.R. 563 | 4 D.L.R. 443 |
| 20 W.L.R. 200 | 4 D.L.R. 168 | 21 W.L.R. 563 | 4 D.L.R. 717 |
| 20 W.L.R. 202 | 4 D.L.R. 688 | 21 W.L.R. 569 | 4 D.L.R. 399 |
| 20 W.L.R. 329 | 4 D.L.R. 457 | 21 W.L.R. 571 | 4 D.L.R. 455 |
| 20 W.L.R. 364 | 4 D.L.R. 697 | 21 W.L.R. 577 | 4 D.L.R. 474 |
| 20 W.L.R. 384 | 4 D.L.R. 718 | 21 W.L.R. 580 | 4 D.L.R. 442 |
| 20 W.L.R. 510 | 4 D.L.R. 413 | 21 W.L.R. 585 | 4 D.L.R. 852 |
| 20 W.L.R. 547 | 4 D.L.R. 376 | 21 W.L.R. 607 | 4 D.L.R. 395 |
| 20 W.L.R. 558 | 4 D.L.R. 465 | 21 W.L.R. 617 | 4 D.L.R. 485 |
| 20 W.L.R. 561 | 4 D.L.R. 451 | 21 W.L.R. 620 | 4 D.L.R. 255 |
| 20 W.L.R. 646 | 4 D.L.R. 354 | 21 W.L.R. 622 | 4 D.L.R. 4 |
| 20 W.L.R. 648 | 4 D.L.R. 369 | 21 W.L.R. 658 | 4 D.L.R. 650 |
| 20 W.L.R. 654 | 4 D.L.R. 327 | 21 W.L.R. 682 | 4 D.L.R. 784 |
| 20 W.L.R. 657 | 4 D.L.R. 24 | 21 W.L.R. 748 | 4 D.L.R. 331 |
| 20 W.L.R. 775 | 4 D.L.R. 290 | 21 W.L.R. 771 | 4 D.L.R. 1 |
| 20 W.L.R. 797 | 4 D.L.R. 27 | 21 W.L.R. 774 | 4 D.L.R. 444 |
| 20 W.L.R. 833 | 4 D.L.R. 8 | 21 W.L.R. 804 | 4 D.L.R. 491 |
| 21 W.L.R. 5 | 4 D.L.R. 239 | 21 W.L.R. 808 | 4 D.L.R. 472 |
| 21 W.L.R. 34 | 4 D.L.R. 369 | 21 W.L.R. 815 | 4 D.L.R. 814 |
| 21 W.L.R. 65 | 4 D.L.R. 476 | 21 W.L.R. 821 | 4 D.L.R. 304 |
| 21 W.L.R. 72 | 4 D.L.R. 487 | 21 W.L.R. 837 | 4 D.L.R. 660 |
| 21 W.L.R. 93 | 4 D.L.R. 96 | 21 W.L.R. 839 | 4 D.L.R. 498 |
| 21 W.L.R. 153 | 4 D.L.R. 861 | 21 W.L.R. 848 | 4 D.L.R. 398 |
| 21 W.L.R. 163 | 4 D.L.R. 707 | 21 W.L.R. 850 | 4 D.L.R. 397 |
| 21 W.L.R. 168 | 4 D.L.R. 648 | 21 W.L.R. 851 | 4 D.L.R. 497 |
| 21 W.L.R. 171 | 4 D.L.R. 705 | 21 W.L.R. 864 | 4 D.L.R. 372 |
| 21 W.L.R. 223 | 4 D.L.R. 866 | 21 W.L.R. 868 | 4 D.L.R. 521 |
| 21 W.L.R. 244 | 4 D.L.R. 238 | 21 W.L.R. 871 | 4 D.L.R. 438 |
| 21 W.L.R. 255 | 4 D.L.R. 435 | 21 W.L.R. 875 | 4 D.L.R. 483 |
| 21 W.L.R. 259 | 4 D.L.R. 432 | 21 W.L.R. 877 | 4 D.L.R. 392 |
| 21 W.L.R. 273 | 4 D.L.R. 523 | 21 W.L.R. 895 | 4 D.L.R. 431 |

# INDEX OF SUBJECT MATTER, VOL. IV., PART I.

*(For Table of Cases Reported see end of this Index.)*

## CASES REPORTED, VOL. IV., PART I.

## SOUTHWELL v. WILLIAMS AND SCHANK.

B.C.

C. A.
1912

June 28.

*British Columbia Court of Appeal, Macdonald, C.J.A., Irving, and Galliher, JJ.A. June 28, 1912.*

1. COURTS (§ I B 3—28)—RIGHT OF VENDOR TO FORFEIT CONTRACT—BREACH —VACATION OF REGISTRATIONS.

A decree or judgment for rescission of a contract for the sale of land upon non-payment of the purchase money, may direct that all registered instruments depending thereon be vacated unless all arrearages are paid within a time limited by the judgment.

2. VENDOR AND PURCHASER (§ III—39)—RIGHTS OF ASSIGNEE OF PURCHASER —FORFEITURE OF CONTRACT—PAYMENTS MADE BY ASSIGNEE TO VENDEE—RECOVERY BACK.

If, upon the failure of the vendee to pay the amount due on a contract for the sale of land, within the time limited by the Court therefor, payment is made by one to whom the vendee assigned his interest in the contract, and who paid to the vendee or his agent all payments under the contract as they came due, the assignee will be given judgment against the vendee therefor, together with interest thereon, and the costs he is compelled to pay.

3. ASSIGNMENT (§ III—33)—ASSIGNEE OF VENDEE—RECOVERY BACK OF PAYMENTS MADE TO VENDEE NOT APPLIED ON PURCHASE.

Upon the forfeiture of a contract for the sale of land, and the vacation of all instruments depending thereon, on account of the default of the vendee to pay the amount due within the time decreed by the Court therefor, the assignee of the vendee's interest in the contract will be given judgment against the latter for the amount the assignee had paid under the contract to the vendee or his agent, which had not been applied in satisfaction thereof.

Statement

APPEAL by plaintiff from the judgment of Grant, Co.J., in an action for forfeiture under an agreement for sale of land. Defendant Williams entered into an agreement to purchase the land in question from plaintiff. He assigned the agreement to the defendant Schank, who continued the payments to one Moss, agent of Williams, according to the allegation of Schank. Williams denied the agency of Moss, who failed to account for the moneys received. Grant, Co.J., gave judgment against Williams for $750 and costs, dismissed the action for foreclosure and also dismissed the action against Schank with costs. The Court of Appeal reserved judgment merely as to the form of the decree which should be made in favour of the plaintiff, but intimated that if plaintiff, Williams, was inclined to do right he would protect Schank against the necessity of having to pay twice for the land.

The appeal was allowed.

*U. B. O'Dell*, for appellant.

*A. Henderson*, K.C., for respondent Williams.

*J. S. Jamieson*, for respondent Schank.

B.C.

C. A.

1912

SOUTHWELL v. WILLIAMS AND SCHANK.

Galliher, J.A.

MACDONALD, C.J.A.:—I concur with judgment of Galliher, J.A.

IRVING, J.A. concurs.

GALLIHER, J.A.:—There should be a decree rescinding the contract and vacating registration of the agreement between the plaintiff and the defendant Williams, and any other registered instruments depending thereon unless all arrears of purchase money and interest payable under the agreement between the plaintiff and defendant Williams, due up to and including the date following, be paid to the registrar of this Court, at Vancouver, for and on account of the plaintiff, on or before the 30th September, 1912, before the hour of 12 o'clock noon, by the defendants or one of them. And in case the parties cannot agree, the amount shall be settled by the registrar.

The plaintiff to have judgment for his costs of the action and appeal and reference (if any) against both defendants whether said money be paid or not.

The judgment pronounced below shall be vacated.

In case the defendant Williams fails to pay the above moneys on the date above mentioned, together with the costs above mentioned, and in the event of the defendant Schank paying the said moneys and costs, there shall be judgment in favour of Schank against Williams for all such sums for principal, interest and costs as he Schank shall be obliged to pay by reason of Williams' default under the agreement.

Should the contract be rescinded and the registration of the agreement and other instruments dependent thereon be vacated by reason of default in payment as hereinbefore provided, the defendant Schank shall have judgment against the defendant Williams for all sums paid by him to the defendant Williams, or his agent Moss for principal and interest, together with interest thereon at 7 per cent. per annum from the dates of such payments.

The defendant Schank is to have judgment against the defendant Williams in any event for his (defendant Schank) costs of defence of the action, and of appeal, and reference as aforesaid. In the event of rescission, the plaintiff to retain the moneys already paid as liquidation damages.

Leave to apply for further directions to the County Court.

*Appeal allowed.*

ONT.

H. C. J.
1912

June 20.

## RE GORDON.

*Ontario High Court, Riddell, J. June 20, 1912.*

1. EXECUTORS AND ADMINISTRATORS (§ III A—69)—APPLICATION FOR ADVICE OF COURT—ADVISABILITY OF CLAIMING LAND ADVERSELY HELD—RULE (ONT.) 938.

Upon an application under Con. Rule 938, as amended 1904, by Rule 1269, the Court will decline to advise or direct an executor as to whether he should follow the opinion of his solicitor and lay claim, as part of the estate, to land held adversely thereto, such an application made summarily not being within the terms of Ont. C.R. 938 and 1269.

[*Suffolk* v. *Lawrence* (1884), 32 W.R. 899, specially referred to.]

Statement

MOTION by the executors of the will of Isaac Gordon the elder, deceased, for the opinion, advice, or direction of the Court, under sec. 65 of the Trustee Act and Con. Rule 1269(938).

*A. A. Craig*, for the executor.

*C. W. Plaxton*, for tenants under a lease made by Henry Gordon.

Riddell, J.

RIDDELL, J.:—Isaac Gordon the elder devised certain lands to his son Henry, "for himself during his natural life, subject to the payment of" certain legacies, "but in case of my son Henry Gordon's death without issue or without leaving any child or children then it is my wish that the real estate be sold and the proceeds divided equally between my surviving sons and daughters share and share alike . . . ." Henry, in 1909, made a lease of the land to C. and A. for a term of five years; and died, without issue, in June, 1911. The executor of Isaac Gordon the elder demanded possession of the land, and the tenants refused, asserting that the lease was good for the term mentioned in it. The executor was advised by his solicitor and believes that the lease was voided by the death of Henry, and that it is his duty to sell the farm as executor.

Instead of taking proceedings to obtain possession of the land, he served upon the tenants a notice of motion "for the opinion, advice, or direction of the Judge, pursuant to sec. 65 of the Trustee Act and Rule 1269 of the Consolidated Rules of Practice." The notice is somewhat ambiguous, but I accept the interpretation which counsel for the motion says was intended, viz., that opinion, advice, or direction is sought in two matters: (1) the course to be pursued by the executor with respect to the lease; (2) the validity of the lease.

Objection being taken to the practice by counsel for the tenants, I gave effect to his objection; and, as he refused to consent to the motion being turned into any other form of motion, I dismissed the second branch of the application, with costs, fixed at $5, following *Re Rally* (1912), 25 O.L.R. 112, and also *Re Turner*, 3 O.W.N. 1438.

ONT.

H. C. J.
1912

RE GORDON.

Riddell, J.

The portion of Con. Rule 1269 (938) which, it is contended, covers the former branch of the application, is (e), by which an application may be made for an order "directing the executors or administrators or trustees to do or abstain from doing any particular act in their character as such executors or trustees." But this means any act in or about the estate of which they are executors or trustees. As it is put in *Suffolk* v. *Lawrence* (1884), 32 W.R. 899, "this only relates to the doing or abstaining from doing by trustees of some act within the scope of their trusts." The section was not intended to cover the case of an executor who was in doubt as to whether he should follow his solicitor's opinion so far as to claim as part of the estate land claimed adversely to the estate. Executors must use their business sense, and not ask the Court to exonerate them in advance: the general duties of executors are so well known that the Court should not be called upon to lay them down on every occasion of apparent difficulty.

This part of the application is also refused.

*Declaration accordingly.*

---

MAN.

C. A.
1912

June 24.

## CONN v. HAWES, and GOWAN, Claimant.

*Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron, Haggart, JJ.A. June 24, 1912.*

1. RECORDS AND REGISTRY LAWS (§ III C—21)—EFFECT OF FAILURE TO REGISTER—SALE OF GOODS—CHANGE OF POSSESSION—R.S.M. 1902, CH. 11, SEC. 3.

A sale of a stack of hay is invalid against an execution creditor under sec. 3 of the Bills of Sale and Chattel Mortgage Act, R.S.M. 1902, ch. 11, providing that every unregistered sale must be accompanied by an immediate delivery followed by an actual and continual change of possession, where the sale was made by the owner of the hay giving it and some cash in payment of an overdue note of his, held by the buyer, who permitted the hay to remain on the premises occupied by the seller where it was seized on execution by the creditor under a judgment obtained after the sale.

[*Jackson* v. *Bank of Nova Scotia*, 9 Man. R. 75; *Brown* v. *Peace*, 11 Man. R. 409; *Parkes* v. *St. George*, 10 A.R. (Ont.) 496, and *Hyman* v. *Cuthbertson*, 10 O.R. 443, specially referred to.]

Statement

AN appeal by the execution creditor, Conn, from the judgment of Ryan, J., on the trial of an interpleader issue.

The appeal was allowed.

On November 23rd, 1910, the claimant bought a stack of hay situate on section 36, township 12, range 16, west, the property of Mrs. Huneston, the mother-in-law of the defendant Hawes, who gave $5 in cash and the stack of hay in question to the claimant in payment of an over-due note of defendant. At the time of the sale, the plaintiff had no judgment against the defendant. Judgment was not obtained until March 14th,

MAN.

C. A.
1912

CONN
v.
HAWES AND
GOWAN.

1911. On December 22nd, 1910, the bailiff of the Court acting under a writ of attachment seized the hay in question, the writ having been issued on the same date. Subsequently the claimant claimed the hay, and the bailiff interpleaded.

The case was tried before Judge Ryan who gave judgment for the claimant, deciding that there was not evidence to hold that the sale of the hay was made with intent to hinder, delay or prejudice creditors under section 38 of the Assignments Act; and holding that the issue of a writ of attachment or seizing thereunder was not an "action" or proceeding had or taken to impeach or set aside the sale. The interpleader summons issued by the bailiff did not issue until April 22nd, 1911, more than sixty days after the sale of the hay to the plaintiff.

Statement

Plaintiff appealed.

*H. R. Hooper*, for the plaintiff.

No one appeared for the claimant, Gowan, although duly served.

The judgment of the Court was delivered by

HAGGART, J.A.:—On the trial of an interpleader issue the County Court Judge decided in favour of the claimant Gowan, and against the execution creditors Robert Conn & Son, who appeal on two grounds; the first being that the sale was void as against the execution creditors under section 3 of the Bills of Sale and Chattel Mortgage Act, and the second that the transfer was preferential and void under the Assignments Act.

Haggart, J.A.

The claimants' version of the transaction is that being the holder of a promissory note made by the execution debtor for $36.50, it was agreed between them that the note should be given up to the execution debtor for the stack of hay in question, and $5 in cash. The stack was on the premises occupied by the execution debtor Hawes, where it continued to remain. Hawes in two or three days thereafter vacated the premises. Gowan the claimant says he asked the consent of the son of the owner of the land to allow the hay to remain where it was and the son consented. This happened in November, 1910, and within a month thereafter the execution creditor issued a writ of attachment and in due course obtained judgment and execution.

I think that with all deference and respect for the finding of the learned trial Judge the sale or transaction under which Gowan claims title to the hay in question was not accompanied by an immediate delivery followed by an actual and continued change of possession, and that it is void as against the execution creditor under the Bills of Sale and Chattel Mortgage Act; *Jackson* v. *Bank of Nova Scotia*, 9 Man. R. 75; *Brown* v. *Peace*, 11 Man. R. 409; *Parkes* v. *St. George*, 10 A.R. (Ont.) 496; *Hyman* v. *Cuthbertson*, 10 O.R. 443.

MAN.

C. A.
1912

CONN
v.
HAWES AND GOWAN.

As the execution creditor succeeds on this ground it is not necessary to consider the other questions raised on the appeal. The appeal should be allowed with costs.

Judgment in the Court below will be set aside and judgment entered for the execution creditor Conn for $25 and costs.

*Appeal allowed.*

---

SASK.

S. C.
1912

May 11.

**Re MATERI Estate.**

*Saskatchewan Supreme Court, Wetmore, C.J., in Chambers. May 11, 1912.*

1. WILLS (§ III K—187)—DEVISE OF LAND SUBJECT TO A MORTGAGE—LIABILITY OF DEVISEE.

One to whom land encumbered with a mortgage was devised, is primarily liable for the payment thereof.

[*In re Carley*, 18 W.L.R. 695, specially referred to.]

2. EXECUTORS AND ADMINISTRATORS (§ II A 2—44*a*)—RIGHT TO MORTGAGE LAND AFTER CONVEYANCE TO DEVISEE—SASK. RULES OF COURT 624, SECS. 7 AND 8.

After land has been transferred and conveyed by executors to the one to whom it was devised, the former cannot be authorized, under paragraphs 7 and 8 of Saskatchewan Rule 624, to execute a mortgage thereon

Statement

THIS was an *ex parte* application on behalf of one Anton Deis, under paragraphs 7 and 8 of Rule 624 of the Rules of Court* for a direction that he be authorized to execute a mortgage on the north-west quarter of section 24, township 16, range 16, west of the 2nd meridian.

*Section 624 of the Sask. Rules of Court (1911), is as follows:—

624. The executors or administrators of a deceased person, or the sureties for administrators, and the trustees under any deed or instrument, or any of them, and any person claiming to be interested in the relief sought as creditor, devisee, legatee, next of kin, or heir-at-law of a deceased person, or as *cestuis que trust* under the trust of any deed or instrument, or as claiming by assignment, or otherwise, under such creditor or other person as aforesaid, may obtain an originating summons returnable before a Judge in Chambers, at such time as he may appoint, for such relief of the nature or kind following as may by the summons be specified, and as the circumstances of the case may require, of any of the following questions or matters:—

1. The administration of the estate of the deceased;
2. The administration of the trust;
3. Any question affecting the rights or interests of the person claiming to be creditor, devisee, legatee, next of kin, or heir-at-law, or *cestui que trust;*
4. The ascertainment of any class of creditors, legatees, devisees, next of kin, or others;
5. The furnishing and vouching of any particular account by executors, administrators or trustees;
6. The payment into Court of any money in the hands of the executors, administrators or trustees;
7. Directing the executors, administrators or trustees to do or abstain from doing any particular act in their character as executors, administrators or trustees;
8. The approval of any sale, purchase, compromise or other transaction;

The motion was refused.

*A. D. Dickson*, for applicant.

WETMORE, C.J.:—It appears by the material on which this application is based that the deceased Phillip Materi, who died on the 30th January, 1904, mortgaged the quarter section to the Home Investment and Savings Association on the 2nd March, 1903, to secure $600. Materi made a will dated 19th December, 1903, and appointed his wife, Anna, his son Jacob, and the above-named Anton Deis, executrix and executors thereof. This will was proved on the 16th March, 1904, and letters testamentary issued to the three persons named above. The mortgagee pressing for the money, the executrix and executors borrowed $900 from one John Fetsch, to pay the company, and executed a mortgage to Fetsch upon the same land on the 13th June, 1908. The deceased left to each of his sons, Jacob, Anton and George, a separate portion of his real estate, charged with certain payments in each case in favour of three daughters. He devised to his son George, the north half of section 24 (on the west half of which, namely the north-west quarter of the whole section, was the mortgage in question) charged with the sum of six hundred dollars to be divided equally share and share alike between his three daughters Odelia, Josephina and Letwina. Anna Materi, the executrix, died on the 19th August, 1909, and the executor, Jacob Materi, has left this country and is supposed to be residing at Wales, in North Dakota. The affidavit states that the shares of the adult heirs of the deceased have been transferred and conveyed to them respectively, and that the only persons who now have any interest in the estate are the two infant children of the deceased. It is not disclosed who these infants are. I conjecture they are two of the daughters named. George took the half section devised to him subject to the mortgage, and is primarily liable to pay it. I refer to *In re Carley*, 18 W.L.R., 695, at p. 698. I am not prepared to say, however, that the executors would not be authorized to take up the mortgage in order to protect the interests of the daughters in respect to the charge on the land in their favour. The diffi-

9. The determination of any question arising in the administration of the estate or trust;

10. An order that no action be brought, or that all actions and proceedings pending against trustees, executors, or administrators be stayed for such period, as to the Court or a Judge may seem necessary or expedient, in order that sufficient time be allowed to such trustee, executor or administrator for the performance of the trusts imposed upon him;

Provided, however, that any creditor or other person interested in such estate may apply, before the expiration of such time, for an order discontinuing such stay;

Provided that the proceedings under this rule shall not interfere with, or control, any power or discretion vested in any executor, administrator or trustee, except so far as such interference or control may necessarily be involved in the particular relief sought.

SASK.

S. C.
1912

RE MATERI.

Wetmore, C.J.

culty I have about warranting my considering is that the affidavit states that the shares of the adult heirs have been transferred and conveyed to them. I assume, therefore, that George Materi's interest in this half section has been transferred to him by the executors. If so, they cannot give a mortgage on the land, and I cannot authorize them to do so. Moreover, in any case it must be stated who these infants are who have not had their share of the estate. It will also be a matter for consideration whether, if an authority to mortgage is given, Jacob should not join in the mortgage. On the present material I cannot order an originating summons.

*Motion refused.*

---

B.C.

C. A.
1912

April 2.

## WATTSBURG LUMBER CO. v. COOK LUMBER CO.

*British Columbia Court of Appeal, Macdonald, C.J.A., Irving, and Galliher, JJ.A. April 2, 1912.*

1. TOWAGE (§ I—1)—LIABILITY OF TUG OWNER NOT ENGAGED IN TOWAGE WORK—MOVING BOOM.

The owner of a tug not engaged in the towage business, who, by a friendly arrangement with a person from whom he had requested the loan of certain implements for use in his business undertakes to move a boom for the latter, does not thereby enter into an ordinary contract of towage by which he is bound to use a tug of sufficient strength and equipment safely to do the work and to face unfavourable weather conditions, and he is not liable for the loss of the boom through the breaking of the tow line in a gale, when using to the best advantage the equipment he had.

[*Wattsburg Lumber Co.* v. *Cook Lumber Co.*, 16 B.C.R. 154, 17 W.L.R. 129, reversed.]

2. EVIDENCE (§ IV R—483)—ADMISSIBILITY OF PLAN OR SKETCH—NEGLIGENCE—POSITION OF TUG AND TOW.

A plan or sketch of the *locus in quo* will be excluded on being produced to witnesses being examined as to the position and movements of a tug and its tow in a negligence action, if the sketch purports to shew on its face the relative position of the tug and tow at different points in their course, and such positions are involved in the questions at issue.

[*Beamon* v. *Ellice*, 4 Car. & P. 585, applied.]

Statement

APPEAL by defendant from judgment of Morrison, J., *Wattsburg Lumber Co.* v. *Cook Lumber Co.*, 16 B.C.R. 154, 17 W.L.R. 129.

The appeal was allowed.

*W. A. Macdonald*, K.C., for appellant.

*S. S. Taylor*, K.C., for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—I think that the fundamental error in the reasons for judgment below is to be found in the assumption that the defendant entered into the ordinary contract of towage with the plaintiff, that the contractor was bound to use a tug of sufficient strength and equipment to safely do the work and to assume the risk of weather conditions. In my

view of the case, what was in the contemplation of both parties was that that tug with its then equipment, and on the morning in question, and under, at least, the partial direction, and with the assistance of the plaintiff's servants, was to move the boom in question. The defendant wished to borrow some boom sticks from the plaintiff, and the plaintiff asked the defendant to move the boom around to his jack ladder. It was a friendly arrangement altogether outside the scope of the business of towage, in which defendant was not engaged. While I agree that Yates had authority and did make this arrangement, I do not think that either party had any notion that it was other than the lending of assistance by the defendant to the plaintiff for the mutual benefit of both, and with the appliances that they had at hand. The learned Judge below seemed to think that the defendant would be responsible for anything which happened to the boom between the time he attached his line to it and its safe arrival at the jack ladder; that the defendant's servants had sole control and were responsible if they ventured out with it when the weather conditions were not favourable. I am unable to take this view of the transaction. I think the defendants could only be held responsible for negligence or unskilfulness in the handling of the tug where such negligence or unskilfulness caused the loss of the boom.

Now, it cannot be suggested that there was any negligence or unskilfulness up to the time when the plaintiff's yard foreman, Williams, and his other employee, Sewell, who were assisting in the moving of the boom, tied it up to what is known as the first dolphin, and called to Captain Johnston of the tug to let go his line. If there was any negligence up to this point, it was the negligence of Williams in not fastening the boom to the dolphin with a stronger rope or steel cable. On this point the evidence of West is of importance. But, however that may be, there is no question that up to this point there was no negligence or unskilfulness on the part of those handling the tug. When Williams called to the captain to let go his line, and back away, Williams says they were through with the tug, after that they proposed to guide the boom down with the rope in the current to its place of destination. The crucial point of the case, as I view it, turns on whether or not as Williams and Sewell say the captain of the tug ran his boat over this line, which fastened the boom to the dolphin, and broke it. I do not think the defendant can be held responsible for anything that happened after the breaking of the line because what the persons in charge of the tug did was done at the direction of Williams and on account of signals made by the plaintiff himself. Taking the view I have above expressed, the plaintiff can only succeed if he has satisfied the Court

B.C.

C. A.
1912

WATTSBURG LUMBER CO.
v.
COOK LUMBER CO.

Macdonald, C.J.A.

that the rope was broken in the manner Williams and Sewell say it was. Now, unfortunately, as I think, the learned Judge makes no finding on this point. His judgment is based upon entirely different grounds, and such as, with respect, I am unable to adopt.

There is a direct conflict between Williams and Sewell on the one side and Johnston and E. J. Cook on the other as to whether or not the tug did, as Williams and Sewell say, run over this line and break it. The only other witness who throws any light on this crucial point in dispute is C. H. Houle, who was at the time in plaintiff's employ, and was in the neighbourhood of the jack ladder where he could see the position of the boom and the tug at the time in question. His evidence, as far as it goes, corroborates that of Johnston and Cook. As I have already said, Williams and Sewell say that the tug ran over the line instead of backing out and away from the line. Captain Johnston, who was at the wheel, and Cook who was handling the tow rope, say that they were never at any time nearer than about seventy feet of this line. They attribute the breaking of the line to its insufficiency for the purpose, having regard to a gale of wind which sprang up shortly before, blowing off-shore, and which put such a strain upon the rope that it broke and allowed the boom to escape. I think the evidence sufficiently establishes that there was such a gale, in fact the learned Judge, inferentially, at least, finds so when he considers that the defendant's servants in charge of the tug were reckless and ignorant in going out with the boom in such weather.

I do not agree that they were reckless in doing this, but I advert to this finding as shewing that we may take it as proved that there was a gale about the time the boom reached the first dolphin and was tied up with the rope by Williams. Houle's evidence also in that the tug was never at any time near the rope in question, and while the learned Judge criticises this witness, when giving his evidence, a perusal of the evidence itself shews that the learned Judge was under an unfortunate misapprehension which brought about this criticism. In view of the conflict of evidence it will be useful to look at the circumstances, and endeavour to judge of the probabilities of the two stories. Williams and Sewell say that the tug was using its bow line and had no stern line; at all events, none that they could see. The importance of this, as I view it, is that if the tug were using its bow line, it would be heading towards the rope in question, and if it kept on going ahead, would come against the rope, and thus lend colour to the story of these two witnesses. On the other hand, the captain and Cook, who was in charge of the line with which the work was being done, say that they were using the stern or tow line, and heading the

other way. The evidence on this point is not very definite on either side; we should have been much assisted had the evidence clearly shewn in which direction the tug "was rolling" the boom, there is some evidence, but it is vague. However, it is not probable, in fact it is highly improbable, that those in charge of the boat, knowing that the boom was fastened to the dolphin by the line in question, and the importance of that, and that the line was some distance above the water, plainly in view should run the tug over it. It is much more likely that the story of Johnston, Cook and Houle is correct.

I have already adverted to West's evidence. West says that the line used to fasten the boom to the dolphin should have been a steel cable. He was an experienced man, not only on the lake, but at this very place, and says he never used a rope alone, but always a cable or both. It is also to be noted that both Williams and Sewell attempt to minimise the fact that a strong wind was blowing. The impression they try to create is that there was no wind of any consequence at all. In the absence therefore of a finding by the learned Judge, and it appearing that he had not directed his mind to this phase of the question, the onus which was upon the plaintiff, if my view of the arrangements under which the boom was to be moved is right, to prove negligence or unskilfulness, I think the plaintiff has not made out his case.

It was objected by the appellant that a sketch of the locality purporting to shew the boom at different points in its course, and the position of the tug, and the relation of the boom to the dolphin, and other matters of that kind, ought not to have been admitted; and *Beamon* v. *Ellice* (1831), 4 Car. & P. 585, was cited to us as authority against its admission. I agree that the sketch was inadmissible, but in view of the conclusion to which I have come this ceases to be of importance.

I would allow the appeal, and dismiss the action.

IRVING, J.A.:—The point in dispute was the defendants' negligence in breaking the plaintiffs' rope, or was the rope broken owing to the wind, or other causes. Irving, J.A.

There were four witnesses who were in a position to testify as to the proximity of the boat to the rope, namely, Williams, the defendants' foreman, and Sewell, his assistant, for the plaintiff; and Johnston, the master of the tug, and Cook.

The learned Judge took the view that Johnston was reckless or incompetent, and basing his opinion on Johnston's condition at the trial, suggested that possibly Johnston was drunk. Now, there was no suggestion to or by any of the witnesses that Johnston on that day had been drinking, or exhibited any recklessness.

The result was that having discounted Johnston's evidence in this way, he found in favour of the plaintiff's contention.

B.C.

C. A.
1912

WATTSBURG LUMBER CO. v. COOK LUMBER CO.

Galliher, J.A.

Now, in connection with the weight to be attached to the cause of the breaking of the rope, must be considered the evidence of Houle, but the learned Judge misunderstood what Houle had said, and in that way he rejected his testimony. The total result, in my opinion, brought about a mistrial.

I would order a new trial.

GALLIHER, J.A.:—Whether the finding of the learned trial Judge that the moving of the logs was the consideration for the loan of the boom sticks and chains is borne out by the evidence may be doubtful, in any event the defendants undertook to move them, and would be required to use such care and skill in so doing as a man would use in carrying on the operation in his own business.

Be that as it may, the whole case, in my opinion, narrows down to the manner in which the rope was broken which allowed the logs to drift away from the dolphin to which they were moored.

Williams, the plaintiff's witness, says when the tug brought the boom of logs round and he fastened them with the rope to the dolphin, they were through with the tug, and he gave orders to the captain to throw off his line and back away.

If as Williams and Sewell swear on behalf of the plaintiff, that the tug instead of backing out, steamed forward over the rope and broke it, then the defendants would be liable, but if, on the other hand, as Cook and Johnston on behalf of the defendants assert, the tug did not steam towards, but away from the rope, and was at no time near it, and it was the force of a high wind which had arisen, and the current bringing such a severe strain upon the rope that it broke, then the defendants could not be held liable on the plaintiff's own admission that their work was done when the logs were moored to the dolphin.

I have read the learned trial Judge's judgment carefully to see if he had made any finding on this point, but I am unable to find that he directed his mind to it. Had he done so, I should have felt the greatest hesitation in interfering with that finding, but as he has not, it devolves upon us to consider and weigh that evidence without the advantage of seeing the witnesses in the box.

I think the preponderance of evidence is that there was a considerable squall at that point at the time in question. I attach considerable importance to the evidence of young West. He was born and raised on the lake, and has been working on boats on it ever since he left school, and knows the locality thoroughly, and the conditions attaching to winds there. That is a feature to be taken into consideration in determining the probability as to which story is true.

Two other features seems to me to weaken the probability of the truth of the plaintiff's version.

One is that it seems unaccountable that the captain of a boat would deliberately steam up against or upon a taut rope which was the only thing holding the logs in place when the course was clear for him to pull out without going near the rope; and the other is, how he would get the tug over this taut rope—he might break it by running against it, but both plaintiff's witnesses swear he ran over it.

The trial Judge makes reference to the condition of Captain Johnston at the trial, but there is no suggestion by the plaintiff of anything of that nature on the day in question.

It is not an easy task to decide where there is a conflict of evidence such as here without an opportunity of seeing the witnesses, but I do not think any useful purpose would be served by sending the case back for a new trial.

Considering the evidence in all its aspects, and the conditions as they existed at the time, my conclusion is that the plaintiff's version of the breaking of the rope is not the reasonable one.

As to what took place afterwards in trying to shove the boom across to the bay after it had broken loose, I do not consider it, for what was done was, I think, at the instance of and under the directions of the plaintiff, and against what the captain of the boat considered the best methods to pursue.

Mr. Macdonald, counsel for the defendants, raised a point as to the admissibility of a plan or sketch, and I quite agree with his contention that it should not have been admitted.

I would allow the appeal.

*Appeal allowed.*

**Annotation—Towage (§1—1)—Duties and liabilities of tug owner.** **Annotation**

Towage contracts

The ordinary contract of towage has been defined to be aid in the propulsion of one vessel by the employment of another vessel having within her the motive power which is used to expedite the voyage of the first mentioned vessel which requires the acceleration of her progress through the water: *The "Princess Alice,"* 3 W. Rob. 138. An amplified illustration of this definition is given in *The "Merrimac,"* 2 Sawy. 586; where it was stated that the contract to tow a barge, and her cargo, is one in the line of carriage, or transportation for compensation; and is therefore a bailment of the kind denominated *locatio operis mercium vehendarum*, in which the master of the tug is bailee, and responsible for ordinary skill and diligence; and that the tug is responsible for the navigation of both vessels; and her duties as tower are those of an ordinary carrier for hire; just as if she had the tow on her deck instead of astern at the end of the tow-line. And so when a tug negligently places a tow in peril, and she is thereby lost or damaged, it is no excuse on the part of the tug to allege that the tow might have been saved from such

B.C.

Annotation.

Towage contracts

**Annotation** (*continued*)—**Towage (§ 1—1)—Duties and liabilities of tug owner.**

loss or damage but for a mistake of, or want of skill in, the crew of the tow: *The Montreal Transportation Company* v. *The Ship "Buckeye State,"* 12 Can. Exch. R. 419.

Where a tug engages to tow a vessel, it is her duty to use due diligence and care in regard to it; and if the vessel suffers or is damaged in consequence of negligence on the part of the tug, the tug will be liable. On the other hand, it is also the duty of the vessel being towed to use care and diligence and if the tug is injured in consequence of the negligence of the vessel, the vessel itself will be liable to the tug: *Read* v. *The Tug "Lillie,"* 11 Can. Exch. R. 274.

When a boat engages to tow a vessel for a remuneration the legal principle to be applied is that such boat will use its best endeavours for that purpose and will bring to the task competent skill and such a crew and equipment as are reasonably to be expected in boats of such class, but there is no warranty that the towing will be done under all circumstances and at all hazards: *The "William,"* 4 Que. L.R. 306.

When a contract of towage is made, the law implies an engagement that each vessel, tug and tow, will perform its duty in completing it; that proper skill and diligence will be used on board of each; and that neither vessel, by neglect or misconduct, will create unnecessary risk to the other, or increase any risk incidental to the service undertaken. If, in the course of the performance of this contract, any inevitable accident happen to the one, without any default on the part of the other, no cause of action will arise; such an accident is one of the necessary risks of the engagement to which each party is subject, and creates no liability on the part of the other. If, on the other hand, the wrongful act of either occasion any damage to the other, such wrongful act creates a responsibility on the party committing it, if the sufferer have not, by any misconduct or unskilfulness on her part, contributed to the accident: *Bland* v. *Ross*, 14 Moore P.C.C. 210, *sub nom. The "Julia,"* Lush. 231.

When a tug engages to tow a vessel for a certain remuneration from one point to another, she does not warrant that she will be able to do so and will do so under all circumstances and at all hazards; but she does engage that she will use her best endeavours for that purpose, and will bring to the task competent skill, and such a crew, tackle, and equipments as are reasonably to be expected in a vessel of her class. She may be prevented from fulfilling her contract by *vis major*, by accidents which were not contemplated and which may render the fulfilment of her contract impossible; and in such case, by the general rule of law, she is relieved from her obligations. But she does not become relieved from her obligations because unforeseen difficulties occur in the completion of her task; because the performance of the task is interrupted, or cannot be completed in the mode in which it was originally intended, as by the breaking of the ship's hawser. But if in the discharge of this task, by sudden violence of wind or waves, or other accidents, the ship in tow is placed in danger, and the towing-vessel incurs risks and performs duties which were not within the scope of her original engagement, she is entitled to additional remuneration for additional services if the ship be saved, and may claim as a salvor instead of being restricted to the sum stipulated to be paid for mere towage: *Ward* v. *M'Corkill*, 15 Moore P.C.C. 133, at p. 153, *sub nom. The "Minnehaha,"* Lush. 335.

**Annotation** (*continued*)—**Towage** (§ 1—1)—**Duties and liabilities of tug owner.**

B.C.

**Annotation.**

Towage contracts

In a contract of towage the owners of the tug must be taken to have contracted that the tug should be efficient, and that her crew, tackle, and equipment should be equal to the work to be accomplished in weather and circumstances reasonably to be expected; and that reasonable skill, care, energy, and diligence should be exercised in the accomplishment of the work. On the other hand, they do not warrant that the work will be done under all circumstances and at all hazards, and the failure to accomplish it will be excused if due to *vis major* or to accidents not contemplated, and which rendered the doing of the work impossible: *The "Marechal Suchet,"* [1911] P. 1, at p. 12.

In *The "West Cock"* (1911), P. 208, Farwell, L.J., at p. 227, declared that the rule stated by Lindley, J., as to a contract of carriage, in *Hyman* v. *Nye*, 6 Q.B.D. 685, at p. 687, was applicable to a contract of towage, and proceeded to quote such rule by altering it so as to apply to a tug owner: His duty is to supply a tug as fit for the purpose for which it is hired as care and skill can make it, and if while the tug is being properly used for such purpose it breaks down it becomes encumbent upon the person who has let it out to shew that the breakdown was in the proper sense of the word an accident not preventable by any care or skill, and as between him and the hirer the risk of defects in the tug, so far as care and skill can avoid them, ought to be thrown on the owner of the tug.

For all purposes of their joint navigation, a tug and tow are one ship in contemplation of law: *The "Niobe,"* [1891] A.C. 401, *e.g.*, for the purposes of the regulations: *The "Cleadon"* (1860), 14 Moo. P.C. 92, 97, 15 E.R. 240, though there are exceptions: *The "Lord Bangor,"* [1896] P. 28, *e.g.*, not stopping at once under art. 18. The tug is in the service of the tow; and the tow is answerable for the negligence of her servant, and is for some purposes identified with her: *The "American"* v. *The "Syria"* (1874), L.R. 6 P.C. 127; *The "Englishman and Australia,"* [1894] P. 239, 245. The tug may, besides supplying the motive power, also direct the course, if no directions are given by the tow; but generally the tug, though it is the motive power, is under the control of the master or pilot of the tow: *Smith* v. *St. Lawrence T. Co.* (1873), L.R. 5 P.C. 313; *The "Isca"* (1886), 12 P.D. 34. Under an ordinary towage contract, the tow is therefore liable to third parties for damage caused by the defective equipment of the tug: *The "Belgic"* (1875), 2 P.D. 57, or its wrongful act, unless done so suddenly that the tow cannot control it: *The "Niobe"* (1888), 13 P.D. 55. But if the tug is the governing as well as the motive power, the tow is not liable: *The "American"* v. *The "Syria"* (1874), L.R. 6 P.C. 127; *The "Stormcock"* (1885), 5 Asp. 470; *The "Quickstep"* (1890), 15 P.D. 196. But in all such cases the real question is whether or not the relation of master and servant exists between the owners of the tow and the persons in charge of the navigation of the tug. Unless that relation exists, considerations of expediency cannot avail to impose liability on the owners of the tow: Butt, J., *The "Quickstep," ubi. cit. sup.*, at p. 199. Though the tug is generally the servant of the tow, yet the tow can recover against the tug what she has had to pay for her negligence: *The "Stormcock," ubi. cit. sup.*, at p. 472. In every contract of towage there is an implied obligation that the tug shall be efficient and fully equipped for the service: *The "Undaunted"* (1886), 11 P.D. 46. The tug is bound to use proper

B.C.

Annotation

Towage contracts

Annotation (*continued*)—Towage (§ 1—1)—Duties and liabilities of tug owner.

skill and diligence, and is liable for damage done by her wrongful act or default, unless the towage contract exempts her from liability: *The "United Service"* (1883), 8 P.D. 56 and 9 *ibid.* 3; and a provision in the contract that the tug owners will not be responsible for the default of the master (*ibid.*) or that the master and crew of the tug become for the time being the servants of the tow: *The "Ratata,"* [1897] P. 118, will not release the tug owners from this obligation: 14 Encyc. Laws of England, 143, 144.

Although the policy of the law has not imposed on owners of boats engaged in the business of towage the obligations resting upon a common carrier, it does require in the management of such boats the exercise of reasonable care, caution, and maritime skill, and if these are neglected by those in charge of a towing boat and disaster occurs, its owner is liable for the consequences: *The Steamer "Syracuse,"* 12 Wall. (U.S.) 167.

A tug is not a common carrier and the law of that relation has no application to a contract of towage. Such a vessel is not an insurer. The highest possible skill and care are not required of her. She is bound, however, to bring to the performance of the duty she assumes reasonable skill and care and to exercise them in everything relating to the work until it is accomplished. The want of such skill or care in such cases is a gross fault and the offender is liable to the extent of the full measure of the consequences: *The "Margaret,"* 94 U.S. 494.

A tug is neither a common carrier nor an insurer, and hence the highest possible degree of skill and care is not required of her. On the contrary, the owners of a tug are merely bailees for hire, and, as such, are bound to exercise reasonable skill, care, and diligence in everything relating to the work until it is accomplished; that degree of caution and skill which prudent navigators usually employ in similar services. A tug owner impliedly undertakes to furnish a seaworthy vessel, of sufficient capacity and power, and properly equipped with the necessary fitting and appliances including a proper supply of coal. The tug must also be provided with a sufficient and competent crew, familiar with the channel, its shoals and currents, the state of the tides, the proper time of entering upon the service, and, generally, all conditions which are essential to the safe performance of the undertaking. If the tug is derelict in any of these respects, it is subject to an imputation of negligence, and liable for any resulting damage: 38 Cyc. 562, 567.

The following cases offer some illustrations of the application by the Canadian Courts of the principles of law above discussed, to contracts of towage, as far as the parties thereto are themselves concerned.

A towage company entered into a contract to tow a ship to a certain place where the ship was to be loaded with coal, and, when so loaded, to tow her back to sea, and after the ship was towed to such place and loaded, a tug sent by the agent of the towing company to complete the contract did not have sufficient power to tow the ship, and the agent supplemented that power by sending another towing steamer, belonging to another company, to assist in the towing, and the two tugs together proceeded to tow the ship out to sea, and while being so towed the ship was dragged on a reef and became a complete wreck. The ship had no pilot and those abroad her were strangers to the coast as those in charge of

**Annotation** (*continued*)—**Towage** (§ 1—1)—**Duties and liabilities of tug owner.**

B.C.

Annotation.

Towage contracts

the tugs knew. The night of the accident was light and clear, the tugs did not steer according to the course prescribed by the charts and sailing directions, and there were, on the other side of the course they were steering, many miles of open sea, free from all danger of navigation, and the ship was lost at a spot plainly indicated by the sailing directions, although there was evidence that the reef was unknown. It was held, in an action for damages for negligently towing the ship and so causing her destruction, that, as the tugs had not observed those proper and reasonable precautions in adopting and keeping the courses to be steered which a prudent navigator would have observed, and as the accident was the result of their omission to do so, the owners of the tugs were jointly and severally liable: *Sewell* v. *British Columbia Towing and Transportation Co.*, 9 Can. S.C.R. 527. In reply to the contention that as the owners of the assisting tug had no contract with the plaintiffs the latter had no right of action against them, Mr. Justice Strong, said, that, while it was true there was no privity of contract between them, yet the law implied a "duty, in cases like the present, on the part of those who undertake to perform services which involves the personal property of others being placed in their power and control, that they will execute their employment with due and reasonable care."

The owners of a barge brought an action *in personam* against a towing company for a breach of a contract of towage resulting in damage to the barge, and, in the same action, brought proceedings *in rem* for the same damage against the tug which did the towing, though it did not belong to the towage company but to a third person from whom the towing company secured it for the purpose of towing the plaintiff's barge. The trial Judge gave judgment against the tug, but held the towing company not liable, upon the principle that, if the tow was damaged by the unskilful navigation of the tug, the relation between tug and tow "is not so much that which arises directly from the contract of towage, but rather that which imposes a duty on the part of the tug towards the barge, to observe such ordinary care and skill in the towage as will avoid any possible damage or injury:" *The Montreal Transportation Company, Limited* v. *The Ship "Buckeye State,"* 12 Can. Ex. Rep. 419. Upon appeal Mr. Justice Cassels declared that he could find no authority justifying the joinder of the two causes of action—*in personam* and *in rem*—against separate parties, and enunciated what he deemed the true rule in the following language: "The proper course would have been to complete the proceedings *in rem*, and if it appeared that the amount of the damages fixed by the judgment was not recovered against the tug, then, if the Montreal Transportation Company are legally liable, an action against them *in personam* for the difference between the amount recovered, and the damages as fixed by the judgment," citing *The "Orient,"* L.R. 3 P.C. 696, and *The "Zephyr,"* 11 L.T. 351. The learned justice in conclusion stated that, inasmuch as no objection was taken to the misjoinder of the parties, it would be unjust to give effect to any objection on that ground at the stage the case had then reached, but that the judgment should be varied by reserving, among other things, the question of the liability of the towing company until it could be ascertained if the amount of the damages fixed by the judgment

B.C.

Annotation.

Towage contracts

**Annotation** (*continued*)—**Towage (§ 1—1)—Duties and liabilities of tug owner.**

below had been realized against the tug: *The Atlantic Coast Steamship Company* v. *The Montreal Transportation Company*, 12 Can. Ex. R. 429.

A tug was held liable for an injury to her tow resulting from the latter's collision with another vessel, where it appeared that after the tug had gone ahead at full speed in accordance with the order of the master of the tow, it was discovered on the tug that the tow line had been thrown over the wrong post and the tug slackened her speed to allow it to be shifted to the right one, resulting in the tow drifting against another vessel, causing the damage for which the suit was brought: *The "William,"* 4 Que. L.R. 306.

Under a contract to tow a barque to Quebec thence to Montreal and back to Quebec the owners of the tug after having towed the barque to Montreal cannot transfer the contract to another person to complete it with an inferior tug which was also to tow two additional tugs, the tug being inadequate for the work: *The "Euclid,"* 7 Que. L.R. 351.

It is no defence to an action for failure to perform a towage contract that the tow boat was frozen in the ice where the defendant fails to shew that his boat was at the time necessarily at the place where it was frozen in: *Dorland* v. *Bonter*, 5 U.C.Q.B. 583.

Recovery was denied the owners of a vessel in an action by them for damages thereto happening while the defendants were towing it, where it appeared that while proceeding up a river the pilot of the tug and the pilot of the tow were both at fault in not having the course changed after a certain point in the river, though the pilot of the tow afterwards discovered the mistake and gave notice to the tug to change the course by executing the proper manœuvre for that purpose, but not until it was too late to avoid an accident which befell the tow: *The "Prince Arthur"* v. *The "Florence,"* 5 Can. Exch. R. 218.

The owners of a tug cannot be held liable for injury to the tow due to an inevitable accident such as being struck by a sudden squall of wind and forced on shore while making a sudden turn at a critical point in a river, where the tug was sufficiently powerful for the work and was properly managed by its crew: *Atwood* v. *Cann*, 40 N.S.R. 136.

A tug has the right to cast off her tow, in stress of weather, when, owing to the strength of the wind and the amount of sail the tow was carrying, it was overrunning the tug which was therefore in danger of being run into and damaged by the tow, and in such case the tug will not be liable for damage resulting from a subsequent collision of the tow with another vessel, all the precautions required of a ship in full sail not having been taken by the tow: *The "Loyal"* v. *The "Challenger,"* 14 Que. L.R. 135.

Where a mate of a ship, which, though afloat, was in a very leaky condition from having been stranded, contracted, without authority, with the master of a tug to have the ship towed, under a belief on the latter's part that the mate was the captain of the ship, and the mate by his conduct confirmed this belief, and also concealed the dangerous condition of the ship from the tug master when the contract of towage was made, the agreement is void and the owner of the tug is entitled to recover on a *quantum meruit* for extraordinary towage services: *Dunsmuir* v. *The "Harold,"* 4 Can. Exch. R. 222.

**Annotation** (*continued*)—**Towage** (§ 1—1)—**Duties and liabilities of tug owner.**

B.C.

Annotation.

Towage contracts

It was held to be a towage and not a salvage service where it appeared that at the request of the captain of a steam vessel whose fires had been extinguished for the purpose of permitting her engineer to make repairs to her boiler, made necessary by a slight accident thereto, such vessel was towed by another ship for a period of thirty hours in the ordinary channel of navigation at a time when the sea was calm and the weather fine, and neither ship was in a position of danger at any time during the towing, and the crew of the towing vessel were at no time in peril by reason of the services rendered the disabled ship: *Hinc* v. *The "Thomas J. Scully,"* 6 Can. Exch. R. 318.

Attention should be called to a case in which recovery was allowed in the Yukon Territorial Court for the loss of a scow and its cargo while being towed by a steamer which had been previously engaged in carrying passengers and freight, on the ground that the defendants were common carriers. It appeared that when the contract of towage was entered into the steamer was on her way to winter quarters in charge of the engineer and that he, at the request of the owners of the scow, agreed to tow it for a specified remuneration. Upon appeal, a new trial was granted because, apparently, of the lack of evidence of the authority of the engineer to enter into towage contracts: *Courtenay* v. *Canadian Development Co.*, 8 B.C.R. 53.

---

## SARNIA GAS AND ELECTRIC LIGHT CO. v. SARNIA.

ONT.

H.C.J. 1912

June 20.

*Ontario High Court, Riddell, J. June 20, 1912.*

1. EMINENT DOMAIN (§ I D—52)—RIGHT OF MUNICIPALITIES TO EXPROPRIATE ELECTRIC LIGHT AND GAS WORKS—THE MUNICIPAL ACT (ONT.) 1903, 3 EDW. VII. CH. 19.

The Municipal Act of 1903, 3 Edw. VII. ch. 19, as amended, does not confer power upon a town to acquire *"in invitum"* by arbitration and expropriation proceedings a plant owned by a company organized for the manufacture of gas and electricity.

2. COSTS (§ I—19*a*)—COSTS OF A SPECIAL STATED CASE FOR OPINION—DISPOSAL BY JUDGE STATING THE CASE.

Where a special case is stated in a pending action for the opinion of the Court on a preliminary question of law arising therein, the practice is for the costs of the hearing of the special case to be disposed of by the judgment in the action and not at the hearing of the stated case unless the question of costs was also referred and ordered to be then disposed of.

[*Atty.-Gen.* v. *Toronto General Trusts Corporation* (1903), 5 O.L.R. 607, referred to.]

A SPECIAL case stated for the opinion of the Court.

Statement

The plaintiffs had their origin in a declaration filed in 1878, under R.S.O. 1877 ch. 157, whereby they became, under sec. 5, a body corporate for twenty years, under the name of "The Sarnia Gas Company," with the object of supplying the town of Sarnia and its suburbs with gas for illuminating purposes. In that year a by-law was passed by the town council permitting the company to lay down pipes, etc.

ONT.

H. C. J. 1912

SARNIA GAS AND ELECTRIC LIGHT CO. v. SARNIA.

Statement

In 1880, there was a further incorporation for fifty years, under the same Act. Under that the company were to supply electricity, as well as gas.

Various by-laws and statutes affecting the company were passed in successive years. See 44 Vict. ch. 56; 53 Vict. ch. 133; 2 Edw. VII. ch. 61; 3 Edw. VII. ch. 80.

The statute 56 Vict. ch. 105 changed the name of the company to "The Sarnia Gas and Electric Light Company."

Since the 1st January, 1910, the plaintiffs had wholly discontinued the manufacture and supply of artificial gas.

On the 21st August, 1911, a by-law was passed by the town council providing that $125,000 should be offered to the plaintiffs for their works and property. The plaintiffs refused this; and proceedings were taken for an arbitration. The plaintiffs objected to the proceedings; and brought this action on the 2nd February, 1912. The case was stated in the action.

*I. F. Hellmuth*, K.C., *W. J. Hanna*, K.C., and *R. V. Le Sueur*, for the plaintiffs.

*E. F. B. Johnston*, K.C., and *J. Cowan*, K.C., for the defendants.

Riddell, J.

RIDDELL, J. (after setting out the facts and referring to the statutes and by-laws):—The main question in the case is, whether, even if an award be made under the Municipal Act, the town can take the works and property of the company. If this be answered in the negative, there is, I am informed, no need of answering any further.

The statute is the Municipal Act of 1903, 3 Edw. VII. ch. 19, sec. 566, sub-secs. 3, 4. Before the Act of 1899, 62 Vict. (2) ch. 26, sec. 35, which introduced what are known as the Conmee clauses, sec. 566, sub-sec. 4, read thus: "By the councils of cities and towns:—For constructing gas and water works and for levying an annual special rate to defray the yearly interest of the expenditure therefor, and to form an equal yearly sinking fund and for the payment of the principal within a time not exceeding 30 years, nor less than 5 years." Then followed (*a*), providing for the case of a water company incorporated for the municipality, and that the council should not levy water rates before offering the company a price for the works or stock of the company, etc., etc. No provision was made for the case of a gas company.

This was amended by 62 Vict. (2) ch. 26, sec. 35, giving power to cities, towns, and villages to construct gas, electric light, or water works, and introducing the provision, "in case there is any gas, electric light or water company incorporated for or in the municipality," to be found in the present Act. The amendments of 63 Vict. ch. 33, sec. 29, and 2 Edw. VII. ch. 29, sec. 20, I pass over as immaterial on the present inquiry.

The defendants contend that they have the power under the statute, upon an arbitration being had and the price paid or secured, to take the works and property of the company, or some of it: sec. 566, sub-secs. 4, (a4).

It is argued for the plaintiffs that they are not "a gas, electric light, or water company incorporated for or in the municipality." I do not proceed upon that ground, but upon the general ground that nowhere is there given to the municipality a right of expropriation.

From personal knowledge, I am able to say that the intention, of some at least of those who were interested in the passing of the Act of 1899, was solely to protect the companies already in operation. It was thought unjust for a municipality to start opposition with a private enterprise without giving the owners of the enterprise an opportunity of "getting from under"—it was not intended to give the municipalities a power they had not theretofore had of taking away the business directly from its owners.

Of course we must determine the meaning of the legislation not by what we may know or surmise of the meaning and intention of the legislators, or some of them, but by the meaning of the language which is employed.

It is trite law that a man's property is not to be taken from him except by legislation of the clearest character. Here there is no legislation at all indicating that the property can be taken in invitum. What is provided for is, that no rate shall be struck or works constructed by the municipality until the company has had a chance of getting out with 10 per cent. over and above the value of their works and property as they stand: sec. 566, sub-secs. 4, (*a*2), (*a*3).

The only penalty upon the company is, that the municipality may go on and run a competing business—if the shareholders are ratepayers, they will know that their own money is being used to build up a business competitor.

The question of costs is not left to me, and the practice is not for the Judge hearing the "special case" to decide as to costs—that may be done in the action: *Attorney-General* v. *Toronto General Trusts Corporation* (1903), 5 O.L.R. 607.

I do not deal with the many other questions raised, more or less interesting, more or less important.

*Judgment accordingly.*

ONT.

H. C. J.

1912

May 18.

## ONTARIO ASPHALT BLOCK CO. v. COOK.

*Ontario High Court, Middleton, J. May 18, 1912.*

1. EVIDENCE (§ II L—345)—PAYMENT AS A DEFENCE.

The fact of payment is and always has been a matter of defence, the onus of proving which is upon the defendant.

2. EVIDENCE (§ II L—351)—ONUS OF PROVING RECEIPT OF MONEY OTHER THAN THAT ACCOUNTED FOR.

Apart from the fact that no surcharge was filed by the defendant as the Rules require, the onus rests upon him of shewing that the plaintiff, a creditor, who was suing for a balance due him, and who had taken over and completed a contract the defendant had with a town, had received more money therefrom than he had accounted for.

Statement

AN appeal by the defendants from the report of the Master at Welland, to whom, by the judgment of LATCHFORD, J., it was referred to ascertain the state of accounts between the plaintiffs and the defendant B. A. Cook, and between the plaintiffs and the firm of Langley & Cook or the agent or agents of that firm.

The appeal was dismissed.

*F. W. Griffiths*, for the defendants.

*D. L. McCarthy*, K.C., for the plaintiffs.

Middleton, J.

MIDDLETON, J.:—The pleadings are not before me; but from what was said, I infer that the action is one to set aside certain conveyances; and the reference is for the purpose of ascertaining whether the plaintiffs were creditors, and, if so, the amount of the indebtedness to them. The judgment provides that the trial shall stand adjourned until after the Master shall have made his report.

Pursuant to this judgment, the parties went before the Master, and the plaintiffs brought in accounts based upon a number of different transactions or contracts, in pursuance of which they had supplied the firm of Langley & Cook with asphalt block and other materials, and giving credit for various sums of money received on account. These accounts were verified by the affidavit of one Carson, the bookkeeper in charge of the plaintiffs' accounts during the period in question. Mr. Carson was not cross-examined upon this affidavit, and no surcharge or falsification was filed; but a document called "requisitions" appears to have been lodged in the Master's office. This document states shortly the defendants' contention with respect to the different accounts. With reference to one particular section of the account—that called "St. Boniface Job No. 2"—the statement is made that the plaintiffs themselves took over and completed this contract, and must give a complete account of all moneys received and paid out in connection therewith.

Upon return of an appointment to hear and determine, Mr. Fleming, the secretary-treasurer of the company, was called,

and it was made to appear that a judgment had been recovered against Langley & Cook for some $4,000; and it was stated that this covered only a portion of the indebtedness, which, as shewn by the accounts, amounted to upwards of $16,000. Counsel for the defendants then cross-examined Mr. Fleming at length as to different items in the account; and, when the St. Boniface transaction was reached, it appeared that an assignment had been made by Langley & Cook to the plaintiffs of the money supposed to be due by the Corporation of the Town of St. Boniface, and that the work done by Langley & Cook was not in accordance with the contract, and that the plaintiffs had received from the town corporation as much as they were willing to pay, and had given credit for the money received. One Bangham, formerly in the employ of the plaintiffs, had assisted Langley & Cook in the second contract with the municipality, and appears to have had some contractual relationship with Langley & Cook; but the agreement between him and that firm was not filed.

After this, Carson, the bookkeeper, was sent to St. Boniface to assist in the adjustment of the accounts with the municipality. The town corporation required wages to be paid, as Langley & Cook had deserted the contract; and it is suggested that part of the moneys passed through Carson's hands. It is not made to appear that he received any more money than was transmitted to the plaintiffs, for which credit is given. It is suggested that the municipal accounts shew that he received some larger amount, and out of it paid the wages; but this is mere suggestion; it is not proved. See questions 154 to 157. Carson is not now available, and the defendants have tendered no evidence whatever going to shew that Carson received a dollar more than the amount for which credit is given.

The defendants now appeal upon several grounds, but before me only argued that relating to the moneys said to have been received and disbursed by Carson; counsel for the defendants stating that the onus was not upon him to attack the account.

In this I think he is entirely in error. I think that the onus is upon him to shew that the plaintiffs have received more than the amounts for which credit has been given. Payment is and always has been a defence; and the onus is upon the defendants; this quite apart from the fact that no surcharge has been filed, as required by the Rules; and possibly, according to strict practice, this issue was not open before the Master. No application is now made for indulgence; the defendants being content to base the appeal entirely on what they concede to be their strict rights.

The appeal is dismissed with costs.

*Appeal dismissed.*

MAN.

K. B.

1912

April 1.

## McLAWS v. WELLBAND.

*Manitoba King's Bench, Prendergast, J. April 1, 1912.*

*Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron, and Haggart, JJ.A. May 9, 1912.*

1. SOLICITORS (§ II B—29)—RELATION TO CLIENT—AUTHORITY TO PAY OFF REGISTERED JUDGMENTS—REIMBURSEMENT.

Where the plaintiff was acting as solicitor for the defendant and in the course of doing the latter's legal business paid certain registered judgments against his client, in order to enable him to transfer certain property that he desired to sell, the solicitor is entitled to be reimbursed for the money paid by him to discharge the judgments on proof of instructions to pay the judgments.

Statement

ACTION for reimbursement of money alleged to have been paid for defendant at his request.

In June, 1908, McLaws, who was acting as solicitor for T. R. Wellband, paid two judgments, one for $500 and another for $805, which had been recovered by the Colonial Investment Company and William Smith against T. R. Wellband, and he registered discharges of the judgments.

The plaintiff claimed he made these payments under the implied authority of doing all legal business for the defendant, and also under a request made in correspondence between the parties. Certificates of these judgments had been registered, and they were paid off so as to enable Wellband to transfer properties which he desired to do.

Plaintiff had received $450 on account of the payments made, and the defendant denied his liability for the balance on the ground that the plaintiff had no authority to pay the judgments in question.

*G. A. Elliott*, and *M. G. Macneil*, for plaintiff.

*C. P. Fullerton*, K.C., and *J. P. Foley*, for the defendant.

Prendergast, J.

PRENDERGAST, J.:—Considering the general course of dealings between the parties; the correspondence between them, the date of the discharges and of the transfer of the Beverley Street property, I have come to the conclusion that there was authority on the plaintiff's part to pay the judgments in question.

There will be judgment for plaintiff as claimed, with costs.

C. A.

May 9.

May 9, 1912. THE COURT OF APPEAL dismissed with costs an appeal from the above decision.

*Judgment for plaintiff.*

## TOAL v. RYAN.

ONT.

*Ontario High Court, Riddell, J. May* 14, 1912.

H. C. J. 1912

May 14.

1. EVIDENCE (§ II E 5—172)—TESTAMENTARY CAPACITY—STATEMENTS OF TESTATOR IN HIS LIFETIME.

Statements made by a testator in his lifetime were admitted on the contest of a will, as they bore, or might bear on the question of his capacity to make a will and of its due execution.

[*Suller* v. *Saddler*, 3 C.B.N.S. 87, 99, referred to.]

2. WILLS (§ I D—36)—DEGREE OF MENTAL CAPACITY.

One who knew and appreciated that he was making a will, the effect thereof, the property possessed by him, and how he disposed of it, as well as those who had claims upon him, was competent to make a testamentary disposition thereof.

3. WILLS (§ I B—26)—EXECUTION OF WILL—PRESENCE OF PARTIES—SIGNATURE OF ATTESTING WITNESSES.

Where a will was drawn according to the suggestions of a testator, who was mentally competent and not unduly influenced in making it, and was signed by him in the presence of two witnesses, and by them signed in the presence of the testator and in the presence of each other, it was legally executed under Ontario law.

4. COSTS (§ I—16a)—PLEAS SUBMITTING RIGHTS TO COURT—COSTS AGAINST UNSUCCESSFUL PLAINTIFF.

Where an action for the revocation of the probate of a will raised the question of testamentary capacity and certain of the next of kin joined as co-defendants with the executor filed pleas merely submitting their rights to the Court, they will properly be refused their costs against the unsuccessful plaintiff if, notwithstanding their formal pleading, they made common cause with the plaintiff at the trial.

Statement

ACTION for a declaration that a will made by Susan Ryan, deceased, was invalid and for revocation of the letters probate thereof.

The action was dismissed.

*T. G. Meredith*, K.C., for the plaintiffs.

*E. Meredith*, K.C., and *W. R. Meredith*, for the defendant Ryan.

*N. P. Graydon*, for the defendants D. J. Toal and Mrs. Fisher.

*F. P. Betts*, K.C., for the infants.

Riddell, J.

RIDDELL, J.:—Susan Toal had married one McC., and he had left her a farm, etc., when he died in 1885. She married the defendant Ryan in 1889. In 1910, being then a woman of 58 or 59, and suffering from arterial sclerosis, she was, in September or November, taken violently ill with convulsions. She recovered, but not completely or lastingly; and, in July, 1911, took to her bed. The disease, sclerosis, was, of course, quite incurable, as she knew. In September, 1911, her father thought and said that she should make a will; and Richard Code, an unlicensed conveyancer (the best friend of the solicitor), was sent for. He drew up a will, which was signed by Susan Ryan, and was admitted to probate by the Surrogate Court of the County of Middlesex on the 17th October, 1911.

ONT.
H. C. J.
1912
TOAL
v.
RYAN.
Riddell, J.

The father and one of the nephews of the testatrix bring this action, alleging want of testamentary capacity, undue and improper influence by William Ryan, the husband, and non-execution in the manner prescribed by law—and they ask that the will be declared of none effect and probate revoked.

The defendants are the husband, against whom the attack is made, and the next of kin, etc., who submit their rights to the Court (in form), but who really take part with the plaintiff.

The will leaves everything to the husband except small legacies to certain relatives.

No evidence was given of anything approaching undue influence, and that was not pressed in argument. The two matters are, (1) capacity, and (2) execution.

Much evidence was given of statements made by the deceased. These were objected to, but I admitted them (subject to the objection), as they bore or might bear upon the question of capacity and the factum of the will: *Sutton* v. *Saddler*, 3 C.B.N.S. 87, 99.

Whether these statements be admitted or not is, in the present case, immaterial. I am perfectly satisfied that the testatrix was competent to make a will, and so find.

And while, on the evidence of Code, it might be doubtful how far it was established that all due formality was observed in the making of the will, that doubt is removed by the evidence of the nurse, Miss Hoy—whose evidence at the trial is to be fully credited. I do not find that any of the witnesses was not trying to tell the truth: Code was confused and "mixed" upon cross-examination; and the plaintiff's witnesses were anxious and rather extreme. But Miss Hoy's evidence at the trial was most satisfactory, notwithstanding the document she gave Mrs. Fisher previously.

I find that the deceased knew that she was making a will, knew its effect, and knew what property she had, and how she was disposing of it, knew those who had claims on her, and appreciated all these. The will was drawn according to her instructions and as she wished it; it was signed by her in the presence of the two witnesses as her will, and by them in her presence and in the presence of each other at the same time, etc.; also that there was no undue influence.

All due formalities being observed, the testatrix being competent, and no undue influence being used, the will is valid.

The action will be dismissed with costs payable by the plaintiff to the defendant Ryan and the Official Guardian. The costs of the other defendants I do not order to be paid by the plaintiffs—they are in common case. If the Official Guardian cannot make his costs out of the plaintiffs, he may receive them from the legacy to the mother of the infants.

*Action dismissed.*

B.C.

C. A.

1912

April 1.

## FORMAN v. RYAN.

*British Columbia Court of Appeal, Macdonald, C.J.A., Irving and Galliher, JJ.A. April 1, 1912.*

1. WILLS (§ I D—36)—MENTAL CAPACITY—EXECUTION BY FEEBLE OLD MAN—PROCEEDINGS IN LUNACY.

Where the evidence does not shew that the testator when making his will was under any insane delusion nor that he had such weakness of intellect and mental decay as to destroy testamentary capacity, the will should not be refused probate on the ground of incapacity, because it appears that the testator was a feeble old man, 79 years of age who was found a few months later to be suffering from senile dementia and was declared incompetent in lunacy proceedings taken for the purpose of placing some one in authority to provide necessary care and nursing for him.

Statement

AN appeal by the plaintiff from the judgment of Clement, J., *Forman* v. *Ryan*, 19 W.L.R. 212, in an action to establish a will. The trial Judge held that the testator was not mentally competent to make a will and dismissed the action.

The appeal was allowed.

*A. E. Bodwell*, K.C., for appellant.

Messrs. *A. E. McPhillips*, K.C., and *A. D. Crease*, for respondents.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—This action was brought to propound an alleged will made by James Boyd, who died in April, 1910, at the age of about eighty years, leaving an estate then valued at about $16,000. Probate was resisted on two grounds, that the testator lacked mental capacity to make the will, and that the will was obtained by undue influence by the principal beneficiary, Mrs. Cook. There is to my mind no evidence at all of undue influence. The real issue, therefore, in this appeal is as to the mental condition of the deceased at the time he made the will in September, 1909. The learned Judge gave very careful attention to the case, and came to a conclusion against the soundness of mind of the testator. As I have come to a contrary conclusion, I feel I ought to state my reasons. As the evidence is very voluminous I shall not attempt to do more than refer to what I regard as the most salient facts.

The case is somewhat complicated by proceedings taken in lunacy in January, 1910. Two of the most important witnesses in support of the will were Dr. Nelson, who was the medical attendant of the testator for at least a year before his death, saw him very frequently indeed, and gave evidence at the trial that the deceased was sound in mind up to at least December, 1909, three months after the making of the will, and the executor thereof, James Forman, who was his financial agent, who drew the will and was therefore able to speak of the testator's condition at the time of its execution. These witnesses made affidavits in the lunacy proceedings, which are to some extent at least in conflict with their evidence at the trial. It therefore

B.C.
C. A.
1912
FORMAN
v.
RYAN.
Macdonald, C.J.A.

becomes necessary to consider under what circumstances the evidence was given in each case. The lunacy proceedings were referred to during the argument as "a friendly conspiracy," and I am inclined to think that that term very aptly describes them. It may be useful to state briefly how matters stood when these proceedings were commenced.

Witnesses on both sides agree that James Boyd was always miserly and penurious, and as one witness described him "cantankerous." Up to July, 1908, it is not disputed that he was of sound mind. Ledingham, one of the witnesses against the will, says that it was in July of that year that he noticed a change in him, physically and mentally. The illness of 1905, referred to by the learned Judge, left the deceased physically more feeble and less active, particularly on his feet, than he had been before, but he was able to take care of himself, living alone as he was, and preparing his own meals, until August, 1908, when he requested Mrs. Ledingham, a next door neighbour, to bring him his meals. In November of that year, he had another illness and Dr. Nelson was called in to attend him. The principal trouble was dysentery and a hernia, and the doctor thought that he was threatened with paralysis. It was about this time that the beneficiary under his will, Mrs. Cook, first took charge of him. It was she who called in Dr. Nelson, and attended to his wants until he had somewhat recovered from the severity of his disorder in February, 1909. In the latter month Boyd went to live with an old friend, James Smith, no relative of the family or connection of defendant Smith. He remained at Smith's house until about 20th March, when he quarrelled with Smith, apparently because the Smiths had been persistently urging him to make a will in which I infer they expected to be beneficiaries. He was from there taken to St. Joseph's Hospital, but either would not stay there or the hospital authorities would not keep him. I infer that he made it so unpleasant, and it was so apparent that he was not an hospital patient in the ordinary sense, that he was sent away. He was then induced to enter the Old Men's Home, but becoming displeased with the manner in which he was treated, he was sent away. The superintendent of the institution, very harshly as it seems to me, sent him to the police station to get rid of him. He was then taken home, and Mrs. Cook undertook the care of him from that time until November, when she herself was taken ill. During this period between March and November, 1909, Mrs. Cook attended him daily at his own house, and saw that his wants were supplied; and during that time while receiving proper care and nourishment, he appears to have been in about the condition of mind one would expect in a man of his age and feeble physical health. He could go about with Mrs. Cook, call on neighbours, chat with friends, and talk intelligently about municipal politics in which he had always been very much interested.

B.C.
C. A.
1912
FORMAN
v.
RYAN.
Macdonald, C.J.A.

The period of time with which I am principally concerned is therefore from July, 1908, to Boyd's death in April, 1910. In the beginning of 1909, Boyd sent for R. T. Elliott, K.C., for the purpose of discussing with him his worldly affairs. Mr. Elliott had known Boyd about ten years previously, but had forgotten him. Boyd, however, remembered Mr. Elliott and remarked upon the fact that he had grown stouter since he had previously known him. At that time Boyd was ill, but Dr. Nelson says his mind was quite sound. Mr. Elliott entered into conversation with him, and found that he wanted to be advised as to the law governing the disposition of property by will. He spoke of having relatives in Ireland, but said they were not dependent upon him. He wanted to know if he could give his property without recognizing his relatives; he had some notion of giving bequests to charity, and stated that he wished to remember Mrs. Cook, who had been very kind to him, and also indicated without mentioning any names that he might remember the Ledinghams. Mr. Elliott found him quite intelligent, and could detect no symptoms of unsoundness of mind, although he says he relied a good deal upon the assurance of Boyd's medical attendant that he was in a fit condition mentally and physically to discuss matters of business. Prior to that time Boyd had discussed making a will with his old friend Alexander Wilson, whose evidence I shall refer to more particularly hereafter, and asked Wilson to be his executor. Wilson says Boyd had told him he had no relatives, in fact had insisted on it, and it is suggested to us that this was an insane delusion. I think that is met by the evidence of Mr. Elliott and other witnesses, which shews that he was under no delusion at all with regard to his relatives, but simply wished to put them aside. Mr. Elliott was not asked then to prepare a will, but in April, Boyd went to his office for the purpose of having his will made. He said to Mr. Elliott that he had come to see him again about the will, and wanted him to write it. Of this occasion Mr. Elliott said in evidence:—

> He kept strictly to the matter in hand from the talk I had at the house. He did not vary a hair's breadth. Of course he was sick and an old man, but he saw what he wanted to do with his property.

On Boyd's instructions Mr. Elliott drew his will giving all he had to Mrs. Cook. After it was read over to him he said he would like to take it away and give it further consideration, which he did. This will was never executed.

I would like to remark here that a good deal of argument was directed to the lack of discussion between Boyd and Mr. Elliott on this occasion with regard to how he should dispose of his property. It seems to me that that circumstance was not at all significant bearing in mind the previous interview and discussion. It was in April that this will was drawn by Mr. Elliott, and nothing more was done by Boyd until September, when he

B.C.

C. A.

1912

FORMAN v. RYAN.

Macdonald, C.J.A.

went to Mr. Forman, whose firm had attended to Boyd's business for a number of years, to have his will made. Mr. Forman questioned him as to what he wished to do with his property, and to whom he wished to leave it. Boyd mentioned Mrs. Cook. He was asked if he had any relatives, and he said that his relatives were nothing to him. He mentioned his sister. Mr. Forman asked him if he would like to leave something to her, and he "agreed" to leave her $1,000. The will was not drawn on that day, Boyd saying he was not ready to sign it, but would come back the next day. He came back, and Mr. Forman says he further pursued the conversation with him of the day before, and asked him further if he did not want to leave something to charity. He does not remember his answer, but says he agreed to leave something to the Protestant Orphans' Home and the Jubilee Hospital. When asked if Boyd himself named these charities, Mr. Forman said:—

> I do know that he mentioned the orphanage in connection with the late Mr. Taylor, apparently a friend of his,

and it was Boyd himself who named the sum he would give to his sister.

Mr. Forman had known Boyd for years, and he says he was not at the time of the execution of the will mentally different from what he had ever been; he was very feeble, physically more feeble than usual. Before executing the will Boyd went to the two banks in which his moneys were deposited, to ascertain the balance at his credit, and after its execution, but on Forman's suggestion, deposited the will with one of his bankers, telling him what it was and to take good care of it. There is no question about all this, because the bank manager and clerks who gave him the information were called.

There is considerable other evidence of independent persons having no interest in the result to shew that he was quite capable of recognizing and talking sensibly with his friends. In one case, that of Cameron, whom he had not seen for a number of years, in fact, since he was a boy, and who had been in the Yukon for several years, when told who he was, Boyd recollected circumstances of the man's youth clearly and distinctly, spoke of his father, and inquired how he was getting on in the north.

Some stress was laid upon the fact that small cheques sent to Boyd by Mr. Forman for rents in the early part of 1909 had not been deposited by him, but kept in his possession, and that upon Forman calling his attention to the fact, all cheques were given back to Forman, and an arrangement made that cheques should not be sent thereafter, and that Boyd should get money from Forman when he wanted it. This was relied upon as evidence that he was unable to transact his business and look after his property, but when his physical condition is remembered, I do not see that that circumstance is of much importance. A

man in his condition could not safely go about the down-town streets.

About the end of November, 1909, Mrs. Cook became so ill as to be unable to attend to Boyd, and Dr. Nelson procured a male nurse, Orton. Boyd soon quarrelled with him, and accused him of ill-treating him. While I do not wish to reflect unduly upon Orton, I think there is some evidence, even in Orton's own testimony, that he used him harshly, and without that gentleness and consideration that the age and feebleness of Boyd required of him. At this time Dr. Nelson and Mr. Forman were in a quandary to know what to do. Neither the hospital nor the Old Men's Home, a home for destitute old men, was a suitable place for him. He objected to Orton being in his house to take care of him, and as it was apparent that he was nearing his end, something had to be done, so that his money could be legally expended for his care, and the expedient was adopted of taking proceedings in lunacy to have a guardian appointed. I therefore come back to the conflict which I mentioned in the beginning between the statements made in the affidavits in lunacy and at the trial by Dr. Nelson and Mr. Forman. The only statement I think it necessary to refer to in the affidavits of Nelson and Forman is that Boyd "has been for some months past feeble both in mind and body and is afflicted with senile dementia which is gradually becoming more acute." In these proceedings Boyd was examined by two other physicians—Fraser and Hall—who both state that Boyd was then (in the month of January, 1910) suffering from senile dementia. The examinations made by them were, I think, somewhat perfunctory. Neither of them was able to remember at the trial what questions he asked and what answers he received, but they concluded that the man was in the condition I have mentioned. Dr. Hall expressed at the trial no settled opinion as to whether or not the disease existed in September. Dr. Fraser was of the opinion that it had existed for some time, but he fixed no time, but says that it was a progressive disease, and that he thought Boyd was in the intermediate stage in January. Neither of these witnesses are specialists in mental diseases. Their evidence is of no great assistance otherwise than as shewing that senile dementia was present in January, 1910. Senile dementia is an incurable disease, we are told, and its duration is different in different patients. Had Boyd died of this disease, perhaps it could be assumed that its duration in his case was longer than from December to April; but he died of progressive paralysis and old age, and while senile dementia may also have been present and contributed to death, still there is nothing shewn in evidence which entitles me to say that deceased had any mental disease prior to December. Dr. Nelson was confronted at the trial with his affidavit affirming the statement above quoted, and

B.C.

C. A.
1912

FORMAN
v.
RYAN.

Macdonald,
C.J.A.

containing the words "for some months past" and asked to harmonise it with his statement at the trial that there were no symptoms of senile dementia before December. I think his explanation is one which I ought to accept, bearing in mind the circumstances in which the affidavit was made. The doctor says he did not notice the significance of the phraseology and did not intend to state that that condition existed for some months past.

As supporting the contention that the lunacy proceedings were taken for what was really an indirect purpose, I would point out that they were entirely irregular, Boyd not having been served with a copy of the petition nor examined by the Judge, as the Act requires. As between statements made in that inquiry and evidence given at the trial of this action, tested by cross-examination and founded upon most careful consideration and knowledge, I have no doubt which I ought to accept. There is no question of the competency of Dr. Nelson to speak of the condition of Boyd's mind, not only in December and January, but also for more than a year prior thereto, in fact, for the whole period during which it was contended that Boyd was wanting in testamentary capacity. Now, there is no suggestion that Dr. Nelson is not a reputable medical practitioner of good standing in the community, and the same is true in his business of Mr. Forman. Am I, therefore, to reject as not worthy of credit the well-considered evidence of these witnesses at the trial because carelessly or inadvertently or good naturedly, or without thoroughly understanding the affidavits, they made statements in the lunacy proceedings somewhat inconsistent with their evidence at the trial? I think not.

The other witnesses called in support of the testator's capacity appear to me to have appreciated the obligations they were under to give evidence thoughtfully and without prejudice. Mrs. Cook's evidence impresses me most favourably, notwithstanding her very great interest in the result of the litigation. I am unable to come to any other conclusion on the evidence in support of the will, if believed, and it cannot be suggested that it should not be believed except as affected in Mrs. Cook's and her daughter's case by self-interest, and in Mr. Forman and Dr. Nelson's by their affidavits in the lunacy proceedings, than that the testator, though feeble in body, was of sound and disposing mind, memory and understanding in September when the will was made.

Turning now to the evidence given on behalf of those contesting the will. First, we have James Smith, a very old friend and acquaintance of the testator, and who was very kind to him during his illness in 1905, and again in the beginning of 1908, when he took him to his house to live. Smith says that on one occasion the deceased said, "This is my house" (referring to Smith's house). But it is manifest from Smith's own testi-

mony that there was no insane delusion here. Then we come to the evidence of Alexander Wilson. We have here a witness who is entitled to the highest credit. A very old friend and acquaintance; a man who had no motives of self-interest to serve, and who states what took place between himself and the deceased within a year before his death in a natural and straightforward manner. He was called by the contestants, but his evidence, I think, really supports the will. He says that Boyd spoke to him on many occasions about making a will, and asked him if he would act as executor. That he sent for him on some occasions to discuss the question of settling up his affairs before his death. Wilson considered him of sound mind. The only things he could speak of which might throw doubt upon that was, first, the testator's habit of putting off making his will. Wilson considered this childish, but it is a kind of childishness, if I may say so, common to many men with respect to the making of their wills. That was the only circumstance which Wilson could relate reflecting on Boyd's soundness of mind before December, 1909, with possibly this other, that Boyd, when asked about his relatives, said he had none; but I gather from Wilson's evidence that he was simply reluctant to speak about his relatives. It appears that his relatives, none of whom resided in Canada, paid little attention to him for thirty or forty years, nor until he had acquired some property. The other matter which this witness thought might indicate feebleness of mind was his denial in December that he had made a will, but this is not hard to account for. Several of his neighbours had been pestering the old man to make a will in their favour, and he might very naturally be desirous that the fact that he had made a will should not become known to them and subject him to further persecutions. These people were the principal witnesses against the will. It is a significant fact, too, that after September, in which month the will was made, the deceased no longer continued to ask Wilson to be his executor.

Then there is the evidence of Mr. and Mrs. Ledingham. They shewed him some kindness in the way of bringing him meals when he was unable to cook his own, and I think they expected a will to be made in their favour. There is a general note of exaggeration running through their evidence which greatly detracts in my opinion from its value. The incident of the fire in the mattress is a good illustration. The cross-examination of Ledingham, I think, shews that the old man did not wish the mattress to be thrown out, because he wanted it saved. I have great difficulty in understanding the evidence regarding this fire. Ledingham speaks of two such fires, but describes only one, which he says was in April or May, 1909; but when Boyd was sent to the Old Men's Home in March, 1909, we find the

B.C.
C. A.
1912
FORMAN
v.
RYAN.
Macdonald, C.J.A.

witness Mackintosh referring to a mattress which had been partially burned being sent with him; and Williams speaks of being at Boyd's house in the evening of the fire in the mattress, which he says was in the summer of 1909. But assuming that this mattress was injured by fire earlier than April, 1909, it was clearly not in the hopelessly burned condition which the evidence of Ledingham would lead us to believe it was in. Boyd was physically unable to do more than look on while the mattress was being carried out, and his alleged remarks—assuming they were made—only indicate that he was deprecating the seriousness of the danger. Ledingham, while professing to think that Boyd was unfit to do business, nevertheless attempted to buy his property at a date later than the will, and as nearly as I can make out, in December. He very naively says that he wanted to buy it, but would rather get it without buying it. Evidently this witness did not think Boyd was mentally incapable of doing business, even in December.

Shepherd's evidence, I think, needs only to be read to be rejected, and the same is true of the evidence of Mackintosh. Boyd's conduct in the police station was that of a sane old man furiously angry at the indignity to which he had been subjected, and at the Home he resented having another person in his room. Apart from the reckless tone of Shepherd's evidence, we have the contradiction between paragraphs 1 and 2 of his affidavit made in the lunacy proceedings and his evidence at the trial. From said paragraphs I gather that within six months of the date of the making of that affidavit, or at all events within a period of not greater than a year, he had had the conversations on the streets with Boyd mentioned in paragraph 2. He did not venture to repeat these statements at the trial, but on the contrary, in the examination-in-chief he stated that he had not spoken to Boyd on the streets for a year before that time, and did not want to.

Then there is the evidence of Miss Partridge. Those incidents which she relates in a natural manner as they occurred, without any embellishment of her own, rather confirm than otherwise the soundness of mind of the testator. For instance, his coming to her father's house early one morning for his breakfast and saying that Mr. Grundy wanted him taken to the hospital, and his aversion to going, are quite rational. When a message came from Mrs. Cook that a carriage would be sent to take him to the hospital, he appreciated the situation thoroughly and wished to go home at once to avoid, as I think, going to the hospital, and objected to Mr. Partridge accompanying him. All this is rational and shows a keen appreciation of his circumstances and memory of persons and things. The date of this is not fixed, but the weather was cold, so it must have been late in the year (1909) or beginning of 1910. And again, when Miss

Partridge visited him at Mrs. Addington's shortly before his death, he recognized her and seemed quite rational, as indicated by his astute remark when she said good-bye that it was not good-bye. This witness kept a record of Mrs. Cook's movements which, when asked to explain, she said was "to protect myself." How she needed protection I am unable to conceive, unless, as was suggested, she expected deceased to make a will in her or her father's favour, and anticipated that Mrs. Cook would make claim against the estate for her services. If she expected this, it had apparently not been present to her mind at that time that the testator was mentally unsound.

Macdowell's evidence is of little importance, and does not, to my mind, indicate unsoundness of mind of the testator.

Williams was at the time of the trial very sure that the deceased had been mentally unbalanced for at least three years before his death, which is contrary to the evidence on both sides. A story which he says the deceased told him about an old friend handling his papers, is the chief factor in his behalf.

Then it is said that the will is inofficious, and this is relied upon as evidence of lack of testamentary capacity in the testator. Nothing was given to James Smith, to whom I have already referred; but Smith and the testator were not on speaking terms for year before his death. Smith is making a claim against the estate for his services to the testator which he values at $1,000. The Ledinghams also were not remembered in the will. They were merely neighbours, and what they did for him was under an arrangement by which they were entitled to claim for services rendered at his request. They, too, have made a claim against the estate for these services. That the testator had carefully considered the claims of his relatives in Ireland is clearly established by the evidence of Elliott and others. As they were in no way dependent upon him, and had paid him little enough attention, he apparently did not consider that they had any claims upon him. For more than a year before his death the testator had given considerable attention to the disposition which he ought to make of his property at his death. It is quite apparent that he found it difficult to make up his mind. It appeared to him to be a choice between charity and those who had been most kind to him during his declining years. It is, therefore, not surprising that in September, 1909, after he had experienced what he believed to be unkindness from several of his old friends, and had for a year been carefully cared for, and his wishes understood by a person who had shewn him the affection and kindness which Mrs. Cook undoubtedly did, he should have decided to leave his property to her. I do not attach much importance to the contention that the bequests to his sister and to the two charities were suggested by others. It is quite clear that he had considered the claims of his relatives, and

B.C.
C. A.
1912
FORMAN
v.
RYAN.
Macdonald, C.J.A.

had put them aside, and that he had also considered doing something for charity long before the will was made, but assuming that he would not have made these bequests had they not been suggested to him by Forman, though I do not think such an assumption would be quite justified, still his making them only shews his willingness to receive and capability to act upon advice.

The testator was under no insane delusion, even if we believe all the evidence, apart from mere expressions of opinion given by the witnesses against the will.

Sir J. Nicholl, 3 Add. 90, gives a much quoted definition of insanity:—

> Where the patient conceives something extravagant to exist which has still no existence, whatever, but in his own heated imagination, and where at the same time having once so conceived he is incapable of being or at least of being permanently reasoned out of that conception, such a patient is said to be under a delusion.

None of the so-called delusions of Boyd were of this nature. Apart from insane delusions, there may be such weakness of intellect or mental decay as to destroy testamentary capacity, but I think that was not shewn to exist here, certainly not earlier than December, 1909.

I think, therefore, the appeal should be allowed, and the will admitted to probate. As I think there was some justification furnished by the lunacy proceedings for contesting the will, all parties should have their costs of the action and of the appeal out of the estate.

Irving, J.A.

IRVING, J.A.:—I do not see how the judgment can be supported.

If we remember the will was made on the 18th day of September, 1910, we have the following positive testimony that the man was perfectly sane and capable of making a will:—

1. Dr. Nelson, who had him in charge from February, 1909, and saw him frequently.

2. Mr. Elliott, who drew a will for him in April.

3. Mr. Forman, who saw him twice in September with reference to the will not in question.

4. Rev. Mr. Grundy, who visited him daily and who fixes the period of the change in December, 1909.

There are others, Mr. Heisterman, whose evidence shews that he paid but little attention to the man; Mr. Doig, Mr. McConcon, and Mr. McKay, testify to the same effect; but the four I have mentioned seem to me from their association with the deceased the best able, with the exception of Mrs. Cook, whose evidence I leave out of the question, to testify as to the man's capacity at and before the critical time.

It must be conceded that Dr. Nelson and Mr. Forman, by their efforts in January, 1910, did much to damage the case they

now support, but the evidence of Mr. Elliott and Mr. Grundy stands unattacked.

I would allow the appeal.

GALLIHER, J.A.:—I have had the opportunity of reading the judgment of my learned brother the Chief Justice, with whom I agree, and would have nothing to add, but out of respect for the views of the learned trial Judge, with whom I differ, I wish to emphasize one or two of what appear to me salient features in the issue.

If I read the learned trial Judge's judgment aright, I think he practically found that there was no undue influence. This, however, is disputed by Mr. McPhillips, counsel for the respondent, Sarah Ryan, and as he strenuously argues that there was undue influence, I will deal with that point.

Mr. McPhillips starts out by urging upon the Court the fact that Mrs. Cook, from the moment she took charge of the deceased, did so with the set purpose of so influencing him that he would make a will in her favour, and speaks of her as a clever and designing woman, who had the deceased completely under her control; he depicts how careful she was to hide her designs from others, and cites as an instance of her cleverness and cunning how she, knowing if all his property were left to her it might create suspicion, and to avoid this, and as part of a well-laid plan, she suggested to the deceased that he leave some of his property to his sister.

Now all this is very well in theory, but unfortunately for Mr. McPhillips' contention, he introduces the evidence of a male nurse, who, during the latter period of the illness of the deceased was in charge of him for a time. The evidence of this man is that Mrs. Cook, when she would call to see deceased, would throw her arms around him and kiss him, and make much of him. Now, if this evidence is to be believed, and this was the clever, designing woman, alert at all times to hide from strangers the fact that she was trying to gain influence over the deceased, this act, repeated time and again in the presence of a male stranger, seems to me would be the most foolish act she could commit.

I discard that evidence, but Mr. McPhillips maintains it should be given full credit, and if so, it answers his own contention.

It is admitted by all that Mrs. Cook was very kind to the deceased, and he was more amenable to her than to any of the others. This fact is urged upon us and against Mrs. Cook.

Mrs. Cook had known the deceased (who was her father's friend) since she was a child, and when she took charge of him she found him in a very filthy condition, due, no doubt, to illness and physical weakness.

B.C.

C. A.
1912

FORMAN
v.
RYAN.

Galliher, J.A.

It is noticeable that all the time she had charge of the deceased, and was able to look after him, the old man improved in health, was always kept clean, was taken out for drives and walks, and the best of care taken of him under the circumstances.

Is it unreasonable then that he should have been more desirous of yielding to her wishes in respect of his own convenience than to that of others, nay, is it not the most natural thing that he should, and yet all this is urged against Mrs. Cook.

I can only say on this point that in my opinion the evidence falls far short of proving any such contention.

It would be unfortunate indeed if acts of care and kindness bestowed upon those needing it should be regarded as emanating from sinister motives, unless the evidence points clearly to that.

The only other point upon which I wish to touch briefly, and wherein in my opinion lies the germ which has developed all this controversy, i.e., the proceedings taken in lunacy. This was some months after the making of the will, and whatever may be said as to the wisdom or otherwise of these proceedings, a full perusal of the evidence leads me to the conclusion that they were taken with the view of placing some one in authority for the purpose of providing creature comforts for the deceased, and whether he was mentally capable at that time, he certainly was physically incapable of doing so himself.

Of course we cannot overlook the testimony given in these proceedings; to do so might in many cases lead to very serious results, but taking these proceedings as a basis to start from, let us carry our mind back to the occurrences adduced in evidence prior to this time, and upon which the contestants base their contention of testamentary incapacity.

My learned brother has gone very fully into these, and as I agree with him, it would be only repetition for me to go over the same ground, but I wish to point out this, that having in mind the proceedings that had been taken, a witness going back to events that occurred previously might in all honesty regard those events as strange or peculiar, and as acts of one not altogether responsible when such acts at the time left no such impression on his mind.

I must say that I was impressed by the fair and able manner in which Mr. Crease, counsel for some of the contestants, marshalled the facts, indeed the counsel on both sides argued the matter very ably before us.

The case is one largely of fact, and I have therefore been at pains to give it my best consideration.

*Appeal allowed.*

## CLARK v. LOFTUS.

ONT.

C. A.

1912

April 15.

*Ontario Court of Appeal, Moss, C.J.O., Garrow, Maclaren, Meredith, and Magee, JJ.A. April 15, 1912.*

1. INSURANCE (§ IV B—170)—CHANGE OF BENEFICIARY—CAPACITY TO MAKE —NECESSITY OF SUPPLYING INDEPENDENT LEGAL ADVICE.

A daughter being neither trustee, guardian nor agent for her father, who lived with her, at and for some time prior to his death, whom the father, while so living with her, makes sole beneficiary of the moneys payable under a policy of insurance issued on his life, is not bound to supply her father with independent legal advice at the time he nominates her as sole beneficiary under the policy, the father being at the time *compos mentis* and there being an entire absence of fraud or undue influence.

[*Nobel's Explosives Co.* v. *Jones* (1881), 17 Ch. D. 721, 739, referred to.]

2. INSURANCE (§ IV B—170)—STATUS OF INSURED IN RESPECT TO BENEFICIARY.

In the absence of agreement to make one the beneficiary, the insured is in no sense a trustee for the beneficiary from time to time named in a policy of insurance containing a clause giving power to the assured to change the beneficiary named.

3. INSURANCE (§ IV B—170)—CHANGE OF BENEFICIARY—GIFT INTER VIVOS.

Where an insured by virtue of the rights accruing to him under an insurance policy changes the beneficiary, this is a gift *inter vivos* and not a testamentary disposition.

[*Fulton* v. *Andrew*, L.R. 7 H.L. 448, distinguished.]

Statement

APPEAL by the defendant from the judgment of a Divisional Court, *Clark* v. *Loftus*, 24 O.L.R. 174, affirming the judgment of Middleton, J., on the trial of an issue to determine whether the plaintiffs or the defendant were entitled to the proceeds of a life insurance benefit certificate of the Independent Order of Foresters which had been paid into Court.

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

Argument

*G. H. Watson*, K.C., and *J. T. Loftus*, for the defendant. As to the alleged agreement between the husband and wife that the apportionment should not be changed, it is submitted that no binding agreement has been proved; and, in any event, it could not be given effect to, having in view the amendment of sec. 151 (3) of the Insurance Act, R.S.O. 1897, ch. 203, by 1 Edw. VII. ch. 21, sec. 2 (5), which provision must be considered to be retroactive. This states that no one can be a beneficiary for value unless expressly so designated in the certificate. To revive the references to the sections of the Act, reference is made to R.S.O. 1897, ch. 203, sec. 80, amended by 3 Edw. VII. ch. 15, sec. 3 (2); R.S.O. 1897, ch. 203, sec. 151 (3), (4), (5); sec. 159, sec. 160 (1), (2). Sub-section 3 of sec. 151 of R.S.O. 1897, ch. 203, is amended, as has been stated, by 1 Edw. VII. ch. 21, sec. 2 (5). Then sub-sec. 6 of sec. 2 of the last-mentioned Act amended sub-sec. 2 of sec. 160 of R.S.O. 1897, ch. 203. Thus these two sub-sections introduce into secs. 151 and 160 of the Insurance Act the same words. Then 3 Edw. VII. ch. 15, sec. 3 (2), amends sec. 80 of

ONT.

C. A.
1912

CLARK
v.
LOFTUS.

Argument

the Insurance Act, giving the beneficiary the right to sue in his own name. So that the defendant has an absolute statutory right to sue to recover these moneys. The plaintiffs failed to prove want of mental capacity on the part of the deceased to make the change of beneficiaries in question, or that there was any fraud or undue influence exercised by the defendant, or that the defendant stood in a fiduciary position towards her father. Nor has there been any finding on any of these points. There was at most only vague suspicion of fraud or undue influence. The learned trial Judge erred in treating the document of transfer as a will, and applying to it certain rules applicable in some cases to testamentary dispositions. The document was not a testamentary disposition, and the rule invoked had no application to it. The learned trial Judge erroneously held that there was an onus cast upon the appellant herein: *Low* v. *Guthrie*, [1909] A.C. 278, which modifies *Tyrrell* v. *Painton*, [1894] P. 151. The case of *Book* v. *Book* (1900-01), 32 O.R. 206, 1 O.L.R. 86, rather went off on the ground that the beneficiary did not take as wife but as secured creditor. Besides, sec. 151 (3) was not in force at that time. The onus was upon the plaintiffs to prove their case, and in this they have failed. The affirmative is not proved merely because the witness for the negative is not wholly believed: *Nobel's Explosives Co.* v. *Jones* (1881), 17 Ch.D. 721, at p. 739. There was no duty cast upon the defendant to advise her father as to the nature and effect of his action in altering the apportionment. The Court has nothing to do with the fairness or unfairness of the transaction, though that consideration seems to have influenced one of the learned Judges below in his placing this case within the principle of *Fulton* v. *Andrew* (1875), L.R. 7 H.L. 348. The change which was made was Clark's act and deed, and that is all which it is necessary to shew.

*J. B. Clarke*, K.C., and *E. J. Hearn*, K.C., for the plaintiffs. At the time he signed the instrument of transfer, Clark lacked the mental capacity to comprehend the nature of the instrument or the effect of what he was doing, and the defendant, taking advantage of his mental condition, and by the exercise of fraud and undue influence, induced him to sign the transfer. Even if competent, he was precluded from altering the original nomination of beneficiaries, by reason of the agreement between himself and the plaintiff Jane Clark that he would not make any change in the beneficiaries. This agreement was made before the passing of the amendment to the Insurance Act (1 Edw. VII. ch. 21, sec. 2 (5).) This amendment is not retrospective, and does not apply to this case. In any event, the agreement is not within the provisions of the Act. In the circumstances of this case, the onus was upon the defendant to shew that the deceased thoroughly understood what he was doing, or at least that he had been protected by independent advice: *Phillips* v. *Mullings* (1871), L.R. 7 Ch. 244; *McCaffrey* v. *McCaffrey* (1891), 18 A.R. 599. In view

of the facts found by the learned trial Judge, the document relied upon as making a change of beneficiaries ought not to stand: *Fulton* v. *Andrew*, L.R. 7 H.L. 448, at p. 471; *Tyrrell* v. *Painton*, [1894] P. 151; *Adams* v. *McBeath* (1897), 27 S.C.R. 13; *Collins* v. *Kilroy* (1901), 1 O.L.R. 503; *Low* v. *Guthrie*, [1909] A.C. 278; *Malcolm* v. *Ferguson* (1909), 14 O.W.R. 737, 1 O.W.N. 77; *Kreh* v. *Moses* (1892), 22 O.R. 307; *In re Jansen* (1906), 12 O.L.R. 63; *Milroy* v. *Lord* (1862), 4 DeG. F. & J. 264. From the time of making the agreement, Clark was a trustee of the policy for the beneficiaries named therein, and the appellant, having knowledge of the agreement and taking the benefit of it, is bound by its terms, and is not entitled to take any further benefit arising from a breach of the trust which she actively assisted in bringing about, and prepared and witnessed herself: *Allen* v. *Wentzell* (1909), 7 E.L.R. 575. The certificate, or policy, was subject to the rules of the Order in respect to the change of beneficiaries. See rule 150. We also rely on the reasons given in the judgments below.

*Watson*, in reply. There is the right to transfer without reference to the rules and conditions. See rule 147; also *Mingeaud* v. *Packer* (1891), 21 O.R. 267, affirmed in (1892), 19 A.R. 290; *Neilson* v. *Trusts Corporation of Ontario* (1894), 24 O.R. 517; *Re Harrison* (1899), 31 O.R. 314. The other side rests its case on suggestions, suspicions, and equities. There was no fiduciary relationship, and so the doctrine as to necessity of independent advice has no application: *Wallis* v. *Andrews* (1869), 16 Gr. 624, at p. 641; *McEwan* v. *Milne* (1884), 5 O.R. 100; *Trusts and Guarantee Co.* v. *Hart* (1901), 2 O.L.R. 251, affirmed in (1902), 32 S.C.R. 553; *Fisher* v. *Fisher* (1902), 1 O.W.R. 442; *Vandusen* v. *Young* (1902), 1 O.W.R. 55; *Christian* v. *Poulin* (1902), 1 O.W.R. 275; *Thorndyke* v. *Thorndyke* (1902), 1 O.W.R. 11. The effect of the statute since its amendment has been considered in several cases. See *Re Murray* (1904), 4 O.W.R. 281; *Lints* v. *Lints* (1903), 6 O.L.R. 100; *Cartwright* v. *Cartwright* (1906), 12 O.L.R. 272; *In re Cochrane* (1908), 16 O.L.R. 328.

MOSS, C.J.O.

April 15, 1912. Moss, C.J.O.:—One James E. Clark, a member of the Independent Order of Foresters, and the holder of an endowment certificate issued by the Order, and dated the 6th March, 1893, for the sum of $3,000, payable as in the certificate set forth, died on the 16th February, 1910. Thereupon a dispute arose between the parties hereto as to the right to receive payment from the Order of the $3,000 in question. The amount, less expenses, was paid into Court by the Order. Pursuant to an order of Court, these proceedings were instituted for the determination of the question as to which of the parties was entitled to the moneys, and, if more than one was entitled, the proportions in which they were to share.

In the certificate all three were named as beneficiaries; but, by an instrument signed by him and dated the 29th November,

ONT.

C. A.
1912

CLARK
v.
LOFTUS.

MOSS, C.J.O.

1909, Clark designated the defendant Florence Loftus as the sole beneficiary, reserving to himself the right of revocation and substitution of other beneficiaries in accordance with the constitution and laws of the Order. This instrument remained unrevoked at the date of his death.

The question for trial, therefore, was as to the validity of this instrument. It was not admitted by the plaintiffs, but at the trial it was clearly proved, that the signature attached to the instrument was Clark's; and it is not open to question that, as executed by him, it is in form and substance sufficient to effect the desired change of beneficiaries.

But the plaintiffs alleged that, at the time he signed the instrument, Clark was in such a mental condition as to be unable to comprehend the nature of the instrument or the effect of what he was doing, and that the defendant, taking advantage of his mental condition, and by the exercise of fraud and undue influence, induced him to sign the instrument. They further alleged that, even if competent, he was precluded from altering the original nomination of beneficiaries, by reason of an agreement between him and the plaintiff Jane Clark that he would not make any change in the beneficiaries.

The learned trial Judge held the instrument of the 29th November, 1909, to be invalid and ineffective, but chiefly on his view as to Clark's mental condition when he signed it and as to the duty which he considered was cast upon the defendant of satisfying the Court that Clark properly understood and appreciated the effect of his act. He also expressed the opinion that an agreement was in fact made between Clark and the plaintiff Jane Clark; but, in view of the amendments made to secs. 151 and 160 of the Ontario Insurance Act, he rested his judgment principally upon the other branches of the case. In the Divisional Court the judgment was affirmed upon the latter grounds. Mr. Justice Clute, by whom the principal judgment was delivered, held that, in view of the amendments, effect could not be given to the agreement. The Chief Justice of the Common Pleas reserved his opinion as to the effect of the amendments. Mr. Justice Teetzel agreed in the result. So far, therefore, as expressed opinions are concerned, it may be taken that, while it has been found that there was an agreement in fact, it could not avail to preclude Clark from making the change of beneficiaries. As I have reached the conclusion that an agreement in fact has not been proved, it is not necessary to consider the effect of the statute as amended. As to what is said to have taken place between Clark and the plaintiff Jane Clark on this point, there is no conflict of testimony —the proof resting upon what was deposed to by the two plaintiffs, taken in the light of subsequent conduct and events. Upon the testimony, I am, with deference, of the opinion that no agreement is shewn. I think that, at the time in the year 1900 when it said the agreement was come to, there was no bargaining and no

intention to bargain about the matter. It happened that Clark, through losses in his business and inability owing to poor health to earn any considerable income, concluded that he was unable to keep up the payments called for by the certificate.

The matter appears to have come up in conversation between him and the plaintiff Jane Clark, who had separate means. In her testimony in chief she thus stated what took place: "Q. When he failed in business did he say anything to you about this insurance? A. Yes, he came and told me that it was to my benefit and to the benefit of the children to keep that policy up. Q. What else did he say? A. He said that we were—as we were beneficiaries for value—Q. He said that you were to pay the usual assessments? A. Yes. Q. And if you did not, what would happen? A. He said it would be a loss to me and to the children. Q. How would it be a loss to you and the children? A. Simply because I was paying on it, and of course he said he had no means to pay it. . . . Q. Then he said it was for the benefit of you and the children? A. Yes. Q. What children? A. We never made any difference between Florrie and my own. We were all very agreeable. Q. You were to pay the usual assessments for the benefit of yourself and the children? A. Yes. Q. Did you pay the dues and assessments after that? A. I did." On cross-examination she was asked: "Q. What happened in relation to the insurance? A. Well, he had no money to pay on it, and I paid it. Q. That was all? A. Yes; I paid it. Q. Was there anything said? A. Yes; he told me it was a benefit for me and my children to keep that policy paid, and I did so out of my own means. . . . Q. But he did not make an agreement with you or anything of that kind? A. Yes; he told me that me and my daughters were beneficiaries, and that it was to my benefit to keep the policy paid-up and for the benefit of the children. His Lordship: Q. Your children included? A. Yes. Mr. Loftus (counsel for the defendant): Q. Why didn't you state that before? A. This is the first time I have had anything to do with anything like this. That's right, and Mrs. Loftus knows it . . . Q. That is all that was said? A. That is all; he said it was to our benefit."

The testimony of the other plaintiff, though varying slightly in terms, does not carry the matter further. It is true that to the question "Was there anything said about it?" she answered: "Yes; my father told my mother in my presence that he had no means since he failed, and that it was to her benefit, my sister's and my own, to pay that insurance; and as he had no money to do it, that she should do so out of her own money, and that she should be benefited by it hereafter, *and that it would be hers.*" But, in her answer to the next question, she shews that it was not her understanding that it was to be her mother's any more than any of the others. Asked, "Were you to get any benefit of it?" she answered, "Yes; the understanding was that

ONT.
C. A.
1912
CLARK
v.
LOFTUS.
MOSS, C.J.O.

we were to share and share alike." Now, making all proper allowance for the suggested inexperience as a witness of the plaintiff Jane Clark, which may be considered as very fairly offset by the assistance rendered by her counsel in the form of leading questions, I am unable to find in this testimony the ingredients of an agreement such as has been found. Clark stated what was very probably true, that he was unable to pay, and said what was obviously true, that it would be to the benefit of the beneficiaries to keep the certificate on foot. He put it before his wife as a matter for her consideration, but he made no request that she should pay or any stipulation as to what he would do or would not do if she continued the payments. That matter was never considered or discussed by them. She was left free to act on his suggestion or advice or not at her pleasure. Whether as a matter of fact some of his means were not employed in making some of the subsequent payments is by no means clear. It is shewn that he turned over his earnings to his wife, and there was a common fund. As shewing that she knew that she was not bound to continue the payments herself, she admits that she made application to the defendant to contribute. Payments were continued to be made by or through her up to the 30th September, 1908, when she ceased making them—and, but for the subsequent payments being continued by the defendant, the certificate would, in all probability, have lapsed. So far as the plaintiffs were concerned, they had abandoned all intention or desire to keep it on foot any longer.

The element of agreement should, I think, be entirely eliminated from the case.

Upon the other branches I am also unable to agree to the conclusions reached by the trial Judge and the Divisional Court. These conclusions appear to me to be based upon a misapprehension as to the duties and obligations of the defendant under the circumstances disclosed by the testimony and as to the onus of proof at the trial. No doubt, the burden may shift from time to time during the progress of the trial, and it may be assumed that in the course of this trial the onus varied from time to time as in other cases. The question is, upon whom was it resting, having regard to the testimony given, at the time when the evidence closed?

It having—as before mentioned—been shewn beyond question that the instrument impeached was signed by Clark, it is scarcely necessary to say that the onus of shewing that it was for some reason or reasons invalid and ineffectual was cast upon the plaintiffs.

Clark had the right by law to change the nomination of beneficiaries within the scope of the certificate, and in order to avoid his act it was incumbent upon those impeaching its effect to shew mental incapacity unfitting him to execute the instrument with knowledge and appreciation of its effect, or that he was induced to execute it through fraud or undue influence, or that the defendant,

in whose favour the nomination was made, stood in a fiduciary relationship towards her father, that is, that she occupied such a position of trust and confidence in regard to him as necessarily to lead to the conclusion that she possessed a controlling influence over his mind and actions. If the latter case were established then the onus might be cast upon her to support the transaction, and the question whether she had satisfactorily shewn all that was required would arise, but only in that case.

It was not alleged nor was it proved or found that the defendant stood in a fiduciary position towards her father. She was his daughter, but she was neither his trustee, guardian, or agent. There is no evidence that at any time during his life had he reposed any special trust or confidence in her. There existed between them nothing but the natural affection of father and daughter; no relationship that called upon the daughter to justify or explain her father's action. Assuming capacity and the absence of fraud or undue influence, the act was one within his right, however unreasonable or unjust towards others it may appear. Apart from agreement, with which I have already dealt, Clark was in no manner a trustee of the certificate or for any of the parties named as beneficiaries; and his act is binding and conclusive, unless the plaintiffs have proved a case of mental incapacity or fraud or undue influence.

I have given careful attention to the evidence, as well as to the adverse comments of the learned trial Judge upon the testimony of some of the witnesses; and, after making every allowance for the advantage which is necessarily enjoyed by the trial Judge from having seen the witnesses and noticed their demeanour, I am unable to adopt the conclusions arrived at. It may be that, if I shared the views of the Courts below as to the burden of proof, I should not disagree with their findings. But if, as appears to me, it lay upon the plaintiffs to prove their case, then, I think, they failed to discharge the onus.

It has been said more than once that it is a fallacy to suppose that the affirmative is proved because the witness for the negative is not wholly and entirely to be believed. The affirmative must be proved; and to say that a witness for the negative is not wholly to be believed is, in no sense of the word, to prove the affirmative: *Nobel's Explosives Co.* v. *Jones*, 17 Ch.D. 721, at p. 739.

The learned trial Judge was disposed to deal with the question of capacity as upon the same footing as if the act was a testamentary act. As the instrument was intended to take effect in Clark's lifetime, it was probably more in the nature of, though not in all respects similar to, a gift *inter vivos*. It differed from the latter in that it was not absolute in effect, because of the reservation of a power of revocation.

But, however regarded, the evidence fails, in my judgment, to establish a want of capacity to understand the nature of the

ONT.
C. A.
1912
CLARK
v.
LOFTUS.
Moss, C.J.O.

transaction or to appreciate its effect. Clark was, no doubt, in poor health and had been so from the time when he suffered from an attack of paralysis in January, 1909. According to the testimony of the plaintiff Jane Clark, he was then in the hospital for about three weeks, after which he returned home. In April he was sufficiently recovered to go to visit an old friend, the witness Crompton, at his farm near St. Catharines, where he remained until some time in June, a period of about eight weeks. He appears to have been considered as of sufficiently good health and capacity to take care of himself to be allowed by the plaintiffs to make the journey each way unattended. The evidence fails to shew any material failure in health or mind between his return in June and the signing of the instrument on the 29th November. He appears to have suffered pains in his head produced by a blow from a trap-door in his factory falling upon him, and which induced the first paralytic condition. But he went about the streets conversing with his neighbours and calling upon his daughter the defendant, without it occurring to any one that he should be attended. The trivial incidents related by the plaintiffs as indicating mental weakness are wholly insufficient to establish want of capacity, or inability to understand what he was doing when he signed the instrument. It was a single and simple transaction in connection with a certificate with the purport and effect of which he was quite familiar, for he had considered and discussed it on more than one occasion. His signature appended to the instrument compares quite favourably with that appended to the agreement concerning the additional rates made with the Order in September, 1908, and presents every appearance of having been written by one quite capable of controlling his faculties. And it is to be noted that the learned trial Judge says that he is not satisfied that Clark had not testamentary capacity.

Beyond vague suspicion, there is really no evidence of fraud or undue influence such as is required to be shewn in order to invalidate such an act as that here impeached. It is important to bear in mind that there was no secrecy about the matter; no retaining the instrument so as to prevent scrutiny and inquiry. It was sent on to the Order immediately, and the plaintiffs were afforded opportunities not only of seeing the instrument, but Clark was shewn to have visited the plaintiffs from time to time afterwards, and they had every opportunity of ascertaining whether or not any improper suggestions had been made to him or his mind otherwise unduly influenced. But, beyond endeavouring to induce the Order to refrain from recognising the instrument, nothing was done or attempted.

The defendant had paid the arrears due in respect of the certificate after the plaintiffs had abandoned making payments, and she kept it on foot from that time onwards. Otherwise it would have lapsed and have been of no benefit to anybody. Having done so, there was no reason why her father should not,

if he chose, put her in the position of sole beneficiary. In doing so he was not bestowing upon her an extravagant sum, and he may very justly have considered that, his wife having considerable property of her own and having shewn no disposition to keep the certificate on foot, his daughter by his first marriage, through whose payments it had been kept on foot, might without unfairness receive the full benefit of it.

Moss, C.J.O.

I would allow the appeal and declare the defendant entitled to the moneys in Court, subject, however, to repayment to the plaintiff Jane Clark of the sums paid by her in respect of dues and assessments as offered and agreed to by the defendant's counsel.

As to the costs, the defendant is entitled to her general costs of the interpleader proceedings, of the issue, and of the appeal to the Divisional Court and to this Court.

Meredith, J.A.

MEREDITH, J.A.:—The dominating factor in the conclusions reached in this case hitherto was that which was considered great unfairness in the result of the transaction which is in question in this action; had that result been the opposite of that which it was, that is, had it changed the beneficiaries from the one only to the three, no one can doubt that it would have been unhesitatingly and firmly upheld. It was its want of "righteousness" that caused its downfall.

Mr. Justice Clute seems to me to have put that very plainly, for himself and as to the trial Judge. After quoting the oft-quoted words expressed by Lord Hatherley in the case of *Fulton* v. *Andrew*, L.R. 7 H.L. 448, at p. 472: "But there is a further onus upon those who take for their own benefit, after being instrumental in preparing or obtaining a will. They have thrown upon them the onus of shewing the righteousness of the transaction;" he goes on to say: "The rule appears to me to be applicable to a case of this kind, which closely resembles the case of a will. So far from the evidence removing the suspicious nature of the transaction and shewing the same to be a righteous transaction, quite the reverse is the case. The learned trial Judge largely discredited the evidence of the defence, and considered the transaction a most unrighteous one."

So that two things seem to me to be evident: (1) that there has been a grave misunderstanding of the meaning which Lord Hatherley intended to convey by the word "righteousness;" and (2) that this case is not at all like that with which he was dealing, or such cases as *Barry* v. *Butlin* (1838), 2 Moo. P.C. 480, or *Tyrrell* v. *Painton*, [1894] P. 151.

"Righteousness," as applied to proof in such cases, means no more than that the document propounded is really the will of the testator; that it is the duty of those asking the Court to pronounce in favour of the will, to prove affirmatively that the testator knew and approved of its contents: to import into the word any such meaning as that it must be proved that the will

ONT.
C. A.
1912
CLARK
v.
LOFTUS.
Meredith, J.A.

is a fair or just one, or such as a reasonable man ought to make, is, of course, entirely wrong: a testator may be as unreasonable, unjust, or capricious as he pleases, without the Court having any power to control him; the character of the will may, of course, afford evidence upon the question whether the paper propounded is really the testator's will; but some care must be taken fairly to treat such things only as evidence; that we do not make them an excuse for finding against the validity of the will really because *we* do not approve of its contents. The man or woman who makes a will is, it may be, the only one who knows what is just and fair; and, in the absence of such knowledge as he or she could impart, one should be very careful of condemning his dispositions of his property.

On the other point it is not necessary to do more than point out that this is not the case of a controversy arising for the first time after a testator's death in propounding a writing as his last will and testament; the controversy arose in his lifetime, and was carried on for some time before his death and before his second stroke of paralysis, and carried on by him, on the one side, seeking registration of his change of beneficiaries, and the respondents, on the other side, opposing it, in the offices of the friendly society whose certificate of insurance is the subject-matter of this litigation. If there had been any real doubt of the man's knowledge and approval of the change he had made, or of his capacity to make it, or that he had duly signed the writing, all that could at once have been set at rest, by asking him; but that was not done, nor was any attempt, on the part of the respondents, made to investigate it; they knew that it had been done, and that they could not undo it.

The learned trial Judge said, among other things in which I am quite unable to agree with him, that "the law calls upon the person who so takes to explain the circumstances in such a way as to remove all shadow of suspicion from the mind of the Judge who is called to pass upon the case." The rule is simply this: the onus shifts; presumption of knowledge and approval of the contents of the will, from proof of its due execution by a competent testator, to whom the will was read over, or who has read it, is displaced: actual knowledge and approval must be proved by those who take a benefit under it and who have been instrumental in making it: the conscience of the Court must be satisfied, that is all.

Again, I am quite unable to agree with him in these observations also contained in the reasons for his judgment: "The situation was one which, more than any other situation one can think of, called for the exercise of great precaution. I think it called for Mr. Clark receiving advice from an absolutely disinterested and independent solicitor." It was but a single transaction, of a very ordinary and simple character; the man had become dissatisfied with his home, and desired to change it, to

go and live with the only child of his first wife. He may, or may not, have had real cause for that desire; that in itself is not material; he had, as I have said, a right to be capricious; he had a right to do just as he pleased with his own. His conduct was not unique, it was not even extremely uncommon; as one grows old, the impressions of earlier days are more vivid and attractive than those of later days, and one is apt to become exacting and more readily dissatisfied; and there is at least this to be said in extenuation of this conduct of the man who is not here to justify himself, that no great efforts, if indeed any efforts, were made to dissuade him from going away or to induce him to remain or return. He had got to that age and condition of health that he was, no doubt, more or less a burden to those with whom he lived, and there can be little, if any, doubt that, rightly or wrongly; he was impressed with the idea that his wife thought so. I am quite unable to perceive anything so complicated or extraordinary in the circumstances as to require the services of any solicitor, or what there was in the simple and single transaction that any layman could not quite comprehend. The man knew that his wife and two children were to share equally in the money payable under the certificate upon his death—if not changed; he knew that he wanted to change that so that one daughter should have all; and that all that was needed to effect the change, could be readily accomplished through the officers of his "lodge." He knew also that his wife had property of her own, of considerably greater value than this certificate; and that he had no other property which could go to the child of his first wife.

The learned Judge was also emphatic in the opinion that Clark ought to have been advised that he was receding from a binding bargain, made with his wife, that the beneficiaries of the certificate should not be changed. In that I am also quite unable to agree, because: (1) no such agreement is proved; and (2), if there had been, there would be no object in advising him not to do a thing he had no power to do. If there were no binding agreement, it was no part of a solicitor's duty to advise him on the moral aspect of his conduct; a solicitor has enough to do in keeping his client right in law.

That there was no such agreement in fact seems to me to be plain enough. Notwithstanding the controversy which arose fully and sharply in the man's lifetime, there was no assertion of any such contract. In the first statutory declaration of the wife, in her opposition to the change being made in the society's records, she made no sort of assertion of any such agreement. In a supplementary declaration, made eight days afterwards, for the sole purpose of making such a claim, she put it in these words:—

"1. That when I began to pay the assessments on the benefit certificate on the life of my husband, James Clark, about eight years ago, as set forth in my said former declaration, it was at the

ONT.

C. A.
1912

CLARK
v.
LOFTUS.

Meredith, J.A.

request of the said James Clark that I did so, he intimating to me that, as my daughter, May Clark, and myself were two of the beneficiaries named in the said policy, and as he had failed in business, his membership in the Order and the benefit certificate would have to lapse, unless I kept the assessments paid, and many times after that, through the period of about seven years that I kept the assessments paid out of my own money, he frequently spoke to me, encouraging me to keep the assessments paid, and I did so with his knowledge and on the understanding that myself and my daughter May were to be beneficiaries for value in the said benefit certificate.

"2. I am sure that my husband did not expect, during that period, that he would be able to change the beneficiaries in the said policy from myself and our daughter, May Clark, without my consent and her consent, and I would not have paid the said assessments or any of them, but for the fact that she and I were two of the beneficiaries named in the said benefit certificate. And I now claim, as the fact is, that she and I are beneficiaries for value, and I positively object to any change being made in the beneficiaries as they stand in the said benefit certificate."

Not only is no such contract proved, but, if the case had been tried by a jury, there would have been no reasonable evidence to submit to them in support of any claim that there was.

The man, having been obliged to give up his business, and his earning powers being greatly impaired, was unable to keep up the periodical payments necessary to keep the certificate in force; there were then, practically, but two things which might be done, either abandon it, or else make the payments through the family purse, to which his wife, through the property which she owned, appears to have been the chief contributor from that time on. To abandon would have been foolish; to keep up the payments in that way was really the only thing to be done; and they all acted accordingly, until the man left the household and went to live with his oldest child, when payment out of the household purse ceased, and payment was taken up by that child.

There is really no sort of evidence of any kind of a binding agreement; if there had been, the wife broke it when she ceased making payments, and contradicted, if she did not break, it, when she, long before that, endeavoured to make the oldest child contribute towards the payments.

There could have been no contract unless the wife was bound by it; and how was she in any sense bound? How could she have been compelled by any one to make the payments? Nor was it suggested, by any of the witnesses, that the husband was to retain any separate legal right to an interest in the certificate, or to any of the moneys which might become payable under it; so that, if the wife had taken over the insurance, as she now claims, it would not be for value; all the payments which she made would

be voluntary and for her own benefit only; but that was not the character or effect of the dealings between them; it was merely the case, and the not uncommon case, of keeping up the payments out of the family purse, as I have said. There is no suggestion by any one that any kind of provision was made for the possibility of the benefits of the certificate becoming available in the man's lifetime; that was never taken into consideration, as it must have been if the parties were definitely contracting in regard to the rights to accrue under the certificate. It was simply the common case of the family taking up the burden of the payments, when the head of the house became disabled from fully meeting them. The man did not cease to pay, he continued to pay all that he was able to pay; his earnings, though perhaps little, all went into the family purse. No attempt was made to procure an assignment of the certificate or of any rights under it, nor was anything of the sort even suggested, as it doubtless would have been if the man were to be precluded of all his rights under it. It was the every day case of trusting to the husband and father not to alter his will. It is out of the question to speak of any one as a beneficiary for value of this certificate; such a contention is really like catching at a straw to save oneself from drowning.

But, if any one had been meant to be a "beneficiary for value," it would be in the teeth of the plainly and emphatically expressed intention of the Legislature that no one can be a beneficiary for value unless expressly so designated in the certificate; and I decline to attempt to dodge that enactment because I am carrying a hard case which tempts me to do so. If the man had lived long enough to become dissatisfied with his new home, and had gone back to his old one, and had again changed the beneficiaries, back to his wife and her daughter, a thing which might very well have happened, I can hardly think the other daughter would be held to be a beneficiary for value, although she took on, even, a former understanding that if she paid the premiums the benefits would be altogether hers.

There is no finding of want of mental capacity, on the part of the man, to make the change of beneficiaries in question; really the contrary has hitherto been found, and rightly so. The man was, no doubt, much impaired in physical and mental vigour; it may be that he was not either physically or mentally capable of carrying on any trade or business, but many an one may be so incapable, and yet capable of making a will; and in this case there was unquestionable mental and physical capacity to make, and thoroughly understand, the change of beneficiaries which he did make—there can be no doubt he knew the simple fact that he was taking from his wife and his daughter, by her, one-third each of the $3,000 so paid under the certificate, and giving the whole sum to his only child by a former wife, a thing which, wise or unwise, just or unjust, he was determined to do; and there can be no doubt that when doing it he knew that his wife had property of her own,

ONT.
C. A.
1912
CLARK
v.
LOFTUS.
Meredith, J.A.

and that her son and daughter were able to earn, and were earning, their own living; he knew a vast deal more than we can on the subject of the moral righteousness or justness of his act.

Nor has it been found that there was any undue influence exercised by any one over the man to bring about the change; indeed, it seems to be plain that the intention originated in himself, arising, in part, at all events, in his dissatisfaction, whether reasonable or unreasonable, with his own home, and in his desire to leave it. There was nothing like exclusion from intercourse with his wife and her children after he left the household; he was indeed a frequent visitor there, according to the wife's testimony, even while the contest over the change of beneficiaries was being waged in the society:—

"Q. You say he went to Mrs. Loftus in November, 1908; had he been at your house after that? A. Yes, he came over next morning, and came over every other day for a week or so, while he was able to go out.

"Q. Up to what date? A. I don't know, but I know he came over the whole time he was there, while he was able to go out; while he was able to walk from Mrs. Loftus's, he came over to see me.

"Q. He was able until after New Year's; was he over after New Year's to your place? A. Well, I cannot say whether he was or not; he was over, but he had two strokes in Mrs. Loftus's house. I did not know when he had them. I was not notified of them.

"Q. Was he over after the first stroke? A. Yes, after the first stroke he had at Mrs. Loftus's.

"Q. That was about the New Year? A. Then he came over after that."

After the inability of the trial Judge—though so strongly desirous of upsetting the transaction—to find undue influence, and after the inability of the Divisional Court to do so, it would be an extraordinary thing for this Court to do so, even if there had been some substantial evidence of it, and even if the persons concerned were not the reputable people the evidence shews them to be.

If I were at liberty to substitute my will for that of the dead man in the distribution of this money, I would very willingly cancel the later "designation" and set up the earlier one, in accordance with my sense of what would be fairer and juster, in the dim light which the case throws upon the knowledge which the man had, and upon his real and full reasons for acting as he did; but, as I have no manner of doubt that the change was made by him of his own free will, I have no more power to alter it, according to my notions of moral right and wrong, than he, if living, would have to change my will.

ONT.

C. A.
1912

CLARK
v.
LOFTUS.

I would allow the appeal and give effect to the change, which was made under the statute, and so is not controlled by the rules of the society. According to the practice of this Court, and, as I understand, the consent of the appellant, the money paid by the respondents or any of them in keeping the certificate in force, with interest, should be repaid out of the fund in Court.

Meredith, J.A.

I have not gone into the question, dealt with by Mr. Justice Clute, whether any such rule as that involved in the case of *Andrew* v. *Fulton* is applicable to such a case as this; that is not necessary; if the transaction were a contract, it would not apply; if it were a gift merely, some such rule might very well be applied, for after all it comes down to this simply: Was the act, mentally and physically, really that of the donor?

Maclaren, J.A.
Magee, J.A.

MACLAREN and MAGEE, JJ.A., agreed in allowing the appeal.

Garrow, J.A.

GARROW, J.A. (dissenting):—Appeal by the defendant from the judgment of a Divisional Court affirming the judgment of Middleton, J., in favour of the plaintiffs, upon the trial of an issue between the parties as to the ownership of certain money in Court, the proceeds of a policy on the life of the late James E. Clark.

James E. Clark was the husband of the plaintiff Jane Clark, his second wife, and the father of the plaintiff May Clark. He was also the father of the defendant, by his former wife.

The policy, dated the 6th March, 1893, was in the form of an endowment certificate issued by the Independent Order of Foresters, and the beneficiaries therein named were the plaintiffs and the defendant in equal shares.

In the month of January, 1909, James E. Clark had a severe stroke of paralysis, from which he never completely recovered. Up to the month of November, 1909, he resided with his wife and children, other than the defendant, in a house owned by his wife, but on the 22nd of that month he left his home and went to reside with the defendant, where he remained until his death on the 16th February, 1910. After the stroke, he had been in the habit of going frequently to the defendant's house. Two days before he went finally to reside with her, he informed her of his intention to leave home.

In her evidence the defendant said: "About the 20th of November my father came to me, and he was crying; he started crying and said they had another quarrel over home with Mrs. Clark, and that he was not going to stand her nonsense any longer; that, if I could not take and do anything for him, he would go into some Home, and it was then we first spoke about his coming to live with me. He came two days after that."

On the day that the deceased came to live with the defendant, steps were taken to alter the apportionment of benefit under the policy by giving it all to the defendant, and a written document to that effect was prepared and executed by the deceased and sent

ONT.

C. A.
1912

CLARK
v.
LOFTUS.

GARROW, J.A.

to the insurers, but had not been assented to by them in his lifetime. The defendant says that the suggestion came first from the deceased; but, even on her own shewing, she seems to have had no compunction in accepting the change, and even in assisting her father to bring it about.

There had, as the plaintiffs contend, been an agreement between the deceased and the plaintiff Jane Clark, made several years before his death, that, if she would keep up the payments of premium on the policy, the deceased would not change the apportionment. And, in pursuance of this arrangement, the plaintiff and her daughter May had made a number of payments of premiums. At the time of the first paralytic stroke, there were some arrears. These were, at that time, paid by the defendant, who continued to pay the premiums until her father's death, the total of such payments amounting to about $82.

There was conflicting evidence as to the mental condition and capacity of the deceased at the time when the document changing the apportionment was executed; the witnesses for the plaintiff stating that he had then become weak in mind, as well as in body, while those of the defendant considered him to be in his normal condition, although weak in body.

Middleton, J., was of the opinion that the circumstances brought the case within the rules as to testamentary dispositions procured or brought about by a beneficiary, laid down in such cases as *Barry* v. *Butlin*, 2 Moo. P.C. 480, and subsequent cases; that, from the month of September before his death, "the old man's mind was in the extremity of weakness, and that he was not fit to exercise testamentary powers, unless he had very careful guidance to see that all proper precautions were taken to compel him to realise the actual situation. . . . I am not satisfied that he had not testamentary capacity; but I think it is incumbent upon those attempting to set up any testamentary act or any act in the nature of a testamentary act to see that all extraneous influence was excluded." And that he should have received advice from an absolutely disinterested and independent solicitor. The learned Judge also expressed dissatisfaction with the explanation of the transaction in its inception given by the defendant. And he held that the agreement between the deceased and his wife as to the payment of premiums operated to prevent the deceased from changing the apportionment.

In the Divisional Court, Clute, J., delivered a judgment upon practically similar lines, agreeing with Middleton, J.; and Meredith, C.J., in a brief judgment, said that he agreed with Clute, J., that the transaction was one which, under the circumstances, could not stand, but declined to express an opinion upon the effect of the agreement as to the payment of premiums made between the deceased and his wife. Teetzel, J., agreed in the result. If the plaintiffs' case rested solely upon the agreement said to have been made between the deceased and his wife, I would have had some

difficulty in following the conclusion of Middleton, J. I even doubt whether, upon the whole evidence, an actual binding agreement was ever made. The impression which I gather from the evidence is, that the deceased, finding himself unable to continue to pay, simply turned the matter over to his wife, advising her that it would be to the advantage of the family to keep up the payments. This, which is, I think, something less than a binding agreement, would explain the application subsequently made by the plaintiff Jane Clark to the defendant, to assist in keeping up such payments, and possibly also the fact that the plaintiff Jane Clark latterly did not keep them up. Nor, with deference, am I able to agree that the case can be properly dealt with upon the footing of a testamentary disposition procured by the defendant, so as to admit of the application of the rule as to evidence in the case of wills to which Middleton, J., refers.

The substantial issue between the parties, it seems to me, arises upon the plaintiffs' allegation of fraud and undue influence on the part of the defendant in obtaining from the deceased the execution of the document in question. And upon that issue, which is alone quite sufficient to dispose of the whole case, I would without hesitation find in favour of the plaintiffs.

The learned trial Judge found as a fact, upon conflicting evidence, that at the time of the transaction the deceased was of weak mind.

No consideration was paid or agreed to be paid by the defendant for the transfer. She knew her father's condition and circumstances, and also that the policy had been kept alive by the plaintiffs, and must, therefore, have known that what, as she alleges, he proposed to do was at least unfair, and even dishonest, as against them. He came to the defendant, having left his own home without any sufficient cause; and steps were immediately taken, not to heal the breach, but to obtain the transfer now under attack. Under these circumstances, the defendant was, I think, bound to shew by satisfactory evidence, that the deceased thoroughly understood what he was doing, or at all events that he had been protected by independent advice: see *Phillips* v. *Mullings*, L.R. 7 Ch. 244, at p. 246; *McCaffrey* v. *McCaffrey*, 18 A.R. 599.

Middleton, J., who saw the witnesses, has expressed his dissatisfaction with the explanatory testimony adduced by the defendant concerning the transaction; and it is not even pretended that there was independent advice.

Under these circumstances, the transaction in question is one which, in my opinion, cannot be supported; and the appeal should be dismissed with costs.

*Appeal allowed;* GARROW, J.A., *dissenting.*

ONT.

C. A.
1912

April 4.

## REX v. BRITNELL.

*Ontario Court of Appeal, Moss, C.J.O., Garrow, Maclaren, Meredith, and Magee, JJ.A. April 4, 1912.*

1. EVIDENCE (§ XII L—987)—CRIMINAL CASES—CHARACTER—REPUTATION—EXTENT OF BUSINESS—REASONABLE DOUBT.

While neither the character, reputation, or extent of one's business, constitutes a reason why he should not be convicted of a criminal offence, or punished if guilty, yet they all have weight in considering the probability of the truth of the charge, and a bearing upon the question whether there was reasonable evidence of guilt, as well as upon the fact whether he was guilty or innocent.

2. OBSCENITY (§ I—5)—SELLING OR EXPOSING FOR SALE OBSCENE BOOKS—KNOWLEDGE OF ACCUSED—CRIMINAL CODE (1906), SEC. 207.

In order to warrant a conviction under sec. 207 of Criminal Code, R.S.C. 1906, ch. 146, as amended by 8 and 9 Edw. VII. ch. 9, for selling or exposing for sale an obscene book, it must be proved that the accused was aware of its obscene character and that it was sold or exposed for sale with his knowledge.

[*Rex* v. *Beaver*, 9 O.L.R. 418, 9 Can. Cr. Cas. 415, referred to.]

3. INDICTMENT, INFORMATION, AND COMPLAINT (§ II B—10)—SUFFICIENCY OF ALLEGATION—KNOWLEDGE—SELLING OR EXPOSING FOR SALE OBSCENE BOOKS—CRIMINAL CODE (1906), SEC. 207.

In an information for exposing for sale and selling obscene books under sec. 207 of Crim. Code (1906), as amended by 8 and 9 Edw. VII. ch. 9, it is necessary to allege that it was knowingly done, and an allegation that it was done "contrary to law" and "contrary to the form of the statutes," is not sufficient.

4. INDICTMENT, INFORMATION AND COMPLAINT (§ II E 3—40)—DESCRIPTION OF OFFENCE OF SELLING OR EXPOSING FOR SALE OBSCENE BOOK—ABSENCE OF "KNOWINGLY" FROM INFORMATION.

A person cannot be summarily convicted by a magistrate under sec. 207 of the Crim. Code, which declares that it is an indictable offence to "knowingly . . . sell, or expose for sale" any obscene book, upon an information which did not charge that he "knowingly" exposed for sale or sold such book.

5. OBSCENITY (§ I—5)—SALE OF OBSCENE BOOKS—PURCHASE BY CLERK WITHOUT KNOWLEDGE OF ACCUSED—STOCK CELLAR.

The owner of a book store containing thousands of books, cannot be convicted of knowingly exposing for sale an obscene book under sec. 207 of the Crim. Code, where a few copies which had been purchased by a clerk without the defendant's knowledge, were found in a cellar where stock was kept, and to which the public was not admitted.

6. OBSCENITY (§ I—5)—SALE OF OBSCENE BOOK—ABSENCE OF KNOWLEDGE OF CONTENTS OF BOOK.

The proprietor of a book store cannot be convicted, under sec. 207 of the Crim. Code, of knowingly selling an obscene book, where he did not have knowledge as to the contents of the book, a few copies of which had been, without his knowledge, purchased by a clerk and kept among stock in a cellar to which the public was not admitted.

7. EVIDENCE (§ II E 5—166)—PRESUMPTION AS TO KNOWLEDGE—SALE OF OBSCENE BOOK—RETURN OF COPIES TO PUBLISHER.

Knowledge of a dealer in books, who had a stock of 150,000 to 250,000 volumes, of the obscene character of a book, cannot be inferred from the fact that a clerk had, without his employer's knowledge, ordered a few of them and sold one, and that the defendant had, about a year before, upon receiving a few copies of such book, without reading one of them, returned them to the publisher because he had heard that the book was immoral.

Statement

CASE stated by one of the Police Magistrates for the City of Toronto.

ONT.

C. A. 1912

REX v. BRITNELL.

The defendant was convicted upon an information charging that, in the month of April, 1911, he, the defendant, contrary to law, exposed for sale and sold certain indecent and obscene books, tending to corrupt public morals, contrary to the form of the statute in such case made and provided.

Section 207 of the Criminal Code, R.S.C. 1906, ch. 146, as amended by 8 & 9 Edw. VII. ch. 9, provides:—

Statement

> Every one is guilty of an indictable offence and liable to two years' imprisonment who knowingly, without lawful justification or excuse —(*a*) makes, manufactures, or sells, or exposes for sale or to public view, or distributes or circulates, or causes to be distributed or circulated, or has in his possession for sale, distribution or circulation, or assists in such making, manufacture, sale, exposure, having in possession, distribution or circulation, any obscene book or other printed, typewritten or otherwise written matter, or any picture, photograph, model or other object tending to corrupt morals, or any plate for the reproduction of any such picture or photograph.

The stated case was as follows:—

"Pursuant to the order of the Court of Appeal dated the 15th May, 1911, I submit the following questions for the consideration of the Court:—

"1. Was there evidence upon which the defendant might be convicted of the offence of selling obscene books, within the intent and meaning of sec. 207 of the Criminal Code?

"2. Was there any evidence upon which the defendant might be convicted of having knowingly sold or exposed for sale obscene books, within sec. 207 of the Criminal Code?"

Argument

*George Wilkie*, for the defendant, argued that it had not been proved that the books had been exposed for sale or that they were obscene, or that they were sold or exposed for sale with the defendant's knowledge, or that the defendant knew of their obscene character. These were essentials of the case for the prosecution: *Rex* v. *Beaver* (1905), 9 O.L.R. 418, 9 Can. Cr. Cas., 415. On the question of obscenity, he referred to Burbidge's Digest of the Criminal Law of Canada, pp. 163 and 164, especially the note at the foot of the latter page.

*J. R. Cartwright*, K.C., and *E. Bayly*, K.C., for the Crown, contended that the defendant had been rightly convicted. There was sufficient evidence to establish that the defendant had knowledge that the books were on sale and were sold and that they were obscene. On the question of obscenity they referred to *The Queen* v. *Hicklin* (1868), L.R. 3 Q.B. 360; *People* v. *Doris* (1897), 14 App. Div. N.Y. 117; *People* v. *Muller* (1884), 96 N.Y. 408; *State* v. *McKee* (1900), 73 Conn. 18; *United States* v. *Bennett* (1879), 16 Blatchf. (Circuit Court) 338; *Rex* v. *Key* (1908), 1 Cr. App. R. 135.

*Wilkie*, in reply.

Meredith, J.A.

April 4, 1912. MEREDITH, J.A.:—The convicted man is a reputable book-seller, who carries on business, in an extensive

ONT.

C. A.
1912

REX
v.
BRITNELL

Meredith, J.A.

way, in one of the business centres of Toronto. Although neither his reputation, nor the character and extent of his business, is a reason why he should not be convicted, and punished, if guilty, yet they are not things without weight, and very considerable weight, in considering the probabilities of the truth of the charge against him upon the question whether there was any reasonable evidence of guilt adduced against him at the trial, as well as upon the question of fact, with which the Court cannot deal, whether guilty or not guilty.

The charge against him seems to have been a double one in two senses, exposing for sale and selling two different obscene books; but no question is raised in that respect; the conviction seems to have been in accordance with the charge, as if of one offence only.

The offence is one against morality, and one of a despicable character; the maximum punishment of which is two years' imprisonment; and it must be "knowingly" committed, "without lawful justification or excuse."

Assuming the books to have been sold, or exposed for sale, and to have been obscene books, which is assuming a good deal in favour of the prosecution, two other essential things must have been proved against the accused before he rightly could have been convicted: (1) that the books were sold or exposed for sale with his knowledge; and (2) that he knew of their obscene character. This is but a reasonable provision of the law; if it were otherwise, the lot of a book-seller, however honest and anxious to avoid anything like offending morality, would be a hard one; and especially hard upon one who carries a stock of a quarter of a million volumes, as one of the witnesses thought the accused does.

Neither book was manifestly or notoriously obscene or immoral; and it may be that neither is in that respect better or worse than a great number of books which are freely sold and read everywhere; and there is, I should think, nothing in either of them to make them very attractive to any one; and the small profit to be derived from their sale is hardly such as would induce a large dealer to conceal them in his cellar, so that he might sell them with less chance of being found out, and to sell them with the possibility of two years' imprisonment in the penitentiary before his eyes.

There was no sort of evidence of any exposure of them for sale; and there, manifestly, should have been a finding of "not guilty" to that extent; but there was not; on the contrary, there seems to have been a conviction in respect of which the penalty imposed was to some extent imposed.

Nor can I think that there was any reasonable evidence of a guilty knowledge on the part of the convicted man of the sale which was made, and which was of one of the books only, or of its obscene character, if it really has any.

ONT.

C. A.

1912

REX v. BRITNELL.

Meredith, J.A.

It is quite plain that, in the extensive business of the convicted man, the books in question might have been bought and sold without his knowledge; he did not attend to the department in which such books, that is, "works of fiction," are sold. He testified that he did not know that there were any such books in his establishment; that he had a year or more before found invoices of them and returned them, because, from what he had heard, he thought their tendency was suggestive, and so did not want to sell them. There is not a word of testimony to the contrary of this; the most that can be said is, that, if dealing with a man who might be thought untruthful and tricky, there were some circumstances of suspicion, a book having been sold and other books having been found in the cellar; things which are not unsatisfactorily explained by the witnesses for the prosecution. But no one, much less a reputable man doing an extensive reputable business, is to be convicted on suspicion merely; when there is no more than that against him a verdict of "not guilty" should be entered. The statement that, from what he had heard, he thought their tendency suggestive, is a good way removed from an admission that he knew that they were obscene.

The cases which were referred to on the argument here were very different from this case; in them the obscene character of the writings was manifest, and in some of them it was the author who was prosecuted and who had sold them.

In a case of this character, where there may be different opinions as to the immorality of a book, which is being generally sold here and in other countries or another country, it would seem to me to be the better course for those who object to its sale on that ground, to give notice of such objection to such a book-seller as the convicted man is, and to prosecute only if the objection is not heeded. No such book-seller can have any reasonable desire to sell such books as those in question, if they be obscene, for all there is in it for him, at the risk of being branded as a criminal and sent to penitentiary for two years, after first perjuring himself in the hope of escaping conviction.

I would answer the second question in the negative and direct that the accused be discharged.

Magee, J.A.

MAGEE, J.A.:—The two questions stated by the Police Magistrate under the order of the Court for its opinion refer only to sec. 207 of the Criminal Code, 1906, under which he had professed to convict. That section, as amended in 1909, declares that every one is guilty of an indictable offence "who knowingly, without lawful justification or excuse,—(*a*) makes, manufactures, or sells, or exposes for sale or to public view . . . any obscene book or other printed, typewritten or otherwise written matter, or any picture, photograph, model or other object tending to corrupt morals." In the information laid against this defendant it was charged only that in the month of April, 1911, he,

ONT.

C. A.
1912

REX
v.
BRITNELL

Magee, J.A.

"contrary to law, exposed for sale and sold certain indecent and obscene books, tending to corrupt public morals, contrary to the form of the statute in such case made and provided." It was not charged that he did it either knowingly or without justification or excuse. It was necessary to allege that he did it knowingly to bring it under that section. The information was not amended. He, therefore, was not charged with any criminal offence under that section. The words "contrary to law" and "contrary to the form of the statute" do not make up for the absence of that allegation of knowledge.

In the formal conviction, however, the words "knowingly" and "without lawful justification or excuse" are inserted in setting out the offence, which is otherwise described as in the information, except that the word "morals" is substituted for "public morals;" and the word "obscene" for "indecent and obscene."

In his statement of the case for this Court, the learned Police Magistrate says: "The defendant elected to be tried summarily and pleaded not guilty. After hearing evidence, I was of the opinion that the charge was proved, and accordingly convicted the defendant, being satisfied that the books were obscene, and that the defendant knew that they were on sale in his establishment." It is not specifically stated whether or not the Police Magistrate was satisfied that the defendant knew of the books being obscene, and we are as to that left to the inference to be drawn from the fact that he made the conviction. In his reasons for his decision, given at the time, he said, "The section of the Code under which this prosecution is brought is 207."

It would, therefore, appear that the defendant was convicted of an offence with which he was not charged and for which he had not consented to be tried summarily.

As the charge was laid "*contra formam statuti*," and was dealt with under sec. 207, and the questions propounded refer only to that section, it is unnecessary to consider how far, at common law, a book-seller charged with selling and publishing an obscene libel, sold by his clerk in the course of his business, could shelter himself by his want of knowledge of the sale, or of the contents, or how far either must be brought home to him.

Dealing, then, with the case as one under sec. 207, there must be shewn knowledge of the sale or exposure for sale, and also knowledge of the character of the book. That the latter must be shewn was held by this Court in *Rex* v. *Beaver*, 9 O.L.R. 418, 9 Can. Crim. Cas., 415.

The former is also manifestly necessary. An auctioneer selling a library, or shelf or package of books, might not know what books it contained. Objectionable articles may be made or sold in a factory or shop; and, while the statute would be futile if the proprietor could escape because they were not made or sold directly by himself, but by his employees, though with his knowledge, it might also cause injustice if he could be punished

because the making or selling was done for his benefit by his employees, though without his knowledge or consent, or even against his orders.

The only books specifically referred to in the evidence are three recent novels, which, for brevity, I may refer to as X, Y, and Z. There were, indeed, other books found along with these three in the cellar of the defendant's shop, but the Police Magistrate does not name them, and merely says that some of them were of the same type, and some of them he had looked through sufficiently to see that they all were more or less within the scope of the test of obscenity.

Apart from evidence as to the character of the three books, X, Y, and Z, the prosecution contented itself with proving that a copy of Y had been bought on the 6th April at the defendant's shop from a clerk who brought it from the cellar; and that on the 8th April a Police Inspector went to the shop and there saw the defendant, who said that he had not a copy of X or Y; but the Inspector says, "On searching, we found," in a box in the cellar, eleven copies of X and thirteen of Y, besides other books, including one or more copies of Z, and that, in the defendant's presence, his clerk said that he had been selling the book Y, and he thought that the defendant knew it. It is not stated whether the defendant made any remark thereupon. Indeed, it is not said that he heard it. He was not asked about it when called in his own defence, and he did not refer to it.

It is not shewn that any of the public or customers were ever admitted to the cellar. There was, therefore, no evidence of exposure of any of the books for sale, and only proof of a sale of one copy of one book, Y, by the clerk, and no proof of the defendant's knowledge of the contents of any of the books. Z and the other unnamed books are not further spoken of, and may be left out of consideration.

For the defence, the defendant himself and four of his clerks gave evidence. It appears that his stock contains 150,000 to 250,000 books, of which 4,000 to 7,000 are kept in the cellar in stock. A clerk says the whole place is full of books, and another, that he "put the boxes of books down the cellar, and especially as at Christmas time there was not room for as much stock." The defendant says that in the cellar he has in stock a theological library and cook-books and other books that he has not room for in the shop. One department of the business is that of dealing in old or antiquarian books. One of his clerks, Appleton, who states that he looks after the sale of the new books, says that X came out in 1907, "and was sold by other dealers here before we had it." "We sold a great many copies till lately, and now we would not sell more than one a month or so." The defendant, himself, testified that he did sell them when they first came out, but "a year or more ago" he found in the invoices a shipment of X and Y, and he returned

ONT.

C. A.
1912

REX
v.
BRITNELL

Magee, J.A.

the books, as from what he heard he thought the tendency of the books was suggestive, and so did not want to sell them; and he did not know, when the Police Inspector asked him about them, that he had a copy of either, and he had not read X nor Y, "nor such books." A clerk also testifies that, "a year ago or so," the defendant returned a shipment containing X and Y, "because they were not, I think, the class of books he desired to sell."

Even if we take these statements as going far enough to shew that the defendant knew that the books were obscene or such as tended to corrupt morals, it is evident that there is here no proof of a sale with his concurrence after he had learned of the objectionable character of the books.

Then it appears from the evidence of Appleton, who has charge of the sale of the new books, that "a year ago we got some twenty-five copies of each of these two books," X and Y, and "those found by the police were the remainder of that order." The invoice containing Y seems to have been produced by the witness before the Police Magistrate, but is not among the papers sent to this Court, and the exact date of it does not further appear. Appleton says: "The defendant probably did not know that I had ordered these books, as I am in charge of that branch." Another clerk says that the defendant is at the office in rear, and does not know what new books are in stock. Another says: "The whole place is full of books, 250,000 I would think. Appleton and I are in charge of the front of the shop. The defendant is at the office in rear, and looks after the old books. . . . The defendant does not know just what books we have bought, nor all we have in stock." Another clerk, Congdon, who says he is in charge of the antiquarian books, says that the defendant also looks after that department, and the defendant does not know what new books are in stock. The defendant, himself, says: "I am at the back of the shop, where the branches of the business I look after are situated: I do not attend to the new novels at all." He says that the clerk who ordered the last copies of these two books was in his employ when he returned the shipment, but he only remembered telling Congdon of having sent the shipment back, and he, Congdon, would have nothing to do with ordering these books —"they would likely be ordered by Appleton."

Bearing in mind the extent of the defendant's business, and the fact that the prosecution proved only one sale—and that by a clerk—of one book, without shewing that the defendant had any knowledge of its contents, can it be said that this evidence given for the defence affirmatively establishes knowledge by the defendant that this small order for these books had been given by his clerk, after he himself had sent back a shipment of these very books on account of their character? It may be said that, even taking the evidence for the defence, it is not absolutely clear that the defendant did not know of his clerk's order, whether

ONT.

C. A. 1912

REX v. BRITNELL

Magee, J.A.

at the time or afterwards, or of the receipt of the books thereunder, even though he thought that all had been sold; but it was for the prosecution to establish knowledge, not for him to shew want of knowledge; and, if the prosecution had had doubts upon the subject, it could have been cleared up by cross-examination. That not having been done, there was, in my opinion, failure of proof of knowledge of the sale, even in the sense of implied or tacit authority or consent to it; and, therefore, the second question should be answered in the negative.

It is unnecessary to answer the first question, as it becomes merely academic when the second is answered in the negative. No specific parts of any of the books have been referred to in the information, the conviction, the evidence, or in the argument. The statement by the Police Inspector as to the contents of X and Y was conceded to be at best inaccurate. No particulars seem to have been asked for by the defence, or delivered. The result would be that it would be necessary for the Court to peruse the books seized to see if it could discover any objectionable page, phrase, or sentiment, before it could answer the question propounded. In a sense this would be to ask the Court to be accuser instead of Judge. It is a course which should not again be adopted.

The defendant, on the evidence, should, in my opinion, have been acquitted, and the conviction should be declared invalid.

Moss, C.J.O., GARROW and MACLAREN, JJ.A., concurred.

Moss, C.J.O.
Garrow, J.A.
Maclaren, J.A.

*Conviction quashed.*

---

## ROBINSON v. REYNOLDS.

ONT.

H. C. J. 1912

May 11.

*Ontario High Court. Trial before Britton, J. May 11, 1912.*

1. BROKERS (§ II B—12)—REAL ESTATE AGENT—COMMISSION—PAYMENT OUT OF PURCHASE MONEY.

Where the plaintiff, a real estate agent, procured a written offer from a person to purchase land owned by the vendor, which the latter accepted, and where the only agreement shewn as to the payment of the plaintiff's commission was a stipulation in such offer that it was to be paid out of the purchase money, the agent is not entitled, upon the refusal of the purchaser to complete the purchase, to recover a commission from the vendor, unless the latter is at fault in not carrying out the purchase.

2. VENDOR AND PURCHASER (§ I B—5)—DEDUCTION FOR PURCHASE MONEY OF COMMISSION—WRITTEN CONTRACT.

A stipulation in an agreement for the sale of land made by written offer and acceptance and negotiated through a real estate agent, that the agent's commission against the vendor be paid "out of and form part of the purchase money" permits the purchaser to pay such commission on closing the purchase and to deduct the amount so paid from the purchase money then payable to the vendor.

ONT.

H. C. J. 1912

ROBINSON v. REYNOLDS.

Britton, J.

ACTION by real estate agents for 2½ per cent. commission upon the selling price of the defendant's property, viz., King George Apartments, in the city of Toronto.

The action was dismissed.

*G. H. Watson*, K.C., for the plaintiffs.

*C. A. Moss*, for the defendant.

BRITTON, J.:—The plaintiffs procured an offer in writing from one John G. Foster, addressed to the defendant, offering to purchase this property for $60,000, which offer the defendant accepted; but subsequently Foster refused to carry out the purchase, and he did not in fact purchase, and the defendant did not receive any purchase-money from Foster.

The plaintiffs' contention is, that immediately upon a contract of purchase and sale being made—through the intervention and agency of the plaintiffs, acting for the defendant—they, the plaintiffs, became entitled to their commission, no matter whether the actual purchase and sale was carried out or not.

There was an employment by the defendant of the plaintiffs as the defendant's agents to make a sale of the property mentioned. The particulars and real nature of the agreement between the plaintiffs and defendant are found in the offer drawn up by the plaintiffs and signed by Foster, which offer the defendant accepted. In the offer it is stipulated as follows: "The agents' commission to be paid out of and form part of the purchase-money, at 2½ per cent." There was nothing in writing between the plaintiffs and defendant, and the defendant contends that the agreement between him and the plaintiffs is evidenced in the offer written out as above-mentioned.

It may be that this special clause was inserted in the offer to prevent any possibility of Foster being liable for commission, and also to permit Foster's paying it out of the purchase-money, and so prevent the money, to the extent of the commission, going into the hands of the defendant. This offer permitted Foster to pay the commission and keep the amount so paid out of the purchase-money. I find that the agreement between the plaintiffs and the defendant was that, in the event of a sale—not merely an agreement for sale—the commission was to be paid out of the purchase-money.

This is what the plaintiffs said. If the commission was to form part of the purchase-money—as between Foster and the defendant—it can come only out of the purchase-money as between the plaintiffs and defendant. If Foster paid it, he would be protected. If the defendant got the purchase-money, or if the sale was carried out so that he would be responsible for not getting it, the defendant would be liable to the plaintiffs. In the acceptance of the offer by the defendant, he acknowledges receipt of $500 as a deposit. This cheque of Foster's was payable

to the order of the defendant, but it was not received by him, nor was it offered to him, nor was he asked to indorse it. It was retained by Mr. Bethune, one of the plaintiffs, for some time, and when presented payment had been stopped, as Foster repudiated and refused to go on with his proposed purchase. The holding of the cheque, and all the dealing between the plaintiffs and Foster, convince me that the real agreement between the plaintiffs and the defendant was as the defendant contends, viz., that the commission was to be paid out of the purchase-money. The defendant has acted in perfect good faith throughout. He did his utmost to get Foster to complete the purchase.

The fair inference upon all the evidence is, that the defendant never agreed to pay and the plaintiffs did not intend to charge so large a commission for procuring a person to sign an agreement to purchase, for an amount which the defendant would accept.

No fraud or collusion in this transaction can be imputed to the plaintiffs; but to accept their contention would offer a temptation to any real estate agent, upon a general retainer or employment, who would be guilty of collusion to procure an offer at a price that the vendor would gladly accept, and then have the proposed purchaser retreat or simply decline to carry out the purchase, allowing the agents to collect their commission from the responsible owner. My decision, however, is based upon my view of the evidence in this case, and not because of what might happen in some other case.

Then I am of opinion that the defendant is entitled to succeed upon the ground taken in the amended statement of defence.

The plaintiffs did so draw this agreement as to give to the purchaser Foster an opportunity to resist the defendant's claim to have Foster's purchase carried out. It seems to me that the Statute of Frauds affords a good defence to Foster. If the defendant in good faith desired to have the purchase carried out, and if the plaintiffs are in any way responsible for that, so that no purchase-money was received or can be received by the defendant out of the alleged sale by the plaintiffs, the defendant is not called upon to pay.

The action will be dismissed with costs; and the counterclaim also will be dismissed with costs.

*Action dismissed.*

ONT.

D. C.
1912

April 18.

## UNDERWOOD v. COX.

*Ontario Divisional Court, Boyd, C., Latchford, and Middleton, JJ.*
*April* 18, 1912.

1. FRAUD AND DECEIT (§ IV—16)—COMPROMISE OF FICTITIOUS CLAIM—CAVEAT—OVERREACHING BY BROTHER—LACK OF INDEPENDENT ADVICE—THREATS.

Where one who has no *bonâ fide* claim against the estate files a caveat against the granting of probate of the will of his deceased father, and obtains from his sister, the principal beneficiary under the will, an agreement purporting to be a compromise of his claim, whereby she covenants to pay to him more than the amount which she receives under the will, and it appears that she was overmatched, overborne, and overreached by his superior shrewdness, and that, though she consulted her husband, he was, to the brother's knowledge, of no assistance to her, and that she had no independent or professional advice, and, further, that the agreement was obtained by misrepresentations as to the legal situation, and by threats to give publicity to a secret of her past life, the agreement cannot be enforced.

[*Underwood* v. *Cox*, 3 O.W.N. 765, reversed.]

2. EVIDENCE (§ IV K—441)—ADMISSIBILITY OF LETTERS WITHOUT PREJUDICE—WHEN NOT BONA FIDE—THREATS.

Letters written without prejudice, and *bonâ fide* to induce the settlement of litigation, are not admissible in evidence against the party sending them, but this rule does not protect a letter not written for the purpose of a *bonâ fide* offer of compromise, but containing threats.

[*Pirie* v. *Wyld*, 11 O.R. 422, followed; *Kurtz & Co.* v. *Spence and Sons*, 58 L.T.R. 438; Phipson on Evidence, 5th ed., p. 211, referred to.]

Statement

ACTION to recover $964.70 and interest upon a covenant in an agreement.

*R. U. McPherson* and *J. W. McCullough*, for the plaintiffs.

*G. Waldron*, for the defendant.

Kelly, J.

February 28. KELLY, J.:—This action is brought by William J. Underwood and his sister, Catharine Laurie, against their sister, Jane Cox, for payment of $964.70 and interest, claimed as their two-thirds share of an amount agreed by the defendant to be paid to the plaintiffs and another sister, Mary Ann Cox, by an agreement dated the 5th May, 1910.

The defence set up is, that the defendant was induced to sign the agreement by the misrepresentation, fraud, intimidation, duress, and undue influence of the plaintiff Underwood and Joseph Laurie, husband of the plaintiff Laurie, and that she signed it without knowing its contents and without legal advice as to her rights.

The parties to the agreement are children of Francis Underwood, deceased, who by his will, dated the 2nd August, 1902, and a codicil thereto, dated the 1st March, 1905, gave to Ida Frances Cox, the minor daughter of the defendant, an organ and a mortgage which he held for $1,000 on the property of the defendant and her husband, and all the rest of his estate to the defendant.

The testator died on the 27th March, 1910; and his executors applied for probate of the will; the plaintiffs and Mary Ann Cox filed a caveat against the issue of probate, alleging that the will was not executed by the testator, or, if so, that it was executed under undue influence and duress, and that he was not of sound mind, memory, and understanding.

The real ground, however, of the plaintiff Underwood's objection to the disposition made by the testator of his estate is found in the claim which he had, or believed he had, against the testator and his estate, arising out of an agreement or understanding between the father and son. Several years prior to his death, the father obtained from the son a conveyance of certain property, at a price much less than its real value, on the promise that, at his death, the son would be given a substantial part of his estate. The son honestly believed that he was entitled to enforce this claim against his father's estate, or to share in the assets of the estate; he also claimed the organ which his father bequeathed to the defendant's minor daughter, and which, the evidence shews, had been at some time looked upon as belonging to him. The claim of the plaintiff Catharine Laurie was, that she had been promised by her father consideration for having nursed and cared for him for a considerable time prior to his death, and that the estate was, therefore, indebted to her. Mary Ann Cox, the other party to the agreement sued on, is not a party to these proceedings; it was stated by the defendant's counsel, during the progress of the trial, that she was not pressing her claim.

On the 4th May, 1910, the plaintiff Underwood, who lives in London, went to the defendant's residence in the township of Markham, and, during an interview of considerable length, proposed a settlement. The defendant's husband, Walter Cox, was not present; and Underwood, after stating to the defendant why he claimed to be entitled to a settlement, named an amount which would be accepted for the plaintiffs and Mary Ann Cox in full, the terms proposed being exactly those which were afterwards embodied in the agreement sued upon. The defendant, as was natural, said that she wished to talk it over with her husband; and Underwood left the house with the understanding that he would return next day for her answer.

On the 5th May, Underwood, accompanied by Joseph Laurie, husband of the plaintiff Catharine Laurie, returned to the defendant's house, and had a further interview with the defendant and her husband. The proposal made on the day previous was fully and freely talked over and considered by those present, and the defendant and her husband decided to accept it; and it was suggested by the defendant's husband that the plaintiff Underwood draw the agreement to carry out the settlement. This Underwood refused to do. It was then suggested, and, so

ONT.
D. C.
1912
UNDERWOOD
v.
COX.
Kelly, J.

far as the evidence shews, by the defendant, that Underwood, Walter Cox, and Laurie go to one of the executors, who lived near by, and have him draw the agreement. They went. The executor also refused to draw it, and suggested the parties going to Markham to have it drawn by a solicitor. These same three persons went together to Markham, a distance of five and a half miles, and instructions were given to a solicitor to prepare the agreement, on the terms which had been agreed on at the defendant's house, all three being with the solicitor when the instructions were given.

The plaintiff Underwood and the defendant's husband returned to the defendant's house with the agreement, which, on the way from the solicitor's office, had been signed by Mary Ann Cox.

The defendant did not then read the agreement, but she admits that she understood the proposal for settlement, made by her brother on the 4th, and discussed by the parties assembled at her house on the 5th. There is no doubt, and the defendant admits it, that the agreement is in the exact terms then proposed. Under these circumstances, its not having been read over at the time of its execution is not a ground for repudiating the agreement: *North British R.W. Co.* v. *Wood* (1891), 18 Ct. of Sess. Cas. (4th series) 27.

The defendant shewed some hesitation about signing, and the plaintiff Underwood said to her: "Now, Jane, you do not need to sign that paper, and don't sign it unless you feel that you are giving what you feel that I should have; I consider this is a just claim, and if you don't consider so, don't sign that paper." And, further, "You don't have to sign it."

The defendant's husband then said, "What will happen if she don't sign it?" Underwood replied, "We will let it stand on its own merits, will let the case stand on its own merits, and the case will settle itself."

At the trial it was admitted that there was no duress; and there was no evidence of it; but it was attempted to be shewn that there was fraud and misrepresentation on the part of the plaintiff Underwood, and that he had intimidated the defendant and obtained undue influence over her.

The evidence does not satisfy me that these contentions are well founded. I do not find that the plaintiff Underwood or Joseph Laurie made any misrepresentations to or perpetrated any fraud upon the defendant; nor do I think that any fiduciary relationship, or relationship of confidence, existed or was established between these parties such as would justify the assumption of undue influence; nor is there any evidence of intimidation.

The defendant alleged that she was in a weak state of health, that she had no independent advice, and that she was unduly

pressed by the plaintiff Underwood, and was hastened into the settlement.

It is true that she was not then in the best of health, but she was not so unwell as not to be able to attend to her household duties, which she was doing unaided at that time, including the preparation of dinner for those who assembled at her house on the 5th May. She was not unduly pressed or hurried into the settlement. When, on the 4th May, she expressed her desire to be given until the following day to consult with her husband, her brother readily consented. She had from some time on the 4th May until the afternoon of the 5th May to confer with her husband, and obtain other independent advice, had she desired to do so; and I do not find that any circumstances arose which threw the burden on the plaintiffs of doing more than they did. See *Wallis* v. *Andrews* (1869), 16 Gr. 624, at p. 640.

In *Harrison* v. *Guest* (1856), 2 Jur. N.S. 911, the Lord Chancellor held the absence of professional advice no objection, when the party dealt with did not occupy a fiduciary relationship. It was also there laid down that the burden of proof is on the party seeking to set aside the transaction to shew that he has been imposed on, and it is not for him to say, "I had no professional advice," unless he can shew that there has been contrivance or management on the part of the person who was dealing with him, and whose transaction is sought to be set aside, to prevent him having that advice.

Nothing has happened in this case to throw that burden on the plaintiffs.

The defendant endeavoured to shew that the plaintiff Underwood had used an incident in her early life as a threat to compel her to make the settlement. I do not find this to have been the fact. The defendant's evidence is, that she did not know if her brother knew of this incident, that he had never mentioned it to her, and when she herself mentioned the subject on the 4th May, she cannot remember his making any reply. Her brother denies having alluded to it.

It was argued on behalf of the defendant that the filing of the caveat was not the proper procedure by which Underwood could establish his claim. He, however, believed that whatever procedure was adopted by his solicitor in London, who prepared the caveat, was the necessary procedure by which to establish his claim.

The settlement was, to my mind, deliberately made; and the fact that one party to it afterwards became dissatisfied with it, is not of itself a sufficient reason for seeking to be relieved from it. In many instances, compromises or settlements are entered into which are at the time not altogether satisfactory to one or other of the parties, but which they, nevertheless, enter into so as to avoid the expense and anxiety attendant on litigation, or

ONT.

D. C.
1912

UNDERWOOD
v.
COX.

Kelly, J.

to settle doubtful claims, or for some such consideration, and the Courts uphold these compromises or settlements.

It is not unusual for a compromise to be effected on the ground that the party making it has a chance of succeeding in it; and, if he *bonâ fide* believes he has a fair chance of success, he has a reasonable ground for suing, and his forbearance to sue will constitute a good consideration: *Callisher* v. *Bischoffsheim* (1870), L. R. 5 Q.B. 449; *Miles* v. *New Zealand Alford Estate Co.* (1886), 32 Ch.D. 266.

These plaintiffs not only believed that they had a chance of success, but there is nothing in the evidence to shew that their claims were, in their minds, at least, other than honest ones, or that they were otherwise than honestly made. By the agreement sued upon, they and Mary Ann Cox, in consideration of the payment which the defendant agreed to make, released their father's estate from all claims which they had against it, and withdrew, without costs, the caveat.

After a careful consideration of the evidence, I can only conclude that the plaintiffs are entitled to succeed. There will, therefore, be judgment in their favour for the amount prayed for and costs.

The defendant appealed from the judgment of KELLY, J.

The appeal was allowed.

Argument

*G. Waldron*, for the defendant, argued that the learned trial Judge erred in the following findings: that the plaintiff Underwood did not make any misrepresentation to the defendant; that his real ground of objection to the will was in the claim which he had against his father's estate; that there was no evidence of intimidation; that no fiduciary relationship or relationship of confidence existed between these parties such as would justify the assumption of undue influence; that the defendant's health was not such as to interfere with her power to contract; that the absence of professional advice was not objectionable; that the plaintiff Underwood had not used an incident in the early life of the defendant as a threat to compel her to make a settlement; that the agreement was deliberately made; that the plaintiffs believed they had a fair chance of success. Counsel contended, on the contrary, that there was fraud and overreaching on the part of the plaintiff Underwood; that there was a fiduciary relationship or relationship of confidence between the plaintiff Underwood and the defendant; that there was evidence of intimidation; that the plaintiff Underwood did use an incident in the early life of the defendant as a threat to compel her to make a settlement; in fine, that the bargain was not a compromise of a dispute at all, but a surrender by the defendant through fear of Underwood's betrayal of a family secret, and should not be enforced. The learned trial Judge should have admitted in

ONT.

D. C.
1912

UNDERWOOD
v.
COX.

Argument

evidence a letter written by the plaintiff Underwood from London in November, 1911. Though written "without prejudice," it was not a privileged document, because it contained threats, and was not written for the purpose of a *bonâ fide* offer of compromise: *Kurtz and Co.* v. *Spence and Sons* (1888), 58 L.T.R. 438, at p. 441; Phipson on Evidence, p. 211; *Pirie* v. *Wyld* (1886), 11 O.R. 422. In support of his contentions counsel also referred to the following authorities: *Cadaval* v. *Collins* (1836), 4 A. & E. 858; *Huguenin* v. *Baseley* (1807), 14 Ves. 273, at p. 287; *Gordon* v. *Gordon* (1816), 3 Swanst. 400; *Hoghton* v. *Hoghton* (1852), 15 Beav. 278; *In re Roberts*, [1905] 1 Ch. 704; *Tennent* v. *Tennents* (1870), L.R. 2 Sc. & D. 6; *Hartopp* v. *Hartopp* (1856), 21 Beav. 259; *Ellis* v. *Barker* (1871), L.R. 7 Ch. 104; *Boyse* v. *Rossborough* (1856), 6 H.L. C. 2; *Allcord* v. *Skinner* (1887), 36 Ch. D. 145, at p. 171; *Stapilton* v. *Stapilton* (1739), 1 Atk. 2; *McCaffrey* v. *McCaffrey* (1891), 18 A.R. 599; *Trusts and Guarantee Co.* v. *Hart* (1900), 31 O.R. 414, at p. 420; *Gissing* v. *T. Eaton Co.* (1911), 25 O.L.R. 50.

*R. U. McPherson* and *J. W. McCullogh*, for the plaintiffs, contended that the learned trial Judge was right in his findings, and that his judgment should be affirmed. They denied that the evidence shewed any fraud or overreaching or intimidation, or that any fiduciary relationship existed between the plaintiff Underwood and the defendant such as would justify the assumption of undue influence. Therefore, the absence of professional advice was no objection: *Harrison* v. *Guest*, 2 Jur. N.S. 911. The plaintiff Underwood did not use an incident in the early life of the defendant as a threat to compel her to make a settlement. The settlement was deliberately made, and the fact that one party afterwards became dissatisfied with it was not a sufficient reason of itself to be relieved from it. The bargain was a fair compromise, as the plaintiffs believed that they had a fair chance of success: *Callisher* v. *Bischoffsheim*, L.R. 5 Q.B. 449; *Miles* v. *New Zealand Alford Estate Co.*, 32 Ch. D. 266. The learned trial Judge was right in refusing to admit in evidence the letter of November, 1911, as it was a privileged communication: *Kurtz and Co.* v. *Spence and Sons*, 58 L.T.R. 438.

*Waldron*, in reply.

April 18. BOYD, C.:—This appears to be a nefarious transaction, though its real import was obscured at the trial by reason of the rejection of evidence. Had the letter written by the plaintiff Underwood to the defendant *pendente lite* been admitted and considered by the learned trial Judge, I do not doubt but that he would have arrived at a conclusion diametrically opposite to that now under appeal. He was impressed favourably with the appearance of the plaintiff Underwood, but his own letter shews to what unworthy means he will stoop to serve his own ends.

Boyd, C.

ONT.

D. C.
1912

UNDERWOOD
v.
COX.

Boyd, C.

The dispute falls to be decided (as I take it) mainly, if not entirely, on what occurred during the first interview of one hour between brother and sister (the said parties) on the 4th May, 1910, when he made the claim which was afterwards given legal effect to by the writing under seal which is the foundation of this suit. But to understand the situation it is needful to refer to what is in evidence and to the prior sequence of events.

The first group relates to the plaintiff Underwood's claim of unfair treatment by his father. This claim, vague at best, looms up more largely at the trial than elsewhere. It was not known by or disclosed to the defendant; and, even now, it is difficult to find out coherently any claim from the evidence. But, so far as it has substance, the situation is this, and it rests entirely on the recollection and good faith and credibility of the plaintiff Underwood—with no scrap of writing to assist, but all the writings making against him.

The lot named in the will, N. part of lot 18 (fifty acres) in the 4th of Scarborough, was, the plaintiff Underwood says, originally owned by his mother. She died in 1885, without a will, leaving the father, this son, and four sisters, of whom the youngest, the defendant, Jane, was under age. It is said that the mother intended that the son should get this lot, and it is said that the father got the sisters to sign off their claims, without consideration, in favour of the plaintiff Underwood. It is said that the plaintiff mortgaged for $500, with which money he went into business, without much success apparently. Then the father asked the son to sell him the lot, and the son wanted for his interest therein $3,500, but the father would give no more than $2,000, and this the son took, on the father saying that the son would get a share with the rest of them when he divided—this being taken to mean, "when he died." The son contradicts himself as to whether the father paid $2,000 and assumed the mortgage for $500, or whether the mortgage was to be paid out of the $2,000. This occurred in 1888. This manner of claim was not explained to the sister when the alleged settlement took place in 1910. He gives it in his evidence in chief thus: "I said I felt I had not got from the estate what I should have got, that my father had not left me what I was promised, what I felt I should have; she said she had nothing to do with that part of it as to what I got or should have got." "Then I asked her, in view of the circumstances, her knowing how the property was made and got together, and how I stayed at home till I was twenty-three, I felt it was due her to make good the money, as she was evidently the only beneficiary under the will, that I should have a certain amount and that Mary Ann and Catharine should have something."

To follow the history of this lot after the son conveyed to the father. In 1902, the father called upon Mr. Holmes to draw the papers conveying this lot to his daughter Jane and her husband, Walter Cox, and to draw a mortgage, on the 26th July, 1902, for $1,000, upon the lot, from the Coxes, payable to the father at the end of fourteen years, with interest at two and a half per cent. This was subject to a first mortgage from the father to George Morgan (probably an executor) for $1,500. Mr. Holmes says that the mortgage was drawn expressly for the purpose of being left to the child (Ida Frances). According to the statement of the plaintiff Underwood, this farm was worth about $5,000, and they were to give $4,750 for it; of which $1,500 was paid by the defendant. There was also the mortgage for $1,000; and, if it was subject to another mortgage for $1,500, that would total $4,000. And the plaintiff omits to tell that his sister Jane relinquished her share in the lot originally when it was conveyed to the plaintiff—worth several hundred dollars. The rest of the sisters got $2,500 each from the father during his life.

The next group relates to the will of the father.

The father died at the home of the plaintiff Catharine Laurie, on the 27th March, 1910. His will was made on the 2nd August, 1902, pursuant to instructions given to the well-known lawyer Mr. Holmes, who drew it and was one of the subscribing witnesses. He gives to his daughter Mary Ann Cox and her husband the north half of lot 19 in the 4th of Scarborough, being 100 acres. To his daughter Fanny Newell, a small lot containing one-eighth of an acre alongside the north fifty acres of lot 18, conveyed to Jane and her husband. To Frances Cox, daughter of his daughter Jane, he gives the organ and also the mortgage for $1,000 made by his daughter Jane to the testator, and drawn less than a week before the will.

Nothing is given to his son Richard and daughter Catharine, as he had advanced them a sufficient portion (the plaintiff Underwood's name is not mentioned), and the residue of the estate goes to Jane Cox.

There was a codicil to this, drawn after it because of the death of Fanny Newell on the 1st March, 1905, when the testator was living with his daughter Catharine, whereby the small lot of one-eighth of an acre was given to his daughter Jane, the defendant. This codicil was drawn by Mr. Holmes's partner, Mr. Gregory, and by him also witnessed. The defendant was too ill to attend the funeral, but the plaintiff Underwood was there, and then found out from the Lauries that a will had been made. The matter was talked over with the sister Catharine, and they were disturbed about the way the property was left, and about Ida the little girl securing the mortgage for $1,000. The plaintiff bespoke a copy of the will, and returned to his home

ONT.

D. C.
1912

UNDERWOOD
v.
COX.

Boyd, C.

at London. He writes a letter on the 24th April, 1910, to the executor George Morgan urging the forthcoming of a copy of the will, in which he says: "All the information I have is from the Lauries to the effect the youngest girl (*i.e.*, defendant) in the family and her daughter comes in for the entire estate. And it is my opinion (sic) to go thoroughly into the matter before allowing the matter to be settled."

The plaintiff repairs to Mr. Beattie, solicitor in London, and procures the filing of a caveat on the 26th April, 1910, on behalf of the plaintiff and the two sisters Mary and Catharine. It is not clear what he told this solicitor as to the grounds of attack; at p. 122 of the evidence he says: "One of the grounds was his own promise before a witness that I was to have a share in the estate." And there is this further from his examination for discovery: "Q. And your solicitor did not think that would be a ground for setting aside the will? A. I do not think I asked him that. I thought possibly that would be a ground for setting aside the will . . . I did not go into the question of my reasons for the caveat to Jane." However, the caveat does set forth as grounds that the alleged will was not executed by the testator, or, if executed, it was so by means of duress and undue influence exercised over him, and that he was not of sound mind, memory, and understanding. The plaintiff says the caveat was filed because "he felt that he had not got what he felt was just out of the estate."

A warning was given on behalf of the executors on the 27th April that the contestant was to appear within ten days after service, failing which the Court would proceed in the premises: that would allow him till the end of the first week in May to act. Accordingly, on the 3rd May he visited Mr. Gregory, solicitor for the executors, and the caveat was discussed and the will, and he asked information, speaking something of the father and saying the will was not fair. Mr. Gregory informed him that there was no doubt about the validity of the will or codicil or of the capacity of the testator. He and his partner Mr. Holmes had known the testator well for years, and the plaintiff admits that he was told emphatically that there was no cause for breaking the will.

The plaintiff had visited his father in 1909, and found him robust and strong-minded, and that was his last visit.

These are the facts, which shew a perfectly hopeless case for attacking the disposition of property made by the testator, either on the grounds set forth in the caveat or upon the vague oral intimation alleged to be given by the testator, a quarter of a century before his death, that he would leave the son something by will. How then does it come that the defendant appeared willing to settle the plaintiffs' claims by paying $1,400? It is to be noted that Mary makes no claim on the estate and takes

no part in this litigation; and, further, that the alleged claim of Catharine for nursing was not in any way referred to before the defendant, it being supposed and believed that she (Catharine) had been paid by the testator all that he had promised to pay her—at so much per week. This apparent family compromise turns out to be really a surrender by the defendant, at the bidding of the plaintiff, because of his knowledge and use of a family secret. That secret may be revealed by the use of the plaintiff's own words in the letter dated "Nov. ——, 1911," written to the defendant after he had been examined for discovery in this action:—

"I am going to use what evidence I can get to shew that I had good reasons to enter a caveat against the will. . . . You know that my father was induced to make his will in the way he did just because of that child that Walter declared did not belong to him, and my father told us when he lived with us in Uxbridge that the child did not belong to Walter, and did not look like him, and went so far as to hint pretty loudly who it did belong to, and there are others in Scarborough who will be brought to tell what they know.

"You will remember that I was in Scarborough that day that Walter laid drunk on the side of the road after being up at Markham, and threatened to leave you, and you know his reasons, and he told them to some others in Scarborough. . . . All I want is my rights."

This precious epistle was enclosed in an envelope and addressed to Mrs. Jane Cox, and marked "personal," with a double injunction, marked on the envelope and written again on a strip of paper, to the post master, "Please see that the enclosed letter is given to no one else but to Mrs. Cox," and the whole put into an envelope addressed to the post master at Malvern. This outside envelope is stamped as of the 24th November at Malvern, and as of the 25th November at London, where it was posted. This letter begins "Dear Sister Jane" and ends "Your Bro. Will," and has at its opening "*Without prejudice.*" The plaintiff has some knowledge of the niceties of law, such as that he should not draw an instrument of which he gets the benefit, and he doubtless thought that this would be a secret missive not to be revealed or used against him in Court. And he hoped, no doubt, that it would work no less efficaciously in writing than if given by hint or word of mouth. But the authorities shew that this kind of letter, containing threats not written for the purpose of a *bonâ fide* offer of compromise, is not within the category of privileged documents.

On grounds of public policy, letters written without prejudice and written *bonâ fide* to induce the settlement of litigation, are not to be used against the party sending them. But, when the letter embodies threats if the offer be not accepted, it

ONT.

D. C.
1912

UNDERWOOD
v.
COX.

Boyd, C.

is in the interests of justice that such tactics should be exposed, and no privilege protects: *Kurtz and Co.* v. *Spence and Sons*, 58 L.T.R. 438, 441; Phipson on Evidence, p. 211; *Pirie* v. *Wyld*, 11 O.R. 422.

A critical point in the case was reached at the beginning of the cross-examination of the plaintiff. I quote: "You said you never made any threats to this woman? A. I never made any threats. Q. You did not make any threats on the 4th or 5th May? A. Oh, no. Q. Or on any other occasion? A. Threats—no, sir." Then counsel calls for the letter, but further questioning is frustrated by the ruling that it was not admissible. Now this letter, when looked at and read on this appeal, is fatal to the plaintiffs' success. The trial Judge, believing the answers made by the plaintiff Underwood, gives judgment in the plaintiffs' favour. But this letter is full of threat and menace of the basest kind; and so his answers must be discredited, for this letter discloses his threats, and therein stamps him as untruthful, and its contents reveal that he is also unscrupulous.

Leaving Mr. Gregory on the 3rd May, the plaintiff paid his visit to the defendant—and this visiting her was a new thing that had not happened before—on Wednesday the 4th May, 1910. She had heard nothing about the will from the plaintiff or her sisters, but it appears that the solicitor of the executors, Mr. Gregory, had, with the executor Morgan, called on her in the early part of April to see about the details of the estate with a view to obtaining probate. The affidavit of the other executor, Wyper, as to value, was made on the 20th April. Mr. Gregory says that he found her at the time of his visit in a "very frail condition." She had been married about thirteen years, and had children other than the one who takes under the will the mortgage intended for her by the testator—her grandfather—notwithstanding and perhaps because of his knowledge of the stigma which attached to her birth. The plaintiff, being asked, identified her thus: "Q. And that is the girl that was born as the result of something being up with the mother? A. That is the girl." The allusion is to the expression used by the mother in giving the scraps which she was able to recollect of this private one hour's interview with her brother on the 4th May. I quote: "He told me he had stopped the business. . . . He said that I knew why my little girl got the money left to her (*i.e.*, the $1,000 mortgage). I said, 'Was it because there was something up with me when I was married?'" At this stage of the examination and often afterwards she failed to remember what he said as to that and to other matters germane to it. No one can tell the strain put upon her by the exposure in public Court: she felt tired and faint, and finally collapsed, and the Court adjourned early. It is to be regretted that, on the resumption of the case next morning, she had not

been asked to put in writing in Court what she remembered, but this was not done, and she was overwhelmed with varied questions, which, far from helping, only hindered and embarrassed her. On the other hand, the plaintiff answered evasively and "hedged" on the different occasions when his cross-examination was nearing this critical point. As a short sample I put in a page which exemplifies his manner of answering while being examined for discovery:—

127. Q. You did not tell her the grounds upon which you were going to break the will if she did not give in now? A. No.

128. Q. You told her that you were going to fight it? A. Yes.

130. Q. You know the history of the little girl? A. Of the granddaughter?

131. Q. Yes, of your niece? A. I know partly the history of it.

132. Q. Say yes or no? A. If I could tell how children come in every family, I could tell you; I know the child was born.

133. Q. Did you make use of that in talking with your poor, feeble, consumptive sister? A. She is not consumptive.

134. Q. Weak lunged; did you make use of that? A. Her name was mentioned as receiving a thousand dollars, which she should not have. I made use of it in that way, that she got a thousand dollars that the rest of the family should have, I did make use of that.

135. Q. Did you talk with poor Jane about what would happen if you smashed this will which your father had made? A. What would happen?

136. Q. How the property would go if you smashed the will? A. I guess I did.

137. Q. What did you tell her? A. If the will was broken, then we would share and share alike—I think that is what I told her.

138. Q. Did you tell her that your proposition was a little better for you and Mary Ann and Catharine than that? A. I do not think so, because it would not have been.

140. Q. Did you say what would happen to the little girl if the will was broken? A. That that thousand dollars which she was to get would go to the rest of us, yes.

141. Q. Did you play upon the mother's timid horror of publicity? A. I do not think so.

142. Q. Did you play upon the fear of the woman who has made a mis-step and who was your own sister? A. Only as I am mentioning here.

No one can read the plaintiff's evidence (with the light reflected from this letter) and fail to see that the man knew how to touch the sore sport in his sister's past life.

No one who reads the defendant's evidence (with the light so reflected) can fail to see the cause of her mental disturbance,

ONT.

D. C.
1912

UNDERWOOD
v.
COX.

Boyd, C.

her distress of mind. She could not collect her senses: she failed to recollect, and that at many critical points, when, if she were an untruthful witness, it would have been simple and easy for her to fabricate favourable responses.

Consider the parties pitted against each other, in the absence of the husband and children and in the seclusion of the farm-house: he suing as a book-keeper, but giving evidence as an "insurance-solicitor," whose business it was to persuade people, and who had the adroitness and resourcefulness and assurance possessed by a shrewd man in that line of business. She, the youngest of the family, in frail health (as he admits), nervous, without knowledge of affairs, and without advice—burdened, moreover, with a secret, condoned after thirteen years of married life, but now likely to be revealed in all the publicity of an open Court. He takes out a copy of the will and reads it to her: he says he has authority to come down and break the will, and that she had to get on her knees because there was going to be a big storm. Confronted with the last statement, all that the plaintiff can say is, "To the best of my recollection and knowledge I said no such thing."

Again he said (with reference to the farm willed to Mary, which the testator before his death sold and conveyed to her), "The selling of the farm to Mary Ann could break the will." This statement is not contradicted by the plaintiff.

Again he said, "If the will was broken, I would lose everything, and my sisters would come in for the money that was left to me (*i.e.* the residue), and my little child would lose hers . . . He said he had stopped the business. . . . I did not know what a caveat was." To stay all this turmoil and exposure, she was to give up the money in the bank (which turned out to be about $750) and to pay $700 besides.

This because, as he said in his letter to Morgan, she and the girl get the entire estate. What was the entire estate given by the will? As valued by the affidavit of the executor Wyper, as follows:—

| | |
|---|---|
| Household goods and furniture ..... | $ 10.00 |
| Mortgage to child (to be paid by Mrs. Cox).. | 1,000.00 |
| Cash in bank (reduced by expenses to $750). | 1,000.00 |
| The small lot to Mrs. Cox, value ..... | 400.00 |
| | $2,410.00 |

The plaintiff makes grave complaint of the "organ" being given to the child: an old organ, bought, as is proved, by his mother, and, like the land (as he says), intended for him. The mother died in 1885, and the organ of that age was included in the valuation at $10. The woman appears, therefore, to have been willing to strip herself of all she gets from her father, *i.e.*,

$700 in bank and $400 in lot, and give $300 more, to save the mortgage for her little girl and save both of them from public shame.

It is necessary, perhaps, to say a little more of what took place after the 4th May. The plaintiff permitted her to talk it over with her husband that night, and he would return in the morning. I suppose the wife communicated the proposition and her misery in some way to her husband (what passed was not and could not be given in evidence); but, at all events, the effect on the man was simply stupefying. He is, I judge, a slow-witted man: if not exactly stupid, certainly not one to be looked to in an emergency. The plaintiff agrees that any conference between the two would not much help either of them. He is asked: "Of course they did not contribute much to each other's wisdom? A. I cannot help that . . . I done the best I could." That is, I think, true. He did the best he could for himself. Walter Cox, when examined, appeared to be all at sea: he says: "My wife got worried over it, and it got me rattled . . . my wife was so much worked up about it and nervous that it got me rattled, and I would not talk to the plaintiff." "My mind was in a queer state that day" (5th May). "I spoke in the house of getting some advice before she signed and before going to Wyper's (the executor). . . I did not think of advice at Wilson's (who drew the agreement); it was too far gone: he had us beat. I was beat completely. My idea was when I spoke about getting advice, I wanted to come to Toronto, but he said he had not time—to-morrow was the last day to act. . . . Neither my wife nor I said at our house that we would give what the plaintiff asked." They both contradict, in this, the statement of the plaintiff as to their having given audible assent. "I was not thinking of giving the money in Wilson's office, for I was bothered quite a bit." He also affirms what his wife says, that the plaintiff told them he had authority to break the will, and, if it was broken, we would lose the money, and the girl would lose the $1,000.

Walter says when the paper was laid before his wife to sign he said, "Hold on, not to sign. I wanted him to leave the paper with me and I would mail it to the lawyers . . . he would not do that: then I said, 'Well, go ahead and sign.'"

I may note in passing that the plaintiff appears to have had complete influence over his sister Mary: she was not privy to this arrangement, and in returning from the draftsman's office the instrument was taken to Mary's house, who was to sign first, and the plaintiff said: "I wonder if she will be satisfied with the agreement: if not she will have to sign." She did sign, but it is said that she has renounced any claim. The other, Catharine, did not appear, nor was she examined as a witness. Of course, whatever claim she may have for nursing will not be

ONT.

D. C.
1912

UNDERWOOD
v.
COX.

Boyd, C.

affected by the dismissal of this action. She may still proceed against the estate or the recipients of it.

Neither husband nor wife knew anything about law: the talk of a *caveat* would only mystify them, and the plaintiff's protestations of his authority to break the will, and the effect on the will of part of the land having been sold, would only tend further to mislead them. It was eminently a case calling for competent advice, but any attempt to seek this was checked by the peremptory veto of the plaintiff—in effect presenting the filing of the caveat and the purpose of the warning given him as to entering an appearance, to hurry matters to a close while yet the defendant was under the shock of his demand and fear of the consequences which would follow its refusal.

When the plaintiff was asked if he was not an overmatch for husband and wife, he replies with his usual indirectness, "Not necessarily."

I cannot doubt that the woman was overmatched, overborne, and overreached by her shrewd brother. From the moment of seeing her, he kept her in hand till the paper was signed on the 5th May. He knew that the husband's advice would rather confuse than help her, and he resolutely refused any opportunity for them to get independent assistance. When they did get such assistance, the result was a letter, dated the 14th May, in which the instrument sued upon is repudiated, and the reasons given for its repudiation.

There is another aspect of the plaintiff's evidence that I may briefly advert to. He is asked: "Why do you object to the little girl getting the money? A. She had no claim to it, she had no right to it. Q. How do you mean no claim to it? A. No right to it: no moral right whatever . . . the little girl had no legal right to the money: he left her money that should have been left to us: I made her understand that." We can read into this the method by which the brother made her understand that that little girl had no legal or *moral* claim on the testator or to the money. It is worth while, also, to give his answers to the application for delay and to get advice: "Q. Why did you not let this woman and her husband have three or four days to go and consult their solicitor? A. I could not. Q. Why? A. They had from Wednesday, Wednesday night I went there, and they had from (?to) Thursday morning. Q. Why did you not let them go? A. I was not asked." The defendant gives the reason which the plaintiff gave for refusing them time to get advice. It was this, "that he had just till to-morrow to act." And the husband says the same thing: "The plaintiff said he had not time; to-morrow was his last day to act. I did not know what he meant."

I have gone over the main turning point and the subsidiary ones on which the judgment should turn. Everything else in

ONT.

D. C.
1912

UNDERWOOD
v.
COX.

Boyd, C.

the way of detail is of little moment. There was the going to the executor Wyper to see if he would draw the paper. He moralised that it was a good thing parties could agree together, and passed them on to a lawyer. Mr. Wilson simply put the thing into legal shape according to what Underwood told him, and all this was in the absence of the wife. She had no one but her husband, who was baffled in his attempt, and gave it up. No doubt, she was able to go about the house and attend to domestic routine, getting dinner ready and the like, but that is really no more to the point than to suggest that, because the brother kissed her as he left on the evening of the 4th May, he had the most fraternal regard for her, and that she reciprocated his friendship.

The plaintiff had no belief in his flimsy claims upon his father or upon his estate or in respect to the validity of the will: his whole action indicates a scheme to put money in his pocket (by hook or by crook) at the expense of his sister.

The judgment should be vacated and the action dismissed, with all costs below and in appeal to be paid by the plaintiffs.

LATCHFORD, J.:—I agree in the result. Latchford, J.

MIDDLETON, J.:—Upon the facts, there seems to me only one conclusion possible. The bargain itself and all the surrounding circumstances shew that there must have been fraud or overreaching on the part of the plaintiff. There was mental inequality between the contracting parties, and the stronger was possessed of a weapon which he did not scruple to use in his attack upon the weaker. Therefore, to me at least, it seems plain that the transaction cannot stand. Middleton, J.

When it is made to appear that the bargain was not a fair compromise of a real dispute, but a complete surrender to a groundless attack, suspicion is at once aroused; and when the plaintiff is revealed—not only by his letter, but by his evidence—as cruel and unscrupulous, and as a man ready to use an incident in his sister's life for his own financial advantage, and reckless enough to attempt to cause the sister to abandon her defence to this action by the use of the same threat—and cunning enough, with his superficial smattering of legal knowledge, to think that he could conceal this last attempt by the use of the words "without prejudice"—I am compelled to the conclusion arrived at by my Lord the Chancellor, that the contract sued upon is in truth a "nefarious transaction."

The true function and office of the words "without prejudice" is well defined in *Pirie* v. *Wyld*, 11 O.R. 422, where it is said that "all communications expressed to be written without prejudice, and fairly made for the purpose of expressing the

ONT.
D. C.
1912
UNDERWOOD
v.
COX.
Middleton, J.

writer's views on the matter of litigation or dispute, as well as overtures for settlement or compromise, and which are not made with some other object in view and wrong motives, are not admissible in evidence."

This rule, founded on public policy, cannot be used as a cloak to cover and protect a communication such as the letter in question, which contains no offer of compromise, but a dishonourable threat.

*Appeal allowed.*

---

ONT.
C. A.
1912
June 18.

## NORTHERN SULPHITE MILLS Limited v. CRAIG.

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

1. PRINCIPAL AND AGENT (§ II A—12)—AGENT'S AUTHORITY—PURCHASE OF BONDS—UNDISCLOSED PRINCIPAL—TRANSACTION BETWEEN SEVERAL COMPANIES.

Where two companies are represented in financial matters by a third, all with common directors, and the financial company uses money which it has in hand to the credit of one company, being the proceeds of a sale of the bonds thereof, for the purpose of redeeming certain maturing bonds of the other company pending recoupment by the sale of a further issue of that company's bonds, and the transaction upon the minutes of the financial company bears the appearance merely of a payment by it on behalf of the company whose bonds are redeemed, and subsequently, upon the failure of the expected source of recoupment the minute is changed so as to shew that the financial company acted only as agent for the company whose money was used, and entries are made in the books of the respective companies, with the approval of the common directors, shewing that the bonds had been purchased by and were the property of that company, the proper conclusion is that the intention was to give permanence to the original temporary transaction, and that the bonds became the property of the company whose money was used in the purchase thereof, and not of the financial company.

[*Northern Sulphite Mills* v. *Craig*, 3 O.W.N. 214, affirmed on appeal.]

2. LIENS (§ I—4*a*)—GENERAL LIEN FOR BALANCE OWING—POSSESSION OF PROPERTY.

A general lien asserted by one party upon the property of another, for the balance owing by the latter upon the accounts between them, depends upon possession of the property by the party asserting the lien.

Statement

APPEAL by the defendants the Occidental Syndicate Limited from the judgment of Meredith, C.J.C.P., *Northern Sulphite Mills* v. *Craig*, 3 O.W.N. 214.

The appeal was dismissed.

*C. A. Masten*, K.C., and *H. W. Mickle*, for the defendants.

*I. F. Hellmuth*, K.C., and *J. H. Moss*, K.C., for the plaintiffs.

The judgment of the Court was delivered by

GARROW, J.A.

GARROW, J.A.:—The action was brought by the plaintiff E. R. C. Clarkson, as receiver of the Northern Sulphite Mills of Canada Limited, to recover from the defendants, John Craig

ONT.

C. A.
1912

NORTHERN SULPHITE MILLS, LTD. v. CRAIG.

GARROW, J.A.

and the Occidental Syndicate Limited, certain first mortgage bonds of the Imperial Land Company for $500 each, alleged to be the property of the plaintiff company.

The questions involved, which are almost entirely questions of fact, seem to depend less upon contradictory evidence, of which there is very little, than upon the proper inferences to be drawn from certain of the facts appearing in evidence, which are not in themselves decisive or plainly pointing only in one direction. There were, it appears, several joint stock companies, some organised in England and some in Canada, all more or less related, namely, the defendant company, which was in some respects the parent company, the plaintiff company, the Imperial Land Company, and the Imperial Paper Mills Company. The three latter companies were engaged in certain undertakings at or near Sturgeon Falls, in this Province, which included the manufacture of pulp and paper, and, in the case of the land company, the sale of lands.

The defendant company acted at London, England, in financial matters for the other companies. Its board of directors consisted of Archibald Baird Craig, chairman and managing director, his brother, the defendant John Craig, and William Richard Loxley. The same gentlemen were also the directors of the plaintiff company. Both companies occupied the same offices in London and employed the same office staff. The defendant John Craig was also the managing director of the plaintiff company and of the paper mills company, and was president of the land company, and resided in Canada. The defendant company had, as agent for the land company, floated for it certain bonds, of a total issue of $50,000, and, among them, those now in question, which bonds were to mature on the 1st January, 1906. The land company was apparently not at that time prepared to take them up. The defendant company had also, as agent for the plaintiff company, floated certain bonds of that company, the proceeds of which were still in hand at the credit of that company. It was the intention of the land company to issue additional bonds, with the proceeds of which the bonds so maturing would be paid; and, pending such issue, the requisite money required to retire them was transferred by the common directors from the account of the plaintiff company to that of the defendant company, and by the latter used to take up the bonds now in question. Of these there were originally in all 52. One was subsequently paid by the land company itself out of its own money, and is now no longer in question. Forty of them were so taken up and received from the holders in London; the other 12 were sent by the holders direct to the office of the land company in Canada for redemption, and were there taken up out of money which had been remitted for the purpose by the defendant company to the land

ONT.

C. A. 1912

NORTHERN SULPHITE MILLS, LTD. v. CRAIG.

GARROW, J.A.

company. The 40 so taken up in London were afterwards sent to J. H. Payne, secretary-treasurer of the land company, at Sturgeon Falls, in a letter written by William Tait, the defendant company's secretary, the date of which does not appear, but it was evidently written in January, 1906, in which Mr. Tait said:—

> I am sending you by this mail the following debentures and coupons which have been paid by this syndicate on behalf of your company on the 1st instant, viz., etc.

Mr. Payne afterwards handed these to the defendant John Craig, who had, at the time, the other 12 in his possession, and the whole were placed by him in the safe of the Imperial Paper Mills Company for safekeeping, where they remained until brought into Court under the order made in this action before trial.

The original minute of the transaction, dated the 15th January, 1906, in the defendant company's books, is set out in full in the judgment of the learned Chief Justice, from which it appears that the transaction then bore the appearance merely of a payment by the defendant on behalf of the land company. Nothing is said in it about the source of the money with which the payment was made, or otherwise to indicate that the plaintiff company was interested.

The new bond issue of the land company not having for some reason materialised, the defendant company's auditor, Andrew Wilson Tait, who was also auditor for the plaintiff company, intervened; and, at his suggestion, the original minute was so amended as to read as if the defendant company had acted in the matter only as agent for the plaintiff company; and a corresponding minute was made in the books of the plaintiff company to agree with the amended minute in the defendant company's books. The necessary entries were also then made in the books of account of the respective companies so as to shew that the bonds had been purchased and were the property of the plaintiff company, and not of the defendant company. All of which was done under the direction and with the consent of the same directors who had been the parties to the original minute; and, indeed, could not have been done without their consent. And from that time forth until this litigation began, the matter apparently so stood in the books of both companies.

The defendant company now contends that, notwithstanding such entries, it was the purchaser and is the owner of the 51 bonds in question, and that the money of the plaintiff company which was used in the purchase should be regarded either as a loan to it from the plaintiff company, or as a repayment by it upon account of its indebtedness to the defendant company.

These several contentions were determined by the learned Chief Justice in favour of the plaintiff company; and with his conclusions I agree.

I do not, however, regard it as essential to go so far as to hold that what was done in July was, as he apparently thought, intended to express and carry out the original intention held by the parties in the previous month of January. The whole transaction, including the use made of the money of the plaintiff company, was clearly of a temporary character, intended merely to bridge the gap until the new bond issue of the land company came forward, which until midsummer, Mr. A. B. Craig says, was expected "any day." To speak of it as a repayment by the plaintiff company of a debt not yet due, and, even if due, a considerable over-payment, or as a loan of money in the ordinary sense by the one company to the other, seems to me, in the light of all the evidence, to be simply absurd. No one at the time, I am satisfied, intended either a loan or a repayment. The money was there under the control of the two gentlemen who comprised the quorum of the boards of both companies, and it was used for such temporary purpose practically as a convenience for the land company, with the intention of a speedy readjustment when the new bonds of that company were sold. It was never for a moment intended that the bonds so acquired should be permanently held by either company. And, when it was afterwards found that the original intention could not be carried out, through the temporary failure of the source of expected recoupment, it was quite within the power of the parties to give the temporary transaction of January the more permanent form given to it in July, by which the bonds formally became the property of the company which had supplied the chief part of the funds for their acquirement. The amount actually paid for the bonds apparently somewhat exceeded the amount withdrawn from the account of the plaintiff company; and for such excess the learned Chief Justice has, apparently without objection, given to the defendant company a lien.

But, in addition, the defendant company claimed before us a lien of the nature of a general lien upon the bonds for the balance owing by the plaintiff company upon the accounts between them, a claim not apparently made before the learned Chief Justice, or at all events not dealt with in his judgment.

Such a lien depends, of course, upon proof that the party claiming it is in possession of the property in respect of which the lien is asserted; and such proof is, in my opinion, wholly absent in this case. As I have said, the bonds were physically in the safe of the Imperial Paper Mills Company when the litigation began. They had been placed there by the defendant John Craig, who received them from the land company, of

ONT.

C. A.

1912

NORTHERN SULPHITE MILLS, LTD. v. CRAIG.

GARROW, J.A.

which he was president; and the only reasonable or proper inference upon the whole evidence, his own included, is, that, in so placing them, he acted for and on behalf of the land company, and not as a director of the defendant company, as he now asserts—another instance, of which we see so many, of "wisdom after the event." He had, so far as appears, no instruction from his co-directors in London to require or to assert a right to the possession of the bonds. The 40 redeemed in England had been sent without limitation of any kind direct to the land company, to which company the holders also sent the remaining 12; and any possession afterwards acquired by John Craig from that company was clearly so acquired solely in his character of an officer of that company. The exact date at which the bonds were placed in the Imperial Paper Mills Company's safe is not stated in the evidence, further than that it occurred some time in the year 1906. If it was after the date of the change made in London, on the 30th July of that year, by which the plaintiff company became the owners, it might even be said that the possession of the defendant John Craig was that of the plaintiff company, of which, in addition to his other numerous and one would think slightly embarrassing offices, he was the managing director. But it is not necessary to go so far; because, in my opinion, the reasonable and proper inference upon the whole evidence is, as I have before stated, that such possession was and remained that of the land company only.

For these reasons, I would dismiss the appeal with costs.

*Appeal dismissed.*

---

ONT.

H. C. J.

1912

June 20.

**TRUBEL v. ONTARIO JOCKEY CLUB and FRASER.**

*Ontario High Court, Cartwright, M.C. June 20, 1912.*

1. PLEADING (§ I S—149)—STRIKING OUT PART OF STATEMENT OF CLAIM—MATTERS OF EVIDENCE—CON. RULE (ONT.) 268.

In an action for damages for a refusal to license the plaintiff, a professional jockey, who had paid the required fee therefor, in order to enable him to "exercise his profession" as driver of race horses upon the race track of the defendant, a racing club owning a public franchise, that operated for gain a race-course to which the public was invited upon the payment of an admission fee, a portion of the statement of claim will, on motion, be stricken out, where its allegations in substance were that "so public is the function it [the club] exercises, that it has a monopoly of race-horse betting on its tracks, that would be criminal but for the saving grace of legislation, whereby all members of the public, at its race meetings, are forced to bet through the defendant club, which acts as stake-holder, and exacts therefor over five per cent, on over a million dollars a year of bettors' money passing through its hands, and from which its chief income is derived," since such allegations are merely statements of evidence pertaining to the plaintiff's claim, which, under Con. Rule 268, are not properly a part of a statement of claim.

[*Blake* v. *Albion*, 35 L.T. 269, 45 L.J.C.P. 663, 4 C.P.D. 94, referred to.]

ONT.

H. C. J.

1912

TRUBEL v. ONTARIO JOCKEY CLUB.

2. PLEADING (§ I S—149)—STRIKING OUT PART OF STATEMENT OF CLAIM—HISTORICAL OR EXPLANATORY ALLEGATIONS.

In an action for damages for the refusal to license the plaintiff, a professional jockey, after he had paid the necessary fee therefor, so that he might "exercise his profession" as a driver of race horses, not only upon the race track of the defendant, but as well upon the tracks of the various members of an unincorporated association of racing clubs, the franchises of which required them to treat all members of the public fairly and equally, an allegation of the statement of claim, alleging in substance, that other members of such association owned and controlled other tracks where betting was done by means of book-makers in the employ of such members, will not be stricken out, since it is an allegation either historical and explanatory of the nature and composition of the association, or referable to the damages the plaintiff sustained by being prevented from driving upon the tracks of the association, as well as upon that of the defendant.

Statement

THE plaintiff was a professional jockey. He asked $10,000 damages for the refusal by the defendants of the necessary license to enable him "to exercise his profession." This refusal, he said, was without giving him a hearing and without assigning any cause for such refusal, after receipt and retention by the defendants of the usual fee of $25 for such license, duly paid by the plaintiff.

Before pleading, the defendants moved for an order striking out parts of paragraphs 2 and 4 and the whole of paragraph 5 of the statement of claim, under Con. Rule 298.

*C. F. Ritchie*, for the defendants.

*J. T. White*, for the plaintiff.

The Master

THE MASTER:—The statement of claim is in some parts decidedly rhetorical. Language less ornate would have been more appropriate. This is especially true of the expression objected to in the 4th paragraph, where it is said that the defendant Fraser "officiously and maliciously volunteered . . . to be a defendant." It was conceded on the argument that the words "officiously and maliciously" might properly be struck out; and the order will so direct.

The second paragraph is as follows: "The defendant club derives its existence from a public franchise, and owns and operates, for gain, a race-track in the city of Toronto, where it carries on race meetings at which the public are invited to attend and for which they are charged an entrance fee, and it owes a public obligation in the conduct of its business to treat all members of the public equally and fairly [and so public is the function it exercises, that it has a monopoly of race-horse betting on its track, that would be criminal but for the saving grace of legislation, whereby all members of the public, at its race-meetings, are forced to bet through the defendant club, which acts as stake-holder, and exacts therefor over five per cent. on over a million dollars a year of bettors' money passing through its hands and from which its chief revenue is derived]."

ONT.

H. C. J. 1912

TRUBEL v. ONTARIO JOCKEY CLUB.

The Master

The defendants ask to have all that follows the word "fairly," enclosed in brackets as above, struck out as irrelevant and tending to prejudice them at the trial, which the plaintiff asks to have before a jury.

In disposing of these motions it is well to refer once more to Con. Rule 268, which provides that pleadings shall contain a concise statement of the material facts upon which the party pleading relies, but not the evidence by which they are to be proved.

As to this second paragraph, it would seem that the material fact which the plaintiff must prove is the allegation in the first part that the Ontario Jockey Club is obliged to treat all members of the public equally and fairly—and that the part after the word "fairly" is probably wholly irrelevant, and not admissible in evidence in chief, whatever may be allowable in cross-examination.

In any case, it is no more than evidence to establish the obligation of which the plaintiff claims the benefit. It should, therefore, be struck out, as was done in *Blake* v. *Albion*, 35 L.T. 269, 45 L.J. C.P. 663, even though it was by the same Court allowed to be used at the trial: see 4 C.P.D. 94. Standing in the statement of claim, it could be read to the jury, and might very possibly prejudice their minds by suggesting the possibility of the defendants gaining $50,000 a year without any labour or expense.

The 5th paragraph is as follows: "The plaintiff further says that one of the members of the said Canadian Racing Association is known as the Niagara Racing Association, controlled by John H. Madigan, of Buffalo, New York, and Louis Cella, of St. Louis, Missouri, and owning and operating a racing-track at Fort Erie, Ontario, where betting is done with book-makers in the employ of and working for the said Madigan and Cella, who control and operate the race-track, and the same control and betting conditions prevail on the tracks of the Hamilton Jockey Club and the Windsor Jockey Club, all of which are members of the said Canadian Racing Association."

This is not so easy to deal with as were the other objections. The Canadian Racing Association is said, in paragraph 3, to be "an unincorporated combine of a body of representatives of various racing clubs and associations in Canada;" and it is further said that to this association is given, amongst other things, the "licensing of jockeys to ride on Canadian race-tracks."

This 5th paragraph may be justified either as being merely historical and explanatory of the nature and composition of the association, or as being referable to damages, as shewing that the refusal of a license prevents the plaintiff from "exercising his

profession," not only on the track of the Ontario Jockey Club, but also at other important race meetings such as Fort Erie, Hamilton, and Windsor.

It seems to be implied that, as all these meetings have a public franchise similar to that of the Ontario Jockey Club, they are under the like obligation "to treat all members of the public equally and fairly." There seems no ground for interfering with this paragraph at this stage. I see nothing in it embarrassing or prejudicial to a fair trial.

The motion succeeds on the two first grounds, but fails as to the third. The costs will, therefore, be in the cause. The defendants should plead in four days.

*Application granted in part.*

ONT.

H. C. J. 1912

TRUBEL v. ONTARIO JOCKEY CLUB.

The Master

---

## Re SMITH AND PATTERSON.

*Ontario High Court, Middleton, J. May 25, 1912.*

ONT.

H. C. J. 1912

May 25.

1. WILLS (§ III G 2—126)—DEVISE TO WIFE "TO BE DISPOSED OF BY HER AS SHE MAY DEEM JUST AND PRUDENT IN THE INTEREST OF MY FAMILY."

Under a will devising all the testator's property to his wife "to be disposed of by her as she may deem just and prudent in the interest of my family," the widow takes the property in fee simple unfettered by a trust, and, therefore, an objection to the title of a vendor to whose predecessor the widow had sold the property, based upon the contention that the words quoted above from the will were not sufficient to give the widow a fee simple in the lands nor any power to convey them in fee, is not well taken.

[*McIsaac* v. *Beaton*, 37 Can. S.C.R. 143; *Lambe* v. *Eames*, L.R. 6 Ch. 597, followed; *Countess of Bridgewater* v. *Duke of Bolton*, 6 Mod. 106, specially referred to.]

Statement

AN application by the vendor, under the Vendors and Purchasers Act, to determine the validity of an objection taken by the purchaser to the vendor's title.

*T. A. Gibson*, for Smith, the vendor.

*F. W. Carey*, for Patterson, the purchaser.

Middleton, J.

MIDDLETON, J.:—The title of the vendor is derived through a will. The testator died on the 8th February, 1892, and devised all his property to his wife, "to be disposed of by her as she may deem just and prudent in the interest of my family." The widow, assuming that this gave her a fee simple, purported to sell the property to the vendor's predecessor in title. The purchaser objects that the words quoted are not sufficient to give the widow a fee simple in the lands or any power to convey them in fee.

Upon the argument the purchaser placed his contention thus: The gift is a gift to the wife of the property "to be disposed of . . . in the interest of my family," and this constitutes an express trust. If the gift had been to the widow in

ONT.

H. C. J. 1912

RE SMITH AND PATTERSON.

Middleton, J.

fee, and a power to dispose of the same in the interest of the family had been superadded, this would not reduce the fee.

The case is thus distinguished from most of the authorities dealing with precatory trusts; as, if the argument is well founded, this is an express trust.

After the most careful consideration, I do not think it necessary to deal exhaustively with this argument, because I am convinced that the words "to be disposed of" give the widow a right to sell. It may be that she held the proceeds of the sale in trust for the family, but this would not prevent the title passing by the sale.

The nearest approach to the precise words that I have been able to find is in *Countess of Bridgewater* v. *Duke of Bolton*, 6 Mod. 106, where, at p. 111, it is said: "A devise to a man 'to dispose at will and pleasure' is a fee, and this is 'to dispose as he pleases.' A devise was made of land to his wife 'to dispose thereof upon herself and her children,' and it was held that she had a fee subject to the particular trust for the children."

The power to dispose of property gives the widest possible right to alienate, and must be taken to "comprehend and exhaust every conceivable mode by which property can pass:" Lord Macnaghten in *Duke of Northumberland* v. *Attorney-General*, [1905] A.C. 406, 410-11; and enables the party having that power "to sell out and out:" *per* Farwell, J., in *Attorney-General* v. *Pontypridd Urban Council*, [1905] 2 Ch. 441, 450.

This is sufficient to warrant me in holding that the objection to the title is not well founded.

I am inclined to think that, upon the construction of the will, there is not a trust, and that the words used cannot be successfully distinguished from the words construed in the case *Lambe* v. *Eames*, L.R. 6 Ch. 597. The words there used, following the gift to the widow, were, "to be at her disposal in any way she may think best for the benefit of herself and family." This was held insufficient to cut down the absolute gift.

The whole tendency of the more recent cases is in favour of restricting the doctrine of precatory trust rather than extending it. See, for example, *In re Williams*, [1897] 2 Ch. 12; *In re Oldfield*, [1904] 1 Ch. 549.

Since writing the above, I have found the case of *McIsaac* v. *Beaton*, 37 Can. S.C.R. 143, where the words are almost identical with the words here used. The property was given to the wife "to be by her disposed of among my beloved children as she may judge most beneficial for herself and them;" and the Court, affirming the Nova Scotia Courts, held that the widow took the real estate in fee, with power to dispose of it whenever she deemed it was for the benefit of herself and her children so to do.

ONT.

H. C. J.
1912

RE SMITH AND PATTERSON.

An order will, therefore, go declaring that the objection to the vendor's title is not well taken, and that under the will and the conveyance in question the vendor's predecessor in title took the land in fee simple. Costs are not asked.

*Judgment for vendor.*

---

## TOWNSEND v. NORTHERN CROWN BANK.

ONT.

H. C. J.
1912

April 18.

*Ontario High Court. Trial before Meredith, C.J.C.P. April 18, 1912.*

1. BANKS (§ VIII C—189)—LOAN BY BANK TO WHOLESALE DEALER—MEANING OF "AND THE PRODUCTS THEREOF"—R.S.C. 1906, CH. 29, SEC. 88.

The words "and the products thereof" in sub-section 1 of section 88 of the Bank Act, R.S.C. 1906, ch. 29, apply to all the articles previously mentioned in the sub-section, and not to live stock and dead stock only.

[Dictum of Hall, J., in *Molsons Bank* v. *Beaudry*, Q.R. 11 K.B. 212, approved.]

2. BANKS (§ VIII C—189)—WHO IS A WHOLESALE DEALER IN LUMBER—R.S.C. 1906, CH. 29, SEC. 88, SUB-SEC. 1.

One who carries on business partly as a wholesale dealer in lumber, and partly as a builder, is a wholesale dealer in lumber within the meaning of sub-section 1 of section 88 of the Bank Act, R.S.C. ch. 29.

3. BANKS (§ VIII C 2—203)—SECURITY UNDER R.S.C. 1906, CH. 29, SEC. 90—CONTINUATION OF FORMER SECURITY—ONUS OF SUPPORTING SECURITY.

Security under section 90 of the Bank Act, R.S.C. ch. 29, which, though given less than 60 days before an assignment by the giver thereof for the benefit of his creditors, is but a continuation of a former security of the like character held by the bank for the indebtedness more than 60 days before the assignment, is not given within 60 days of the assignment, so as to throw upon the bank the onus of supporting it.

4. BANKS (§ VIII C—184)—ARTICLES PRODUCED FROM PLEDGED GOODS.

Articles manufactured from lumber covered by security under sections 88 and 90 of the Bank Act, R.S.C. 1906, ch. 29, are likewise covered by the security.

5. BANKS (§ VIII C—187)—RIGHT OF BANK TO PROCEEDS FROM SALE—LUMBER USED IN BUILDING—ASSIGNMENT OF BUILDING CONTRACTS.

Where lumber covered by security given to a bank under sections 88 and 90 of the Bank Act, R.S.C. 1906, ch. 29, is used in the erection of buildings, and the building contracts are assigned to the bank, the bank is entitled to such of the money payable under the contracts as represents the lumber so used.

Statement

THE plaintiff, the assignee for the benefit of creditors of Joseph E. Brethour, a builder, contractor, and dealer in lumber, brought this action to set aside certain securities given by Brethour to the defendants to secure his indebtedness to them.

*W. Laidlaw*, K.C., for the plaintiff.

*F. Arnoldi*, K.C., for the defendants.

Meredith, C.J.

April 18, 1912. MEREDITH, C.J.:—The securities which are attacked are securities taken by the defendants under sec.

ONT.

H. C. J.
1912

TOWNSEND
v.
NORTHERN
CROWN
BANK.

Meredith, C.J.

90* of the Bank Act, R.S.C. 1906, ch. 29, and assignments by Brethour of moneys payable to him under building contracts which he had entered into, and book-debts, and these securities were given within sixty days before the making of the assignment; and the plaintiff attacks them on several grounds.

The securities taken under sec. 90 of the Bank Act are attacked on two grounds.

It was contended that Brethour was not a person from whom securities upon lumber could lawfully be taken, because, as is said, he was a builder, and not a wholesale dealer in lumber. The evidence does not support this contention, but shews that part of the business which Brethour carried on was that of a wholesale dealer in lumber.

It also contended that sawn lumber is not a product of the forest, within the meaning of sec. 88.†

In support of this contention *Molsons Bank* v. *Beaudry* (1901), Q.R. 11 K.B. 212, was cited. The opinion of the Chief Justice (Sir Alexander Lacoste) in that case, no doubt, supports the contention. Hall, J., however, differed from the Chief Justice, and the other member of the Court (Wurtele, J.) expressed no opinion on the point. The question was not necessary for the decision, as the Court was unanimous in affirming on other grounds the judgment that had been given against the plaintiffs.

The provision of the Bank Act then under consideration was sub-sec. 2 of sec. 74 of 53 Viet. ch. 31, which reads as follows: "2. The bank may also lend money to any wholesale purchaser or shipper of products of agriculture, the forest and mine, or the sea, lakes and rivers, or to any wholesale purchaser or shipper

*90. The bank shall not acquire or hold any warehouse receipt or bill of lading, or any such security as aforesaid, to secure the payment of any bill, note, debt, or liability, unless such bill, note, debt or liability is negotiated or contracted,—

(*a*) at the time of the acquisition thereof by the bank; or,

(*b*) upon the written promise or agreement that such warehouse receipt or bill of lading or security would be given to the bank;

Provided that such bill, note, debt, or liability may be renewed, or the time for the payment thereof extended, without affecting any such security.

2. The bank may,—

(*a*) On shipment of any goods, wares and merchandise for which it holds a warehouse receipt, or any such security as aforesaid, surrender such receipt or security and receive a bill of lading in exchange thereof; or,

(*b*) on the receipt of any goods, wares and merchandise for which it holds a bill of lading, or any such security as aforesaid, surrender such bill of lading or security, store the goods, wares and merchandise, and take a warehouse receipt therefor, or ship the goods, wares and merchandise, or part of them, and take another bill of lading therefor.

†Section 88, sub-sec. 1, of the Bank Act, R.S.C. 1906, ch. 29, provides: The bank may lend money to any wholesale purchaser or shipper of or dealer in products of agriculture, the forest, quarry and mine, or the sea, lakes and rivers, or to any wholesale purchaser or shipper of or dealer in live stock or dead stock and the products thereof, upon the security of such products, or of such live or dead stock and the products thereof.

of live stock or dead stock, and the products thereof, upon the security of such products, or of such live stock or dead stock, and the products thereof." That sub-section was repealed by sec. 17 of 63 & 64 Vict. ch. 26, and re-enacted, with some changes that are not material to the present inquiry; and the substituted sub-section appears in R.S.C. 1906, ch. 29, as sub-sec. 1 of sec. 88.

In my view, the construction placed by Hall, J., on sec. 74, was the correct one. In my opinion, the words "and the products thereof," in the fourth and fifth lines, apply to all the articles previously mentioned in the sub-section, and, therefore, to the products of the forest, and the words "the products thereof," in the last line, apply as well to the products mentioned in the earlier part of the sub-section as to the products of live stock and dead stock.

Being of this opinion, it is unnecessary to express an opinion as to whether sawn lumber is a product of the forest, within the meaning of the sub-section; but I am inclined to think that it is.

It is further contended that, as the security under which the defendants claim was given less than sixty days before the making of the assignment, it cannot prevail against the assignment. That security was, however, but a continuation of a former security of the like character held by the defendants for the indebtedness; and this contention, therefore, fails.

Some of the lumber upon which the defendants held security was manufactured into doors and window sashes and the like, and these products of the lumber are covered by the securities: R.S.C. 1906, ch. 29, secs. 88, 89.

None of the other articles covered by the securities are within sec. 88 of the Revised Act; and the securities do not, therefore, extend to them.

Some of the lumber covered by the securities was used by Brethour in the erection of buildings; and, as far as the money payable under the building contracts assigned to the defendants represents the lumber so used, they are entitled to it.

The claim of the defendants to the book-debts cannot be supported; and, indeed, according to my recollection of what took place at the trial, it was abandoned.

If the parties cannot agree as to it, there will be a reference to the Master in Ordinary to determine what part of Brethour's stock in trade at the time of the assignment, not being lumber, was the product of lumber covered by the defendants' securities, and what part, if any, of the money payable under the building contracts assigned represented lumber or the products of lumber covered by those securities.

As success is divided, there will be no costs to either party.

*Judgment accordingly.*

ONT.

C. A. 1912

June 28.

## LECKIE v. MARSHALL.

*Ontario Court of Appeal, Moss, C.J.O., Garrow, Maclaren, Meredith, and Magee, JJ.A. June 28, 1912.*

1. SPECIFIC PERFORMANCE (§ II—43)—DECREE OR JUDGMENT—BINDING EFFECT ON PARTIES—DEFENDANT COUNTERCLAIMING.

Where the plaintiff brought an action upon an agreement entered into between him and the defendant to have the same cancelled and to have a cash payment made thereon declared forfeited, and the defendant, by counterclaim resisting the plaintiff's claim, sets up an agreement to sell or purchase land and asks the Court to order specific performance, he necessarily submits on his part to perform it and the judgment which he afterwards succeeds in obtaining is as binding upon him as it is upon his opponent.

[*Leckie* v. *Marshall*, 3 O.W.N. 86, 20 O.W.R. 117, affirmed with a variation on appeal.]

2. SPECIFIC PERFORMANCE (§ II—43)—PARTY CLAIMING BOUND BY JUDGMENT—DECREASE IN VALUE OF LAND.

Where the plaintiff brought an action upon an agreement entered into between him and the defendant to have the same cancelled and to have a cash payment made thereon declared forfeited, and the defendant, by counterclaim resisting the plaintiff's claim, sets up an agreement to sell or purchase land and asks the Court to order specific performance and judgment goes for the defendant, he cannot, when the litigation has finally ceased, complain that owing to the delay caused by the litigation, which was wholly due to his opposition to the plaintiff's claim, the property has so much decreased in value that it is now inequitable to compel him to accept it.

3. VENDOR AND PURCHASER (§ I C—10)—REFEREE'S FINDING AS TO CONVEYANCING MATTERS—EFFECT ON TITLE.

A finding by a master or referee that a good title can be made to land upon certain things in the nature of mere conveyancing being done, is not a conditional finding or a finding against the title but a mere finding as to the conveyancing necessary to perfect the good title shewn to be in the vendor.

Statement

APPEAL by the defendants William Marshall and Gray's Siding Development Limited from the order of a Divisional Court, *Leckie* v. *Marshall*, 3 O.W.N. 86, 20 O.W.R. 117, affirming with some variations the order of SUTHERLAND, J., *Leckie* v. *Marshall*, 2 O.W.N. 1441, 19 O.W.R. 803, directing payment into Court; and from the judgment of Riddell, J., on further directions. Cross-appeal by the plaintiffs from so much of the judgment of RIDDELL, J., as reserved further directions.

The appeal was dismissed with costs and the cross-appeal allowed without costs.

*G. Bell*, K.C., for the appellants.

*J. Bicknell*, K.C., for the plaintiffs.

GARROW, J.A.

The judgment of the Court was delivered by GARROW, J.A.:—The case, in one form and another, has been before us more than once, and with the facts we are very familiar.

Dealing first with the cross-appeal, chiefly a question of practice, I am unable to see the necessity for the further reservation. The motion was itself a motion on further directions,

and ought to have, I think, made further provisions for disposing of the remaining questions. I would, therefore, allow the cross-appeal, and direct such further amendments, if any, to the order on further directions as may be necessary, with liberty to either party to apply in Chambers in case any subsequent direction becomes necessary; which amendments may, if the parties desire, be defined on settling the minutes of the judgment in this Court.

I am entirely against the defendants' appeal, which, it seems to me, is based upon unsubstantial, I had almost said fanciful, grounds.

Three points were mainly relied on: first, that the specific performance awarded by the judgment left it optional with the defendants at whose instance it was ordered, to recede from the bargain; second, that, owing to the delay caused by the litigation, the property has so much decreased in value that it is now inequitable to compel the defendants to accept; and, third, that, in any event, the Master's report on the title is conditional, and should not be acted upon.

These, and possibly other objections which I have not noted, were all presented and elaborated before us with great ability by the learned counsel for the defendants; but I am quite unable to see any force in any of them. When a litigant, either as plaintiff or, as in this case, a defendant, by counterclaim, resisting the plaintiff's claim, sets up an agreement to sell or to purchase land, and asks the Court to order specific performance, he necessarily submits, on his part, to perform it, and the judgment which he afterwards succeeds in obtaining is as binding upon him as it is upon his opponent.

As to the second point, the delay of which the defendants complain was wholly caused by their own demand, in opposition to the plaintiffs' claim, to have specific performance. That being so, how could they now be heard to complain? If, after long delay and changed circumstances, a plaintiff comes into Court asking the Court to enforce specific performance, the Court might consider it inequitable so to order, and leave the parties to their other rights under the contract. But that is not at all this case.

As to the third point, the report of the Master finds that a good title can be made, upon certain things in the nature of mere conveyancing being done. That is not, in my opinion, a conditional finding, or a finding against the title, but a mere finding as to the necessary conveyancing to perfect the good title shewn to be in the plaintiffs.

The appeal should be dismissed with costs, and the cross-appeal allowed, but without costs.

*Appeal dismissed and cross-appeal allowed.*

MAN.

K. B.
1912
April 22.

## NIAGARA FALLS CO. v. WILEY.

*Manitoba King's Bench. Trial before Prendergast, J. April 22, 1912.*

1. EVIDENCE (§ VI—D)—PAROL AGREEMENT—NEW AGREEMENT IN LIEU OF FORMER WRITTEN CONTRACT.

In an action for money received by the defendant for goods sold by him for the plaintiffs as their agent, the dispute was as to the amount of commission the agent was to receive, the agent claiming five per cent. commission under a written agreement, and the plaintiffs claiming by subsequent oral agreement the defendant was to receive thereafter one-half such commission, the plaintiffs' contention was upheld where the evidence shewed that after the date of the alleged oral agreement, the defendant received a statement from the plaintiffs bearing the words "two and a half per cent. commission, when sold" and never disputed it, and he sent them his own statement charging only two and a half per cent. and that all the plaintiffs' cheques were made out to the defendant on the two and a half per cent. basis and their correctness was never disputed by him.

Statement

THE defendant is a broker residing in Winnipeg, who, as plaintiffs' agent, received from them goods on consignment for sale, sold them and received payment therefor, and the latter now sue him for $1,274.62, as balance of moneys so received by him for their use.

The defendant admits having received $1,342.93, but claims certain credits, and brings the balance into Court.

There is no dispute as to the amount actually received by the defendant—the difference between the two amounts hereinabove set forth resulting merely from a different method of dealing with the admitted credits.

Judgment was given for plaintiff.

*E. F. Haffner*, and *K. L. Patton*, for the plaintiffs.

*J. B. Coyne*, for the defendants.

Prendergast, J.

PRENDERGAST, J.:—I will deal with the matter as the parties have done at the trial, upon the lines of the statement of account set out in the defence, which is more detailed and explicit.

This statement shews the defendant received $1,342.93. It sets out three small credits for discount, shortage and overcharge—in all $26.41, which plaintiffs admit. It also sets out a further credit of $1,061.60, which is really the issue, leaving a balance of $254.90, which was brought into Court.

The said credit of $1,061.60 is claimed for commission at 5 per cent on certain sales to the T. Eaton Co., the Foley Bros. and Larson Co., and the Jobin-Marrin Co.

On the sale to the Jobin-Marrin Co., as to which $53.72 is claimed, the plaintiffs admit one half on the basis of a 2½ per cent. commission, thus reducing the disputed amount to $1,034.74.

The defendant bases his claim on an agreement in writing with the plaintiffs, dated October 16th, 1908, appointing him

their sole broker for Winnipeg and Western points, and providing, among other things: that brokerage of 5 per cent. is to be allowed on all orders sold; that the defendant assumes storage charges and insurance charges; that he shall do his utmost to make speedy sale of the goods; that he will interest himself in no other goods which will in any way conflict or retard the sale of any lines packed by the company, and that the latter will furnish all necessary samples, information and assistance generally.

The plaintiffs' contention is that although the written agreement (Ex. 2) provided for a 5 per cent. commission, there was on August 25, 1909, at the company's office at Niagara Falls, a verbal agreement between the defendant and F. H. Boulter, president and manager, and S. E. Boulter, secretary-treasurer of the company, whereby the commission was reduced from 5 per cent. to 2½ per cent., with the understanding that the insurance charges and storage charges, which would include also cartage, would no longer be borne by the defendant.

I think that this contention of the plaintiffs is amply established. There is the evidence of the two officers of the company, and also that of Miss Annie Biggar, their book-keeper and typewriter, who was present at the interview and, moreover, shews that she thereafter made all cheques to the defendant on a 2½ per cent. basis and the correctness of the same was never disputed.

Defendant says that at the meeting in question nothing whatsoever was said about a change in the commission rate. But in November, 1909, he received from the plaintiffs their statement (Ex. 24), bearing the words "2½ per cent. commission when sold" and never disputed it. And on May 7th, 1910, and August 24th, 1910, he sent them his own statements (Ex. 27 and 15), charging them in as many words and figures only with 2½ per cent. There is also the plaintiffs' letter of June 21, 1910 (Ex. 26), which supports their contention to some extent if not conclusively by itself.

I do not think that against such evidence the defendant's contention that he had lost the written agreement and so made mistakes in his statements, can avail.

This disposes then fully of the Jobin-Marrin sale, on which the defendant cannot claim more than a 2½ per cent commission, which the plaintiffs allow.

The plaintiffs further contend that at the said interview of August 25, 1910, at Niagara Falls, it was specially agreed that the defendant would not claim any commission on the Eaton sale and the Foley Bros. & Larson sales when the same were consummated. In my opinion, the evidence on this point, supported as it is also by that offered on the question of the

MAN.

K. B.
1912

NIAGARA FALLS CO. v. WILEY.

Prendergast, J.

reduction of commission, establishes that before the Foley Bros. & Larson sales were put through, the defendant was consulted and agreed to these being completed without his having any claim for commission. The consideration for this seems to have been that the order was directly placed with the Sanitary Packing Co. for a full line of their goods and that the plaintiffs were only filling a comparatively small part of their order, and, that the whole order was accepted at a special cut as an opening to secure this firm's trade, which would help the defendant in making further sales to them thereafter.

As to the Eaton sale, which was placed directly with the plaintiffs, the case was different in many respects, and although it seems to have been also referred to, I cannot come to the same conclusion that the commission was also abandoned here. In fact, in their letter of August, 1910 (Ex. 12), while the plaintiffs say concerning the Foley sales: "We have made this clear to you when you were here last year at the factory," they do not base their view of the abandonment of commission on the Eaton sale on the ground of understanding or agreement, but on certain other considerations therein stated. Although protesting they are not liable, they, however, say they are willing to pay the commission at the reduced rate, and I do not think, on the evidence, that they can now recede from that position. That commission on a 2½ per cent. basis, following the verbal agreement of August 25, amounts to $48.75.

The defendant's account then stands as follows:—

| | | |
|---|---|---|
| Dr. To admitted amount received for plaintiffs' use | | $1,342.93 |
| Cr. By disc., shortage and overcharge | $26.41 | |
| By Comm. Eaton sale at 2½ per cent. | 48.73 | |
| By Comm. Jobin-Marrin sale at 2½ per cent. | 26.86 | |
| | | 102.00 |
| Balance | | $1,240.93 |

Judgment

There will be judgment for the plaintiffs for $1,240.93 with interest since August 31, 1910, and costs, in part satisfaction of which the amount brought into Court will be applied.

*Judgment for plaintiffs.*

## SMITH v. EXCELSIOR LIFE INSURANCE CO.

ONT.

C. A.

1912

June 28.

*Ontario Court of Appeal, Moss, C.J.O., Garrow, Maclaren, Meredith and Magee, JJ.A. June 28, 1912.*

1. INSURANCE (§ III E 2—120)—OCCUPATION AS RAILWAY EMPLOYEE—AVOIDANCE OF POLICY.

A contract of life insurance is void where the insured has violated a condition thereof forbidding him, within two years from date of contract, to engage in railway employment, without a permit from the insurance company.

2. INSURANCE (§ III E 2—120)—REASONABLENESS OF CONDITION AS TO OCCUPATION AS RAILWAY EMPLOYEE.

A condition of a contract of life insurance that it shall be void if, within two years from the date of the contract, the insured shall, without a permit, engage in the employment of a railway, is reasonable and valid.

3. EVIDENCE (§ II K—313)—ACCEPTANCE BY COMPANY OF PAYMENT OF PREMIUMS—ONUS—KNOWLEDGE OF VIOLATION OF CONDITION AS TO OCCUPATION.

In order that the acceptance of payments of premiums on a contract of life insurance shall constitute a waiver by the insurer of a condition of the contract that it shall be void if the insured should, without a permit, within two years from date of contract, enter into the employment of a railway, the onus rests upon those claiming under the policy to shew that the payments were accepted by the insurance company with notice or knowledge of the fact that the insured had violated such condition of the policy.

[*Western Assce. Co.* v. *Doull*, 12 Can. S.C.R. 446, and *Torrop* v. *Imperial Fire*, 26 Can. S.C.R. 585, specially referred to.]

4. ESTOPPEL (§ III G 1—87)—INSURANCE AGENT WITHOUT AUTHORITY—WAIVER OF CONDITION AS TO OCCUPATION—ACCEPTANCE OF PREMIUMS.

The fact that an agent, who had no authority to waive any of the conditions of a policy of insurance, after the expiration of the two years in which an assured person was, by the terms of the policy, prohibited from entering the employment of a railway without a permit from the company, acquired knowledge that the former was engaged in such employment, which was never communicated to the company, cannot amount to a waiver of such condition of the policy.

[*Wells* v. *Independent Order of Foresters*, 17 O.R. 317; *Wing* v. *Harvey*, 5 DeG. M. & G. 265; *Imperial Bank* v. *Royal Ins. Co.*, 12 O.L.R. 519, specially referred to.]

Statement

APPEAL by the defendants from the judgment of BRITTON, J., 3 O.W.N. 261.

The appeal was allowed and the action dismissed.

Judge Britton's judgment is as follows:—

Britton, J.

BRITTON, J.:—This action is brought by Jean Smith, the widow and the administratrix of the late Charles Francis Smith, and by Zillah Smith, his mother, to recover $1,000, being the amount of the policy issued by the defendants upon the life of Charles Francis Smith. The policy is dated the 16th May, 1898, and is a contract that, upon the payment of twenty annual premiums of $23.35 each, annually in advance, at the head office

ONT.
C. A.
1912
SMITH
v.
EXCELSIOR
LIFE
INSURANCE
CO.
Britton, J.

of the defendants, the defendants will pay to Zillah Smith, mother of Charles Francis Smith, $1,000, at the expiration of twenty years from the date of the policy.

This policy was subject to the statements in the application being true; and as to proof of the age of the assured and to other things not necessary to mention, as no point is raised in reference to them by the defendants in this action. The following was one of the terms of the policy printed on its face:—

> Receipts for premiums. No payment to any person except in exchange for a premium receipt, duly signed by the president, vice-president, or managing director, shall be binding upon the company, and all payments made to an agent of the company by the assured, or any one representing him, without receiving a premium receipt signed as above, shall be deemed to have been received by the said agent as agent for the assured, and not for the company.

Then, in addition to what is on the face of the policy, in the body of it, it is made subject to certain conditions and provisions indorsed thereon. One of these, 5 (1), is, so far as material in this case, as follows:—

> If, within two years from the date of this contract, the assured, without a permit, engage in employment on a railway, this policy shall be void, and all payments thereon shall be forfeited to the company.

Mr. Smith was canvassed for this insurance by one A. B. Telfer. The application is dated the 6th May, 1898, is upon one of the blanks of the defendants, and is signed by Mr. Telfer as the soliciting agent. Mr. Telfer was in fact then agent of the defendants, under a contract dated the 25th March, 1898. The contract as between Telfer and the defendants was terminated on the 30th June, 1898.

The assured, C. F. Smith, did in fact, on or about the 25th September, 1899, enter the service of the Grand Trunk Railway Company as fireman. He continued in the employment of that railway company until his death, which occurred on the 20th July, 1911. At the time of his death, C. F. Smith was locomotive engineer, having been promoted to that position some years before. He was killed when upon duty. The defendants plead, in bar of the plaintiffs' right to receiver, that the assured, without a permit from the defendants, did, within two years from the date of the policy, engage in employment on a railway, and that, therefore, the policy became void.

The defendants admit that, notwithstanding the alleged forfeiture of the policy, the premiums were regularly paid; and, without admitting any liability, the defendants bring into Court the amount of the premiums so paid for the years 1900 to 1911, inclusive, with interest thereon, which amount the defendants ask the plaintiffs to accept in full satisfaction of their claim. The plaintiffs, in reply, allege that the defendants had notice of the employment of the insured upon a railway; and, after such

notice, the defendants, without objection, continued to accept from Zillah Smith and retain the premiums paid by her for the purpose of keeping the policy alive, and that, by so doing, the defendants waived any right to claim a forfeiture of the policy.

The question is, how far the defendants are affected by notice to A. B. Telfer, their former agent.

It is not certain when Telfer first had notice of the assured accepting employment on the railway—probably soon after 1899—but he admits that he knew of it in 1908, and knew that in subsequent years the insured continued in such employment.

The position of A. B. Telfer and his relation to the defendants was apparently no different, so far as the insured or the plaintiffs knew, from what it was when the insurance was affected. All premiums from first to last on this policy, whether paid by C. F. Smith or by the plaintiff Zillah Smith, were paid to Telfer. Receipts from Telfer for 1898, 1899, 1900, 1901, 1902, and later years, were produced. These receipts or many of them were signed by Telfer as agent for the defendants. In all cases the money was remitted to the defendants; and official receipts were procured and handed over to the insured or the plaintiff Zillah Smith.

The defendants treated, dealt with, and recognized Telfer as to this policy as their agent in collecting premiums, and was paid by the defendants therefor the usual commission to agents. The plaintiff Zillah Smith had no means of knowing and did not know what other business, if any, Telfer was engaged in. All the business as to this policy and payment of premiums thereon was transacted by her with Telfer as her agent. It is true that, in the absence of Telfer, one or more letters were written by Telfer's wife, but she acted for her husband and only for him, to accommodate the plaintiff Zillah Smith.

As late as the 17th June, 1911, Telfer received that year's premium, remitted to the defendants, and again was paid the agent's commission. If established that Telfer was the agent of the defendants in respect to collection of premiums, then the notice to him must be treated as notice to the defendants, and the defendants will be precluded from insisting on the forfeiture of the policy.

*Wing* v. *Harvey*, 5 DeG. M. & G. 265, seems expressly in point. In that case, a life policy was subject to a condition making it void if the assured went beyond the limits of Europe without a license. An assignee of the policy, on paying the premiums to a local agent of the assurance society, at the place where the assurance had been effected, informed him that the assured was resident in Canada. The agent stated that this would not avoid the policy, and received the premiums until the assured died; and it was held that the society were precluded from insisting on the forfeiture. Here the local agent at the place

ONT.

C. A.
1912

SMITH
v.
EXCELSIOR
LIFE
INSURANCE
CO.

Britton, J.

where the assurance was effected, after knowing that the deceased had engaged in employment on a railway, accepted the premiums. The defendants accepted the premiums; and these were regularly paid down to the time of the death of the assured. In the case cited, Lord Justice Knight Bruce said:—

> The directors taking the money were and are precluded from saying that they received it otherwise than for the purpose and in the faith for which and in which Mr. Wing expressly paid it.

This is not the case of the authority of an agent—collecting agent—to waive a forfeiture occasioned by breach of a condition. The forfeiture is waived by the defendants themselves, by their accepting premiums from year to year, after the occurrence of what they now rely in as permitting them to declare a forfeiture—premiums paid in good faith and received by the defendants without inquiry or objection. In 1900, the defendants increased their rates. Had C. F. Smith not been insured with the defendants until 1900, the annual premium would have been, as of twenty-one years of age, $27.70. That increase of rate could not affect this contract, made in 1898. The defendants in 1898 were not issuing policies upon railway employees; but they were in 1900 and ever since, upon the terms of an annual addition of $5 to the regular premium rate. The local agent did not, nor did the defendants, in any way notify the plaintiffs or C. F. Smith, or, so far as appears, any existing policy-holder, of any additional amount required for premium.

Upon all the facts, I do not think the cases cited by counsel for the defendants are in conflict with *Wing* v. *Harvey*. It cannot be said that the defendants intended to declare a forfeiture —when the time mentioned in the policy within which the assured could not take railway employment had expired. The most they could attempt to do would be to impose the additional charge of $5 a year.

*Wing* v. *Harvey*, 5 DeG. M. & G. 265, is discussed in *Wells* v. *Independent Order* of *Foresters*, 17 O.R. 317, at p. 326.

The claim seems to me a just and equitable one; and I am glad to find that the defendants—notwithstanding their pleading —admit by the letter of their actuary, put in upon the trial, that, upon the basis of a premium of $23.35 plus $5=$28.35, the plaintiffs would be entitled to $823.65.

In any event, in my opinion, the plaintiffs are entitled to that sum.

I would be sorry to find that the law is such as to prevent recovery of the whole claim by the claimant who has regularly paid all premiums, sometimes at personal inconvenience—relying upon ultimately getting the amount of the policy. The formal proof of claim was admitted on the 16th August, 1911. The plaintiffs are entitled to recover $1,000, with interest at five per cent. per annum from the 16th August, 1911, with costs.

*H. E. Rose*, K.C., for the defendants.
*John R. Logan*, for the plaintiffs.

The judgment of the Court was delivered by GARROW, J.A.:—The action was brought upon an insurance policy issued by the defendants for $1,000 upon the life of Charles F. Smith, payable to his mother, the plaintiff Zillah Smith. The policy is dated the 16th May, 1898. At that time, Charles F. Smith was a farmer. The policy contained a condition that, if, within two years from the date of the contract, the insured should, without a permit, engage in employment on a railway, the policy should be void and all payments made thereon should be forfeited to the company. The assured did, within the period of two years, engage in employment on a railway, by becoming a fireman upon a locomotive engine, in which employment he continued, and in which he finally lost his life in an accident on the 20th July, 1911. There was no evidence that a permit had ever been given, or even asked for, to enable the assured to become a railway employee. But, the premiums having been paid after the change until the death, it was contended by the plaintiffs that, under the circumstances, the defendants should be held to have waived the condition. To this contention Britton, J., acceded, and gave judgment for the full amount. I am, with deference, unable to agree with that conclusion.

The terms of the contract are very clear and easily understood. What the defendants stipulated for was, not merely notice of a change of employment, but that for such change a permit should be required. The condition is a perfectly reasonable one. The premium for the one risk naturally differed from that of the other. It is even doubtful, on the evidence, if, at the time the risk was undertaken or the employment changed, a locomotive fireman would have been able to obtain from the defendants a policy on any terms.

The change of employment having admittedly taken place without a permit, in breach of the condition, the onus was clearly upon the plaintiff to establish by satisfactory evidence a case against the company of either waiver or estoppel. And the very first step towards making out such a case would necessarily be proof of notice to or knowledge by the company; for without such notice or knowledge there could be neither the one nor the other.

There was no such proof, nor indeed any serious attempt made to prove notice to or knowledge by the company as a company. And the negative of any such notice or knowledge, at any time prior to the death of the assured, was clearly established by the uncontradicted testimony of the general manager, Mr. Marshall. What was proved and all that was proved by the

ONT.
C. A.
1912
SMITH
v.
EXCELSIOR
LIFE
INSURANCE
CO.
Garrow, J.A.

plaintiffs was, that Mr. Telfer, the defendants' local agent at Sarnia, who obtained the risk in the first instance, and who continued to forward the premiums until the death of the assured, had become aware of the change of employment. Exactly when he acquired this knowledge is not clear; but it is clear that it was long after the expiry of the two years within which the condition was operative.

Mr. Telfer's appointment as agent was in writing, which was produced at the trial. He was not a general agent, but agent only for the town of Sarnia and vicinity and such other territory as might be from time to time agreed upon. By the terms of the contract, he had no power to make, alter, or discharge any contract given on behalf of the company, or to waive any forfeiture or grant any permit or to collect any premiums except those for which policies or official receipts had been sent to him for collection.

In the body of the policy it is stated that none of the terms of the policy could be modified nor any forfeiture waived except by agreement in writing signed by the president, a vice-president, or the managing director, whose authority for such purpose it was therein declared could not be delegated.

In the month of August, 1899, or before the expiry of the two-year period, Mr. Telfer retired from the agency, although he continued to forward premiums upon this and some other policies which had been received by him while agent. He, however, never notified the defendants of what he had heard concerning the change of employment, which he apparently did not regard as a matter of any moment, as of course it would not have been if it had occurred, as he probably assumed, after the two years had expired.

Notice to any agent in the position of Mr. Telfer, even if his employment had continued, would not be notice to the company. That seems to be settled by authority binding upon this Court. See *Western Assurance Co.* v. *Doull*, 12 Can. S.C.R. 446; *Torrop* v. *Imperial Fire Insurance Co.*, 26 Can. S.C.R. 585. See also *Imperial Bank of Canada* v. *Royal Insurance Co.*, 12 O.L.R. 519, where many cases, including *Wing* v. *Harvey*, 5 DeG. M. & G. 265, upon which the learned trial Judge relied, are cited; and *Wells* v. *Supreme Court of the Independent Order of Foresters*, 17 O.R. 317. The result might be otherwise if there were any circumstances from which it could be reasonably inferred that the knowledge acquired by the local agent had been in any way communicated to the head office. There are, however, here no such circumstances, while the uncontradicted evidence of Mr. Marshall makes it beyond question that in fact the company never actually had, until the death, any notice or knowledge whatever of the change.

The appeal must, therefore, in my opinion, be allowed, and the action dismissed. And, under the circumstances, the usual consequences as to costs must follow. It is a great pity that the very reasonable offer made by the defendants at the trial, to pay such an amount as the premiums would have paid for in the new and more hazardous employment, was not accepted. I have, of course, no power to impose such a term; but I may at least express the hope that, notwithstanding the result of the litigation, the defendants will again renew the offer, and that the plaintiffs will accept it.

*Appeal allowed and action dismissed.*

---

## POCOCK v. NOVITZ.



*Saskatchewan Supreme Court. Trial before Wetmore, C.J. May 29, 1912.*

1. PLEDGE (§ I A—8)—RECOVERY OF POSSESSION—FALSE REPRESENTATION OF PLEDGOR.

One who holds personalty as security may retake it from the owner who had obtained possession from the bailee by falsely representing that he had paid the debt for which it was held as security.

[*Wallace* v. *Woodgate*, 1 C. and P. 575, and *Babcock* v. *Lawson*, 5 Q.B.D. 286, specially referred to.]

Statement

THIS is a replevin action, for the recovery of chattels detained by the defendant, who counterclaimed for moneys due in respect of payments made by him in connection with a well-boring agreement.

Judgment was given for the defendant.

*A. D. MacIntosh*, for plaintiff.

*F. F. Morton* and *A. L. McLean*, for defendant.

Wetmore, C.J.

WETMORE, C.J.:—The plaintiff entered into an agreement with the defendant to bore a well for him. I am of opinion that the weight of evidence establishes, and I find, that the terms of the agreement were that the defendant was to board the plaintiff, his men and teams during the progress of the work, and furnish the casing and materials, but if the well was not satisfactory to the defendant, he was not to pay anything to the plaintiff for doing the work, but the plaintiff was to pay him for the board, casing and materials furnished. The plaintiff proceeded to bore a well, but before it was completed he got his drill stuck in the hole and could not get it out, and the earth caved in and buried it, so that well was not satisfactory, in fact it was useless. The plaintiff then proposed to bore another hole for a well on the same place, and it was agreed that the terms for boring this well would be the same as those for boring the first one, and that the plaintiff should leave his well-boring outfit with the defendant as security until he made him a satisfactory well and

SASK.

S. C.
1912

POCOCK
v.
NOVITZ.

Wetmore, C.J.

satisfied him in every way—by which, I understand, and find, that the outfit was to held as security for all obligations that the plaintiff was to be under to the defendant in respect to both the well-boring agreements if the second boring did not turn out satisfactory. The plaintiff went on to bore for the second well, and that proved a failure also. This time the drill got caught in the casing, and the plaintiff could not get it out. He eventually abandoned the work. This was in the fall of the year. The boring outfit was left on the defendant's premises. The plaintiff applied to the defendant the following spring for permission to take the engine away. The defendant refused. Subsequently however, the defendant agreed to let him have the engine provided he would pay the account of Ritz and Yoerger for casing supplied for the wells; he was to retain the rest of the outfit for the board furnished and other supplies and material. The plaintiff and defendant went to Ritz and Yoerger to have this agreement carried out by Ritz and Yoerger accepting the plaintiff for the price of the casing. Those gentlemen agreed to accept him, provided satisfactory security was given by the plaintiff, who went away stating that he would give security. About a day or two after this, the plaintiff came to the defendant's place in the evening and asked for the engine, stating that he settled the account with Ritz and Yoerger. The defendant declined to let him have the engine then, stating that he wanted to know if he had settled, and he would go to town the next day and find out. The plaintiff went away. The defendant did not go to town the next day—some other matter claimed his attention—but he sent one Crook to ascertain whether the account had been settled. The plaintiff turned up that day, and again asked for the engine, and pleaded very earnestly for it, and assured the defendant that he had paid the account, so the defendant, yielding to his solicitations, and depending upon such assurances, let him have it. The plaintiff hitched his horses on to the engine, and took it away. Very shortly after that Crook returned from town and informed the defendant that the account had not been paid or settled. I may say that the plaintiff had not been near Ritz or Yoerger since the time he was there with the defendant, and the account had not been paid or arranged for in any way. The defendant, upon receiving the information from Crook, immediately drove after the plaintiff, taking Crook with him, and overtook him on the road with the engine about a mile and a half from the defendant's place from which he had taken the engine, and took it away from him and carried it back to his place. This, and a demand and refusal to deliver up the whole of the well-boring outfit, including the engine, constitute the wrongful acts of the defendant complained of in this action. The plaintiff replevined the whole of the property in question.

The defendant was justified in retaking the engine, as he had been induced to give it up to the plaintiff by his fraudulent representation. See *Wallace* v. *Woodgate*, 1 C. & P. 575, R. & M. 193, and *Babcock* v. *Lawson*, 5 Q.B.D. 284, at p. 286.

There will be judgment for the defendant on the claim, with a return of the property replevined, with costs of defence. I allow the defendant on the counterclaim.

| | |
|---|---|
| Amount paid Ritz and Yoerger for casing | $ 70.00 |
| Amount paid Albert Smith for casing | 25.70 |
| Amount paid W. A. Westwood for pipe, rod, pump head and cylinder, with interest | 54.55 |
| Board of plaintiff's men | 60.00 |
| Board of horses | 30.00 |
| Paid for lumber | 25.00 |
| In all | $ 265.25 |

for which the defendant will have judgment, with costs of counterclaim.

Declare that the defendant has a lien on the well-boring outfit, including the engine, for the amount of the said $265.25 together with the costs awarded the defendant both on the claim and counterclaim.

And that the plaintiff pay into Court to the credit of this cause the said sum of $265.25 and costs within three months from the date of the taxation of such costs, and on default, that the well-boring outfit and engine be sold by the sheriff of the judicial district of Saskatoon at such time and place as he may appoint, first giving the same notice of sale as is usually given for the sale of personal property under execution. The proceeds of such sale to be applied:—

(1) In payment to the sheriff of the costs and expenses of the sale, including an allowance to him.

(2) In satisfaction of the defendant's judgments above awarded, with interest thereon at the rate of five per cent. per annum; if not sufficient to satisfy such judgments and interest, then as far as it will extend, and the defendant to have execution for the balance.

(3) If more than sufficient to pay the defendant's judgments, the balance to be paid into Court to be paid out to the defendant on his application therefor.

It occurred to me at first that the agreement which I have found was made between these parties was a very harsh one. On further consideration I am of opinion that it was not as harsh as it first appeared to be. In the first place, it is quite a common agreement to make in well-boring transactions. The chances of striking water seemed to be pretty sure in that part of the country. The plaintiff had bored for two or three other wells before he engaged with the defendant, and there was no complaint of his not getting water. In both the borings for the

SASK.

S. C.
1912

POCOCK
v.
NOVITZ.

defendant water was struck. So the inability to get water was not the trouble. The defendant got no benefit whatever from the work, and I strongly suspect from the tenor of the plaintiff's letter to the defendant of the 28th March, 1911, that the trouble was largely due to the carelessness of the plaintiff and his want of knowledge of how to do the work.

*Judgment for defendant.*

---

MAN.

C. A.
1912

June 10.

## COLTART v. WINNIPEG INDUSTRIAL EXHIBITION.

*Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron, and Haggart, JJ.A. June 10, 1912.*

1. BAILMENT (§ III—17)—LIABILITY OF EXHIBITION ASSOCIATION—DEATH OF DOGS EXHIBITED, FROM INFECTIOUS DISEASE—ABSENCE OF NEGLIGENCE.

An exhibition association that solicited the exhibition of the plaintiff's dogs, is not liable for their subsequent death from distemper, which developed upon their being returned to him, where it did not appear that other dogs there exhibited had such disease, and that there was ample opportunity for the plaintiff's dogs to have contracted it elsewhere, and no negligence was shewn on the part of the defendant, either in inspecting dogs admitted to the exposition, or in caring for the plaintiff's dogs while there.

[*Coltart* v. *Winnipeg Industrial Exhibition*, 17 W.L.R. 372, affirmed; *Connacher* v. *City of Toronto*, 21 C.L.T. 172, distinguished.]

Statement

APPEAL by plaintiff from the decision of Prendergast, J., at the trial dismissing the action, *Coltart* v. *Winnipeg Industrial Exhibition*, 17 W.L.R. 372.

The appeal was dismissed.

Messrs. *J. H. Munson*, K.C., and *H. A. Bergman*, for plaintiff.

*A. B. Hudson*, for defendants.

Richards, J.A.

RICHARDS, J.A.:—The plaintiff, who lived near Beulah, in Manitoba, and owned a number of valuable Japanese spaniels, sent 12 of them in 1909 to the annual exhibition of the Winnipeg Industrial Exhibition Association, where they were exhibited in the building used for shewing dogs. Shortly after their return home they began to sicken with distemper, which spread to others. A large number of valuable dogs died, and several others were permanently injured and rendered of no commercial value.

The plaintiff claims that the Association were guilty of negligence in their sanitary arrangements at the exhibition, and that, as a result of that negligence, the distemper infected her dogs. The learned trial Judge thought there was ground for holding that the dogs had contracted the disease at the Dog Show, but he held that the Association had not been guilty of negligence, and so dismissed the action.

Two things have to be established to make the Association liable: First, that they were guilty of negligence, and second,

that, as a result of that negligence, these dogs contracted the distemper. If the plaintiff fails to prove either of these grounds her action fails.

I have gone carefully over the evidence and am unable to find in it any proof that germs of distemper were actually present at the Dog Show. The only evidence on the point refers to one Airedale terrier, the property of Mr. Lord. This dog was brought in without being inspected at the gate, or door, of the building. There is no evidence that he was sick when brought in, but he was found, later on, to have symptoms which might be those of distemper or merely those of a bad cold. On that being discovered he was almost immediately taken away. His bench was then disinfected, and was not occupied by any other dog during the show. He is referred to in the evidence by witnesses, two or three times, as "with the distemper"; but the only skilled evidence called with regard to him is that of the veterinary surgeon who attended him after he was removed, who says that he was merely suffering from a severe cold.

It was argued that the evidence shews that there was another Airedale terrier at the show which had distemper, but I think all the evidence on that point refers only to Mr. Lord's dog.

Now, while it is quite possible that the dogs caught the distemper at the Dog Show, they may have caught it in the train coming to, or returning from, Winnipeg, or they may have got the germs into their hair during a previous visit to Winnipeg, or on the way to or from that visit, and the germs may have been there for some time before being taken into the system of any dog. There seems to be some doubt as to how long before the exhibition week that visit was had, but it was within from one to four weeks.

The nearest case in point that I can find is *Connacher* v. *City of Toronto*, reported in 21 C.L.T. at p. 172. In that case the plaintiff and his family lived in a house about 142 feet from the mouth of a sewer of the city of Toronto. Owing to low water in the Toronto Bay, into which the sewer discharged, parts of the sewage were exposed above the water line to the sun. Apparently they were very filthy. The plaintiff's family contracted diphtheria. A number of them died, and he was put to considerable expense. He sued the city for damages, claiming that diphtheria germs had got from this sewage to his house and infected his family. The evidence shewed that the sewage was likely to contain diphtheria germs, and that, if it did, and if the exposed sewage became dry, the germs were likely to be carried, in the atmosphere, to the plaintiff's house. But it was not shewn that such germs were actually present in the sewage.

The plaintiff recovered a verdict. A motion to set it aside was heard before a Divisional Court, composed of Armour, C.J., Falconbridge, J., and Street, J. The Court held that there was

MAN.

C. A.
1912

COLTART
v.
WINNIPEG
INDUSTRIAL
EXHIBITION.

Richards, J.A.

no evidence from which a jury might fairly or reasonably infer that the germs which infected the plaintiff's family came from this sewage, and dismissed the action.

Armour, C.J., who gave the judgment of the Court, says at p. 179, after stating the plaintiff's claim as to the facts:—

> The difficulty in supporting this theory is that there was no evidence that there were any germs of diphtheria in this sewage; that if there were any portion of this sewage became sufficiently dry to be taken up into the air, and that, if it were, any of such germs were so taken up, and that, if taken up, they were wafted by the air into proximity to the plaintiff's family, and that they were inhaled by them.

With every respect it seems to me that, if it had been shewn that there were germs of diphtheria in the sewage, and that the sewage had become dry enough for those germs to be taken up by the air, the other conditions, which the Court thought essential to maintain the action, might, from the circumstances, have been taken as proved, after a verdict by a jury. But the absence of evidence of the existence in that sewage of diphtheria germs, which were sufficiently dry to be taken up by the air, was, in itself, I think, a proper ground for holding as the Court did.

In the present case there is no greater ground for holding that there were distemper germs at the dog show than in the case just mentioned there was for finding that there were diphtheria germs in the sewage.

In view of the above, there is no need to consider whether there was or was not negligence on the defendants' part in the management of the dog show.

I would dismiss the appeal.

Perdue, J.A.

PERDUE, J.A.:—The plaintiff was, no doubt, importuned and finally induced to send her dogs to the show, on the representation made by officers of the Association that great care would be taken to protect them from harm. But the legal position of the plaintiff and the defendants remained that of bailor and bailee. It was a bailment without reward, and in order to charge the bailees with damages for loss or injury to the animals bailed it was necessary to prove, at the very least, that the bailees did not exercise reasonable care. I think the plaintiff failed to establish negligence on the part of the defendants. Even if she were taken to have established a *primâ facie* case of negligence in the inspection and supervision of the dogs admitted as exhibits, the facts would not warrant the Court in making a positive finding that the plaintiff's dogs contracted distemper by being exposed to that disease while at the show.

The dogs sent to Winnipeg became in some way infected with distemper, and after their return they transmitted it to the plaintiff's other dogs, so that all became diseased and either died or were permanently injured. I have much sympathy for the

plaintiff in her loss, but I cannot see any way in which the defendants can be held liable for the damage she sustained.

CAMERON, J.A.:—This action is brought in respect of 29 Japanese spaniels and two Fox terriers owned by the plaintiff, 22 of which spaniels and the two terriers, it is alleged, died, and three others of the spaniels were disabled by reason of the wilful and negligent acts and omissions of the defendants. It is alleged that the plaintiff, at the solicitation of the defendant corporation, sent 12 of the spaniels to be exhibited at the annual exhibition of the defendants in Winnipeg in July, 1909, the defendants charging a fee to the public for admission. It is further alleged that the defendants represented that the arrangements for the safety, comfort and well-being of the dogs would be adequate and that all proper steps would be taken to prevent the dogs being exposed to infection, and the plaintiff relied on such representations. It is then charged that the defendants did not provide proper arrangements or supplies or take proper precautions for the care, safety, comfort and well-being of the dogs and wilfully and negligently omitted to provide proper arrangements and take proper precautions for the care, etc., and wilfully and negligently omitted to take proper precautions to prevent the dogs being exposed to infection, and by reason of such wilful and negligent acts and omissions the dogs were exposed to infection, and contracted distemper, which was communicated to all the other dogs, with the result that 22 of the spaniels and the two Fox terriers died.

In the statement of defence the defendants deny the plaintiff's allegations and set up further that the plaintiff signed a form of entry and an agreement to abide by the rules and regulations under which the dog show and exhibition were held, and that under said rule and regulations, which are set out, they are not liable for any damage sustained by the plaintiff. Alternatively, it is alleged, amongst other defences, that the defendants, although not bound, did take proper precautions for the care of the dogs and to prevent their exposure to infection.

Particulars of the alleged negligent acts and omissions were demanded and furnished as follows:—

(1) That the defendants did not cause the dogs sent to the Exhibition to be inspected, or if they did, the inspection was insufficient.

(2) Dogs on exhibition were suffering from infectious diseases and were removed only after delay.

(3) The attendance was insufficient and inefficient.

(4) The sanitary arrangements were inadequate.

(5) Defendants failed to supply proper pens or benches and to prevent the plaintiff's dogs coming into contact with other dogs and infected matter.

Later these particulars were elaborated and made more specific as follows:—

MAN.

C. A.

1912

COLTART v. WINNIPEG INDUSTRIAL EXHIBITION.

Cameron, J.A.

(1) That no medical examination or inspection of the dogs exhibited at the defendants' exhibition in the year 1909 was made at any time prior to or during such exhibition.

(2) No proper disinfectants were used by the defendants, or if used, were not properly or sufficiently used for the purpose of preventing disease.

(3) The building in which the dogs were exhibited was unsanitary and improper and inadequate.

(4) The exercise yard provided was of insufficient size and otherwise improper for the purpose.

(5) No proper food or water was supplied to the dogs exhibited.

(6) The dogs exhibited were allowed to mix with one another, both in the building in which the said dogs were exhibited and also in the exercise yard and in the judging ring.

(7) The premises were not kept in a clean or sanitary condition.

All these grounds were discussed at length on the argument before us, but I propose to deal with two of them only.

The main contention on the argument was that the germs giving rise to the distemper which caused the death and disabling of the dogs in question are communicable by contact and without contact, that these germs were communicated to at least one of the plaintiff's dogs during the exhibition, and that this was due to negligence on the part of the defendants in allowing dogs to be exhibited suffering from distemper. Special stress was placed on the argument, upon the alleged fact that a dog on exhibition, an Airedale terrier, belonging to a Mr. Lord, was, at the time, suffering from distemper. Mr. Lord says he found this Airedale terrier "sick" on the second day of the exhibition. He appealed to the Judge in attendance at the exhibition, who looked at the dog and said, "He had got the distemper." But Dr. Smith, a duly qualified veterinary surgeon, to whom the dog was brought for treatment, diagnosed and treated the case "as simply a cold." I think this evidence must be accepted as conclusive. Brush's evidence (178, 179) is not that of a professional man.

Now Shepard, who strikes me as a keen and competent witness, who was in attendance all the time, says this was the only case of illness amongst the dogs that came to his notice (p. 321). Dr. Rombough says (p. 341):—

> We found one of them present with slight symptoms, had a catarrhal discharge from the nose and eyes.
>
> Q. What kind of a dog was that?
>
> A. Airedale terrier.

That was the only dog, he said, that shewed signs of distemper. On the evidence, I think it clear that the references of the witnesses are to one Airedale terrier only, and on this I am forced to differ from the finding of the trial Judge. It is to be observed that Dr. Rombough says that the Airedale terrier shewed "slight

symptoms," not that it was actually affected by the disease. The diagnosis of Dr. Smith is, in my judgment, conclusive on that point.

Elmes, the superintendent, says he knew of only one case of illness, that of the Airedale terrier.

A reference by the witness O'Brien to a dog that looked unwell, can, I think, be passed by as unimportant.

In the result we have it established that there were no dogs at the exhibition suffering from distemper. Or, to put it another way, it is not established that there were any dogs, or that there was any dog, at the exhibition affected with distemper. That being the case, it seems difficult to deduce grounds on which we can base the liability of the defendants in this case. It is only too plain that from the time the dogs in question were shipped from the kennels at Beulah until they were returned to them, apart altogether from the time they were in the exhibition building, there were many opportunities for one or more of them to become infected. In the absence of positive evidence shewing the existence of distemper in the building at the time of the dog show, it would seem to me impossible to fasten liability upon these defendants without resting that liability upon mere conjecture.

Apart from this consideration, which seems to me decisive, it does not appear to me to have been established that the defendants were guilty of negligence in the examination and inspection of the dogs admitted to the exhibition. I think the method of inspection adopted by the defendants was reasonable and adequate, and that the defendants did all they could be called upon to do in the circumstances. I have gone through the whole evidence with this point in view, and have come to the conclusion that Dr. Rombough's evidence on this subject is satisfactory. His view is confirmed by the experienced veterinarian Shepard, who stood at the door and saw that there was nothing wrong with the dogs as they were brought in. Exhibitors with experience of other exhibitions gave evidence that the method of inspection in this case was satisfactory.

I have read the judgment of Mr. Justice Richards and concur therewith. I think the appeal must be dismissed.

HOWELL, C.J.M., concurred with Richards, J.A. Howell, C.J.M.

HAGGART, J.A., concurred. Haggart, J.A.

*Appeal dismissed.*

ONT.

H. C. J. 1912

July 2.

## RE SNETSINGER.

*Ontario High Court, Britton, J. July 2, 1912.*

1. WILLS (§ III E—106)—SALE OF LAND IN LIFETIME OF TESTATOR—WHAT PASSES ON DEVISE OF "REAL ESTATE."

Land that a person had, in his lifetime, contracted to sell to one who, without paying all of the purchase money or receiving a conveyance, had entered into possession, does not pass under a devise of "real estate," while the agreement remained in force, since the only interest the testator had, after the execution of such agreement, was to receive the unpaid portion of the purchase money.

Statement

MOTION by Allan M. Snetsinger, upon an originating notice under Con. Rule 938, for an order determining a question arising in the administration of the estate of John Goodall Snetsinger, deceased, as to the construction of a clause in his will dealing with real estate in the township of Cornwall which belonged to the testator.

The motion was heard at Cornwall.

*G. A. Stiles*, for the applicant.

*C. H. Cline*, for the executors.

Britton, J.

BRITTON, J.:—The testator made his will on the 19th November, 1906. On that day he owned several farms in the township of Cornwall. On the 15th March, 1899, the testator entered into an agreement with one W. H. Conliff for the sale to Conliff of part of the east half of lot 22 in the 4th concession, 5th range, of the township of Cornwall, for the price or sum of $2,500, payable in yearly payments—the first of $50 and the second to the fourteenth inclusive of $100 each, and the balance at the expiration of the fifteenth year. The time for payment in full will not expire until the 15th March, 1914. The purchaser went into possession, was at the time of making the will, at the time of the death of the testator, and is now, in possession. The executors recognise the agreement with Conliff as in force; and, although there has been default in paying as much on account of principal as the agreement calls for, and although the agreement permits the vendor (in case of default) to resell, there has been no re-entry or attempt to sell by either the testator or the executors. The principal money of the purchase-price has been reduced. The vendee could, during the testator's life, according to the terms of the agreement, have made his payments on principal up to $1,000, and could have demanded and got a conveyance to him—giving to the testator a mortgage for the balance. The testator died on the 9th December, 1909. The vendee has his right to retain the land, and get a conveyance from the executors.

The clauses of the will requiring consideration are:—

(1) "I give devise and bequeath to my son Allan M. Snetsinger my entire stock of goods in my store at Moulinette aforesaid, my carriages, harness, farm implements of all kinds, horses, and all kinds of live stock, and generally the contents of

the stables, carriage houses, and outbuildings at my residence and upon my farms in the township of Cornwall, and one half of my household furniture and household effects and furnishings of all kinds, including plate, glass ware, pictures, books, and the entire contents of my dwelling, and all my real estate in the township of Cornwall . . . ."

The testator had farms—real estate—in the township of Cornwall not in any way connected with the farm under agreement with Conliff. No part of the chattel property bequeathed to Allan was upon the Conliff farm. Nothing in the will refers directly to the Conliff farm.

The devise of all the rest and residue of the testator's property is upon trust "(1) forthwith to convey, assure, assign, and set over to my son Allan M. Snetsinger the real and personal estate hereinbefore devised and bequeathed to him." This clause does not in any way enlarge the devise or assist Allan in his claim to the Conliff farm.

The sole question is, do the words, "my real estate in the township of Cornwall," include the real estate sold to Conliff?

I am of opinion that they do not. This farm was not, at the time of making the will, or at the time of the testator's death, his real estate, within the meaning of these words. The words "real estate" do not, as a general thing, include leasehold—nor do they include the beneficial interest which a mortgagee has. In this case the testator had his interest limited to the unpaid purchase-money—what the testator intended to indicate as the real estate he devised to his son is shewn by mentioning the chattels upon the farms, and mentioning by description one parcel. The distinction between purchase-money for land and the land itself it clearly maintained in all cases of ademption. See *In re Clowes*, [1893] 1 Ch. 214; *Re Dods*, 1 O.L.R. 7; *Ross* v. *Ross*, 20 Gr. 203.

It was held in *Leach* v. *Jay*, 6 Ch. D. 496, that the words "real estate of which I may die seized" did not pass lands which, at the time of the testator's death, were in the wrongful possession of a stranger. The fair inference from the reasoning in that case is, that the words "real estate" would not pass lands which, at the time of the testator's death, were in the rightful possession of a purchaser, even if all the purchase-money was not paid.

The order will go construing the will of the said John Goodall Snetsinger in this way, that the clause devising all the real estate of the deceased in the township of Cornwall did not pass that portion of the east half of lot number 22 in the 4th concession, 5th range, of the township of Cornwall, in the county of Stormont, lying north of the Ottawa and New York Railway, crossing said east half of said lot.

Costs of all parties out of the estate—costs of executors between solicitor and client.

*Order accordingly.*

IMP.
P. C.
1912
Feb. 21.

**WINNIPEG ELECTRIC RAILWAY CO.** (defendants, appellants) v. **CITY OF WINNIPEG** (plaintiffs, respondents).

*Judicial Committee of the Privy Council. Present: Earl Loreburn, L.C., Lords Macnaghten, Atkinson, Shaw of Dunfermline, and Robson. February 21, 1912.*

1. STATUTES (§ I G 2—86)—SPECIAL LEGISLATION AS TO USER BY CORPORATION OF HIGHWAYS—ERECTION OF POLES—43 VICT. (MAN.) CH. 36.

Power granted under 43 Vict. (Man.) ch. 36 to a company to "break up, dig, and trench so much and so many of the public streets, roads, squares, highways, and other public places in any municipality . . . as may at any time be necessary or required for laying down or erecting [or repairing] the mains, pipes or wires to conduct" gas or electricity, will permit the erection of poles therein to carry wires necessary for the conveyance of electricity.

[*Winnipeg* v. *Winnipeg Electric R. Co.*, 20 Man. L.R. 337, 16 W.L.R. 62, reversed.]

2. HIGHWAYS (§ II B—47)—ELECTRIC LIGHT POLES—MUNICIPALITY GRANTING CONDITIONAL PERMITS TO ERECT.

All doubt as to the power of a company to erect poles to carry electric wires through the streets and public places of a city is concluded by the fact that the city agreed to grant the company permits, under certain conditions, to erect poles therein, and requiring that it should permit the use thereof by other companies, and also by the city for wires of its fire alarm system, or for heat and light.

3. TAXES (§ I E—70)—CONSTRUCTION OF BY-LAW FIXING TAXATION OF STREET RAILWAY COMPANY—IMPORTATION OF ELECTRICITY.

A city by-law relating to the taxation of an electric street railway company, which provided that the company should keep and maintain within the city limits all of its engines, machinery, power houses and shops, will not prevent the company importing, for the operation of its plant, electricity generated at a point beyond the city limits.

4. ELECTRICITY (§ I—2)—RESTRICTION AS TO IMPORTATION—AMALGAMATION.

A restriction in the charter of a street railway company that prevented it from importing electricity from without the city limits, is not binding upon a company formed by the amalgamation of such street railway company with other companies, none of which were so restricted.

5. STREET RAILWAYS (§ I—5)—REGULATION BY MUNICIPAL CORPORATION—MAINTENANCE OF PLANT—SUB-STATION TRANSFORMER.

A requirement of a city by-law that a street railway company should keep and maintain its engines, machinery and power houses within the city limits, is complied with by the maintenance therein of a sub-station containing apparatus for the reduction of the voltage of electricity generated beyond the city limits, and also for transforming it into a direct current.

6. HIGHWAYS (§ II B—47)—MUNICIPALITY GRANTING PERMIT TO ERECT POLES—PERMITS NOT AUTHORIZED BY BY-LAW.

A city that has, under a general by-law, granted permits to a company to erect poles in its streets and public places cannot, after such permits have been acted upon, require the removal of such poles on the ground that the permits were void because issued without the adoption of a by-law in each instance.

[*Winnipeg* v. *Winnipeg Electric R. Co.*, 20 Man. L.R. 337, 16 W.L.R. 62, reversed.]

7. ELECTRICITY (§ I—2)—RIGHT TO IMPORT ELECTRICITY GENERATED OUTSIDE CITY—CHARTER OF COMPANY—ACQUIESCENCE OF MUNICIPALITY.

After an electric street railway has, to the knowledge of a city and its officers, and with their active co-operation, erected beyond the city limits, at a cost of millions of dollars, a plant for the generation of electricity, located its sub-power houses and erected poles and wires in the city, and after the city has received about $100,000 in taxes from the company, and has adopted by-laws and resolutions requiring a company that the street railway had absorbed by amalgamation, to lay double tracks on certain streets, and to establish a schedule for operating its cars, the city cannot deprive the street railway company of the right to introduce into the city, electricity generated beyond the city limits, on the ground that its charter forbade such importation of electricity, or that permits were void which the city had granted for the erection of poles.

[*Winnipeg* v. *Winnipeg Electric R. Co.*, 20 Man. L.R. 337, 16 W.L.R. 62, reversed.]

8. ELECTRICITY (§ I—2)—BRINGING IN OF ELECTRICITY FROM OUTSIDE—TRANSMISSION ON WIRE ERECTED—CONSENT OF MUNICIPALITY.

A company empowered to operate a street railway and to supply electricity for light, heat and power, over poles and wires erected in the streets and public places of a city, may, without first obtaining the consent of the city, transmit thereon electricity generated and developed beyond the city limits.

Statement

APPEAL and cross-appeal from a judgment of the Court of Appeal for Manitoba, *City of Winnipeg* v. *Winnipeg Electric R. Co.*, 20 Man. L.R. 337, 16 W.L.R. 62 (December 23, 1910), varying an order of the Court of King's Bench (January 27, 1910).

The appeal was allowed and the cross-appeal dismissed.*

The city of Winnipeg sued on November 12, 1906, for a declaration that the defendants, a municipal corporation whose powers and obligations are defined in 1 and 2 Edw. VII. (Man.) ch. 77, and amending statutes, and the history of whose formation is narrated in their Lordships' judgment, have no right to erect poles or wires in the city in order to transmit electrical power developed outside the city limits, with consequent relief. This first portion of the suit was the subject of the defendants' appeal, while the cross-appeal of the city related to the further prayer of the plaint, which was for a declaration that the defendants have no right to make use of any electric power for the operation of their street railway system except such as is developed within the limits of the city; and a further declaration that the defendants had failed to fulfil the terms and conditions of a city by-law, No. 543, the material paragraph of which is set out in their Lordships' judgment, and that the enjoyment of any privileges conferred thereby should cease till such fulfilment.

Mathers, J., decreed as prayed in the first portion of the suit. As regards the second portion, he held that the defendants' works and machinery at Lac du Bonnet, a place sixty-four miles from the city, were a power house, engines, and machinery

*Also reported, [1912] A.C. 355.

IMP.

P. C.

1912

WINNIPEG ELECTRIC R. CO. v. CITY OF WINNIPEG.

Statement

within the meaning of the by-law, and that their use might constitute a breach of contract for which the city might recover damages. But he held that any right of the city to prevent the continued operation of the street railway by their means had been lost by waiver.

The Court of Appeal for Manitoba held in effect that the defendants had no right to use the streets, without the assent of the city, for transmission of electrical energy wherever produced, except for the one purpose of operating their street railway. Upon the second portion of the suit a majority (Howell, C.J., and Perdue, J.A.) decided that the works and machinery at Lac du Bonnet were not a power house within the meaning of the by-law. Richard, J.A., on the other hand, held that it was, and that its use constituted a breach of the by-law, and that the right of the defendants to the enjoyment of their privileges had ceased and would continue suspended until they fulfilled the conditions laid down therein.

The appeal was argued on December 14, 15, 18 and 20, 1911.

Argument

*Danckwerts*, K.C., *Wallace Nesbitt*, K.C., *J. H. Munson*, K.C., *D. H. Laird*, and *G. Lawrence*, for the appellants, the Winnipeg Electric Railway Company, contended that there was nothing in any statute or contract under which they derive their powers to prevent them bringing into the city of Winnipeg electric power which is produced outside the city limits. Their doing so had been acquiesced in by the city, and no prohibition or restriction could be raised by implication. Their pole and wire system had covered almost the entire city, involving large expenditure and supplying electric light to thousands of customers as well as power to a less number. The evidence shewed that the poles had been erected to the knowledge of the city and after written permits by its officers had been issued, and that the respondents had used them for their own purposes by agreements with the appellants. It was contended that the city was bound by acquiescence and could not now set up that it was not authorized by their by-law. The appellants had vested in them all the powers which had been obtained by their predecessors the Manitoba Company, the North-West Company, the Street Railway Company, and the Power Company. They relied on Manitoba Act 43 Vict. ch. 36, secs. 23 and 29, and on agreements made between the Manitoba Company and the respondents on July 15 and November 6, 1889, and upon numerous permits duly issued thereunder by the city engineer; and on an agreement made August 23, 1889, between the North-West Electric Company and the respondents. In all cases where the poles were lawfully erected by statutory or contractual authority they could be used for all lawful purposes in the absence of express restriction and having regard to long acquiescence. They also relied on the Provincial Act 55 Vict. ch. 56, secs. 10 and 12, the incor-

IMP.

P. C.

1912

WINNIPEG ELECTRIC R. CO. v. CITY OF WINNIPEG.

Argument

porating Act of the Street Railway Company, and the respondents' consent by by-law obtained thereunder. They were also entitled without obtaining any consent under 3 and 4 Edw. VII. ch. 87, sec. 4, which also related to the street railway; and also under 1 and 2 Edw. VII. ch. 75, secs. 7, 9, 18, the incorporating Act of the Power Company, and the respondents' consent obtained thereunder. The appellants had incurred heavy expenditure and made large outlays of capital on the faith of these Acts, contracts, consents, and permits, and it was contended that the provision contained in the Winnipeg Charter, 1 and 2 Edw. VII. ch. 77, sec. 472, and in the general Municipal Act of the Province of Manitoba of 1890, that "the powers of the council shall be exercised by by-law when not otherwise authorized or provided for," was not applicable and did not have the effect of rendering the permits and other consents given revocable at pleasure by the city. Those Acts were later in date than the Act which incorporated the Manitoba Company. The respondents by their conduct and the Manitoba Legislature by various Acts from 1899 onwards had recognized the existence of the electric lighting works of the Street Railway Company, thus including, it was submitted, the pole and wire system of the appellants and its use and operation in the manner impugned for the first time by this suit.

With regard to the cross-appeal the broad question there raised was whether the Winnipeg Electric Railway Company in respect of its water power plant outside the limits of the city had been guilty of a breach of by-law No. 543, which obliged them to keep all their power houses within the city, and thereby forfeited their privileges under that by-law until the breach is remedied. That clause, it was contended, did not bar the respondents' use of power not developed within the city. It only barred them from placing their own power houses outside the limits, not from purchasing and importing power from another concern operating outside those limits. It impliedly recognized their right to purchase and import in the manner complained of. The Street Railway Company were not affected by the by-law, and the appellants as their successors are not affected by it. Further, the expression "power houses" in the by-law did not include a plant for the development of water power, which must necessarily be placed where the water is. The remedy of the city if they established the appellants' default was in damages and not as claimed. Reference was made to *Hull Electric Co.* v. *Ottawa Electric Co.*, [1902] A.C. 237; *Goldsmid* v. *Great Eastern Ry. Co.* (1883), 25 Ch.D. 511; *Plimmer* v. *Mayor, etc., of Wellington* (1884), 9 A.C. 699; *Toronto Corporation* v. *Bell Telephone Co. of Canada*, [1905] A.C. 52; *Perth Gas Co.* v. *City of Perth Corporation*, [1911] A.C. 506, 519; *Montreal* v. *Standard Light and Power Co.*, [1897] A.C. 527.

IMP.
P. C.
1912
WINNIPEG ELECTRIC R. CO. v. CITY OF WINNIPEG.
Argument

*Sir R. Finlay*, K.C., *Ewart*, K.C., *Rowlatt*, and *Theo. A. Hunt*, for the city of Winnipeg in both appeals, contended that the appellants had no authority to sell and distribute electricity for lighting and power purposes within the city; while the respondents by sec. 719 of their city charter were vested with the possession of all the highways in the city and were made liable for the repair thereof. It was contended in the first appeal that the Court of Appeal was right in holding that the appellants had not acquired a right to erect their pole and wire system within the city for the transmission of electric energy other than for their street railway. Act 43 Vict. ch. 36 did not empower them to do so. Under the three agreements relied upon, dated July 15, August 23, and November 6, 1889, whatever permission was given to them to do so was subject to the supervision of the city engineer. The incorporating Act of the Street Railway Company (55 Vict. ch. 56) sanctioned the operation of their railway in the city streets by such motive power as might be authorized by the city and the exercise of all powers set forth in a city by-law No. 543 scheduled to and validated by their Act. That by-law dealt only with the construction and working of an electric street railway and had no reference to light, heat or power. It contained a restriction as to the limits of the appellants' operations which must be held applicable to all their powers. No by-law was passed authorizing the pole and wire system of the appellants. It was contended that the appellants never received under any of the Acts or agreements referred to authority to use the city streets according to their own pleasure. Sec. 29 of 43 Vict. ch. 36 did not authorize the erection of poles, and by the agreement of July 15, 1889, they were not to erect them without the consent of the city. Their rights, except so far as their street railway purposes were concerned, were always subject to the consent of the city previously had and obtained, to be given either by by-law under the Street Railway Company's Act or by agreement or Order in Council under the Power Company's Act. The evidence shewed that no by-law or other formal consent of any kind was ever given by the city to the use of the streets for the purposes now in question. No request for such consent was ever made, and there has been no appeal as provided in one of the Acts to the Lieutenant-Governor in Council. Nor has the city waived its right to object because of the permits from time to time given. No permission of any kind was ever given to the appellants to erect poles. Even if the permission given to the Electric and Gas Light Company is taken to be given to the appellants, it was ineffective because not given by by-law. As to the respondents not objecting to the importation by the appellants of electric energy into the city which had been produced outside, there was evidence that they were warned in good time both orally and by letter that the

IMP.

P. C.

1912

WINNIPEG ELECTRIC R. CO. v. CITY OF WINNIPEG.

Argument

permission of the city was necessary before they could legally do so. It was contended that no waiver was proved in fact, and the city being a public corporation, could not waive a protection given to its citizens by statute and could not be estopped from objecting to operations to which it had not validly assented.

In the cross-appeal it was contended that the appellants were bound by the terms of the by-law No. 543 to keep all their power houses within the city limits. But the power house at Lac du Bonnet and the machinery there are a power house and machinery within the meaning of paragraph 11 of that by-law. Its construction was begun by the General Power Company and completed by the appellants, who erected a transmission line therefrom across the intervening municipalities and across the Red River, which forms the eastern boundary of the city, to a sub-station within the city. The respondents never consented to the wires crossing the river, but the appellants continued to transmit energy from Lac du Bonnet power house to their sub-station and thence generated the direct current with which they operated their street railway system in the city. Thus the power house at the lake was where the electrical energy was generated, and the only office performed by the machinery within the city was to transmit energy generated elsewhere into a new form. It was contended that the appellants' continued right to use the streets is by the by-law stipulated to depend upon the appellants' continued observance of its terms. There was no power to waive the non-observance, for to do so would be to dispense with a provision of a by-law which had been declared to have the same effect as if enacted by the Legislature; and there was no evidence of such waiver having been made.

*Danckwerts*, K.C., in reply.

February 21, 1912. The judgment of their Lordships was delivered by

Lord Shaw.

LORD SHAW OF DUNFERMLINE:—The appellants are the successors, by amalgamation, purchase, or agreement, of certain companies hereinafter referred to, the general object of whose constitution was for the supply of light, heat and power in and about the city of Winnipeg by gas or by electricity. This is stating the position of the appellants in the most general terms. It was not denied by the counsel for the respondents that the powers, rights, privileges, and franchises belonging to the respective companies who were predecessors of the appellants have been taken up and carried forward by reason of the various transactions of amalgamation and otherwise, and are now vested in the appellants. As, however, a most minute criticism has been made of the powers which are now sought to be exercised by the appellants, it is necessary to state in detail what these were, and what were the various steps by which the present situation has been reached.

IMP.
P. C.
1912
WINNIPEG ELECTRIC R. CO. v. CITY OF WINNIPEG.
Lord Shaw.

In the year 1880 the Manitoba Electric and Gas Light Company was incorporated by an Act of the Legislature of Manitoba (43 Viet. ch. 36), and by sec. 23 of the statute the company was empowered to supply light and heat in Manitoba by gas, electricity or other means. While the area of the operations of the company was not limited to the city of Winnipeg, the authority, as is seen, did not extend to the supply of power. By various sections of the statute the company was given large powers for the acquisition of property for their purposes, and for the construction, erection and use of their works, and also "to alienate any of their personal property, lands, tenements, rights, and franchises, or any interest therein, as they should see fit." Authority was given to "break up, dig, and trench so much and so many of the public streets, roads, squares, highways and other public places in any municipality or other portion of the Province as may at any time be necessary or required for laying down or erecting the mains, pipes, or wires to conduct the gas or electricity from the works of the said company to the customers thereof," or for taking up, altering, or repairing the same.

To save coming back upon it, there are two observations which may be made upon this, which is the first of these incorporating statutes. In the first place, their Lordships do not feel disposed to assent to the proposition that power to do certain things "for laying down or erecting the mains, pipes, or wires" is to be read as a power which did not extend to the putting up of poles upon which the wires could hang, and they are not surprised to learn that during the thirty years which have elapsed since the passing of the Act such a point was never taken. Language of this kind must be reasonably construed: and a perusal of other sections of the statute, and of other expressions occurring in the course of the Act, shews quite clearly that the accompaniment of poles for the wiring is simply what is implied in any reasonable reading of the powers to be exercised by the company.

In the second place, the 23rd, 25th and 29th sections of this Act of 1880 appear by their provisions to present a most reasonable view of the natural relations which exist on the one hand between a municipality whose streets are used in the course of the operations for the supply of gas and electrical power and, on the other, of the company furnishing the supply. Under the 25th section it is provided that the company shall so construct and locate their works and all apparatus connected therewith as not to endanger the public health, convenience or safety, the whole works, etc., to be open to visit and inspection by the municipality at all reasonable times, and the company being bound to obey "all just and reasonable orders and directions they shall receive." Sec. 29 also makes fairly clear what are the rights

IMP.
P. C.
1912
WINNIPEG ELECTRIC R. CO. v. CITY OF WINNIPEG.
Lord Shaw.

and duties of company and municipality respectively, by providing that, when streets are broken up, wires erected, and so forth, the company is to do no unnecessary damage, and take care, as far as may be, to preserve free passage through the said streets, and make such openings as the municipality or the Governor in Council, as the case may be, shall permit and point out, and place such guards, lamps, etc., and taking such precautions as may be necessary for the prevention of accidents. There follow provisions for the finishing and replacing the work and restoration of the streets. It is provided further that, for the purpose of laying mains, it shall not be lawful for the company, except with the written consent of the engineer of the municipality, to break up or interfere with the streets until after thirty days' notice in writing, but for the purpose of laying or erecting service pipes or wires, or for repairing such, this may be done without any notice.

These provisions have been referred to because, as already indicated, they point to such a regulation and accommodation of the private interests of the company with the public interests of the inhabitants as seems, if reasonably acted upon, adequate to protect both, and to prevent frictions or collision. The language of these provisions not unnaturally reappears in the agreements between the city and the companies after referred to.

In this year 1889, if there ever could have been any question as to whether the right to put up poles was included in the Manitoba Electric and Gas Company's power, that question was set at rest. Reference was frequently made to an agreement of date July 15, 1889, between the city of Winnipeg and the Manitoba Electric and Gas Light Company. It was thereby agreed that the city should grant its permits for poles under certain conditions. One of these was that the company should give to the city the right to use free of charge such poles as the Council might require for light and power, and for the stringing of wires for the fire alarm system, etc. Notice is taken by this time of the Electric Light and Power Company of Winnipeg, of which nothing further is heard, and of the North-West Electric Company, incorporated a month before, and to be hereinafter referred to, and it is provided that the Manitoba Electric and Gas Company shall give to these other companies "the right to string wires upon their poles for the purpose of light (arc, incandescent, or otherwise) and power distribution, upon payment by them of a fair annual rental." So far as the city is concerned it thus appears to be clear, (1) that the limitation of the Manitoba Company to light and heat was not acted upon, but on the contrary, (2) provision was made for communication of power to the city over the company's poles, and (3) the use of these for power distribution by the newly-formed company was specially provided for.

IMP.
P. C.
1912
WINNIPEG ELECTRIC R. CO. v. CITY OF WINNIPEG.
Lord Shaw.

Provisions are made for the issue of permits and for forfeiture in the case of the violation of any of the conditions. No suggestion of forfeiture in consequence of any such violation was made in this case. Thousands of permits have been issued, the whole of which, the Board was informed, were, with the exception of one, in the name of the Manitoba Gas Company. It should be further explained that it was provided by the agreement that "wherever in this agreement the company is named or referred to it should be taken to mean and include, as well as the said company, its successors and assigns, as fully and to all intents and purposes as if its successors and assigns were in each case specially mentioned."

In November of the same year, 1889, another agreement was entered into between the city and the Manitoba Electric and Gas Light Company, under which arrangements were made, in consideration of the issue of permits to erect poles, for the furnishing of maps, and for other practical directions and requirements being made, and in particular for the company leaving space for and providing "a top arm on each of their poles for the line of wires for civic purposes." It is thus quite clear that by this time the system of the electric supply, in its widest sense, under which the requirements and conveniences of the city, as well as of the customers of the company, were all provided for, was in full operation.

In June of this year, 1889, the North-West Electric Company, Limited, was incorporated by letters patent under the Manitoba Joint Stock Companies Act, "for the purpose and with the object of acquiring, building, constructing, erecting, operating and maintaining an electric lighting system or systems, electric street railways, electric motors, or other electrical power . . . . in the various cities, towns and villages in the Province of Manitoba." The objects of the new company were not limited to light and heat, but they include, in short, everything within the widest range of an electric company's business. An amalgamation of this concern with the Manitoba Electric and Gas Light Company was possibly, and, it may be, manifestly, in contemplation. On August 23 the city agreed with the North-West Electric Company (then two months old) to give permits for the erection of poles on similar conditions to those granted to the Manitoba Electric and Gas Light Company in the previous month, namely, on July 15. It was provided that the new company should give to the old, just as a month before it had been provided that the old company should give to the new, the right to string wires upon their poles upon payment of a fair annual rental. In all this the city actively co-operated.

In 1892 a third company, called the Winnipeg Electric Street Railway Company, was incorporated. This was done by an Act of the Legislature of Manitoba, 55 Viet. ch. 56. Authority was

given to construct and operate a railway on the streets of the city and adjacent municipalities and to exercise all powers set forth in a by-law scheduled to the Act. The company was also authorized to carry on the business of selling, licensing and disposing of electric light, heat, or power, and was to have the right to erect all necessary "poles, wires, conduits and appliances." The provisions of the by-law, which contains a reference to the keeping of machinery and power houses within the city, will be afterwards referred to. This company came into operation and erected and used poles for wires placed in the streets.

On January 4, 1898, this Street Railway Company acquired by conveyance from the Manitoba Company all the assets of the latter, including "all franchises, rights, powers, etc." On June 9, 1900, the Street Railway Company absorbed the second company, namely, the North-West Company, taking over by purchase all its assets, including "all franchises, rights, powers, etc." One of these consolidations took place without the knowledge of the municipality of the city of Winnipeg. On the contrary the city continued its co-operation, participating in the use of the plant and receiving supplies just as before.

In 1902 a fourth company, called the Winnipeg General Power Company, was incorporated by Act of the Legislature of Manitoba, 1 and 2 Edw. VII. ch. 75. It was given the fullest powers of carrying on the business of electricity "for the purpose of light, heat, or motive power, and any other purpose for which the same may be used," and to acquire, make, or operate "all necessary works in Manitoba for the purpose aforesaid and for the utilization, transmission and supply of electricity, or water power, including poles, wires, pipes, conduits, and appliances of every kind necessary or advisable therefor, and which may, with the consent of the council of any municipality affected, be erected in or along any streets or highways in the Province of Manitoba, subject to the provisions hereinafter contained." By sec. 9 it was provided that, in the event of the company and any municipality failing to agree as to the terms of the exercise of the franchise or rights, there should be an appeal to the Lieutenant-Governor of Manitoba, and by sec. 18 it was provided that the company might enter into an agreement with any other company for amalgamation, and the amalgamated company should have "all the rights of exercising the powers, privileges and franchises of the companies entering into such agreement or a party to such sale or purchase."

The position of the General Power Company, accordingly, was this. It had unlimited powers with regard to the electrical business. In the event of a municipality failing to agree to such details as the erection of poles for wires, there was an appeal to the Lieutenant-Governor, and it was specially provided that any amalgamation of the company with existing companies should

IMP.
P. C.
1912
WINNIPEG ELECTRIC R. CO. v. CITY OF WINNIPEG.
Lord Shaw.

give the amalgamation the powers of the companies absorbed. This must, of course, be read as in addition to, and not in derogation of, the powers conferred upon itself.

The Street Railway Company had not yet joined the combination. But in the year 1904 the Street Railway Company and the Power Company amalgamated by agreement, and the amalgamation was ratified by the Legislature in 4 and 5 Edw. VII. ch. 72, and 9 Edw. VII. ch. 108, of the statutes of Manitoba. The validity of any of the amalgamations referred to has in no further particular been questioned in the present case.

The amalgamated company was named the Winnipeg Electric Railway Company, and they are the appellants herein. They, in point of fact, are accordingly the successors by amalgamation of the Electric Street Railway Company and the Winnipeg General Power Company, and the successors by purchase of the Manitoba Electric and Gas Light Company and the North-West Electric Company. The details of all these transactions need not be further entered upon, but the result is as stated.

It may now be mentioned that the Power Company (incorporated in 1902) had, prior to the agreement of amalgamation, commenced the erection of large and important works at Lac du Bonnet, some sixty or seventy miles from the city of Winnipeg, for the purpose of generating electricity by water power. These operations were important and involved large expenditure, and it is manifest that the transmission of power to communities like the city of Winnipeg,—power supplied by nature and converted and conveyed by suitable apparatus—was not unlikely to be put to the best use of, and at the least cost to, the consumer, if it could be linked up with the system or systems in operation within the municipality so as to reduce to a minimum all interference with the streets or highways, and to take advantage of existing and available plant.

After an analysis of the statutes, agreements, etc., under which the companies ultimately amalgamating were constituted, their Lordships are unable to discover anything forbidding or restricting the importation into the city of Winnipeg of power from outside its bounds. Such a restriction, which might seriously hamper the operations of the company in conveying, for the use of consumers within the city, power which could be obtained from outside on easier terms than by manufacture inside, might be to the disadvantage of all parties—producers and consumers—and such a prohibition or limitation accordingly would not be readily implied. In their Lordships' opinion, neither by implication nor expression is there a prohibition or limitation of such a kind in this case. In the arguments presented for the city of Winnipeg the argument upon this head was confined to the point of a restriction as to the construction, etc., of "power houses" within the city, the restriction being applicable to the case of the Street Railway Company as now to be mentioned.

The argument is that, although this restriction occurs in the case of the Street Railway Company alone, it must be read into a restriction of all the powers of all the other companies of which the amalgamation was composed, and that the wider and unlimited powers of the other companies amalgamated are restricted by the clause as to the street railway. This contention is somewhat singular, and does not appear to their Lordships to be justified by the language of the statutes, agreements, or other documents founded on. This might be sufficient for determination of the point. But in view of the arguments submitted it may be right to quote the exact terms of the restriction itself in the case of the Street Railway Company. It occurs in the by-law of the city of Winnipeg, which is confirmed by the Act to incorporate the Winnipeg Electric Street Railway Company (55 Viet. ch. 56), assented to on April 20, 1892. Sec. 11 of the by-law is as follows:—

> The railway property of all kinds, including cars, equipment, power house, engines, dynamos, and appliances of all kinds relating to the railway . . . . shall be liable to taxation. . . . The company shall place and keep within the city limits all their engines, machinery, power houses, repair shops, and construction shops (if any).

It may be observed that this section is primarily a section dealing with taxation. Neither it nor any part of the by-law or the Act of the Legislature prohibits the company from purchasing power or entering into a transaction of that kind which might prove highly advantageous and economical. Nor, in the second place, with regard to "power houses," upon which the argument has dwelt, does it oblige the company to erect such power houses, but what the clause does do is to say that, if these are required, they shall be kept within the city limits and be liable to the city taxation. In the opinion of their Lordships it is not legitimate to convert a section of this character into a restriction upon the Winnipeg Electric Street Railway Company of the importation of power, or a compulsitor upon that company to be its own manufacturer of power within the city bounds. Such a restriction might prove, and the figures laid before the Board and admitted by both sides seem to shew that that was the case here, highly detrimental to the interests both of the company and the community.

On this part of the case, however, there remains a further point with which, in view of the arguments so anxiously submitted to the Board, it is, in the opinion of their Lordships, expedient to deal. The point is this: apart altogether from the general argument against prohibition which has been tabled, how do the facts stand as to the "houses," apparatus, etc., for the conversion of power imported into the city; and do not these reasonably and adequately satisfy the provision as to "power houses" under the Act? Their Lordships venture to refer to

IMP.
P. C.
1912
WINNIPEG ELECTRIC R. CO. v. CITY OF WINNIPEG.
Lord Shaw.

the lucid narrative in the judgment of Mathers, J., upon this subject:—

> Prior to amalgamation the Power Company had commenced the construction of a hydro-electric power plant at Lac du Bonnet on the Winnipeg River, about sixty-four miles from Winnipeg, and had expended a large sum of money upon the same. After amalgamation the amalgamated company completed, at an additional expense of several millions of dollars, this work, including the erection of a transmission line, which crossed the Red River into the city of Winnipeg to a power house or sub-station (hereinafter referred to as the Mill street sub-station) erected by the defendant company on property it then owned abutting on the Red River.
>
> In this sub-station there is transforming apparatus for the purpose of reducing the voltage of the current brought over the transmission line, and also a generating plant for the purpose of generating direct current. The direct current generators are operated by a motor driven by the alternating current brought over the transmission line, and the direct current so generated is sent out of the Mill street sub-station and is used for the purpose of propelling the street cars through the city of Winnipeg.
>
> In June, 1906, the defendants' hydro-electric plant at Lac du Bonnet was completed, and on the 13th June the defendants began to send current over the transmission wires to their Mill street sub-station. It comes over the transmission wires at a voltage of about 55,000 volts, and so enters the sub-station. It then passes through a transformer, which steps it down to about 2,200 volts. Part of this reduced current is used to drive direct current generators which supply the current for the defendants' street railway system, and part of it is used for the purpose of their electric lighting system throughout the city, and for commercial power. It leaves the sub-station at 2,200 volts, but at different points through the city it passes through further transformers which reduce it to 110 to 120 volts, which reduced current passes over secondary wires into the various buildings where light is used.

In these circumstances their Lordships are disposed to think that the language of the by-law as to the company keeping within the city limits their engines, machinery, power houses, etc., is amply satisfied by what has actually been done by the appellant company. Unless, in short, the language of this by-law excludes the importation of power, it appears to be the case in fact that its language, as well as its spirit, have been complied with within the city limits.

Failing the case upon the power house, the city of Winnipeg, however, has presented another point, which is this: Assuming that there is no restriction upon the importation of power from outside, still that power has to be linked up with the machinery for conversion, reduction of voltage, and transmission within the city, and for this purpose of connection six poles were required, and for the erection of these poles no authority was given. Whatever view may be entertained as to the taking of such a point, it turns out not to be in accord with the facts. The

letters have been produced in the case, and the narrative given by Mathers, J., on the subject has not been controverted:—

> In order that the current brought from Lac du Bonnet might be utilized for the purpose of operating the defendants' street car lines and their electric lighting and power systems, it was necessary to erect six additional poles, three along the Thistle street lane from Victoria street eastward, and three along Mill street from Thistle street lane to the then existing line of the defendants.
>
> On 17th August, 1905, Mr. Phillips, the defendants' manager, wrote to H. N. Ruttan, the city engineer, the following letter: "Dear Sir,—Kindly grant permit to extend pole line on south side of Thistle street lane from end of present line east on Victoria street, three poles east, and also on Mill street, east side, from end of present line south to Thistle lane, three poles."
>
> That letter, as well as the other letters in which application for permits were made, was headed, "Winnipeg Electric Railway Company," and underneath, "operating Winnipeg Street Railway; Manitoba Electric and Gas Light Company; North-West Electric Company; and Winnipeg General Power Company." In the ordinary way this request for permit was referred to the city electrician. His duty was to ascertain whether or not the portion of the street intended to be occupied by the proposed poles was required for any city poles, and on the electrician replying that the erection of these poles would not interfere with the city, a permit, No. 3545, was issued by S. H. Reynolds, the assistant city engineer, pursuant to a general practice that had prevailed in the office, in the following terms: "Manitoba Electric and Gas Light Company is hereby permitted to erect poles. (Here follows a description of several locations where poles may be erected, having no reference to this action, and continues)—Also to extend poles line on south side of Thistle street lane from end of present line east of Victoria street three poles east; also on Mill street, east side, from end of present line south to Thistle lane, three poles, under the requirements of the city by-laws and the regulations of the Committee on Works and any special agreements relating to this matter."

It thus appears to be undoubted that, so far as permits were concerned, these were obtained from the city authorities. In this situation, what is the attitude which the respondents have assumed? They have challenged their own permits—not only these six permits, but the thousands of others—as having been granted without a by-law. Their Lordships do not enter upon the topic at length because, in their opinion, the granting of permits did not require a by-law in each case, but was an executive act to carry out a general by-law such as is admitted to have been quite properly passed. Otherwise business could not be carried on, and at any moment the authorities or an official of the city could bring the entire operations, which have involved great capital expenditure, to a deadlock, bringing upon all parties sudden and great inconvenience and loss.

IMP.
P. C.
1912
WINNIPEG ELECTRIC R. CO. v. CITY OF WINNIPEG.
Lord Shaw.

Furthermore, their Lordships do not leave out of view the fact that, after the amalgamation of the appellant company was completed, and after the large expenditure for the transmission of power to the Red River and the bridging of that river to the city had been incurred, and with full knowledge on the part of everybody of the meaning and effect of these great operations

> The city recognized the continued existence of its contract with them by passing by-laws on the 11th February, 1907, and on the 4th March, 1907, fixing a schedule pursuant to which the defendants must operate their cars. . . . It also, on 24th June, 1907, under the powers contained in by-law 543, passed a resolution requiring notice to the railway company to proceed at once with the construction and operation of double street railway lines on ten different streets or parts of streets in the city, and directed the work to commence on these lines not later than the 1st of July, 1907.

This is the language of Mathers, J., and the accuracy of his narrative was not denied, nor of what succeeds: "The defendant company proceeded as required with the construction of these lines, and have expended a large sum of money in doing so, and in subsequently operating them. It is true that the resolution is directed to the Winnipeg Electric Street Railway Company, and not to the defendant company. It does not seem to me that that makes any difference, because the plaintiff knew of the amalgamation of that company with the Power Company, and that at that time the power by which the street railway was being operated was that derived from Lac du Bonnet. By-law 543 provides that five per cent. of the gross earnings of the street railway shall be paid annually to the plaintiff. These sums, aggregating about $100,000, have been paid by the defendant company to the plaintiff since it has begun to use the Lac du Bonnet power, and this money has been accepted by the plaintiff."

In their Lordships' opinion the facts of this case give ample warrant for the conclusion which Mathers, J., reaches, in which conclusion their Lordships concur, that "after these unequivocal acts recognizing the continued existence of the contract, entailing a large expenditure by the defendants, the city is too late now to have it declared that the defendants have forfeited their privileges in the streets."

Were it open to the city authorities to go back upon the permits issued by themselves and their predecessors, and to obtain a declaration that these have all along been invalid, serious and far-reaching consequences might ensue—the traffic of the city might be dislocated or stopped and the municipal services provided from the supply would cease and the city itself plunged in darkness. Their Lordships think it right to add their opinion, however, that, important as the questions of the history and acting of parties are, the rights and interests both of the

city and the appellants are, upon the statutes and documents themselves, not on a basis so precarious and insecure.

The question that arises after the facts are thus reviewed is: What was it that the city of Winnipeg in those circumstances really desired? The case, notwithstanding all its length and complexity, has never gone beyond the initial demand suddenly made by the city solicitor of Winnipeg in his letter of May 3, 1906: "I beg to notify you that, unless you are prepared to treat with the city as to the terms upon which power shall be brought in, an application will be made restraining you from exercising such privilege within the city limits until such time as you have made application to the city, and an agreement is reached."

Throughout all the length of the case the same objection, for apparently the same reason, is made—the objection that the appellants have no right to import power into the city, that the city can forbid this, and that its consent must be obtained at a price. In their Lordships' opinion, for the reasons already stated that contention is not well founded in law.

It is here proper to state that, as the result of the argument before their Lordships' Board, the demands of the respondents were conveniently placed before their Lordships by their learned counsel, and an order or decree is now asked under the following four heads:—

1. That it may be declared that the defendants have not the right to use the three poles on the south side of Thistle street lane and the three poles on the east side of Mill street mentioned in the permit No. 3545, dated 8th September, 1905, for the transmission of electric energy for the purpose of working the street railway which has been produced outside the city limits, or has been produced by means of electric energy or other power produced outside the city limits.

2. That it may be declared that the works of the defendants situate at Lac du Bonnet and the machinery there installed constitute a power house, engines and machinery within the meaning of clause 11 of by-law No. 543 of the city of Winnipeg referred to in the pleadings herein, and that the defendants have failed in this respect to fulfil the conditions mentioned in the said by-law, and that their enjoyment of the privileges conferred by the said by-law should cease until the defendants comply with the said conditions as contained in the said clause 11 of the by-law.

3. That it may be declared that the defendants have no right without the consent of the City Council to erect poles or wires in the streets, lanes or highways of the city of Winnipeg, for the purpose of transmitting electric power developed outside the city limits.

4. That the defendants may be restrained from using without the consent of the city any poles and wires erected by them, for the purpose of transmitting electric power developed outside the city limits, and from erecting any poles or wires to be used for such purpose without the like consent.

IMP.
P. C.
1912
WINNIPEG ELECTRIC R. CO. v. CITY OF WINNIPEG.
Lord Shaw.

It is not necessary to enter upon the question of whether the language of these orders squares with that employed in the suit —probably at least it is not inconsistent with it. Their Lordships are of opinion that the orders thus sought are beyond the rights of the respondents.

With regard to the first conclusion, in their Lordships' opinion, the defendants have the right to use the poles mentioned for the transmission of energy for the purpose of working the street railway.

As to the second conclusion, that it may be declared that the Lac du Bonnet works and machinery constitute a power house, etc., within the meaning of clause 11 of the by-law, and that the defendants have failed to fulfil the conditions in the by-law, and that their privileges should cease until they so do, their Lordships are of opinion that this proceeds entirely upon the error already referred to. The power houses for conversion, reduction and distribution already within the city amply satisfy the provisions of the by-law, and there is no occasion for attempting to extend those provisions to power houses, etc., sixty or seventy miles away, or to import into any arrangements between the city and the appellants a prohibition which nowhere expressly appears against importation of power.

As to the third conclusion, that it may be declared that the defendants have no right, without the city's consent, to erect poles or wires for transmitting power developed outside the city limits, their Lordships cannot agree to such a declaration, which is inconsistent with the view already expressed, adverse to the restriction of the importation of power.

As to the fourth conclusion, that the defendants may be restrained from using, without the city's consent, poles or wires for transmitting power developed outside the city limits, that conclusion is clearly negatived for the reasons already given.

It is unnecessary, in the view of their Lordships, to enter upon the question which bulked somewhat largely in the arguments, namely, the position of the city as having itself been a participant in the benefits to be derived from the introduction of power from outside. It appears to be clear that, not only subsequent to the formation of the appellant company, but prior thereto, and during the regime of their predecessors, the city and all the companies concerned co-operated, permits were granted for the erection of poles, orders were issued by the city in regard to location and otherwise, and provision was made for the service of the city as a consumer on specially arranged terms. After the amalgamation elaborate arrangements were made for the erection of a sub-station and for carrying out all arrangements consequent upon the introduction of power from outside, such introduction being mentioned in letters proceeding from the city officials. It is also apparently matter of common

knowledge that, while the city was thus impliedly assenting, and indeed actually co-operating, in regard to the scheme, the appellants were, on the other hand, in the course of expending millions of dollars on the completion of the scheme. Whether such action on the part of the city, carried on during a long term and with the knowledge of expenditure as referred to, would bar the rights of the city to such an objection against the introduction of power which is at the bottom of all these protracted legal proceedings, need not of course be separately determined, the view of their Lordships on the fundamental rights of parties being as above stated.

Their Lordships are of opinion that both of the judgments of the Court below were erroneous. The learned trial Judge, Mathers, J., decided substantially in the terms of the orders formulated at the Bar of the Board by the respondents' counsel, that the appellants were not entitled to erect or maintain poles or wires in the streets of the city for the purpose of transmitting electrical energy developed outside. Upon that their Lordships' opinion has been already expressed. On appeal, however, it was held that the appellants had no right to erect or maintain such poles for the transmission of electric energy for any purpose other than their street railway. In other words, as the respondents' case puts it, the Court held that the rights of the company to use the streets without the assent of the city for the transmission of electrical energy, wherever produced, are confined to one purpose, namely, the purpose of operating its street railway. This decision, their Lordships think, goes far beyond the real point which was at issue between the parties, and the respondents not unnaturally expressed themselves willing to accept the view of Mathers, J. But in both cases, for the reasons given, their Lordships think that the suit under all its heads falls to be dismissed, and they will humbly advise His Majesty accordingly that the appeal of the Winnipeg Electric Railway Company should be allowed and the cross-appeal by the city of Winnipeg be refused. The city will bear the costs of the proceedings at this Board and full costs in the Courts below.

*Appeal allowed and cross-appeal dismissed.*

SASK.

S. C.
1912

May 13.

## SCOTNEY v. SMITH BROS. & WILSON.

*Saskatchewan Supreme Court. Trial before Brown, J. May 13, 1912.*

1. MASTER AND SERVANT (§ II B 4—162)—LIABILITY OF MASTER—ASSUMPTION OF RISK BY SERVANT—FAILURE TO COMPLAIN.

Where the mode of laying brick in a cornice at the top of a brick wall 50 feet in height, which was in itself architecturally sound, was unsafe as a result of the system or method of laying it adopted by servants of the defendant other than the plaintiff, the master will be liable for injuries sustained, through the falling of the wall, by a servant, an experienced bricklayer, who, without complaint as to the manner in which the work was being done, continued to work thereon, where, notwithstanding he knew that the manner of laying brick was unsafe, he did not fully appreciate the real danger he was incurring.

[*Ainslie Mining and R.W. Co.* v. *McDougall*, 42 Can. S.C.R. 420; *Lindsay* v. *Davidson*, 19 W.L.R. 433, and *Smith* v. *Baker*, [1891] A.C. 325, specially referred to.]

2. MASTER AND SERVANT (§ II A 4—66*a*)—MASTER'S DUTY AS TO WALLS—WHAT RISKS ASSUMED—VOLENTI NON FIT INJURIA.

Notwithstanding a servant knew that the method adopted by other servants of the defendant in laying brick in a cornice at the top of a wall 50 feet in height, was unsafe, and was also aware of the risk of injury therefrom, where he did not appreciate the real danger, and had reason to assume that those responsible for building the wall in such manner were exercising due care that it did not proceed to the danger point, the maxim *volenti non fit injuria* is inapplicable, as the only risk of injury the plaintiff voluntarily agreed to assume as part of his employment was such as he would have incurred had the work been carried on according to safe methods.

[*Smith* v. *Baker*, [1891] A.C. 325, applied.]

3. DAMAGES (§ III J 4—192)—COMPENSATION—PERMANENT INJURIES.

$5,500, as general and special damages, is fair and reasonable for injuries sustained through a master's negligence by a bricklayer 27 years of age, capable of earning $1,200 to $1,500 per annum, where his injuries would undoubtedly prevent him ever again following his trade, as one foot was injured, his head cut, nose broken, two teeth knocked out, and his back hurt so as to prevent his doing any work involving stooping or lifting.

Statement

TRIAL of an action against employers for damages for personal injuries to a workman through negligence.

Judgment was given for the plaintiff for $5,500 and costs.

*F. W. G. Haultain*, K.C., for plaintiff.

*A. Casey*, for defendant.

Brown, J.

BROWN, J.:—The defendants are building contractors, and as such were, on August 25th, 1910, erecting a large brick building for Campbell Bros. & Wilson of the city of Regina. The plaintiff is a bricklayer by trade, and was on that date in the employ of the defendants and engaged with others in the construction of this building. The walls of the building were solid brick nine inches in width, and the east side wall, being the one on which the plaintiff was working on the day in question, was some 107 feet in length, having a pilaster at each end in width some 17 feet and having five other pilasters, each about

six feet wide, alternating with the windows. The wall was slightly over 50 feet in height, and the pilasters extended the full height of the wall. The plans called for the crowning of this wall with a cornice having a projection of nine inches beyond the wall itself and five inches beyond the pilasters, the pilasters projecting four inches beyond the wall. The construction of the cornice over the windows, or on the wall between the pilasters, was accomplished by five projecting courses of brick, the first two courses projecting two and three-eighths inches each, the third course one and three-quarter inches, and the other two courses one and a quarter inches each, so that the wall at the top of the fifth projecting course of bricks was practically eighteen inches in width. The plans also called for three more courses of brick on the top of the last projecting course. There were ten bricklayers engaged in the work of building this wall, located at various points along its full length. One of them, called Lloyd, was working over the most northerly window, and the plaintiff was working over the window next to Lloyd. While just completing the laying of the row of stretchers of the second course of bricks above the last projecting course, all the portion of the wall above the window where the plaintiff was working down to the base of the cornice and between the pilasters slid out, the plaintiff going with it and falling some fifty feet to the ground. A similar portion of the wall over the most northerly window, on which Lloyd was working, fell at practically the same time. It fell probably a moment before, because the plaintiff says he noticed Lloyd ahead of him as the two of them were falling to the ground below. The other portions of the wall remained in act, except that each of the three pilasters adjacent to the falling portions were torn away somewhat at the sides. There is some conflict of testimony as to how much of the wall had been completed at the time of the accident. This conflict is evidently simply the result of mistaken impression or defective memory, and is not material, for in either view the result is practically the same. I accept, however, the defendants' version, and find under the evidence that the fourth projecting course of bricks over the windows had been fully completed. The fifth or last projecting course had a stretcher laid backed up with a header and leaving a space of some four or five inches on the inner side of the wall not filled in. The sixth course had a stretcher laid backed up by a clip-bonding row and leaving eight or nine inches from the inner side of the wall not filled in; and the row of stretchers was just being completed on the seventh course, when the wall gave way, precipitating the plaintiff and Lloyd to the ground, and resulting in serious injury to both of them. The plaintiff by this action seeks damages against the defendants, alleging negligence against them, and setting up that the wall was con-

SASK.

S. C.
1912

SCOTNEY
v.
SMITH BROS. & WILSON.

BROWN, J.

structed unsafely and in a defective and improper manner, in that the cornice was too heavy to be constructed without tie-irons and the use of props, and further, that it was not properly backed up during its construction, and that in consequence the wall fell, with the resulting injuries to the plaintiff. I am satisfied from the evidence that the cornice-work was not of an unusual or difficult character to build, that the whole structure was architecturally sound, and that there was no necessity for using either tie-irons or props in the construction of the wall or any portion of it. It could and should have been built safely, without the use of either. It is not customary to use either in the construction of such cornices, and the defendants cannot be said to be negligent in not using the same. It is, however, the custom of the trade in building a cornice to back up completely each course of bricks as it is laid before proceeding with another course. Charles Willoughby, one of the witnesses for the defence, who has had much experience in this class of work, states that he never saw a cornice built that was not backed up solid, and the evidence of all the witnesses is to the effect that such is customary. It is regarded as the sane and safe method, for in that way the projecting bricks are so bonded that they cannot fall, unless, of course, the walls are architecturally at fault. In this case the wall was architecturally sound, and in the ordinary course of events should not have fallen if properly backed up during its construction. Any departure from the custom of backing up each course in building a cornice is fraught with more or less danger, because it is difficult for an operative to know at what time the equilibrium has been so shifted that the projecting portion has lost its support. The material used, both as to mortar and brick, was of good quality, and the wall did not fall because of defective material. I am convinced, however, notwithstanding the opinion of some witnesses to the contrary, that the wall at the time it fell had reached the danger point. The evidence of Butler, for the plaintiff, and of Puntin and Chambers, for the defence, together with the actual results, satisfies me as to that. Chambers was the foreman on this part of the work, and stated that he happened to go up on the works and noticed that the men were not backing up the wall solid, that before giving any instructions on the matter he was suddenly called down, and when below, saw the corner man raise the line for another course: he called to him to back up and take no chances, and was on the point of going up to see that his orders were enforced when the wall fell. Puntin's evidence under cross-examination (and he was agent of the architect in charge) is that it would not be safe to leave two courses of brick not backed up, that it should be backed up completely to the course before the one being laid. The wall had reached that position where there was great danger of it falling, and great danger to the men working on it. Both the plaintiff and

Lloyd were standing on the back of the wall at the time it gave way, for although there was a platform four inches back from the inside of the wall, yet at this point the wall was eighteen inches wide, and it was necessary to stand on the wall itself in order to do their work effectively. They both state that they were in the act of laying a stretcher brick when the wall gave way from under their feet. In so laying their bricks they were doing only what it was natural for them to do; and although it was suggested that they must unnecessarily and carelessly have applied some force to the outside of the wall, I do not so find. It gave way so rapidly that they had no time to get on the platform or save themselves. I am of opinion, and find, that the wall fell while the plaintiff was working on it in the natural course of his employment, and that it fell because of the neglect to fully back up each course of bricks laid. It is pointed out on behalf of the defendants and emphasized that the wall over the three south windows did not fall, although built in precisely the same manner and to the same point in construction, and this is a matter to which I have naturally given serious consideration. On the other hand, there is the fact that the wall over two windows gave way at practically the same time, and the undisputed evidence is that the falling of the one could not have been caused by the falling of the other, because of the intervening and saving pilaster. As I have already stated, the whole wall had, I believe, reached the danger point, and a very slight difference in projection of the cornice (and the evidence shewed there were slight variations in projection even over the same window) or in manner of construction may, in my judgment, be the explanation of why the wall should go at one point and not at the other.

I am not much impressed with the idea that a man working on the wall would help to support it. That would undoubtedly be true if the workman did nothing but stand still and hold the wall down, but a man who was doing his work would continually be altering his position. He would be moving along the wall as the bricks were laid; he would be reaching for bricks and mortar, and in doing so would constantly be turning towards the platform; he would occasionally have one foot on the platform and one on the wall; in laying his brick and cutting off the mortar he would have to lean well forward and as it were look over the brick being laid to see that it was well and truly laid, and in doing this on a wall as wide as this one was at this point, the operative might very naturally rest one hand, supporting the body, at varying points forward on the wall. In thus doing his work each man might very naturally vary in some degree from his fellow-workmen, and this is what I refer to by slight variations in manner of construction as being an explanation of the wall falling at one point and not another.

SASK.

S. C.
1912

SCOTNEY
v.
SMITH BROS. & WILSON.

Brown, J.

There is no evidence of any personal negligence on the part of the defendants. The building, as already stated, was architecturally sound; they had supplied good material with which to construct it; Chambers, their foreman, was a competent man, and had been in their service for six years; the men working on the wall were apparently all competent men; and the defendants had no reason to anticipate that the wall would be built otherwise than in a proper and customary way. If they are liable at all, it must be by reason of the negligence of their servants. The method of construction adopted in this case, and which in this respect was the customary method, was to stretch a line the full length of the building. The corner-men, called also the line-men, had control of this line. They raised and placed it, and the intervening men were supposed to work to the line. This was done to ensure uniformity in procedure and accuracy in work. In this case the corner-men raised the line before the backing-up was completed, and the intervening men, in accordance with the custom, worked to it. The plaintiff and Lloyd were two of the intervening men, and this is the reason given by them for not backing up, and building the wall as they did. That such is the practice is confirmed by the fact that in this case all the intervening men so acted, and by the further fact that Chambers, when giving instructions to back up just before the wall fell, gave same to the corner-man. I do not find that Chambers, the foreman, gave instructions to build the wall or any part of it without backing up, but on the other hand, if he at any time gave instructions to back up, as he says he did, I find that neither the plaintiff nor Lloyd heard or received such instructions. They having been stationed on the wall by the foreman, proceeded to work without receiving any special instructions, and they did not back up simply because they followed the line set for them by the corner of line men. It was no advantage to the defendants that the wall should be built otherwise than in the usual way, the only apparent object being to make it easier for the operative, as he thus would not have to stoop so far, and the strain on his back would in consequence be lessened. Moreover, the evidence of the plaintiff and Lloyd shews clearly that they knew the method adopted here of building the cornice was not the customary method or a safe one, that the proper and safe way was to back up completely each course of bricks as laid. The plaintiff in his examination for discovery deposes as follows:—

> 54. Q. And it is the ordinary practice to carry the wall up with the cornice as you build it?
>
> A. Yes.
>
> 55. Q. And that is the way you would consider that a cornice should be built, that is, the wall to be carried up with the cornice?
>
> A. Yes.

56. Q. Now as a practical bricklayer you know that the wall should be carried up along with the cornice?

A. Well, that is the way it is mostly done.

57. Q. Yes, that is the way you would do it, if you were left to yourself to do it?

A. Yes.

58. Q. Why would you do it that way?

A. I would consider it safer.

Lloyd also in his examination for discovery deposes as follows:—

98. Q. Mr. Scotney, in answer to this question, replied "Yes"; "And it is the ordinary practice to carry the wall up with the cornice as you build it?" Do you give the same answer?

A. Yes.

99. Q. You give the same answer?

A. Yes.

100. Q. And the safe way to do it?

A. It is the safe way to do it.

Again, Albert Sharley, who was called in rebuttal on behalf of the plaintiff, says a bricklayer is supposed to know how to build a cornice and that it should be backed up. From this and the evidence generally I am satisfied that the men on the wall, including the line men, had similar knowledge in this respect to the plaintiff.

Notwithstanding this knowledge, neither the plaintiff nor Lloyd at any time made any objection or complaint to the foreman or anyone else about building the wall in the manner pursued by them. In fact, all the men apparently continued to work in this way, without objection or complaint, and without a full appreciation of the real danger they were incurring. It is quite apparent that neither the plaintiff nor Lloyd nor any other of the ten operatives knew that the wall had reached so dangerous a point in its construction, otherwise they would have backed the wall up or left the works.

On this state of facts, are, firstly, the defendants, apart from the question of contributory negligence, liable? And, secondly, if they are, are they relieved of that liability by contributory negligence on the part of the plaintiff? And, thirdly, if the above questions must be answered favourably to the plaintiff, what damages is he entitled to?

Dealing with the first question; it is the duty of the master to provide fit and proper places for the workman to work in *and a fit and proper system* and suitable materials with which to work: *Ainslie Mining and Railway Company* v. *McDougall*, 42 Can. S.C.R. 420; *Lindsay* v. *Davidson*, 19 W.L.R. 433.

In *Smith* v. *Baker*, [1891] A.C. 325 at p. 339, Lord Halsbury is reported as saying:—

> I think the cases cited at your Lordship's Bar of *Sword* v. *Cameron* 1 Sc. Sess. Cas., 2nd series, 493, and the *Battonshill Coal Company* v. *McGuire*, 3 Macq. 300, established conclusively the point for which

SASK.

S. C.
1912

SCOTNEY
v.
SMITH BROS. & WILSON.

BROWN, J.

they were cited, *that a negligent system or a negligent mode of using perfectly sound machinery* may make the employer liable quite apart from any of the provisions of the Employers' Liability Act.

And Lord Watson, at p. 353, says:—

> It does not appear to me to admit of dispute that, at common law, a master who employs a servant in work of a dangerous character is bound to take all reasonable precautions for the workman's safety. The rule has been so often laid down in this House by Lord Cranworth, and other noble and learned lords, that it is needless to quote authorities in support of it. But, as I understand the law, it was also held by this House, long before the passing of the Employers' Liability Act, 43 and 44 Vict. ch. 42, that a master is no less responsible to his workman for personal injuries occasioned *by a defective system of using machinery* than for injuries caused by a defect in the machinery itself.

And in Dawbarn on Employers' Liability, 4th ed., at p. 15:—

> A further duty of a master is to conduct his business on a proper system, and with due and reasonable care for the safety of his servants, and judging from the remarks of Lord Cranworth in the case of *Sword* v. *Cameron* (1839), 1 D. 439, it would appear this is a duty cast upon him whether he personally attend to his business or otherwise.

I have no hesitation in holding that the system or mode or method of constructing this wall was of a negligent character. The men who were responsible for the system or method of construction adopted were the servants of the defendants, other than the plaintiffs or Lloyd, and because of this negligence on the part of their servants, the defendants, under the above authority, would in my opinion be liable.

The second question must in my judgment, under the authority of *Smith* v. *Baker*, [1891] A.C. 325, be answered in the plaintiff's favour. In that case, Lord Halsbury, at p. 336, says:—

> It appears to me that the proposition upon which the defendants must rely must be a far wider one than is involved in the maxim *volenti non fit injuria*. I think they must go to the extent of saying ing that wherever a person knows there is a risk of injury to himself, he debars himself from any right of complaint if an injury should happen to him in doing anything which involves that risk . . . . In both *Thomas* v. *Quartermaine*, 18 Q.B.D. 685, and in *Yarmouth* v. *France*, 19 Q.B.D. 647, it has been taken for granted that mere knowledge of the risk does not necessarily involve consent to the risk. Bowen, L.J., carefully points out in the earlier case (*Thomas* v. *Quartermaine*) that the maxim is not "*scientia non fit injuria*," but "*volenti non fit injuria*." And Lindley, L.J., in quoting Bowen, L.J.'s, distinction with approval, adds (19 Q.B.D. 660): "*The question in each case must be, not simply whether the plaintiff knew of the risk, but whether the circumstances are such as necessarily to lead to the conclusion that the whole risk was voluntarily incurred by the plaintiff.*"

And again at page 338:—

I am of opinion myself that in order to defeat a plaintiff's right by the application of the maxim relied on, who would otherwise be entitled to recover, the jury ought to be able to affirm that he consented to the particular thing being done which would involve the risk, *and consented to take the risk upon himself.*

And Lord Watson, at p. 355:—

In its application to questions between the employer and the employed, the maxim *volenti non fit injuria* as now used generally imports that the workman had either expressly or by implication agreed to take upon himself the risks attendant upon the particular work which he was engaged to perform, and from which he has suffered injury. The question which has most frequently to be considered is not whether he voluntarily and rashly exposed himself to injury, but whether he agreed that, if injury should befall him, *the risk was to be his and not his master's.* When, as is commonly the case, his acceptance or non-acceptance of the risk is left to implication, the workman cannot reasonably be held to have undertaken it unless he knew of its existence, *and appreciated or had the means of appreciating its danger. But assuming that he did so, I am unable to accede to the suggestion that the mere fact of his continuing at his work, with such knowledge and appreciation, will in every case necessarily imply his acceptance.* Whether it will have that effect or not depends, in my opinion, to a considerable extent upon the nature of the risk, and the workman's connection with it, as well as upon other considerations which must vary according to the circumstances of each case.

Lord Herschell at p. 360 says:—

Where a person *undertakes to do work which is intrinsically dangerous*, notwithstanding that reasonable care has been taken to render it as little dangerous as possible, he no doubt voluntarily subjects himself to the risks inevitably accompanying it, and cannot, if he suffers, be permitted to complain that a wrong has been done him, even though the cause from which he suffers might give to others a right of action.

And again, at p. 362:—

It is quite clear that the contract between employer and employed involves on the part of the former the duty of taking reasonable care to provide proper appliances, and to maintain them in a proper condition, *and so to carry on his operations as not to subject those employed by him to unnecessary risk.* Whatever the dangers of the employment which the employed undertakes, amongst them is certainly not to be numbered *the risk of the employer's negligence*, and the creation or enhancement of danger thereby engendered.

And at p. 365:—

I think that the judgment in *Yarmouth* v. *France*, 19 Q.B.D. 647, was perfectly right; but I should not lay the same stress as Lindley, L.J., did upon the fact that the workman had remonstrated against the risk to which he was exposed, and on being told to continue his work did so to avoid dismissal. For the reasons which I have given I think that where a servant has been subjected to risk owing to a breach of duty on the part of his employer, *the mere fact that he*

SASK.

S. C.
1912

SCOTNEY
v.
SMITH BROS. & WILSON.

BROWN, J.

*continues his work, even though he knows of the risk and does not remonstrate*, does not preclude his recovering in respect of the breach of duty, by reason of the doctrine, *volenti non fit injuria*, which in my opinion has no application to such a case.

In this case, did the plaintiff know the risk and consent to incur it? I am of opinion that he did not. He knew that it was an unsafe procedure to build the wall in this way, he was as much aware of the danger as anyone else, but he did not appreciate and could not be expected to have appreciated the real danger to which the failure to back up several courses had led. He was too busy about his work to make any such fine calculations. Again: he cannot be said to have consented to incur any such risk. He had reason to assume that those who were responsible for building the wall in this way were exercising due care that they did not proceed to the danger point. He in entering upon his work had reason to assume that the wall would be constructed along safe methods. He voluntarily agreed to incur all risks incidental to the wall being built by safe methods. But it cannot be said, to use the words of Lord Halsbury, "that he consented to the particular thing being done "which involved the risk, and consented to take the risk upon "himself." The corner or line-men, were at fault. They were negligence in constructing the wall in this way. The plaintiff simply followed the procedure which they mapped out, and it was part of their business to map out the procedure. To apply the language of Lord Herschell on p. 362, of *Smith* v. *Baker*, [1891] A.C. 325, whatever the dangers of the employment which the plaintiff undertook, amongst them is certainly not to be numbered the risk of the employer's negligence (or the risk of negligence on the part of fellow-employees). And again, his language at p. 365, when the plaintiff was subjected to this risk brought about by the negligence of his fellow-employees, and which I have held amounted to a breach of duty on the part of the defendants, the mere fact that he continued his work, even though he knew there was danger, and did not remonstrate, does not preclude his recovering by reason of the doctrine, "*volenti non fit injuria.*"

Having thus found the defendants liable, the plaintiff is unquestionably under the evidence entitled to substantial damages. His injuries as a result of the fall were severe. The marvel is that they were not more so, as he fell a distance of over fifty feet. His right foot was injured, head cut, nose broken, two teeth knocked out, and what was more serious, his back was hurt. He was confined to the hospital for some eight days and in bed at his home for two weeks, and after getting out of bed he was obliged to use crutches for some six weeks. He has ever since had a weak back, accompanied by more or

SASK.

S. C.
1912

SCOTNEY
v.
SMITH BROS.
& WILSON.

Brown, J.

less pain which has prevented him from doing any kind of labour that involves stooping or lifting. He also suffers from neurasthenia. He has been practically unable to do any kind of work since the accident, and the evidence indicates that he will not likely ever again be the man he was. He may in time be able to go back to his work as bricklayer, but the chances are against it. He is, however, by no means in a helpless condition, and I would judge that with care he will be able to earn a fair competence at some occupation. He is 27 years of age, and was earning 65 cents an hour and capable of earning at his trade from $1,200 to $1,500 per annum. It is difficult under such circumstances to fix with any degree of certainty the damages which the plaintiff has suffered. I can only use my best judgment in the matter, which is that $5,500 would be reasonable and fair, this amount to cover both special and general damages.

There will, therefore, be judgment for the plaintiff for $5,500 and costs.

*Judgment for plaintiff.*

---

## LLOYD v. SMITH BROS. & WILSON.

SASK.

S. C.
1912

May 13.

*Saskatchewan Supreme Court. Trial before Brown, J. May 13, 1912.*

1. DAMAGES (§ III J 4—192)—COMPENSATION—PERMANENT INJURIES—INSTANCE OF AMOUNT.

A verdict for $4,000 damages is not excessive for injuries received by a bricklayer 25 years of age, who was capable of earning $1,200 to $1,500 per year, where his injuries resulted in a weak back and neurasthenia, and he had been unable to do much work since receiving such injuries, except some at his trade, which he did with great difficulty and limitations, and, while the chances for complete recovery were not very hopeful, yet it seemed probable that in a reasonable time he would be able to resume work at his trade and to earn a fair livelihood.

[*Scotney* v. *Smith Bros. and Wilson*, 4 D.L.R. 134, followed and applied.]

Statement

TRIAL of an action against employers for damages for personal injuries to a workman, through negligence.

*F. W. G. Haultain*, K.C., for plaintiff.

*A. Casey*, for defendants.

Brown, J.

BROWN, J.:—For the reasons given in the case of *Scotney* v. *Smith Bros. & Wilson* [ante 4 D.L.R. 134], I find that the plaintiff is entitled to recover. The only question is the amount of damages that ought to be allowed. This plaintiff was also severely injured, though not so severely as the plaintiff in the other case. As a result of his injuries he has been suffering from a weak back and neurasthenia, and has been unable to do much work since the time of the accident. He has, however, done some work at his trade, but with difficulty and great limitations. His chances for complete recovery are not very

SASK.

S. C. 1912

LLOYD v. SMITH BROS. & WILSON.

Brown, J.

hopeful, but in a reasonable time it seems probable that he will be able to go back to his trade. In any event I feel confident, under the evidence, that he will be able to earn a good livelihood. He is twenty-five years of age, and was capable of earning at his trade an amount similar to that of the plaintiff in the other case. I fix the damages in this case at $4,000, this amount to cover both special and general damages.

There will therefore be judgment for the plaintiff for $4,000 and costs.

*Judgment for plaintiff.*

---

QUE.

C. R. 1912

May 23.

## TURGEON v. BOURGEOIS.

*Quebec Court of Review, Tellier, DeLorimier and Dunlop, JJ. May 23, 1912.*

1. PAYMENT (§ IV—30)—APPLICATION—INDICATION IN DEED—THIRD PARTY—REVOCATION BEFORE ACCEPTANCE.

An indication of payment in favour of a third party who does not intervene or appear in the deed of sale containing the indication of payment does not constitute a delegation of payment until it has been formally accepted by the creditor in whose favour it is made, and may be revoked by the parties to the deed at any time before such acceptance.

2. PAYMENT (§ IV—30)—INSOLVENT DEBTOR DIRECTING PAYMENT TO CREDITOR—NON-ACCEPTANCE BY HIM—LIABILITY AS FOR A PREFERENCE.

Where an indication of payment is made in a deed of sale to which the creditor is not a party by an insolvent trader who sells part of his assets a few days prior to his formal abandonment and the third party has not accepted the indication so as to transform it into a delegation of payment, such indication does not constitute a preferential payment to the detriment of the other creditors, and no action will lie against the third party who has not accepted the same.

Statement

THIS was an appeal by one of the *mis en cause*, Dame E. St. Denis, from the judgment of the Superior Court, Demers, J., rendered on December 27th, 1910, whereby the action of the curator, respondent, to obtain the cancellation of a clause in a deed of sale passed by an insolvent, was maintained both as regards the defendant and all the *mis en cause*.

The appeal was allowed.

Argument

*J. P. Whelan*, for the appellant, argued that the mere unilateral expression of the will or intention of the insolvent, even if fraudulent, did not constitute any delegation of payment and no contract ever took place between the insolvent and the appellant as she was not a party to the contract. Reference was made to *Duggan* v. *Trenholme*, 17 R.L.N.S. 403; 5 Mignault, p. 608 *et seq.*; *Dubuc* v. *Charon*, 9 L.C.J. 79; *Reeves* v. *Darling*, M.L.R. 4 Q.B. 357; *Mallette et al.* v. *Hudon*, 22 L.C.J. 101;

*Lajoie* v. *Désaulniers*, 2 D.C.A. (Dorion) 241; *Ethier* v. *Paquette*, 12 R.L. 184; *Société Permanente de Construction Jacques Cartier* v. *Robinson*, 1 D.C.A. 32; 870, 877 C.P.

*T. Rinfret*, for respondent.

May 23, 1912. The unanimous judgment of the Court of Review was delivered by

TELLIER, J.:—This is an inscription in review on the part of the *mis en cause*, Dame E. St. Denis, to obtain the revision of the judgment rendered by the Superior Court, on December 27th, 1910. Tellier, J.

The *mis en cause*, Campeau and St. Denis, have made an abandonment of their property for the benefit of their creditors and the plaintiff has been duly appointed as curator to this insolvency.

By deed of sale before Perrault, N.P., on April 24th, 1909, these two, Campeau and St. Denis, sold to Bourgeois, the defendant, their hotel or restaurant, at No. 561 Demontigny Street East, in Montreal, with all its contents and also ceded to him all their rights to their lease of the building and all their rights in the license for the sale of spirituous liquors then held by the said Campeau and St. Denis. This sale was made for the price of $10,000, of which $600 to be paid cash and the balance of $9,400 was to be paid to divers parties and amongst others $1,500 to Dame St. Denis, another of the *mis en cause*.

On June 17th, 1909, the plaintiff *es qual.* instituted the present action against the defendant and the *mis en cause*. The plaintiff alleged, amongst other things, that when the said Campeau and St. Denis agreed to this sale with the defendant they were notoriously insolvent and this to the knowledge of the defendant and of all the *mis en cause;* that this sale was agreed upon a few days prior to the abandonment made by the said Campeau and St. Denis; that this sale was the result of a fraudulent understanding between the defendant and all the *mis en cause* and was made for the purpose of allowing the defendant to obtain the restaurant therein mentioned *à vil prix* and for the purpose of allowing the other *mis en cause* to obtain in the said deed delegations of payment in their favour so as to secure preferential payment of their claims over the other creditors of the said insolvents; that the defendant never paid to the said Campeau and St. Denis the sum of $600 cash, as falsely stated in this deed; that the purchase price therein mentioned is ridiculous and does not represent the value of the said hotel or restaurant, and that the payments to be made thereafter are spaced so far apart that it is impossible for the creditors to realize effectively on the assets of these insolvents.

QUE.
C. R.
1912
TURGEON
v.
BOURGEOIS.
Tellier, J.

The plaintiff *es qual.* therefore concludes that this deed of sale be declared false and fraudulent and be set aside, and subsidiarily that that portion of the said deed wherein it is stipulated that the defendant shall pay the following amounts: $2,900 to C. Gagnon, $1,500 to Dawes & Co., Ltd., $2,208 to M. Langlois, $1,600 to E. St. Denis, and $1,500 to Dame E. St. Denis, wife of Hervé Campeau, be declared fraudulent, as constituting preferential payments in favour of the above-named persons, and be therefore declared void, null and of no effect; and that the defendant be ordered to pay the afore-mentioned amounts to the plaintiff *es qual.* to be by him ratably distributed between all the creditors of the said Campeau and St. Denis, according to their rights and privileges.

At the trial the plaintiff desisted from the main conclusions of his action and proceeded only on the subsidiary conclusions I have just enumerated.

The *mis en cause* appellant, Dame St. Denis, met this action by a demurrer, which was dismissed with costs, and by a defence to the merits wherein she pleaded ignorance of all the allegations of the plaintiff's declaration with the exception only of the allegation that the deed of sale in question was the result of a fraudulent understanding in which she had participated; this she denied. She asked the dismissal of the action as far as she was concerned.

The plaintiff has not established the allegations of his declaration in so far as the appellant is concerned. She was not a party to the deed attacked herein; she had nothing to do with it in any shape or form; she never accepted nor repudiated the so-called delegation of payment made in her favour; she was never even called upon to accept it or to refuse it.

This indication of payment was an indication pure and simple; it did not constitute a perfect delegation of payment in the proper meaning of the term; it could not constitute a preferential payment to the detriment of the other creditors until it was accepted, and she never accepted it. Until acceptation there could be no "*lien de droit.*" And until such indication was accepted it could always be revoked by Campeau and St. Denis before their abandonment, and after the abandonment by the plaintiff himself. Indeed, after the abandonment, it became null; it lapsed and could no longer be accepted.

By the allegations and conclusions of his action in nullity the plaintiff has compelled the appellant to defend herself; he has not substantiated the charges of fraud he brought against her; he has failed to justify his prayer that she should be condemned to pay costs and he must in consequence pay the costs of her defence, and his own in so far as the action directed against her is concerned.

QUE.

C. R.
1912

TURGEON
v.
BOURGEOIS.

We therefore reverse that part of the judgment which condemned the appellant to pay the costs of her contestation and confirm the said judgment in so far as it has annulled the indication of payment made in her favour; and the plaintiff *es qual.* will pay the costs of the appellant's contestation and all the costs in review.

*Appeal allowed.*

## EVERETT v. SCHAAKE.

B.C.

C. A.
1912

June 4.

*British Columbia Court of Appeal, Macdonald, C.J.A., Irving and Galliher, JJ.A. June 4, 1912.*

1. MASTER AND SERVANT (§ II B 3—144)—LIABILITY OF MASTER—UNGUARDED MACHINE PRODUCT OF WORKS—TESTING AND INSPECTING—B.C. FACTORIES ACT (1911) CH. 8, SEC. 32.

A machine which was no part of a factory or plant, but a product thereof manufactured for a customer, is not within the words or intention of sec. 32, ch. 8 of the B.C. Factories Act of 1911, which requires the secure guarding, so far as practicable, of all dangerous parts of mill-gearing, machinery, shafts, etc., so as to render a manufacturer liable where a servant sustained injuries while testing such newly constructed machine, by coming into contact with a portion thereof which was not guarded as such section required, since it was necessary that such portion should be exposed to view in order that all parts of the machine might be properly inspected.

2. MASTER AND SERVANT (§ II E 6—275)—TESTING NEW MACHINE—UNGUARDED SAWS—KNOWLEDGE OF SERVANT—BRINGING TO ATTENTION OF FOREMAN—B. C. EMPLOYERS' LIABILITY ACT.

Where a servant, who was directed to test a machine manufactured by the defendant, called the attention of the defendant's foreman to the danger of doing so without the guarding of rapidly moving saws, and was thereby injured while making such test, the jury may find a verdict against the master under B. C. Employers' Liability Act.

3. NEW TRIAL (§ III B—19)—ERRONEOUS VERDICT—FAILURE OF JURY TO FOLLOW INSTRUCTIONS.

Where an action for an alleged breach of the Factories Act and the B. C. Employers' Liability Act as well, was improperly submitted to the jury on the theory of a common law liability arising from an alleged breach of the former Act, upon the jury returning a verdict of $2,880 for the plaintiff, and being asked what damages they would award if they were to decide the case under the Employers' Liability Act, they answered $2,880, a new trial will be granted if the jury have failed to answer questions submitted to them on the question of voluntary assumption of risk which would be material to the question of liability under the latter Act.

4. NEGLIGENCE (§ I B 2—15) — LIABILITY OF MANUFACTURER — SERVANT'S ASSUMPTION OF RISK—STATUTORY DUTY.

The defence of *volenti non fit injuria* is not available in an action for injuries sustained through a breach of a statutory duty imposed by the Factories Act.

[*Baddeley* v. *Earl Granville* (1887), 19 Q.B.D. 423, and *Rodgers* v. *Hamilton Cotton Co.*, 23 Ont. R. 425, and *Lore* v. *Fairview*, 10 B.C.R. 330, specially referred to.]

Statement

AN appeal by the defendant from the judgment at trial in favour of the plaintiff in an action for damages for personal injuries, the jury having fixed the damages at $2,880.

The appeal was allowed and a new trial ordered.

B.C.

C. A.
1912

EVERETT
v.
SCHAAKE.

Statement

The plaintiff was injured while testing a morticing machine manufactured for a customer by the defendants in their factory. The plaintiff, an experienced journeyman machinist, had been employed for three weeks prior thereto in building and finishing the machine; in fact, he was the machinist in charge of the construction of the machine. On completion he made two tests to see that it ran properly. After these tests the foreman directed the plaintiff to make a third test, and it was while making this third test, and while oiling the machine while running, that the plaintiff met with the accident complained of. The plaintiff complains of the absence of a guard over the rapidly revolving saws. It appears that when the machine was installed in the place where it was to be operated, a guard consisting of a hood was to be suspended over these saws with suction tubes to take away the sawdust and shavings, but it was no part of the machine itself. The plaintiff says that he protested to the foreman against making the third test, because of the want of a guard over the saws. These tests, it will be understood, were made in the factory where the machine was constructed, not in the factory where it was intended finally to be used.

*C. W. Craig*, for appellants.

Messrs. *G. E. McCrossan* and *A. M. Harper*, for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The plaintiff claims, first, that the defendants were guilty of a breach of the Factories Act, R.S.B.C. 1911, ch. 81, sec. 32, which provides that:—

> In every factory all dangerous parts of mill-gearing, machinery, shafting, vats, pans, cauldrons, reservoirs, wheel-races, flumes, water-channels, doors, openings in the floors or walls, bridges, and all other dangerous structures or places, shall be, as far as practicable, securely guarded.

The only authority to which we were referred on the scope of this section is *Redgrave* v. *Lloyd*, [1895] 1 Q.B. 876, but in my view of the case we get practically no assistance from that decision. In the case at bar, the point is, does the machine, which is no part of the factory plant or machinery, but is the product of the factory, fall within the above quoted section? Whereas in *Redgrave* v. *Lloyd*, [1895] 1 Q.B. 876, the point was, did a machine which was not part of the machinery which supplied the motive power, but was a machine operated as part of the plant by machinery which formed part of the motive power, fall within the English Act, which is practically identical with ours? Had this morticing machine been one used in the manufacture of the product of the factory, the cases would be identical, and there would, in my opinion, be no difficulty in holding that it fell within the Factories Act. But not being part of the mill gearing machinery or shafting of this factory in any true sense of the word, I do not think the Factories Act is applicable. It seems to me neither to fall within the words nor the intention

of the Act. The object of guarding machinery which is being used constantly is at least to a large extent to provide familiarity with and constant use of the machine. Where a machine is being tested not only is it important, as pointed out in the evidence, that the different parts should be exposed in order to observe whether it be working properly or not, but those making the test are in a position to guard themselves and others against inadvertent or thoughtless acts.

The case went to the jury on two points, first, as to the common law liability arising by the alleged breach of the Factories Act, and secondly, under the Employers' Liability Act. The jury, having returned a common law verdict, which in my opinion is wrong, we have then to consider whether the plaintiff was entitled to succeed on the other branch of the case. That branch turns on the direction given by the foreman to the plaintiff to test this machine, and the fact that the plaintiff called the foreman's attention to the danger of doing so, but his, nevertheless, carrying out the order which resulted in his injury, I am not prepared to say that the jury could not properly find a verdict on this branch. After returning their verdict they were asked by the learned Judge what damages they would give if they were to decide it under the Employers' Liability Act. They answered $2,880, and if it were not for the difficulty which I shall presently mention, I should hold that the plaintiff is entitled to that sum. The difficulty arises in this way: the jury were directed that as a matter of law the Factories Act is applicable to this case, and that if they found that it was practicable to guard the machine then there was a breach of the Act, and they were told that the voluntary assumption of the risk by the plaintiff is no defence against a breach of statutory obligation, so that if they came to the conclusion that the plaintiff was entitled to recover at common law, they need not consider the question of *volens*. They were told, however, that if they came to the conclusion that he was entitled under the Employers' Liability Act, then they should consider the question of *volens*. Having brought in a common law verdict, and not having answered the questions submitted to them, there is nothing to shew that they have considered the question of *volens* at all. Hence that element in the case has not been passed upon by the jury.

I think, therefore, that there should be a new trial.

IRVING, J.A.:—It seems to be conceded by the writers of all the leading text books that the defence *volenti non fit injuria* is not available to the employer in an action founded on the violation by him of a statutory duty. This has been decided by the Divisional Court in England: *Baddeley* v. *Earl Granville* (1887), 19 Q.B.D. 423, followed in Ontario by the Common Pleas Division in *Rodgers* v. *Hamilton Cotton Co.*, 23 Ont. R. 425. In *Love* v. *Fairview*, 10 B.C.R. 330, where it was argued that assum-

Irving, J.A.

B.C.
C. A.
1912
EVERETT
v.
SCHAAKE.
Irving, J.A.

ing the plaintiff had suffered injuries from the non-fulfilment of statutory duties, no right of action was given him, the full Court held that there was, and Martin, J., at p. 346, held that the right to statutory protection could not be lost by waiver.

I think the judgment must be set aside on the ground that the provisions of the Factories Act, 1911, ch. 81, sec. 32, are inapplicable to this machine. It was a product of the mill and not part of the plant of the factory.

I am of opinion that the order for a new trial should go.

GALLIHER, J.A., concurred in the result.

*Appeal allowed and new trial ordered.*

---

ONT.
H. C. J.
1912
June 14.

## BINKLEY v. STEWART CO.

*Ontario High Court. Trial before Teetzel, J. June 14, 1912.*

1. PRINCIPAL AND AGENT (§ III—33)—LIABILITY OF AGENT—ABSENCE OF NEGLIGENCE—FAILURE TO PLACE INSURANCE—SUBMISSION OF APPLICATION.

An agent who had no authority to bind an insurance company until it had approved an application for insurance, is not liable for failure to effect insurance upon property before it was destroyed by fire, where he agreed with the applicant only to submit his application to the company for approval, which he did without negligence, and it did not appear that he unconditionally agreed to place and effect such insurance.

[*Baxter* v. *Jones* (1903), 6 O.L.R. 360, and *Rudd Paper Box Co.* v. *Rice* (1911), 2 O.W.N. 1417, affirmed; *Rudd Paper Box Co.* v. *Rice*, 3 D.L.R. 253, 3 O.W.N. 534, 20 O.W.R. 979 (C.A.), and by the Supreme Court of Canada, 4 June, 1912, *sub nom. Rice* v. *Rudd Paper Box Co.*, distinguished.]

Statement

ACTION for damages for the defendant's negligence in not effecting an insurance on the plaintiff's stock, in violation of an alleged undertaking or agreement by the defendant to effect such insurance.

The action was dismissed.

*H. D. Gamble*, K.C., and *F. L. Smiley*, for the plaintiff.

*R. McKay*, K.C., and *D. T. K. McEwen*, for the defendants.

Teetzel, J.

TEETZEL, J.:—On the 10th July, 1911, the plaintiff applied to the defendants, an incorporated company carrying on business as insurance agents at New Liskeard, for $1,000 insurance on his stock of goods in his store at Cochrane. The insurance was not effected, and the stock was destroyed on the 11th July.

Upon the evidence, I find the following additional facts: (1) that the defendants did not unconditionally agree to place or effect the insurance; (2) that the defendants agreed only to submit an application for such insurance; (3) that the defendants did submit such application, and in connection there-

ONT.

H. C. J. 1912

BINKLEY v. STEWART CO.

with were not guilty of any negligence; and (4) that it does not appear that the defendants had any authority from any insurance company to bind it by an interim receipt or otherwise in respect of property in Cochrane, unless approved by the company.

Upon these facts, the case is excluded from the application of such authorities as *Baxter* v. *Jones* (1903), 6 O.L.R. 360, and *Rudd Paper Box Co.* v. *Rice* (1911), 2 O.W.N. 1417,* cited by Mr. Gamble.

The action must be dismissed with costs.

*Action dismissed.*

*Affirmed, *Rudd Paper Box Co.* v. *Rice*, 3 D.L.R. 253, 3 O.W.N. 534, 20 O.W.R. 979 (C.A.), and by the Supreme Court of Canada, 4 June, 1912, *Rice* v. *Rudd Paper Box Co.*

---

## HOLDEN v. RYAN.

ONT.

H. C. J. 1912

July 8.

*Ontario High Court. Trial before Teetzel, J. July 8, 1912.*

1. BUILDINGS (§ I A—9*a*)—SEMI-DETACHED HOUSE—SIZE OF LOT—MUNICIPAL REGULATION.

A building structurally divided into two equal divisions by a wall extending its whole height with no internal communication, common staircase, or common front door, constitutes a pair of semi-detached buildings, and to erect such a building upon a lot which has a frontage of only forty feet on a specified street would be a violation of a building restriction that every pair of semi-detached buildings shall be upon land having a frontage on such street of at least fifty feet.

[*Ilford Park Estates* v. *Jacobs*, [1903] 2 Ch. 522, followed.]

2. BUILDINGS (§ I A—9*a*)—ERECTION OF APARTMENT HOUSE—CORNER LOT—MUNICIPAL BUILDING RESTRICTIONS.

It is a violation of a building restriction that buildings erected upon certain lots having a frontage upon some other street as well as upon a specified street shall have its front upon such specified street, to erect an apartment building on the corner of such street and another street with an entrance to only one of the apartments on the specified street and the main entrance for all the other appartments on the other street, there being no connection between them and the one apartment entered from the specified street.

3. BUILDINGS (§ I A—5)—MUNICIPAL RESTRICTIONS—DISTANCE FROM CENTRE OF STREET.

If the wall of a building which supports the super-structure and its roof, is not nearer than fifty-five feet to the centre line of a certain specified street there is no violation of a building restriction requiring the main wall of buildings on such street to be no nearer than such distance to its centre, though the wall of the bay-windows of the building is nearer to the centre of the street than fifty-five feet.

4. BUILDINGS (§ A—9*a*)—MUNICIPAL BUILDING RESTRICTIONS—MEANING OF "APPURTENANT."

In a building restriction requiring that every building on certain lots "shall have appurtenant to it land having a frontage on" a certain street of at least a specified number of feet, the word "appurtenant" is not to be given a strict legal meaning but its ordinary popular meaning that the buildings in question must be erected upon lots having the required frontage on such street.

ONT.

H. C. J. 1912

HOLDEN v. RYAN.

ACTION for an injunction to restrain the defendant from erecting upon his land a building alleged by the plaintiff to be in violation of a certain building scheme, in accordance with which the lands were laid out by the original owner, and made subject to certain building restrictions running with the land.

Judgment was given in favour of the plaintiff.

*W. A. McMaster*, for the plaintiff.

*W. G. Thurston*, K.C., for the defendant.

Teetzel, J.

TEETZEL, J.:—The restrictions in question, with violation of which the defendant is charged, are numbers 3 and 5 of the scheme, covered by the covenants in the conveyances and endorsed thereon:—

"3. Every building erected upon any such lot shall be either detached or semi-detached. Every such detached building (except stables and outbuildings) shall have appurtenant to it land having a frontage on Palmerston avenue of at least thirty-three feet; and every such pair of semi-detached buildings shall have appurtenant thereto lands having a frontage on Palmerston avenue of at least fifty feet."

"5. Any building (except stable and outbuildings) erected upon any such lot, which has a frontage upon some other street as well as upon Palmerston avenue, shall have its front on Palmerston avenue."

The defendant's lot has a frontage of only forty feet on Palmerston avenue, and Harbord street adjoins to the south. The defendant's plans are for the erection of a building to be used as an apartment house or houses; and, having obtained a permit from the city architect, he was proceeding, at the commencement of this action, with the erection thereof.

As to the first alleged violation, the plaintiff charges that the proposed building is in fact a pair of semi-detached buildings, and not a detached building; and that, the total width of land appurtenant thereto being only forty feet, restriction number 3 is thereby violated.

In the proposed building there is a vertical division wall, running north and south, extending the whole height of the building, dividing it into two equal divisions, and in each division there are some seven or eight separate apartments. There is no door or other opening in this division wall, so that there is no means of access to and from the easterly and westerly halves of the building; each half has its independent entrance facing upon Harbord street.

I think, upon this question, the case is governed by *Ilford Park Estates Limited* v. *Jacobs*, [1903] 2 Ch. 522, in which it was held that a building structurally divided into two tenements on different floors, with no internal communication, com-

mon staircase, or common front door, constituted two houses, within the meaning of a covenant not to erect more than one house on the site. I, therefore, hold that the proposed building is in fact a pair of semi-detached buildings, and to permit the same to be erected would be in violation of the restriction which provides that every "pair of semi-detached buildings shall have appurtenant thereto lands having a frontage on Palmerston avenue of at least fifty feet."

Although the word "appurtenant," if strictly construed, as urged by Mr. Thurston, would not be the strict legal expression to use, I think that what the parties meant is plain, and that, instead of giving the word "appurtenant" as used a strict legal meaning, its ordinary popular meaning must be given to it; and, so doing, I find that the defendant, if permitted to erect the building in question, would be violating restriction number 3.

Then as to the other condition, I have no hesitation in finding, upon a consideration of the plan and the weight of evidence at the trial, that the proposed building will not have its front on Palmerston avenue, as required by restriction number 5, but will have its front upon Harbord street.

While it is true that there is an entrance to one of the apartments from Palmerston avenue, there is no connection between that apartment and any of the others in the building. The main entrance for all the other apartments in the easterly half of the building is on Harbord street, as is also the main entrance for all the apartments in the westerly half of the building.

While it is true that the portion of the building facing Palmerston avenue may be described as the front end, it is not the substantial or predominating front of the building, which, as already stated, having regard to the plan and to the weight of evidence at the trial, is on Harbord street, and is, therefore, in violation of building restriction number 5.

Among other ingenious and ably maintained defences urged by Mr. Thurston, much attention was paid to a defence alleging that the plaintiff himself had violated one of the restrictions of the scheme, and, therefore, cannot be heard to complain of violations by the defendant. I do not stop to discuss the law which would be applicable if there had been a violation by the plaintiff; but find as a fact that the violation charged by the defendant against the plaintiff was not established.

The claim is, that the main wall of the plaintiff's building has been erected nearer than fifty-five feet to the centre line of Palmerston avenue, in violation of restriction number 1.

In my opinion, it was well established by the plaintiff that the main wall of his building is not built in violation of that condition. I think the main wall of the plaintiff's building is the wall which supports the superstructure and roof of his house, and not the wall in front of the bay-windows.

ONT.

H. C. J. 1912

HOLDEN v. RYAN.

Judgment, therefore, will be, declaring that a building as proposed by the defendant would be in violation of conditions 3 and 5 of the building restrictions in question, and that the defendant must be restrained from proceeding with the erection of the building unless and until he alters his plan and complies with those restrictions.

The defendant must pay the plaintiff's costs of the action.

*Judgment for plaintiff.*

---

B.C.

C. A. 1912

June 4.

## PEARLMAN v. GREAT WEST LIFE ASSURANCE CO.

*British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin and Galliher, JJ.A. June 4, 1912.*

1. CONSTITUTIONAL LAW (§ II B 7—398)—RIGHT OF ACTION AGAINST INSURANCE COMPANY IN PROVINCE OTHER THAN WHERE HEAD OFFICE IS—WHERE CAUSE OF ACTION AROSE—R.S.B.C. 1911, CH. 53, SEC. 67.

Where the cause of action arose in the province in which an insurance company was organized and has its head office and principal place of business, suit is not authorized in a different province by the fact that the company has been registered and has a registered office therein, under R.S.B.C. 1911, ch. 53, sec. 67, which permits a defendant to be sued at the place where he "dwells or carries on business."

2. COURTS (§ I B 4—43)—ACTION AGAINST INSURANCE COMPANY—HEAD OFFICE IN DIFFERENT PROVINCE—B. C. COMPANIES ACT, R.S.B.C. 1911, CH. 53, SEC. 67.

An insurance company that was registered in British Columbia cannot be sued therein on a cause of action which arose in the province of its organization, where it had its head office and principal place of business, notwithstanding the British Columbia Companies Act provides that for the purpose of sec. 67 of ch. 53 of R.S.B.C. 1911, a company registered therein shall be considered as carrying on business in such province.

3. INSURANCE (§ I B—11*a*)—FOREIGN CORPORATION—RIGHT TO SUE OR BE SUED.

The provisions of ch. 7, of the B.C. Companies Act of 1910, will not permit an insurance company organized and having its head office and principal place of business in another province, although registered and having a registered office in British Columbia, to sue or be sued in the Courts thereof, except in respect to business transacted therein.

Statement

THIS is an appeal from the judgment of McInnes, Co. J., on a stated case.

The appeal was allowed.

The defendant is a life insurance company incorporated by Dominion charter, and having its head office and principal place of business in the city of Winnipeg, where its directors and officers reside, and where its general business is carried on. It is registered in this Province under the Companies Act, and has its registered office for this Province and a local office where insurance business is solicited at Vancouver. The plaintiff now resides at Vancouver, but it does not appear whether or not he resided in this Province when the cause of action arose or con-

B.C.

C. A.

1912

PEARLMAN v. GREAT WEST LIFE ASSURANCE CO.

tract sued on was made; it is merely stated that the cause of action arose wholly in the city of Winnipeg. The plaintiff brought action in the County Court of Vancouver, claiming to do so by virtue of R.S.B.C. 1911, ch. 53, sec. 67, which provides that a defendant may be sued at the place where he "dwells or carries on his business." The learned Judge held that because of registration in this Province with a registered office and place of business at Vancouver, the defendant falls within the words quoted.

Messrs. *W. B. A. Ritchie*, K.C., and *C. M. Woodworth*, for appellant.

*J. A. Clark*, for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—I am unable to agree with that view of the law. There are a number of authorities bearing upon the subject, but I shall content myself with referring to the following: *Corbett* v. *General Steam Navigation Co.*, 4 H. & N. 482; *Brown* v. *London & N.W.R. Co.*, 4 B. & S. 326; *Adams* v. *Great Western R. Co.*, 6 H. & N. 404; *Shiels* v. *Great Northern R. Co.*, 30 L.J.Q.B. 331; *Le Tailleur* v. *South Eastern R. Co.*, 3 C.P.D. 18; *Jones* v. *Scottish Accident Insurance Co.*, 17 Q.B.D. 421.

There are other more recent cases which turn on the construction of the Income Tax Acts in England, such as *De Beer's Con. Mines Ld. & Howe*, [1906] A.C. 455, which in my opinion support the appellant's contention. The only case the other way, to which we have been referred, is *Weatherley* v. *Calder* (1899), 61 L.T.N.S. 508, which seems to me to be at variance with the decisions both before and since that date.

It was contended by the respondent's counsel that his case is strengthened by virtue of the B. C. Companies Act, under which this company was registered. I am unable to accede to that view for this reason: While it might be contended that a company registered under the Act should for all business done in this Province be considered for the purpose of sec. 67 of the County Courts Act to be carrying on business here, yet such an argument is not applicable to the case like the present one, where the cause of action arose in another Province.

I think the appeal should be allowed.

Irving, J.A.

IRVING, J.A.:—When in 1885 the Provincial Parliament reduced into one statute (the County Court Jurisdiction Act, 1885) the many provisions—English and colonial—governing County Court practice, it was provided that—

> 1. The plaint might be entered in the County Court within the territorial limits of which the defendant dwelt or carried on his business—
>
> (*a*) At the time of bringing the action, or
>
> (*b*) By leave within six months next before the time of action or suit brought, or
>
> 2. In the County Court within the territorial limits in which the cause of action wholly or in part arose.

B.C.

C. A.

1912

PEARLMAN v. GREAT WEST LIFE ASSURANCE CO.

Irving, J.A.

The action having arisen wholly in Manitoba, we need not trouble ourselves with the last limb of the section.

As to the first, the expression "dwell or carry on business" has been considered many times by English Courts. It has been held that a railway company dwells at the principal office, and not at every station on the line. So too a *quasi* corporation under 7 and 8 Vict. ch. 110, was deemed to carry on its business where its principal office was situate: *Adams* v. *G. W. R.*, 30 L.J. Ex. 124, 6 H. & N. 404; *Taylor* v. *Crowland Gas Co.*, 24 L.J. Ex. 233, 11 Ex. 1.

Again, it was held in *Corbett* v. *General Steam Navigation*, 4 H. & N. 482, 28 L.J. Ex. 214, that a public company carrying on business in London, which employed in a country town a general commission agent who transacted the company's business in such town, in an office for which the company paid him rent, did not "carry on business" in that town within the meaning of the County Court Act.

The defendants rely on these cases as shewing that the County Court at Vancouver has not jurisdiction to deal with this case. The plaintiff points to the general words of the Companies Act, and claims that as the attorney is to accept process, the Vancouver County Court has jurisdiction.

The general rule which lies at the root of all international and most domestic jurisprudence on this matter is that the plaintiff must sue in the Court to which the defendant is subject at the time of the suit. All jurisdiction is territorial. Territorial jurisdiction attaches with special exceptions upon all persons either permanently or temporarily resident within the territory while they are in it.

It exists always as to land within the territory, and may be exercised over moveables within the territory. And in question of status or succession governed by domicile, it may exist as to persons domiciled, or who when living were domiciled within the territory.

In a personal action, to which none of these causes of jurisdiction apply, a judgment is not recognized by international law (unless, of course, the defendant has submitted himself to the jurisdiction of the Court making such judgment.)

In those cases in which the Courts of one country recognise the judgments of another country, the principle proceeded on is this: That as the judgment of a (foreign) Court of competent jurisdiction imposes a duty or obligation on the defendant to pay the sum for which judgment is given, the (home) Court will enforce it.

The question we have to determine is whether the compliance with the provisions of the Companies Act, 1910, ch. 7, so as to enable the defendants—a Dominion incorporated company, having its head office in Manitoba—to carry on business in this Province, makes the company a resident of this Province, so as to

give the Courts of this Province jurisdiction over the company in respect of a cause of action not relating to land or moveables within the Province, nor connected with domicil.

Having regard to the authorities as to the meaning of the words "dwells or carries on business" in the County Court Act, 1905, this answer must depend on the provisions of the Companies Act, 1910.

I can find nothing in that Act shewing it was the intention to confer any extraordinary jurisdiction on the Courts, or to make the company liable to process except in respect of their British Columbia business. The aim and object of the statute of 1910 was to provide by a system of licensing for the protection of creditors of the company in this Province, and to enable the company to sue and be sued in respect of business transacted in this Province.

If it were the intention to give the company power to be sued in respect of any matters wholly unconnected with their British Columbia business, say a mortgage held by the company on land in Manitoba by a resident of Manitoba, one would expect having regard to the rules relating to enforcement of foreign judgments, which I have already referred to, a very clear declaration to that effect.

I would allow the appeal.

MARTIN, J.A.:—I concur in the judgment of Macdonald, C.J.A.

GALLIHER, J.A.:—I agree.

*Appeal dismissed.*

---

## LETSON v. "THE TULADI."



*Exchequer Court of Canada, British Columbia Admiralty District, Martin, L.J. June 19, 1912.*

1. ADMIRALTY (§ II—8)—WARRANT FOR ARREST—AFFIDAVIT LEADING TO ISSUING SAME—ADMIRALTY RULE 39.

A warrant for the arrest of a ship for supplies furnished, may be issued by the deputy registrar, notwithstanding the affidavit therefor omitted the material allegations of the national character of the ship and that the aid of the Court was necessary, as, under Rule 39, (Admiralty Rules, Canada, 1892), the registrar has power to dispense with some of the prescribed particulars for the issuance of a warrant, without disclosing his reason for so doing, and without laying his discretion open to review.

Statement

AN application by the owners of the defendant ship to discharge the warrant for its arrest.

The motion was dismissed.

*W. J. Taylor*, for the defendant ship.

*A. D. Macfarlane*, for plaintiff.

CAN.
EX. C.
1912
LETSON
v.
"THE
TULADI."
Martin, L.J.

MARTIN, L.J.:—This is a motion, in an action *in rem*, for necessaries, to discharge the warrant for the arrest of the defendant ship on the ground that the affidavit to lead to warrant does not contain all the particulars required by Rules 35, 36, and 37, and therefore, it is contended, the deputy district registrar at Vancouver had no jurisdiction to issue the warrant. These rules bear a close similarity to the corresponding English Rules, Ord. v., rr. 16 and 17, but there is this important distinction, viz.: that while in England the power to dispense with "all the required particulars" is reserved for "the Court or a Judge" in this Court the registrar has the like power, Rule 39 (Admiralty Rules, Canada, 1892), providing that:—

> 39. The registrar, if he thinks fit, may issue a warrant, although the affidavit does not contain all the prescribed particulars, and in an action for bottomry, although the bond has not been produced, or he may refuse to issue a warrant without the order of the Judge.

The affidavit here does not state the national character of the ship, or that the aid of the Court is required; the first omission is of importance, the latter is almost a matter of inference: in other respects I think it is sufficient. Were it not for Rule 39 I should have thought that as a whole there had not been a substantial compliance with the Rules, but I see no escape from the fact that the registrar has for reasons which must be assumed to be valid and which are not required to be disclosed on the record, "thought fit" to dispense with some of the prescribed particulars and in such circumstances I cannot perceive in what respect I am entitled to review the exercise of that discretion any more than I should be under the English Rule. I may say that I have searched carefully for any decision which would throw light on the subject, as it is of much practical importance, but have been unable to find one.

The motion must be dismissed with costs payable to the plaintiff in any event.

*Motion dismissed.*

## GOODCHILD v. SANDWICH WINDSOR AND AMHERSTBURG R. CO.

ONT.

C. A.
1912

May 15.

*Ontario Court of Appeal, Moss, C.J.O., Garrow, Maclaren, Meredith, and Magee, JJ.A. May 15, 1912.*

1. APPEAL (§ VII L 2—476)—VERDICT OF JURY—PERSONAL INJURIES SUSTAINED BY BEING STRUCK BY STREET CAR.

A verdict against a street railway company in favour of the plaintiff for injuries sustained by being struck by a street car will not be disturbed where, from the evidence, the jury was justified in finding that the car was negligently operated at excessive speed in crossing a public street at a dangerous point where the view was obstructed, and that the plaintiff, who was driving a long waggon, exercised reasonable care in approaching and endeavouring to cross the track, and took reasonable care to save himself from injury, and that the motorman in charge of the car had time to avoid the accident after he became aware that the plaintiff intended to cross the track.

Statement

APPEAL by the defendants from an order of a Divisional Court affirming a judgment entered at the trial by BOYD, C., in favour of the plaintiff, upon the answers of a jury to the questions submitted to them, in an action to recover damages for personal injuries to the plaintiff and the death of one horse and injuries to another and to the plaintiff's waggon, occasioned by the negligence of the defendants' servants in the operation of one of their street-cars.

The appeal was dismissed.

*D. L. McCarthy*, K.C., and *W. G. Bartlett*, for the defendants.

*J. H. Rodd*, for the plaintiff.

Moss, C.J.O.

MOSS, C.J.O.:—The plaintiff, while driving south on McDougall street, in the city of Windsor, and crossing the track of the defendants' railway upon Wyandotte street, at the intersection of the two streets, was struck by a car proceeding east, with the result above stated.

The jury found that the injuries were caused by the defendants' negligence; that the negligence was in the motorman not having his car under control; that the plaintiff took reasonable care in approaching and endeavouring to cross the track; that the plaintiff took reasonable care to save himself from injury; that the motorman had time to avoid the collision after he became aware that the plaintiff intended to cross the track; that the plaintiff had not time to turn away from the track or to stop the team after he had an opportunity of seeing the coming car; and that the defendants were to blame for the accident; and they assessed the damages at $1,910. No complaint is made as to the amount of damages.

If the evidence warrants these findings, the judgment should stand, beyond question.

The case was submitted to the jury in a charge to which no exception was taken, directing the jury's attention specially, in a manner quite favourable to the defendants, to the plain-

ONT.

C. A. 1912

GOODCHILD v. SANDWICH, WINDSOR & AMHERSTBURG R. CO.

MEREDITH, C.J.O.

tiff's conduct, as detailed in the testimony, in approaching the crossing and in looking out for cars coming either way upon the track and as to the duties and responsibility of the motorman in nearing a crossing.

There was a conflict of evidence as to whether the gong was sounded, but the jury have not found against the defendants in that respect.

There was also a conflict of testimony as to the speed at which the car was going when nearing the crossing. The motorman and conductor swore that it did not exceed 7 or 8 miles an hour, while others placed the speed at a much higher rate; one witness, Sloake, who said he had been a street-car man at one time, placing it as high as 20 miles an hour. The jury's finding that the motorman had not his car under control implies that they were of the opinion that the speed was greater than was proper when approaching a crossing.

The motorman admitted that the crossing is a dangerous one, "one of the worst" on the whole route. His answers on this point are as follows:—

"Q. This is a dangerous crossing? A. Yes.

"Q. And you know that you have to take extra precaution at this point? A. Yes.

"Q. Perhaps the most dangerous crossing on your whole route, is it not? A. It is one of the worst.

"Q. One of the most dangerous? A. Yes, that is, on that side—when you are going east.

"Q. And it is pretty dangerous when you are coming west? A. Yes—it is worst when you are going east.

"Q. Because the other building is a little further back? A. Yes."

The building referred to is a barber's shop on the north-west corner of McDougall and Wyandotte streets, which obscures the view of any one going south on McDougall street, and prevents him seeing a car approaching from the west on Wyandotte street. In this instance the car was coming from the west, going east. The motorman, therefore, should have recognised what he well understood—the necessity of proceeding with great caution.

The plaintiff was seated in a waggon, with a long reach, and would not be able to get a clear view along Wyandotte street to the west until his body had cleared the barber's shop. There are obstructions to the vision in the shape of a telephone pole and some trees.

He said he looked to the west just as he was coming to the front of the barber's shop, but could not see very far, and he neither saw a car nor heard a gong. He then looked to the east, where he had a clear view, and, seeing nothing, drove on. When the horses were on the north rail of the track, he saw the car, and, before he could do anything, they were struck.

The motorman said that he saw the plaintiff when the car was about 70 or 80 feet from the centre of the crossing, and he thought that the plaintiff did not realise what was going on. The motorman did not then prepare to stop the car, but contented himself with taking up some of the slack of the brake, and it was not until he was within 10 feet of the horses that he reversed, too late to avert the collision.

There was a conflict as to the distance the plaintiff and his waggon were carried after the collision. The jury evidently credited the witnesses who swore that the car went across McDougall street and some distance beyond before it came to a stop, thus shewing that the speed must have been much greater than the motorman and the conductor put it at.

If the motorman had had the car under control, there is very little reason to doubt that, when he saw the plaintiff and became aware that he did not realise the situation, he could have stopped in time to avert the collision.

The jury might well have thought that the plaintiff should have exercised more caution when approaching this dangerous crossing; but there is evidence upon which they could reasonably find as they did, and it was for them to say. But, even if they had taken an adverse view to the plaintiff upon that question, they could well find as they did that the motorman had sufficient time to avoid the collision after he became aware of the plaintiff's intention to cross, and that he did not appear to realise the situation.

The appeal must be dismissed with costs.

GARROW, J.A., concurred. Garrow, J.A.

MACLAREN, J.A., concurred. Maclaren, J.A.

MEREDITH, J.A.:—No reasonable man could find that the plaintiff was not guilty of negligence; he looked when looking was useless; but he failed entirely to take any such precaution when, if taken, it should have saved altogether this lamentable accident. Meredith, J.A.

But the jury have found that, notwithstanding such negligence the defendants might, exercising ordinary care, have saved the situation; and, therefore, if there be any reasonable evidence to support that finding, the verdict must stand.

There was evidence that the motorman took no effective means to stop the car, although it was said to be going at an excessive rate of speed, until the car was only a little more than five feet from the horses; if that, or anything like it, be true, the finding cannot reasonably be found fault with.

The car was going much faster than the horses, if some of the testimony be true, five times faster, so that, at a distance

ONT.

C. A. 1912

GOODCHILD v. SANDWICH, WINDSOR & AMHERSTBURG R. CO.

Meredith, J.A.

much greater than anything like five feet the imminent danger of the plaintiff must have been very apparent, and the motorman testified that he saw the horses and waggon from the first, and that he realized the danger when 70 or 80 feet away; in the presence of such imminent danger—when it became evident—the failure to take "emergency" steps to stop the car was negligent, very negligent; it may very well be that if such steps had been taken the accident would have been avoided; or even if collision were wholly unavoidable it might have been harmless, or almost so. If wrong is done, the doing of it rests upon the jury, who are the sole judges of the facts regarding which the testimony is such that reasonable men might find as they have found. The appeal must be dismissed.

MAGEE, J.A., concurred with the Chief Justice.

*Appeal dismissed.*

---

QUE.

C. R. 1912

Feb. 9.

## RIOUX v. PROULX et al.

*Quebec Court of Review, Tellier, DeLorimier, and Dunlop, JJ. February 9, 1912.*

1. COSTS (§ II—30)—RIGHT OF ADVOCATE TO SUE ON BOND GIVEN AS SECURITY FOR COSTS—QUEBEC PRACTICE.

A judgment dismissing an action with costs grants an advocate distraction of his costs for defending the suit, and vests him with ownership of his bill of costs so as to permit him to maintain an action in his own name on a security bond given by the plaintiff in the former action notwithstanding it ran in favour of the defendant therein, under the laws of Quebec province.

[*Millette* v. *Gibson*, 17 R.L. 600, specially referred to.]

Statement

APPEAL from the decision of the Superior Court dismissing the action brought by an advocate in his own name upon a security bond given for his client's costs.

*Emile Rioux*, for appellant; *E. F. Surveyer*, K.C., counsel. *Campbell & Gendron*, for respondents.

Dunlop, J.

DUNLOP, J.:—The plaintiff appeals from the decision of the Superior Court at Sherbrooke, Globensky, J., rendered on June 30, 1911, dismissing plaintiff's action with costs. The facts are very simple and there is only a question of law in issue.

Plaintiff is an advocate practicing in the district of St. Francis. He acted for a man named Antonio Tanguay, in a case brought against the said Tanguay by one Charles Proulx, domiciled in the United States. Security for costs was demanded and respondents became security for the said Charles Proulx under a security bond. The action of Proulx was dismissed and the condemnation not having been paid, the present plaintiff sued the securities for the amount of his bill of costs. To this action the respondents pleaded that they are not indebted to the present plaintiff.

The judgment in the Court below dismissed the action of the plaintiff herein on the ground that the bond had not been given in favour of plaintiff, but in favour of a man named Antonio Tanguay; that distraction of costs does not operate as a subrogation and transfer in favour of the advocate; that the defendants have not been paid in the case where the security has been given; and that there does not exist any *lien de droit* between them and appellant.

The plaintiff submits that this judgment is unfounded in law and should be set aside. The question at issue is: What is the extent of the distraction of costs granted to the advocate?

The security given by respondents reads as follows: "They acknowledge themeselves jointly and severally to owe and to be indebted to the defendant in the sum of $200 to be levied of their and each of their goods, chattels, lands, and tenements, to the use of the defendant, his heirs and assigns.

This undertaking . . . is made under the following resolutory condition:—

"The condition of the above written recognizance is such, that if the plaintiff shall not fail . . . in this action, or if the plaintiff do pay to the defendant all costs that may be awarded to the defendant, then the above recognizance shall be null and void; but if otherwise to be and remain in full force and virtue."

The pretension of the respondents is that Antonio Tanguay is the only person who has the right to sue them in virtue of the bond.

This appears to me to reverse all the well-known doctrines in matters of distraction of costs. The distraction of costs has been established to give to the advocate a plain right, a debt, a *créance* for the amount of his taxed costs. Article 553 of the Code of Procedure reads: "Every condemnation to costs involves, by the operation of law, distraction in favour of the attorney of the party to whom they are awarded."

The attorney is the owner of his costs and the party to the suit cannot execute for them in his own name without the consent of the attorney (C.P. 555).

The pretension of the respondents is manifestly contrary to equity and equally contrary to the jurisprudence. Reference might be made to different authorities in plaintiff's factum, all of which establish that the attorney to whom distraction of costs is granted has the right to sue for his bill of costs.

It is not correct to say that the plaintiff was not a party to the case of *Proulx* v. *Tanguay*.

In the case of *Millette* v. *Gibson*, 17 R.L. 600, the Court of Appeal refused to a party the right to execute a judgment for

QUE.
C. R.
1912
RIOUX
v.
PROULX.
Dunlop, J.

costs in his own name for which the advocate had obtained distraction of costs. I would refer to the authorities cited in the note. See also Pothier (Budnet edition) vol. 5, Mandat, No. 135.

I am of the opinion that the effect of the judgment dismissing the action with costs in which the present defendants were security for costs, was to grant the present plaintiff distraction of his costs of defending the said action and vested and seized with the ownership of his bill of costs, giving him the right to issue execution for said bill of costs in his own name, and also, if necessary to sue the present defendants on their security bond as he has done.

I am of the opinion that there is error in the judgment of the Superior Court and that the action was properly brought in the name of plaintiff; and that the judgment of the Superior Court should be reversed, and the defendants' plea rejected, and the plaintiff's action maintained; and that defendants be jointly and severally adjudged and condemned to pay plaintiff the sum sued for, to wit, $155.98 with interest and costs in both Courts.

*Appeal allowed.*

---

ONT.
H. C. J.
1912
July 4.

## DUBÉ v. MANN.

*Ontario High Court. Trial before Sutherland, J. July 4, 1912.*

1. CONTRACT (§ I D 3—55)—SALE OF MINING CLAIMS—DEFINITENESS—PAYMENT OF PURCHASE PRICE—POSSESSION.

An agreement concerning mining claims is a contract of sale and purchase and not a mere option to purchase, which provided not for a small down payment, but for a cash payment of $20,000 and the payment of the balance of the purchase price, $15,000, in two cash instalments within one year and that the vendors were to sell and the purchaser was to purchase all the right, title and interest of the vendors in the mining claims, it also appearing that the purchaser went into possession and continued therein until after all the purchase money was paid, when he received from the vendors written documents transferring to him all their right, title and interest in the claim.

2. CONTRACTS (§ II A—127)—CONSTRUCTION OF ABSOLUTE COVENANT—TO TAKE OUT SPECIFIED AMOUNT OF ORE—PAYMENT OF ROYALTY.

Under an absolute covenant in a contract for the sale of mining claims that the purchaser should pay a royalty at a specified rate for each long ton of ore removed from the claims, the amount to be removed from the claims in each year to be not less than a specified amount of long tons and that the said royalty at such rate should be paid on such number of tons annually at least, whether that amount should be actually removed or not, the fact that no merchantable ore was found in the claims will not relieve the purchaser from the royalty.

[*Palmer* v. *Wallbridge* (1888), 15 Can. S.C.R. 650, applied; Leake on Contracts, 6th ed., 490, specially referred to.]

Statement

ACTION for the first instalment of a royalty, $9,750, under an agreement in writing dated the 8th April, 1908.

By the agreement, the plaintiffs agreed to sell to the defendant, and the defendant to purchase from the plaintiffs, all their

right, title, and interest in certain mining claims, in consideration of the payment of a royalty and $35,000 in cash.

The provision as to the royalty was in part as follows: "The royalty . . . shall commence immediately upon the expiration of two years from the day of the date hereof, and shall be at the rate of 15 cents for each long ton (2,240 lbs.) of ore removed from the said locations, the amount to be removed from the locations in each year to be not less than 65,000 of such long tons, and the said royalty of 15 cents per long ton shall be paid on 65,000 long tons per annum at least, whether that amount shall be actually removed or not, and such royalty shall be payable annually on the 8th day of April, in each year.

The $35,000 was paid by the defendant, and the claims were transferred to him.

The first instalment of royalty, $9,750, being 15 cents per ton on 65,000 tons, came due, as the plaintiff alleged, on the 8th April, 1911, and was not paid by the defendants.

This action was begun on the 29th May, 1911. Under an order made by CLUTE, J., in the course of the action, upon consent, the sum of $34,750 was paid into Court by the defendant. The order provided that this sum should, upon the termination of the litigation, be paid out, with accrued interest thereon, to the successful party or parties, and thereupon all parties should be discharged and released from all the terms and conditions of the agreement of the 8th April, 1908.

*R. McKay*, K.C., for the plaintiffs.
*Leighton McCarthy*, K.C., for the defendant.

Sutherland, J.

SUTHERLAND, J. (after setting out the agreement and stating the facts at length and quoting portions of the evidence):—In his statement of defence, the defendant avers that he was induced to execute the contract in question by the fraud and misrepresentation of the plaintiffs, and that the plaintiffs, or one of them, fraudulently represented to him, knowing the same to be untrue, that there were upon the mining claims in question large quantities of merchantable iron ore, and that the said claims were capable of producing at least 65,000 tons, long tons, of such merchantable iron ore per annum, whereas the claims had not thereon nor were capable of producing iron ore in any merchantable quantities whatever.

No evidence was adduced at the trial from which I could find that any fraudulent representations were made to the defendant by the plaintiffs. The fact of the matter was, that the defendant was in just as good a position, through his agent, Harris, and the knowledge he had obtained from him, as the plaintiffs, about the character of the properties in question and their possibilities.

ONT.

H. C. J.
1912

DUBÉ
v.
MANN.

Sutherland, J.

The defendant also alleges "that the basis of the agreement, and particularly paragraph 3 thereof, was, that it was possible to work, raise, and remove from the mining claims in question not less than 65,000 long tons of merchantable iron ore per annum, and that the true intent and meaning of the parties, which was set up or intended to be set up in the agreement, was, that a royalty of 15 cents should be paid on every long ton worked, raised, and removed" from the mining claims, "providing that an average quantity of not less than 65,000 of such long tons should be removed from the said mining claims or locations every year, or the said royalty should be payable on that quantity, when weighed at the mine's mouth, whether that quantity should be actually removed from the said claims or locations or not."

He also further says "that, notwithstanding the expenditure of upwards of $75,000, the employment of competent mining experts, and the use of the most improved methods of mining and the best machinery, no merchantable iron ore whatever can be discovered upon the said mining claims, and that it is impossible to remove 65,000 long tons, or any commercial quantity whatever, of merchantable ore."

He further alleges that the "plaintiffs are not entitled to recover a royalty upon ore that does not and never did exist, and which, therefore, cannot be removed."

He further "submits that there has been entire failure of consideration for the alleged agreement, and the payments made by him to the plaintiffs in connection therewith."

By way of counterclaim, he asks that the agreement shall be declared null and void and of no force or effect, and for repayment of the sum of $35,000 paid by him to the plaintiffs, and an order declaring that the true intent and meaning of the parties to the agreement was as set out in paragraph 4 of the statement of defence, and that, if the Court should deem necessary, it should order the agreement to be rectified so as to make it embody the real intention of the parties.

In view of the fact that, in place of providing for a small down-payment, as is usual in the case of an option, and as had been the case in the agreements in the form of options which had previously been entered into between the parties, the contract in question provided for a cash payment of $20,000 and the payment of the two remaining cash instalments within one year, and that the purchaser assumed to go into possession and continued in possession until after all the purchase-money was paid, and thereupon received from the vendors written documents transferring all their right, title, and interest in the respective unpatented mining claims in question, and in view of the form of the agreement itself, which provided that the vendors were to

sell and the purchaser to purchase all the right, title, and interest of the vendors in each of the mining claims, I have come to the conclusion that the document must be considered and treated as a sale and purchase, and not as a mere option.

On the purchaser obtaining the documents transferring the title of the vendors to him, he became and was the owner of the claims, subject to the payment of the royalty as mentioned in the agreement in question, and which was also referred to in the documents of transfer as follows: "The royalty hereinbefore referred to as being hereby expressly reserved and excepted from this transfer is the royalty agreed upon in the agreement dated the 8th day of April, A.D. 1908 . . . which royalty is to be paid on 65,000 such tons per annum at least from the said group and on more if more be removed, but the royalty is subject to be purchased by the owners of the properties at any time as to payments not overdue at the time of such purchase, for the sum of $25,000 cash."

The covenant on the part of the defendant is a definite and certain one, viz., that "the amount to be removed from the locations in each year" is "to be not less than 65,000 of such long tons, and the said royalty of 15 cents per long ton shall be paid on 65,000 long tons per annum at least, whether that amount shall be actually removed or not, and such royalty shall be paid annually on the 8th day of April in each year."

The purchaser also provided for his own protection, by the alteration made by his own solicitor in the contract as originally drafted, that "shipments in excess of 65,000 tons in any year shall, to the extent of such excess, be credited in reduction of shortages in any subsequent year or years."

There is another term of the contract, also, which was for his special protection and advantage, which is as follows: "Provided, also, that the purchaser shall have the right, at any time, to purchase such royalty from the vendors for the sum of $25,000 cash." He took upon himself, under the terms of the contract, "the burden of quantity and failure."

I think the case of *Palmer* v. *Wallbridge* (1888), 15 Can. S.C.R. 650, has much application. It was there held "that the lease contained an absolute covenant by the lessee to pay the rent in any event; and, not having terminated the lease under the above proviso, he was not relieved from such payment in consequence of ore not being found in paying quantities." Here, too, there is an absolute covenant to take out a named quantity of ore and pay a definite amount of royalty thereon. Here, too, there is a clause permitting the purchaser to put an end to the royalty by payment of a lump sum in lieu thereof: *Phillips* v. *Jones* (1839), 9 Sim. 519; *Marquis of Bute* v. *Thompson* (1844), 14 M. & W. 487; *Mellers* v. *Duke of Devonshire* (1852), 16 Beav. 252; *Lord Clifford* v. *Watts* (1870), L.R. 5 C.P. 577; *Gowan* v.

ONT.

H. C. J. 1912

DUBÉ v. MANN.

Sutherland, J.

*Christie* (1873), L.R. 2 Sc. App. 273; *Battle* v. *Willox* (1908), 40 Can. S.C.R. 198; and Leake on Contracts, 6th (Can.) ed. (1912), p. 490.

The plaintiffs will, therefore, have judgment for the sum of $34,750, with interest, paid into Court under the order of Clute, J., as aforesaid, together with subsequent interest, and all parties to be otherwise discharged and released from the terms and conditions of the agreement in question. The plaintiffs will also have their costs of suit.

*Judgment for plaintiffs.*

---

SASK.

S. C. 1912

Feb. 9.

## HASTINGS v. DUNBAR.

## DAVIES v. DUNBAR.

*Saskatchewan Supreme Court, Newlands, J. February 9, 1912.*

1. COSTS (§ II—28)—SCALE OF COSTS—VERDICT FOR NOMINAL SUM—RULES OF COURT.

Where the jury has given a verdict for a nominal sum only, the Court will not, under ordinary circumstances, interfere by special order to raise the scale of costs which would be applicable to such verdict under general rules of Court.

Statement

MOTIONS by both parties to dispose of the question of costs after the trial of the actions before Newlands, J., with a jury, and verdicts for nominal amounts.

*J. A. Allan* and *N. J. Lockhart*, for the plaintiffs.

*C. E. D. Wood* and *W. J. Perkins*, for the defendant.

Newlands, J.

NEWLANDS, J.:—In these cases I make no order as to costs, and the costs will therefore follow the event and be taxed under rule 95 of the consolidated rules of the Supreme Court, now rule 721* of the rules of Court. Rule 95 applied to all cases in the Supreme Court, and provided that, unless the plaintiff recovered more than $200, his costs should be taxed on the lower scale of the Supreme Court tariff, unless the Judge otherwise ordered.

*Rule 721 of the Saskatchewan Rules of Court, 1911, is as follows:—

In actions in which the plaintiff recovers, by judgment or otherwise, a sum (exclusive of costs) not exceeding $500, he shall be entitled to no more costs than he would have been entitled to had he brought his action in a District Court, unless the Court or a Judge otherwise orders, and unless the Court or Judge shall otherwise order, the defendant shall be entitled to tax his costs of defence, and so much thereof as exceed the taxable costs of defence, which would have been incurred had the proceedings been had in the District Court shall, on entering judgment, be set off and allowed by the local registrar against the plaintiff's costs to be taxed, or against such costs and the amount of the judgment, if it be necessary; and, if the amount of the costs to be set off exceeds the amount of the plaintiff's judgment and taxed costs, the defendant shall be entitled to judgment for the excess against the plaintiff; but, where a defendant in any such action becomes entitled to tax costs against the plaintiff, such defendant shall be entitled to costs on the Supreme Court scale. (C.R. 95.)

SASK.

S. C. 1912

HASTINGS v. DUNBAR.

Newlands, J.

The jury having given a nominal amount in each of these cases, I see no reason why I should make an order in the plaintiffs' favour as to costs; on the other hand, I see no reason why the defendants should have a set-off of costs, there being no merits on their side. There will, therefore, be no set-off, the plaintiffs' costs being taxed on the lower scale.

I am deciding this question under this rule as it was before the 1st January, its application being changed since that date.

*Order accordingly.*

---

## GREER v. GREER.

ONT.

H. C. J. 1912

Jan. 23

*Ontario High Court, Middleton, J. January 23, 1912.*

1. STAY OF PROCEEDINGS (§ II—21)—PENDING LITIGATION IN A FOREIGN COUNTRY.

An action in Ontario by the personal representative of a deceased person for an accounting against a person alleged to be indebted to the estate in respect of foreign lands held in trust, will not necessarily be stayed because of an action pending in the foreign jurisdiction brought by the beneficiaries against the same defendant to declare the trusts.

2. PLEADING (§ I S—146)—STRIKING OUT—ABSENCE OF QUALIFICATION TO MAINTAIN—CON. RULE (ONT.) 261.

A statement of claim will not be struck out under Con. Rule 261 (C.R. (Ont.) 1897), on the ground that the plaintiff was not qualified to maintain the action unless the lack of qualification appears from the pleading itself.

Statement

A MOTION by the defendant A. B. Greer to stay this action pending the trial of an action in Arkansas; and, in the alternative, for an order striking out paragraphs 9*c* and 9*d* of the statement of claim, on the ground that, according to the law of Arkansas, the plaintiff had no right to maintain this action.

The application was dismissed.

*R. Bayly*, K.C., for the applicant.

*G. N. Weekes*, for the plaintiff.

*T. G. Meredith*, K.C., for the B. W. Greer estate.

*J. B. McKillop*, for W. H. Wigmore.

Middleton, J.

MIDDLETON, J.:—The allegations in the statement of claim, so far as now material, are that certain lands in Arkansas were held by the late B. W. Greer in trust for the late J. H. Greer and A. B. Greer. Some of these lands were sold, and the proceeds were received by B. W. Greer and deposited in the bank account of the firm of which he and Wigmore were partners. The unsold lands were conveyed to A. B. Wigmore in trust.

The executor of J. H. Greer now seeks an account and payment.

The action in the Arkansas Court is not by the same plaintiff—the beneficiaries under the will of J. H. Greer, claiming as his heirs, allege the trust and ask that it may be declared.

ONT.

H. C. J. 1912

GREER v. GREER.

Middleton, J.

The question of law suggested is this. J. H. Greer, domiciled in Ontario, by his will appointed M. A. Greer and M. H. Greer his executors, and devised his property, real and personal, to them in trust. M. H. Greer renounced, and probate issued to M. A. Greer alone. This probate has been recognised by the Arkansas Courts. M. H. Greer disclaimed as trustee, and refused to act. It is said that, according to the law of Arkansas, where the land is, when one of two trustees disclaims, the land does not vest in the other. The affidavit is not candid, because it does not go on to explain what should be done. I would infer that a new trustee to take the place of the disclaiming trustee should be appointed.

I cannot see what this has to do with either action. The land is vested in A. B. Greer, and it is asked that he be declared a trustee.

So far as accounting is concerned, the Court here is by no means impotent; and, if necessary, a new trustee can be appointed, so that the defendants can be adequately protected.

So far from being any reason for the staying of the action, the ground suggested is so flimsy and dilatory merely, that it affords the strongest reason for allowing the action to proceed.

The motion against the statement of claim, as pointed out on the argument, is misconceived, because the Rules* only contemplate a motion based on the pleading itself; but, quite apart from that, what has been said indicates that this may be found to be no defence at all. I do not determine this, as much clearer evidence as to the law of Arkansas must be given.

Motion dismissed. Costs to the plaintiff in any event.

*Motion dismissed.*

*Ontario Rule 261 (C.R. 1907), is as follows:—

261. A Judge of the High Court may order any pleading to be struck out on the ground that it discloses no reasonable cause of action or answer, and in any such case, or in case of the action or defence being shewn by the pleadings to be frivolous or vexatious, may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just.

---

ONT.

H. C. J. 1912

July 16.

## Re WATSON and ORDER OF CANADIAN HOME CIRCLES.

*Ontario High Court, Kelly, J., in Chambers. July 16, 1912.*

1. INSURANCE (§ IV B—170)—CHANGE OF BENEFICIARY—MUTUAL INSURANCE ASSOCIATION—2 GEO. V. CH. 33, SEC. 179.

Under section 160, of chapter 203, of Insurance Act, R.S.O. 1897 (now 2 Geo. V. ch. 33, sec. 179), the beneficiaries named in a certificate of insurance issued by a mutual insurance association may be changed by a provision of a will which describes the certificate only by stating the amount thereof, and giving the name of the association that issued it.

APPLICATION by the executor of the will of Catharine A. M. Watson for an order determining the disposition to be made of certain insurance moneys.

*James Fraser*, for the executor.

*J. E. Jones*, for the Order of Canadian Home Circles.

*F. W. Harcourt*, K.C., for the infants.

KELLY, J.:—On the 13th February, 1893, the Order of Canadian Home Circles issued a beneficiary certificate to Catharine Ann Minerva Watson for $1,000, made payable on her death as follows: $500 to her husband Daniel Webster Watson; and $500 to her son Richard J. T. Watson.

On the 30th December, 1911, Catharine A. M. Watson made her will, and she died on the 5th January, 1912. The will contains this provision: "My Home Circle policy for $1,000 to be divided as follows: to my daughter Margaret Minerva Watson, $500; the balance of $500, in equal shares to my husband, Daniel Webster Watson, my son James Richard Watson and my son Daniel Ross Watson."

The question to be decided is: does the will alter the apportionment of the moneys represented by the certificate, or alter or vary the certificate as to beneficiaries?

Section 160 of the Insurance Act, R.S.O. 1897 ch. 203,* provides that "the assured may, by an instrument in writing attached to or endorsed on or identifying the policy by its number or otherwise, vary a policy . . . previously made, so as to restrict or extend, transfer or limit, the benefits . . . and may, from time to time, by instrument in writing attached to or endorsed on the policy, or referring to the same, alter the apportionment as he deems proper; he may also, by his will, make or alter the apportionment of the insurance money . . . and whatever the assured may, under this section, do by an instrument in writing attached to or endorsed on or identifying the policy, or a particular policy or policies, by number or otherwise, he may also do by a will identifying the policy or a particular policy or policies by number or otherwise."

Does, then, the will in this case identify the policy (or certificate) in such a manner as to satisfy the requirements of sec. 160?

The question of identification was considered in *Re Cochrane*, 16 O.L.R. 328, a judgment of a Divisional Court; at p. 332, the Chancellor said that identification of a policy by its num-

*The Insurance Act has been consolidated and amended by 2 Geo. V. ch. 33; section 160 referred to, as amended, is now section 179 in the new Act, and by 2 Geo. V. ch. 33, sec. 247, it was enacted that this new section was to come into force on August 1, 1912.

ONT.

H. C. J. 1912

RE WATSON AND ORDER OF CANADIAN HOME CIRCLES.

Kelly, J.

ber "or otherwise" would include reference by date and amount and other means of incorporating one document with another.

Here we have identification by the name of the Order or body which issued the certificate and the amount of the certificate, and I know of no better means of identification by an instrument not attached to or endorsed upon a policy, unless it be in cases where the identification is by the date of the certificate as well.

My view is, that a change as to the beneficiaries and an altering of the apportionment of the moneys has been effected, and that the moneys represented by this certificate are to be divided as directed by the will.

The shares of these moneys to which the infants are entitled will be paid into Court, to be paid out to them as they respectively come of age. Costs of all parties to be paid out of the fund.

*Order for payment into Court.*

---

B.C.

C. A. 1912

June 4.

## GOLDSTEIN AND CREEHAN v. VANCOUVER TIMBER AND TRADING CO.

*British Columbia Court of Appeal, Macdonald, C.J.A., Irving and Martin, JJ.A. June 4, 1912.*

1. CORPORATIONS AND COMPANIES (§ VI D—339)—PROCEEDING BEGUN PRIOR TO LIQUIDATION—EX PARTE APPLICATION—B.C. RULE 973.

Permission to carry on a proceeding begun by a company, may be granted the liquidator thereof under Order XVII. on an *ex parte* application, without the month's notice required by Rule 973 of the B.C. Court Rules, 1906.

Statement

AN appeal by defendants from order of Murphy, J., granting the application *ex parte* for the carrying on of the proceedings by the plaintiff Creehan.

The appeal was dismissed.

*W. O. Macdonald*, K.C., for appellants.

*C. W. Craig* and *W. C. Brown*, for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—I think the appeal should be dismissed.

Irving, J.A.

IRVING, J.A.:—In a note to Order LIV., p. 771, Y.P. 1912, it is said that an application under Order XVII. may be made *ex parte* in the King's Bench division. Under a note in Order XVII., p. 206, the same thing is said, and a reference is given to Chitty's Forms, No. 515, where a form of affidavit is given. In the Chancery division the order is usually obtained on a petition of course—an *ex parte* proceeding.

Seton on Decrees (1891), vol. 1, p. 101, gives the form of the order. This states the last material proceeding in the action,

B.C.

C. A.
1912

GOLDSTEIN & CREEHAN v. VANCOUVER TIMBER AND TRADING CO.

and the subsequent events causing the abatement and consequent devolution of interest.

I am of opinion that Murphy, J., had jurisdiction to make *ex parte* the order for the carrying on of the proceedings by Creehan, and without the month's notice prescribed by Rule 973.*

The amendment made to the style of cause could not be made *ex parte*. That was a proceeding within the Rule 973 and required notice, but as Murphy, J., corrected that mistake on the 4th December, with costs to the successful party, I think the appellant has nothing to complain of.

I would dismiss the appeal.

The material before us does not shew whether the proper way to proceed is by use of the liquidator's name or the company's name: *Kent* v. *La Communauté des Sœurs de Charité de la Providence*, [1903] A.C. 221, 225.

Macdonald, C.J.A.

MARTIN, J.A.:—At the conclusion of the argument I was of the opinion that the appeal should be dismissed, and, as I understand it, the rest of the Court shared that view, the only question reserved being the application to have some sort of special clause put in the order in favour of the unsuccessful appellant, having regard to future proceedings. This was strongly objected to by the respondents' counsel, and I do not think that it is necessary or desirable to make any other order than to dismiss the appeal with costs.

Martin, J.A.

*Appeal dismissed.*

*Rule 973, B.C. Supreme Court Rules, is as follows:—

"In any cause or matter in which there has been no proceeding for one year from the last proceeding had, the party who desires to proceed shall give a month's notice to the other party of his intention to proceed. A summons on which no order has been made shall not, but notice of trial, although countermanded, shall be deemed a proceeding within this rule."

---

## PRINGLE v. STRATFORD.

ONT.

H. C. J.
1912

May 20.

*Ontario High Court, Riddell, J., in Chambers. May 20, 1912.*

1. COSTS (§ I—4)—INJUNCTION—ABANDONMENT OF ACT PROPOSED TO BE RESTRAINED.

Where the plaintiff, a ratepayer, upon being informed by an alderman that a city council intended to carry out an illegal agreement for the exchange of land without submitting the agreement to the people, or passing a by-law in relation thereto, obtained an injunction preventing the carrying out of such agreement, the subsequent abandonment of the plan will not deprive the plaintiff of his costs.

Statement

APPEAL by the plaintiff from an order of the Local Master at Stratford refusing to order the defendants to pay the plaintiff's costs of the action, upon a summary application by the plaintiff.

The appeal was allowed.

ONT.

H. C. J.

1912

PRINGLE v. STRATFORD.

Riddell, J.

*W. H. Gregory*, for the plaintiff.

*C. A. Moss*, for the defendants.

RIDDELL, J.:—On the 20th March, 1912, a proposition was made to the city council of Stratford that the city corporation should buy the property, land, buildings, and machinery of the McD. Thresher Company, for $2,000, and convey to that company a parcel of land in the city. The proposition was referred to a special committee, and the council met on the 25th March to consider the report of the committee. The committee submitted an agreement that the city corporation should convey to the company the said land, in payment for which the company would convey to the city corporation the equity of redemption (subject to a mortgage for $20,000) of the lands of the company, and also the factory premises and plant. The council passed a resolution at the meeting adopting the agreement.

An alderman of the city informed the plaintiff, a ratepayer of Stratford, that it was not the intention of the council to submit the agreement to the people or to pass any by-law, but that it was the intention to buy the land for transfer to the company at once and carry out the agreement forthwith. Thereupon the plaintiff applied to the Local Judge at Stratford and obtained an injunction, served notice of motion to continue the injunction, took out an appointment to examine, etc.

Pending the motion, the city solicitor wrote the plaintiff's solicitor that the McD. company had declined further to proceed with the matter of the agreement—that the agreement had not been executed and would not be executed. "We assume, therefore, that you will not find it necessary to proceed further with your injunction proceedings." The plaintiff's solicitor then replied, saying, amongst other things, "Our client must be assured of his costs if you wish him to drop this at the present juncture"—whereupon the city solicitor said: "When there is nothing left to litigate about except costs, it is improper to proceed with the action. The question of costs can be determined, if not agreed upon, in Chambers."

The plaintiff moved for his costs before the Local Master at Stratford, who did not allow costs to either party. He gave leave to appeal; and the plaintiff now appeals.

The defendants file an affidavit upon the motion setting out that no action was taken by the council except the passing of a resolution adopting the agreement—but there is no denial of the intention to proceed forthwith with the illegal arrangement, although it must have been the allegation of such intention which influenced the Local Judge in granting the injunction order, and although the plaintiff's affidavit sets this up as the reason for moving. It must be taken, then, that such was the intention.

ONT.

H. C. J.
1912

PRINGLE
v.
STRATFORD.

Riddell, J.

It was argued that the plaintiff cried out before he was hurt —but where a council contemplates an illegal act, a motion for an injunction should be made at the earliest possible moment. Had the plaintiff delayed after receiving the information of the council's act and intention, he might well be found fault with if he came for relief after the council had expended money and labour upon the scheme. *Vigilantibus non dormientibus*, etc.

The appeal will be allowed and the defendants directed to pay the plaintiff's costs of action, application to the Local Master, and this appeal.

*Appeal allowed.*

---

## CRANE v. LAVOIE.

MAN.

C. A.
1912

May 20.

*Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron, and Haggart, JJ.A. May 20, 1912.*

1. BILLS AND NOTES (§ VI C—169)—DEFENCES—SIGNING NAME OF NON-EXISTING COMPANY—DESCRIPTIVE WORDS—BILLS OF EXCHANGE ACT, SEC. 52.

The fact that the defendants, who executed a promissory note in the name of a non-existing company, added the words "president" and "manager" to their respective personal signatures below the name of the alleged company is not sufficient to absolve them from personal liability thereon under sec. 52 of the Bills of Exchange Act, R.S.C. 1906, ch. 119, which relieves from liability one who signs an instrument in a manner indicating that he did so on behalf of a principal or in a representative capacity, the mere addition of descriptive words to the signer's name not being sufficient for that purpose.

[*Crane* v. *Lavoie*, 19 W.L.R. 580, affirmed on appeal.]

2. BILLS AND NOTES (§ I B—5)—VALIDITY—SIGNATURE OF NON-EXISTING COMPANY—LIABILITY OF PARTIES SIGNING AS PRESIDENT OR MANAGER.

Where a promissory note that was void as to its purported maker, a non-existent company, began "we promise" and was signed by two persons who added the words "president" and "manager" to their respective signatures thereto, such designations will be disregarded and the signers held individually liable thereon under sub-sec. 2 of sec. 52 of the Bills of Exchange Act, R.S.C. 1906, ch. 119, which requires that the "construction most favourable to the validity of an instrument shall be adopted."

[*Fairchild* v. *Ferguson*, 21 Can. S.C.R. 484, *Watling* v. *Lewis*, [1911] 1 Ch. 414, and *Chapman* v. *Smethurst*, [1909] 1 K.B. 927, specially referred to.]

3. EVIDENCE (§ VI F—544*a*)—PAROL EVIDENCE AS TO NEGOTIABLE INSTRUMENTS.

It may be shewn by parol evidence that the persons who signed a negotiable instrument ostensibly as agents were in fact not acting for any principal but for themselves. (*Per* Howell, C.J.M.)

4. BILLS AND NOTES (§ I D—32)—PARTIES SIGNING AS PRESIDENT AND MANAGER—WARRANTY OF EXISTENCE OF COMPANY.

Persons who sign a promissory note made ostensibly by a company, as president and manager thereof, warrant that such company actually exists. (*Per* Richards, and Perdue, JJ.A.)

MAN.

C. A.

1912

CRANE v. LAVOIE.

5. CORPORATIONS AND COMPANIES (§ IV G 5—136)—PROMISSORY NOTE GIVEN IN CORPORATE NAME PRIOR TO INCORPORATION—LIABILITY OF INDIVIDUAL SIGNERS—IMPLIED WARRANTY.

Persons who sign a promissory note as president and manager of a non-existing company are liable upon their implied warrant of its actual existence for the full face value of such note. (*Per* Richards and Perdue, JJ.A.)

[*Thomson* v. *Feeley*, 41 U.C. Q.B. 229 and *Kelner* v. *Baxter*, L.R. 2 C.P. 174, applied.]

6. BILLS AND NOTES (§ I D 2—42)—CERTAINTY AS TO AMOUNT—LIABILITY OF PARTIES TO NOTE.

The liability of persons who sign a promissory note as president and manager of a non-existing company, thereby warranting the existence of such company, is not to be measured by what the holder of the note could have obtained after the subsequent incorporation of the company upon the settlement of its affiairs in bankruptcy. (*Per* Richards, J.A.)

7. CORPORATION AND COMPANIES (§ IV D 4—90)—RATIFICATION BY COMPANY—NOTE SIGNED BY PRESIDENT AND MANAGER.

After the incorporation of a company the personal liability of the signatories to a promissory note executed in the company's name by persons purporting to be the president and manager thereof and signed prior to the incorporation remains unaffected by the incorporation of the company. (*Per* Richards, Perdue, and Cameron, JJ.A.)

8. BILLS AND NOTES (§ I C—27)—CONSIDERATION—FORBEARANCE TO SUE.

Delay in enforcing a claim against co-partners and permitting them to transfer the assets of the firm to a company formed by them to take over their business, is a sufficient consideration for a promissory note to hold the makers liable, where the note was void as to the company purporting to be its maker, which was executed by the co-partners as president and manager thereof. (*Per* Perdue and Cameron, JJ.A.)

Statement

APPEAL from decision of Robson, J., *Crane* v. *Lavoie*, 19 W.L.R. 580, in favour of plaintiff.

The appeal was dismissed.

The judgment of Robson, J., appealed from was as follows:—

Robson, J.

ROBSON, J.:—The plaintiffs set up that on or about the 10th May, 1910, the defendants F. X. Lavoie and D. Fournier, purporting to act as president and manager respectively of the Fournier Company Limited, signed six promissory notes for $200 each, payable to the plaintiffs dated the 10th May, 1910, payable 2, 3, 4, 5, 6, and 7 months, respectively, after date, and one otherwise similar note for $115.79, the notes being signed as follows:—

THE FOURNIER CO. LTD.
F. X. LAVOIE, *President*.
D. FOURNIER, *Manager*.

The plaintiffs also alleged that, at the time of the making of the said notes, there was no such company; that the notes were not paid at maturity, and still remain unpaid.

The defendants appeared separately, and delivered defences, in which they denied the plaintiffs' allegations and pleaded the special matter now to be dealt with.

A company named "The Fournier Company Limited" was incorporated by letters patent of incorporation (Manitoba), on the 2nd June, 1910. It was that company which the defendants had in contemplation when they signed the notes sued on. It is unnecessary to remark that that company could not ratify these contracts or become liable for the indebtedness in any way short of a new contract entered into by it: *Natal Land and Colonization Co.* v. *Pauline, etc., Syndicate, Limited*, [1904] A.C. 120. So that, unless the defendants are in some way liable, the making of the notes meant nothing. Whether, under the circumstances, the defendants are to be treated as makers of the notes, or as having warranted the existence and capacity of the company, makes, to my mind, little difference, on the substantial question of liability.

There is a class of cases where it was contended that personal liability was excluded by words indicating that the maker was merely signing in the capacity of executor or administrator or the like. In Story on Agency, 9th ed., this class is referred to as follows (paragraph 280):—

> Persons contracting as agents are, nevertheless, ordinarily, although, as we shall presently see, not universally, held personally responsible, where there is no other responsible principal to whom resort can be had. Thus, for example, where a person signed a note "as guardian of A. B.," he was held to be personally liable on the note, for he could not make his ward personally liable therefor, nor his ward's assets. So, where a person signed a note "as trustee of A. B.," he was held personally liable on the note, for it was not primarily binding on his *cestui que trust*. So, where a person signed a note "as executor of A. B.," or as "administrator of A. B.," it was held that he was personally liable on the note, for such a note would not bind the estate of the deceased, and to give it any validity it must be construed to be a personal obligation of the maker. So, a bill of exchange accepted by A., "as administrator of B.," will bind B. personally.

Paragraph 281:—

> This whole doctrine proceeds upon the plain principle that he who is capable of contracting and does contract in his own name, although he is the agent of another who is incapable of contracting, intends to bind himself, since in no other way can the contract possess any validity, but it would perish from its intrinsic infirmity.

Section 52 of the Bills of Exchange Act reads thus:—

> 52. Where a person signs a bill as drawer, indorser or acceptor, and adds words to his signature indicating that he signs for or on behalf of a principal, or in a representative character, he is not personally liable thereon; but the mere addition to his signature of words describing him as an agent, or as filling a representative character, does not exempt him from personal liability.
>
> (2) In determining whether a signature on a bill is that of the principal or that of the agent by whose hand it is written, the construction most favourable to the validity of the instrument shall be adopted.

MAN.

C. A.
1912

CRANE
v.
LAVOIE.

Robson, J.

Mr. Justice Russell, in his Commentary on the Act, p. 176, refers to a note of Mr. Justice Maclaren in his work, [Maclaren on Bills and Notes, 4th ed.], "to the effect that it is in accordance with the maxim '*ut res magis valeat quam pereat,*' saying that in many cases where an agent or officer has been held personally liable, it is quite evident that he did not intend to bind himself personally, and there has been a great deal to be said in favour of his not being liable; but, inasmuch as he did not legally bind his principal or the company, as the case may be, he has been considered personally responsible, on the principle laid down in the sub-section.

These authorities seem to treat the person who assumes to qualify the obligation as in fact the maker. But in a case referred to in Russell [Russell's Commentary on the Bills of Exchange Act], p. 173, and more like this, viz., *West London Commercial Bank* v. *Kitson*, 13 Q.B.D. 360, the liability is put on the ground of warranty. Brett, M.R., said:—

> The acceptance was in this form: "Accepted for and on behalf of the B. and I. Company, G. K., F. S. P., directors; B. W., secretary." The meaning of that is plain. It is that we accept as directors for and on behalf of the company, so that any one who shall take the bill would assume that the company had power to accept it, and that the defendants, as directors, were authorized by the company to accept it. That is what this acceptance meant, and it was so given in order that the bill might be discounted. By whom was the bill to be discounted? Surely not by the person who knew that the company had no power to accept, and that the defendants had no authority to do so for the company. The acceptance was meant to represent that the company had such power, and that the defendants had such authority.

Bowen, L.J., at p. 362, said:—

> What is the effect of their signatures as acceptors of this bill? It is a representation that they had authority to sign as directors on behalf of the company; and, as they intended that the bill should pass to third persons, they are bound to make it good.

It seems to me that this is the proper view from which to approach the present case. There is recent authority for saying that there may be an implied warranty of the existence of the principal. The action is not confined to cases of warranty of authority from an existing principal.

In *Simmons* v. *"Liberal Opinion" Limited, In re Dunn*, [1911] 1 K.B. 966, a solicitor appeared and defended in an action against a supposed incorporated company, whereas in fact there was no such corporation. The solicitor was held liable to the plaintiffs for the costs of the abortive proceedings. This was on the ground of warranty of the existence of the client. No distinction was made between the case where there is a principal, but an absence of authority, and that where there is in fact no principal.

The statement of claim in the present case is so drawn that the action may be treated from either of the two standpoints mentioned.

Having got thus far, it is necessary to consider the facts more closely. The defendant Fournier and one Laplante had been doing business as plumbers. They became indebted to the plaintiffs in about $1,500. Shortly before the notes in question were given, Fournier and one Coté approached Thompson, the accountant of the plaintiffs, and intimated, as the fact was, that Coté, Lavoie, Fournier, and others, were about to form the Fournier Company, and desired that the plaintiffs should accept the obligations of that company to meet the account against Laplante and Fournier. The plaintiffs agreed to that course; and, shortly afterwards and before the incorporation, the plaintiffs received the notes. The notes were signed by the defendants and sent to the plaintiffs pursuant to the arrangement mentioned.

It was contended by the defendants that the plaintiffs reserved their rights against Laplante and Fournier, and that the transaction did not amount to a novation; and, therefore, there was no consideration for the notes. Even assuming that there was no release of the plaintiffs' rights against Laplante and Fournier, there was, as appears from the evidence of Coté and Fournier, a request for forbearance, in consideration of the new obligations, and the forbearance in fact was granted. It is my view that this was sufficient consideration. There is high authority for this in the case of *Crears* v. *Hunter*, 19 Q.B.D. 341. The head-note succinctly sets forth the facts and the decision as follows: "For the purpose of inducing the plaintiff to give time to the defendant's father for payment of a debt, the defendant signed a promissory note whereby the defendant's father and the defendant jointly and severally promised to pay to the plaintiff the amount of the debt with interest half-yearly at the rate of 5 per cent. per annum until the amount was paid. The plaintiff having forborne to sue for several years:—Held, that, the plaintiff having forborne from suing the defendant's father at the defendant's request, there was a good consideration for the defendant's liability on the note, although there was no contract by the plaintiff to forbear from suing."

The defendants endeavour to meet the case of warranty by shewing that the plaintiffs knew, when they took the notes, that the Fournier Company Limited had not been incorporated; and *Halbot* v. *Lens*, [1901] 1 K.B. 344, was cited. I was asked to infer this knowledge from certain facts. The meeting of Coté, Fournier, and Thompson, the plaintiffs' accountant, took place apparently about the 6th May. Coté told Thompson that the company was not yet formed, but would be in a short time;

MAN.

C. A.
1912

CRANE
v.
LAVOIE.

Robson, J.

that they would have a meeting as soon as possible, form the company, and apply for a charter; that Thompson said that would be all right; that Thompson expressed the wish to get the notes promptly, in which Coté agreed, as he expected that the company would be formed in a couple of days.

Any one would know that the company's notes could not be got till it was formed. Thompson was told that it would be but a couple of days till the company would be formed. Thompson was not allowing the matter of the notes to drift, but asked for them once or twice, perhaps several times. It may actually have been because of his persistence, for which a business man cannot be blamed, that notes dated the 10th were placed in his hands on the 12th May.

As stated, the company was not formed till the 2nd June. I cannot impute to Thompson a knowledge of the length of time it takes to procure letters patent of incorporation. Not only that, but, as far as I am aware, it would be no impossibility for such incorporation to have taken place between the 6th and the 10th May. The matter was more in the knowledge of the defendants and their associates than in that of Thompson; and he, representing the plaintiffs, would have the right to assume, when he got the notes, that the incorporation had taken place. I think there is no basis for inference that Thompson had knowledge that the company had not been incorporated when the notes were sent to the plaintiffs.

As a matter of fact, the plaintiffs, who, it was intended, should rely on the notes, did rely on them. See *West London Commercial Bank* v. *Kitson*, 13 Q.B.D. 360. They, as requested, forbore their remedy against the firm of Laplante and Fournier, whose assets meanwhile went into the company. The plaintiffs never had a remedy against the company; and, from all appearances, unless the defendants are liable, the plaintiffs' debt is virtually gone. To hold the defendant Lavoie personally liable will, doubtless, be hard on him, but it cannot be said that that is the plaintiffs' fault.

The objection was taken at the trial that the notes were not presented for payment according to their tenor. The defence on the pleadings differs from that. The defendant Fournier pleads that the notes were not presented to him. The defendant Lavoie pleads that payment has not been demanded of him. The notes, in fact, purport to be payable at the Northern Crown Bank, St. Boniface.

The notes were not made by the Fournier Company. If that company had been sued on them, it might possibly have raised the objection for what it was worth. I fail to see any obligation on the plaintiffs to present the notes in order to recover against the defendants on a breach of warranty of the existence of their pretended principal. If the defendants

were being sued as indorsers or guarantors of the liability of an existing debtor, the case might be different. But here the supposed maker did not exist, and presentment would be futile.

If the defendants were to be treated as makers, as in the instances cited by Story [Story on Agency, 9th ed.], the objection might be open to them, if properly raised; but, as already stated, it seems to me that the proper basis on which to consider the action is that of warranty of the existence of the principal.

As against a maker it is not necessary, according to the form of statement of claim authorized by the Rules in the King's Bench Act, to allege presentment. It is left to the defendant to raise the defence if he so desires. Here there is no allegation by either defendant that the notes were not presented for payment at the place named therein.

On the whole, I think the defendants are liable to the plaintiffs.

The measure of damages was not discussed, but I think it must be taken to be the amount of the notes and interest. I do not think any possible liability over of Laplante and Fournier to the plaintiffs can be taken into account. Their liability was, according to the arrangement, to be suspended till the notes should be collected. The plaintiffs had a right to exhaust their remedies in respect of the notes. The fact that the Fournier Company subsequently went into liquidation, apparently on insolvency, does not affect the matter.

There will be judgment for the plaintiffs for the amount represented by the seven notes mentioned in the statement of claim, with interest at 5 per cent. per annum from the maturity thereof respectively. The plaintiffs to have their costs, including examination for discovery.

The defendant appealed to the Court of Appeal.

Messrs. *C. P. Wilson*, K.C., and *A. Dubuc*, for defendants.

*G. H. Ross*, for plaintiffs.

HOWELL, C.J.M.:—Section 52 of the Code [The Bills of Exchange Act, Canada] declares that where a person signs in such a manner as to indicate that he was signing for or on behalf of a principal, or in a representative capacity, he is not personally liable, but the mere addition of words to his name alone does not exempt him from liability. The notes in question begin with "We promise," and are signed:— Howell, C.J.M.

The Fournier Co. Ltd.
T. A. Lavoie, President.
D. Fournier, Manager.

It seems to me no one would ordinarily be deceived as to what was apparently intended by this signature. It commences with the name of a joint stock company, and this is verified by

MAN.

C. A.

1912

CRANE v. LAVOIE.

Howell, C.J.M.

the signatures of the president and manager, just as is commonly done in this country when a joint stock company makes a note, and it would follow that the defendants are not liable. However, on proving the signatures it is shewn that when the note was made, no such company existed and so, of course, there was no president or manager of such company. If the defendants were president and manager respectively it was not of this company at all events.

Sub-section 2 of the above mentioned section declares that in determining whether the signature was that of the principal or the agent "the construction most favourable to the validity of the instrument shall be adopted." Now, if we strike out the first line of the signatures, which then was a myth, we have left the individual names of the defendants, each with a mere addition as meaningless in this case as "Esquire" and if the defendants are held liable as makers of the note, the construction demanded by the sub-section is complied with.

No doubt the rule as to admitting parol evidence to vary the liability of parties upon negotiable instruments is very strict. Parol evidence, however, can undoubtedly be given to shew that an agent acting for a then existing principal had no authority to act, and then the agent is liable, not as a party to the note, but for breach of warranty of authority, as in *West London* v. *Kitson*, 13 Q.B.D. 360, and I can see no reason why parol evidence should not be given to prove that the parties actually signing the paper were not acting for any principal, and were not acting as agents, and as they did act they acted for themselves and are liable as principals. This proof really in both instances arises in proving the making of the note.

It does seem to me that untrammelled by authority, the proper conclusion to come to under the Code is to hold the individual defendants liable as makers of the note.

Prior to the Code the cases on this subject are numerous and conflicting. The "anarchy" of the decisions is well illustrated by the United States Supreme Court in *Falk* v. *Moebs*, 127 U.S. 597. Suppose in that case the company was in fact at the time of the making of the note non-existent, can it be doubted that the defendants would have been held personally liable?

In *Thomson* v. *Feeley*, 41 U.C.Q.B. 229, at 234, Mr. Justice Adam Wilson held, following *Kelner* v. *Baxter*, L.R. 2 C.P. 174, that if the agent acted for an existing principal and signed as such without authority he was not liable on the note, but was liable on breach of warranty; but where there was no principal he was liable on the note.

The case of *Dutton* v. *Marsh*, L.R. 6 Q.B. 361, was cited as an authority that the defendants were liable even if the company had been in existence, but that case was decided before the

Code, and it seems to me not in harmony with section 52. However, that case was explained away pretty well in the case of *Chapman* v. *Smethurst*, [1909] 1 K.B. 73 and 927. A perusal of the judgments in the last mentioned case, convinces me that if in that case there was no company in existence, when the note was made, the defendant would have undoubtedly been held liable.

I have not overlooked the partnership case of *Fairchild* v. *Ferguson*, 21 Can. S.C.R. 484, but, in that case the partnership was in existence, and the Court held that the defendant's signature as manager was the signature of the existing partnership.

In signing their names to bind a company that did not exist they really endeavoured to keep themselves from liability as in *Watling* v. *Lewis*, [1911] 1 Ch. 414, where the subscribing parties had it stated in the document that they were not to be personally liable, yet they were held liable.

The appeal must be dismissed with costs.

RICHARDS, J.A.:—The facts are stated in the judgment of the learned trial Judge and my brother Judges. Richards, J.A.

It seems to me that there are three positions argued with respect to the instruments in question, which I shall, for convenience, call notes.

First, that, when made, they were the promissory notes of the defendants, Lavoie and Fournier.

Second, that, if they were not their promissory notes, they (Lavoie and Fournier) by signing them for and on behalf of the alleged company, warranted to the plaintiffs that such a company existed and that they had power on its behalf and in its name to make them the company's promissory notes.

Third, that the notes were nullities.

I cannot accept the idea that the notes were nullities. It might be possible that, if the plaintiffs were shewn by the evidence to have known, when they took the notes, that the company was not in existence, and to have agreed that they would not look to the defendants, but would only look to the company for payment, if brought into existence in the future, taking the risk of the company being created and making the payment, there might be something in this point, because they would then know what they were taking were instruments that had no validity; and it would be so intended between the parties. The evidence, however, does not seem to me sufficient to shew that the plaintiff's knew, when taking the notes, that the company had not yet been incorporated, and the onus of proving this knowledge on their part lies, I think, on the defendants.

MAN.

C. A.
1912

CRANE
v.
LAVOIE.

Richards, J.A.

In *Thomson* v. *Feeley*, 41 U.C.Q.B. 229, the late Sir Adam Wilson, in giving the judgment of the Court of Queen's Bench for Ontario in Term, said, at page 234:—

> It is established that, although a person signs an agreement on behalf of a company, and the company has no existence at the time, but is only projected or in prospect, he is personally liable, because there is no such principal whom he does or can represent, and the agreement would be wholly inoperative if it were not to be binding on the person who has signed it: *Kelner* v. *Baxter*, L.R. 2 C.P. 174. But, if there be a principal, and the principal never gave authority to one who professes to act as agent, or if the principal had no power to do the act which the agent has done, the agent is not liable upon any agreement he may have entered into, professing to be such agent, as the principal in the transaction, but he is liable to an action for damages for a breach of warranty of authority to act as the agent of the principal he assumed to represent: *Collen* v. *Wright*, 7 E. & B. 301; *Richardson* v. *Williamson*, L.R. 6 Q.B. 276.

In *Thomson* v. *Feeley*, 41 U.C.Q.B. 221, the defendant, signing his name with the word "secretary" after it, purported to enter into an undertaking on behalf of an as yet not incorporated company which he named in the instrument, and it was held that the defendant was *primâ facie* liable, because at the time he signed the receipt there was no company, and therefore no principal whom he could bind, and that it must therefore, be presumed, to give the instrument validity, that he executed it on his own behalf.

If the above quotation from Mr. Justice Wilson's judgment correctly states the law, then the notes now in question became, under the circumstances of this case, the promissory notes of the defendants Fournier and Lavoie. I find myself unable to decide how far *Kelner* v. *Baxter*, L.R. 2 C.P. 174, bears out the learned Judge in the above. In some subsequent cases *Kelner* v. *Baxter* is said to turn rather upon the fact that the form of the body of the instrument there shewed an intention on behalf of the defendant to make himself liable. Now, there was, I think, in the present case, no such intention on the part of the defendants and nothing in the body of the instrument shews it. But I do not think that, for the purpose of this action, it is necessary to decide whether the notes in question are the defendants' personal promissory notes or not. For, if they were not such, they were at least warranties by the defendants that the alleged company on whose behalf they purported to give the notes, was an actually existent company and that they had power to sign on its behalf; and it seems to me that, in either alternative, they are bound to make the notes good, though the action in one case would be upon the notes and in the other upon the misrepresentation.

But it is said that if these documents are but a warranty of the existence of the company, and of the defendants' right to

make the notes on its behalf, then the damages would not be the full amount of the notes, but rather the amount which the plaintiffs would have succeeded in collecting upon these notes if they had in fact been the notes of the company of the same name, which was afterwards formed; and it is pointed out that, owing to that company having become insolvent, the plaintiffs, if they had had that company's notes, would not have been able in fact to recover their face value, but merely such dividend as could be recovered by ranking on the company's estate.

This last argument is one which, if we could hold it valid, would in fact meet the ends of justice; but I cannot see that it is good in law. We must treat the instruments as what they were at the time when they were executed. Now, when they were executed, the company did not exist, and it might never have come into existence. If it had not come into existence, then, I think no question could be raised that the defendants would, on their above-named warranty, be liable for the full face amount of these promises to pay. That is the position I think the matter stood in when the notes were taken. Can the fact that there was subsequently incorporated a company, bearing the same name as that which the notes purported to be executed in, make any difference?

The argument that the company, after its birth, ratified the notes as its own promises to pay must fail. A corporation has no power to ratify contracts made on its behalf before its incorporation. It can only do so in effect by making a new similar contract of its own. Even if it had power to ratify, that, in itself, would not change the effect the notes had when they were made.

It seems to me that, whether we hold that the defendants made the notes, or hold that they entered into the warranty, as above mentioned, in either case they have to make good their face value.

I would dismiss the appeal with costs.

Perdue, J.A.

PERDUE, J.A.:—I agree with the finding of the learned trial Judge that there was sufficient consideration for the making of the notes in question. The plaintiffs delayed their remedies against Fournier & Laplante, the original debtors, and permitted the assets of that firm to be handed over to the Fournier Co., Limited, which was to assume the liabilities of Fournier & Laplante. The plaintiffs not only granted the request for forbearance as against the original debtors, but also changed their position by permitting the transfer of assets.

I also agree in the finding that the evidence does not establish that Thompson, the plaintiffs' accountant, had knowledge that the company had not been incorporated when the notes were delivered to the plaintiffs. On the other hand, information as to the condition of the incorporation proceedings was within the

MAN.

C. A.
1912

CRANE
v.
LAVOIE.

Perdue, J.A.

knowledge of the defendants and the other incorporators, and the plaintiffs had a right to assume that the officers of the company would not make and issue notes of the company before it was incorporated.

It is claimed that defendants are liable either as makers of the notes or for breach of warranty as to the existence of the company and the defendants' authority to sign the notes on its behalf.

In considering the first of these two questions, it is essential that the form of the notes and the manner in which they are signed should be carefully scrutinized. Whether the defendants have sufficiently excluded their personal liability and shewn that they signed on behalf of another party, must be gathered from what appears on the face of the notes: *Leadbitter* v. *Farrow*, 5 M. & S. 345, 349. Extrinsic evidence cannot be given to shew in what capacity the maker intended to sign: *Thomas* v. *Bishop*, 2 Stra. 955; *Rew* v. *Pettet*, 1 A. & E. 196; *Kelner* v. *Baxter*, L.R. 2 C.P. 174; *Brown* v. *Howland*, 9 O.R. 48; *Hagarty* v. *Squier*, 42 U.C.R. 165. All the notes sued upon in this action are in similar form, the only difference being in the time of their maturity. The following is a copy of one, which will serve for all:—

> $200. St. Boniface, May 10th, 1910.
>
> Two months after date, we promise to pay to the order of Crane & Ordway Co. at the Northern Crown Bank here, the sum of two hundred dollars. Value received.
>
> THE FOURNIER CO., LTD.
> F. X. LAVOIE, *Pres.*
> D. FOURNIER, *Manager.*

At the time the notes were signed the Fournier Co., Limited, had not been incorporated. The letters patent incorporating that company bear date 2nd June, 1910. Section 52 of the Bills of Exchange Act, as made applicable to promissory notes by section 186, declares that where a person signs a promissory note as maker "and adds words to his signature, indicating that he signs for or on behalf of a principal, or in a representative character he is not personally liable thereon; but the mere addition to his signature of words describing him as an agent, or as filling a representative character, does not exempt him from personal liability." Sub-section 2 provides the rule that is to be followed in determining the capacity in which the signer of the note has placed his signature upon it. That sub-section enacts that in determining whether a signature on a bill or note is that of the principal or that of the agent by whose hand it is written, the construction most favourable to the validity of the instrument shall be adopted.

The notes in question were signed by the defendants. The addition of the word "president" or of the word "manager" after one of the signatures is not in itself sufficient to exclude

the personal liability of the party signing. The note commences with the words "we promise" which would be quite appropriate in the case of a note intended to be the note of two or more parties. As has already been pointed out, no explanation, outside what appears on the note, is permissible to shew in what character the parties signed. But it urged the name of the Fournier Co., Ltd., appears above the individual signatures and it is argued the natural inference is that the defendants were signing as president and manager of that company, and not as actual makers. It appears to me that one fact which confronts the defendants at the very threshold of the case is fatal to the above contention. There was no such company or any such entity as the Fournier Co., Limited, when the notes were signed. Where there was no principal there could be no agent. Where there was no company there was no president or manager. Then, in order to give any validity to the document, *ut res magis valeat quam pereat*, we must assume that the parties signing it made themselves personally liable. Otherwise, there being no principal who can be made liable the note would have no validity and would become a mere meaningless paper.

The principle upon which this proposition rests is well exemplified in *Kelner* v. *Baxter*, L.R. 2 C.P. 174. In that case a proposal in writing was made by the plaintiff to A.B. and C. on behalf of the proposed Gravesend Royal Alexandra Hotel Co., for the sale of certain goods. The proposal was accepted by "A. B. and C. on behalf of the Gravesend Royal Alexandra Hotel Co." At the time of the acceptance there was no such company in existence. The Court unanimously held that A. B. and C. were personally liable. Erle, C.J., in giving judgment (p. 183), said:—

> I agree that if the Gravesend Royal Alexandra Hotel Co. had been an existing company at this time, the persons who signed the agreement would have signed as agents of the company. But, as there was no company in existence at the time, the agreement would be wholly inoperative unless it were held to be binding on the defendants personally. The cases referred to in the course of the argument fully bear out the proposition that, where a contract is signed by one who professes to be signing "as agent," but who has no principal existing at the time, and the contract would be altogether inoperative unless binding upon the person who signed it, he is bound thereby.

So also, in *Thomson* v. *Feeley*, 41 U.C.R. 229, at p. 234, Wilson, J., gave expression to the same principle in these words:—

> It is established that although a person signs an agreement on behalf of a company, and the company has no existence at the time, but is only projected or in prospect, he is personally liable, because there is no principal whom he does or can represent, and the agreement would be wholly inoperative if it were not to be binding on the person who has signed it.

See also *Rew* v. *Pettet*, 1 A. & E. 196.

MAN.

C. A.
1912

CRANE
v.
LAVOIE.

Perdue, J.A.

This being the law in respect of ordinary contracts, it applies, by the effect of the sub-section of section 52 of the Act, *a fortiori* to the case of promissory notes. "The construction most favourable to the validity of the instrument shall be adopted." Therefore, in the present case if the defendants are not held liable personally, the instruments bind no one and fall to the ground as worthless. I think the construction necessarily to be adopted in this case is to hold the defendants liable as makers of the notes.

The case of *Kelner* v. *Baxter*, L.R. 2 C.P. 174, above referred to, is also authority for the proposition that a subsequent ratification by the company after it came into existence, did not relieve the defendants from the liability that had attached to them upon the making of the instrument. The contention, therefore, founded on the resolution of the company after incorporation, to assume and pay the notes, that the plaintiffs had, or could have, obtained what they bargained for—the promise of that company—cannot avail the defendants.

I think the defendants might also be made liable for breach of their implied warranty, that the Fournier Company, Limited, was incorporated and in existence and that they had the power to sign the notes on behalf of that company. A question was raised as to what would be the measure of damages accruing to the plaintiffs in such a case. I do not think it necessary to decide that question. I prefer to decide this case simply upon the ground that the defendants are liable as makers of the notes.

The appeal should be dismissed with costs.

Cameron, J.A.

CAMERON, J.A.:—The promissory notes in question in this case contain the words "we promise" in the body and are signed:—

THE FOURNIER CO., LTD.
F. X. LAVOIE, *Pres.*
D. FOURNIER, *Manager.*

The terms president, manager, agent etc., attached to a signature are regarded as merely *designationes personæ*. The rule is applied with peculiar strictness to bills because of the non-liability of the principal: Chalmers 86. Ordinarily in the case of a written contract, signed by a person as principal, who is in fact agent for another, parol evidence can be given to shew that the agent has an undisclosed principal who thereby becomes liable on the instrument as a party, although it does not follow that the agent ceases to be liable: *Higgins* v. *Senior*, 8 M. & W. 834. But this doctrine is inapplicable to the case of a bill.

The contracts of the parties to bills and notes as appearing on the face of the instrument, whether of drawer, acceptor,

maker or indorser, cannot be varied by parol evidence: Maclaren on Bills and Notes, 4th ed., at p. 46, and the cases there given.

The law is clear that no party can be charged as principal upon a negotiable instrument unless his name is disclosed on its face.

"The reason of this rule is that each party who takes a negotiable instrument makes his contracts with the parties who appear on its face to be bound for its payment; it is 'a courier without luggage,' whose countenance is its passport; and in suits upon negotiable instruments, no evidence is admissible to charge any person as a principal party thereto, unless his name in some way is disclosed upon the instrument itself; although upon other written contracts, not negotiable, it is often competent to shew that, although signed in the name of the agent only, they were executed in the business of the principal, and with the intent that he should be bound. And in such cases he is bound upon them accordingly. The rule excluding parol evidence to charge an unnamed principal as a party to negotiable paper is derived from the nature of such paper, which being made for the purpose of being transferred from hand to hand, and of giving to every successive holder as strong a claim upon the original party as the payee himself has, must indicate on its face who is bound for its payment; for any additional liability not expressed in the paper would not be negotiable": Daniel on Negotiable Instruments, 5th ed., sec. 803.

The law is also clear that he who accepts a bill or signs a note is liable unless, by appropriate words in the instrument, he exonerates himself from liability.

This principle is thus stated by Lord Ellenborough in *Leadbitter* v. *Farrow*, 5 M. & S. 349:—

> Is it not an universal rule that a man who puts his name to a bill of exchange, thereby makes himself personally liable, unless he states upon the face of the bill that he subscribes it for another, or by procuration of another, which are the words of exclusion? Unless he says plainly, "I am the mere scribe," he becomes liable.

Nothing could be clearer than this statement.

On the face of it this note is the joint note of the Fournier Co., Ltd., and Lavoie and Fournier. But such a company had no existence at the time the note was given and this to the knowledge of Lavoie and Fournier, who knew they were not and could not be its president and manager.

Have these signers, Lavoie and Fournier, in subscribing themselves as makers, used any words in this instrument to exclude their personal liability? Or, to put it in another way, are their names on this document in such a manner as to negative their own obligation and assert that of another? Had the body of the note contained the words "the Fournier Co. (Ltd.) promises" (not "we promise") it might well be argued that there being no apt words to charge Lavoie and Fournier, and

MAN.

C. A.
1912

CRANE
v.
LAVOIE.

Cameron, J.A.

no authority of course on their part to sign as agents, (and, in fact, no principal to be agents for) the instrument must fall as being void. But the name of the company is not used in the body of the note, while the personal pronoun "we," to which it is difficult not to attach some significance, is. I can see no words used in this instrument that plainly express an intention to exclude the personal liability of the individual signers. They do not state in the note that they are signing on behalf of, or on account of, the company, nor do they expressly negative their own obligation as they might have done by adding the words "but not individually" to qualify "promise" (as was the case in *Barlow* v. *Lee*, 3 Allen 460), or by inserting either of the words "by" or "per" before their own names, or using other words indicating that they signed merely in a ministerial capacity.

In *Dutton* v. *Marsh*, L.R. 6 Q.B. 361, a note reading, "We the directors of the Isle of Man Slate and Flag Company, Limited, do promise to pay John Dutton, etc." and signed with their individual names, was held to bind the directors personally, although sealed with the corporate seal. "There is no case," said Lord Chief Justice Cockburn, at p. 365, "that goes to the length of saying that the affixing of the seal, where the parties do not otherwise use terms to exclude their personal liability, would have that effect."

The words "pres." and "manager" used in the note are, it would seem to me, words of description within section 52 and nothing more, and therefore, insufficient, of themselves, and without further apt words, to exempt the signers from personal liability. But it is not necessary in the case here presented for our consideration to determine the legal position of the parties signing had the company actually been in existence at the time of the making of the notes.

These parties, thus signing the note, must have intended to bind somebody upon the instrument. There was no company in existence and the words "pres." and "manager" convey nothing and mean nothing, and what is left? As there are no promisors but themselves appearing thereon, the note can be construed as their note. Otherwise it would be a nullity, and it is the declared policy of the Act that the construction most favourable to the validity of the instrument shall be adopted: sec. 52, sub-sec. 2. Here, if there be no liability of the individual promisors, there is no liability of anyone.

If it is the duty of officers of a corporation, who, when executing negotiable instruments on behalf of the corporation, desire to keep themselves free from any personal liability thereon, to exclude that liability by the use of clear and specific language on the face of the document, then it surely follows that, when they merely assume, with full knowledge, to be acting for a corporation which has no present existence, that duty demands

the clearest language on their part if they wish to keep themselves clear. In point of fact, they are, as I have stated, not officers in this case. The words "pres." and "manager" on the note in question were really meaningless when the signatures were affixed. They are mere surplusage and without any greater effect on the names of the individual signers than if they had been omitted altogether. Had they been omitted it would seem to me impossible to uphold the non-liability of the signers, and their actual use is devoid of effect.

What would have been the position of these individuals had the incorporation of the company never been proceeded with? I think it would surely have been difficult then to argue that no one was liable on this note. The signers, as I have stated, intended to bind someone. And it must be taken that they did not intend to bind a non-existent person or corporation. The signers do not state upon the face of the instrument that they subscribe themselves for, or on account of, another. In accordance with the Act, the maxim *ut res magis valeat* is to be held applicable so that this instrument may be a valid negotiable security and not a nullity. I need hardly say that the legal liabilities arising out of the instrument are not affected in the slightest by the subsequent incorporation of a company with a name similar to that mentioned in the note. I am of the opinion, therefore, that the promisors are liable as individuals.

We were referred to a late case in appeal of *Chapman* v. *Smethurst*, [1909] 1 K.B. 927. There it was held that the note given was so given in accordance with the provisions of the Companies Act, 1862. "No question arises here," says Vaughan-Williams, L.J., at p. 928, "as to the authority of the defendant to sign the promissory note: it is admitted that he had the company's authority to do so. To my mind when you have once got a promissory note so drawn as to bind the company, and when the form of the note is such that no question of joint liability can arise, it almost conclusively shews that the note is in such a form that the company alone is liable, and I have no doubt that the company is alone liable on this particular note." I call attention to the italicised words as bearing upon the form of the note before us and as indicating an important difference between the note in that case and the one we are now discussing.

In *Chapman* v. *Smethurst*, [1909] 1 K.B. 927; *Lindus* v. *Melrose*, 3 H. & N. 177; *Dutton* v. *Marsh*, L.R. 6 Q.B. 361, *supra*, and *Alexander* v. *Sizer*, L.R. 4 Ex. 102, are discussed and distinguished. I refer also to the case of *Landes* v. *Marcus*, 25 T.L.R. 478, where a cheque was signed by the two defendants as directors of a company. "The defendants had not said that they did so on behalf of the company" and were held personally liable.

As to the question of want of consideration, it seems to me that the facts of the case satisfy the requirements of the law.

MAN.

C. A.
1912

CRANE
v.
LAVOIE.

Cameron, J.A.

"The consideration required to support a promise has been defined as consisting of any damage, or any suspension, or forbearance of his right or any possibility of a loss occasioned to the plaintiff by the promise of another, although no actual benefit accrue to the party undertaking": Leake on Contracts, 6th ed., p. 431.

I think Lavoie is liable as maker of the promissory notes in question and that the appeal should be dismissed.

Haggart, J.A.

HAGGART, J.A.:—In *Chapman* v. *Smethurst*, [1909] 1 K.B. 927, at p. 930, Kennedy, L.J., approves of the test applicable to such cases laid down in Lindley on Companies, 6th ed. vol. 1, p. 280:—

> The question is in every case one of construction. Is the bill or note the bill or note of the company or not? Does it really purport so to be? for although given for the purpose of the company, the bill or note may not even purport to bind it. If on the true construction of the instrument, the bill or note is the bill or note of the company, the company will be liable upon it and not the individuals whose names are on it, unless the bill or note is the bill or note of both. On the other hand, if on the true construction of the bill or note it is not the bill or note of the company, the persons whose names are upon it will be liable upon it, whether they intended to be so or not.

In *Thomson* v. *Feeley*, 41 U.C.Q.B. 229, at p. 236, where a similar question was involved, Wilson, J., who delivered the judgment, in which Harrison, C.J., and Morrison, J., concurred, suggested a form of plea which might shew a good defence, setting out that both parties believed the writing was not binding on the defendant, and that it was not the intention to bind him, and that the writing so drawn was a mistake and the mistake of both parties, and that the plaintiff was taking an inequitable advantage of such mistake by suing the defendant upon it.

If such were a defence, it would not be available here. Equity will, of course, interpose and grant relief on the ground of mistake, but only when it can restore the parties to their former condition, or place them in the same situation in which they would have stood but for the mistake. Here the old debtors have been divested of all their assets and the new company could not now, if it desired, give the securities originally contemplated.

Sub-section 2 of section 53 of the Bills of Exchange Act reads:—

> In determining whether a signature on a bill is that of the principal or that of the agent by whose hand it is written, the construction most favourable to the validity of the instrument shall be adopted.

Unless we construe the instruments as the notes of the defendants, the documents would mean nothing and be binding upon no one.

*Appeal dismissed.*

# INDEX OF SUBJECT MATTER, VOL. IV., PART II.

*(For Table of Cases Reported see end of this Index.)*

## CASES REPORTED, VOL. IV., PART II.

317
210
278
278
356
278
366
342
278
278

295
327
217
356
312
224
238
352
196
315
196
354
255

## Re POLSON IRON WORKS, Limited.

ONT.

*Ontario High Court, Middleton, J., in Chambers. May 15, 1912.*

H. C. J.
1912
May 15.

1. CORPORATIONS AND COMPANIES (§ V C—188)—TRANSFER OF SHARES—ORIGINAL HOLDER BECOMING INDEBTED TO COMPANY SUBSEQUENT TO TRANSFER—R.S.C. 1906, CH. 79, SEC. 67.

The directors of a company cannot refuse to register a transfer of its shares of stock, under sec. 67 of ch. 79 of R.S.C. 1906, on the ground that the transferer was indebted to the company, where the indebtedness did not exist at the time the transfer was executed, although it was incurred before the application for registry was made.

2. CORPORATIONS AND COMPANIES (§ V C—188)—TRANSFER OF SHARES ON BOOKS—VALIDITY OF UNREGISTERED TRANSFER—R.S.C. 1906, CH. 79, SEC. 64.

A transfer of shares of stock of a company is not invalidated, under sec. 64 of ch. 79 of R.S.C. 1906, by failure to have the transfer registered on the books of the company, as such section, for the purpose of exhibiting the rights of the parties toward each other, expressly preserves the validity of an unregistered transfer.

3. CORPORATIONS AND COMPANIES (§ V C—192)—RIGHT OF TRANSFEREE TO HAVE RECORD OF TRANSFER ENTERED IN BOOKS—PRIOR OPTION GIVEN BY TRANSFERROR.

An agreement giving an option to purchase shares of stock in case the owner should desire to sell them does not create a contract with the company issuing the stock so as to justify the refusal of the directors, upon a transfer thereof to a third person, to record the transaction on the books of the company.

4. CORPORATIONS AND COMPANIES (§ V C—195)—TRANSFERS OF SHARES TO TRUSTEE UNDER MARRIAGE SETTLEMENT—PRIOR OPTION TO THIRD PARTY TO PURCHASE.

A transfer of shares of stock to a trustee under a marriage settlement does not constitute a sale within the meaning of an agreement giving a third person an option for their purchase should the settlor desire to sell them.

5. ASSIGNMENT (§ III—31)—PROPERTY ASSIGNED TO TRUSTEE OF MARRIAGE SETTLEMENT—NOTICE OF PRIOR OPTION—ENFORCEMENT AGAINST TRUSTEE.

A trustee under a marriage settlement who in pursuance thereof takes a transfer from the settlor of shares of stock in a company incorporated under the Dominion Companies Act, R.S.C. 1906, ch. 79, having at the time full notice of the terms of a prior option agreement made concerning such shares by the settlor, will hold the shares subject to the terms of such agreement and subject to the enforcement against him by the holders of the option of the rights which they had acquired from the settlor.

6. MANDAMUS (§ I E—41)—REGISTRY OF A TRANSFER OF SHARES.

Mandamus is the proper remedy to require the board of directors to register a transfer of shares of stock on the books of the company issuing them.

[*Crawford* v. *Provincial Ins. Co.*, 8 U.C.C.P. 268, and *Rich* v. *Melanchthon Board of Health*, 2 D.L.R. 866, 26 O.L.R. 48, 3 O.W.N. 826.]

Statement

MOTION by McWhinney and Brown, trustees of the marriage settlement of John James Main and LaDelle McCahon, for a mandamus directing the Polson Iron Works Limited, an incorporated company, to register a transfer of 500 fully paid-up

ONT.

H. C. J.
1912

RE
POLSON
IRON WORKS,
LIMITED.

Middleton, J.

non-assessable shares of the capital stock of the company from John James Main to the applicants.

The order for a mandamus was granted.

*R. McKay*, K.C., for the applicants.

*C. A. Moss*, for the company.

MIDDLETON, J.:—The 500 shares in question were acquired by Mr. Main under and pursuant to the terms of an agreement of the 27th June, 1906, between Mr. Main and Messrs. Polson and Miller, by which Mr. Main undertook to transfer to the company all the assets of the Canadian Heine Safety Boiler Company, in consideration of the issue of these 500 shares. As part of the same agreement, Mr. Main agreed to subscribe for $25,000 capital stock of the Polson company, for which he was to pay when calls were made by the board of that company.

By this agreement certain rights are given to Messrs. Polson and Miller, enabling them to acquire the $75,000 of stock upon payment to Main of the value of the stock as shewn by the books of the company, in the event of Main ceasing to be in the service of the company, or upon Main desiring to sell the stock. This agreement, made originally with Messrs. Polson and Miller, was adopted by the directors and shareholders of the company, by appropriate by-laws.

The 500 paid-up shares were duly issued, and the 250 other shares were duly subscribed for. The stock is subscribed for as follows: "500 shares to be issued as fully paid-up and non-assessable, pursuant to by-law No. 40, and to be held subject to the terms of agreement referred to in said by-law;" the agreement and by-law being those above-mentioned.

On the 15th September, 1911, by his marriage settlement, Mr. Main transferred the 500 paid-up shares to the applicants. This instrument was duly executed on the 16th. At this time, no calls had been made upon the 250 shares; but subsequently, on the 28th December, 1911, a call of $20 per share upon all unpaid stock of the company was made by the directors. This call was payable on the 4th January, 1912, and notice was duly given to Mr. Main on the 28th December.

Mr. Main, for reasons which, he thinks, justify him in doing so, refuses to pay the call; and his counsel states that, if any attempt is made to collect payment, Mr. Main is advised that he has a good defence to any action that may be brought.

For some reason, the trustees omitted to apply for registration of the transfer until the 5th January, when the company declined to record the transfer. The secretary of the company, on the 11th January, in reply to the formal demand for registration, writes that the matter has been considered by the directors, and that "I have been directed to inform you that the directors decline to register the transfer of the shares in

ONT.

H. C. J.
1912

RE POLSON IRON WORKS, LIMITED.

Middleton, J.

question belonging to the said John J. Main, owing to his being indebted to the company."

Upon the argument of the motion, it was admitted that the only indebtedness is the indebtedness in respect to the calls made upon the 250 shares.

The company is incorporated under Dominion legislation, and the sections of the statute which require to be considered are R.S.C. 1906 ch. 79, secs. 64, 67.

By sec. 64, "except for the purpose of exhibiting the rights of the parties to any transfer of shares towards each other . . . no transfer of shares . . . shall be valid for any purpose whatever until entry of such transfer is duly made in the register of transfer." By sec. 67, it is provided that the directors may decline to register any transfer of shares belonging to any shareholder who is indebted to the company.

I have read the numerous cases cited upon the argument, but have come to the conclusion that none of them throws much light upon the problem before me, which must be determined upon the wording of these two sections.

Primâ facie, a share—or at any rate a paid-up share—of the capital stock of a company is personal property, and may be disposed of by the shareholder freely. Any provisions which cut down this right must be construed strictly. Section 67 gives the right to the directors to decline to register any transfer of shares "belonging to any shareholder who is indebted to the company."

I do not think that the shares in question ever belonged to a shareholder who was indebted. Upon the execution of the transfer on the 15th September, these shares ceased to belong to Main. They then became the property of the trustees. Section 64 does not invalidate the transfer by reason of the failure to register, for it expressly preserves to the transfer validity "for the purpose of exhibiting the rights of the parties . . . towards each other."

The indebtedness did not arise until the making of the call on the 28th December. Main then became indebted to the company, within the meaning of sec. 67; but he had ceased to own the shares. As I read the statute, the ownership and the indebtedness must be concurrent; and the section cannot be read as if it gave authority to the directors to refuse to register when the transferee is at the date of the application indebted. The section itself seems to be carefully worded so as to require indebtedness at the time of the ownership; and the ownership is, by sec. 64, made independent of registration.

It was argued that the transfer ought not to be permitted, because of the terms of the agreement. In the first place, the transfer is not a sale, which is the only transaction that gives to Polson and Miller any right to purchase under the agreement.

ONT.

H. C. J.
1912

RE POLSON IRON WORKS, LIMITED.

Middleton, J.

In the second place, the agreement in question is an agreement with Polson and Miller, not with the company; and the trustees, taking with full notice of the agreement, will hold subject to its terms; and any rights that Polson and Miller may have can be exercised against the trustees.

Objection was taken to the remedy sought. It was said that a mandamus would not lie. I think this is determined in favour of the application by *Crawford* v. *Provincial Insurance Co.*, 8 C.P. 263. See also the recent decision in *Rich* v. *Melancthon Board of Health*, 2 D.L.R. 866, 26 O.L.R. 48, 3 O.W.N. 826, 21 O.W.R. 517.

The order for mandamus will go as sought, with costs.

*Application granted.*

---

QUE.

C. R.
1912

May 23.

**J. M. WILSON v. THE H. G. VOGEL COMPANY; THE H. G. VOGEL COMPANY v. CHARLES M. GARDINER; CHARLES M. GARDINER v. THE LOCOMOTIVE AND MACHINE COMPANY.**

*Quebec Court of Review, Tellier, DeLorimier, Dunlop, JJ. May 23, 1912.*

1. PROXIMATE CAUSE (§ VI—105)—FALLING OF A WATER TANK—LIABILITY OF SUB-WARRANTOR—DEFECTIVE WALLS.

In order to absolve a sub-warrantor who manufactured a steel structure to support a water tank erected upon the roof of a building, from liability for damages occasioned by the fall thereof, on the ground that the walls were defective, the defective condition must be shewn, and it must appear that that was the immediate and proximate cause of its fall.

2. EVIDENCE (§ VII A—590)—EXPERT TESTIMONY—WEIGHT.

The evidence of expert witnesses should not necessarily prevail over that of disinterested non-expert witnesses.

[*Lafcunteum* v. *Beaudoin*, 28 Can. S.C.R. 89, and *Deschenes* v. *Langlois*, 15 Que. K.B. 388, referred to.]

3. SALE (§ III A—57)—REMEDIES OF WARRANTOR AGAINST SUB-WARRANTOR—BREACH OF WARRANTY—PAYMENT MADE.

The fact that a sub-warrantor had received pay for an article furnished a warrantor, does not absolve the former from liability to the plaintiff in warranty for damages caused by defects in the thing warranted.

4. CONTRACTS (§ IV E—367)—CONTRACT CALLING FOR FIRST-CLASS MATERIAL AND WORKMANSHIP—EFFECT OF BREACH.

One who erected a water tank and a steel supporting structure therefor on the roof of a building, under a contract calling for first-class material and workmanship, is liable to the owner of the building for damages caused by the fall of the tank as a result of defects of which the defendant should have been aware, in the construction of the supporting structure.

5. INDEMNITY (§ I—5)—FALL OF WATER TANK—FAULTY CONSTRUCTION OF SUPPORTS—LIABILITY OF SUB-CONTRACTOR FURNISHING.

A defendant who is liable to the owner of a building for damages caused by the fall of a water tank erected by the former on the roof of the building, as a result of the faulty construction of the supports thereof, is entitled to indemnity from a defendant in warranty from whom the former obtained the tank and its supports.

QUE.

C. R.
1912

WILSON
v.
THE
H. G. VOGEL
CO.

6. DAMAGES (§ III K 2—218)—MEASURE OF COMPENSATION—INJURY TO BUILDINGS.

A sub-contractor who constructed a steel support for a water tank that was erected on the roof of a building, which fell, by reason of the defective construction of the supports, must indemnify the principal contractor to whom he supplied it for all damages the latter may be condemned to pay by reason of the fall of the tank.

INSCRIPTIONS in review by the Vogel Company, Gardiner, and the Locomotive and Machine Company respectively.

Messrs. *E. Lafleur*, K.C., and *A. Perrault*, for plaintiff.

Messrs. *A. Geoffrion*, K.C., and *R. C. McMichael*, K.C., for defendant.

*H. S. Williams*, for defendant in warranty.

Messrs. *T. Chase-Casgrain*, K.C., and *A. Chase-Casgrain*, for defendant in sub-warranty.

The opinion of the Court of Review was delivered by

DUNLOP, J. Dunlop, J.

DUNLOP, J.:—In this case the principal defendant inscribes in review from the judgment of the Superior Court, Monet, J., rendered on the 25th February, 1911. Inscriptions in review are also filed by the defendant in warranty, Charles M. Gardiner, and by the defendant in sub-warranty, The Locomotive & Machine Company of Montreal.

The pleadings are as follows:—

The plaintiff, by the principal action, sued the company defendant for the sum of $11,323.40 damages, alleged to have been caused to him by the fall of a water-tank installed by the company defendant on the roof of the plaintiff's store, No. 520 St. Paul street, and specially alleges in his declaration, which was amended on the 5th January, 1909, that, on the 13th March, 1905, the company defendant had contracted with plaintiff to instal on his building a system of protection against fire, including, among other things, the placing of a tank capable of holding 12,000 gallons of water, the company defendant to employ the best materials and the best workmanship in so doing; that on the 2nd April, 1906, the said tank had been filled with water for the first time, and that on the next day the said tank gave way, damaging one of the walls of the building and the merchandise in said building; that a part of the building was totally destroyed and another part partially; that this accident was due to a fault of construction in the steel structure, and owing to the weakness of the walls of the said building, a weakness which defendant should have known and for which it must be held responsible; that on the 6th December, 1905, the plaintiff notified the company defendant by letter to be careful in the execution of the works it was doing, putting it on its guard; that on the 4th April, plaintiff protested the company defendant, through the ministry of Perrault, notary public, notifying it of the accident

QUE.

C. R.
1912

WILSON
v.
THE
H. G. VOGEL
CO.

Dunlop, J.

which happened the day before and notifying it to immediately repair the damages caused by its fault and imprudence, a thing which the defendant has neglected to do.

Plaintiff produced a statement of the damages caused to him by the defendant, shewing $1,500, amount of money paid to the company defendant during the execution of the works on account of their price; $165 paid to the city of Montreal for the supply of water required; $397.50 extra premiums of insurance charged by the insurance companies; $3,066.09 damages caused to the merchandise not totally destroyed; $2,620.50 for the goods totally destroyed; $2,949.29 for repairs which the plaintiff was obliged to make to his building partially destroyed by the fall of the tank, and $625 paid to experts with regard to the examination and valuation of the damages caused to him.

By dilatory motion, the defendant obtained permission on the 15th of June, 1906, to call the defendant, Charles M. Gardiner, of the Crescent Company in warranty. On the 18th of June the principal defendant took the action in warranty against the said Charles M. Gardiner, alleging that, on the 11th of October, 1905, he contracted with it for the construction of a water tank and other works required on the buildings of the principal plaintiff on the terms and conditions of a letter recited in its declaration, for the sum of $859, which contract had been accepted by the defendant in warranty on condition that Vogel & Company, the principal defendant, or the proprietor of the Wilson building, would guarantee the solidity and sufficiency of the walls and foundations, conditions written in the letter addressed by the defendant in warranty to the plaintiff in warranty and accepted by the latter; that the defendant in warranty constructed the said tank.

The principal defendant, plaintiff in warranty, set up in his action in warranty the principal action of the plaintiff, a copy of which is attached to the action in warranty, and the plaintiff in warranty alleges also that, on the 5th of October, 1906, it protested the defendant in warranty, notifying him of the accident which happened to the Wilson building, the protest served on it by the plaintiff Wilson, alleging that, if the principal defendant is held responsible towards the principal plaintiff, the said defendant in warranty is the party really responsible to the principal defendant.

The plaintiff in warranty concludes by praying that the defendant in warranty should be condemned to take up the said case and should be held liable to indemnify the principal defendant from every condemnation that could be rendered against it, as well as the costs of the said action in warranty and of the principal action.

Subsequently, the defendant in warranty, Charles M. Gardiner, was by the Court permitted to call in the Locomotive and

QUE.
C. R.
1912
WILSON
v.
THE
H. G. VOGEL
CO.
Dunlop, J.

Machine Company of Montreal, Limited, in sub-warranty, and in this action the plaintiff in sub-warranty alleges that, on the 21st of October, 1905, the defendant on sub-warranty contracted to set up a structure in steel necessary to support the water tank containing 12,000 gallons of water, for the sum of $347, and to place the structure on the Wilson building within two weeks from said date. The plaintiff in sub-warranty recites the facts mentioned in the principal action and in the action in warranty, alleging, moreover, that on the 7th April, 1907, he protested the defendant in sub-warranty, notifying it of the accident that had occurred on the Wilson building and notifying it that it would be held responsible for all damages he might be condemned to pay, and praying that the defendant in sub-warranty should be held to take up the cause of the plaintiff in sub-warranty and condemned to indemnify him for every condemnation that might be rendered against him by reason of any defect in the steel structure; that the plaintiff in sub-warranty alleged that, if the accident happened as alleged, it was not due to negligence nor to his fault, but to the negligence and fault of the defendant in sub-warranty, who was charged to make the steel structure mentioned in the contract, and praying besides that the defendant in sub-warranty should be condemned to pay all the costs of the principal action as well as of the different actions in warranty.

The principal defendant, besides his action in warranty, pleaded to the principal action, denying any negligence on its part and alleging that, if the accident happened, it was because the plaintiff had overcharged the walls and floors of his store; that he knew at the time of the said contract the nature, the strength, the character and the condition of his walls and of the beams of his building, of which the principal defendant had no knowledge.

The defendant in sub-warranty, Charles M. Gardiner, pleaded, besides his demand in sub-warranty, that he is not responsible for t said accident; that, if the said accident was due to a *vice de struction*, it is the Locomotive and Machine Company of Montreal, Limited, that is responsible; that if the said accident was due to the weakness of the wall, it was the Vogel Company and Wilson who are responsible, and he prays for the dismissal of the action in warranty, with costs as well of the action in warranty as of the action in sub-warranty.

The defendant in sub-warranty pleaded that it is not responsible for the accident; that it fulfilled the terms of its contract as proved, and that, if the accident happened, it was not due to the insufficiency of the structure in steel which it had made, but was owing to the great weakness in one of the walls of the Wilson building, a defect for which it could not be held responsible; that it has been paid the price of its contract and that it cannot

QUE.
C. R.
1912
WILSON
v.
THE
H. G. VOGEL
CO.
Dunlop, J.

be proceeded against after such payment, and it prays that the action in sub-warranty should be dismissed with costs.

The cases were all joined for trial and were heard at the same time and decided upon the same evidence by the judgment. The trial lasted 31 days. A large portion of the evidence consists of the opinion and suggestions of expert witnesses.

The judgment condemned the company defendant to pay plaintiff the sum of $9,590.68, with interest from the institution of the action, and all the costs; and further, dismissed the two actions in warranty and sub-warranty, and condemned the plaintiff in warranty to pay the costs of its demand in the two cases, and also condemned the Locomotive and Machine Company of Montreal, Limited, the defendant in sub-warranty, to pay the costs of the defence in the two cases.

From this judgment no less than four inscriptions in review were filed.

The principal defendant inscribes (1) from that part of the judgment which maintained the principal action; (2) from that part of the judgment which dismissed the action in warranty taken by it against Chas. M. Gardiner.

Charles M. Gardiner, plaintiff in sub-warranty, inscribes in review from that part of the judgment which dismisses the action taken against the Locomotive and Machine Company of Montreal, and the Locomotive and Machine Company of Montreal, the defendant in sub-warranty, inscribes in review from that part of the judgment condemning the defendant in sub-warranty to pay the costs of the defence of the two actions in warranty.

The whole question in this case seems to me to be limited to whether the accident was caused by the giving-way of part of the wall of plaintiff's premises on which the water tank was erected, or by the breaking of part of the steel structure which supported the tank in question.

All the experts examined on behalf of the plaintiff said that the accident was caused by a defect in the steel structure which supported the tank. There is a principle of law well established and which cannot be contested, that, when one seeks the cause of an accident and one finds a defect which was, by its nature capable of producing the accident in question, and when one finds no other cause to which the accident could be imputed, it must be necessarily assumed that the accident was caused by such defect.

The evidence of Mr. Vautelet and that of Mr. Hays, both distinguished engineers, has not been contested on essential points. The part of the steel structure, which is identified as B-D, certainly had not been made according to the rules of art. The steel had not been riveted, as should have been done. It must be remembered that the trial Judge held distinctly that it had not been constructed according to the rules of art, and this was the reason why he dismissed the actions in warranty without

costs, on the ground that, under the facts of this case as proved, the plaintiffs in warranty were justified in taking their action, though he ultimately held that the determining cause of the accident was not owing to any defect in the steel, but to the giving-way of part of the east wall of plaintiff's premises.

It seems to be established that the defect was in that part of the structure identified by B-D, as that appears to be the main defect established, and the result was that the tank fell towards the west.

Besides the evidence of the experts, we have the evidence of two witnesses which certainly must have an important bearing on this case. They do not rely on any theories. They simply state what they saw. I do not think the evidence given by Mr. Miner is attackable. Mr. Miner says that he was at one of the windows on the sixth storey of the Canada Life Building when the accident occurred, and he tells what he saw:—

"I saw the tank gradually incline to the west and ultimately fall in that direction." This seems to shew that the accident was caused by a defect in the steel, because all the witnesses without exception seem to be of opinion that, if the defect had been in the steel structure the tank would fall to the west, and if the defect had been in the wall it would fall to the east, and the witnesses for the Locomotive and Machine Company, as I read the evidence, do not seriously contest this pretension. Mr. Archibald, one of their most important witnesses, admits this. It seems to me that, if the wall had given way first, as is pretended by the Locomotive and Machine Company, the tank would have inclined and fallen toward the east. If, on the contrary, the defect was in that part of the structure identified as B-D, the result would certainly be as observed by Mr. Miner—that it would have fallen to the west.

It seems to me that this is the only reasonable explanation of the only possible cause of this action, and it must be remembered that his evidence is corroborated by another witness who was on St. Paul street and saw the tank fall, and his evidence has not been contradicted and cannot be contradicted.

It is pretended that Mr. Miner might have been deceived. I do not see how this can be. He was in a position where he had a full view of the tank, and is positive that the progressive inclination was towards the west. Here is what Mr. Archibald says at page 14 of his evidence:—

> Q. Well, how can you explain the testimony of Mr. Miner and the other witnesses, who say that they saw the tank canting towards the west?
>
> A. That does not worry me for a minute, because all the evidence is contrary to it.
>
> Q. Mr. Miner said he was sitting in his office in the Canada Life Building on the sixth floor, looking towards the river, and that he saw the collapse. When he saw the tank, when it first went over, it canted

QUE.

C. R. 1912

WILSON v. THE H. G. VOGEL CO.

Dunlop, J.

towards the west. Now, how can you reconcile the deposition which you are now giving with that deposition of Mr. Miner, which appears to be corroborated by the deposition of another witness by the name of Calvin?

A. Well, I made observations with regard to that point with Mr. Mattice from the position of the Canada Life Building, and I found that it would be quite possible for Mr. Miner to be under the impression that the tank fell to the west when it was actually falling north-east or east of north.

This seems to me a very lame explanation and in no way contradicts or discredits the evidence of Mr. Miner.

Reference might also be made to the testimony of Mr. Archibald, a very self-sufficient witness, when he states, at page 36, in re-examination by Mr. Casgrain:—

Q. When you say that Mr. Miner must have been mistaken, will you kindly tell me what mistake he made in your opinion?

A. From the relative positions of the Canada Life Building and the Boivin Wilson Building, the Boivin Wilson Building being considerably to the west of the Canada Life Building, it was quite possible for that tank to fall in a northerly direction when Mr. Miner thought it was falling toward the west, because the tank was towards the right hand side of him.

It will be remembered that witness Calvin, who was standing on the north side of St. Paul street, a little west of the intersection of St. Paul and St. Peter streets, where he had a full view of the tank from the east side, says at page 3 of his deposition:—

Q. It (the tank) fell to the west?

A. Yes.

Q. Gradually?

A. Yes, it gradually fell to the west.

It has been attempted to shew that he could not see, from the spot where he says he was standing, as much of the steel structure as he stated in his evidence. There is nothing in the record of a nature to contradict the evidence of these two witnesses, except the conjectures and speculations and theories of expert witnesses, who do not testify, but merely suggest that the tank may have fallen in another direction.

Mr. Vautelet was examined as an expert. He visited the premises almost immediately after the accident, before any portion of the debris had been disturbed, and he found that the member, B-D, one of the principal members of the steel structure, was too weak to support the load which came upon it owing to the manner in which the connections transmitted such load. See summary of his conclusions at pages 53, 54, 55. In cross-examination he points out that bolts were used instead of rivets, and even then there were only two at point B, although more rivets were required. He states that while rivets always worked together, there is no certainty that bolts will do so, seeing they do not fill the hole so completely and may become unscrewed. He also points out that the connection being only attached by one

side of the angle, the strain would be transmitted on the member in an eccentric manner, thereby more than doubling the strain upon the member. He states that the member B-D was the weakest of all, and that the strain would be 8,800 pounds with eccentricity and would be 19,600 pounds under the existing conditions. He condemned the steel structure and said the member, as connected, could not stand the strain.

It is obvious to anyone, upon examining the plan P-7, that the member B-D at the point B is attached in the same manner as the secondary members, although it was a principal member of the truss and required to carry a strain of 20,000 pounds.

This witness says that the defects in the member B-D, coupled with the fact that the tank fell towards the west, explained the accident. He states that if the wall had given way first the tank must necessarily have fallen towards the east, and this is testified to by almost every witness examined in the case.

Mr. Vanier, an expert civil engineer and architect, corroborates Mr. Vautelet's testimony. He describes how the fall took place. He says that the walls were in good condition and did not cause the accident. It will be seen that these witnesses had no interest, as between defects in the east wall and defects in the steel structure, in attributing the collapse to one suggested cause more than another. Mr. Henry Demers, also examined for the principal plaintiff, testifies as a fact that the east wall was in good condition. He made a careful examination of it because he placed an additional storey upon the building resting upon this wall.

We might now refer to the witness examined on behalf of the Vogel Company, Mr. Henry Holgate, probably one of the best-known civil engineers in Canada, who corroborates in every particular the evidence of Mr. Vautelet. At page 80 Mr. Holgate emphasizes an important principle of steel structures. He says, in effect:—

"The principle of all steel construction is that connections should be stronger than the members, the object being to develop the fullest possible strength of the main body of the member."

At the foot of page 95 he again insists upon this same principle—that the strength of the member depends upon the strength of the connection. Continuing, at page 80, he says:—

"This principle has been departed from here, and the different causes of weakness are from the neglect to properly detail the connections," and at page 87 he points out:—

"That weakest point is the member B-D, an essential member of the steel truss."

At pages 113 and 114 he makes an interesting comparison of the stress on the two bolts at point "B," contrasting such stress on these bolts with those in the other principal members. In some instances it was five times as great. He attributes the collapse to the failure of the member B-D.

QUE.
C. R.
1912
WILSON
v.
THE
H. G. VOGEL
CO.
Dunlop, J.

Mr. Freeman, of New York City, was also examined. He had had a very extensive experience in steel constructions for the support of tanks and corroborates the evidence of Mr. Holgate and Mr. Vautelet.

We now come to the witnesses of the Locomotive and Machine Company.

Mr. Harrington, Mr. Legrand and Mr. Borden were all examined as steel experts. They were the three engineers responsible for the steel structure. They all concede in effect that the member B-D was defectively constructed, and that they would not have put up a similar construction. Harrington and Legrand conceded in their evidence that the tank fell towards the west. Archibald contradicts the testimony of Harrington and Legrand on this point. He propounds a theory as to the line of vision of the witness, Mr. Miner, in an endeavour to reconcile his evidence with his own testimony, admitting, however, that if the tank fell to the west the initial break did not take place in the east wall.

Mr. Mattice is another interested witness, because he is in the company which took over the business of the Locomotive and Machine Company. He takes the position that it matters not in what direction the tank fell; the east wall gave way in any event. It will be observed that the versions of the Locomotive and Machine Company's own witnesses are therefore irreconcilable.

We now come to Gardiner's witnesses. No evidence was made by Gardiner in chief except formal proof of the contract. In rebuttal, Messrs. Alex. C. Hutchison and William Hutchison, well-known architects, were both examined. They testify that the walls were in good condition and amply strong enough to bear the weight that was imposed on them. They both state that if the east wall gave way the tank must necessarily have fallen towards the east.

The witness Magloire Huberdeau, an experienced contractor, and Honore Guilbault, one of his employees, a mason of many years' experience, who worked upon the east wall, testify as a fact that it was a good wall and well made.

Mr. Wm. Stewart, called as an expert, testifies to the same effect.

Mr. Gardiner, examined on his own behalf, points out that the top of the tank and a large portion of the staves were found inside the building towards the west. He indicates them on the photograph P-I-C. See page 66 of his deposition. Mr. Vanier also testified to the same effect.

This evidence corroborates the evidence given by the eye-witnesses, Miner and Calvin.

We have pointed out the defects in the member B-D as appearing in the testimony of Vautelet, Vanier, Holgate and

Freeman. It cannot be disputed that the member B-D was constructed in defiance both of practical and of scientific principles. The judgment finds that as a fact witnesses of the Locomotive and Machine Company concede it.

I am of opinion that, as between two suggested causes, the admitted defects in the member B-D were the determining causes of the accident. In support of this view I might state (1) that the tank fell to the west; (2) that the direction of the initial movement of the tank is conclusive as between these two suggested causes and shews that the initial failure took place in one of the western steel supports and not in the east wall.

The words "east," "west," "north" and "south," used in the evidence, do not refer to the cardinal points, but are used in the vulgar sense, i.e., as they are ordinarily used in Montreal, the assumption being that the streets parallel to the St. Lawrence River, as St. Paul street, run from east to west, while the other streets, such as St. Peter street, run from north to south.

As between the two alternatives—east or west—Mr. Miner could not have been mistaken from where he was looking. The tank obviously must have fallen to the right of Mr. Miner's line of vision, and appreciably so, otherwise he would have stated that the tank had fallen towards him and described it as having fallen towards the north. If it fell appreciably to the right of his line of vision, it necessarily fell towards the west. The evidence of Mr. Miner, to my mind, is, therefore, conclusive, even if it stood alone. But it is strongly corroborated by that of Mr. Calvin, who saw it fall and swears that it fell towards the west.

The question, after all, is whether we are to believe the direct and positive evidence of the two witnesses who saw the accident occur, or the theories and suggestions and speculations of certain experts, who did not see the accident in question. The evidence of Miner and Calvin cannot be discredited. They simply stated in plain language what they saw and what they had every opportunity of seeing. No evidence was adduced that these witnesses were either interested or prejudiced.

Another fact is established which confirms the evidence of Miner and Calvin. It is that after the accident the upper part of the tank and the staves lay inside the building to the west, which indicates clearly that the tank fell towards the west. In another aspect, the break in the roof, as seen by the witnesses and shewn in the photographs, clearly indicates a fall towards the west, inasmuch as the rupture in the roof and floors extends almost over to the west wall, far beyond the point where the tank stood. Obviously, nothing would have fallen or broken down through the roof and floors beyond where the tank stood if the tank itself had fallen to the east.

Finally, all the witnesses examined in the case for the various parties, except Archibald and Mattice, concede that the tank fell to the west. See Harrington's evidence, where he expounds

QUE.
C. R.
1912
WILSON
v.
THE
H. G. VOGEL
CO.
Dunlop, J.

his theory at page 36, also at page 40, where he says that from the inspection of the western steel supports "A" and "B" he found evidence that the tank had fallen upon the western members of the truss. He says at page 40:—

> The photograph P-1-D indicates such a condition in the failed truss. It indicates that the load fell in between the members "A" and "B." (Members of the truss on the west side.)

The evidence of the witness Archibald is based upon entirely theoretical grounds. He never saw the ruins. He takes it for granted that the steel was strong enough and that the wall was weak. He says that the wall must have yielded, and after the wall yielded, the tank must have fallen towards the east. Therefore, whatever may have been the evidence in the case, the tank must have fallen to the east. In other words, he takes for granted a point which is entirely theoretical, and controverted, to say the least, and proves from that a conclusion at variance with the established and admitted facts of the case. He then goes on to make a suggestion to reconcile Mr. Miner's evidence with his own, a suggestion which was shewn to be utterly without foundation. He makes no reference whatever to the evidence of Calvin, nor to any of the other facts established in the case, shewing that the tank fell to the west.

I do not think that there is any uncertainty in regard to the propositions of fact that the tank fell to the west.

I think that the suggestions of experts directly opposed to the positive testimony of witnesses to the facts, should not have been accepted by the trial Judge. As I said before, I have come to the conclusion that the tank fell to the west.

It is not denied that the usual factor of safety, or, in other words, the usual margin over and above the strength required to carry the calculated load, had not been provided for in the member B-D. By providing the usual factor of safety in the other principal members, the Locomotive and Machine Company admit that it was necessary to do so. No reason has been advanced why they should not have done likewise as regards the member B-D. The whole point of these experts is, that although the usual factor of safety or margin has not been provided for, nevertheless they are of opinion that the member was sufficiently strong under the circumstances. Therefore they abandon universal practice as a standard for determining the proper strength of the member, and adopt in its stead a purely theoretical basis which had not proved itself, as it is never acted upon.

One obvious answer to the theory advanced by them is that, inasmuch as it has been the universal practice to provide for a certain factor of safety above the calculated load (or margin above the strength required to carry the calculated load), it

must be that this margin or factor of safety is considered necessary. In other words, that a lesser margin or factor of safety is considered dangerous because the calculations cannot be relied upon as providing for every possible stress. It is, therefore, safely to be assumed that the factor of safety sanctioned by practice, and not a lesser factor, is needed to make a safe construction. Here there is a construction which provides for the incalculable loads a factor of safety at least 100 per cent. less than the factor which universal experience shews to be needed. If that is considered alone, the case for the Locomotive and Machine Company would be very weak, even if the evidence as to what was the cause of the collapse, which had been previously considered, is ignored.

The evidence, therefore, as to the weakness of the member B-D, particularly at point "B" (plan P-7), being the cause of the collapse, strong as it is when considered alone, becomes conclusive when it is taken in conjunction with the evidence previously mentioned establishing that the tank fell towards the west, and that nothing but a failure in the steel supports to the west could have caused such a collapse. The trial Judge held in one of his considerants that, according to the proof of the principal defendant, the factor of safety should have been 8 and it was only 4. This seems to me a misapprehension of the proof adduced. Mr. Alex. C. Hutchison says, in his examination, at page 337, that this wall would carry a safe load of 7 tons per square foot, but when the steel structure and tank were there it actually was carrying only about 2 tons per square foot, so that there would be a factor of safety of 14 in 4. The wall would, therefore, be loaded only to the extent of one-quarter of the load which it could safely carry. To reach this conclusion the Court evidently took the figures, 7 tons, not as being the safe load, but as being the load which the wall was actually carrying. Now, as I read the evidence, it is clear that the load on the wall was only two tons per square foot, and not 7 tons per square foot. There would only be a factor of safety of 4 if the wall had been loaded to the extent of 7 tons. But the evidence is that the wall had been loaded to the extent of 2 tons. The figures are as follows:—

Breaking load, equal to 28 tons per square foot;
Safe load, 7 tons per square foot;
Actual load, 2 tons per square foot.
The factor of safety would be 14, and not 4.

Mr. W. B. Hutchison, at pages 102 and 103, testified to the same effect.

After a careful consideration of the voluminous evidence, I am of opinion that it has been established that the walls were good walls, and that as such they were amply strong enough to bear the weight imposed upon them. In fact, the Locomotive

QUE.
C. R.
1912
WILSON
v.
THE
H. G. VOGEL
CO.
Dunlop, J.

and Machine Company do not appear to attack the sufficiency of the walls. They claim that the walls gave way on account of defects.

But the Locomotive and Machine Company had to shew not only that the walls were defective, but they also had to connect the accident with the alleged defect in the walls, for it is elementary that, in a case of this kind, there must not only be defects, but it must be established that such defects were the immediate and proximate cause of the accident. On the other hand, the steel admittedly was defective, and it only remained to shew that the cause of the collapse resulted from the defects in the steel, which I am of opinion has been conclusively done.

Courts and text-writers have frequently pointed out that the testimony of expert witnesses should only be accepted after an *examen severe et quantum valeat*. See judgment and particularly the remarks of Bossé, J., and authorities cited in the case of *Deschenes* v. *Langlois*, 15 Que. K.B. pp. 388 and 390. The same doctrine is supported by Phipson on Evidence, 4th ed., at page 357, under the heading "Value of Expert Testimony."

The Court below, in its appreciation, seems, erroneously, to have caused the evidence of expert witnesses to prevail over that of disinterested witnesses: see *Lafeunteum* v. *Beaudoin*, 28 Can. S.C.R. 89.

I do not think that the fact that the contract price was paid freed the Locomotive and Machine Company from responsibility under the circumstances of the present case.

With regard to the amount of damages awarded, I am not inclined to disturb the judgment of the trial Judge on this point. He had all the advantage of seeing and hearing the different witnesses.

1. As to the principal action:—

I am of opinion that it should be maintained and the judgment confirmed, not for the reasons stated in the judgment, but for the reason that it has been fully established that the accident in question and the damages resulting therefrom were caused by a fault of construction *vice de construction* of the steel structure supporting the tank, which gave way, causing the damages in question, which the principal defendant should have known and for which it must be held responsible, and that this was the real and determinate cause of the accident in question: that the accident in question was not caused by any weakness in the east wall of said building, and that principal defendant's inscription in review must be dismissed with costs.

2. As regards the action in warranty taken by the principal defendant against Charles M. Gardiner, the defendant in warranty:—

I am of opinion that, inasmuch as the principal action must be maintained for the reasons above cited, the action in warranty

QUE.

C.R.
1912

WILSON
v.
THE
H. G. VOGEL
CO.

DUNLOP, J.

taken by the principal defendant against Charles M. Gardiner, must also be maintained, and that the defendant in warranty should be adjudged and condemned to indemnify the principal defendant from the condemnation adjudged against him in the principal action, and that the part of the judgment dismissing the said action in warranty against the said Charles M. Gardiner must be reversed, with costs against the said defendant in warranty.

3. I am of opinion, further, for the same reason, that the action in sub-warranty taken by the said Charles M. Gardiner against the Locomotive and Machine Company, of Montreal, Limited, must also be maintained and the said defendant on sub-warranty held to indemnify the plaintiff in sub-warranty against every condemnation against him in the action in warranty above referred to.

4. I am, further, of opinion that the inscription in review taken by the Locomotive and Machine Company, the defendant in sub-warranty, against the said Charles M. Gardiner, from that part of the judgment condemning it to pay the costs of the defence of the two actions in warranty, must be dismissed with costs. Consequently, the inscription in review of the principal defendant from that part of the judgment which maintained the principal action is dismissed, with costs, said action having been maintained for the reason hereinabove cited.

The inscription in review of the principal defendant from that part of the judgment which dismissed the action in warranty taken by it against Charles M. Gardiner, is maintained, the judgment of the Superior Court in this respect having been reversed as hereinabove stated.

The inscription in review taken by Charles M. Gardiner, plaintiff in sub-warranty, from the part of the judgment which dismisses the action taken against the Locomotive and Machine Company, is maintained, the judgment of the Superior Court dismissing said action in warranty having been reversed and said action maintained, for the reasons hereinabove stated.

The inscription of the defendant in sub-warranty from that part of the judgment condemning the defendant in sub-warranty to pay the costs of the two actions in warranty is dismissed, for the reasons stated above.

*Judgment accordingly.*

ONT.

H. C. J.
1912
June 22.

## REX v. LAPOINTE.

*Ontario High Court, Riddell, J., in Chambers. June 22, 1912.*

1. INDICTMENT, INFORMATION AND COMPLAINT (§ III—65)—JOINING SEPARATE OFFENCES—EVIDENCE RELEVANT TO SOME ONLY.

Upon more than one information for separate offences of a similar character being lodged against a person a magistrate should not hear evidence at the same time as to all the charges, where some of it would be relevant to one, but not to the others.

[*Hamilton* v. *Walker*, [1892] 2 Q.B. 25; *Regina* v. *Fry* (1898), 67 L.J.Q.B. 67; *Regina* v. *McBerny* (1897), 3 Can. Cr. Cas. 339, 29 N.S.R. 327; and *Rex* v. *Burke* (No. 2) (1904), 8 Can. Cr. Cas. 14, followed; *Rex* v. *Dunkley* (1910), 1 O.W.N. 861, and *Rex* v. *Sutherland*, 2 O.W.N. 595, distinguished.]

2. SUMMARY CONVICTION (§ III—30)—PROCEDURE—SEPARATE INFORMATIONS—HEARING EVIDENCE IN THREE CASES—QUASHING CONVICTION.

A conviction for selling liquor without a license will be quashed where the magistrate before whom three informations were lodged charging sales to different persons, heard evidence at one time tending to prove sales in the three cases, some of which were not relevant to the case in which the accused was convicted.

3. INTOXICATING LIQUORS (§III 1—91)—UNLAWFUL SALES—TRIAL OF OFFENDER—THREE INFORMATIONS—HEARING EVIDENCE AT ONE TIME.

A conviction for selling liquor without a license will be quashed, where a magistrate with whom three informations were lodged against the accused for separate sales to different persons, heard evidence at the same time tending to prove the three offences, and found the accused guilty in all three cases.

4. JUSTICE OF THE PEACE (§ II—6)—EXEMPTION FROM LIABILITY—EXPLANATION OF CONDUCT—ORDER FOR PROTECTION.

Where a magistrate, a King's Counsel, with whom three informations were lodged charging a person with separate sales to different persons of liquor without a license, heard, at the same time, evidence tending to prove the three offences, if he fails to explain his conduct, upon one of the convictions being quashed, an order of protection will be granted him only upon payment by him of the costs.

Statement

MOTION by the defendant to quash a conviction made against him by the Police Magistrate at Thessalon for selling intoxicating liquor without a license.

The conviction was quashed.

*H. S. White*, for the defendant.

*J. R. Cartwright*, K.C., for the Crown.

Riddell, J.

RIDDELL, J.:—On the 9th November, 1910, one Grigg laid three informations against Louis Lapointe for selling liquor without a license, on the 29th October then ultimo, to (1) B. Guertin, (2) Joseph Dubie, and (3) Edward Dubie, respectively.

The defendant appeared before the Police Magistrate at Thessalon; the Police Magistrate read to him the informations one by one; and the defendant pleaded "not guilty" to each. Thereupon the Police Magistrate took the evidence of witnesses,

B. Guertin, Joseph Dubie, and Edward Dubie for the prosecution, and others for the defence, the evidence being taken down on paper headed:—

"Deposition of a Witness.

"Canada

"Province of Ontario

"District of Algoma

"To wit:—

"The deposition of———— taken before the undersigned Police Magistrate for the said district of Algoma this 18th day of November in the year 1910, at Cutler, in said district of Algoma, in the presence and hearing of Louis Lapointe, who stands charged that he did, at or near the village of Cutler, in said district, on or about the 29th day of October, 1910, sell liquor without a license, as required by law."

There was ample evidence of the sales to Joseph Dubie and Edward Dubie. With some hesitation, I think there was sufficient to justify a conviction in the Guertin case also.

The Police Magistrate recorded a conviction in the Joseph Dubie case, and imposed a fine of $100 and $32 costs, and, in default of payment, three months' imprisonment.

It is sworn and not denied that at the same time he announced that he found the defendant guilty on the other two charges, but adjourned these two convictions for the purpose of fixing the fine thereon until a future day—and this must have been the case, as we find the magistrate writing the defendant on the 1st December, 1910: "Having adjourned the two other cases against you for selling liquor without a license until to-day, I have this day come to the conclusion to simply allow the one fine to go which has been paid, on payment of the costs in the other two cases." He then states the amount of costs, and asks this to be sent him by return mail—"otherwise I will have to send the constable down."

The Police Magistrate told the solicitor for the defendant that all the evidence in the three charges is set out in the depositions forwarded, and that "the said evidence was utilised by him on each and all of the said charges."

A motion is now made to quash the conviction for selling to Joseph Dubie—the grounds taken in the notice of motion being: (1) that there was no evidence to support the conviction; (2) that, having three informations before him, the Police Magistrate proceeded to hear evidence in all three cases, and did then find him guilty in all three cases.

It is a well-established and well-known principle of the criminal law "that each case ought to stand on its own merits and should be decided on the evidence given with relation to that particular charge:" *per* Pollock, B., in *Hamilton* v. *Walker*, [1892] 2 Q.B. 25, at p. 28. And where the Justices had two

ONT.
H. C. J.
1912
REX
v.
LAPOINTE.
Riddell, J.

informations before them, and, after hearing evidence on the one charge, determined to proceed with and hear the second, and, having so proceeded with and heard the same, thereupon convicted of the offence charged in the first, the conviction was quashed. So in *Regina* v. *Fry* (1898), 67 L.J.Q.B. 67, 19 Cox C.C. 135, 62 J.P. 457, it was held that it is contrary to the rules and principles of the criminal law that Justices should mix up two criminal charges and convict or acquit in one of them with any reference to the facts appearing in the other. In that case one of the Justices had been the Rt. Hon. Sir Edward Fry, "a great lawyer of long judicial experience;" and the Justices satisfied the Court that they applied to the case the evidence that was given in reference to it and to none other; and the conviction was sustained.

In our Canadian Courts the points has come up more than once: *Regina* v. *McBerny* (1897), 3 Can. Crim. Cas. 339, S.C. 29 N.S.R. 327; *Rex* v. *Burke* (No. 2) (1904), 8 Can. Crim. Cas. 14. The two cases in Ontario to which I have referred are not in reality against the view I have indicated. In *Rex* v. *Dunkley* (1910), 1 O.W.N. 861, there were in fact two informations, and both were before the magistrates; but the Court (Middleton, J.) held that one charge and one charge only was tried. In *Rex* v. *Sutherland*, before the same learned Judge, 2 O.W.N. 595, there was also only one charge tried—it being considered that the Crown might prove any number of sales on one day as constituting a selling on that day.

In the present case, the conviction is for selling to Joseph Dubie; and it is evident that all the evidence taken was heard on that charge and considered in determining the question of guilt upon that charge. I am not prepared to say that, if all the evidence given were applicable to that charge, the conviction must be quashed simply because the other informations were before the Police Magistrate, and evidence applicable to the three charges was heard: but, if any of the evidence could not be applicable to the Joseph Dubie charge, it is, to my mind, plain that the conviction cannot stand. This, I think, applies to all the evidence on direct, cross, or redirect examination, and whether for prosecution or defence.

Looking at the defence evidence, it would seem that the real defence is an alibi; there is nothing in that part of the evidence which is not applicable and admissible in the Joseph Dubie case.

In the Crown case, Joseph Dubie swears that it was the defendant who sold him the whisky; Edward Dubie swears that he was with him at the time, and that he, Edward Dubie, bought a bottle at the same time. He would not swear that it was not Louis Lapointe, as it was dark, and he did not know who it was. Remembering that the defence is apparently based upon the

identity of the seller, I cannot say that this last statement was inadmissible. Guertin does not seem to have been with the Dubies, and he says that the man who sold him the whisky was one of the Lapointes, he did now know which one, but he knew by the voice that it was one of the Lapointes—this was at 9.15. Joseph Dubie bought his liquor at about 8.30; the places were close together—or not far apart. Can it be said that this is not cogent evidence against the alibi set up? The defence and the only defence actually set up being that the accused was at Spanish at 8.50 (Modviski), 9.20 (John Foltz), 8.45 (John Smith), 8.30 (Louis McGregor), 6.30, 7.30, 9, and 10 (Simon Lapointe), 9.00 Peter Lapointe, 6.30, 7.30, and 9 (Joseph Lapointe), is it not competent to shew by witnesses that he was at Cutler that evening?

Notwithstanding all this, it may have been that the magistrate would not have accepted the statement of Joseph Dubie that he had bought whisky at all, had it not been sworn that two others had bought whisky the same evening. We are left in the dark as to this—the magistrate has not vouchsafed any explanation. In that view, as the sale to the two others is clearly not evidence of the sale to Joseph Dubie, I think the doubt should be resolved in favour of the defendant, and the conviction quashed.

As to costs and protection, it is the rule of the Court to go as far as possible for the protection of non-professional magistrates. But the present Police Magistrate is a lawyer and a King's Counsel; he has left us in the dark, and not (like that other lawyer Sir Edward Fry) explained his conduct (and it certainly needed explanation); the proceedings were very irregular; and I think the conviction should be quashed with costs to be paid by the magistrate; and that, on these being paid, an order for protection will go, but not otherwise.

*Conviction quashed.*

---

## GROCERS' WHOLESALE CO. v. BOSTOCK.



*Ontario High Court, Sutherland, J. July 9, 1912.*

1. APPEARANCE (§ I—5)—FAILURE TO ENTER A CONDITIONAL APPEARANCE—SOLICITORS' LIEN FOR COSTS—CON. RULE (ONT.) 173.

Where a party to an action failed to take advantage of Con. Rule (Ont.) 173, providing that a conditional appearance might be entered by leave of the Court or a Judge; and entered an unconditional appearance, he cannot after recovery of judgment against him object to the jurisdiction of the Court to entertain a petition by solicitors representing the prevailing party in the action for an order declaring them entitled to a lien for their costs upon the judgment recovered by their client and for payment of these costs by the losing party.

ONT.

H. C. J.
1912

GROCERS' WHOLESALE CO. v. BOSTOCK.

2. SOLICITORS (§ II C 1—30)—SETTLEMENT OF JUDGMENT BY PARTIES—RIGHT TO LIEN ON JUDGMENT FOR COSTS.

Where no specific notice of any claim for a lien as to their costs appears to have been given at any time by the solicitors representing the prevailing party in an action to the party against whom judgment was rendered and who settled with the winning party at a sum less than that which the judgment called for, the Court will, in the absence of evidence that there was collusion or improper conduct on the part of the losing party aiming to deprive the solicitors of their costs, refuse to grant a petition by such solicitors asking for an order declaring them entitled to a lien upon the judgment recovered by their client and for the payment of these costs by the losing party.

[*Reynolds* v. *Reynolds*, 26 Times L.R. 104, specially referred to.]

3. PARTIES (§ III—124)—THIRD PARTY PROCEDURE—INDEMNITY CLAIM—CONDITIONAL APPEARANCE.

A person brought into the action by a "third party notice" upon a claim of indemnity made by the principal defendant against him should obtain leave to enter a conditional appearance on defending such indemnity claim otherwise he will be taken as waiving any right he may have to object to the local jurisdiction.

[*Grocers' Wholesale Co.* v. *Bostock*, 22 O.L.R. 130, followed.]

Statement

PETITION by a firm of solicitors, who represented the defendant in the above action, for an order declaring them entitled to a lien for their costs upon the judgment recovered in the action by the defendant against the Canadian Canning Company, third parties, and for payment of these costs by that company.

Rule 173 (Con. Rules of 1897 (Ont.)) is as follows:—

"173. A conditional appearance may be entered by leave of the Court or a Judge."

*M. L. Gordon*, for the petitioners.

*H. E. Rose*, K.C., for the Canadian Canning Company.

Sutherland, J.

SUTHERLAND, J.:—The action was commenced about July, 1908, by the Grocers' Wholesale Company Limited against John L. Bostock and the Canadian Canning Company. On or about the 22nd September, 1909, the action was discontinued by the plaintiffs as against the Canadian Canning Company. A third party notice was served by the defendant claiming relief against the Canadian Canning Company. The action proceeded to trial, and judgment was given therein on the 20th October, 1910, in favour of the plaintiffs against the defendant, with a reference to ascertain the amount of damages, and judgment also that the Canadian Canning Company indemnify the defendant, as therein set out: *Grocers' Wholesale Co.* v. *Bostock*, 22 O.L.R. 130.

Upon the present application, counsel for the Canadian Canning Company took exception to the jurisdiction to entertain the petition. In view of the finding of the trial Judge, when disposing of the action, I am inclined to think that it is not open now to the company to object to the jurisdiction. The judgment is reported in 22 O.L.R. 130, and at p. 143, the trial Judge

says: "The fact that the third parties here plead in their statement of defence to the jurisdiction does not help them—their election was made on entering their appearance, and, that appearance standing, they cannot take a new position."

However, upon the merits of this application, with some hesitation I have come to the conclusion that the prayer of the petition cannot be granted.

The notice of lien on which the petitioners mainly rely is contained in a letter dated the 20th September, 1909, directed by the petitioners to the solicitor in Vancouver from whom they had originally received instructions to appear for the defendant (Bostock). I quote from the letter: "Up to date we have not been paid any fees by Mr. Bostock, and we would not care, under the circumstances, to incur any further costs unless our bill up to the present is paid and we are assured that the balance will be paid." In a letter dated the following day, they also say: "We wish that you would in the meantime take up the question of our costs with Mr. Bostock, and write us as to whom we are to look for payment of our costs."

The Vancouver solicitor apparently took the matter up with Mr. Bostock, who, on the 28th September, 1909, wrote directly to the petitioners, and I quote from the letter: "I went into the question of your account with Mr. Russell; and, although I contend that the Canadian Canning Company should pay this, yet your good selves had nothing at all to do with any action between the Canadian Canning Company and myself with regard to the account; and I, accordingly, enclose herewith my cheque for $51.61, which kindly acknowledge, and I shall be further obliged if you will let me have your account."

This correspondence was, of course, long before the recovery of the judgment. No subsequent notice of any claim for lien as to costs appears to have been given either to the solicitor in Vancouver or to the Canadian Canning Company. In fact, no specific notice to the latter appears to have been given at any time.

Subsequent to the judgment on the 24th January, 1911, and while the reference to ascertain the damages was pending, the defendant (Bostock) made a settlement with the Canadian Canning Company, in so far as their liability in connection with the said action was concerned. This document states as follows: "The undersigned John J. Bostock hereby receipts to the Canadian Canning Company all liability from or by reason of the express warranty given, mentioned in this case, and upon which the said judgment is founded, and from the said judgment and every clause therein contained: the intention of this receipt being to stay any further proceedings as between the said John J. Bostock and the Canadian Canning Company, with a view to

ONT.

H. C. J. 1912

GROCERS' WHOLESALE CO. v. BOSTOCK.

Sutherland, J.

saving costs, and to release the Canadian Canning Company from all further or other liability in respect of the costs of action between the said John J. Bostock and the Canadian Canning Company, and to ensure that, if any costs are or have been incurred against the Canadian Canning Company in this suit in favour of either the plaintiff or the defendant, the said John J. Bostock shall assume the same and indemnify the Canadian Canning Company therefrom."

An affidavit is filed by the Vancouver solicitor in answer to the petition, in which it is stated, among other things, as follows:—

"9. On receipt of letters dated the 20th and 21st September, 1909, we again took up the question of costs with Mr. Bostock, and he again assured us that all costs had been paid, and that he would call the attention of the petitioners to the fact that we were not to be troubled further about his costs, which he evidently did, as appears from his letter to the petitioners dated the 28th September, 1909, when he tells them, 'Your good selves have nothing at all to do with any action between the Canadian Canning Company and myself with regard to the account; and I, accordingly, enclose herewith my cheque for $51.61, which kindly acknowledge, and I shall be further obliged if you will let me have your account.'

"10. From this date on and until long after the judgment, as between the Canadian Canning Company and Bostock, had been settled in full, as per memorandum of settlement, dated the 24th January, 1911, we heard nothing further from the petitioners with regard to their costs."

It appears that, originally, the Vancouver solicitor had not only instructed the petitioners to act for Bostock in the said action, but had also instructed solicitors at Hamilton to act for the Canadian Canning Company, the Vancouver solicitor apparently acting originally as principal for both defendants, and the defendants apparently being at first disposed to act together to a certain extent in their defence.

In the same affidavit, the Vancouver solicitor says as follows:

"14. In January, 1911, the defendant (Bostock) came to me, knowing that I was no longer connected with the Canadian Canning Company as manager or solicitor, and asked me if the claim as between himself and the Canadian Canning Company could not be arranged. I asked him then how he stood in the east, and he told me that he had arranged everything. I was particular to ask him how he stood with his own solicitors, and he told me he had paid them some $490. . . I then suggested that he should see Mr. Fleming, the manager of the Canadian Canning Company, and they came together and made the settlement, dated the 24th January, 1911. I was asked to draw this settlement up merely

for the reason that I was more or less conversant with the facts of the case. It is for this same reason that, when this present petition was presented, I was asked to instruct agents in Ontario."

"16. I say that, from the time the plaintiffs discontinued their action against the Canadian Canning Company, and the defendant (Bostock) elected to proceed with his third party notice against the Canadian Canning Company, the petitioners have not acted as solicitors for the Canadian Canning Company, nor as agents of my firm, but have been acting under direct instructions from the defendant (Bostock) and his Vancouver solicitor.

"20. . . . I say positively that there was no collusion in any sense, direct or indirect, between Bostock and the Canadian Canning Company, or our firm or any member of the firm, having in view depriving the petitioners' firm of their proper charges for services rendered, or any part thereof."

It is said that at the time Bostock made the settlement for $1,100 with the Canadian Canning Company, he was in insolvent circumstances and in ill-health, and had left the country, and that the canning company compromised with him, under these circumstances, their indebtedness in connection with the remedy over which he had against them, at a much smaller sum than Bostock was reasonably entitled to claim.

While the circumstances may and do look somewhat suspicious, I am unable to find, particularly in the face of the affidavit of the solicitor in Vancouver, that there was any collusion or improper conduct on the part of the canning company to deprive the petitioners of their costs. See *Reynolds* v. *Reynolds*, 26 Times L.R. 104.

The prayer of petition will, therefore, be refused. I do not think, however, on the whole, that it is a case for costs, and I make no order as to the same.

*Petition refused.*

---

## Re SOLICITOR.

**(Decision No. 2.)**



*Ontario High Court, Middleton, J. May 15, 1912.*

1. SOLICITOR (§ II S—34) — AGREEMENT BETWEEN SOLICITOR AND CLIENT FOR COMPENSATION—9 EDW. VII. (ONT.) CH. 28, SEC. 22 ET SEQ.

A writing signed by a person in custody on a criminal charge which stated that "I hereby retain (a solicitor) to make application for my release from gaol, and hereby deliver him a cheque for $300 as retainer," the cheque being claimed by the solicitor as a retainer and not as remuneration for his services, is not an agreement in writing with the client respecting the "amount and manner of payment for the services of a solicitor in respect of the business done or to be done by him" within the meaning of the Law Reform Act, 9 Edw. VII. ch. 28, sec. 22 *et seq.*, which permits agreements in writing between solicitor and client respecting the amount and manner of payment for either past or future services.

ONT.

H. C. J.
1912

RE SOLICITOR.

2. SOLICITORS (§ II C—30)—RETAINER FEE—KNOWLEDGE OF CLIENT OF ITS NATURE.

A retainer is a gift of money by a client to his solicitor outside of and apart from his remuneration, which he is not bound to bring into account, but in order that it be construed as a retainer the former must know the true nature thereof as a gift.

3. SOLICITORS (§ II C—30)—RETAINER FEE—SECURITY FOR FUTURE COSTS.

A solicitor cannot elect to render services gratuitously and keep as a retainer money received from his client, where the latter did not understand the nature of a retainer, and supposed such money was delivered as security for the remuneration of the solicitor, or as a part payment thereon.

4. SOLICITORS (§ II C—30)—DELIVERY OF MONEY BY CLIENT—COMPENSATION—DELIVERY OF BILL OF COSTS—TAXATION.

Where a client delivers money to his solicitor not as a retainer but as security for the payment of his remuneration, the latter is bound to account therefor, and to deliver to the client a bill of his actual charges, which will be referred for taxation.

5. EVIDENCE (§ VII F—621)—OPINIONS OF COUNSEL AS TO SOLICITOR'S CONDUCT—OBTAINING MONEY AS A RETAINER.

Affidavits of counsel expressing opinions regarding the propriety of a solicitor's conduct in obtaining money from his client as a retainer are most improper, on an application by the client for delivery of a bill of costs and for an account of moneys handed by the client to the solicitor.

Statement

MOTION by Canale Demetrio, the client, for an order requiring the solicitor to deliver a bill and to account for certain moneys received by him from the client; and, in the alternative, if it should be held that the solicitor made an agreement respecting payment for his services, for an order reopening the agreement and directing the delivery of a bill and for taxation.

The application was allowed.

*J. D. Falconbridge*, for the client.

*F. Arnoldi*, K.C., for the solicitor.

Middleton, J.

MIDDLETON, J.:—The motion was originally made before the Master in Chambers, and was enlarged by him before a Judge in Chambers (see 3 O.W.N. 1132, 3 D.L.R. 718); and upon the return of the motion before me it was agreed by counsel that the motion should be dealt with by me either as a motion in Court or Chambers, if this makes any difference.

This case, as far as I know, is the first application in which the provisions of the statute 9 Edw. VII. ch. 28, secs. 22 *et seq.** are invoked.

*Section 24 of 9 Edw. VII. (Ont.) ch. 28, is as follows:—

(1) Subject to the provisions of sections 25 to 41, a solicitor may make an agreement in writing with his client respecting the amount and manner of payment for the whole or a part of any past or future services in respect of business done or to be done by such solicitor, either by a gross sum or by commission or percentage, or by salary or otherwise, and either at the same rate or at a greater or less rate than that at which he would otherwise be entitled to be remunerated. In this sub-section the expressions "commission" and "percentage" apply only to non-contentious business and to conveyancing.

(2) This section shall apply to and include any business to which section 53 of the Revised Statute respecting Solicitors, relates, whether or not any general rule under section 52 thereof is in operation.

ONT.

H. C. J.
1912

RE SOLICITOR.

Middleton, J.

Before this statute, known as the Law Reform Act, 1909, it was incompetent for a solicitor to make a bargain with his client for remuneration upon any other or higher scale than that allowed by law. Charges made by solicitors for services rendered by them were subject to review by the Court; and any attempt to obtain more than the law permitted was most sternly dealt with. See, for example, *Re Solicitor*, 14 O.L.R. 464.

This statute has introduced a new era. It permits an agreement in writing between the solicitor and the client respecting the amount and the manner of payment for either past or future services; and this agreement may be either for the payment of a salary, a lump sum, or a percentage; but the agreement as to percentage is permitted only in non-contentious and conveyancing business, so that champertous bargains are not yet sanctioned.

In this case, Canale Demetrio, who describes himself euphemistically as a labourer and as having a very imperfect knowledge of the English language, had apparently likewise a very imperfect knowledge of Canadian law; as on the 7th October, 1911, the Police Magistrate at Porcupine found, upon evidence, that the Nugett Saloon—of which Demetrio was then the proprietor—was a disorderly house, a bawdy house, and a house for the resort of prostitutes; and sentenced Demetrio to six months' imprisonment with hard labour in the Central Prison; a fact which probably justifies the description Demetrio now assumes.

At this time Demetrio had $500 in the bank; and, not relishing the proposed change of occupation, he procured the gaoler at North Bay, where he then was, to send for a lawyer. The gaoler thereupon selected the respondent solicitor, who waited upon Demetrio, and the subject of remuneration appears to have been immediately discussed. The solicitor says: "In all my criminal practice I exact a retaining fee before undertaking a case; my experience having been that, if I did not so protect myself, in many instances, and after heavy disbursements, I would never receive any remuneration."

In pursuance of this, he informed Demetrio that he would undertake an application for the latter's release, but that he would require "a retaining fee of $300;" and, this being agreed to, he "wrote out an agreement calling for a retainer of $300, and at the request of Demetrio made out a cheque for $300, both of which were signed by the said Demetrio."

It is said that this agreement and cheque were read and explained to Demetrio, and he appeared to understand the same. The solicitor is corroborated by a series of three affidavits made by the gaoler, in which he confirms the solicitor's affidavit by instalments.

ONT.

H. C. J.
1912

RE SOLICITOR.

Middleton, J.

In launching this application, Demetrio says that he is not aware that he made any agreement with the solicitor in regard to remuneration, or, if he did sign any document purporting to be an agreement, he did so without independent advice, and that he has no recollection of any such document being signed. He also says that he signed a blank cheque, which he gave to the solicitor, and which he now finds is filled in for $300. The cheque is not produced, but the agreement is. It is in the words following: "North Bay, October 20th, 1911. I hereby retain (the solicitor) to make application for my release from gaol; and herewith deliver to him cheque for $300 as retainer. C. Demetrio."

The motion for discharge was then made, and heard by my brother Sutherland. He refused to make the order sought. See *Rex* v. *Demetrio*, 3 O.W.N. 313, 20 O.W.R. 524.

An application for leave to appeal was heard by myself and dismissed. Mr. Arnoldi appeared for Demetrio on these two applications. What he charged is not stated.

Upon the material, I would find against Demetrio's statement as to the filling in of the cheque. I must also find that he understood the document which he signed. But this does not conclude the matter. I must, in the first place, find that this document is an agreement in writing with the client respecting the "amount and manner of payment for the services of the solicitor in respect of the business done or to be done by him." On the solicitor's own statement, it is not. The payment made was not to be remuneration for the services, but was to be a retaining fee; and, as put in Mr. Arnoldi's affidavit, "the payment of a substantial retainer enables the professional man to exercise an option whether he will charge for his services or not;" and Mr. Arnoldi's first contention on behalf of the solicitor is, that this money was received, as it is said, "as a retaining fee;" and the solicitor now elects to render his services gratuitously, and has, therefore, no bill to deliver—an attitude which is quite consistent with the wording of the document, and justifies the holding that it cannot be relied upon as an agreement under the statute.

Nor can the solicitor retain this $300 without accounting for it, under the guise of a retaining fee. It has more than once been stated that a retainer is a gift by the client to the solicitor. It is something outside of and apart from his remuneration, and something which he is not bound to bring into account. Its true nature must be known to and understood by the client.

That is not the situation here. The solicitor's own account of the transaction justifies me in taking the view that the real situation was, that he declined undertaking these proceedings unless and until his client placed him in funds to the extent of $300, and that, when the client paid this $300, it was not with the intention of its being regarded as a gift, but rather either

ONT.

H. C. J.
1912

RE SOLICITOR.

Middleton, J.

as a security to the solicitor for his remuneration or as a payment of the remuneration. In either case the solicitor is bound to deliver to the client a bill of his actual charges and to account for the $300, if I am right in thinking that the memorandum signed does not constitute a sufficient agreement under the statute.

Two affidavits have been filed by counsel, expressing opinions with regard to the propriety of Mr. Bull's conduct. I think that these affidavits are most improper.

I direct the delivery of a bill, and that it be referred for taxation, and reserve the question of costs until after the taxation.

*Application allowed.*

---

## CUNNINGHAM v. MICHIGAN CENTRAL R. CO.

ONT.

C. A.
1912

June 18.

*Ontario Court of Appeal, Moss, C.J.O., Garrow, Maclaren, Meredith, and Magee, JJ.A. June 18, 1912.*

1. RAILWAYS (§ II D 2—36)—LIABILITY—BRAKEMAN OF ANOTHER RAILWAY —TRACING CARS.

A brakeman who was employed by a railway company other than the defendant, cannot recover for injuries sustained by being struck by a train where, without the knowledge or leave of the defendant, he was in its yard looking for cars that might be delivered to his master in due course, so as to, for his own convenience, expedite their disposal, when received, since no breach of any duty owed him by the defendant was the cause of his injury.

2. EVIDENCE (§ II E 5—163)—PRESUMPTION—ESTABLISHING KNOWLEDGE—ACQUIESCENCE OF RAILWAY COMPANY.

Permission of a railway company to a brakeman of another company to enter its yards to look for cars that might be delivered his master in due course, so as to, for his own convenience, facilitate their disposal when received, cannot be inferred from the testimony of the plaintiff that he had done so for several months in the night-time, or from the testimony of a servant of the defendant that he had "seen them come out different times," since it was not sufficient to shew knowledge on the part of the defendant of the plaintiff's conduct, much less to establish acquiescence therein sufficient to amount to leave or right to do so.

3. RAILWAYS (§ II D 2—36)—EMPLOYEE OF ANOTHER RAILWAY IN DEFENDANT'S YARD—DUTY TO TRESPASSER—SPEED OF TRAIN IN RAILWAY YARD.

A brakeman of a railway company other than the defendant cannot recover for injuries sustained while, for purposes of his own, he was in the defendants' yard, by being struck by a train that gave all statutory warnings of its approach, where the plaintiff stated immediately after the accident that he saw the train coming but supposed that it was on a track different from that near which he was standing and where no peculiar circumstances are shewn to require a lessening of speed in the yard below that permitted by statute.

Statement

APPEAL by the defendants from the judgment of Teetzel, J., upon the findings of a jury, in favour of the plaintiff, a brakesman employed by the Toronto Hamilton and Buffalo Railway

ONT.

C. A.

1912

CUNNINGHAM v. MICHIGAN CENTRAL R. Co.

Company, who, while engaged in checking cars for his employers, was struck by an engine in charge of the defendants' servants, and injured, in an action for damages for his injuries. The jury found negligence, and assessed the plaintiff's damages at $1,500, for which sum he was awarded judgment with costs.

*D. W. Saunders*, K.C., and *A. A. Ingram*, for the defendants.

*D. L. McCarthy*, K.C., and *J. G. Gauld*, K.C., for the plaintiff.

The judgment of the Court was delivered by

Meredith, J.A.

MEREDITH, J.A.:—It seems to me to be impossible to support the judgment in this case, directed to be entered in the plaintiff's favour at the trial.

In the first place, there is no evidence of any duty to the plaintiff, on the part of the defendants, the breach of which had anything to do with his injury. He was in the place where the accident happened without the leave or knowledge of the defendants, as far as the evidence shews. The work he was engaged in was premature; he had no right to interfere with the cars in any way until they were delivered by the defendants to his masters, the other railway company. That which he was doing was being done for his own convenience, and was at best but only a cursory glance at cars which might, and probably would, be so delivered in due course—a glance which might, and no doubt would generally, aid in the convenient disposition of some of the cars after such delivery in due course. There is no evidence of any duty, or right, on the part of the other railway company to interfere, in any manner, with any cars, such as those in question, until they were duly delivered; the delivery being made by the transfer of way-bills, through the station-master, or the night operator performing his duty, and shunting the cars from the defendants' lines into the line of the other railway company. So that there seems to me to be no lawful justification for the plaintiff, or any other of the servants of the other railway company, going among the tracks of the defendants for any purpose in connection with these cars. But it was said that it had been habitually done by them, and that from such conduct it ought to be conclusively presumed that it was done with the leave of the defendants. There is, however, no such evidence sufficient, in my opinion, to support even a prima facie case of such leave. The whole evidence is that of the plaintiff, who said that he had done the same sort of thing, in the night-time, for several months; and that of a brakesman of the defendants, that he had "seen them come out different times there." Surely there is in this no reasonable evidence of any knowledge on the part of the defendants of the plaintiff's actions in this respect, not to speak of acquiescence in it amounting to even leave, much less a right. The plaintiff, then, being really a trespasser upon the

defendants' property, it cannot be reasonably contended that there was a breach of any duty towards him.

Assuming, however, that the plaintiff had a right to be where he was, on what ground can it be said that the defendants were guilty of negligence towards him? The jury have said, in not slowing speed and giving such warning as ringing the bell or blowing the whistle of the engine of the train by which he was injured on approach to station or yard limits. It is not proved, nor is it now contended, that any "warnings" which legislation provides for were not given; the evidence is that they were given; so that that which the jury must have meant was additional warning, because the warnings required by statute and given were given on approaching the station or yard limits; it may be that they meant within the yard limits, though there is no evidence that the bell was not continuously rung. Having given all the warnings required by statute-law, and the railway being fenced, no jury has a right to be a law-maker in each particular case, and in effect overrule legislation without any peculiar circumstances requiring a reduction of speed. It ought not to be the law that each jury may in each particular case determine what ought to have been the speed of a railway train, though there are no kind of peculiar circumstances in the particular case requiring a lessening of the statute-permitted speed.

Again, the plaintiff testified that, if the bell were ringing, he could not hear it; he said, "You could not hear a bell very far coming that distance;" and two witnesses, both trainmen, and one the engineer of the train on which the plaintiff was employed, testified that, immediately after the accident, the plaintiff said that he saw the train coming, but mistook the place where he was standing, thinking there was a track between him and the west-bound line on which the oncoming train was; that is, that his own mistake, not any want of warning, caused his injury. The most that he would testify to, opposed to this, was that he had no recollection of saying it, and that, if he did, it was untrue; so that I cannot think there was any reasonable evidence that the accident was caused by the speed of, or any want of warning from, the train by which he was struck. His statement at the time is the only reasonable one of the cause of the accident, having regard to the fact that he was an experienced brakesman, with a knowledge of the yard and of the movement of trains at the time, especially of the incoming, about that time, of the fast train by which he was struck in the noise of its oncoming, after signalling its approach, and in the glare of the head-light of the engine.

I would allow the appeal and dismiss the action.

*Appeal allowed and action dismissed.*

ONT.

C. A. 1912

June 28.

## STRONG v. CROWN FIRE INSURANCE CO.

*Ontario Court of Appeal, Garrow, Maclaren, Meredith, and Magee, JJ.A., and Lennox, J. June 28, 1912.*

1. APPEAL (§ VII M 1—524) — WRONGFUL CONSOLIDATION — REMITTER FOR FURTHER TRIAL.

Where the plaintiff, while actions on policies of insurance were pending, to which defences had been interposed, brought two new actions, which, notwithstanding they had not proceeded to the length of pleading, were ordered consolidated with the older actions, after which the trial Court found in favour of the plaintiff in all the actions, such order of consolidation, as well as the judgments so rendered, will be vacated, but without prejudice to an application to the trial Court, under sec. 158 of the Ont. Insurance Act of 1912 (2 Geo. V. (Ont.) ch. 33), to make a further order of consolidation upon the completion of the pleadings in the new actions, whereupon the cases shall be heard upon the evidence already taken, together with such further testimony as either party may desire to give in relation to such new actions.

[*Strong* v. *Crown Fire Insurance Co.*, 1 D.L.R. 111, 3 O.W.N. 481, 20 O.W.R. 901, reversed.]

Statement

APPEAL by the defendants from the judgment of SUTHERLAND, J., 3 O.W.N. 481, 1 D.L.R. 111.

See also note of a motion before SUTHERLAND, J., 3 O.W.N. 1377, 3 D.L.R. 882.

The appeal was allowed in part.

*F. E. Hodgins*, K.C., and *A. H. F. Lefroy*, K.C., for the defendants.

*N. W. Rowell*, K.C., and *G. Kerr*, for the plaintiffs.

GARROW, J.A.

The judgment of the Court was delivered by GARROW, J.A.:—The actions were brought upon insurance policies against loss by fire upon the property of the firm of Wright & Hughes, at the town of Dresden. There were several defences set up in the statements of defence—the one which involved the most evidence and the greatest difficulty being as to the value of the stock-in-trade which was destroyed, upon which a large number of witnesses were examined. It appears that, while the actions were pending, the plaintiffs in two of the actions, in anticipation of an objection that their actions had been prematurely brought, caused other actions upon the same causes of action to be commenced, which actions had apparently not proceeded the length of pleadings when the judgment now in appeal was delivered. In that judgment, Sutherland, J., ordered the consolidation of these new actions with the older ones, and found in favour of the plaintiffs in all the actions. Objection is now taken to the consolidation—among other reasons, because, by the course adopted, the defendants were prevented from pleading and setting up defences to the new actions, and giving further evidence in support of such defences.

On the other hand, it is alleged that the defendants were given the opportunity to do what they now say they were prevented from doing, and that they waived the right to do so and cannot now complain.

It is not easy to determine exactly what occurred. What seems clear is, that there is not upon the record, where it should be, any proper evidence of such waiver. The effect of what occurred is plainly to put the defendants at a disadvantage, from which in some way they are entitled to be relieved. And the reasonable and fair way, in my opinion, is, without expressing any opinion upon the merits, which I think would be premature, to vacate the present judgment, including the consolidation, permit the parties to plead and to offer such further evidence in the new actions as they may be advised, and to direct the cases to be reheard or tried before Sutherland, J., upon the evidence already given and such further evidence, if any. This to be, of course, without prejudice to any order which the learned Judge may make as to consolidation, under sec. 158 of the Ontario Insurance Act, 1912,* upon the completion of the pleadings in the new actions.

The costs of this appeal and of the former trial, and of the further proceedings before Sutherland, J., may all, I think, not unfairly, be made costs in the cause, and, as such, subject to the order of the trial Judge. The misunderstanding is one for

*Sec. 158 of the Ontario Insurance Act, 2 Geo. V. ch. 33, is as follows:—

(1) Where several actions are brought for the recovery of money payable under a contract of insurance the Court may consolidate or otherwise deal therewith so that there shall be but one action for and in respect of all the claims made in such actions.

(2) Where an action is brought to recover the share of one or more infants, all the other infants entitled, or the trustees, executors, or guardians entitled to receive payment of the shares of such other infants, shall be made parties to the action, and the rights of all the infants shall be determined in one action.

(3) In all actions where several persons are interested in the insurance money, the Court or Judge may apportion among the persons entitled any sum directed to be paid, and may give all necessary directions and relief.

(4) In an action commenced in a Division Court or a County or District Court for any insurance or benefit alleged to be payable to the assured or any beneficiary, assignee, representative or guardian, when the insurance or benefit claimed is in the nature of an annuity, or other periodical or recurring payment, so that the present or capitalized value of the insurance or benefit amounts or may amount to a sum beyond the jurisdiction of the Court, the action may upon the application of the defendant be removed into the High Court upon such terms and conditions as to costs and otherwise as the Court may direct: R.S.O. 1897, ch. 203, sec. 146.

(5) Where the person entitled to receive money due and payable under any contract of insurance except insurance of the person is domiciled or resides in a foreign jurisdiction, and payment, valid according to the law of such jurisdiction, is made to such person, such payment shall be valid and effectual for all purposes: 3 Edw. VII. ch. 15, sec. 4.

ONT.

C. A.
1912

STRONG
v.
CROWN FIRE INSURANCE CO.

GARROW, J.A.

which no one is particularly to blame, although it is rather apparent that, if Mr. Rose, acting for the defendants, had attended, as he at first intended to do, the meeting for the settlement of the minutes of the judgment, of which he was duly notified, the situation which I have been dealing with would probably not have been created. I do not say this to blame him at all; for his diversion from his original intention, while unfortunate in the result, is, I think, sufficiently accounted for.

The appeal will, therefore, to the extent I have indicated, be allowed, and the cases remitted for further trial before Sutherland, J.

*Appeal allowed in part.*

QUE.

K. B.
1912

June 15.

## CARDINAL v. GEOFFROY.

*Quebec Court of King's Bench (Appeal Side), Archambeault, C.J., Trenholme, Lavergne, Cross and Carroll, JJ. June 15, 1912.*

1. PENALTIES (§ I—4)—STATUTORY PENALTY FOR FAILURE TO REGISTER MARRIAGE STATUS—R.S.Q. ART. 7442—INFORMER.

Under the R.S.Q. 1909 the action for penalty for failure by a trader to register a declaration as to his marriage status in accordance with art. 1834 C.C. can only be brought by the Crown and does not lie in favour of any person or informer, as the statutes call for a special authorization by law or by municipal by-law before an individual can sue by way of *qui tam* action.

Statement

APPEAL from a judgment of the Superior Court, Laurendeau, J., rendered on September 13th, 1911, maintaining the respondent's exception to the form and dismissing the plaintiff's action for a penalty of $100 for failure to register a declaration as to his marriage status.

The appeal was dismissed with costs.

Argument

*E. F. Surveyer*, K.C., for the appellant, said the penalty was incurred by a violation of par. 3 of art. 1834 C.C. and was recoverable according to the procedure laid down in R.S.Q. 7538 *et seq.* (1909), introduced by 6 Edw. VII. ch. 37, abrogating the law as regards *qui tam* actions. The appellant could therefore sue in his own name: 7442 and 5639 R.S.Q., art. 7538 R.S.Q. being a general law covering all cases concerning fines and penalties: *Lamontagne* v. *Grosvenor Apartments, Ltd.*, Que. 20 K.B. 221.

*T. Rinfret*, K.C., for the respondent, argued that in penal actions all formalities must be strictly complied with: *Lamontagne* v. *Grosvenor Apartments, Ltd.*, Que. 20 K.B. 221*. The

*It was held in the case here referred to that penal actions, partaking of the nature of criminal prosecutions, should strictly comply with the formalities prescribed by law. Therefore, an action for penalties imposed by a federal Act in the form *qui tam* is irregular such action being open only to the Crown or to a private person in its name: Criminal Code sec. 1038 and art. 30 R.S.Q. 1909; *Lamontagne* v. *Grosvenor Apartments*, Q.R. 20 K.B. 221, 11 Que. P.R. 329, affirming 37 Que. S.C. 274.

QUE.
K. B.
1912
CARDINAL v. GEOFFROY.
Argument

action is badly taken, because the names and surnames of the appellant are not fully set out as required by 122 C.P. and because art. 7442 R.S.Q. says that penalties can only be recovered by a person suing as well in his own name as in that of His Majesty. This enactment is absolute and it cannot be contended that the revision of the statutes in 1909 repealed provisions of the statute of 1906 by implication: 23 Am. & Eng. Encyc. of Law, pp. 146-8, 422-32, *ibid.*, vol. 26, p. 743; Endlich, Interpretation of Statutes, pp. 276, 287-91; Maxwell, Interpretation of Statutes, 4th ed., pp. 263-76; Hardcastle, "On Statutory Law," 3rd ed., pp. 498-508.

*Surveyer*, K.C., in reply.

Archambeault, C.J.

Montreal, June 15, 1912. ARCHAMBEAULT, C.J.:—Appeal from the judgment of the Superior Court maintaining the exception to the form of the defendant and dismissing the plaintiff's action.

The declaration alleges: First, that the respondent is married; second, that he is carrying on business alone as hotelkeeper; third, that he never filed at the prothonotary's office or in the registry office the declaration required by art. 1834 C.C. as to whether he is common as to property with his wife or separate as to property; fourth, that he has thus incurred the penalty of $100 imposed by art. 7442 R.S.Q.

This action was met by an exception to the form alleging: First, that the writ of summons does not mention the names and surnames of the appellant; second, that the latter could not sue in his own name alone, but should have proceeded by a *qui tam* action.

Art. 7437 R.S.Q. of 1909 requires all persons associated in partnership to transmit a declaration to this effect to the prothonotary and the registrar.

Art. 7439 imposes the same obligation on every person who, not being associated with any other person, carries on business under a firm name or under some name or designation other than his own name, or under his own name, with the addition of the words "and company," or some other words or phrase indicating a plurality of members.

Art. 7442 adds that every member of a partnership or person doing business under a co-partnership style, failing to comply with the provisions first mentioned or the provisions of the third paragraph of art. 1834 C.C., is liable to a fine of one hundred dollars, which may be recovered by any person acting as well in his own name as in that of His Majesty.

The last paragraph of art. 7442 adds that the provisions of the law respecting penal actions apply to suits for penalties under this section. Art. 7538 of the same statutes, which treats of penal actions, states that whenever by law or under a muni-

QUE.

K. B. 1912

CARDINAL v. GEOFFROY.

Archambeault, C.J.

cipal by-law, any person is authorized to sue for the recovery of any fine or penalty before the civil Courts, he may recover the same in his own name as an ordinary debt.

It is in virtue of this last article that the appellant claims he had the right to take the present action in his own name. But this article gives the right to a person to take suit in his own name only when he is authorized by law or by a municipal by-law to sue for the recovery of a fine or penalty.

It is true that art. 1834 C.C. imposes the penalty of art. 7442 R.S.Q., that is to say, a fine of one hundred dollars, on every married person who carries on business alone or in partnership without registering the proper declaration in the prothonotary's office. But there is no law authorizing any person to sue for the recovery of such penalty. Hence the fine or penalty in question is due to His Majesty and can only be recovered by an action taken in the name of His Majesty.

The appeal is, therefore, dismissed with costs.

Cross, J.

CROSS, J.:—The plaintiff, appellant, does not bring this action within the rule of art. 7442 R.S.Q., inasmuch as that article applies only to members of partnerships and to persons doing business under a co-partnership style, and it is not alleged either that the defendant, respondent, is a member of a partnership or does business under a co-partnership style.

The plaintiff must consequently support his right to sue for the penalty in his own name upon some enactment other than art. 7442.

The offence charged is default to transmit to the registrar a declaration of matrimonial proprietary status as required by art. 1834 C.C.

By that article the offence is made punishable by the penalties "above mentioned," which turn out to be the penalties mentioned in art. 7442 R.S.Q., so that though art. 7442 does not (as above pointed out) enact the offence here charged, it does mention the penalty. We thus have an offence created by 1834 C.C. and a penalty mentioned in art. 7442 R.S.Q. and it remains to be seen whether or not the plaintiff is a proper party to sue for the penalty by ordinary civil law action as he is doing.

We have been referred by counsel for the plaintiff to art. 7538 R.S.Q., but it is to be observed that that article applies only in cases in which a law or by-law authorized the suit to be taken by "any person."

Does any law or enactment authorize "any person" to sue for the penalty, respecting the declaration of matrimonial regime, sued for in this action? We have already seen that art. 7442 R.S.Q. does not. This would seem to be due to an oversight in the revision of the statutes. It follows that the penalty sued for by this action is merely a Crown debt to be sued for by His Majesty's Attorney-General.

QUE.

K. B.
1912

CARDINAL
v.
GEOFFROY.

The appellant is, in that view, a mere private citizen, and the taking of his action has not had the effect of bringing before the Court any claim of the Crown to a penalty, and his appeal should be quashed.

*Appeal dismissed.*

---

## BETHUNE v. THE KING.

ONT.

H. C. J.
1912

March 30.

*Ontario High Court. Trial before Falconbridge, C.J.K.B. March 30, 1912.*

1. TAXES (§ V A—184)—INCOME FOR LIFE—GIFT—SUCCESSION DUTY ACT, 7 EDW. VII. CH. 10, SEC. 11 (1); 12 (5).

A gift for life of the income from the residue of an estate does not create an annuity within the meaning of the Succession Duty Act (Ont.).

[*Foley* v. *Fletcher* (1858), 3 H. & N. 796; *Winter* v. *Mouseley* (1819), 2 B. & Ald. 802; *Booth* v. *Ammerman* (1856), 4 Bradford, (N.Y. Surr.) 129, specially referred to.]

2. MISTAKE (§ VII B—160)—RECOVERY OF MONEY FROM CROWN—MISTAKE OF LAW.

Money paid in satisfaction of a succession duty under a mistake of law to the effect that a bequest created an annuity, cannot be recovered from the Crown.

[*Rogers* v. *Ingham* (1876), 3 Ch. D. 351; and *William Whiteley Limited* v. *The King* (1909), 101 L.T.R. 741, referred to.]

3. MISTAKE (§ VII A—150)—RECOVERY OF MONEY VOLUNTARILY PAID—MISTAKE OF FACT.

The future happening of an unforeseen event which affects the right of one to whom money had been voluntarily paid does not amount to a mistake of fact that will permit the payor to recover such payment.

4. MISTAKE (§ VII A—150)—RECOVERY OF SUCCESSION DUTY PAID UNDER MISTAKE OF FACT—RECOVERY BACK—DEATH OF ANNUITANT—7 EDW. VII. CH. 10, SEC. 11 (1).

Where the executor of an estate from which an annuity was payable, in order to facilitate the settlement thereof, paid all of the succession duty on the annuity in one payment, instead of in four annual instalments, as he might have done under sec. 11 (1) of the Succession Duty Act, 7 Edw. VII. ch. 10, he cannot recover from the Crown upon the death of the annuitant immediately after such payment was made, on the theory that it was paid under a mistake of fact, the amount of the three annual instalments of succession duty that would have subsequently accrued had it not all been paid at one time, notwithstanding such Act provides that in the event of the death of the annuitant before the expiration of the four years, payment should be required only of the instalments which fell due before the death of the annuitant.

5. EXECUTORS AND ADMINISTRATORS (§ IV C—122)—PAYMENT OF SUCCESSION DUTY—MISTAKE OF LAW.

The payment by an executor, in order to facilitate the settlement of an estate, of the succession duty on a legacy, on the theory that it created an annuity, is not improvident, notwithstanding it subsequently appeared to have been erroneously paid under a mistake of law.

Statement

PETITION of right presented by the suppliants as executors and trustees of the will of John Sweetland, deceased.

The petition was dismissed.

ONT.

H. C. J.
1912

BETHUNE
v.
THE KING.

Falconbridge, C.J.

*F. H. Chrysler*, K.C., for the suppliants.
*H. D. Gamble*, K.C., for the Crown.

March 30, 1912. FALCONBRIDGE, C.J.:—The petition, after setting out the will and probate thereof, states that the Solicitor to the Treasury for Ontario furnished the suppliants a statement shewing that the total succession duty payable in respect of the legacies and bequests of the said will amounted to the sum of $8,379.82; that of this amount the sum of $2,139.80 was attributable to duty payable in respect of the annuity bequeathed by the will to Caroline Florence Anderson;* that, in and by sec. 11 of the Succession Duty Act then in force, the duty payable upon any legacy given by way of annuity was to be paid in four equal consecutive annual instalments; and that, in the event of the annuitant dying before the expiration of the first four years, payment only of the instalments which fell due before the death of the annuitant should be required.

The suppliants, deeming it advisable to discharge the whole of the succession duty at once, and obtain a release thereof, paid to the Treasurer for Ontario a sum of money which included the duty, amounting in the aggregate to $2,139.80, attributable to the annuity bequeathed to the said Caroline Florence Anderson.

The said Caroline Florence Anderson departed this life on or about the 9th day of November, 1908; and, therefore, the suppliants claim that, at the time of her decease, the only amount which they were legally liable for was the instalment of $534.95 which became payable on the 5th May, 1908. And the suppliants claim that they paid to the said Treasurer $1,604.85 in excess of the legal and proper amount payable.

The Attorney-General for Ontario, on behalf of His Majesty, objecting that the petition of right discloses no facts giving any cause of action to the petitioners against the Crown, says that the legacy or bequest to the said Caroline Frances Anderson was not an annuity within the meaning of the Succession Duty Act then in force; and, therefore, is not affected by that provision of sec. 11,

*The testator died on the 5th May, 1907. His will was dated the 10th March, 1906. After certain specific bequests, he created a residuary trust fund, and directed that his executors and trustees should stand possessed thereof upon trust during the respective lives of his daughters, Selina Florence Geddes, Elizabeth Jane Thompson, and Caroline Florence Anderson, "to pay the net income derivable from the investment of the said residuary trust fund . . . unto the said Selina Florence Geddes, Elizabeth Jane Thompson, and Caroline Florence Anderson," in certain proportions specified; "and, upon the death of any of my said daughters, in trust to pay the share of such deceased daughter in the said net-income unto the surviving daughters in equal shares, and, upon the death of any one of such two surviving daughters, in trust to pay the whole of the said income unto the sole surviving daughter during her lifetime, and, upon the death of such sole surviving daughter, in trust to divide the said residuary trust fund between my granddaughter Isabella Shaw, . . . the children of the said Caroline Florence Anderson, and the children of my stepson . . ., share and share alike, so that each of such persons will receive an equal amount."

ONT.

H. C. J.
1912

BETHUNE
v.
THE KING.

Falconbridge,
C.J.

sub-sec. 1, of said Act, which requires payment only of the instalments falling due before the death of the annuitant; and he further pleads that, if the legacy in question does come within the provision of sec. 11, then the amount paid for succession duty was paid under a mutual mistake of law, and is not recoverable back.

He further pleads, in the alternative, that, if the petitioners are entitled to the repayment of the said succession duty as claimed in the petition, then a further succession took place on the death of the said Caroline Florence Anderson as to that portion of the estate from which her claim was derived; and the succession duty thereon should be ascertained and paid.

Further, in the alternative, he pleads that the commutation of the succession duty to be paid was compromised upon the consideration of the whole estate, and the different interests therein; and, if the petitioners are entitled to repayment as asked, then the whole matter should be re-opened, and a new computation made.

The case rests entirely on the correspondence and on the uncontradicted evidence of Mr. Bethune.

The money was voluntarily paid in supposed pursuance of secs. 11 (1) and 12 (5) of the Succession Duty Act then in force (7 Edw. VII. ch. 10).

Section 11 (1) is, in part, as follows: "Provided that the duty chargeable upon any legacy given by way of annuity whether for life or otherwise shall be paid in four equal consecutive annual instalments, the first of which shall be paid before the falling due of the first year's annuity and each of the three others within the same period in each of the next succeeding three years. In case the annuitant dies before the expiration of the said four years payment only of the instalments which fall due before his death shall be required."

Section 12 (5) is as follows: "Notwithstanding that the duty may not be payable under this section until the time when the right of possession or actual enjoyment accrues an executor or person who has the custody or control of the property, may, with the consent of the Treasurer, commute the duty which would or might, but for the commutation, become payable in respect of such interest in expectancy, for a certain sum to be presently payable, and for determining that sum the Treasurer shall cause a present value to be set upon such duty, regard being had to the contingencies affecting the liability to and the rate and amount of such duty and interest; and on the receipt of such sum the Treasurer shall give a certificate of discharge from such duty."

Both the Solicitor to the Treasury and the suppliants seem to have assumed that the benefit conferred by the will upon Mrs. Anderson was a legacy given by way of annuity, within the meaning of sec. 11 (1). The authorities are quite clear that it was not an annuity. They are set out in the extended notes of argument, and the effect both of English and American cases is, that the income or interest of a certain fund is not an annuity, but simply

ONT.

H. C. J. 1912

BETHUNE v. THE KING.

Falconbridge, C.J.

a gift of interest or income. Among the numerous authorities cited, I refer particularly to *Foley* v. *Fletcher* (1858), 3 H. & N. 769; *Winter* v. *Mouseley* (1819), 2 B. & Ald. 802, at p. 806, where Best, J., says: "I have . . . always understood the meaning of an annuity to be where the principal is gone forever, and it is satisfied by periodical payments."* See, in the *United States*, *Booth* v. *Ammerman* (1856), 4 Bradford N.Y. (Surr.) 129, at p. 133.

If the money, then, was paid under mistake of law, which Mr. Chrysler seems to disavow, it could not be recovered back. James, L.J., says, in *Rogers* v. *Ingham* (1876), 3 Ch.D. 351, at p. 355: "I have no doubt that there are some cases which have been relied on, in which this Court has not adhered strictly to the rule that a mistake in law is not always incapable of being remedied in this Court; but relief has never been given in the case of a simple money demand by one person against another, there being between those two persons no fiduciary relation whatever, and no equity to supervene by reason of the conduct of either of the parties . . ." That is not this case, and it is the Crown from whom repayment is sought; and the position of the Crown is, as one might expect, certainly not inferior to that of a subject. This is very clearly laid down in *William Whiteley Limited* v. *The King* (1909), 101 L.T.R. 741.

Then it was certainly not paid under a mistake of fact. The only mistake (if any) was something which related to a future event, *viz.*, the absolutely unforeseen occurrence of this lady departing this life when she did.

I do not see, therefore, how the suppliants can recover. It is not a case of hardship; the estate as a whole does not suffer. If the money had not been paid in this way, there would have been some other succession; and, some of the reversionary legatees being strangers, it is probable that, in the result, a larger amount of duty would have to be paid.

In this view, and considering that it was done to facilitate a winding-up of the estate, I think that the payment by the executors was not improvident; and probably in the passing of their accounts this circumstance will be taken into consideration.

I am of the opinion, therefore, that no case has been proved giving rise to any cause of action against the Crown; and that the petition should be dismissed.

It is not a case for costs as between the parties. If I have the power so to order, I direct that the suppliants be paid their costs, as between solicitor and client, out of the estate.

*Petition of right dismissed.*

*The following English cases were cited, in addition to those mentioned by the learned Chief Justice: *Gibson* v. *Bott* (1802), 7 Ves. 89, 96; *Pridie* v. *Field* (1854), 19 Beav. 497; *Hedges* v. *Harpur* (1858), 3 De G. & J. 129; *Baker* v. *Baker* (1858), 6 H.L.C. 616; *In re Crane*, [1908] 1 Ch. 379.

## CANADIAN NORTHERN R. CO. v. LEVINE.

QUE.
K. B.
1912

*Quebec Court of King's Bench (Appeal Side), Archambeault, C.J., Trenholme, Lavergne, Cross and Carroll, JJ. June 15, 1912.*

June 15.

1. JURY (§ I B1—10)—RIGHT TO TRIAL BY JURY—TIME FOR ELECTION—EFFECT OF FILING SPECIAL PLEA.

Where the option for a trial by jury should be made within three days after issue joined (423 C.P.) and the defendant after filing a plea of general denial is subsequently allowed to file a special detailed plea, then the plaintiff may move for a trial by jury on such special plea, although he did not do so on the plea of general denial.

2 PLEADING (§ P—130)—CONSENT TO FILE AFTER DEFAULT BEFORE RIGHT TO JURY IS FORFEITED—EFFECT.

Where a consent to file a pleading is given after the expiry of the legal delays, but before the right to a jury trial is forfeited, such consent has an interruptive effect on these delays and the plaintiff has three days from such consent to move for a jury trial. But a consent to file a pleading after the right to a jury trial has lapsed will not make this right revive.

[*Matthews v. Town of Westmount*, Que. 6 P.R. 52; *Asselin v. Montreal Light, Heat & Power Co.*, Que. 7 P.R. 218; *Anderson v. The Norwich Fire Ins. Co.*, Que. 17 K.B. 361, distinguished; *St. Paul Electric Light & Power Co. v. Quesnel*, Que. 12 P.R. 158, in appeal, followed.]

3. PLEADING (§ I N—111)—AMENDMENT BY CONSENT—RIGHT TO TRIAL AFTER FILING OF SPECIAL PLEA.

Where a plea of general denial is filed in order not to retard the hearing of the case which is to be inscribed for proof and hearing with the understanding that such plea may be replaced later at any time before the trial by a special plea, and the case is inscribed on the roll in the ordinary way, then such agreement precludes the option for a trial by jury on the special plea filed later by consent.

Statement

APPEAL by the defendant from an interlocutory judgment of the Superior Court, Charbonneau, J., rendered on March 29th, 1912, granting the respondent's motion that the case be tried before a jury.

The appeal was allowed and the motion dismissed with costs.

*D. R. Murphy*, K.C., and *A. Perrault*, for the appellant.

*G. C. Papineau-Couture* and with him *E. F. Surveyer*, K.C., as counsel, for respondent.

Archambeault, C.J.

Montreal, June 15, 1912. ARCHAMBEAULT, C.J.:—This is an action in damages for defamatory libel and the present appeal is from a judgment which granted a motion of the respondent, making option for a trial by jury. The question to be decided is whether the respondent has a right to demand this trial by jury.

Art. 423 C.P. decrees that the option for this form of trial is made either in the declaration or in the defence, or by a special application to the Judge within three days after issue joined. In the present case the respondent was plaintiff and the appellant defendant in the Court below. The plea of the company was filed on the 12th of January, 1912. It was a plea of general

QUE.

K.B.
1912

CANADIAN NORTHERN R. Co.
v.
LEVINE.

Archambeault, C.J.

denial. This plea, which was filed long after the delays granted by law to a defendant to plead, bears on it the following declaration, signed by the respondent and the appellant.

> It is understood between the parties that the present plea is filed in order that the case may not be retarded, and that before the day which will be fixed for proof and hearing the present plea will be replaced by a special plea.

Four days after the filing of this plea, on the 16th of January, 1912, the respondent inscribed the case on the roll for proof and hearing on the merits, as allowed by article 293 C.P. Subsequently, on March 5th, 1912, the appellant replaced this plea of general denial by a special plea. The respondent had six days' delay to answer this plea, but only filed this answer on the 15th of March. The appellant consented to the filing of this answer, and the consent is dated March 14th. The answer alleged new facts. On the morrow of the filing of this answer, the 16th of March, the respondent served on the appellant a motion for a trial by jury, with notice of presentation to the Court for adjudication for the 18th. On the said day a motion was, as a matter of fact, presented and granted.

The question, as I have already said, is as to whether this motion was presented within three days after issue joined. The appellant contends that the option was made too late because the issues were joined on the 12th of January, when it filed, with the respondent's consent, a plea of general denial. The Superior Court decided that the issues had not been really joined by this plea. The real plea of the appellant was only produced on March 5th. The appellant itself understood this so well that on the 14th of March it consented to the filing of an answer to this plea. This plea of March 5th absolutely did away with the first plea, and all that was done in virtue thereof. The issues were re-opened and all the rights which flow from the filing of the plea accrued again in favour of the respondent. The first argument of the appellant is therefore ill-founded.

In the second place, the appellant says that even if the delays for procedure started again with the production of the second plea, the respondent did not answer this plea within the six days following, and the issues, therefore, became joined at the expiry of this delay, to wit, on the 11th of March. The respondent, says the appellant, should have presented his demand for a trial by jury within the three days following, to wit, on the 14th of March at the latest, and the option was, therefore, made after the expiry of the delay allowed by the law.

The respondent answers this by saying that on the 14th of March the appellant consented to the filing of the answer to plea, and that at that time the delay granted by law within which the option for trial could be made, had not yet expired, and would only have expired on the night of the said day, the

14th of March. There can be, therefore, no question here as to the revival of a right which has become extinguished. All the judgments referred to by the appellant were rendered in cases where the right to a trial by jury had lapsed by the expiry of the delay within which it was to be exercised. The Courts in these cases have decided that the consent by one party to allow the filing of a plea or other pleading, or of an amendment to a pleading, has not the effect of reviving the right to a trial by jury, once this right has been lost. These judgments, therefore, do not apply to the present case.

Here the right to the trial by jury still existed when the appellant consented to the filing of an answer to its plea. The effect of this consent was to prolong the delay for the exercise of this right. The answer to plea alleged new facts. According to the terms of art. 214 C.P., when an answer to plea contains new facts, then the issue is joined only by the filing of a reply, or by the failure to file such reply within six days. Now, as the answer to plea was filed on the 15th of March, the issues were only joined on the 22nd of March. Hence the application for a trial by jury was made within the proper delays.

But a third question arises in the case, and on this point I agree with the appellant. As I have already said, the respondent, on the 16th of January, 1912, inscribed the case for proof and hearing. The first plea of the appellant was filed on the 12th of January. This plea did not contain new facts. Hence issues were joined between the parties by the filing of this plea. No application for a trial by jury was made within the three days which followed. Now art. 293 C.P. declares that when a case is not to be tried by a jury it may be inscribed by either party for proof and hearing after the expiry of three days from issue joined. Therefore, when the respondent inscribed the case for proof and hearing on the 16th of January, he admitted and recognized that the case was not to be tried by a jury. Besides this was the understanding between the parties. The declaration which appears at the bottom of the plea of the appellant was only filed in order to allow of such inscription being made as soon as possible.

The question of choice between a trial by jury and trial before a Judge was thus settled. The parties themselves chose this mode of trial, and when the respondent inscribed this case for proof and hearing he simply acted in conformity with the understanding entered into between the appellant and himself. The consent given later to the appellant by the respondent to substitute a special plea to the plea of general denial, did not give the appellant the right to demand a trial by jury. Nor did the consent given by the appellant to the respondent, as regards the filing of the answer to plea, give the respondent the right to demand such trial by jury. Besides, the inscription for proof

QUE.
K. B.
1912
CANADIAN NORTHERN R. CO v. LEVINE.
Archambeault, C.J.

and hearing is still of record. How can the respondent claim he is entitled to a trial by jury when he has already made his option for a trial before a Judge, and when his inscription for this purpose has neither been set aside nor abandoned.

The Judge in the Court below declares that the filing of the new plea by consent, without restriction, has the effect of quashing the inscription for proof and hearing, and effaced all proceedings anterior to the date of the filing of this new plea, and that all subsequent proceedings must, therefore, take their starting point from the filing of such new plea. I cannot concur in this opinion.

The respondent and the appellant agreed that the latter could substitute a special plea for this plea of general denial between the inscription and the day fixed for proof and hearing. The filing of the new plea could not, therefore, result in quashing this inscription, since the agreement of the parties expressly states that the first plea is filed in order to allow the case to be more rapidly inscribed for proof and hearing, and that a special plea may be filed of record at any time in replacement of the first.

The consent subsequently given by the respondent allowing the filing of a new plea and the consent of the appellant to allow the filing of an answer to this plea, cannot be interpreted as implying the setting aside of the inscription. Such an interpretation would result in frustrating the parties from the very object they had in view when they made the agreement. They consented to allow a special plea to be substituted to a plea of general denial in order to be able to inscribe the case immediately. If the filing of the special plea should have for effect the setting aside of the inscription, it is evident that the result would be absolutely contrary to that which the parties had in view.

For these reasons I am of opinion that the judgment should be reversed, and the motion dismissed.

Cross, J.

CROSS, J.:—This appeal is from a judgment whereby it was ordered that the action should be tried with a jury. The principal ground taken in support of the appeal is that the delay within which the application for a trial by jury has to be made, namely, three days after issue joined, had expired before the application was made. Incidentally, attention was called to the terms of a consent of parties written at the end of the defence filed by the appellant on the 12th January, 1912.

That consent is worded as follows:—

> Il est entendu entre les parties que le présent plaidoyer est produit pour ne pas retarder la cause et que d'ici au jour qui sera fixé pour l'audition et l'enquête, ce plaidoyer sera remplacé par un plaidoyer spécial.

Accordingly the respondent (plaintiff) inscribed the action for proof and hearing as if it were a case to be tried without a jury. The appellant afterwards filed an amended defence as contemplated by the consent. The respondent answered the amended defence and thereupon, instead of proceeding upon the inscription previously filed, made a motion for an order for a trial by jury. It is clear that that is a thing different from what the respondent has agreed to do.

The agreement written at the foot of the original defence was made with a view not to retard the trial and provided that before the date which would be fixed for the trial the original defence would be replaced by a plea containing special matter. It is an agreement made by professional gentlemen and expressed in the language of Court procedure. The expression "l'audition et l'enquête" meant to have a trial without a jury, and would mean that to any practitioner.

The manifest, one might almost say the expressed, object of the agreement was to enable the appellant to put in a sort of dummy plea, so that the case could be inscribed without loss of time, with the provision that, later and before the time for trial would have arrived, a more formal or specific defence would be put in, and the trial would go on on the amended defence as if that defence had been the one filed in the first instance. It necessarily resulted that the inscription for trial without a jury was to apply to whatever amended defence would be afterwards filed. Briefly put, the agreement was that the defendant would plead with the right to amend afterwards, but so as not to delay proceeding to trial at *enquête* and merits.

But for that special agreement, it would have been a consequence of filing the amended plea that the inscription previously filed would have been effaced, as is correctly recited in the judgment. The parties, however, have agreed otherwise, and the respondent should be held to his agreement, namely, to proceed at *enquête* and merits, the amended defence of the adverse party being taken in replacement of the defence as originally filed. Upon the whole our conclusion is to maintain the appeal and dismiss the plaintiff's motion with costs. It is opportune to add that I quite agree with the propositions of legal procedure set forth in the judgment as to the effect of the filing of amended pleadings upon an inscription previously made (saving, of course, the power of the Judge under art. 516 C.P. to attach conditions having a different effect), and as to the time at which issue can be said to have been joined when amended pleadings have been put in. The conclusion at which we have arrived turns, as will readily be seen, upon a different consideration.

*Appeal allowed.*

ALTA.

S. C.
1912

April 30.

## THOMAS v. DAY.

*Alberta Supreme Court, Harvey, C.J. April 30, 1912.*

1. ELECTION OF REMEDIES (§ I—7)—SALE OF LANDS BY GUARDIAN—UNDERVALUATION—ONE ACTION TO SET ASIDE SALE AND FOR AN ACCOUNT —ELECTION.

An action against a guardian and other defendants, both to set aside a sale of property of his ward made by the former to his co-defendants, at an undervaluation, in breach of his trust, the latter being aware of such breach, and also to obtain an account of all the guardian's dealings with the estate of his ward, involves two distinct and separate causes of action against different parties, and therefore the plaintiff must elect which he will pursue.

[*Edinger* v. *McDougall*, 2 A.L.R. 345; and *Thompson* v. *London County Council*, [1899] 1 Q.B. 840, specially referred to.]

Statement

MOTION by a defendant to compel the plaintiff to elect upon which of two causes of action set up in his pleading he would proceed and to disallow his proceeding upon both concurrently.

The statement of claim alleged (1) that the defendant Day being the plaintiff's guardian in breach of his trust sold certain property of the plaintiffs to his co-defendants who were aware of the breach, at an undervalue, and (2) in the alternative, that the defendant Day has not accounted for the proceeds of the sale.

The plaintiff asks to have the sale set aside and the property retransferred and for an account of all the dealings of the defendant Day with the estate.

One of the co-defendants now applies for an order putting the plaintiff to an election to proceed either for the recovery of the land or for the account.

*D. H. MacKinnon*, for the defendant.

*G. V. Pelton*, for the appellant.

Harvey, C.J.

HARVEY, C.J.:—I think my decision and the reasons given in *Edinger* v. *McDougall*, 2 A.L.R. 345, are applicable here. Though there is only one set of circumstances out of which the cause or causes of action arise, namely, the transaction between Day and his co-defendants, assuming that it was only one transaction as suggested by the application and not two as suggested by the statement of claim, and assuming that the plaintiff desires to claim, as his counsel urges, only an account in respect of this and not, as the statement of claim states, a general account, still the cause of action, as pointed out in *Thompson* v. *London County Council*, [1899] 1 Q.B. 840, by Collins, L.J., at p. 844, is the *injuria* or wrong done the plaintiff. Now the wrong of a sale in breach of trust and the wrong of a failure to account are entirely different things and we have consequently different causes of action joined in which the different defendants are not all interested.

ALTA.

S. C.
1912

THOMAS
v.
DAY.

It is hard to see how any of the defendants could be prejudiced by the continuance of the action against all the defendants and the purpose of the rules is to prevent multiplicity of action. As, however, they do not go far enough to authorize the present joinder and one of the parties objects, effect must be given to his objection and the order will go that the plaintiff elect. The costs will be costs in the cause between the plaintiff and the applicant.

*Order made.*

---

## BRITISH COLUMBIA NEWS CO. v. EXPRESS TRAFFIC ASSOCIATION.

CAN.

Ry. Com.
1912

Jan. 27.

*File* 4214.199.

*Board of Railway Commissioners. January* 27, 1912.

1. CARRIERS (§ IV C 3—537)—GOVERNMENTAL CONTROL OF RATES—DEVELOPMENT OF BUSINESS—EXPERIMENTAL TOLLS.

It is not the function of the Railway Board to order experimental tolls, against the objection of the carrier, with a view to develop business, but the Board is to deal with the reasonableness of the transportation charges, recognizing the right of the carrier to a reasonable profit.

[*Florida Fruit Co.* v. *A.C.L. R. Co.*, 17 I.C.C.R. 560, specially referred to.]

Statement

APPLICATION for an order directing the respondent to establish a flat toll of one cent per pound on magazines and periodicals from Vancouver to out-of-town dealers in competition with the Post Office Department.

The respondent submitted and the applicant admitted that at the present time there would not be very much profit to the carrier in the experimental toll applied for.

The Board held that it would not be justified in ordering the fixing of experimental tolls since it has not been established that the tolls now charged are unreasonable, and the application was therefore refused.

The application was disposed of on the material filed with the Board. The facts are fully set out in the judgment of Mr. Commissioner McLean.

Com. McLean.

January 27, 1912. MR. COMMISSIONER MCLEAN:—The applicant, who is located in Vancouver, applies for a flat rate of one cent per pound on magazines and periodicals. The applicant and the express companies having developed their positions by written submissions, the matter may now be dealt with.

At present, the rates applicable are merchandise pound rates, minimum charge 10 cents per shipment, or section D rates if a lower charge can be made thereby. It is contended by the applicant that the existing rates will not permit the out-of-town business being developed.

CAN.

Ry. Com. 1912

BRITISH COLUMBIA NEWS CO. v. EXPRESS TRAFFIC ASSOCIATION.

Com. McLean.

The merchandise rates are not attacked as being unreasonable in themselves. The desire is for a rate for development purposes. The allegation of the Dominion Express Company that the flat rate proposed would result in a loss is not supported by evidence; but it is admitted by the applicant that "at the present time there would not be very much profit in the rate."

Under section 49 of the Canadian Official Postal Guide, British and foreign newspapers and periodicals, as well as Canadian publications recognized as second-class matter, are, if authorized by the Postal Department, carried for news dealers to subscribers in Canada or Mexico at the rate of one cent per pound bulk weight. The rate asked for is competitive with this.

In meeting the post office rates, the express companies have a right to exercise their discretion as to whether these rates shall be met or not. This has been set out in the matter of the *Application of the Express Traffic Association for an order authorizing the express companies to withdraw and cancel section D of Classification C.R.C. No.* 2. In giving his decision on this matter on October 23rd, 1911, the Chief Commissioner used the following words:—

> Now the situation would be the same if the post office authorities had just put in effect these regulations and an application were now heard by this Board for an order requiring the express companies to compete with these reduced rates on this matter that under these regulations can go through in the post office. This Board would have no authority to require the express companies to enter into any such competition: *Express Traffic Association* v. *Canadian Manufacturers' Association*, 13 Can. Ry. Cas. 169, at p. 174.

The express company is under no obligation to protect the applicant against loss in the extension of its business. The Interstate Commerce Commission has said:—

> The position of the growers is that such rates should be established as will permit them to market their product at a reasonable profit. No such test of the justness of a transportation charge can be admitted: *Florida Fruit and Vegetable Company* v. *A.C.L.R.R.Co.*, 17 I.C.C.R. 560.

That is to say, the right to a reasonable profit to the transportation agency as well must be recognized. Looked at as a rate competitive with the post office, the rate asked for is one which the express company has the right either to refuse or to grant. Looked at from the standpoint of an experimental rate for the development of business, it must be recognized that the express company in putting in, of its own volition, a low rate basis to develop buisness has a greater initial discretion than is possessed by the Board through the medium of its orders. It is the policy of the Railway Act that, subject to the inhibitions as to discrimination, there should, in the public interest, be elasticity of rate-making. The initial making of rates is in the hands of the

transportation agency. It is not the Board's function, as delegated by Parliament, to make rates to develop business, but to deal with the reasonableness of rates either on complaint or of its own motion.

As it has been established that the rates as charged are unreasonable, the Board is not justified in ordering the installation of the experimental rates asked for.

THE CHIEF COMMISSIONER, HON. J. P. MABEE, concurred.

*Application refused.*

---

**THE CITY OF HALIFAX v. THE NOVA SCOTIA CAR WORKS, Limited.**



*The Nova Scotia Supreme Court, Graham, E.J., and Meagher, Russell, Drysdale, and Ritchie, JJ. May 10, 1912.*

1. TAXES (§ I F 2—81)—EXEMPTIONS—LIABILITY FOR SPECIAL SEWER RATES —AGREEMENT SANCTIONED BY LEGISLATURE.

"A total exemption from taxation" for a certain time upon the "buildings, plant and stock" of a company and upon "the lands on which its buildings used for manufacturing purposes are situated," agreed to be granted to the company by a city, does not include the company's liability to contribute its share of the cost of sewers constructed in streets upon which its land fronts, where the city charter expressly preserved the liability of every person or company for the construction of sewers in streets in front of his or its land, and the agreement of the city aforesaid was merely sanctioned by a private act of the legislature which did not further affect any statute touching the city's right to recover for the cost of sewers.

[*Les Ecclesiastiques de St. Sulpice* v. *The City of Montreal* (1889), 16 Can. S.C.R. 399, distinguished.]

2. TAXES (§ I F 2—81)—EXEMPTIONS—AGREEMENT TO EXEMPT EXCEPT AS TO WATER RATES—SEWER TAX—BETTERMENTS—FRONTAGE ASSESSMENTS.

In an agreement by which a city granted to a company a total exemption from taxation on its buildings and on the land on which its buildings were established, a further provision that "the foregoing exemption shall not apply to the ordinary water rate for fire protection nor to the rate for water used by the company," limits the operation of the exemption and does not enlarge it so as to exempt the company from all other liability for contributing its share of the cost of such public work as bettered its property, because not mentioned in the exception.

3. STATUTES (§ II B—114)—CONSTRUCTION OF STATUTE AS TO EXEMPTIONS FROM TAXATION.

In construing legislation merely confirming a contract between a municipality and a company exempting the company from taxation, the effect of which must be to increase the burdens of all other tax payers, the general presumption is that it was not intended to afford relief to the company or to diminish the civic rights of the citizens of the municipality beyond what can be clearly gathered from the contract as to the intention of the parties.

Statement

CASE stated and agreed upon pursuant to O. 33, r. 6, of the Nova Scotia Judicature Act.

1. The plaintiff is the city of Halifax, a corporation under the Halifax city charter.

N. S.

S. C.
1912

THE CITY OF HALIFAX v. THE NOVA SCOTIA CAR WORKS, LIMITED.

Statement

2. The Silliker Car Company, hereinafter called the "Silliker Company," was duly incorporated under the provisions of the Nova Scotia Companies Act on the 4th day of April, A.D. 1907.

3. Section 4 of chapter 70 of the Acts of 1907, entitled, An Act to authorize the City of Halifax to assist the Silliker Car Company, Limited, is as follows:—

"The exemption from taxation of the property of the said company set out in the said memorandum of agreement is hereby confirmed."

4. The memorandum of agreement referred to in said section 4 of chapter 4 of chapter 70 of the Acts of 1907, was printed as a schedule to said Act, and clause 1 thereof is as follows:—

"1. The city will grant the company a total exemption from taxation for ten years on its buildings, plant and stock, and on the land on which its buildings used for manufacturing purposes are situated, or immediately connected with the same, and used exclusively for the purposes of its business, such lands to be practically in one block may be divided by a street, and not to exceed twenty acres in all. In addition to these lands, the company hold, for the purposes of its business, and upon the same terms, a lot of land on the water front, north of the Intercolonial round house, Richmond, and not exceeding five acres, providing no tolls or wharfage are charged in connection therewith. At the expiry of the ten years the city agrees that the total yearly value for assessment on such lands, buildings, plant and stock shall, for a further period of ten years, not exceed fifty thousand ($50,000) dollars, the foregoing exemption not to apply to the ordinary water rate for fire protection, nor to the rate for water used by the company, which shall be charged at the minimum rate charged other manufacturing concerns."

5. The lands formerly owned by the Silliker Company and used exclusively for manufacturing purposes are practically in one block of less than twenty acres in extent and are situate in the north-west suburbs of the city of Halifax, bounded generally on the south by North street, on the west by Windsor street, on the north by Almon street, and on the east in part by Clifton street and in part by the rear line of lots fronting on said Clifton street, and were acquired and conveyed to the Silliker Company on the ninth day of May, A.D. 1907.

6. The defendant, the Nova Scotia Car Works, Limited, is a body corporate duly incorporated in February, 1911, under the provisions of the said Nova Scotia Companies Act with the object, among others, of acquiring and undertaking the whole or any part of the business, good will, property, franchises, rights, privileges, assets and liabilities of the said Silliker Company.

7. The defendant purchased and acquired all the property of every kind, real, personal and mixed, of the Silliker Company,

and assumed its liabilities and the real property of the said Silliker Company, including the said lands used exclusively for manufacturing purposes, mentioned and described in paragraph five hereof, were on the twenty-fifth day of April, A.D. 1911, conveyed to and the title thereof vested in the defendant.

8. The said lands since their acquisition by the Silliker Company have always been and still are used continuously and exclusively for manufacturing purposes, either by the Silliker Company or the defendant.

9. In 1911 an Act, chapter 41 of the Acts of that year, was passed, dealing with the exemptions from taxation of the Silliker Company and the defendant. The said Act is to be deemed a part of this case and incorporated therewith.

10. In the year 1908 the city of Halifax constructed public sewers along North, Windsor and Almon streets, opposite the lands mentioned and described in paragraph five hereof, and in 1910 and 1911 the city of Halifax constructed a public sewer along Clifton street opposite the said lands.

11. The proportion of the cost of construction of such sewer along North, Windsor and Almon streets claimed by the plaintiff to be chargeable by and under the provisions of the Halifax city charter against the said lands mentioned and described in said paragraph five hereof, is two thousand and sixty-seven dollars and thirty-four cents ($2,067.34); and the proportion of the cost of construction of such sewer along Clifton street claimed by plaintiff to be chargeable as aforesaid against the said lands is three hundred and twenty dollars ($320.00); and making in all the sum of $2,387.34.

12. The sewers on North, Windsor and Almon streets were completed during the year 1908 and the sewer on Clifton street was completed in 1910, and the plans of North, Windsor and Almon streets, with the list of owners of each property fronting on said streets, were duly prepared and filed by the city engineer of the city of Halifax at his office in accordance with the provisions of section 602 of the Halifax city charter on the 26th day of March, A.D. 1908, and the plan of said Clifton street, together with the list of the owners thereon, was duly filed by said city engineer in his office on the 30th day of March, A.D. 1911.

13. The plaintiff claims that the said proportions of the cost of constructing the said sewers constitute a lien on the said lands of the defendant, under and by virtue of the provisions of the Halifax city charter, and thereby enforceable against the said lands and the defendant company.

14. The defendant claims that the said lands are exempt from liability from such lien by reason of the said Acts, chapter 70 of 1907, and chapter 41 of 1911.

N. S.
S. C.
1912
THE CITY OF HALIFAX v. THE NOVA SCOTIA CAR WORKS, LIMITED.

15. The question for the Court is, does the exemption claimed by the defendant apply in respect to the sewers herein referred to?

16. If the Court is of opinion that the lien exists in respect to the sewers herein referred to, the plaintiff is to be at liberty to enter judgment against the defendant for the sum of two thousand three hundred and eighty-seven dollars and thirty-four cents ($2,387.34), with costs. Such liability, however, not to effect any other remedy which the plaintiff has or may have for enforcing such lien. If the Court answers the said question in the negative, the plaintiff shall pay defendant the costs of this action, and defendant may enter judgment therefor when taxed.

Argument

*F. H. Bell*, K.C., for plaintiff:—A tax is an impost on the population generally for the benefit of the civic government and gives no benefit to the individual tax payer, except in the protection of property and rights: Hamilton's Law of Taxation, sec. 10. Statutes exempting property from taxation do not exempt from special assessments: Am. & Eng. Encyc. of Law, vol. 12, p. 314.

*E. P. Allison*, for the defendant company:—The principles laid down by the American cases are not applicable: *Davidson* v. *New Orleans*, 96 U.S.R. 97; *Norwood* v. *Baker*, 172 U.S.R. 269; *French* v. *Barbour Asphalt Co.*, 181 U.S.R. 324; Dillon on Municipal Corporations, secs. 1443, 1444, and 1445. "Tax" and "assessment" are not synonymous words but mean two absolutely different things: *Les Ecclesiastiques de St. Sulpice* v. *The City of Montreal*, 16 Can. S.C.R. 399; Am. & Eng. Encyc. of Law, vol. 12, pp. 314, 315. When there is an exemption from taxation the company is exempt from all taxation: *Miller* v. *Kirkpatrick*, 5 Casey, Pa. 226; *Olive Cemetery Co.* v. *City of Philadelphia*, 93 Pa. St. 129; *Townshend* v. *Little*, 109 U.S.R. 504; Endlich on Statutes, p. 289; Provincial Acts (N.S.) 1911, ch. 41.

*Bell*, K.C., replied.

The judgment of the Court was delivered by

Meagher, J.

MEAGHER, J.:—The agreement between the city and the Silliker Car Company, the predecessors in title of the defendant, appears in ch. 70 of the Acts of 1907. The latter did no more than sanction it, and did not further affect any statute touching the city's right to recover the sum in question.

By that agreement the city undertook to grant the former company "a total exemption from taxation for a given period over its buildings, plant and stock, and the lands on which its buildings used for manufacturing purposes were situated." The paragraph containing the foregoing concluded thus: "the foregoing exemption not to apply to the ordinary rate for fire protection, nor to the rate for water used by the company, which

shall be charged at the minimum rate charged other manufacturing concerns."

Chapter 41 of the Acts of 1911 is incorporated in the submitted case, but it has no application. The sewers were completed and the lien, if any, attached before it came into force.

The question submitted by the case is:

"Does the exemption claimed by the defendant under the agreement and statute referred to apply to this case?"

The amount in dispute is the defendant's contribution towards the costs of certain sewers built in streets upon which the defendant's land fronts. The liability is not open to question otherwise than under the agreement.

Sections 299, 300, 301, 334 and 450 (the latter refers especially to the matter of water) of the city charter define the methods of raising the city's general revenue, and the sources whence it is derived. It is produced by rates and taxes based upon assessed values of property except what it obtained from licenses and other specific methods. All real and personal property within the city, subject to the exceptions named in section 335, is expressly made liable to taxation under the charter so as to provide a general revenue for administration by the council for public purposes.

The exemptions in 335 have no bearing in this instance. We have, therefore, as was said by a learned Judge, a general statute, public in its nature, making all property not included in the exemptions of section 335 liable to taxation.

There is not a word in chapter 70, nor in the city charter, to relieve any property, not even those enumerated in section 335, nor any person or company, from the liability in regard to the construction of sewers, created by section 600; on the contrary section 362 expressly preserves such liability. The latter is under the sub-heading "General Provisions," and provides that nothing in the foregoing provision (meaning, I assume, all that precedes it) shall be construed to exempt any company, firm or individual, from liability for paving any street, laying any sidewalk, constructing any sewer or other betterment.

The charter regards all that class of work as "betterment" and therefore not as a burden or taxation in its ordinary acceptation.

It is unnecessary to cite authority to shew that a liability such as that in controversy does not come within the terms "taxation" or assessment. In this view the term "taxation," the only one used in the agreement and chapter 70, is not sufficient to relieve from the sewerage liability.

Section 600 provides that every owner of real property fronting on a street through which a sewer has been built is liable to pay $1.25 for every lineal foot of property so fronting, the balance of the cost of such construction is borne by the city.

N. S.

S. C.
1912

THE CITY OF HALIFAX v. THE NOVA SCOTIA CAR WORKS, LIMITED.

Meagher, J.

The liability is fixed and made absolute and conclusive when the city engineer files a plan in his office shewing the frontages, and a list giving the owners' names and the amount payable by each. By this method a lien is created upon such land for the amount due by each party so named, enforceable by action or by the remedies for the recovery of taxes.

The duty thus cast upon the engineer of including every frontager's name in such list is absolute, and there is nothing in the charter or elsewhere to relieve him from putting every owner's name and the sum he is liable for upon such plan and list. One would expect in cases of exemption from such liability, if any were extended, to find the engineer required to omit all exempted property from his plan and list, so that the balance to be borne by the city could be estimated without further enquiry. The fact that no such provision exists for his guidance is not to be disregarded.

Section 362 shews how careful the city and Legislature were to preserve the liability of frontagers in respect to sewers, paving, etc., even where they were, by statute, only exempt from liability to taxation for general revenue purposes; and should make the Court equally careful to see, so far as proper rules of construction will permit, that such liability is not defeated by a too liberal construction of the agreement before us.

The statute sanctioning the agreement is a private one, which, regarding it apart from the agreement for the moment, purports to grant an exemption from a burden imposed by a general statute attaching to all persons and property in the city in order to produce a revenue for the general uses and purposes of the city.

The liability of frontagers was, when the agreement was made, and still is, a statutory one; one which required no assessment, valuation, levy, or other municipal action of any kind to create it, other than the mere construction of the sewer and the filing of the plan and list spoken of; and, as already observed, there is no repealing provision of any kind in chapter 70, and the statute does no more than give effect to the agreement.

It was said in a somewhat similar case that a construction most conducive to the public good should not be disregarded.

The company sought exemptions and to be put upon a different plane from all citizens and taxpayers, and it was for it to see that the contract was wide enough to cover its present contention.

The general presumption in construing legislation of this kind, and especially when the agents or trustees of the citizens are parting with civic rights, the effect of which must be to increase the burdens of all other ratepayers, is that it was not

intended to afford relief or diminish civic rights beyond what can be clearly gathered from the contract was the intention of the parties.

The company sought and the city only granted and intended only to grant, exemption from burdens, and neither party sought or intended to prevent or take away benefits, or betterments, or to relieve from liability in that connection.

The construction of sewers is always deemed a benefit or betterment to adjoining or adjacent lands and not a burden, because of the enhanced value it gives to such properties. The building of the sewers in question affords a substantial increase in value to the defendant's lands, much of which will, of course, be used for the construction of dwellings, and which, but for the presence of the sewers in question, would not be decently habitable.

Every citizen liable to pay rates or taxes has a right, it may fairly enough be called a vested one, to have section 600 applied strictly and all frontagers made liable to contribute to the cost of sewer construction. If some are exempted then he is forced to contribute to the deficiency thus created, and thus his rights prior to the agreement and statute, will be prejudicially affected and his burdens increased. This view supplies an additional reason for a reasonably strict construction. I find no difficulty in giving effect to every word in the agreement without in the least, touching or affecting the lien and liability created by the charter and what has been done under its provisions.

Defendant's counsel pressed the proviso earnestly upon us; his contention being that inasmuch as the proviso prescribed liability for the fire protection rate and nothing more, there was a presumption that all other liability was exempted—in a word, that the exception of the fire protection rate excluded all liability for sewers.

The fire protection rate is based upon the assessed value of each property—see section 450—and is therefore clearly a matter of taxation, and the sum so raised is for general revenue purposes. It was therefore proper to provide against exemption therefor, and the proviso filled its proper function in that behalf in guarding against such exemption which otherwise would have arisen under the term "total exemption from taxation." The city felt that fire protection conferred a benefit on the company, and therefore it should pay for it. Sewerage liability could not be regarded in any sense under the agreement as taxation and it was therefore not necessary to say aught upon that subject.

The provision in relation to the charge for water does not affect the question. It is not a qualifying provision, but an affirmative one prescribing the terms upon which the city will supply the water it owns to the company, and which could not

N. S.
S. C.
1912
THE CITY OF HALIFAX v. THE NOVA SCOTIA CAR WORKS, LIMITED.
Meagher, J.

in any view be deemed taxation or anything akin to it. It was a matter of bargain and sale of water which the city owns and deals in. Such a provision was outside of the scope and proper office of a proviso. It was not in any sense a qualification of anything which preceded it, but the embodiment of a special bargain in relation to a special matter not previously even alluded to. The defendant was not thereby securing an exemption, but a special price for the water it was to use.

The purpose of the proviso was, in other respects, not to enlarge the exemption which it must do if it is held to cover sewerage liability, but to limit its operation. Water rates and taxes, under the principle I have before adverted to, on the one hand, and sewerage liability on the other, are different and distinct things, and therefore the mention of one class did not necessarily mean the exclusion of the other.

There was a necessity for preserving the liability of fire protection, and with excessive caution the sale of water may perhaps be conceded to have been guarded against. There was no need to do so, nor in respect to the liability under consideration, because neither rested upon the basis of taxation as fire protection rates did. There is nothing in the agreement to suggest that the liability for sewerage was ever thought of or discussed in the negotiations which led to the agreement and which covers nothing but taxation liabilities, and leaves specific statutory liabilities which are outside of taxation and assessment altogether, untouched, not even referred to.

A proviso or saving clause is merely an exception of a special thing out of the general things mentioned in the statute: *per* Bayley, J., *Rex* v. *Taunton*, 9 B. & C. 836; it is of course the same in respect to an agreement. In that view the proviso cannot be construed so as to enlarge the first part of the agreement; otherwise the result would be, that because a subject which did come within the expressed exception was excepted thereout by the proviso—therefore the other one which was not covered by the exemption nor mentioned in the proviso, was also exempted. Such a view is simply impossible.

It is fair to insert the proviso in the earlier part of the agreement and then apply it. It would stand thus: The city will grant the company a total exemption from taxation except as regards the water rate for fire protection, and as to water used by the company in its business we will sell it to the company at the minimum rate charged other manufacturing concerns. So placed it cannot be said there was an expression of one liability and an exclusion of the other. One subject alone is dealt with; in one aspect by way of qualification, in the other affirmatively—and no intention is disclosed to cover or include sewerage liability.

If the proviso goes beyond what I have ascribed to it, it can only be because of its silence in relation to sewerage. But a proviso silent as to a given subject can never be regarded as an affirmative enactment or agreement upon such subject, and this one must amount to that in order to widen the scope of the earlier exempting terms.

Recent authorities hold that the principle founded upon the expression of one being the exclusion of the other is not a very safe one to rely upon, and therefore should not be readily resorted to.

It only remains to consider the case of *Les Ecclesiastiques de St. Sulpice, etc.*, v. *The City of Montreal* (1889), 16 Can. S.C.R. 399; I cannot regard it as controlling this case, because it appears to me the conditions, so far as I can gather, were wholly different from those now before us. The Court did not intend to express an opinion, apart from the proper construction of the statute before them, as to what constituted a tax. They were not called upon to do so. I have not seen that statute further than the decision refers to it. But from expressions used I should say a fixed statutory liability as here was not prescribed; the amount payable by the property owners being dependent upon assessments or special assessments, which it appears by an interpreting clause (furnished by the learned city recorder) was declared to mean the rates levied annually upon immovable property in the city generally. The liability was therefore controlled and measured by an assessment, and the defendant's property was within the exemption of the statute, namely, "exempt from municipal and school assessments whatever may be the act in virtue of which such assessments are imposed, and notwithstanding all dispositions to the contrary." This created a much wider exemption than we have in this instance. Strong, J., regarded the liability as a municipal assessment and therefore fell directly within the very words of the exception. I may add that the exemption provision was wide enough to effect a repeal as to that class of property of any general provision rendering it liable to any municipal assessment; while in the present case there is nothing of the kind.

The city is entitled to a negative answer to the question submitted, and to a lien on the defendant's lands for the sum claimed with interest, and also to the costs.

*Declaration accordingly.*

ONT.

H. C. J. 1912

June 19.

## KARCH v. KARCH.

(Decision No. 2.)

*Ontario High Court. Trial before Kelly, J. June 19, 1912.*

1. DIVORCE AND SEPARATION (§ V C—58)—ALIMONY—BASIS OF FIXING AMOUNT—GROUNDS FOR GRANTING.

A wife will be granted some alimony notwithstanding her husband, who had properly provided for her, had suffered from her neglect of her household duties, and had finally left her because of her neglect of him and her continued nagging and scolding, as her conduct was not such as to disentitle her to alimony upon the defendant refusing to live with her.

[*Nelligan* v. *Nelligan*, 26 O.R. 8, and *Forster* v. *Forster*, 1 O.W.N. 93, 419, specially referred to.]

2. INFANTS (§ I C—11)—FATHER'S RIGHT TO THE CUSTODY—FIT AND PROPER PERSON.

A father will not necessarily be deprived by the Court in an alimony action of the custody of minor children, although the mother was given the right to visit them weekly, where it appeared that he was a fit and proper custodian for the children, and that he was willing and able to care for them, and that for several years the personal care of the younger child had fallen to him, although the wife is granted a decree for alimony.

3. DIVORCE AND SEPARATION (§ V C—58)—ALIMONY—INSTANCES OF AMOUNT—SALARY AND INCOME OF HUSBAND.

Five dollars per week alimony was granted a wife whose husband had left her because of her neglect of him and her household duties, as well as on account of her continued nagging and scolding, where he earned fifty dollars per month, and had an income of three hundred dollars per year from other property, as well as owning a home.

ACTION for alimony, tried before Kelly, J., without a jury, at Berlin.

An interim application in the same case is reported, *Karch* v. *Karch* (No. 1), 3 D.L.R. 658, 3 O.W.N. 1032.

*H. Guthrie*, K.C., for the plaintiff.
*W. E. S. Knowles*, for the defendant.

Kelly, J.

KELLY, J.:—This action presents features not usually found in alimony actions.

The defendant left his home on the 20th November, 1911, and now refuses to live with the plaintiff. The only charge of any kind made by the plaintiff against him, apart from that of his deserting the home, is what she calls his stinginess, although she gives no evidence intended to shew specific instances of this, except a statement that the defendant found fault with her for having bought a coat at a price which he considered excessive.

Any troubles between this couple, the plaintiff says, arose almost entirely on money matters.

She alleges that the defendant at times told her he could not afford things; but she admits that this was not a serious matter. Her further evidence is to the effect that he had provided properly for his home, that he is not a spendthrift, that he did not

frequent hotels, and was not addicted to other habits which might be objectionable.

The cause of the husband's leaving the home and now refusing to live with the plaintiff is to be found in her general conduct towards him. He is a machinist, working in his brother's shop, in Hespeler, close by his residence, and has been earning $50 a month. The family consists of two daughters, one eleven and the other eight years of age. On the plaintiff's own admission, she has not for some years, except in the months of June, July, and August, gotten up in the morning in time to prepare breakfast for the defendant. There is evidence of other acts of hers which indicate that she was not as considerate as a wife should be of her husband's welfare. She justifies part, at least, of her conduct in this respect, by saying that it was with his approval and consent.

Any such approval and consent on his part was, no doubt, given for peace' sake, and because he was indulgently inclined.

He complains, and the plaintiff has not denied it, that she subjected him to continual nagging and scolding, that she was neglectful of his interests, and was extravagant in money matters.

He seems to have submitted to all this until November, 1911. On the 18th November, she was not at home when he returned from work, and had made no preparation for his supper. On the 20th November, when she was again about to leave home, he remonstrated with her about being away and not preparing his meals, and she told him to "fish for his supper." When he returned from work on that evening, she was not at home, and had not prepared his supper. He then left the house and remained away from Hespeler for about six weeks, when he returned and resumed work at his brother's shop; he was still working there at the time of the trial. After leaving the home, he continued to have the tradespeople call there and supply his wife and children with whatever provisions they needed, and he paid the accounts therefor. Since November, the plaintiff and the two children have continued to reside in his house. In the time of his absence she had the lock of the house door, of which the defendant had a key, removed, and a new lock put on, so that on the only occasion of any attempt on his part to return to the house—which was in March, 1912—he was unable to get in. Whatever may then have been his intention as to returning, he was most positive at the trial in his declaration of refusal to live with the plaintiff. The plaintiff has made no attempt at reconcilliation, nor has she communicated with him during the time of his absence; but there is no evidence of refusal on her part to live with him.

Without going further into details of the evidence, the conclusion I have come to is, that the husband is an industrious, thrifty man, not given to any bad habits; that, while living with the plaintiff, he properly provided for his home and family;

ONT.

H. C. J. 1912

KARCH v. KARCH.

Kelly, J.

and that, for peace' sake or through indulgence towards his wife, he condoned what might be termed her neglect of him; and finally left because of her lack of interest in him and her nagging and scolding.

In the light of such authorities as *Nelligan* v. *Nelligan*, 26 O.R. 8, and *Forster* v. *Forster*, 1 O.W.N. 93, 419, though her conduct was not free from objection, the plaintiff has not so misconducted herself as to disentitle her to alimony, the defendant refusing to live with her.

In addition to alimony, the plaintiff asks the custody of the two children and an order for their maintenance by the defendant. To this I do not think she is entitled. The husband is a fit and proper person to have the custody of these children; and he is willing and able to care for them. In fact it was shewn that for years an important part of the personal care of the younger child fell to him. The house is his; and I think, in view of all the circumstances, that he should remain in it with the children, and there maintain and support them.

Though the plaintiff has not disentitled herself to alimony, I do not think that this is a case where great liberality should be displayed in making her an allowance.

In addition to his personal earnings of $50 per month, the defendant has investments which realise an income of about $300 per year, so that his annual income is about $900, and he owns the house. I allow the plaintiff alimony at the rate of $5 per week; the defendant to have the custody of the two children and to maintain and support them in his home; she will have the right to visit them weekly.

At the trial I urged the parties to make a further effort to bring their differences to an end, so that the home should not in any sense be broken up, and I intimated that I would withhold judgment for a time to see if they could affect a reconciliation. I have not heard that this has been accomplished. The case is an unfortunate one, happening as it does between people possessed of all the possibilities of making a comfortable home. The plaintiff's indifference to and lack of interest in her husband's welfare, and the nagging and scolding of which he complains, have contributed largely to the present condition of affairs.

I still entertain the hope that there may be a reconciliation; and I cannot better express what I think will aid much in accomplishing this than to repeat the words made use of in the judgment in *Waring* v. *Waring*, 2 Phill. Ecc. 132: "I recommend to her the duty of self-examination; and to consider whether her own behaviour may not remove the evil, and consist better with her duty to her husband, her children, and herself."

The plaintiff is entitled to her costs of the action.

*Judgment for plaintiff.*

## KRZUS v. CROW'S NEST PASS COAL CO., Limited.

IMP. P. C. 1912

*Judicial Committee of the Privy Council, Lord Macnaghten, Lord Atkinson, and Lord Shaw. June 18, 1912.*

June 18.

1. DEATH (§ II B—11)—NON-RESIDENT ALIEN—DEATH RESULTING FROM INJURIES ARISING OUT OF COURSE OF EMPLOYMENT—B.C. WORKMEN'S COMPENSATION ACT, 1902.

An alien non-resident dependent of a workman who lost his life as the result of an accident arising out of and in the course of his employment while resident in the province, is entitled to compensation under the B. C. Workmen's Compensation Act, 1902.

Statement

APPEAL from a judgment of the Court of Appeal for British Columbia of April 28, 1911, *Krzus* v. *Crow's Nest Pass Coal Co.*, 16 B.C.R. 120, 17 W.L.R. 687, reversing a decision of Mr. Justice Clement upon a case stated by an arbitrator under the provisions of the British Columbia Workmen's Compensation Act, 1902.

The appeal was allowed and the judgment of Clement, J., was restored.

The questions submitted by the arbitrator, Wilson, County Judge, for the opinion of a Judge of the Supreme Court of British Columbia were:—

(1) Can the applicant, who is the legal personal representative of the deceased workman, and who was a resident of the province of British Columbia, obtain an award under the Workmen's Compensation Act, 1902, the dependent of the deceased being an alien residing in a foreign country at the time of the accident out of which the claim for compensation arose, and at the time of the death of the deceased workman and ever since?

(2) Can such legal personal representative, in such circumstances, enforce payment to him of compensation so awarded by an action on the award?

(2) Can such legal personal representative, in such circumstances, enforce payment of the award pursuant to sec. 8 of the second schedule to the Workmen's Compensation Act, 1902?

Mr. Justice Clement, whose judgment is restored by the Judicial Committee, answered question number one in the affirmative, but expressed no opinion on questions numbered two and three.

*Joseph Martin*, K.C. (of the Canadian Bar), and *L. P. Eckstein* (of the Canadian Bar) appeared for the appellant.

*Sir Robert Finlay*, K.C., *Rowlatt* (of the English Bar), and *Sherwood Herchmer* (of the Canadian Bar) for the respondent company.

Lord Atkinson.

London, June 18, 1912. The opinion of the Board was delivered by LORD ATKINSON:—The respondent company had in their employment at Fernie, British Columbia, a workman who was an Austrian subject named Albert Krzus. While in this employment he met with an accident by which he lost his life. It was admitted that this accident was an accident "arising out

IMP.
P. C.
1912
KRZUS
v.
CROW'S NEST PASS COAL CO. LIMITED.
Lord Atkinson.

of and in the course of his, the deceased's, employment," within the meaning of the statute. His wife, now his widow, resided at the time the accident occurred, and still resides, in Austria, and was, like her deceased husband, an Austrian subject.

The appellant is the legal personal representative of the deceased, and resides in British Columbia. As such representative he, in the interest of the widow, made an application for compensation under the statute. The arbitrator submitted for the decision of a Judge of the Supreme Court the three following questions:—

> (1) Can the applicant who is the legal personal representative of the deceased workman, and who is resident in the Province of British Columbia, obtain an award for compensation under the Workmen's Compensation Act, 1902, the dependent of the deceased being an alien residing in a foreign country at the time of the accident out of which the claim for compensation arose, and at the time of the death of the deceased workman and ever since? (2) Can such legal personal representative in such circumstances enforce payment to him of compensation so awarded by an action on the award? (3) Can such legal personal representative in such circumstances enforce payment of the award pursuant to section 8 of the second schedule of the Workmen's Compensation Act, 1902?

Mr. Justice Clement answered the first question in the affirmative, and declined to answer the others.

The statute is practically identical with the statute of the United Kingdom, the Workmen's Compensation Act of 1907, save that the duties imposed upon the registrar of friendly societies by section 3 of the latter are imposed upon the Attorney-General of the province by section 4 of the former. The Court of Appeal (Mr. Justice Irving dissenting) reversed Mr. Justice Clement's decision.

The authority on which the Chief Justice relied was a passage from Maxwell on the Interpretation of Statutes, p. 212, viz:—

> In the absence of an intention clearly expressed or to be inferred either from its language, or from the object or subject-matter or history of the enactment, the presumption is that Parliament does not design its statutes to operate on them beyond the territorial limits of the United Kingdom.

The principle embodied in the passage was directly applicable to the case in which it was cited, because there it was sought to apply a statute of the United Kingdom to an accident happening in Malta, arising out of an employment carried on in Malta. So to apply the statute would, indeed, amount to making it operate beyond the territorial limits of the United Kingdom. And the Court of Appeal held, quite rightly in their Lordships' view, that this statute did not apply to such an employment; but no attempt is made in the present case to do anything of that kind.

IMP.

P. C.
1912

KRZUS
v.
CROW'S
NEST PASS
COAL CO.
LIMITED.

Lord Atkinson.

Here it is not insisted that the Provincial statute shall operate extra-territorially. It is insisted that by its express words it imposes on the employer a liability to compensate his workmen for personal injuries by accident arising out of and in the course of the employment which he carries on, and in which they work. Where that employment is carried on in the Province of British Columbia, one of the results of this intra-territorial operation of the statute may, the respondents admit, possibly be that in some cases a non-resident alien may derive a benefit under it, but their Lordships think that if the liability thus expressly imposed is to be cut down at all, or if the employer is to be relieved from it to any extent, this must be done either by some provision of the statute itself or of the schedules attached to it, either expressed or to be clearly implied, and not by conjectures as to the policy of the Act not suggested by its language.

On the whole case their Lordships are of opinion that the judgment of the Court of Appeal was erroneous and should be reversed, and that the answer given by Mr. Justice Clement was correct in law, and they would humbly advise his Majesty accordingly. The respondents must pay the costs of the appeal.

*Appeal allowed.*

---

## ZDAN v. HRUDEN.

**(Decision No. 2.)**

MAN.

C. A.
1912

June 24.

*Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron, Haggart, JJ.A. June 24, 1912.*

1. DAMAGES (§ III A—63) — BREACH OF COVENANT FOR MAINTENANCE — FUTURE DAMAGES.

Where a conveyance of land is made in part consideration for the support for life of the grantor by the grantee at the latter's place of residence, and the grantee, by his conduct, makes it impossible for the parties to live in the same house, the grantor is entitled to such damages as will compensate him once for all, that is for the future as well as for the past, for the breach of the contract.

[*Schell* v. *Plumb*, 55 N.Y. 592; *Amos* v. *Oakley*, 131 Mass. 413; *Parker* v. *Russell*, 133 Mass. 74, applied; Parsons on Contracts, 111, 211, specially referred to.]

2. JUDGMENT (§ III B—213)—DAMAGES FOR BREACH OF AGREEMENT—PART CONSIDERATION OF DEED—LIEN ON LAND.

Where the Court awards damages for a contract of support of the plaintiff for life by the defendant which was part consideration of a deed from the plaintiff to the defendant, the plaintiff is not entitled to have the amount of such damages charged as a lien upon the land in addition to a personal judgment against the defendant.

[*Zdan* v. *Hruden*, 1 D.L.R. 210, reversed on this point.]

Statement

APPEAL by defendant from decision of Macdonald, J., 1 D.L.R. 210, 19 W.L.R. 883.

The judgment below was varied.

*A. C. Campbell*, for plaintiff.

*W. J. Cooper*, K.C., and *A. Meighen*, for defendants.

MAN.

C. A.
1912

ZDAN
v.
HRUDEN.

Cameron, J.A.

The judgment of the Court was delivered by

CAMERON, J.A.:—In this case there was established on the evidence a contract on the part of the defendant to support the plaintiff and his wife during their lifetime and the lifetime of the survivor and a final breach of that contract. This contract was an entire continuing contract. In such a case the plaintiff is entitled to his full remedy without being driven to the necessity of bringing successive actions.

> For breach of a contract to support for life an action lies as soon as there has been a definite default, and such damages may be recovered at once as will compensate the plaintiff, not only for the past, but for the future.

Parsons on Contracts 111, 211, note, and the cases there referred to. In *Schell* v. *Plumb*, 55 N.Y. 592, it was held by the Court of Appeals of the State of New York that

> An agreement by one party to support another during life is an entire continuing contract; and upon a total breach thereof the latter may recover full and final damages, *i.e.*, not only the expenses of support up to the time of trial but also the prospective expense during life.

This case was decided in 1874. In *Amos* v. *Oakley* (1881), 131 Mass. 413, it was held

> If this was a continuing contract for the plaintiff's life, it was also entire in its character, and a complete breach would justify the plaintiff in treating it as absolutely at an end and in seeking a remedy which should give him an equivalent in damages for its value. . . . The plaintiff was not obliged to renew a contract once broken by the default of the defendant, either by making subsequent demands, or accepting support afterwards tendered.

In *Parker* v. *Russell* (1882), 133 Mass. 74, a contract for support was also under consideration. It was there held that:

> If the breach has been such that the plaintiff has the right to treat the contract as absolutely and finally broken by the defendant, and he so elects to treat it, the damages are assessed as of a total breach of the entire contract. When the defendant, for example, absolutely refuses to perform such a contract after the time for entering upon the performance has begun, it would be a great hardship to compel the plaintiff to be ready at all times during his life to be supported by the defendant, if the defendant should at any time change his mind; and to hold that he must resort to successive actions from time to time to obtain his damages piecemeal, or else leave them to be recovered as an entirety by his personal representatives after his death.

These decisions seem to me founded on sound sense and to be applicable to the case before us. I would fix the plaintiff's damages, once for all, at $400. In my opinion no lien on the defendant's property can be established and I think the registration of the *lis pendens* and the judgment should be vacated. I would vary the judgment entered at the trial accordingly.

There will be no costs of this appeal.

*Judgment below varied.*

## GEORGE v. HOWARD.

ALTA.

S. C.

1912

June 1.

*Alberta Supreme Court. Trial before Beck, J. June 1, 1912.*

1. CONTRACTS (§ I E 4—80)—SUFFICIENCY OF WRITTEN CONTRACT FOR PAYMENT OF COMMISSION—STATUTE OF FRAUDS.

A letter written to the plaintiff by the defendant stating that "I will sell my hotel . . . for the sum of forty thousand dollars, covering lots 1 and 2, block 4, and lot 19, block 4, in Blairmore. I will pay you five per cent. commission on purchase price," and signed by the defendant, is sufficient, under ch. 27 of Alberta Statute of Frauds of 1906, to constitute a contract to pay commission in the event of the plaintiff finding a purchaser for the property.

2. BROKERS (§ II B—12)—REAL ESTATE AGENT'S COMPENSATION—SUFFICIENCY OF SERVICE—FINDING A PURCHASER.

An agreement to pay "five per cent. commission on purchase price" if a purchaser was found for property the owner was willing to sell for forty thousand dollars, is a contract to pay commission upon whatever the property was sold for, although less than the sum mentioned, since it was an agreement to find a purchaser only, and the terms of sale and of payment were to be agreed on by the owner and the purchaser, as the agent did not have authority to conclude the contract.

[*Bridgman* v. *Hepburn*, 42 Can. S.C.R. 228, distinguished; see also *Burchell* v. *Gowrie*, [1910] A.C. 614, 80 L.J. P.C. 41; *Stratton* v. *Vachon*, 44 Can. S.C.R. 395, *Singer* v. *Russell*, 1 D.L.R. 646, and *Rice* v. *Galbraith*, 2 D.L.R. 859.]

3. EVIDENCE (§ II E 4—162)—ONUS OF PROVING AGENT'S AUTHORITY TO FIND A PURCHASER WAS WITHDRAWN.

The onus rests upon the defendant, in an action by an agent to recover commission for securing a purchaser for the former's property, to shew that the agent's authority was withdrawn before he found a buyer.

Statement

TRIAL of action for commission on sale of lands.

Judgment was given for the plaintiff.

*McNeil* and *Moore*, for plaintiff.

*Jennison* and *Putman*, for defendant.

Beck, J.

BECK, J.:—I accept the version of the facts given by the plaintiff rather than that given by the defendant.

The written agreement of employment of the plaintiff by the defendant reads as follows:—

Blairmore, May 20, '10 (this was a mistake for '11).

T. B. George, Esq.,
Blairmore.

Dear Sir,—

I will sell my hotel complete except personal effects and stock for the sum of forty thousand dollars ($40,000), covering lots 1 and 2, block 4, and lot 19, block 4, in Blairmore. I will pay you five per cent. commission on purchase price.

HENRY HOWARD.

The defendant's counsel contended (1) that this is not a sufficient contract in writing or note or memorandum thereof to meet the requirements of chapter 27 of 1906 Alberta and (2) that it is a contract to pay commission only in the event of the plaintiff selling at not less than the precise sum named therein.

There can be no doubt that as a contract for commission in the event of the plaintiff finding a purchaser for $40,000 it is

ALTA.

S. C.
1912

GEORGE
v.
HOWARD.

Beck, J.

sufficient. The parties and their obligations, the consideration, and the subject-matter are all expressed. As a matter of interpretation, in the light of the surrounding circumstances, the contract was, in my opinion, one to pay a commission—not on $40,000, but upon the "purchase price," whatever that might ultimately be fixed at accompanied by a statement that the basis of negotiation was to be a price of $40,000. The contract was quite clearly merely to find a purchaser. The plaintiff was given no authority to conclude a contract. It was never intended or expected that $40,000 cash down could be obtained. It was contemplated that even if that price could be obtained terms of payment would be arranged by the defendant and involved in the contemplated negotiations was the reduction of the price in consideration of terms of payment more nearly equivalent to cash down.

The making of the contract between the plaintiff and the defendant is not disputed. The defendant says, however, that the authority thereby given was withdrawn. The onus of satisfying the Court of this lay upon him. He failed to satisfy me that he had withdrawn the plaintiff's authority. I find as facts that, the plaintiff's authority being in existence, he procured Sparks as a purchaser of the property at $34,000, which on certain terms of payment arranged between Sparks and the defendant, the defendant accepted by giving Sparks an option on the 31st July, 1911; that the sale so arranged was brought about by the plaintiff, that it was completed and that, when about to be completed (and it was completed at a time when the defendant might have refused to complete because the option had lapsed) the defendant was aware that the plaintiff claimed to be entitled to commission. I was referred by defendant's counsel to *Bridgman* v. *Hepburn*, 13 B.C.R. 389; affirmed 42 Can. S.C.R. 228. It is not clear on what ground the decision of the Court *en banc*, British Columbia, was affirmed by the Supreme Court of Canada; whether on the ground that the contract there in question was one for commission only if a sale was affected for a sum not less than the named price or on the ground that the plaintiff did not in fact bring about the sale. The last ground is a question of fact. I have found this fact in the present case in the plaintiff's favour. The first ground depended in the case cited upon the proper inference to be drawn from an arrangement entered into orally. Here that question depends upon the interpretation of a written document enlightened by evidence of the surrounding circumstances. The interpretation I put upon the document in question, if correct, makes the case cited inapplicable.

There will be judgment for the plaintiff for $1,700 with costs.

*Judgment for plaintiff.*

## DARKE v. CANADIAN GENERAL ELECTRIC CO.

ONT.

D. C.
1912

March 8.

*Ontario Divisional Court, Clute, Latchford and Sutherland, JJ.*
*March* 8, 1912.

1. MASTER AND SERVANT (§ II E 5—256)—MEANING OF "SUPERINTENDENCE" —R.S.O. 1897 (ONT.) CH. 160, SEC. 2, SUB-SEC. 1—43-44 VICT. CH. 42 (ENG.) SEC. 8.

Sub-sec. 1 of sec. 2 of the Workmen's Compensation for Injuries Act, R.S.O. 1897, ch. 160, providing that "superintendence" shall be construed as meaning such general superintendence over workmen as is exercised by a foreman or person in a like position to a foreman, whether the person exercising superintendence is or is not ordinarily engaged in manual labour, does not have the effect of limiting the word "superintendence" as found in sec. 8 of the Employers' Liability Act (Eng.) 43 and 44 Vict. ch. 42, in which the expression "person who has superintendence intrusted to him" is defined to mean a person whose sole or principal duty is that of superintending and who is not ordinarily engaged in manual labour.

2. MASTER AND SERVANT (§ II E 5—256)—SUPERINTENDENT AS FELLOW SERVANT—R.S.O. 1897 (ONT.) CH. 160, SEC. 3, SUB-SEC. 2.

Under sub-sec. 2 of sec. 3, Workmen's Compensation for Injuries Act, R.S.O. 1897, ch. 160, giving to workmen the same right of compensation and remedies against the employer as if the workman was not in the service of the employer for personal injuries caused by reason of the negligence of any person in the service of the employer who has any superintendence intrusted to him whilst in the exercise of such superintendence, it is not necessary that such superintendence should be exercised directly over the workman injured, or that the workman should be acting under immediate orders of such superintendence, and it is enough if the superintendent and the workman are both employed in the furtherance of the common object of the employer, although each may be occupied in distinct departments of that common object.

[*Kearney* v. *Nichols*, 76 L.T. 63, followed.]

3. MASTER AND SERVANT (§ II E 5—256)—"SUPERINTENDENCE"—R.S.O. 1897, CH. 160, SEC. 3, SUB-SEC. 2.

Where it was the duty of an electrical expert engineer in the employ of an electric company to make a test of an electric generator, which had been just set up by the workmen of the mechanical department, and before making the test, he informed the foreman of the mechanical department, that he did not think the generator was properly secured to the floor, and such foreman ordered two of the men in his department to be present at the time the test was made for the purpose of doing all necessary mechanical work to the machine, the electrical engineer, though he issued no orders to the workmen, was a person having superintendence within the meaning of sub-sec. 2 of sec. 3, Workmen's Compensation for Injuries Act, R.S.O. 1897, ch. 160, giving to workmen the same right of compensation and remedies against the employer as if the workmen was not in the service of the employer for personal injuries, caused by reason of the negligence of any person in the service of the employer who has any superintendence intrusted to him whilst in the exercise of such superintendence, as explained by sub-sec. 1, of sec. 2, of the Workmen's Compensation for Injuries Act, R.S.O. 1897, ch. 160, providing that "superintendence" shall be construed as meaning such general superintendence over workmen as is exercised by a foreman or person in a like position to a foreman, whether the person exercising superintendence is or is not ordinarily engaged in manual labour.

[*Darke* v. *Canadian General Electric Co.*, 3 O.W.N. 368, 20 O.W.R. 587, reversed.]

ONT.

D. C.
1912

DARKE
v.
CANADIAN
GENERAL
ELECTRIC
CO.

4. DEATH (§ III—20)—WHO LIABLE FOR CAUSING—EMPLOYER—NEGLIGENCE OF FELLOW-EMPLOYEE.

An employer is liable for the death of an employee, caused by the negligence of another employee, where it appears that it being the duty of an electrical expert engineer in the employ of an electric company to make a test of an electric generator, which had been just set up by the workmen of the company's mechanical department, and he, before making the test, informed the foreman of the mechanical department that he did not think the generator was properly secured to the floor, and such foreman ordered two of the men in his department to be present at the time the test was made for the purpose of doing all necessary mechanical work to the machine, and the workmen were of the same opinion as the expert as to the insecurity of the generator and suggested to him that they would tighten up certain bolts, fastening the machine to the floor, to which he assented and they proceeded to do so without any further orders from him, and shortly after the electrical expert saw one of the servants standing up near the machine as if through with the work he had undertaken to do, and, taking it for granted that all was clear, turned on the power, causing the death of the other servant who was still working at the bolts.

Statement

APPEAL by the plaintiff from the judgment of Mulock, C.J. Ex.D., *Darke* v. *Canadian General Electric Co.*, 3 O.W.N. 368, 20 O.W.R. 587, dismissing an action brought by the widow and administratrix of Hugh Darke, who was killed, June 15, 1911, while in the employ of the defendants as a machinist's helper, owing, it was alleged, to the negligence of the defendants.

The appeal was allowed and judgment entered for the plaintiff.

*D. O'Connell*, for the plaintiff.

*G. H. Watson*, K.C., and *L. M. Hayes*, K.C., for the defendant.

Clute, J.

CLUTE, J.:—Darke was a workman in the defendant's employ, under Jeffries, the foreman of the mechanical department. An electrical generator had been set up by Darke and his fellow-workmen and fastened to the floor ready to be tested by Thompson, the electrical expert.

Thompson considered the machine insecurely attached to the floor, and mentioned the matter to the foreman, Jeffries, who directed Cartner to remain with Darke while the machine was being tested by Thompson.

Anson was Jeffries' superior officer. One of the defences raised is, that, after the machine was set up, it was examined by Jeffries and Anson, who pronounced it complete and ready for inspection. Darke was ordered to some other work, and had no right further to meddle with the machine without instructions from a competent authority, which, it is alleged, were never given; it was said that, without authority, he, as a volunteer, took it upon himself with Cartner further to secure the machine to the floor, and in doing so placed himself upon the belt in order to reach the work he was engaged upon; and, while he was in that position, Thompson having completed the connec-

tion, without the knowledge of Darke's position, turned on the power, which caused the belt to move and drew Darke under the wheel, which caused his death.

The jury found in answer to questions: (1) that Anson and Jeffries inspected the machine on the afternoon of the 15th of June, and passed it as satisfactorily set up and ready for the electrical test; (2) Jeffries after such inspection informed Darke to the effect that the machine was satisfactorily set up and that the job of setting up was finished and put him on another job; (3) the machine was turned over by Jeffries to the electrical department as in condition to be tested between 5.30 and 6.00 o'clock p.m., on the 15th of June; (4) Darke was put on another job and left on such other job until shortly before the time for beginning the testing; (5) Jeffries took him off this job and instructed him to be present at and prior to the testing in question; (6) his duties on such occasion were to do all necessary mechanical work; (7) the defendants were guilty of negligence which caused the accident; (8) such negligence consisted of (*a*) lack of proper code of signals; (*b*) lack of electrician's assistants so placed as to intelligently signal all clear before the application of the power; (9) the accident was caused by the negligence of a person in the service of the defendants who had superintendence intrusted to him whilst in the exercise of such superintendence; (10) such person was Thompson, and his negligence was, that he did not make a careful examination of the machine and surroundings immediately prior to applying the power; (11) the jury acquitted the deceased of contributory negligence.

The jury also find that the accident was not caused by the negligence of any person in the service of the defendants, who had charge or control of any points, signals, locomotive, engine, machine or train upon a railway, tramway, or street railway; (15) the deceased, while endeavouring further to secure the machine, just prior to the accident, was acting under Jeffries' general order to look after the machine; (16) that prior to turning on the power Thompson did not know that Darke was on the belt. The jury made no assessment at common law, but assessed $1,800 under the statute.

Upon these answers judgment was reserved and subsequently given on the 9th of December, 1911, *Darke* v. *Canadian General Electric Co.*, 20 O.W.R. 587, 3 O.W.N. 368.

The learned Chief Justice, after stating the nature of the case and the findings by the jury, proceeds as follows: "There is no evidence to support the jury's answer to question (9) that Thompson had intrusted to him any superintendence over Darke. Therefore, there is no liability under sec. 3, sub-sec. 2 of the Workmen's Compensation for Injuries Act, nor is there any evidence to support the jury's findings that Darke was acting

ONT.

D. C. 1912

DARKE v. CANADIAN GENERAL ELECTRIC CO.

Clute, J.

under orders of his foreman, Jeffries, while endeavouring to further secure the machine so that there is no liability under sec. 3, sub-sec. 3.

"At common law the company would not be liable for the negligence of Thompson, who, as regards Darke, was a fellow workman. Thus, there is no common law liability. The evidence shews that Darke's duty was to do nothing until after the machine was set in motion, and though he knew Anson and Jeffries had carefully examined the condition of the machine and pronounced it satisfactory and that in consequence he was removed from the job, he by some mistake of judgment of his own motion, perhaps encouraged by the opinion of Thompson who had no authority over him to undertake to further secure the machine, and whilst so engaged met with the accident. Under the circumstances I fail to see where the defendant company is liable and think the action should be dismissed. This is not a case for giving costs."

The plaintiff contends that there was evidence to support the jury's finding; that in any event the system was faulty by reason of the lack of a proper code of signals and also by reason of the electrician's assistant not being placed so that he could intelligently signal all clear before the application of the power, and that the defendants are liable at common law as well as under the statute. They further claim that, in any event, there should be a new trial because of what took place in respect to the answer to question (13) as the view expressed by the Judge and urged by the defendants' counsel was that there was no evidence to support the charge that the death was caused by the negligence of some person in the service of the defendants who had charge or control of signals, engine train, etc.

The principal question argued at bar was as to whether there was any evidence which ought properly to have been submitted to the jury in support of questions 9, 10, and 15. It was argued that, Jeffries having inspected the job and passed it over to Thompson, Darke voluntarily and officiously interfered without authority, and against his duty; that his duty did not begin until the test by Thompson commenced; that he was not subject to Thompson's orders, nor was Thompson a superintendent under sec. 3, sub-sec. 2, as defined by sec. 2, sub-sec. 1, of the Act.

If the facts are as suggested, the judgment is, in my opinion, right; but it is, upon the other hand, strongly urged by the plaintiff's counsel that the evidence shews what in effect the jury have found; that Darke was properly engaged in making the machine more secure at the moment when Thompson turned on the power which caused his death; that Thompson was a person having superintendence, within the meaning of the Act; and that it was owing to his negligence in not taking

reasonable care, under the circumstances, to ascertain that all was clear before he turned on the power, that Darke came to his death.

The evidence upon this point depends upon a number of witnesses and the meaning to be ascribed to their evidence and the inference to be drawn from it.

It will be seen that, on the findings of the jury in answer to questions 1, 2, 3, 4, and 5, Darke's work upon the machine to be tested was complete; that he was put upon another job; that he was afterwards taken off that job and sent back to be present at the testing; and that his duties on such occasion were "to do all necessary mechanical work." We thus have the position that Darke, having mechanical knowledge, was present at the machine with Thompson and his assistant to do any mechanical work necessary during the testing.

The case turns, I think, upon what took place after Thompson had arrived, and while Darke was waiting to do such mechanical work as he might be called upon to do.

The learned Chief Justice in dealing with this part of the case says, "At about 9.40 p.m., Jeffries instructed Darke to be present at the testing along with one Cartner, and watch the bearings and bolts. Accordingly, Darke was in attendance and formed the opinion that the machine was not sufficiently secure and so expressed himself to Thompson, and said that he would add another bolt. Thompson seems also to have considered the machine insecure. Jeffries was not then present, though elsewhere in the shop. Darke went down the shop for a wrench, returned and proceeded to apply an additional clamp to the machine, Thompson standing at the switch at which point he could not see Darke, the machine being between them. A motion by Cartner was misunderstood by Thompson, as meaning that all was ready for the power to be turned on. This was done when the accident happened. Cartner was not Thompson's assistant proper; he was working with Darke and had been sent by Jeffries to assist, and at Thompson's request, because Thompson feared that the machine would move, that is, it was not sufficiently fastened down. Jeffries was about leaving for home when Thompson saw him." Thompson had been working on another machine until half-past nine. He then went to superintend the starting of the machine, to see that the machine was operating properly, and to obtain certain electrical data which would prove whether the machine would come up to its guarantee, or not.

He says that Darke told him not to start for a moment that he wished to tighten a bolt. The witness says he has an indistinct recollection as to the time when he saw Darke (and this would appear so on reading his examination); that Darke had been tightening up a bolt there and asked Thompson to go to

ONT.

D. C.
1912

DARKE
v.
CANADIAN
GENERAL
ELECTRIC
CO.

Clute, J.

the back of the machine, and he would point out where he had been tightening the machine; that Thompson went around and said, "Well, we will try it anyway at that." He says this was ten minutes or a quarter of an hour before he started the machine; that was before Cartner came; that Darke walked away and that he did not see him until after the accident; that before he started the machine he went around twice to see that all was clear; that Cartner gave, what he took to be a nod, that all was clear, and he turned on the power, when the accident occurred.

On cross-examination he says that when he looked around the machine he was under the impression that it might move, that it was not quite secure. He says that Darke came to him about half-past nine and told him that he would be alone after ten o'clock; that he said to Darke, "I think the thing will move, and to leave only one machine fitter on the job is not fair to us, because I do not want to be in all night, and if they only left one man it would mean a long job if it did move"; that after seeing Darke he saw Jeffries, the foreman; that it was after he told Darke he was afraid the machine would move that Darke said he would tighten the bolt at the back of the machine, and he went around there for that purpose; that at the time he did not know where Cartner was; that he did not see Cartner and Darke together at all; that he saw Darke tightening the bolt, and afterwards Darke came to him and he said, "I have tightened those bolts up now." That was previous to Cartner coming. When Cartner came he said, "Wait a minute I want to tighten a bolt at the front," and Cartner then started to tighten a bolt in the front. This he says was no doubt ten minutes before the switch was turned on. He says, "I have only got a hazy opinion as to the periods of time."

> Q. So he told you not to turn the power on for a minute, he was going to tighten a bolt in the front? A. Yes.
>
> Q. And saw him go there? A. Saw him go there.
>
> Q. And afterwards saw him rise up? A. I saw him standing, I saw him rise up.
>
> Q. What did you do? A. I signalled to him, a wave of the hand.
>
> Q. And you got what you took to be a nod of the head? A. I got a nod, what I took to be a deliberate nod.

Upon being examined further about his conversation with Darke, he says:—

> That he did not make any round of inspection after Cartner told him he was going to tighten the bolt.
>
> His Lordship: Q. Did you see Mr. Jeffries that evening? A. Yes, my Lord.
>
> Q. When? A. Possibly about twenty minutes previous to the accident.
>
> Q. Where did you see him? A. Oh, probably 20 yards away from the outfit, south of the outfit.

Q. Was this before you had gone on duty? A. This was after I had gone on duty.

Q. Was it before Cartner had told you that there was a bolt loose? A. Yes, before Cartner told me he was going to tighten up a bolt.

Q. Before he told you that, did you have any conversation with Mr. Jeffries in regard to tightening up this machine? A. Well, the conversation that I had with Mr. Jeffries was simply to the effect that I had heard Darke tell me there was only one man to be left after 10 o'clock, and that I thought that was not fair to us, and I asked him if he did not think it would be better to leave another man.

Q. To assist in the process of test? A. To assist in case anything moved.

Q. To assist in case anything went wrong after it began? A. Yes.

Q. That was the substance of your conversation with Jeffries? A. Yes, sir.

Q. That was all? A. That was all.

Cartner, a machinist, who was working with Darke at the time of the accident, says that he was otherwise engaged in the shop until nearly twenty minutes to 10 o'clock; that Darke spoke to him about 9 o'clock and said that he did not like the look of the machine; that he did not think the machine was safe; that he thought it would shift, and that one man would be no good jacking it back again. He replied that it was for Jeffries to say whether he would stay or not, and Darke said he was going to see Jeffries, and he went with Darke; he did not hear all that Jeffries said, but Jeffries told him to stay with Darke until the load was on the machine, to see that everything was all right and if he wanted any assistance to give it to him. He did not hear Darke tell Jeffries that the machine might shift. After the conversation with Jeffries, Darke asked him to take a look at the clamp, which he had already spoken of. He did not think it safe. At this time Walker, another fellow-workman, was also there and the three of them talked it over and Cartner suggested putting in a jack, which was tried, but would not work. "We could not get a straight draw on it." Darke then suggested putting in a clamp. This was got and they proceeded to put it in. They had some difficulty in doing so. They finally got the bolt through the slot and were wrenching down the nut, Darke kneeling on the belt which they thought was the quickest way in the interest of the firm to get the thing tightened down.

Q. When you have to secure a machine who superintends the method to be adopted? A. The man in charge. We generally go to work to put up a machine, we pretty near know what is needed, and we go at it in that way, your Lordship.

Cartner stood up to rest himself from the bent position he had been in and Darke said if he could only get a little more squeeze on this we would be all right. Cartner got down again to assist, and the accident happened. Jeffries was on the pre-

ONT.

D. C.
1912

DARKE
v.
CANADIAN
GENERAL
ELECTRIC
CO.

Clute, J.

mises in the shop in the office. When asked by Mr. Watson whether Jeffries was informed of putting on this clamp he said he could not say; he thought the clamp was needed. He speaks of Darke being a pretty careful man, generally.

Q. Then when you came to the machine about 20 minutes to 10 when did you see Thompson first? A. I went and told him we were going to put on this clamp.

His Lordship: Who did? A. I did.

Mr. Watson: Q. You told Thompson you were going to put on the clamp? A. Yes.

Q. Why did you tell him that? A. Because he told me he was going to start up about 10 o'clock.

Q. That was the reason, and you told him that you and Darke were going to put on a clamp? A. That is one thing. I often wish I could remember. I do not remember the exact words, but I remember telling him we were going to fix that, because he said himself he did not think it was safe.

Q. You do not know about that? A. Only what he said.

Q. You did not hear him say that? A. No, he told Darke and Darke told me.

Q. Did the accident occur before or after 10 o'clock? A. It occurred before 10 minutes to 10, to the best of my knowledge.

Q. Did it? A. Yes, sir.

Q. And you say—who told you it was to be started at 10 o'clock? A. Mr. Thompson said he thought he would start about 10 o'clock.

Q. That is before you told him the new clamp was going to be put on? A. Yes, sir.

Q. And now you say it was started before 10? A. Started about 5 minutes to 10.

Q. Are you sure of that? A. To the best of my knowledge, because the whistle blew for 10 o'clock, just when we were getting him out of the belt.

Q. Then did you give him any signal to start? A. I did not, sir.

Q. If he says that in evidence that you got up and gave him a nod, which in the regular course would be a nod, a signal to proceed? A. I did not know a nod was a signal.

Q. Did you give any nod? A. No, sir, to the best of my knowledge anything I did when I rose up was done unconsciously, for I did not raise up with the intention of giving any signal.

He further says that Darke was in charge of this machine that night. He, Cartner, was not.

Q. So that when Thompson started up according to your statement, he started up without any direct signal from you? A. Yes, sir.

Q. Too quickly? A. Too quickly, he thought when I got up, he made a mistake in starting up.

Q. But you were going on to say that doing this particular work it could be done more easily and conveniently on the belt? A. Yes, sir. We could not see any other way to get at it that night, and he got on, and thought he was working in the best position.

Being questioned again as to what Jeffries said, he says:—

Mr. Jeffries told me to stay with Mr. Darke until the load was on the machine to see if everything was all right. If anything was not right I was to stay with him, but he said, "Come in in the morning, I want you on the other machine in the morning."

Q. If anything was wrong with the machine what were you to do? A. We would have to fix it to the best of our ability if anything went wrong in our scope, that we could fix.

His Lordship:—

Q. Did Mr. Jeffries tell you what the nature of the work was to be? A. Your Lordship, we pretty near understood it ourselves what had to be done. If anything went wrong, you see, there was no foreman there after 10 o'clock.

Q. If anything went wrong at what stage? A. When they start the machine up, the machine may shift, there is a chance of that, and we would have to go all over it again and fix it.

Q. Would you go and report that to Mr. Jeffries? A. After 10 o'clock there would be no one to report to.

Q. On whose judgment would you act? A. If we thought we should, we would do it.

Q. Has that been the course of action in that shop? A. Sometimes it was done.

Q. If the machine shifted? A. If they shifted, but I could not remember ever one shifting at night.

Then being asked as to the securing the machine, he says:—

Q. When a machine is put in position on the ground and is handed over to the machine fitters? A. We have to secure it.

Q. Is there any one supervising your work? A. Personally, you mean?

Q. When you are doing it? A. We are there in our own discretion. He might be along, but when we are there we are actually doing the work ourselves. He might come along.

Then being asked as to the machine being sufficiently secured, he says:—

A. I thought it had not enough hold.

Q. So that would be one of the things to which His Lordship referred, you would remedy if you saw fit, do so at your own discretion? A. Well, we might do it at our own discretion.

Q. Or substitute another clamp for it? A. If necessary.

Again being asked as to what he told Thompson, he says that he cannot remember the exact words:—

I told him not to start up, we were going to fix this pillow block.

Q. Did you proceed to do the work immediately afterwards? A. Yes, sir.

The witness Fielder, Thompson's assistant, saw Darke before the accident screwing some bolts at the back of the machine, but did not know where he was at the time of the accident.

The witnesses, Bond and Kite, prove that the machine was further secured after the accident by clamps, as was being done by Darke at the time of the accident.

ONT.

D. C.
1912

DARKE
v.
CANADIAN
GENERAL
ELECTRIC
CO.

Clute, J.

Jeffries, the foreman over Darke, and in charge of him and the other men who set up the machine, swears that it was inspected by Anson, the general foreman over him and himself, between 5 and 6 o'clock and the men put on another job, and that Darke had no instructions from him in the way of further securing the machine down to the floor; that his instructions were to watch the bearings and the belt at the start up and to see that the belt did not go off. He positively denies that he gave either Darke or Cartner instructions to put on a further clamp. On cross-examination he says that in doing work of this kind the men exercise their own discretion more or less. He admits that Darke had spoken to him and in consequence he had sent Cartner to remain with him and that Thompson had also spoken to him, but he does not remember clearly what Thompson said. He is asked:—

> If Darke or Cartner saw a bolt loose would it be their duty to fix it if you were not there? A. If there was no one else to; there would be no one else.
>
> Q. If there was no one else, if there were a bolt loose there, would it be their duty to fix it?
>
> Mr. Watson: Before or after?
>
> Mr. O'Connell: While they were waiting for the test to be made? A. If they said it I suppose it would be made.
>
> Q. It would be their duty? A. If it was——
>
> Q. Never mind explaining the why. A. I do not just see——
>
> Q. Do not try to define reasons. Tell me why, I ask you, why would they tighten the bolt? A. I suppose if it was necessary to tighten the bolt they would do so.
>
> Q. Why, to make the machine more secure? A. May be that.
>
> Q. Would that not be the only reason? A. Yes.

He denies that Thompson had any right of supervision or direction over Darke, but only over the men assisting him in the test.

A fair result of the evidence bearing upon the question of Darke being lawfully where he was and doing what he did at the time of the accident, may be shortly stated thus. He had been engaged under Jeffries during the day, setting up the machine. About half-past five it was inspected and pronounced complete and ready for the test by Jeffries and his superior officer, Anson. Darke was then put upon another job, but ordered to return to be present at the testing about half-past nine; both Darke and Thompson thought the machine insecure, and both Thompson and Darke communicated with Jeffries. Exactly what is disclosed does not clearly appear; but, in consequence of these communications, Cartner was sent back with Darke to be present with Darke during the testing. Jeffries, while denying that he gave Darke specific instructions to put on the clamp at which he was working at the time of the accident, yet admits that Darke had a certain discretion in

work of this kind; and, if it was discovered before the power was applied that a nut was insecure, he might tighten it; and, from his evidence, I think it a fair inference, upon which the jury might have acted, that, as Darke and Cartner were persons who understood and to whose charge had been committed the duty of setting up the machine and securing it ready for the test, they might reasonably and properly act upon their own discretion further to secure the machine, if they thought, and Thompson, who had charge of the test, thought, it was insecure. Thompson, being an electrical engineer, must have had better knowledge of the security required for the power to be applied than any one else; and it appears to me that neither he nor Darke would have been reasonably discharging their obvious duty, if, knowing the machine was insecure, and that men were there competent to make it secure, the proper means had not been taken further to secure it.

I think, therefore, this was evidence which could not have been properly withheld from the jury, and that their finding in answer to question (14)

> By what authority or at whose instance was the deceased acting when endeavouring to further secure the machine just prior to the accident? A. Jeffries' general order to look after the machine.

was well warranted by the evidence; that he was not a volunteer in any sense, but was at work in discharge of his duty at the time of the accident; and this I take to be the meaning of this finding.

Then was there evidence to support the answers to questions 9 and 10?

> Q. Was the accident caused by the negligence of any person in the service of the defendant who had any superintendence intrusted to him whilst in the exercise of such superintendence? A. Yes. Q. If so, who was such person and what was such negligence? A. Thompson, in that he did not make a careful examination of machine and surroundings immediately prior to applying the power.

The first question that arises is as to whether or not Thompson was a superintendent, within sec. 3, sub-sec. 2, as explained by sec. 2, sub-sec. 1. It was strongly urged that, under sec. 2, sub-sec. 1, the superintendence must be of a person under whose authority Darke was acting, that is, having superintendence over him. I do not think this to be the meaning of the section. It should be remembered that, under sec. 8 of the English Act, the expression "person who has superintendence intrusted to him" means a person whose sole or principal duty is that of superintendence and is not ordinarily engaged in manual labour.

The effect of sec. 2, sub-sec. 1, is not to limit the word "superintendence" as found in the Imperial Act, but to extend it. In the Imperial Act, superintendence is limited to persons not

ONT.

D. C.
1912

DARKE
v.
CANADIAN
GENERAL
ELECTRIC
CO.

Clute, J.

ordinarily engaged in manual labour. By sub-sec. 1 of sec. 2, the word "superintendence" is enlarged to mean any person who has general superintendence over workmen such as is exercised by a foreman or person in a like position to a foreman, whether the person exercising superintendence is or is not ordinarily engaged in manual labour. It does not mean that the person having superintendence must have such superintendence over the person who is injured; but that, wherever there is a general superintendence over workmen such as is exercised by a foreman or a person in a like position to a foreman, then sec. 2, sub-sec. 1, applies, whether such person is or is not ordinarily engaged in manual labour. It, in effect, extends the application of the Act to cases not included, owing to the limitation in sec. 8, within the Imperial Act.

In *Kearney* v. *Nichols*, 76 L.T. 63, it was held by Denman, J., that it is not necessary that such superintendence should be exercised directly over the workman injured or that the workman should be acting under the immediate orders of such superintendence. It is enough if the superintendent and the workmen are both employed in the furtherance of the common object of the employer although each may be occupied in distinct departments of that common object.

There the plaintiff's husband had been employed by the defendants as an under-looker in the mill in question, and on the day when he met his death, was engaged in cleaning and oiling some machinery. There were some structural alterations being made in the mill, including the removal of the engine house, and a man named Todd was appointed clerk of the works to superintend the structural alterations, being engaged by the architect but paid by the defendants. The jury found that Todd was guilty of negligence, that the death was caused by such negligence and that Todd was in the service of the defendants as clerk of the works intrusted with the superintendence of these structural alterations and was in the exercise of such superintendence when the negligence was committed.

The case was adjourned for argument. It was objected for the defence that the plaintiff was under no liability to take orders from Todd. If there was a superintendent it was not the clerk of the works, but one Hart, manager of the works, who had employed Kearney to oil the machinery and to whose orders he was bound to conform. Superintendence meant a superintendence over the man and over the work in which he was engaged, and that the words "service" and "superintendence" as used in sec. 1, sub-secs. 5 and 8, shewed that the business of the superintendent and the workman must be the same, and as that was not so here, effect should not be given to the finding of the jury. In answer to this the plaintiff's counsel presented a very clear argument of the law as it existed prior

to the Act and of the object of the Act, and that having regard to the true construction of the Act the master was liable for anything flowing from the superintendent's negligence while acting within the scope of his authority, whether the workman injured thereby was bound to obey him or not, provided he was employed in furthering the common end of the company or of him who was the common master of both. If sub-sec. 2 had been intended to have the limitation put upon it which was contended for by defendants, it ought to have had added to it words similar to those of sub-sec. 3 stating that the workman was at the time of the injury bound to conform and did conform to the orders given.

Denman, J., intimated that although a strong case had been made out against the application of the Act, in his view the Act would apply to even a more extreme case than the one before him. He says:—

> Suppose, for instance, there was a factory and that the person injured was one whose duty it was every day to go to the factory and put the bales of goods into carts; suppose, also that the stables of that factory were totally removed from the other departments, and that there was a foreman, or manager, of the stables, and that he negligently and improperly put a furious horse in a cart, causing injury to those in the cart; yet, looking at the words of the Act, and putting the construction on them, not, perhaps, that the legislature might have intended, but the construction to be put on the words they had used, which was the true principle to be followed, he thought they would cover such a case as that just put, and that, therefore, they would cover the present case.

He then refers to the facts of the case as above stated, and proceeds:—

> Upon the whole it was a safe construction to put on the Act that it did cover the case where injury happens to anyone in the employment of the owner of the works through the negligence of a person intrusted with superintendence, though in another department of the works or business.

This case does not appear to have been questioned. It is referred to in Ruegg's Employers' Liability Act, 1880, p. 132, where he says: "The superintendence under sub-sec. 2 need not be exercised over the injured person. It is sufficient to render the employer liable that a servant who has superintendence, whilst exercising such superintendence, causes injury to a workman in the service of the same master."

I, therefore, think that Thompson was a person having superintendence, within the meaning of sec. 3, sub-sec. 2, as explained by sec. 2, sub-sec. 1.

Then, was there any evidence that could properly be submitted to the jury of negligence on the part of Thompson? Thompson was an electrical engineer employed by the defendants, to whom was intrusted the duty of superintending the

ONT.
D. C.
1912
DARKE
v.
CANADIAN
GENERAL
ELECTRIC
CO.
Clute, J.

final testing of the generator, and having under him an assistant for that purpose. It is part of the defendants' case that Thompson was a man competent for his position. He knew what power was to be applied; what pull would be exerted on the machine when that power was applied; and he knew or ought to have known whether or not the machine was sufficiently secured to resist the power. In his opinion, it was not sufficiently secured. This opinion was supported by Darke and Cartner. So fully did he realise this fact, that he communicated with Jeffries. He states in his evidence that he considered it his duty to examine the machine and to see that all was clear before he applied the power, and states that he went around the machine twice for that purpose. It was after he had made these examinations, he says, that he saw Jeffries, and that Cartner came, in answer to his request for another man; and Cartner, he knew, was in the act of fixing the machine immediately before the power was turned on. He says that he did not know where Darke was, and the jury so find. He says that he understood that Cartner gave him a signal, a nod, that all was clear. Cartner says he gave no such signal, and that he knew of no signal of that kind to be given. Cartner says the power was to be turned on at 10 p.m.; and, notwithstanding that, Cartner told Thompson that "we" (meaning himself and Darke) "were going to fix the clamp," and went immediately to do so; yet Thompson turned on the power before 10 o'clock, without ascertaining if all was clear. Was Thompson justified in a case of that kind in turning on the power without further examination or ascertaining for a certainty that everything was clear and ready for the power to be turned on? After going over the evidence with great care, I cannot say that there was not evidence that ought to have been submitted to the jury. I think there was evidence upon that question, and that there was sufficient to support the jury's finding that Thompson was guilty of negligence. If Cartner's evidence is to be believed, there was no code of signals, and no signal was given. From the undisputed facts, the jury might infer, if they believed Cartner, that Thompson carelessly took it for granted that all was clear when he saw Cartner standing there, and negligently and carelessly turned on the power, without satisfying himself where Darke was, or whether all was clear.

With great respect, therefore, I am unable to agree with the finding of the Chief Justice that there was no evidence to support the answer to question 9.

With the view I take of the case, it is not necessary to consider whether there was evidence to support the answer to question 8 in regard to a code of signals, or whether the jury received a wrong impression from the observations of the Judge and the defendants' counsel as to whether the accident was

caused by reason of the negligence of any person in the service of the defendants who had charge or control of any point, signal, locomotive, engine, machine, or train.

ONT.

D. C.
1912

DARKE
v.
CANADIAN
GENERAL
ELECTRIC
CO.

Latchford, J.

LATCHFORD, J.:—I cannot add much that is useful to the judgment of my learned brother Clute.

It is manifest that the jury did not credit the superintendents, who gave evidence, that until the actual test began nothing remained to be done to the generator by the men connected —as Darke was—with the mechanical department. The machine was, as a matter of construction, completed. The test might, it is true, reveal latent defects, or shew that the capacity was not as great as was desired; but nothing that the highest technical knowledge could foresee had been left undone to make the generator structurally perfect.

The mechanical department had, after construction, to secure the generator in a position for the test. Necessarily, the machine should be properly aligned, and so firmly attached to the metal floor that it would not be moved off its temporary bed when subjected to the enormous strain of the heavy belt. The slightest yielding to this strain would cause the belt to fly off, with obviously serious consequences.

Jeffries thought the generator was properly placed and sufficiently well secured. He swears that after he had passed it as secure, the only duty of Darke in relation to the generator was to look after the belts and bearings, and this only after the test began. Thompson, however, when about to make the test, considered that the machine might move, and so informed Darke and Jeffries; and asked Jeffries for an additional man "to assist in case anything moved." Jeffries then undoubtedly changed his opinion that the clamping he had seen was sufficient, and he furnished Thompson with Cartner as assistant to Darke.

Jeffries and Anson both swear that Darke and Cartner would have no duty to discharge in connection with attaching the generator more securely to the floor until after the test actually began; but there are findings of the jury that Jeffries instructed Darke to be present prior to the test and then, as well as after the test began, to do all necessary mechanical work. The jury manifestly discredited the testimony of Jeffries and other managers of departments and properly drew an inference from the facts disclosed and the sequence in which those facts occurred.

After it was known to Jeffries, Thompson, Cartner and Darke that the generator might shift during the test, Cartner and Darke—in the presence of Thompson—proceeded to make the generator more secure. I think it absurd to say that they should have waited until the test began and the generator was pulled

ONT.

D. C.
1912

DARKE
v.
CANADIAN
GENERAL
ELECTRIC
CO.

Latchford, J.

from its fastenings—temporary at best—and the belt flying from its pulley had wrecked everything within its destructive reach. It is, I think, also absurd to say that Darke, a mere machinist helper, in trying to make the machine more secure for the test was not acting under the superintendence of the engineer who was making that test for the defendants, and who conceived it imprudent or impossible properly to make such a test until the machine was secured as Darke was engaged in securing it when Thompson negligently caused his death. Thompson had, I think, superintendence entrusted to him within the meaning of sub-sec. 2 of sec. 3 of the Act. There is, in addition, evidence which fully warrants the finding of the jury that Darke was at the time of the accident acting under Jeffries' general order to look after the machine, that is, to do all things, both prior to the test and during the test, necessary to the proper application of the test.

I think the judgment appealed from should be reversed and judgment entered for the plaintiff for $1,800, with costs of trial and appeal.

Sutherland, J.

SUTHERLAND, J., also concurred.

*Judgment for plaintiff.*

---

ONT.

C. A.
1912

June 28.

## MANN v. FITZGERALD.
### (Decision No. 2.)

*Ontario Court of Appeal, Moss, C.J.O., Garrow, Maclaren, Meredith and Magee, JJ.A. June 28, 1912.*

1. EJECTMENT (§ II A—15)—DISPUTED BOUNDARY — ADVERSE POSSESSION —NO PAPER TITLE.

On the trial of an action of ejectment in respect of a parcel of land claimed by two adjoining owners, if neither of them has any paper title to the disputed land, the action will be dismissed, notwithstanding proof that plaintiff had placed a tent on the land and was ousted by the defendant, if it appears that such was the only act of possession by the plaintiff and that the lands were not enclosed and that the defendant had at intervals exercised acts of possession equally adverse as to the plaintiff.

[*Mann* v. *Fitzgerald*, 1 D.L.R. 26, 3 O.W.N. 488, affirmed on appeal; see also the Annotation, 1 D.L.R. 28-31.]

Statement

APPEAL by the plaintiffs from the judgment of MIDDLETON, J., 3 O.W.N. 488, 1 D.L.R. 26.

The appeal was dismissed.

The action was for ejectment and the question was as to the title to a peninsula extending into Cameron Lake, physically connected with lot 26 in the 10th concession of Fenelon township, but lying in front of lot 25. The trial Judge dismissed the action: *Mann* v. *Fitzgerald* (*No.* 1), 1 D.L.R. 26, 3 O.W.N. 488.

*E. D. Armour*, K.C., and *A. D. Armour*, for the plaintiffs.

*R. J. McLaughlin*, K.C., for the defendant.

The judgment of the Court was delivered by MAGEE, J.A.:—The land in question is the outer end of a peninsula projecting from the front of broken lot No. 26 in the 10th concession of Fenelon township, south-westerly into Cameron lake. The peninsula is separated from the mainland by a bay running up north-easterly about 10 chains into the southerly side of that lot, the total length of the bay and peninsula being over 40 chains, and the peninsula itself projects as far south as the middle of lot 25, which is south of lot 26, and separated from it only by a side road allowance. The question is, whether the south boundary of lot 26 on the mainland should be extended across the bay and peninsula. The plaintiffs contend that it should not be so extended, but that the whole peninsula is part of lot 26, and was included in the Crown grant of that lot under which they deduce title. The defendant contends that the line should be so extended, and that all south of it belongs to him as owner of lot 25.

The township was surveyed in 1824 by James Kirkpatrick, under written instructions from the Surveyor-General. Those instructions directed that the township should be laid out into concessions, 66 chains and 67 links wide, and each concession into lots 30 chains wide, thus containing 200 acres each. No latitude was given the surveyor as to including in any lot any parcels beyond such boundaries which might more conveniently be occupied with it. Actually, he was only to survey and mark the centre lines of the roads between the concessions and mark the side lines of each lot and side road; and, should the waters of any lake come within the survey, they were to be accurately traversed, the contents of each broken lot were to be calculated and stated on each, and a plan of the survey was to be made out and sent to the Surveyor-General's Department with the field-notes.

Under these instructions, the only way of ascertaining the length of these two lots would be from the traverse of the lake shore. If that is in existence, it is not produced, and the field-notes, being only of the work on the concession road allowances, do not aid. There is some evidence that this peninsula extends so far west that the west part of it would be in the 9th concession, and that the concession road would run north and south across it. But, according to the field-notes of that concession road, the lake extended across it from lot 23 to lot 31. The plan sent in by the surveyor shews no peninsula or bay, but shews the lake shore of lot 26 as being wholly east of the centre line of the 10th concession, and the lot is marked as containing only 78 acres.

In the absence of any record of the traverse of the lake, it is impossible even to guess whether it was the peninsula or the bay which the surveyor failed to see. He shews the northern

ONT.
C. A.
1912
MANN
v.
FITZGERALD.
Magee, J.A.

boundary of lot 26 much shorter than the southern boundary, and in that respect his contour of the shore, wrong as it is, would roughly correspond with the actual lake frontage of the lot down to the disputed parcel. His line of shore trending to the east as it went north across lot 26 he may have got by inaccurate sighting from some point to the north or west where the bay would not be seen, and thus he would be led into drawing the plan wrongly, as he did.

If it were in truth the bay which was omitted, and he intended the line of shore upon his plan to represent the outer or western side of the peninsula, then the line between the lots should be carried to that side. No work on the ground along the side road or side lines was required to be done by the surveyor; there is nothing but the plan to indicate the division line between these two lots; and, according to it, the line extends till there is nothing beyond it but the main body of the lake. It seems to me as reasonable to suppose that he omitted the bay as that he omitted the peninsula; and, if he did, then this land would belong to the defendant. No argument can be drawn against that supposition from the fact that the length of the side road on the plan approximates the actual length measured to the bay, and is much short of the length to the peninsula, for it is evident that the lengths were mere guess-work, and there is in fact greater discrepancy at the northern boundary than at the southern.

But, assuming that it was the peninsula which the surveyor failed to see or to survey or to note on his plan, I agree with the learned trial Judge that it cannot be said that this land was granted by the Crown as part of lot 26. Neither according to the surveyor's instructions nor to any actual work by him on the ground, nor according to his plan or field-notes, nor according to the description by metes and bounds in the letters patent, did it form any part of that lot. The Crown never knew of any land called lot 26 extending beyond the northerly and southerly width of 30 chains and the easterly and westerly length of 66 chains and 67 links. In giving instructions for running the lines in that way, it reserved to itself the discretion as to joining in a grant parcels which could more conveniently be held or worked together. No discretion was given to the surveyor, and there is nothing to shew that he attempted to exercise any such discretion or so depart from his instructions. No land outside the prescribed dimensions is anywhere shewn as constituting part of this lot, and the absence of any marks of division on the peninsula is accounted for by the fact that no division anywhere along the line was called for or made, except at its eastern end.

The description in the letters patent does not strengthen the case for the plaintiff. It runs westerly along the northern

boundary to Cameron lake, and "then southerly, westerly, and southerly to the southern limit of said broken lot number 26 in said 10th concession, otherwise to the allowance for road between broken lots Nos. 26 and 25," and then easterly. This southerly, westerly, and southerly course does not even affect to follow the lake shore; and more nearly agrees with the defendant's contention than with the plaintiffs', in fact, as the plaintiffs would have to interpolate also an easterly and a northerly course. The reference to the side road accords with either contention; and the distances from the township line given for the northerly and southerly courses, though far astray, correspond relatively rather with the line claimed by the defendant. So far as the letters patent are concerned, we are, therefore, left to the meaning to be attributed to "broken lot No. 26;" and the Crown, having never consented to name any land as lot No. 26, which would cover the land in dispute, cannot, I think, be held to have granted it; and the judgment of the learned trial Judge should be sustained.

The evidence shews that ever since 1868 the land in dispute has been recognised by the resident owners of each lot as belonging to lot 25. The owners of lot 25 have sold timber upon it, and trespasses upon it have been reported to them by the neighbouring owner of lot 26. The line of side road across the peninsula was surveyed and marked by a surveyor at the instance of the owner of lot 26 in 1868, and was afterwards pointed out between successive owners of lot 26 as their boundary, and the land in question has been known as Diehl's Point, called after Peter Diehl, who owned lot 25 from 1833 to 1853. Continuously since 1882, excepting a few years, the owner of lot 25 has been receiving rentals from lumber firms for the right of "snubbing" timber along the shore. In every way, so far as acts of ownership of land of such character and so situate could be expected, have the owners of lot 25 been acting as owners. Until these plaintiffs in 1909 obtained, by discreet wording, a conveyance from J. J. Eades, who did not pretend to own the land, and did not think he was conveying it, it was never questioned between the owners of the two lots that it formed part of lot 25. Although there is no fence between the two lots at the peninsula, there is low, swampy ground, and it is not shewn that even cattle from lot 26 crossed more than a very few times. There has been no attempt at shewing any act of ownership by the proprietors of lot 26, and there was, in fact, I think, upon the evidence, clearly a discontinuance of possession by them for more than 40 years, if any possession by any of them could be said to have been had.

The appeal should be dismissed with costs.

*Appeal dismissed.*

ONT.

H. C. J.

1912

April 16.

## REX ex rel. Morton v. ROBERTS.

## REX ex rel. Morton v. RYMAL.

*Ontario High Court, Riddell, J., in Chambers. April 16, 1912.*

1. OFFICERS (§ I C—31)—DECLARATION OF QUALIFICATION—MORTGAGEE ON ASSESSMENT ROLL—MUNICIPAL ACT (ONT.) 1903.

A mortgagee who is assessed for freehold property of the value named in the statute may make a valid declaration of qualification for office under the Municipal Act of Ontario, 1903.

2. OFFICERS (§ I F—65)—CONTEST—ORIGINATING NOTICE—ABSENCE OF CLAIM TO SEAT—AMENDMENT BEFORE DISPOSITION.

The right of a mayor, warden, reeve, alderman, county councillor, or councillors to hold a seat may be attacked by an originating notice at the instance of an elector even though the latter does not claim the seat for any other person, and the notice may be amended at any time prior to the final disposition of the motion attacking it.

3. OFFICERS (§ I C—31)—PROPER DECLARATION OF QUALIFICATION—EFFECT OF NON-COMPLIANCE WITH STATUTE—LEAVE TO MAKE.

The mere fact that a proper declaration of qualification for office required by the Municipal Act of Ontario, 1903, has not been made, does not, of itself, compel the Court to declare the seat vacant, but the party elected may, if otherwise qualified, be given leave to make the declaration of qualification so as to complete his *de jure* right.

[*Regina ex rel. Clancy* v. *Conway*, 46 U.C.R. 85, followed.]

4. OFFICERS (§ I C—31)—REFUSAL TO MAKE DECLARATION OF OFFICE—REFUSAL OF OFFICE.

Refusal or neglect to make the declaration of qualification for office, even if caused by inability to make it, amounts to refusal of the office.

[*Rex* v. *Larwood* (1693), Carthew 306, specially referred to.]

5. OFFICERS (§ II B—27)—MUNICIPAL OFFICERS—ESSENTIALS TO OCCUPATION OF.

The three essential pre-requisites of the occupation of a municipal office *de jure* under the Municipal Act of Ontario, 1903, are: (1) The actual possession of the necessary property qualification: (2) Election to office; and (3) The completion of the statutory declaration of qualification as required by statute.

Statement

APPEALS by the respondents from orders of the Junior Judge of the County Court of the County of Wentworth declaring that the respondents had lost the right to hold their seats as councillor and deputy reeve respectively for the township of Barton, having become disqualified since their election to those offices.

The appeals were allowed on terms.

*J. G. Farmer*, K.C., for the respondent Roberts.

*A. M. Lewis*, for the respondent Rymal.

*W. A. H. Duff*, K.C., for the relator.

Riddell, J.

RIDDELL, J.:—At the recent municipal election in the township of Barton, such a number of nominations were made as would apparently necessitate a taking of votes; but at the proper time, a sufficient number resigned (Consolidated Municipal Act, 1903, sec. 129 (2), (3)) to enable the clerk (sec. 129

ONT.

H. C. J. 1912

REX EX REL. MORTON v. ROBERTS.

RIDDELL, J.

(4)) to declare the remaining candidates duly elected. Accordingly, Roberts was declared elected councillor and Rymal deputy reeve.

Roberts had been assessed as freeholder on a certain lot, and was admittedly "qualified" at the time of the election. He, however, by deed dated the 5th January, registered on the 6th January, conveyed the land by deed absolute to one McDonald, having on the 1st January taken a mortgage for $4,100. Notwithstanding this transfer, he made a declaration of qualification purporting to be in pursuance of sec. 311 of the Act and amending statutes, on the 8th January, and upon that day took his seat as councillor, and still continues to hold it.

The declaration omitted the word "and" between the words "have" and "had" in the third line of the form in the statute, sec. 311.*

Upon motion before His Honour Judge Monck, that learned Judge made an order declaring "that the said Walter Roberts hath lost his right to hold his seat as a councillor of the township of Barton, and hath become disqualified since his election to hold his said seat, he having since his said election sold and disposed of the property on which he qualified, and not being otherwise qualified or possessing the necessary qualification required by the Consolidated Municipal Act, 1903, and amendments thereto, and said seat is vacant."

Rymal had also been assessed for certain property, and admitted was duly "qualified" at the time of the election; but he also conveyed his property by deed of date the 28th December, affidavit of execution the 6th January, registered the 23rd January, on which day the transaction was completed by Rymal taking a mortgage for $4,500 for part of the purchase-money and handing over the deed.

The learned Judge says of this transaction: "Rymal also disposed of his only qualifying property, but this occurred after he took the oath of qualification and after he took his seat." Rymal made, on the 8th January, a declaration in the same defective form as that made by Roberts, and took his seat as deputy reeve, and still claims it. A motion before Judge Monck resulted in a similar order—each respondent was ordered to pay costs.

Both Roberts and Rymal now appeal.

The learned Judge proceeded on the ground that the property qualification of a member of a municipal council was a continuing qualification; and that, once the property qualification originally necessary was lost, the incumbent of the office became *ipso facto* disqualified.

* ". . . have and had to my own use and benefit . . . at the time of my election to the office . . . such an estate as does qualify me to act in the office. . . . ."

ONT.

H. C. J. 1912

REX EX REL. MORTON v. ROBERTS.

Riddell, J.

In the view I take of the case, I do not think I need pass upon that question. It is, however, to be observed that from almost the very earliest times the qualification has been expressed to be that entitling a person "to be elected."

The first general Act (1838), 1 Viet. ch. 21, providing for the election of certain officers—clerk, assessor, collector, etc.—has no qualification for the officer to be elected, although it has for the voter (secs. 2, 4).

The Municipal Act of 1841, 4 & 5 Viet. ch. 10, sec. 11, provides that "every person to be elected a member of a District Council . . . shall be seized and possessed," etc., etc.

Baldwin's Act, 12 Viet. ch. 81, secs. 22, 57, 65, 83, contains the same language; the Act of 1858, 22 Viet. (stat. 1) ch. 99, which is the same as (1859) C.S.U.C. ch. 54, sec. 70, also; and the terminology appears in the various amendments and re-enactment down to the present Act of 1903, sec. 76. Sometimes, indeed, the provision is negative, as at present, and sometimes positive, as was the original form—but, whether it be "no person but," or "every person who," it is always "to be elected."

Language quite different was used almost from the first in respect of certain cases. It is true that in the Act 4 & 5 Viet. ch. 10 it was provided (sec. 12) that "no person . . . in Holy Orders or . . . Minister . . . of any religious sect . . nor any Judge . . shall be qualified to be elected a councillor . . ;" but the language was soon changed. In the Act of 1849, by sec. 132, it was enacted "that no Judge . . . and no person having . . . any interest . . . in any contract with . . . the Township . . . shall be qualified to be or be elected . . . councillor . . ." And in Baldwin's Act, C.S.U.C. ch. 54, sec. 73, it is provided that such person shall not be qualified "to be a member of the Council of the Corporation." The same language continues down to the present Act, sec. 80 (1).

And, in like manner, the Act of 1849, sec. 112, provides that, if any member of a municipal council "be declared a bankrupt . . . or shall compound by deed with his creditors, then . . . such person shall . . . immediately become disqualified, and shall cease to be a member of such municipal corporation . . and the vacancy thereby created . . . filled as in the case of the natural death of such member . . ." In the C.S.U.C. ch. 54, sec. 121, the occasions for the seat becoming vacant are increased in number, introducing amongst others "assigns his property for the benefit of creditors"—and so it has continued to the present time (Consolidated Municipal Act, 1903, sec. 207), appearing in substantially the same words in the nine or ten re-enactments and amendments.

The difference in the terminology affords a very cogent argument against the view that the Legislature intended the sale

of the qualifying property to operate as an act *ipso facto* disqualifying the member, at all events after proper declaration of qualification made—had that been the intention, it is difficult to see why the provision that an assignment for the benefit of his creditors is made specifically a ground of disqualification, without the addition "a sale or assignment of qualifying property."

So in the Act of 12 Viet. ch. 81, sec. 110, it is provided that the absence of the head of the council "vacates" the seat.

On the other hand, a consideration of the form of the oath or declaration affords a strong argument that the ownership of the property qualification must continue—at all events until the oath or declaration was made. And this will appear during the consideration of the forms laid down, which I shall speak of in another point of view. For I do not intend to decide these cases upon the ground taken by the County Court Judge.

From a very early period it has been a statutory requirement that a councillor, etc., should make a declaration (or take an oath). The Act of 1838 provides for a promissory oath, and it was to be made (secs. 9, 36) within twenty days of being notified of election, upon penalty of a fine of £5. But the Act of 1841 contained a provision "that no person elected a councillor . . . shall be capable of acting as such until he shall have taken and subscribed" the statutory oath—and he was given (sec. 16) ten days after notice of his election to take this oath, otherwise he was deemed to have refused the office, and was liable to a fine —his office was deemed vacant and a new election had. The oath is not only promissory (sec. 15), but also "that I am seized and possessed, to my own use, of lands," etc., and that such "lands are within the District of . . . and are of the real value of £300," etc., etc. The Baldwin Act, 12 Viet. ch. 81, provides (sec. 129), "that every person who shall be elected . . . to any office which requires a qualification of property . . . shall, before he shall enter into the duties of his office, take and subscribe an oath or affirmation to the effect following, that is to say: 'I, A. B., do swear . . . that I am truly and *bonâ fide* seized to my own use and benefit of such an estate (specifying it) as *doth qualify me to act* in the office of (naming it) . . . according to the true intent and meaning of a certain Act of Parliament,'" etc., etc. Note that in these earliest qualification oaths the present tense is used in speaking of the ownership, and also (in 12 Viet.) that the ownership of the estate *doth* qualify to *act* in the office.

The language in 22 Viet. (stat. 1) ch. 99, sec. 175, is, "before he . . . enters on his duties . . ;" and the declaration (a solemn declaration now being substituted for an oath) is still, "I am truly and *bonâ fide* seized . . . doth qualify me *to act* in the office," etc.

ONT.

H. C. J. 1912

REX EX REL. MORTON v. ROBERTS.

Riddell, J.

The statute 29 & 30 Vict. ch. 51, sec. 178, makes no change from the language of the Consolidated Statute—the Act of 1873, 36 Vict. ch. 48, sec. 211, brings in the form still in use—"have and had to my own use and benefit . . . as proprietor . . . at the time of my election to the office of . . . does qualify me to act . . . "—precisely the same as the form in the statute of 1903, sec. 311 (the word "proprietor" being used instead of "owner"), but without the addition made by (1906) 6 Edw. VII. ch. 34, sec. 10.

The statute, in my view, lays down three prerequisites to a *de jure* occupation of the office (I do not pause to inquire as to others): (1) possession of property qualification; (2) election by acclamation or otherwise; (3) making the declaration prescribed. Absence of any one of these will prevent the seat being filled *de jure*—absence of one or all will not, of course, prevent it being filled *de facto*.

"Where the statute requires a prescribed oath of office *before* any person elected '*shall act therein*,' a person cannot justify as such officer *unless he has taken an oath* in substantial, not necessarily literal, compliance with the law:" Dillon on Municipal Corporations, 5th ed., sec. 395, and American cases cited in note 1, at bottom of p. 680.

In *The King* v. *Swyer* (1830), 10 B. & C. 486, the capital burgesses and common council of Shafton were authorised to elect one of the burgesses each year to be mayor. The charter provided that "he who . . . shall be elected . . . mayor . . . before he be admitted to execute that office, or in any way to intermeddle in the same office, shall . . . take . . . all the oaths by the laws . . . appointed . . . and that after such oath so taken, he can and may execute the office of . . . mayor . . . " Lord Tenterden, C.J. (p. 491): "A party becomes mayor not merely by reason of his being elected, but of being sworn into office." Bayley, J. (pp. 491, 492): "By the clause authorising the election of a mayor, the capital burgesses are to elect and nominate one of the burgesses to be mayor: and he, before he executes his office, is to be sworn in. He becomes the head of the corporation not when he is elected and nominated, but when he is sworn in." It will be seen that no point is made of the clause in the charter that "after such oath so taken, he can and may execute the office of . . . mayor," which is the only point of differentiation between the Shafton charter and our statute in that regard.

In *The King* v. *Mayor, etc., of Winchester* (1837), 7 A. & E. 215, the language of the statutes (9 Geo. IV. ch. 17, secs. 2, 4, and 5, and 5 & 6 Wm. IV. ch. 76, sec. 50) is a little different, but not substantially so—and Lord Denman, C.J. (p. 221), clearly shews that it is the making of the declaration that constitutes the acceptance of the office. See also *per* Littledale, J., at p. 222.

In a case under our own statute, upon language identical with that in the present statute, Cameron, J. (afterwards Sir Matthew Cameron, C.J.), said: "I am of opinion that until a person elected a member of a municipal corporation has made the declaration of qualification prescribed by the 265th section of ch. 174, R.S.O. 1877, he has no right to exercise or discharge the functions pertaining to the office:" *Regina ex rel. Clancy* v. *St. Jean* (1881), 46 U.C.R. 77, at p. 81. On p. 81 the learned Judge continues: "I think there can be no doubt that this declaration is an essential prerequisite to the discharge of the duties of the office of alderman." In the case of *Regina ex rel. Clancy* v. *Conway* (1881), 46 U.C.R. 85, at p. 86, the same learned Judge gave (in a certain event, which will be considered later) leave to file an information in the nature of a *quo warranto*, "on the ground that without making the declaration of qualification he (Conway) illegally exercises the franchises of the office."

Such cases as *United States* v. *Bradley* (1836), 10 Peters 343, are quite different, as they determine only that an appointment in the nomination of the President, upon confirmation by the Senate of the United States, becomes an absolute appointment, vesting the office in the nominee upon appointment by the President and confirmation by the Senate, although the nominee has not given the bond which a statute requires him to give for the security of the Government. Compare *United States Bank* v. *Dandridge* (1827), 12 Wheat. 64.

It can scarcely be seriously argued that the declaration taken is "to the effect" of the form in the statute. As we have seen, the earliest form of declaration of qualification was in the oath in sec. 129 of the Act of 12 Viet.: "I am truly and *bonâ fide*," etc.; and this continued until the Act of 1873. At that time it seems to have been considered proper to make sure that the declarant had been, at the time of the election, properly qualified—and not simply was possessed of the property qualification at the time of the declaration. It might happen that one not really having the property qualification would offer himself for election, and, if elected, buy property for his qualification. But from the very first the present tense is found somewhere in the oath—and it is wholly absurd to suggest or argue that declaring, "I have had property," etc., is to the same effect as declaring, "I have and had property," etc.

It must be held that neither respondent is *de jure* a member of the council.

We have next to consider whether the present procedure is open to the relator—and two strong cases at first sight seem adverse; but I think the apparent difficulty will disappear when the course of the legislation is examined. In *Regina ex rel. Grayson* v. *Bell* (1865), 1 U.C.L.J. N.S. 130, it was alleged that

ONT.

H. C. J. 1912

REX EX REL. MORTON v. ROBERTS.

Riddell, J.

the candidate's declaration was not proper, but that it set out property of which in fact he was not the owner. Hagarty, J. (afterwards Sir John Hagarty, C.J.O.), refused a writ of summons in the nature of a *quo warranto*.

So, also, in *Regina ex rel. Halsted* v. *Ferris* (1870), 6 U.C. L.J. N.S. 266, Mr. Dalton, C.C. & P., refused to unseat Ferris, on the ground alleged that the declaration made by him was insufficient, saying: "Nothing can be made of this objection on this application. Whatever might be the effect of the omission to describe the nature of the estate on a *quo warranto* at common law, it affords no ground for declaring, in this statutory proceeding, that the election was not legal, or was not conducted according to law, or that the person declared elected thereat was not duly elected."

The common law writ of *quo warranto*—sometimes called *quo jure*—was used by the King to call upon any subject who exercised office or a franchise, to shew by what authority the office or franchise was enjoyed—it might also be used by the King to call upon one who held land, to shew by what title or warrant he held. The right to such a writ rested, of course, upon the principles that the King has the sole power of bestowing offices and franchises and he is lord paramount of all land within the kingdom. The writ, which was an original writ out of Chancery, fell into disuse early, probably in the times of Richard II. (Coke, 2 Inst. 498, etc.), and an information in the nature of a *quo warranto* took its place. This was much abused in Stuart times, but has survived; and still may be put in action in a proper case—it lies against persons who claim any office, franchise, or privilege of a public nature, and not merely ministerial and held at the will and pleasure of others: *Darley* v. *The Queen* (1845), 12 Cl. & F. 520.

As it was held that at the common law the King alone could have such an information against those usurping offices, etc., in municipal corporations, the statute 9 Anne ch. 20 was passed, providing for the issue of such informations at the instance of private prosecutors in such cases—and this statute became part of our law by the Provincial Act, 32 Geo. III. ch. 1.

Both in England and in Upper Canada, the practice in such cases has been simplified: the statutory provisions are in cases covered by the statutes now taken advantage of—but, if there be any *casus omissus*, the information under the Statute of Anne may be still appealed to. In our own Courts, the most recent case I know of is *Regina ex rel. Moore* v. *Nagle* (1894), 24 O.R. 507. *Askew* v. *Manning* (1876), 38 U.C.R. 345, is another case.

By the Act of 12 Vict. ch. 81, sec. 146, it was provided "that at the instance of any relator having an interest as a candidate or voter in any election . . . a writ of summons, in the nature of a *quo warranto*, shall lie to try the validity of such election,

which writ shall issue out of His Majesty's Court of Queen's Bench . . . upon such relator shewing upon affidavit . . . reasonable grounds for supposing that such election was not conducted according to law, or that the party elected or returned thereat was not duly or legally elected or returned." Thenceforward, the writ of summons was used instead of the information in the nature of a *quo warranto* in cases to which it was applicable.

When the case *Regina ex rel. Grayson* v. *Bell*, 1 U.C.L.J. N.S. 130, was decided (in 1865), the statute in force was the C.S.U.C. 1859, ch. 54, which provided (sec. 128 (1)) that, "If . . . the relator shews by affidavit to any such Judge, reasonable grounds for supposing that the election was not legal or was not conducted according to law, or that the person declared elected thereat was not duly elected . . . the Judge shall direct a writ of summons in the nature of a *quo warranto* to be issued to try the matters contested." The only matters which could be thus contested were (sec. 127), "the right of any municipality to a reeve or deputy reeve, or . . . the validity of the election or appointment of a mayor, warden, reeve, deputy reeve, alderman, councilman, councillor or police trustee." It is in view of the provisions of the then existing statute that Hagarty, J., says: "As Bell was properly qualified, and nothing is alleged against the manner of his election, I do not see how I can interfere by *quo warranto*, because an apparent mistake" [the report by a clerical error reads "no apparent mistake"] "has been made in the description of the nature of an estate in property. . . ."

In 1870, when *Regina ex rel. Halsted* v. *Ferris*, 6 U.C.L.J. N.S. 266, was decided, the Act in force was (1866) 29 & 30 Vict. ch. 51; the provisions for a writ of summons in the nature of a *quo warranto*, and the description of the matters that could be tried under such a writ, are *totidem verbis et literis* the same as in the C.S.U.C.: see 29 & 30 Vict. ch. 51, secs. 130, 131.

The statute 36 Vict. ch. 48, secs. 131, 132, was the same, and also R.S.O. 1877, ch. 174, secs. 179, 180, which last contained the statutory enactments when the two cases of *Regina ex rel. Clancy* v. *St. John* and *Regina ex rel. Clancy* v. *Conway*, 46 U.C.R. 77, 85, came on. And it was due to the limited class of cases for the application of the statutory procedure that in these cases an information, and not a writ of summons in the nature of a *quo warranto*, was applied for.

In 1892, by sec. 188 of the statute 55 Vict. ch. 42, a notice of motion in the nature of a *quo warranto* was substituted for a writ of summons: and this practice has continued to the present time; the statute 60 Vict. ch. 15, schedule C (44), struck out in the beginning all reference to the right of a municipality to a reeve or deputy reeve; and 3 Edw. VII. ch. 18, sec. 32, made

ONT.

H. C. J. 1912

REX EX REL. MORTON v. ROBERTS.

Riddell, J.

a most important change: "In case the validity of the election or the appointment or the right to hold the seat of a mayor, warden, reeve, alderman, county councillor or councillor is contested," etc. etc. Before that time it was only the validity of the election which could be challenged in the statutory method —thereafter the right to hold a seat could be attacked in the same way. Section 33 made a corresponding change in the material to be presented to the Judge upon application in the first instance. The consolidation of 1903, 3 Edw. VII. ch. 19, sec. 219, followed, and that Act has been slightly amended by 6 Edw. VII. ch. 35, sec. 26, and 9 Edw. VII. ch. 73, sec. 5 (1).

The scope of the statutory remedy being extended to cover the case of a contest as to a deputy reeve's and a councillor's right to sit, there can be no doubt that the practice followed here is proper.

It would seem that the facts as to the transfer of the property, and I suppose the form of the declaration, came to the knowledge of the relator only within six weeks of the application; and, consequently, he is in time under the amendment made to sec. 220 of the Consolidated Municipal Act, 1903, by the statute of 1907, 7 Edw. VII. ch. 40, sec. 5.

The form of notice of motion is: "Take notice that by leave of His Honour Judge Monck, Junior Judge of the County Court of the County of Wentworth, a motion will be made on behalf of the above named John E. Morton, of the township of Barton, in the county of Wentworth, dairyman, and an elector entitled to vote at a municipal election in the said township of Barton, before the presiding Judge in Chambers, at the court house in the city of Hamilton, on the 8th day after the day of service of this notice on you (excluding the day of service), at the hour of eleven o'clock in the forenoon, or so soon thereafter as the motion can be heard, for an order declaring that the said Frank E. Rymal, the above-named defendant, hath lost his right to hold his seat as deputy reeve of the township of Barton, and has become disqualified since his election to hold his said seat, he having since his said election sold and disposed of the property on which he qualified, and not being otherwise qualified or possessing the necessary property qualification required by the Consolidated Municipal Act, 1903, and amendments thereto."

The statute provides (sec. 221 (2)) that "the relator shall, in his notice of motion, . . . state specifically, under distinct heads, all the grounds of objection to the validity of the election complained against, and in favour of the validity of the election of the relator, or other person or persons, where the relator claims that he or they, or any of them, have been duly elected, on the grounds of forfeiture or disqualification, as the case may be." This is from 3 Edw. VII. ch. 19, sec. 221, and makes no reference to a case in which the validity of the

election is not complained of and no claim is made for the election of some one else—as in the present case. Accordingly, I think the notice of motion may be amended by setting up the omission to make the statutory declaration. Section 226 does not apply for the same reason—or, if it be considered that the first part applies on the *mutatis mutandis* principle, so does the second—and I think it eminently a case where "the Judge in his discretion" should "entertain any substantial ground of objection to" the right to hold the seat.

The mere fact that a proper declaration has not been made does not in itself compel the Court to declare the seat vacant. In *Regina ex rel. Clancy* v. *Conway*, 46 U.C.R. 85, Cameron, J., gave leave to the defendant to make the same within ten days, if he could; and he says in the other case, 46 U.C.R. at p. 82: "As the latter" (*i.e.*, the person elected) "can at any time put himself in a position to exercise the franchises of the office by making a proper declaration, his omission to make the declaration would not render the office vacant." This was a case of an imperfect declaration.

The form of the declaration contemplates that the declarant shall have, at the time of making the declaration, the qualification: no Court would allow a person to make a declaration which was false and so commit an indictable offence: Criminal Code, sec. 175. And, of course, no one with any sense of self-respect would desire to make a false declaration.

From very early times the refusal to make the declaration was held equivalent to a refusal of the office, even if the party was incapable of making it: *Attorney-General* v. *Read* (1678), 2 Mod. 299; *Starr* v. *Mayor, etc., of Exeter* (1683), 3 Lev. 116; affirming *S. C.*, 2 Show. 158; *Rex* v. *Larwood* (1693), Carthew 306.

If the elected can now make the declaration required by sec. 311, then, under *Regina ex rel. Clancy* v. *Conway, ut supra*, [46 U.C.R. 77], they should be allowed to do so, and so make their occupancy of the offices *de jure*, as it is now *de facto*.

The position of a mortgagee is well understood: he has the legal estate in the land, holding the legal estate and the land as security for his debt. Is this legal estate sufficient?

The early statutes do not employ the terminology now in use.

In 1 Vict. ch. 21, there is no qualification prescribed: but in 4 & 5 Vict. ch. 10, sec. 11, one to be elected must "be seized and possessed to his own use, in fee, of lands and tenements within the district . . . of the real value of £300 currency, over and above all charges and incumbrances due and payable upon or out of the same." Under 12 Vict. ch. 81, sec. 22, no one could be elected township councillor "who shall not have been entered upon the . . . roll as assessed for ratable real property held in his own right . . . as proprietor or tenant, to the value

ONT.

H. C. J. 1912

REX EX REL. MORTON v. ROBERTS.

Riddell, J.

of £100 . . ;" and under sec. 57 no one could be elected a village councillor "who shall not be possessed, to his own use, of real estate held by him in fee or freehold, or for a term of twenty-one years or upwards . . . of the assessed value of £250 . . ." Section 65 contains language similar to that of sec. 57; while sec. 83 provides for the qualification of an alderman—"seized, to his own use, of real estate held by him in fee simple, or in freehold . . of the assessed value of £500 . ." In 1858, 22 Vict. (stat. 1) ch. 99, sec. 70, a change was made—"have . . . in their own right or in the right of their wives, as proprietors or tenants, freehold or leasehold property rated . . . to at least the value . . ."

By the last Act before Confederation, 29 & 30 Vict. ch. 51, sec. 70, another change was made—"have . . . in their own right or in the right of their wives, as proprietors or tenants, a legal or equitable freehold or leasehold, rated . . ." There must have been some reason for introducing the expression "legal or equitable."

In the consolidation of 1873, 36 Vict. ch. 48, sec. 71, another change was made—"have . . . in their own right, or in the right of their wives, as proprietors or tenants, a legal or equitable freehold or leasehold, or partly legal and partly equitable, rated . . ." This language is unaltered in R.S.O. 1877, ch. 174, sec. 70; 46 Vict. ch. 18, sec. 73; but 49 Vict. ch. 37, sec. 2, changes it to "legal or equitable freehold or leasehold, or partly freehold and partly leasehold, or partly legal and partly equitable;" and this reappears in 50 Vict. ch. 29, sec. 2, R.S.O. 1887, ch. 184, sec. 73; 55 Vict. ch. 42, sec. 73. The revisers in 1897, under the powers given by 60 Vict. ch. 3, sec. 3, changed the wording into its present form; and the Legislature adopted it as R.S.O. 1897, ch. 223, sec. 76; and now it appears as Consolidated Municipal Act, 1903, 3 Edw. VII. ch. 19, sec. 76—the amendment, 6 Edw. VII. ch. 35, sec. 5, not affecting this part of the section.

I think that the Legislature must have had in view the difference between legal and equitable estates: and that the language now employed, differing as it does from that formerly used, must be given full effect to.

What estate then had Rymal at the time of the election, and what estate has he now?

At the time of the election, it is plain that he had the legal estate, and that such legal estate was then worth not only the $4,500 for which the mortgage was subsequently taken, but also the amount of cash paid by the mortgagor as well. At the present time, it is equally plain that he has the legal estate in the land—that, the mortgage being in fee, this is a freehold, a "legal freehold." This could be mortgaged or sold at any time; and, while it is indeed in equity but a security for the debt, it is

a valuable security—and worth $4,500. At the time of taking the imperfect declaration, there is no question that he could have made the declaration in proper form (owning as he did the whole estate, and the sale being still *in fieri*, and it not appearing that there was any enforceable contract for sale). Whether he can now make the declaration must be determined by the very words of the declaration itself. Leaving out the (for this inquiry) unimportant words, it reads thus: "I . . do solemnly declare . . that I have and had to my own use and benefit . . as owner at the time of my election such an estate as does qualify me to act in the office of deputy reeve for . . . and that such estate is (specifying it) and that such estate at the time of my election was of the value of at least," etc., etc. It is to be noted that the value at the time of making the declaration is not required to be set out.

At the time of the election he had a legal estate worth $4,500 and more—no equitable estate had been carved out of it—now he has the very same legal estate, but it is worth only $4,500, for an equitable estate has been created cutting down the value. I think that, employing the language of sec. 76, Rymal "has, as owner, a legal freehold which is assessed in his own name on the last revised assessment roll of the municipality to at least the value of $4,500."

But it is argued that mortgagees cannot be considered persons contemplated by the statute—and that they cannot qualify unless they are in possession. The rule that mortgagees should not vote unless they are in possession, so far as it exists at all, is statutory—and an examination of the statutes rather furnishes us with an argument that mortgagees have the same rights as to voting, etc., as any other owner of a freehold unless they are expressly excluded. The first Act is (1696), 7 & 8 Wm. III. ch. 25, which, by sec. 7, provides that "no person or persons shall be allowed to have any vote in election of members to serve in Parliament, for or by reason of any trust estate or mortgage, unless such trustee or mortgagee be in actual possession or receipt of the rents and profits of the same estate; but that the mortgagor, or *cestui que trust*, in possession, shall and may vote for the same estate, notwithstanding such mortgage or trust . ." As it was only freeholders who were given the right to vote, it seems to me that Parliament considered a mortgagee a freeholder, and considered that he would have the right to vote, unless specially legislated against. The same provision excluding mortgagees and trustees not in possession appears in (1832) 2 Wm. IV. ch. 45, sec. 23, and in (1843) 6 & 7 Vict. ch. 18, sec. 74.

There are cases in which a mere trustee had been held not entitled to vote—*e.g., South Grenville Election, Jones's Case*

ONT.

H. C. J., 1912

REX EX REL. MORTON v. ROBERTS.

Riddell, J.

(1872), H.E.C. 163, at p. 176: but that was because of the words "in his own right"—shewing that it was a real beneficial ownership that was required by the statute.

I can find nothing in principle or authority to prevent a mortgagee who is assessed for the property qualifying on his legal estate.

The same considerations apply also to Roberts.

If they make a proper declaration, within ten days, their appeals will be allowed—but without costs here or below. They are given an indulgence in being allowed to make now a declaration which should have been made three months ago, and without which they had no right to their seats. It would seem necessary again to call attention to the necessity of observing the plain directions of the statutes, the forms prescribed, etc.

If the declaration be not made by either within ten days, the appeal of that one will be dismissed with costs.

While it is, in my view, probable that there is no necessity for the relator to file an affidavit that the facts as to the defect in the declaration came to his knowledge only within six weeks before the notice of motion was served, he will be permitted to do so, if so advised, for the greater caution in case of an appeal from this decision, or in case either of the respondents fails to make the proper declaration.

*Appeals allowed on terms.*

---

MAN.

K. B. 1912

April 11.

## CHAPDELAINE v. WILKINSON.

*Manitoba King's Bench. Trial before Prendergast, J. April 11, 1912.*

1. ACTION OR SUIT (§ II D—60)—JOINDER OF SEVERAL CLAIMS—PAYMENT INTO COURT.

In an action for an instalment of $300, past due on a mortgage and for the repayment of $105 of insurance on the mortgaged premises as agreed, $200, for goods sold and delivered and $37.50 for insurance thereon, where the evidence shews that, by an agreement between the defendant and the plaintiff, the defendant assumed the liability of $542.97 due by the plaintiff to a third party of which $200 was to be applied in satisfaction of the goods sold and the balance on the mortgage and the defendant set out a statement of account between the parties shewing a balance due the plaintiff $175, which the defendant paid into Court, the claim for insurance paid on the goods fails and, the defendant's statement of account being correct, judgment will be rendered for the balance due the plaintiff for $175.

2. COSTS (§ I—2)—WHERE SUCCESS DIVIDED—PART OF ACTION DISMISSED.

In an action for various sums of money claimed to be due the plaintiff from the defendant, the defendant, among other defences, asserted that no demand was ever made for one of the sums claimed to due, and also filed a statement of account between the parties shewing the balance due the plaintiff and paid the same into Court and the statement was found to be correct, and the defences were upheld, except that the demand aforesaid was found to have been made, and there was judgment for the plaintiff for the amount paid into Court, the plaintiff should have costs up to the trial and costs of trial as to the issue on the demand and the defendant his costs of trial on the issues in which he was successful.

MAN.

K. B.
1912

CHAPDELAINE v. WILKINSON.

Prendergast, J.

ACTION for moneys alleged to be owing under a mortgage.

*N. F. Hagel*, K.C., for the plaintiff.

*J. W. Wilton*, for the defendant.

PRENDERGAST, J.:—Plaintiff claims (1) under a mortgage made by the defendant to the plaintiff, alleging default in payment of an instalment of principal of $300, due September 1st, 1911, and repayment of $105 of insurance on the mortgaged premises as agreed; and (2) for $200 for goods sold and delivered, and $37.50 for insurance on the said goods—the mortgaged premises being hotel premises in the village of Cardinal, and the goods and chattels being stock-in-trade in the said hotel.

The defence is substantially to the effect that, by agreement with the plaintiff, the defendant assumed a liability of $542.97 due by the plaintiff to the Richard Beliveau Co., of which $200 was to be applied in satisfaction of the stock-in-trade and the balance of $342.97 on the mortgage; and that as to the moneys paid by the plaintiff for insurance on the mortgaged premises, no demand was ever made for the same. The defence also sets out a statement of account between the parties, shewing a balance due the plaintiff of $175, which the defendant pays into Court.

The evidence, in my opinion, fully supports the grounds of defence, except the allegation that no demand was made by the plaintiff to the defendant for re-imbursement of the premium of insurance on the mortgaged premises.

Joseph Giroux swears he was at the time the secretary-treasurer and head book-keeper of the Richard Beliveau Co. Limited, and that Mr. Beliveau, the president of the company, before leaving for California, where he then was, had left him with full authority to deal with and settle such matters as this one. Giroux says that as the plaintiff was going out of the hotel business at Cardinal, and as Wilkinson was succeeding him in the same, and was desirous of also taking his supplies from the company, it was considered desirable by the three that the defendant should assume the plaintiff's liability of $542.97, so that the company would then have to deal only with one party.

The plaintiff, although asserting that he was told by Giroux that he was not released, admits that it was desirable for him that such an arrangement be made, as he was receiving only $1,000 cash from the defendant on the sale, and was in no way desirous of taking more than half of it to repay the company.

Giroux produced the original ledger accounts of the plaintiff and defendant, shewing the first closed on April 28th, "By P.C. Wilkinson, $542.97"; and the latter opening with the entry: "To T. Chapdelaine, $542.97"—explaining the date of

MAN.

K. B.
1912

CHAPDELAINE
v.
WILKINSON.

Prendergast, J.

the entries by saying that he considered the matter closed only from the time that the transfer of license from the plaintiff to the defendant was effected, that is to say, from the time that the defendant would be in a position to deal with them. Giroux also produced exhibit 9, which is a statement of the plaintiff's account with the company, shewing a balance due of $542.97, and with the words at the foot thereof, "This amount has been transferred to Mr. P. C. Wilkinson, subject to transfer of license" and signed by both plaintiff and defendant.

Giroux, moreover, says that the company having advanced the defendant $200, goods at that time, making $742.97 with the assumed indebtedness, the company took from the defendant for the said total a chattel mortgage which he also produced.

Giroux is emphatic that the expressed intention of all parties was that the plaintiff should be released and swears that he, Giroux, told the latter that he was so released.

Giroux's evidence was also to the effect that the amount of the assumed indebtedness was to be applied on the $200 stock-in-trade *or* on the mortgage. The plaintiff says that it was to be applied on the mortgage only, which is not reasonable: why should it be made to apply on mortgage instalments not yet due, when the stock-in-trade was due? The defendant says it was to be applied first on the stock-in-trade, and that would also be the course most favourable to the plaintiff, as he was secured by the mortgage for the purchase price of the premises.

This being so, the claim for insurance on the stock-in-trade of course fails.

I find the statement of account set out in the defence to be correct. It shews a balance of $175 due the plaintiff which the defendant has paid into Court.

I find, as stated, that there was a demand made by the plaintiff to the defendant for re-imbursement of the insurance on the mortgaged premises. The defendant was then in default when the action was instituted, and the plaintiff is then entitled, at all events, to costs up to trial.

What as to costs of trial? The plaintiff could not get even his costs up to trial without shewing the demand for the insurance moneys. This he did by production of exhibit 12. He was not justified, however, in putting the defendant to his whole defence.

There will be judgment for the plaintiff for $175 in satisfaction of which the amount paid into Court is to be applied. The plaintiff will have costs up to trial and costs of trial as to the issue on the demand of the insurance moneys. The defendant will have his costs of trial on the issue as to the defendant assuming plaintiff's liability to the company.

*Judgment accordingly.*

## Re HART.

ONT.

H. C. J.
1912
May 18.

*Ontario High Court, Middleton, J., in Chambers. May 18, 1912.*

1. INFANTS (§ I C—11)—CUSTODY—LOSS OF PARENTS' RIGHT TO—WELFARE OF INFANT.

The custody of a fourteen-year-old girl was denied her father, where it appeared that for eight years she had lived with her maternal aunt, and that the child, who was extremely nervous, greatly feared her father and had a strong aversion to her step-mother, and the Court found that they were not proper custodians for the child, whose welfare required that she should remain with the aunt.

MOTION by John Hart, the father of the infant Blanche Emily Hart, upon the return of a writ of habeas corpus, for delivery of the infant to the applicant.

The motion was dismissed with costs.

*R. D. Moorehead*, for John Hart.

*T. A. Gibson*, for Elizabeth Hyde-Powell, maternal aunt.

MIDDLETON, J.:—On the return of this motion it became quite apparent that it was impossible to determine the matter upon affidavit evidence; and the parties consented that I should hear oral evidence and summarily dispose of the case. I accordingly heard the parties and their witnesses. It was then consented to by counsel that I should ask Mr. Kelso, the Superintendent of the Children's Aid Society and of the Government Department having charge of neglected and dependent children, to make personal inquiry into the matter and report to me. This course was suggested by the fact that proceedings had already been had both in the Police Court and in the Juvenile Court concerning this child. The evidence taken before the Commissioner of the Juvenile Court was also put in before me. Middleton, J.

In addition to this, I have had two interviews with the child; and, at the request of the father and with the consent of the aunt, have received verbal and written statements from the employers of Hart, respecting his habits and the charge made against him of intoxication.

The matter has caused me much anxiety, because I recognise the importance of giving the greatest possible effect to a father's wishes and desires concerning his child, and his *primâ facie* right to her custody. At the same time, as the result of all this, I am firmly convinced that the welfare of the child renders it imperative that I should leave her with her aunt.

The mother of the infant, the first wife of John Hart, died in June, 1904. Shortly after her death, his present wife became his housekeeper. Her husband was then living, but the husband died in April, 1905. Hart then married the widow; and there has been no issue of this marriage. The second wife had children by her former husband, who are now of age and married, and who do not live with Hart and his wife.

ONT.

H. C. J. 1912

RE HART.

Middleton, J.

Ever since the death of her mother, the infant has been cared for by her mother's sister, her present custodian. She has from time to time resided with her father and step-mother. There is some conflict as to the length of these visits; but I am satisfied that for the last eight years she has been almost entirely in the charge of this aunt, and that the father has contributed nothing towards her support and up-bringing, except possibly one sum of $10.

Much is made by the father of the supposed difficulty of locating his child, owing to a change of residence of the aunt and her family. As a matter of fact, there is absolutely nothing in this story; because the father has always known where to reach the brother of the respondent, who has been the financial mainstay of the family where the child has been brought up. This family consists of her grandmother, of the present respondent, of another aunt who is an invalid, and this uncle.

The child is now just fourteen years of age, and is very bright and intelligent. She does not appear to be strong physically; and she is exceedingly nervous. She has an impediment in her speech, apparently resulting from her nervousness, and which has prevented her from receiving as good an education as she otherwise would have had; and this impediment in her speech has evidently made her very shy and diffident. She was, however, able to tell me her story very well; and it is quite plain that she fears her father and has the greatest possible aversion to her step-mother. She complains of having been cruelly used while with them; and she seems to have a clear recollection of her life at home during her mother's lifetime, and she thinks that her father was then most unkind to her mother, particularly when he was intoxicated.

It appears that in November, 1911, the infant ran away from her aunt. The aunt, fearing some accident or worse, spoke to the police, and the child was found in the home of a friend. She was then, strange to say, taken before the Police Magistrate on a charge of vagrancy; and the record of the Children's Aid Society states that, as she appeared to act in an eccentric manner, she was remanded for a week, so that the Children's Aid Society might make inquiries. Finally, she was returned to her aunt. The record of the Children's Aid Society contains statements very damaging to the father.

I asked the child about this episode, and she told me that she ran away because her aunt was going away on a visit, and she feared that her father would get her. The fact that the aunt contemplated a visit appears in the evidence given; and I am convinced that this was the real reason for the child's conduct, and that the eccentric manner noted was merely the result of her nervous condition and of the impediment in her speech; as, apart from this, I find no trace of any eccentricity.

ONT.

H. C. J. 1912

RE HART.

Middleton J.

I do not think it desirable to set forth at length the reasons which convince me that the father and the step-mother are not the proper custodians of this young girl. The contemporaneous record of the Children's Aid Society of the occurrence in November, 1911, the fact that the father has a strong will and a temper none too well under control, and the tenor of his two recent letters—of the 5th and 8th April, 1912—indicate his mental attitude; and, with the almost abject terror of the child when the possibility of her being placed in the custody of her step-mother was suggested, compel me to the conclusion that she should be allowed to remain where she now is. This course is that recommended by Mr. Kelso.

I pointed out to her that apparently her father was much better off financially than her aunt; to which she at once replied, "I have come to see that money is not everything." I quite believe that she will be properly cared for and brought up by the aunt and her family, who have sufficient affection for her to be ready to care for her without remuneration.

The motion will, therefore, be dismissed with costs.

*Motion dismissed.*

---

## AGNES SAWYER v. THE MUTUAL LIFE ASSURANCE COMPANY OF CANADA.

MAN.

K. B. 1912

June 11.

*Manitoba King's Bench. Trial before Macdonald, J. June 11, 1912.*

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

Where an applicant for insurance informed the insurer's agent who had secured the application, that he had been lately under medical treatment and the agent, with the consent of the applicant, consulted the physician who had treated the applicant as to his health, and thereafter the applicant submitted to a medical examination, in which he gave a negative answer to a question therein, written in the following form: "Have you now, or have you ever had any disease or disorder of the heart or blood vessels? Atheroma, palpitation of the heart, varicose veins, etc., aneurism," and the medical examiner failed to explain the meaning of the technical terms therein, and nothing appeared in the evidence to shew that the applicant knew that he had any of the diseases or disorders referred to in the question, such answer was an innocent misstatement not avoiding the policy, even though it was untrue at the time it was made.

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

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

MAN.

K. B.

1912

SAWYER v. MUTUAL LIFE ASSURANCE CO. OF CANADA.

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

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

Statement

THE plaintiff sues as the beneficiary in a policy of assurance issued by the defendant company on the life of her husband William Sawyer on the 24th day of March, 1910.

Judgment was given for the plaintiff for $2,000.00 and interest.

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

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

Macdonald, J.

MACDONALD, J.:—The insured died on or about the 4th day of December, 1910, and the company resists payment on the ground that certain statements and answers made by the insured and forming part of the contract for insurance sued on were not full, complete and true statements and answers, and deny that the said policy of assurance was in full force and effect at the time of the death of the said William Sawyer, but say that, on the contrary, the said policy never came into force or effect.

The insured died of embolus following heart disease for which latter he had been treated by Dr. Langril for some time commencing on the 14th day of October, 1909.

The application for insurance was made on the 5th February, 1910, but the medical examination (in connection with which the untrue statements and answers are claimed by the defendant to have been made) was not made until the 28th February, 1910.

In his application the applicant stated, amongst other things, that to the best of his information, knowledge and belief, he was in good health, of sound mind and temperate habits and he agrees that such statements and any statements made or to be made to the company's examining physician should form the basis of the contract for such assurance, and if there be therein any untruth or suppression of facts material to the contract the policy shall be void and any premiums paid thereon forfeited.

The assured was solicited for insurance by the defendant company's agent, James Bremner, for a considerable time prior to securing his application on the 5th February, 1910, and on the latter date the applicant advised him that he had recently been under medical treatment by Dr. Langril and he then agreed that he, Bremner, could consult Dr. Langril and secure all the information he desired from him.

Dr. Langril was consulted and Mr. Bremner says that he was advised to wait a little while before having the applicant submit to examination. This Dr. Langril denies, and says that Mr. Bremner asked him to examine the applicant, which he says he declined to do because the applicant could not pass as he had heart trouble. Bremner, on the other hand, says that Dr. Langril was not the company's medical examiner and that he did not ask him to conduct the examination. Bremner further states that he saw Dr. Langril again and was then advised by him that he thought the time had come when the applicant could be examined, and this is not contradicted.

It seems improbable that Dr. Langril, if asked to examine the applicant, should decline; was he so actuated by the feeling of protecting the company against a medical examiner's fee, and did he lose sight of the fact that there were different classifications of risks, one of which might fit the case of this applicant?

His effort to bring knowledge of the assured's heart trouble home to the wife of the assured by seeking information from her neighbours does not appeal to me as a matter in which he should have meddled.

This witness impressed me as a little unfriendly towards the plaintiff, and I am inclined to think that Bremner's memory is the more reliable and to be the better depended on.

Upwards of three weeks elapses before the applicant is requested to present himself for examination before the company's medical examiner, Dr. Wright, and this lapse of time to some extent corroborates Mr. Bremner's testimony.

The insurance was effected in pursuance of the application and medical examination and examiner's report.

The examination contained a number of questions and answers put to the applicant by the medical examiner and those which are material are:—

> Q. 8. Have you now, or have you ever had any disease or disorder, (c) of the heart or blood vessels? Atheroma, palpitation of the heart, varicose veins, etc., aneurism.
>
> To which he answered—No.
>
> Q. 8. (f) Have you had erysipelas, smallpox, malarial, scarlet, or typhoid fever?
>
> A. Had typhoid fever 27 years ago; made a good recovery, later contracted a cold causing loss of an eye by inflammation.

MAN.

K. B.
1912

SAWYER
v.
MUTUAL
LIFE
ASSURANCE
CO. OF
CO.

Macdonald, J.

Q. 9. When were you last attended by a physician, or when did you consult one and for what disease?

A. Three years ago for fractured rib.

Q. 10. Name and address of such physician?

A. Dr. Langril, Virden, Man.

Q. 11. Are you now in perfect health?

A. Yes.

Q. 12. Name and address of family physician or usual medical adviser?

A. Dr. Langril, Virden, Man.

Q. 13. Are you willing that your physician be consulted respecting your health?

A. Yes.

The questions and answers were on a form prescribed by the company and at the end of the form he signed a declaration, dated February 28th, 1910, wherein he declared that to the best of his knowledge, information and belief each of the above answers is full, complete and true and is a continuation of and forms part of my application for assurance, etc.

The answers given to some of the above questions being untrue it is urged on behalf of the company that the effect is to avoid the policy.

The answer to question 8 (*c*) is "No"; the question itself, apart from the general subject-matter "disease of the heart or blood vessels" is technical and without explanation by the examiner it could not be expected that the applicant would understand its meaning, and the examiner admits that he did not explain the meaning of the different technical terms or expressions. Is it not reasonable to suppose that the medical examiner having known the applicant for years, his character and reputation and having carefully examined him, had concluded the risk an average good one and wrote down the answers more mechanically and from his own knowledge and conclusions than from any serious consideration of the question itself or of the answer made by the applicant.

Can it be reasonably concluded that the contract was obtained by means of untrue representations or concealment of any fact, and as this question and answer are the determining factor in the case it is necessary to consider them with great care.

It is true the applicant made no mention of any heart trouble to either the company's agent or medical examiner, but he does not hesitate to give the name of Dr. Langril, who was attending him to both the agent and the medical examiner and willingly consents that the latter be consulted respecting his health and the agent did consult Dr. Langril and as a result of that consultation the examination of the applicant was deferred. Dr. Langril, as already stated is in conflict with the agent as to what was said at that consultation, but it seems to me in-

credible that the agent, a respectable man, and one having the confidence of the company, would consult Dr. Langril and then act in direct opposition to his information and in violation of his duty to his company. Why consult Dr. Langril at all if he was determined to secure the acceptance of the application regardless of the risk and why tell Dr. Wright, the company's medical examiner, that he was holding back the application to hear further from Dr. Langril and as soon as he did so the applicant would be examined, followed by afterwards seeing Dr. Langril and the applicant presenting himself for examination.

I am satisfied that although the answer to this question is untrue, it was an innocent misstatement, and it is possible that to the mind of the applicant the answer was true as he might have been of the honest belief that he never had any of the diseases or disorders referred to.

Within six months after the issue of the policy of assurance the assured was attended by Dr. Moir, who examined him and found him suffering from mitral regurgitation, but he did not advise him of this fact. The next day he visited him at his home and found him suffering from typhoid fever. Reference was made on this occasion to his heart, when the assured is said to have stated that he was aware he had heart trouble and it is urged that this is an evidence of a knowledge of his condition non-disclosure of which avoids the policy. No doubt he did tell Dr. Moir that he believed he had heart trouble, but whether that applied to past or present knowledge does not appear.

Question 9, it is alleged on behalf of the defendants, is a very important one, and it is possible that the answer to this question has been the chief cause of resistance by the company. This question is as follows:—

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

"Answer: Three years ago for fractured rib."

This answer, in the face of the fact that within less than a year he had been under treatment by Dr. Langril for heart trouble and died within a year after the date of his application, was quite sufficient to arouse the suspicions of the company, and to justify them in resisting a claim under the policy.

Not to do so would be an injustice to their policyholders; but is the deceased responsible for the answer put down to this question? He had advised the agent of his recent treatment by Dr. Langril, the agent had communicated this fact to Dr. Wright, the company's medical examiner, and the latter admits that he discussed that illness with the assured at the time of his examination, and that it was his omission and not through any non-disclosure on the part of the deceased that the answer to this question was not correctly written down.

MAN.

K. B.
1912

SAWYER
v.
MUTUAL
LIFE
ASSURANCE
CO. OF
CANADA.

Macdonald, J.

That, therefore, disposes of this objection, as there was nothing suppressed or concealed by the applicant, nor can I find that there was any intentional concealment or suppression of any fact or any fraud on the part of the applicant sufficient to avoid the policy.

It is urged, however, on the part of the company that the form of contract whereby the application and the answers to the medical examiner are a part of the contract, constitutes a warranty of the truth of all the material matters alleged, and if such is the legal construction of the contract, there is no doubt the plaintiff could not succeed: *Thomson* v. *Weems*, L.R. 9 A.C. 671.

But is that the proper legal construction to put upon it? The warranty in the application and which forms a part of the assurance contract does not, in my opinion, amount to more than a statement founded on knowledge, information and belief and is not an absolute unqualified warranty of the truth of such statements and unless it can be found that the applicant knowingly mis-stated the facts and induced the issue of the policy on such facts, the company should not be exonerated from liability under it. I cannot find that the applicant knowingly made untrue answers. He gave the company's representatives every possible opportunity of satisfying themselves of his condition, both by advising them of who his physician was and his last attendance upon him and submitting himself to the opportunity of a full and complete examination by the company's medical examiner, who made, according to his own evidence, a careful stethoscopic examination of the heart and found no trace of any trouble. If this skilled physician could not locate any imperfect condition of the heart it does seem reasonable to me that the applicant did not give this subject serious thought. The policy that he asked for and received was limited to twenty full yearly premiums, after which no further premiums should be required, and unless this was part of a scheme to deceive the company the applicant evidently considered himself a fair risk for the term of twenty years.

There will be judgment for the plaintiff for $2,000, with interest thereon from the 4th day of January, 1911, together with costs.

*Judgment for plaintiff.*

## NATIONAL TRUST CO. v. BRANTFORD STREET R. CO.

ONT.

*Ontario High Court. Trial before Kelly, J. July 18, 1912.*

H. C. J.
1912
July 18.

1. MORTGAGE (§ VI B—76)—ENFORCEMENT ON DEFAULT—SPECIAL COVENANTS—PAYMENT OF INTEREST IN ARREARS, AFTER ACTION BROUGHT.

In an action for the foreclosure of a mortgage, for possession of the property mortgaged and for a receiver, which mortgage was executed by a street railway company for the purpose of securing payment of an issue of bonds and which expressly provided that until default should be made in payment of the interest on the bonds or some part thereof, the mortgagors or their assigns should be suffered to use, occupy, possess, manage, operate, etc., the property covered by the mortgage and contained no express provision entitling the mortgagees to possession or to a receiver on the non-performance or non-observance of the covenants in the mortgage, and the interest in arrears which had caused the mortgagees to bring the action having been paid to, and received by, them after the commencement of the action on the day preceding the trial, the mortgagees could not contend that they were entitled to possession of the mortgaged property and to the appointment of a receiver on the grounds that the mortgagors had committed breaches of their covenants contained in the mortgage, their remedy being on the covenants themselves.

2. MORTGAGE (§ VI B—76)—COVENANT AS BENEFICIAL OWNER—QUIET POSSESSION ON DEFAULT—10 EDW. VII. CH. 51, SEC. 6, SUB-SEC. (*a*) (IV.).

Sub-sec. (*a*) (IV.) of sec. 6, of 10 Edw. VII. (Ont.) ch. 51, providing that in a conveyance by way of mortgage a covenant by the grantor who conveys and is expressed to convey as beneficial owner that on default the mortgagee shall have quiet possession of the land free from all incumbrances, does not apply to a mortgage which does not expressly state that the grantors or mortgagors convey as beneficial owners.

Statement

A mortgage action, tried at Toronto, without a jury.

*J. A. Paterson*, K.C., for the plaintiffs.

*S. C. Smoke*, K.C., for the defendants.

Kelly, J.

KELLY, J.:—On the 1st July, 1902, the defendants the Brantford Street Railway Company executed to the plaintiffs an indenture by which the company granted, bargained, sold, transferred, set over, mortgaged, conveyed, and confirmed to the plaintiffs certain properties and assets for the purpose of securing payment of an issue of bonds to the amount of $125,000. The indenture (or mortgage, as we may term it) was expressed to be made "in pursuance of the Act respecting Short Forms of Conveyances."

On the 2nd July, 1907, the defendants the Brantford Street Railway Company granted to the defendants the Grand Valley Railway Company the properties and assets so mortgaged. Subsequent thereto, the defendants the Grand Valley Railway Company mortgaged to the Trusts and Guarantee Company Limited, not only the properties and assets so granted to them (subject to the said bond mortgage for $125,000), but also other assets of their own, which were then subject to a prior mortgage.

ONT.

H. C. J.
1912

NATIONAL TRUST CO. v. BRANTFORD STREET R. CO.

Kelly, J.

The time of maturity of the $125,000 of bonds is in the year 1932.

The mortgage to the plaintiffs contains this provision: "In case default shall be made in payment of the interest on said bonds or debentures or any of them secured by these presents when the same shall become due and payable according to the terms hereof, the principal of all the said bonds and debentures shall immediately become due and payable."

On the 1st January, 1912, the half-yearly payment of interest on these bonds became due; and, this interest not having been paid, the plaintiffs on the 27th February, 1912, brought this action against the defendants the Brantford Street Railway Company and the Grand Valley Railway Company, claiming payment of the whole sum of $125,000 and interest, and foreclosure, and possession of the lands and premises and assets covered by the mortgage, and for a receiver. Later on, an amendment was made, adding a claim for sale of the properties and assets.

On the 29th May, 1912, on the application of the Trusts and Guarantee Company Limited, Edward B. Stockdale was appointed receiver on behalf of the applicants, as trustees for the holders of mortgage bonds issued by the defendants the Grand Valley Railway Company, of "all that company's railways, undertakings, revenues . . . property . . . with power to pay out of any money coming to his hands, as such receiver, any debts of that company having priority over the claims of the said debenture-holders."

The action came on for trial on the 5th June, 1912, before the Chancellor, when he ordered that the receiver be added as a party defendant, that he be forthwith served with the order and the pleadings and that the action should be set down for trial on the 12th June.

On the opening of the trial on that date, it was shewn that on the 11th June the defendants had paid to the plaintiffs all arrears of interest, and an undertaking satisfactory to the plaintiffs was given for payment of the plaintiffs' costs up to the time of such payment.

It was conceded by the plaintiffs that, the arrears of interest having been paid, they could no longer claim that the principal was overdue by reason of non-payment of interest.

The plaintiffs, notwithstanding this, contended that they were entitled to possession of the mortgaged properties and assets and to the appointment of a receiver, on the ground that the defendants had committed breaches of their covenants contained in the mortgage to pay taxes and to repair and not to suffer or permit any other lien, charge, or mortgage on the mortgaged property, etc. Taxes were then in arrear; evidence was given tending to shew a breach of the covenant for repair;

ONT.

H. C. J.
1912

NATIONAL TRUST CO. v. BRANTFORD STREET R. CO.

Kelly, J.

and the plaintiffs argued that the making of the sale and transfer by the defendants the Brantford Street Railway Company to the defendants the Grand Valley Railway Company, and the making of the mortgage subsequently by the latter company, constituted a breach of the covenant not to suffer or permit any other lien, charge, or mortgage on the mortgaged property; and, further, that the legal estate in the mortgaged properties and assets being in them as mortgagees gave them the right to possession on breach of any of the covenants.

There is no express provision in the mortgage entitling the plaintiffs either to possession or to a receiver on the non-performance or non-observance of covenants. On the contrary, it is expressly provided that, until default shall be made in payment of the interest on the bonds or debentures or some part thereof, the grantors (the defendants the Brantford Street Railway Company) and their assigns shall be suffered and permitted "to hold, use, occupy, possess, manage, operate, maintain, and enjoy the said property," etc.

No authority was cited in support of this proposition put forward by the plaintiffs, and I have been unable to find any such authority. A breach of the covenants did not, in my opinion, entitle the plaintiffs to possession or to have a receiver appointed. Their remedy is on the covenants themselves.

Apart from this, the plaintiffs further contended that, under the provisions of sec. 6 of 10 Edw. VII. ch. 51, there was implied in the mortgage a covenant that "on default, the mortgagee shall have quiet possession of the said lands free from all incumbrances," and that, as the default referred to in that Act includes default in payment of taxes, and there being such default in this case, they are entitled to possession.

In the case of a conveyance by way of mortgage, this covenant on the part of the person who conveys is implied only, as stated in clause (a) of sec. 6, when that person "is expressed to convey as beneficial owner."

In the mortgage in question here, the grantors or mortgagors are not expressed to convey as beneficial owners; and the statute, therefore, does not apply.

I am unable to find that there was at the time of the trial such default as entitled the plaintiffs to possession of the mortgaged properties and assets or the appointment of a receiver.

The defendants are, therefore, entitled to judgment dismissing the action, with costs from the time of payment of the interest on the 11th June, 1912; the plaintiffs being entitled to the costs to that time.

*Action dismissed.*

MAN.

K. B

1912

July 10.

## SARAH KENNY v. THE RURAL MUNICIPALITY OF ST. CLEMENTS.

*Manitoba King's Bench. Trial before Macdonald, J. July 10, 1912.*

1. MUNICIPAL CORPORATIONS (§ II G 3—241)—LIABILITY FOR DAMAGES—FAILURE TO PROVIDE SUFFICIENT OUTLET FOR DITCH—BACKING UP OF WATER.

A rural municipality is answerable in damage for a failure to provide a sufficient outlet for a ditch opened by it adjacent to the plaintiff's land, by reason of which water backed up and inundated the land so as to destroy the fertility thereof, and render it useless for cultivation.

Statement

The plaintiff is the owner of the north half of the north-west quarter of section seventeen (17) in the township thirteen (13), range six (6), west of the principal meridian in Manitoba, and being within the defendant municipality which land immediately adjoins the right of way of the Canadian Pacific Railway Company on the north side thereof.

About the year 1904, the defendants constructed a ditch from a point between sections seven and eight (as shewn on exhibit 1) and running north between sections seventeen and eighteen to the said right of way of the Canadian Pacific Railway Company. This ditch was dug for the purpose of draining the marshy lands to the south of the road allowance between sections seventeen and eight and eighteen and seven and this ditch connected with a ditch on the road allowance between sections eight and seventeen and running to a spring in the north-east quarter of said section eight.

In 1905 or 1906 a small ditch had been made by the municipality running north from the line of the Canadian Pacific Railway Company between sections seventeen and eighteen and extending to a point a short distance from the north line of section eighteen.

In 1907 the municipality constructed a culvert on the roadway under the line of railway of the Canadian Pacific Railway. Up to this time the land to the south of this point had been wet and, as a consequence, unfit for cultivation and the land to the north, including the land in question, had been dry and fit for cultivation. After the construction of this culvert large quantities of water drained from the land to the south through this culvert causing the water to overflow the land north of it and in the attempt to relieve the situation the municipality deepened the ditch and extended the same to the north line of section eighteen.

After the construction of this culvert in 1907 and up to the date of the bringing of this action the plaintiff's land, which had hitherto been good arable land, has been affected by the water from the ditch between section seventeen and eighteen overflowing and inundating the same and depriving her of the benefit which, but for such overflow and inundation would

result from its cultivation, and also affecting a portion of hay meadow, depriving the plaintiff of the use and benefit thereof, and the plaintiff brings this action claiming damages.

There was judgment for the plaintiff for $700 and costs.

*F. Heap* and *R. D. Stratton*, for plaintiff.

*A. C. Galt*, K.C., for defendants.

MACDONALD, J.:—The evidence establishes the fact that, prior to the ditch and culvert referred to, the land of the plaintiff was a valuable producing quantity and that after the construction of such ditch and culvert a certain portion of it was so affected as stated, as to be valueless for farming or other purposes. Land which had for many years been cultivated, and hay meadow which had for a similar period been of value became useless and valueless, too wet even for hay and this caused by the overflow of the ditch.

The ditch which was extended in 1907 to the north-east corner of section eighteen connected with a ditch constructed in the same year running west along the road allowance between sections eighteen and nineteen to the intersection of the Canadian Pacific Railway Company's line at cross-section two as appears on said exhibit 1, the expectation being that the Railway Company's ditch from that point would meet all the requirements and carry away the surplus waters, but this has not been the result.

Evidence of engineers submitted on the part of the plaintiff is to the effect that the ditch to the north of the culvert and from thence to the outlet at said cross-section 2 is insufficient to carry off the water that is brought north by the ditch between sections 17 and 18.

For the defence expert evidence differs, but the witnesses for the defence also differ, and on the whole I am satisfied that the evidence for the plaintiff is the correct explanation of the cause of the trouble and that the defendant municipality is responsible in not providing a ditch of sufficient dimensions, which I am convinced can easily and inexpensively be done, to protect the land in question from the overflow affecting it.

I have estimated the damage to the plaintiff without taking into consideration any depreciation in the land, and fixing it at the loss to the plaintiff by the non-user of the soil and the loss of the hay for 5 years, commencing with the year 1907, and leaving the plaintiff to her further remedies for such depreciation and further loss should the municipality fail to remedy the trouble.

I fix the damages at $700 and there will be judgment for the plaintiff for such amount together with costs.

*Judgment for plaintiff.*

IMP.
P. C.
1912
May 17.

**DOMINION COTTON MILLS CO., Limited v. AMYOT and others (respondents) and BRUNET (intervenant).**

*Judicial Committee of the Privy Council, Earl Loreburn, L.C., Lord Macnaghten, Lord Atkinson, Lord Shaw and Lord Robson. May 17, 1912.*

1. CORPORATIONS AND COMPANIES (§ IV B—51)—POWERS OF COMPANY TO LEASE TO ANOTHER COMPANY—ACQUIRING CONTROLLING INTEREST IN COMPANY AND KINDRED CONCERNS.

Under 63-64 Vict. (Can.) ch. 98, empowering a cotton company "to construct, acquire, operate and dispose of cotton and woollen manufactories of every description," the company has the power to lease its mills to another company formed for the purpose of acquiring capital stock and a controlling influence in the cotton company and its three principal competitors.

2. CORPORATIONS AND COMPANIES (§ V G—291)—MAJORITY VOTE OF SHAREHOLDERS—SALE TO SYNDICATE—FAIR VALUATION—CONTROL BY COURT.

No abuse of power by the majority of the stock holders of a company and no deprivation of the rights of the minority calling for the interference of a Court are shewn where it appears that the directors and more than three-fourths of the shareholders in a cotton company, because its financial condition was going from bad to worse, and there was no reasonable prospect of any revival of prosperity, due to the ruinous competition which was going on in the cotton business, accepted an offer to purchase their shares made on behalf of a syndicate (afterwards incorporated as a company) formed for the purpose of acquiring capital stock and a controlling influence in the cotton company and its three principal competitors, a fair and liberal valuation being placed upon the assets of the cotton company, and afterwards the cotton company executed a lease to the new company, though the original agreement was that the new company should sell the goods produced by the cotton company at a fair and reasonable commission and the terms of the lease were fair and there was no evidence of any oppressive conduct or want of good faith on the part of either of the parties to the transaction.

3. COURTS (§ I D—120)—JURISDICTION OVER CORPORATIONS—INTERNAL MANAGEMENT.

The Court has no jurisdiction to interfere with the internal management of joint stock companies acting within their powers.

[*Burland* v. *Earle*, [1902] App. Cas. 83, followed.]

4. CORPORATIONS AND COMPANIES (§ V E 2—220)—REFUSAL OF MAJORITY OF SHAREHOLDERS TO BRING ACTION IN NAME OF COMPANY—RIGHT OF MINORITY SHAREHOLDERS TO BRING ACTION IN THEIR OWN NAME.

The rule of law that to redress a wrong done to a company or to recover moneys or damages alleged to be due to the company, the action should be *primâ facie* brought by the company itself, does not apply where the persons against whom the relief is sought, themselves hold and control the majority of the shares of the company, and will not permit an action to be brought in the name of the company and in such case the minority shareholders complaining will be permitted to bring an action in their own name.

[*Burland* v. *Earle*, [1902] App. Cas. 83, followed.]

5. CORPORATIONS AND COMPANIES (§ V E 2—220)—LIMITATIONS TO ACTIONS BROUGHT BY MINORITY SHAREHOLDERS.

Where a minority of shareholders are permitted by the Court to bring an action in their own name because the majority of shareholders will not permit an action to be brought in the name of the company, the plaintiffs cannot have a larger right to relief than the company itself would have had if it were plaintiff, and the objecting minority

cannot complain of acts which are valid if done with the approval of the majority of the shareholders or are capable of being confirmed by the majority and they are, therefore, confined to actions in which the acts complained of are of a fraudulent character, or beyond the powers of the company.

[*Burland* v. *Earle*, [1902] App. Cas. 83, followed.]

6. CORPORATIONS AND COMPANIES (§ V 8—294)—RIGHT OF SHAREHOLDER TO VOTE HAVING INTEREST IN SUBJECT OF VOTE.

Unless otherwise provided by the regulations of the company a shareholder is not debarred from voting or using his voting power by the circumstance of his having a particular interest in the subject-matter of the vote.

[*Burland* v. *Earle*, [1902] App. Cas. 83, followed.]

Statement

THIS was an appeal from a judgment of the Superior Court in Review of Quebec (Mr. Justice Charbonneau dissenting) of June 30, 1910, *Amyot* v. *Dominion Cotton Mills Co.*, 38 Que. S.C. 457, affirming a decision of Mr. Justice Demers, *Amyot* v. *Dominion Cotton Mills Co.*, 36 Que. S.C. 35.

*Sir Robert Finlay*, K.C., *Geoffrion*, K.C. (of the Canadian Bar), and *Geoffrey Lawrence*, for the appellant company.

*Rowlatt*, for the respondents.

*S. Green*, for the intervenant.

LONDON, ENG., May 17, 1912.*

Lord Macnaghten.

LORD MACNAGHTEN, in giving their Lordships' reasons, said the action was brought by two shareholders in the Dominion Cotton Mills Company, Limited, in their individual capacity against that company and against the Dominion Textile Company, Limited, seeking to set aside a lease of the Cotton Company's mills, dated November 10, 1905, which was granted to the Textile Company for 21 years, as well as a resolution passed by the Cotton Company in general meeting approving of that lease. Mr. Justice Demers gave judgment for the plaintiffs and set aside the resolution and the lease with costs against both companies. In the Superior Court in Review that judgment was affirmed by a majority of two Judges to one, Mr. Justice Charbonneau dissenting.

The grounds on which the plaintiffs claimed relief were (1) that the lease was *ultra vires* the Cotton Company, and (2) that the transaction was of a fraudulent character and amounted to a confiscation of the interests of the plaintiffs and other dissentient shareholders.

The Cotton Company was incorporated by letters patent in 1890, with the object of carrying on the business of cotton manufacturers. In 1900 the letters patent were superseded by the Dominion statute 63 and 64 Vict. ch. 98, which empowered the Cotton Company "to construct, acquire, operate and dispose of cotton and woollen manufactories of every description."

*Also reported, 28 Times L.R. 467.

IMP.

P. C.
1912

DOMINION COTTON MILLS CO., LTD. v. AMYOT.

Lord Macnaghten.

Although the Cotton Company paid dividends in the earlier part of its existence, at first at the rate of 8 per cent. and afterwards at 6 per cent., the management seemed to have been unsound from the beginning. No reserve fund was formed. No provision was made for renewals. In 1899, on the appointment of a new manager, about $2,000,000 was spent or misspent on machinery. The expenditure was made without the consent or knowledge of the Bank of Montreal, who were the largest creditors. Then application was made to the bank to provide for that expenditure. The manager was much dissatisfied, and it was a question with the bank whether they would find the money or make the Cotton Company liquidate their bills. Ultimately the bank consented to make the required advance on the company agreeing to issue bonds to the amount of $2,000,000. The bonds were underwritten by the directors and the principal creditors of the company, the Bank of Montreal underwriting for $500,000 and the president of the Cotton Company and his friends for a still larger amount. It was found impossible to dispose of those bonds on the market, either in Canada or England. The evidence was that "nobody would take them." So the bank consented to carry them for a time. The directors had previously endeavoured to raise money by the issue of preference shares, but they got no support from the general public and very little help from shareholders. Towards the end of 1901 payment of dividends was discontinued. The shares of the company fell to 26 cents. The position of affairs was serious. The prospect of dividends was, as the manager of the Bank of Montreal said, "very remote." To add to the gravity of the situation ruinous competition was going on in the cotton business. The principal competitors of the Cotton Company were the Merchants Cotton Company, the Montmorency Cotton Mills Company, and the Colonial Bleaching and Printing Company. The cotton companies, as Mr. Forget, the late president of the Dominion Cotton Company, said, "were fighting each other for all they were worth." In that state of things on December 29, 1904, the Royal Trust Company, on behalf of a syndicate formed for the purpose of acquiring capital stock and a controlling influence in the Cotton Company and its three principal competitors, sent a circular to the shareholders in the Cotton Company offering to purchase shares in that company at 50 per cent. of their par value, payable half in 6 per cent. bonds and half in 7 per cent. preference stock of a new company then in course of formation, and afterwards incorporated by letters patent as the Dominion Textile Company. The offer was accompanied by a letter signed by the directors of the Cotton Company, stating that they had considered the offer in all its bearings and had come to the conclusion that it was a reasonable proposal backed by responsible parties and that they considered its acceptance

IMP.

P. C.
1912

DOMINION COTTON MILLS CO., LTD. v. AMYOT.

Lord Macnaghten.

in the best interests of their shareholders, and adding that they had as individual shareholders accepted the offer and recommended all their shareholders to do the same. The holders of 24,467 shares in the Cotton Company out of 30,336 shares then outstanding accepted the offer of the Royal Trust Company and transferred their shares accordingly. Those shares were afterwards vested in the Textile Company. The Textile Company also acquired a preponderating influence in the three other companies and thus became in a position to manage the businesses of the four companies as one concern. At first it was arranged that the Textile Company should sell the goods produced in the mills of the Cotton Company at a fair and reasonable commission. Afterwards, as a simpler and more convenient mode of conducting the combined business, it was arranged that the Textile Company should take a lease of the Cotton Company's mills, and so the lease of November 10, 1905, was executed. It was in respect of that lease that the plaintiffs sued for relief, and the relief was confined to a claim to have the lease declared null and void.

It was difficult to see what legitimate advantage the plaintiffs could hope to obtain from the only relief they claimed. The lease, if not *ultra vires*, even though annulled by the Court, was capable of being ratified by the majority, who were, of course, interested in supporting it. The principles applicable to cases where a dissentient minority of shareholders in a company sought redress against the action of the majority of their associates, were well settled.

In order to succeed it was incumbent on the minority either to shew that the action of the majority was *ultra vires* or to prove that the majority had abused their powers and were depriving the minority of their rights. It would be pedantry to go through the line of decisions by which those principles had been established. But there was a passage in a recent judgment of this Board in the case of *Burland* v. *Earle*, [1902] App. Cas. 83, which had the high authority of Lord Davey, so apposite to the circumstances of the present case that it might be useful to cite it at length. "It is," said his Lordship, "an elementary principle of the law relating to joint stock companies that the Court will not interfere with the internal management of companies acting within their power, and, in fact, has no jurisdiction to do so.

"Again, it is clear law that in order to redress a wrong done to the company or to recover moneys or damages alleged to be due to the company, the action should be *primâ facie* brought by the company itself. These cardinal principles are laid down in the well-known cases of *Foss* v. *Harbottle*, 2 Hare 461, and *Mozley* v. *Alston*, 1 Ph. 790, and in numerous later cases which it is unnecessary to cite. But an exception is made to the second rule where the persons against whom the relief is sought them-

IMP.

P. C.
1912

DOMINION COTTON MILLS CO., LTD. v. AMYOT.

Lord Macnaghten.

selves hold and control the majority of the shares in the company and will not permit an action to be brought in the name of the company. In that case the Courts allow the shareholders complaining to bring an action in their own names. This, however, is a mere matter of procedure in order to give a remedy for a wrong which would otherwise escape redress, and it is obvious that in such an action the plaintiffs cannot have a larger right to relief than the company itself would have if it were plaintiff, and cannot complain of acts which are valid if done with the approval of the majority of the shareholders or are capable of being confirmed by the majority. The cases in which the minority can maintain such an action are therefore confined to those in which the acts complained of are of a fraudulent character or beyond the powers of the company. A familiar example is where the majority are endeavouring, directly or indirectly, to appropriate to themselves money, property, or advantages which belong to the company or in which the other shareholders are entitled to participate, as was alleged in the case of *Menier* v. *Hooper's Telegraph Works*, L.R. 9 Ch. 350. It should be added that no mere informality or irregularity which can be remedied by the majority will entitle the minority to sue if the act when done regularly would be within the powers of the company and the intention of the majority of the shareholders is clear. This may be illustrated by the judgment of Mellish, L.J., in *MacDougall* v. *Gardiner*, 1 Ch.D. 13. There is yet a third principle which is important for the decision of this case. Unless otherwise provided by the regulations of the company, a shareholder is not debarred from voting or using his voting power to carry a resolution by the circumstance of his having a particular interest in the subject matter of the vote. This is shewn by the case before this Board of the *North-West Transportation Company, Limited* v. *Beatty*, 12 App. Cas. 589. In that case the resolution of a general meeting to purchase a vessel at the vendor's price was held to be valid, notwithstanding that the vendor himself held the majority of the shares in the company, and the resolution was carried by his votes against the minority who complained."

The first question, therefore, was: Was the lease of November 10, 1905, *ultra vires*? On that point there was really no room for doubt or argument. The Dominion statute of 1900 in express terms authorized the Cotton Company to dispose of its mills, and the lease which was impeached by the plaintiffs was a disposition within the letter of the statute.

The next question was: Had the majority abused their powers and deprived the minority of their rights? The plaintiffs alleged that the lease was the result or outcome of a conspiracy on the part of the syndicate, which began by coercing or deluding shareholders in the Cotton Company into parting with their

shares at an under value. And counsel, with the view of throwing light on the transaction impeached by the plaintiffs, dwelt at considerable length on the circular of the Royal Trust Company, the recommendation of the directors of the Cotton Company, and the short time which the shareholders had to make up their minds whether they would or would not sell their shares at the price offered. But the sale of the company's shares to the Textile Company was not the gist of this action. No complaint, apparently, had ever been made by any one of the selling shareholders on the score of under value or on any other ground. And the majority of the directors not being members of the syndicate, after investigation and consideration, accepted the offer of the Royal Trust Company without acquiring or seeking to acquire any interest in the syndicate.

No doubt the syndicate hoped and expected to make a good thing out of the venture, and of course they offered the price which in their opinion would tempt a majority of the shareholders to part with their shares. On the other hand, it must be borne in mind that unless the venture were successful the security for the price offered would be of comparatively little value.

The plaintiffs had gone into a great deal of evidence for the purpose of shewing that there was a suspicion of some unfair dealing somewhere, and that the lease was granted at an under value. In their Lordships' opinion they had not succeeded in proving anything of the kind. The bulk of their evidence consisted of a collection of directors' reports in past years, in which the shareholders were presented with statements that would not bear close examination, and with a view of the position of the company that was over-sanguine if not extravagant. Nor had the plaintiffs, in their Lordships' opinion, succeeded in shewing any oppressive conduct or any want of good faith on the part of the directors of the Textile Company or the directors of the Cotton Company nominated by the Textile Company, or any individual connected with the management of either of those companies. Oddly enough, one of the grievances of the plaintiffs was that they were not given an opportunity of taking part in the scheme, which they denounced as a fraudulent conspiracy.

The evidence seemed to shew that the valuation which the directors of the Cotton Company placed on the assets of that company when the syndicate made their offer, was a fair and liberal valuation; that the Cotton Company was then going from bad to worse; that there was no reasonable prospect of any revival of prosperity, and, what was still more important, that the terms of the lease were intended to be fair and are fair. In their Lordships' opinion the case of the plaintiffs failed on both grounds and they had no hesitation in advising his Majesty that the action should be dismissed.

*Appeal allowed and action dismissed.*

MAN.

K. B.

1912

June 13.

## STEWART v. SAUNDERS.

*Manitoba King's Bench. Trial before Prendergast, J. June 13, 1912.*

1. TRUSTS (§ I B—6)—SHARE IN OPTION TO PURCHASE—FAILURE TO CONTRIBUTE ONE-HALF OF PAYMENT—PAROL TRUST.

Where the plaintiff failed to furnish funds to make a large initial payment for property the defendant had an option to purchase, as the former had undertaken to do in consideration of an agreement for a one-half interest in the property, the defendant will not, upon himself furnishing such funds and purchasing the property, be declared a trustee for the benefit of the plaintiff as to an undivided one-half interest therein.

2. CONTRACTS (§ I E 4—80)—PAROL AGREEMENT TO FURNISH PART OF PURCHASE PRICE—DEMAND—NOTICE OF REPUDIATION OF CONTRACT.

Where the plaintiff, who had agreed, in consideration of a half interest in property the defendant purposed to purchase, to provide a large sum for the initial cash payment, instead of doing which he claimed to have found a purchaser for the property, but upon terms the defendant refused to accept, and also attempted to obtain an option on the property to the exclusion of the defendant, the latter is relieved from making a demand upon the plaintiff to furnish the money necessary for such payment, or of giving him notice of the repudiation of such agreement.

3. PARTNERSHIP (§ IV—16)—PAROL AGREEMENT—OPTION TO PURCHASE REAL ESTATE—PAYMENT FOR OPTION—DEFAULT IN MAKING FIRST PAYMENT—RETURN OF ADVANCE.

The fact that the plaintiff, who claimed that the defendant was a trustee for him in respect to a one-half interest in property the latter purchased and in which the plaintiff was to have such an interest upon providing a large sum for the initial payment, advanced the defendant $500 as one-half of the sum the latter was to pay and did pay the owner of the property in order to obtain an option thereon, which was subsequently applied as a part of such initial payment, the balance being furnished by the defendant upon the plaintiff's failure to do so, does not make the defendant a trustee for the plaintiff, notwithstanding the $500 was not returned the plaintiff until fourteen days after the defendant made such initial payment.

Statement

TRIAL of an action to have the defendant, who was a jeweller at the time of the transactions in question, declared a trustee for the plaintiffs, who are partners as real estate agents, as to an undivided one-half interest in an agreement for sale of certain lands wherein one John William Gunn appears as vendor and the defendant as purchaser.

The action was dismissed.

Messrs. *R. M. Dennistoun*, K.C., and *G. W. Jameson*, for plaintiffs.

Messrs. *J. E. O'Connor*, K.C., and *E. R. Levinson*, for defendant.

Prendergast, J.

PRENDERGAST, J.:—The evidence, in my opinion, establishes the following facts:—

The defendant had Gunn's promise that upon being paid $1 000 within a day or two he would give him a 30-day option for the purchase of the said lands at $38,800 on the following

terms: One-quarter cash, and the balance in three equal annual instalments bearing interest at 6 per cent. This was in the fall of 1911. He then proposed to plaintiff (Stewart) to take a half interest in the deal, making it a distinct and absolute condition, as I find, that he (Stewart) should provide for the whole of the cash payment, amounting to $14,700, payable at the expiration of the option. Stewart accepted, and gave the defendant as his half of the deposit a cheque for $500, which the defendant had credited to his account in the bank, and which was duly honoured. That the defendant distinctly made his offer subject to the condition stated and that Stewart so accepted it, as I find, seems to me the essential fact on which the issue revolves. The following day, being on October 30th, the defendant gave Gunn his cheque for $1,000 and secured from him a written option on the said terms in his own favour.

A few days later Stewart left for the United States. The defendant says Stewart told him he was going there to finance the cash payment; but it seems that Stewart's intention, whatever he may have said, was rather directed to selling the property before the cash payment came due.

During Stewart's absence Walker had several interviews with the defendant and again saw him either alone or with Stewart after the latter's return.

According to the plaintiffs, who deny first of all that the defendant's proposition to Stewart was subject to the condition that he should finance the first payment, the result of the subsequent interviews was that the defendant authorized Walker to close a sale of the property that the latter had arranged with one Kenny acting for the International Realty of Oskosh, that he undertook to pay the plaintiffs $1,000 for their financing his half of the cash payment to Gunn, and agreed that there should also be allowed to them out of the property a commission of 2½ per cent. for securing a purchaser, as well as 5 per cent. to Kenny "if he were found legally entitled to it." Even on the evidence given by the plaintiffs, every one of those contentions is suspicious. As to the alleged proposed sale to the International, there is altogether lacking that corroboration which one would expect, to shew that there really was such a transaction and that it was a *bonâ fide* one. The terms of this sale were also so unsatisfactory as to make it most unlikely that the defendant should accept them in his circumstances. As to financing the defendant's half of the cash payment to Gunn, Walker admits that he had agreed at one time to "take care of it for him" without remuneration, and the reason he gives for asking $1,000 later is not at all satisfactory. It also appears from the plaintiffs' examination for discovery, as well as from certain parts of their testimony at the trial, that they also took the position that the 2½ per cent. commission to themselves was to be paid

MAN.

K. B.
1912

STEWART
v.
SAUNDERS.

Prendergast, J.

out of the defendant's share alone, and I fail to see on what ground Kenny, who was virtually the purchaser in the proposed sale, stated to be to the International, should be entitled to 5 per cent. or any other commission.

I believe, as the defendant contends, that he refused to consent to the proposed sale because, as he expressed it, "while the price was excellent, the terms of payment were utterly rotten," and that with respect to the $1,000 allowance and the two commissions, which the plaintiffs said he "would have to agree to or the deal would be off," he, after protesting that this was not the original agreement with Stewart, declared before leaving them that he "would not in any form consent to such an arrangement unless he had to." He explained in evidence that what he meant by this was that the plaintiffs had purposely allowed the time for exercising the option to draw near to a close, that he was doubtful of being able to secure the cash payment, and that in his failure to do so it would still be better for him to accept their terms and have something than have nothing at all.

The plaintiffs did not approach the defendant after this last interview. They say they were suspicious of him, giving therefor reasons which do not seem satisfactory, and also that his request made at one time that they should bring to him the cash payment to be made to Gunn was unbusinesslike and unreasonable. Surely they should have at least made the modified proposition to either give him the amount in the shape of a cheque payable to Gunn, or to pay Gunn directly. At all events, the next step to be taken in the matter was to make the cash payment which they had undertaken to procure (either conditionally or unconditionally), and it behooved them to take a definite position in the matter, unless they should be considered as having done so by stating that if he did not accept their terms "the deal would be off."

Neither did the defendant approach the plaintiffs. He first went to work and tried to procure the amount required for the first payment. Then he got word from Gunn, who testifies to that effect, that the plaintiffs were endeavouring to secure from him an option upon the property for themselves on the representation that the defendant "could not put up the money and would fall through." The defendant eventually secured, partly from his brother and partly by mortgaging his wife's property, $13,700, which he paid to Gunn, and which, with the $1,000 paid for the option, made up the cash payment.

In my opinion the plaintiffs, by their conduct, relieved the defendant of the obligation of making any demand on them or giving them any notice of repudiation or otherwise.

The plaintiffs lay stress on the fact that it was only on December 4th that they were paid back the $500 which Stewart had contributed to the $1,000 deposit on the option, and that as this

MAN.

K. B.
1912

STEWART
v.
SAUNDERS.

deposit was eventually made part of the cash payment, they have in reality thus paid part of the same. But the delay of some twelve days is not considerable, and the plaintiffs should not complain in any event of the consequences of their having gone back on their undertaking and put the defendant in a position of embarrassment as they did.

There are also other matters of defence, amongst others the Statute of Frauds, which, on the above findings of fact, I do not deem it necessary to deal with.

Prendergast, J.

The action will be dismissed with costs.

*Action dismissed.*

---

ONT.

H. C. J.
1912

May 29.

## WELLAND COUNTY LIME WORKS CO. v. AUGUSTINE.

*Ontario High Court. Trial before Boyd, C. May 29, 1912.*

1. JUDGMENT (§ II D 6—136)—RES JUDICATA—JOINT AGREEMENT—JUDGMENT AS TO ONE PARTY—SUBSEQUENT ACTION AGAINST THE OTHER.

The decision adverse to the plaintiff company in a previous action in which it sued another person who jointly with the present defendant had entered into the contract in question with the company, by which previous decision it was held adversely to the company that both the present defendant, not a party to the previous action, and the party then sued were entitled to certain rights against the plaintiff as to the supply of gas and that the cutting off of the supply to the defendant in the first action operated as a forfeiture in favour of the present defendant of the plaintiff company's claim to an oil and gas lease over his farm, operates as *res judicata* in bar to the company's second action as regards the same points of controversy.

[*Welland County Lime Works* v. *Shurr*, 1 D.L.R. 913, 3 O.W.N. 715, 21 O.W.R. 480, specially referred to.]

Statement

ACTION for an injunction and damages in respect of an alleged breach of an agreement.

The action was dismissed.

The case of *Welland County Lime Works* v. *Shurr*, 1 D.L.R. 913, 3 O.W.N. 715, 21 O.W.R. 480, is founded upon the same state of facts, and the present defendant was there held to be a party to the contract, although not made a party defendant in the former action. The plea of *res judicata* was raised in the present action amongst other defences.

*W. M. German*, K.C., and *H. R. Morwood*, for the plaintiffs.
*S. H. Bradford*, K.C., and *L. Kinnear*, for the defendants.

Boyd, C.

BOYD, C.:—The plaintiffs' rights in this case depend upon an agreement made between them and the defendants on the 20th November, 1903. By this the defendants agreed to give to the plaintiffs the usual oil and gas leases of their respective farms, "to continue so long as the plaintiffs continue to comply with the conditions agreed upon." The condition was, mainly, to supply, free of charge, sufficient gas to heat the defendants' houses.

A well was made and gas procured from it on the lands of one of the defendants, Shurr. From this source gas was supplied by the plaintiffs to both defendants down to June, 1911,

ONT.

H. C. J. 1912

WELLAND COUNTY LIME WORKS CO. v. AUGUSTINE.

Boyd, C.

when the plaintiffs cut off the supply of gas to the house of the defendant Augustine, and thereafter called upon Shurr to execute a lease of the gas wells as to his land. The defendant Shurr refused; and, in conjunction with Augustine, cut off the plaintiffs' pipes on his land and so stopped the supply of gas from the well in question so far as the plaintiffs were concerned. Then an action was brought by the company, in July, 1911, against Shurr alone, to restrain him from interfering with the gas well, and that he be ordered to carry out the terms of the agreement (*i.e.*, as to the granting of a lease). This action was tried before Mr. Justice Sutherland, who granted the relief sought, and referred it to the Master to settle the terms of the lease; see *Welland County Lime Works Co.* v. *Shurr* (1911), 3 O.W.N. 398. Upon appeal to a Divisional Court this decision was reversed and the action dismissed, *Welland County Lime Works Co.* v. *Shurr*, 1 D.L.R. 913, 3 O.W.N. 715, 21 O.W.R. 480. The Court held that the agreement was a joint one and not severable as to Shurr; that both were entitled to be supplied with gas; that the plaintiffs had no right to cut off Augustine and retain a right or claim as against Shurr; and it was further held that the plaintiffs had no right to demand a lease from Shurr because the plaintiffs had ceased to supply gas to Augustine; and, therefore, the term for which the lease was to be granted had been ended by the action of the plaintiffs. This last ground of decision clearly indicates the opinion of the Court that the plaintiffs had by their own act forfeited their rights under the agreement, and had no locus standi in Court. That judgment of the Divisional Court has been taken to the Court of Appeal, but the appeal has not yet been argued.

In this state of affairs, the present action was brought by the plaintiffs against both defendants, on the 9th April, 1911, based, as the other, upon the written agreement between the parties as to the gas, made in 1903. There is the further allegation that, on the 1st March last, the defendants, without legal authority, took possession of the gas wells and have since prevented the plaintiffs from taking gas therefrom. This is explained in the evidence as being done upon faith of the judgment in the Divisional Court by the defendants. The relief asked is by way of injunction and damages. No evidence was given materially affecting the situation other than that taken on the first trial, which was put in as evidence in this case.

Among other defences, the plea of res judicata is relied on. That appears to be a sufficient defence; for, substantially, what was determined by the Divisional Court is, that the plaintiffs have forfeited their contract by non-compliance with its conditions; and the former judgment did not simply decide that the action could not be maintained on account of the absence of parties. Non-joinder was pleaded in the former action, but the

three Judges held upon the merits that the plaintiffs had lost their right to claim a lease from the defendant Shurr of the oil well on his premises. Apart from a lease or the right to a lease, the plaintiffs have no right to or ownership over the well sunk on Shurr's land, though the plaintiffs may have been at several thousand dollars' expense in sinking it.

While the forfeiture declared by the Court continues, it is not competent for the plaintiffs now to litigate as if they were the aggrieved party. They must, by some means, if possible, get rid of this disability before they can be rightly in Court as to the gas well. It may be that a proper application to the Court of Appeal would result in opening up the controversy by adding the co-contractor Augustine on that record and by obtaining relief from the forfeiture upon proper terms. But this is, of course, merely a suggestion: for, if that former judgment stands, it is a complete bar to the relief now sought by the plaintiffs; and, if it is reversed, the plaintiffs will obtain all that is sought permanently which they had only temporarily under the judgment of Mr. Justice Sutherland. In either view, the present action seems to be not well-advised; and I see no other course but to dismiss it with costs.

*Action dismissed.*

---

## REX v. BOUCHARD.



*Quebec Court of the Sessions of the Peace, C. Langelier, J. June 20, 1912.*

1. HABEAS CORPUS (§ I B—7)—WHEN PROPER REMEDY.

Habeas corpus, and not an application to a magistrate for the release of a person remanded by him to custody, is the proper mode of inquiry as to whether his detention was illegal.

2. CRIMINAL LAW (§ II H—85)—PROCEDURE—DETERMINING SANITY OF ACCUSED—REMAND IN ABSENCE OF ACCUSED—CAN. CRIM. CODE (1906) SEC. 722, SUB-SEC. 4.

Where a person was brought before a magistrate upon a written complaint for an assault upon his wife, who, in her deposition, swore that the accused had twice been confined in an insane asylum, and that since his release therefrom he had continually threatened her with death, and the magistrate remanded the accused to gaol after directing an examination to be made by experts as to his sanity, the magistrate has discretion under sub-sec. 4 of sec. 722 of the Crim. Code (1906), eight days later, on their report not having been made, to sign another remand in the absence of the accused.

[*Re Sarault*, 9 Can. Crim. Cas. 448, distinguished.]

Statement

AN application on behalf of the prisoner for his release from custody on the ground that the second remand by the magistrate was signed in the absence of the prisoner.

The motion was refused.

*J. E. Bedard*, K.C., for the Crown.

*Oscar Morin*, for the prisoner.

QUE.

C. S. P. 1912

REX v. BOUCHARD.

Langelier, J.

LANGELIER, J.:—The defendant was arrested for assault upon the complaint of his wife. In her deposition she swears that on two occasions, namely, in 1907 and in 1910, her husband was confined in a lunatic asylum and that since he has left it he has constantly threatened her with death, when on the 27th of May he assaulted her.

When arrested the accused appeared before me and I ordered to send him to gaol upon a written remand and at the same time I also ordered that he should be examined by medical experts as to his sanity. Eight days after, the experts not having made their report, I signed another remand, without the actual presence of the accused, because the medical experts had not yet made their report.

The counsel for the defence made a motion to have his client liberated, based upon the ground that the second remand was signed in his absence.

The rule for remand is fixed by art. 722 of our Criminal Code (1906) at sub-sec. 4, it is said:—

> 4. Whenever any justice adjourns the hearing of any case he may suffer the defendant to go at large, or may commit him to the common gaol or other prison, etc., or to such other safe custody as such justice think fit.

It was argued by the defence that the detention of the accused was illegal and that my jurisdiction was exhausted. And to support that contention the case of *Re Sarault*, 9 Can. Crim. Cas. 448, which is pretty much like the present one, was cited. However, in that case the defence had proceeded by way of *habeas corpus*, which is the proper mode of ascertaining whether the accused is illegally deprived of his liberty.

In the case of *Re Sarault*, 9 Can. Crim. Cas. 448, the facts were not the same as in the present one. When arrested the accused had given signs of insanity, and the magistrate, informed of these facts by the constables, had remanded the prisoner without the latter being brought before him, and ordered a medical examination.

The Court of King's Bench presided by the late Mr. Justice Hall based their decision to liberate the accused upon that ground.

> Although, said Judge Hall, the motive of the magistrate in remanding the prisoner was a commendable one, yet there was an absence of a condition which appears to me to involve a principle of safeguard of the highest importance for the liberty of the subject, the order was made upon verbal, unsworn statements, presumably of constables, and not within the hearing and view of the accused, who, in reality, was neither confronted with a complainant or seen by the magistrate.

In the present case it was quite different; I had before me the affidavit of the wife, in which it was stated that twice her husband had been sent to a lunatic asylum and that since he had

QUE.

C. S. P. 1912

REX v. BOUCHARD.

Lavergne, J.

been out he had constantly threatened her with death, till he assaulted her on the 27th of May last.

Upon that complaint I issued a warrant and the accused was brought before me and I ordered that he should be sent to gaol to be examined by medical experts, which order appears on the face of the record. At the expiration of eight days I signed another remand, which was unnecessary, because the accused was kept in virtue of a sentence, i.e., the medical examination.

Our Code gives some latitude in such a case, when it says "or to such other safe custody as such justice think fit."

I am of opinion that the only mode of verifying if a person is detained illegally, is by *habeas corpus* and not by a motion.

The counsel for the defence has contended that my jurisdiction was exhausted. If such is the case how could I order the liberation of the prisoner? Upon a writ of *habeas corpus* the Judge might give such an order. Motion dismissed.

*Application refused.*

---

ONT.

H. C. J. 1912

March 27.

## HUEGLI v. PAULI.

*Ontario High Court. Trial before Boyd, C. March 27, 1912.*

1. CHARITIES AND CHURCHES (§ I C—24)—PROPERTY RIGHTS—SALE OF PROPERTY—RIGHTS OF MAJORITY OF CONGREGATION.

Where a church, to which certain lands are conveyed in perpetual trust for its maintenance, is organized on a congregational basis, the view of the majority prevails, and no breach of a general trust occurs by the conversion of the lands pursuant to direction of the majority of the congregation; and resolutions to change the place of worship and sell the lands deeded to the trustees of the congregation are matters of congregational competence and are conclusive against dissident members of the congregation.

[*Newburgh Reformed Church* v. *Princeton Theological Seminary* (1837), 4 N.J. Eq. 77; and *Pine Hill Lutheran* v. *St. Michaels Evangelical* (1864), 48 Pa. St. 20, followed.]

2. PARTIES (§ I A—11*a*)—BREACH OF TRUST—CESTUI QUE TRUST—PLAINTIFF SUING ON BEHALF OF HIMSELF AND OTHER MEMBERS OF CONGREGATION.

The rule is well settled that a member of a society or church congregation may sue on behalf of himself and all other members of the congregation to prevent a breach of trust as to which they have a legal interest to intervene.

3. CHARITIES AND CHURCHES (§ I C—27*a*)—UNINCORPORATED ASSOCIATION—RIGHTS OF DISSIDENT MEMBERS TO PROPERTY OF ORIGINAL BODY.

Dissident members of a church organized on an independent or congregational basis, who band themselves together with others in a new organization, are an off-shoot from the old body, and, therefore, have ceased to be a part of it, and can have no right as once members of the original body to claim any part of the property vested in trustees for that original body.

4. CHARITIES AND CHURCHES (§ I C—22)—STATUTORY POWER TO SELL CHURCH PROPERTY—CAPACITY—R.S.O. 1897, CH. 307, SEC. 23.

R.S.O. 1897, ch. 307, sec. 23, gives power to sell land held by churches in trust, when it becomes unnecessary to hold it for the religious use of the congregation, and it is deemed advantageous to sell, but

ONT.

H. C. J.
1912

HUEGLI
v.
PAULI.

without disturbance of special trusts, the aim of the statute being to give a right of alienation to a religious body holding lands by trustees capable of perpetual succession.

5. CHARITIES AND CHURCHES (§ I C—24)—HOLDING TITLE TO CHURCH LOT —REMOVAL OF CHURCH TO ANOTHER LOT.

Where a given trust deed provides a specific event when "the church, for which the trust was created shall lose its visibility and cease to exist," this cannot be said to have happened where the church congregation has merely moved to another location.

6. CHARITIES AND CHURCHES (§ I D—39)—DISCRETION AS TO BENEFICIARIES —VACATING SITE OF CHURCH—CONTINUITY OF TRUST.

Vacating the site of a place of worship by a church organized upon a congregational basis pursuant to a special trust granting the site to the church for that purpose, does not amount to a cesser of the existence of the beneficiary.

[Compare *Parish of St. Stephen's* v. *Parish of St. Edward's*, 2 D.L.R. 594, a decision of the Supreme Court of Canada affirming the King's Bench of Quebec.]

7. CHARITIES AND CHURCHES (§ I C—24)—DEED TO CHURCH TRUSTEES— PERMANENCY OF SITE.

A deed of land to church trustees upon trust that the land shall be forever held and enjoyed for the use of the members of a specified local church and that rents derived from any portion of the site shall be applied towards the upkeep of the meeting-house thereon, is a trust which forbids a change of site so long as a congregation exists.

Statement

ACTION for a mandatory injunction requiring the defendants, the trustees of an Evangelical Lutheran Church in the town of Stratford, to reopen for public worship their disused church-edifice, and to allow the plaintiff Huegli to conduct services therein; for a declaration that the plaintiffs were entitled to have the trusts of the deed of the land upon which the building stood carried into execution; for an injunction restraining the defendants from leasing or selling the building or the land and from using or allowing it to be used for purposes other than those declared in the trust deed; and for other relief.

The action was dismissed.

*F. H. Thompson*, K.C., for the plaintiffs.

*R. S. Robertson*, for the defendants.

Boyd, C.

March 27. BOYD, C.:—This is a church case, not involving questions of doctrine, but only those of property. All the litigants are of the Evangelical Lutheran denomination, holding the doctrines set forth in the unaltered Augsburg Confession, and both parties claim conflicting rights under one and the same deed of trust.

The plaintiffs' statement of case appears simple; but, upon the development of the facts at the trial, questions arise of difficult and complicated character which have not been considered by our Courts. I do not purpose to deal with more than are necessary to determine this action. Three plaintiffs are on the record, but at the hearing they asked leave to sue "on behalf of others." An initial difficulty arises as to "who are the others?" That remains as yet undefined. The defendants are

alleged to be and are the trustees of the legal estate in the church property in question, and breaches of trust are complained of. No doubt, the rule is well settled that a member of the society may sue on behalf of himself and all the members of that society to prevent a breach of trust; or it may be that, if he stands alone, he may sue in his own name for an injunction; but it must appear that he has a legal interest to intervene. So I pass for the present from the question of parties and the *locus standi* of the plaintiffs.

The trust property was acquired in July, 1874, by conveyance in fee simple from Alexander Grant, of Stratford, for an expressed consideration of $200. The conveyance is made to three persons appointed to be trustees (under the statute then in force, 36 Vict. ch. 135(O.), respecting the property of religious institutions), for the purposes therein set forth. The recitals shew that a then existing religious society or congregation of Evangelical Lutherans had occasion for the land purchased and conveyed as a site for a house of public worship, and had appointed three persons to hold in perpetual succession, under the name of "The Trustees of the Stratford Evangelical Lutheran Church," for the use of the said society and upon the trusts thereinafter set forth.

There are two "special trusts" (to use the phrase of the deed): first, that the premises shall be forever hereafter held for the use of the members of an Evangelical Lutheran Church, which shall be exclusively composed of persons holding the doctrines of the said Augsburg Confession; and, second, "that the trustees shall at all times hereafter permit any minister, he being duly authorised by the said Evangelical Lutheran Church to conduct the worship thereof, to officiate in the church existing or which may hereafter be built on the said lot according to the ritual . . . of the said Church, and shall also apply the rents and profits derived from any portion of the said lot or the buildings erected thereon towards the maintenance of public worship in the said church or meeting-house according to the rules . . . or towards the repairs or improvement of the said property, and to no other purpose whatsoever."

It is to be noted that the word "church" is used in two senses in different parts of the conveyance; at times referring to the religious society, and again to the particular meeting-house on the premises.

The recitals shew that the conveyance was obtained under the powers conferred upon religious societies by the provincial statute then in force, 36 Vict. ch. 135, sec. 19, which provides that "in every case the special trusts or powers of trustees

ONT.

H. C. J.
1912

HUEGLI
v.
PAULI.

Boyd, C.

contained in any deed, conveyance, or other instrument, shall not be affected or varied by any of the provisions of this Act." That clause is carried into the latest revision of the same Act (R.S.O. 1897, ch. 307, sec. 23). This Act gives power to sell the land when it becomes unnecessary to be held for the religious use of the congregation, and it is deemed advantageous to sell, etc.: sec. 7 of 36 Vict. ch. 135.

This original society built and took possession of a meeting-house on the said land, and occupied the place for religious uses down to the 13th December, 1908, when the premises were vacated under the following circumstances.

The congregation was growing from year to year, and it became a question whether the old building should be repaired and extended or another site should be procured and a new building erected.

By the record in the church minutes it was, on the 17th December, 1906, resolved unanimously that a new church should be erected. There was some fluctuation of opinions and of resolutions as to the *locus;* but finally it was moved and carried at a meeting of the congregation held on the 24th January, 1908, that a new lot should be bought, and on the 28th August of the same year that the old lot should be sold. This vote also appears to be practically unanimous, only one person (who is one of the plaintiffs, Allstadt) voting "nay."

The new building being put up on the new lot, the congregation as a whole took possession of the new building, in Erie street, on the 13th December, 1908, when the new meeting-house was formally opened. There does not appear to have been what is called a "split" in the society. Some members may have been reluctant or inert, but only the one who voted "nay" upon the question of sale is in evidence as being actively dissident. The pastor of the society that moved into the new building says, "Practically the whole congregation went with me." He names the plaintiff Allstadt as the only exception. Another plaintiff, Racey, was active in support of the new movement, and voted in favour of it at the meeting.

After vacating the old site, the trustees, acting on the direction of the congregation, rented the building thereon, and applied the surplus of rent, after paying taxes and insurance, for the benefit of the congregation and of the new site. The trustees also, in like manner, sold four feet of the land, and are now offering the rest for sale. The trustees of the Erie street lot (now defendants) claim to be the legal owners of the old site; and this is not in effect questioned by the plaintiffs in the present case. The object of the suit is to restrain the sale and to get a right of entrance to the old building (which is in Cambria street) in order to make use of it for religious services.

in the interest of a body of people represented by the plaintiffs. This movement in regard to the new body began in February, 1911, by the forwarding of a petition with twelve signatures to the plaintiff Huegli, who is an Evangelical Lutheran clergyman of the Synod of Missouri, and in good standing as a member of that Synod, inviting him to take up ministerial work in Stratford. He came, and a hall was rented on Downey street, and there he began to organise a congregation, and was joined by the plaintiffs Racey and Allstadt and two or three others who had been members of the congregation worshipping in Cambria street, and also by some outsiders, aggregating in all about twenty members—the whole number of present adherents in Downey street hall being about one hundred.

To go back now to an analysis of the petitioners and their standing in the Cambria street church at the time it was resolved to build a new meeting-house on another site, we find that five of these were not members of the old church; one, Hembruch, was not in good standing since 1906, and had no right to vote in the old church; and of the remaining six, Homan attended the Erie street meetings for a while; Schroeder subscribed for the building of the new church, and became liable on the bond for its debt, and also attended at Erie street for a while; Wolf subscribed towards the new building and went over with the majority; Redding is now a member of the Erie street church and in good standing (*i.e.*, making his payments, etc.); Racey went over with the rest to Erie street church, and, as has been stated, was an active advocate of the change; and the last of the twelve, Allstadt, is the only one who has opposed and stood aloof from the new movement.

The situation as it has been developed is not provided for in the four corners of the deed of trust. Only two conditions are there dealt with: (1) when all is going on in due course by the occupation and religious use of the trust property by the congregation of the Stratford Evangelical Lutheran Church; and (2) when the church for which the "trust was created shall lose its visibility and cease to exist"—then the control of the property is to pass over to and vest in the nearest Evangelical Lutheran Church of the same faith and order.

The action is framed on the theory that this second situation has arisen—by assuming that the vacating of the old site is equivalent to the cesser of existence of the beneficiary. This proposition cannot, it seems to me, be sustained. The church in possession under the deed of trust has, for sufficient reasons, decided no longer to remain on the trust property; and the question as to what is to be done with that property cannot be solved by reference to this latter provision in the deed of trust.

The newly organised body, containing a few members of the former church society, has applied for leave to enter upon

ONT.

H. C. J. 1912

HUEGLI v. PAULI.

Boyd, C.

the old site, by notice about the 12th April, 1911; and, failing to get satisfaction, this action is brought on the 1st February, 1912, seeking a mandatory order on the defendants to enforce the reopening of the church and to allow the plaintiff Huegli to conduct public worship therein, and for a declaration to have the trusts of the deed carried into execution, and to have the sale stayed and the rents applied under the trust to the old site.

By the terms of the deed, the land is held on the special trusts that the same shall be forever held and enjoyed for the use of the members of an Evangelical Lutheran Church, and that the rents, etc., shall be applied to repairs and improvement of the said property, and to no other purpose whatsoever.

The plaintiffs' broad contention is, that the lands cannot be sold and that the rents (if any) cannot be diverted from the perpetual purpose of repairing and improving the trust property. They claim to represent some of the beneficiaries, being members of the original congregation for whose use and benefit the trust was created, and that the majority cannot by any vote or action overrule and extinguish their rights and claims.

The broad contention of the defence is, that there is no private right of action; that the beneficiary is the society or congregation, and not any individuals of it; and that the society as a whole is represented by the Erie street church. As to the sale and the application of the rents, they invoke the benefit of the statute referred to in the deed; and say that, even if the rents were misapplied, it is a grievance to be complained of by the Attorney-General, and not by the plaintiffs.

This Act, no doubt, provides for the sale and leasing of church lands when it becomes unnecessary to retain them for religious use, upon the consent being obtained of a majority of the members present at a meeting duly called for that purpose; and, so far as all necessary preliminaries are concerned, this place may well be sold or leased if the Act applies. But the plaintiffs rely on sec. 19 of the Act (sec. 23 of the present Act), which provides that in every case the special trusts or powers of trustees contained in any deed shall not be affected or varied by any of the provisions of the Act. In this deed we find expressed as "special trusts:" (1) that the land shall be forever hereafter held and enjoyed for the use of the members of an Evangelical Lutheran Church; and (2) that the rents and profits derived from any portion of the said parcel of ground or the building erected thereon shall be applied towards the maintenance of public worship in the said church or meeting-house, towards the repairs and improvement of the said property, and for no other purpose whatsoever. This last special trust is peculiarly emphatic in being impressed on the very place and the building (the meeting-house) thereon.

ONT.

H. C. J. 1912

HUEGLI v. PAULI.

Boyd, C.

Unless I can nullify these special trusts, the land cannot be sold or the rents diverted to another place. And, as I read the statute, it forbids the nullification of these special trusts. The effect of this statute has not been considered, I believe, by the Courts in the aspect now presented. The aim of the Legislature appears to be to give a right of alienation to a religious body holding lands by trustees capable of perpetual succession. The statute leaves out cases of special trust and deals with lands held by the corporation on the general trust or obligation of using the property for the purposes contemplated at its creation.

Apart from special restraining trusts, when the body outgrows its building, and the majority decide that it has become necessary and advantageous to dispose of the property with a view of removing to a more convenient situation, then the statute promotes the benefit of the body by sanctioning such a course; and a sale so had, which is a conversion of the present property, cannot be regarded as a diversion or a breach of trust.

But, if words are found in the conveyance which forbid a change of site, the statute does not mean to violate that term of the contract, but lets the parties abide by the bargain they have made when the property was acquired. By the terms of this deed, the land is bought for the possessory use and benefit of the particular local church as a congregation, and is to be maintained and improved in perpetuity. The rents and profits, if any, are to be invested in the meeting-house and otherwise on the particular site; the congregation is tied down to that spot as their place of worship so long as the congregation exists. In brief, the trust inheres in the title, and so passes to the successive trustees indefinitely *in futuro*—not to be interrupted by a sale out and out. This is my reading of the statute and of this trust deed—but the result does not enure to the benefit of the plaintiffs.

Now the present trustees, the defendants, hold this land in trust for the particular church so long as it exists and can be traced and identified. The Stratford Evangelical Lutheran Church of the deed had power to change the place at which its services should be conducted and also to change its name to that of the "Erie Street Church." These changes of local habitation and name are matters of ecclesiastical concern and cognizance, with which the Courts have nothing to do. The organisation of this particular church is based on the Independent or Congregational system, in which the voice of the majority of the members prevails. The minority, however small or large, is outvoted by the action of the majority, and the resolutions to vacate the old place, to sell or rent it, and to move into a new building on a new site, are all matters of congregational competence, and are conclusively settled as against the plaintiffs. The identity of

ONT.

H. C. J. 1912

HUEGLI v. PAULI.

Boyd, C.

the beneficiary church is established in favour of the body represented by the trustees, the defendants. The few who went out and banded themselves together with others in a new organisation, worshipping in the Downey street hall, are an offshoot from the old body, but thereby have ceased to be a part of it, and can have no right as once members of the original body to claim any part of the property vested in the trustees for that original body: see *per* Dickerson, J., in *Newburgh Associate Reformed Church Trustees* v. *Princeton Theological Seminary Trustees* (1837), 4 N.J. Eq. 77, and *Pine Hill Lutheran Congregation Trustees* v. *St. Michael's Evangelical Church of Pine Hill* (1864), 48 Pa. St. 20.

That appears to be the situation as regards the religious or ecclesiastical aspect of this controversy. None of the plaintiffs is a corporator or beneficiary because not a member of the old church. But that leaves untouched the consequences of this congregational act of removal in a legal point of view, as affected by the legal breaches of trust begun in part and in process of consummation by the sale of the land.

It may be well now to deal with the plaintiff Huegli, who is an outsider (so to speak) and stands alone in his claim. Assuming the non-existence of the church, the plaintiffs invoke that part of the deed which provides that, if the church loses its visibility, the land forthwith vests in the trustees of the nearest Evangelical Lutheran Church, which in this case happens to be the Erie Street Church, and the defendants the trustees. If so vested with the land in this character, the deed provides that the trustees shall be under obligation to open the church for regular or occasional services to any minister or missionary of the Evangelical Lutheran denomination holding the doctrinal views of the Augsburg Confession aforesaid. This requirement is fulfilled by Mr. Huegli, who is in good standing as a member of the Synod of Missouri, and is presented by the newly organised church on Downey street as a fit and proper person to be inducted for the time being in connection with the services to be resumed on the site owned by the defendants. The difference between this part of the trust and that which relates to the regular services held when the building is occupied by the original church is, that in the latter case the clergyman who has the right of entrée is one "duly authorised by the said Evangelical Lutheran Church to conduct the worship thereof." The context shews that the source of authority is to be sought, not in the denomination at large, extending over the continent, but in the particular body or church representing the original congregation. There being no lack of existence or of visibility of this latter body, the plaintiff Huegli is a clergyman not competent to officiate, whose claim to conduct the services in the old building may well be vetoed by the trustees. So that,

ONT.

H. C. J. 1912

HUEGLI v. PAULI.

Boyd, C.

to put it shortly, the plaintiffs, who complain of a breach of trust by the trustees, propose to enforce against them an occupancy of the site which would be a further breach of trust. Upon the ecclesiastical side, the old church body worshipping close by in Erie street regards this move as an attempt to establish a rival church in their proximity for no sufficient cause.

No amendment enabling the plaintiffs to sue on behalf of others who sympathise with them—and this is essential in order that no incongruity in the class represented may arise—no such amendment would better the cause of action. The legal title is in the defendants, and no breach of trust has arisen in regard to which the plaintiffs had a right or an interest to complain. The breaches of trust must be investigated by another method, probably by the intervention of the Attorney-General and a competent relator; but on that I do not decide. The only possible way of reparation to cure the breaches would be for the Zion Church to retrace their steps, resume possession, and re-establish worship on the old site; but I suppose it is now too late for that remedy. It may be that the real solution of the difficulty is to resort to the Legislature and procure special legislation, which may quiet, if not satisfy, all concerned.

The action must be dismissed; but costs will not be given, considering that the question discussed is new and bare of precedent, and that the conduct of the defendants has not been according to law, however honestly undertaken.

*Action dismissed.*

---

## SKLARIUK v. WHITEHOUSE.

SASK.

S. C. 1912

*Saskatchewan Supreme Court. Trial before Johnstone, J. March 29, 1912.*

March 29.

1. FIRES (§ I—4)—LIABILITY FOR STARTING BACK FIRE—LACK OF EVIDENCE FIXING RESPONSIBILITY.

An action for damages to the plaintiff's property from a prairie fire must be dismissed where it appears that on the day the damage occurred, there were two fires burning, one of which was kindled by the defendant for the purpose of backfiring to save his property from the other fire which was coming in the direction of his farm and he kept his fire under control so far as his property was concerned and that the two fires merged on the farm of the defendant or very near it, and one or both of them ultimately terminated in the plaintiff's land, destroying his crop.

Statement

AN action for damages from a fire alleged to have been set out by defendant by reason whereof the plaintiff's crop was destroyed.

The action was dismissed.

*C. D. Livingstone*, for plaintiff.

*J. A. M. Patrick*, for defendant.

Johnstone, J.

JOHNSTONE, J.:—There can be no question whatever but that the plaintiff suffered serious damage from a prairie fire,

SASK.
S. C.
1912
SKLARIUK v. WHITEHOUSE.
Johnstone, J.

one or other of two which started in the direction of the defendant's lands to the west, and spread east to the plaintiff's farm and destroyed his crop; but I may say I have had the greatest difficulty in arriving at a conclusion satisfactory to myself as to which fire—that kindled by the defendant in his lands, or that started on the farm of Gabora—caused the plaintiff's loss. I find as a fact that there were two fires burning on the Saturday, the 29th October, 1910, the day on which the damage was sustained by the plaintiff to his grain, one of these kindled by the defendant for the purpose of backfiring to save his property, from a fire raging to the north and coming in the direction of his farm. It is not necessary I should find who was responsible for this fire to the north, but I imagine it was the witness Gabora. He was said to have started a fire on the morning of the 29th, in fact, he said to one Smeed he had so started fire. These fires merged on the farm of the defendant, or quite adjacent to it on the farm of Gabora, one going with the wind, the north fire, and the other to the north and east to the defendant's ploughed ground on the east, and one or both east in the direction of the plaintiff's premises, ultimately terminating at the lands of the plaintiff, destroying his crop. There is a conflict of testimony as to whether or not the fire started in the direction of Gabora's farm, and which came south, really reached the defendant's premises. Several witnesses were called by the plaintiff who positively stated they had made no examination of the ground after the fire, and that there was an unburnt stretch between the fires of at least ten paces; that owing to sparsity of grass at that point the north fire had burnt itself out. This unburnt stretch, however, according to the plaintiff and two witnesses, was not to be seen on the Tuesday following. There was then no such stretch of unburnt grass; if it had ever existed at all, except in mind, it had been burnt over in the interval—inferentially, at the instance of the defendant, for no other purpose, of course, than that of destroying the only existing visible evidence of the fact that the fires had not come together, the defendant and his witnesses having stated as a fact that they had. These are the only persons who were on the spot and could have actually seen whether or not the fires had or had not run into each other. If the north fire had not burnt itself out, the person who started that fire, and not the defendant, is responsible to the plaintiff; unless the backfiring of the defendant got out of control of the defendant and his men and made its escape and ran east before the north fire reached the space burnt over by the defendant's fire.

There is no disputing the fact that the defendant, to save his property, started to backfire in the field across the road from Hyshka's house. He and four, at least, of his witnesses say that the fire was burning fiercely to the north with the wind blowing from

the north-west to south of east when the defendant commenced to backfire; that whilst backfiring on sec. 17, the defendant's section, the fire from the north came south around a slough, and thence east to the plaintiff's, north of some ploughed ground of the defendant and north of the defendant's fire and buildings. None of the plaintiff's witnesses saw the fire to the north, but say that they saw the defendant's fire spread to the east and in the direction of the plaintiff's lands, and one or two say positively this is the fire which did the damage. Under these circumstances, it may be conceded that the task of arriving at a satisfactory solution of the cause of the trouble is not an easy one.

I am convinced, from the direction the fire from the north was taking, and the situation of Hyshka's house, and the distance to the house of the defendant, and owing to the great volumes of smoke caused by both fires, the view of those at Hyshka's house was more or less obscured to such a degree as to render a view from that point of what was going on in the direction of the plaintiff's and defendant's premises impossible, or at any rate to render uncertain and unreliable any statements to the effect that the defendant's fire did the damage.

Moreover, to find the defendant guilty of setting the fire which caused the damage would be to impeach several evidently very respectable English-speaking persons of education and good standing in the community, and from appearances, persons who in my judgment would not commit wanton perjury. I rather incline to the opinion that the Hyshkas were, for the reasons mentioned, mistaken as to what did actually occur on the afternoon in question.

I may say further that the fire of the defendant did not get out of control, or it would have destroyed his property.

In my judgment, the plaintiff's action should be dismissed.

Judgment accordingly.

*Action dismissed.*

ONT.

H. C. J. 1912

May 28.

## Re PATTISON v. ELLIOTT.

*Ontario High Court, Riddell, J., in Chambers. May 28, 1912.*

1. COURTS (§ II C—185)—TRANSFER OF CAUSE FROM SURROGATE COURT TO HIGH COURT—R.S.O. 1897, CH. 59, SEC. 34.

Under the Surrogate Courts Act, 10 Edw. VII. (Ont.) ch. 31, sec. 33, providing that any cause or proceeding in the Surrogate Courts in which any contention arises as to the grant of probate or administration, or in which any disputed question may be raised (as to law or facts), relating to matters and causes testamentary, shall be removable by any party to the cause or proceeding into the High Court by order of the Judge of the latter Court, but that no cause or proceeding shall be so removed unless it is of such a nature and of such importance as to render it proper that the same should be withdrawn from the jurisdiction of the Surrogate Court and disposed of by the High Court and unless the property of the deceased therein exceeds $2,000 in value, a cause should be removed where a fair case of difficulty is made out so that there will be a real contest, provided the value of the estate brings the case within the above section of the statute.

[*Re Wilcox* v. *Stetter* (1906), 7 O.W.R. 65; *Re Graham* v. *Graham* (1908), 11 O.W.R. 700; *Re Reith* v. *Reith* (1908), 16 O.L.R. 168, specially referred to.]

Statement

MOTION by the plaintiffs for an order transferring this cause from a Surrogate Court to the High Court.

*W. Proudfoot*, K.C., for the plaintiffs.

*H. S. White*, for the defendants.

Riddell, J.

RIDDELL, J.:—The late Ann Jane Anderson left an estate of about $3,000. The executors named in a will said to have been made by her presented it for probate in the Surrogate Court of the County of Huron, but the defendants entered a caveat setting up a former will. Pleadings were delivered, in which the execution of the will propounded was disputed, as was the capacity of the deceased; undue influence was also alleged; and the former will set up.

The plaintiffs move to have the matter transferred into the High Court.

Until the decision of Mr. Justice Mabee in *Re Wilcox* v. *Stetter* (1906), 7 O.W.R. 65, it was considered almost as of course that a cause would be removed into the High Court where the value of the property was over $2,000, and there was a real dispute. In that case a halt was called to this practice, and a rather more stringent rule was supposed to be laid down. This case I followed in *Re Graham* v. *Graham* (1908), 11 O.W.R. 700, "without expressing any independent opinion of my own;" and the Chancellor in *Re Reith* v. *Reith* (1908), 16 O.L.R. 168, says: "It is enough if it appears from the nature of the contest and the magnitude of the estate that the higher Court should be the forum of trial. No doubt, much is left to the discretion of the High Court Judge as to the disposal of each application."

I have had an opportunity of consulting a number of my judicial brethren, and the general consensus of opinion is, that,

ONT.

H. C. J. 1912

RE PATTISON v. ELLIOTT.

Riddell, J.

where a fair case of difficulty is made out so that there will be a real contest, the case should be removed, if the amount of the estate brings the case within the statute. There is one reason which has its influence in my own mind, as it has on the minds of some of my brethren. If the case is removed, the opinion of the highest Provincial Court may be taken; while, if the matter remain in the Surrogate Court, this cannot be done.

The only objection to removal is the costs—but the trial Judge has full power to award, if he sees fit, only Surrogate Court costs.

An order will go, in the usual form, removing the cause into the High Court of Justice—costs in the cause, unless otherwise ordered.

*Order transferring cause.*

---

## DOMINION PERMANENT v. MORGAN.

B.C.

C. A. 1912

June 28.

*British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, Galliher, JJ.A. June 28, 1912.*

1. FRAUD AND DECEIT (§ VIII—35)—RECOVERY OF LOSS BY LOAN COMPANY —FRAUDULENT MIS-STATEMENTS OF BORROWER—AGENT OF COMPANY PARTY TO FRAUD.

The recovery by a loan company from a borrower of the loss caused by fraudulent mis-statements in the application for the loan is not prevented by the fact that the local agent of the company was a party to the fraud.

2. HUSBAND AND WIFE (§ II F 2—99)—MORTGAGE OF WIFE'S PROPERTY— LIABILITY OF WIFE—FRAUD OF HUSBAND.

Where, in connection with a loan to her from a loan company, a married woman executes a mortgage, a statutory declaration, an assignment, an authority to a local agent of the company to receive the money, and an extension agreement, but swears that she was not aware of the nature of these documents, and was misled by her husband as to their contents, she may be relieved from liability to the loan company for deceit in respect of fraudulent mis-statements in the application for the loan, which was signed by her husband in her name, but the husband will be held liable.

Statement

AN appeal by plaintiffs from judgment in favour of defendant at trial.

The appeal was allowed against Thomas C. Morgan, with costs, Irving, J.A., dissenting, and dismissed as against Caroline Morgan, without costs.

*Owen Ritchie*, for appellant.

*S. Livingston*, for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—Concurs with judgment of Galliher, J.A.

Irving, J.A.

IRVING, J.A., (dissenting):—I would dismiss this appeal.

It is plain that the application for shares, and the representations as to value were signed by the husband, Thomas C. Morgan, and it is equally plain that Mrs. Morgan executed the

B.C.

C. A.
1912

DOMINION PERMANENT v. MORGAN.

mortgage, but in my view of the evidence, the defendants were mere dupes of Leighton and Williams.

I am unable to see that either of them was guilty of fraud. The exception laid down in *Swan* v. *North British Australian Co.* (1863), 2 H. & C. 175; 32 L.J. Ex. 273, to the rule that a man who executes a deed without inquiring into its character will be bound by it, relieves the defendants in this case.

Irving, J.A.

In that case it was held that Swan's negligence was not the proximate cause of the removal of his name from the list of shareholders. There was something further necessary to complete the fraud. The broker in that case, Swan's agent had to steal the share certificates to complete the transaction. In this case, Leighton, the company's agent, and Williams, his clerk, had to transfer the title of the property into the name of Caroline Morgan, and get a false valuation of the property from the company's local appraiser, Mr. Forman, as well as a recommendation from the local board, and then forward all these false documents to the plaintiff company.

The proximate cause of the company's loss was the fraudulent conduct of their own agent, who, if he is regarded as the agent of the defendants, also was in this fraud acting for himself. I would therefore uphold the judgment.

Martin, J.A.

MARTIN, J.A.:—Though not after some hesitation, I find myself unable, after careful consideration of the matter, to dissent from the view that Thomas B. Morgan signed his wife's name to exhibits 1 and 2, because not only is there strong evidence in his own handwriting to support this conclusion, but inferences may fairly be drawn from surrounding circumstances which tend to discredit his testimony and point to him as the author of the disputed signatures. I may say that if it were not for the writings I should have affirmed the finding of the learned trial Judge in his favour. I agree that the appeal should be allowed as against Thomas B. Morgan.

Galliher, J.A.

GALLIHER, J.A.:—This case reeks with fraud, carelessness and incompetence.

Shortly stated, an application was made in the name of Caroline Morgan for 15 shares in the plaintiff company, and a loan of $1,500 on such shares secured by a mortgage on lots 1 and 4, block 1, of Newcastle suburban lots, addition to the city of Nanaimo, B.C.

The shares were issued and the application for loan duly passed upon by the head office at Toronto, and referred to the local board at Nanaimo to be passed upon by them.

This was done, and the mortgage and necessary papers were duly signed and forwarded to the head office, and the money advanced.

In the application for loan certain buildings were described and valued which never existed upon the premises.

Payments upon the mortgage were made more or less regularly for a time through the local agent, a Mr. Leighton (since deceased), but the payments having fallen greatly in arrears in June, 1898, an extension agreement was entered into between the company and Mrs. Morgan, A.B. 341.

The matter ran on until 1903, when the payments not having been made in accordance with the extension agreement, the company were threatening proceedings, and as Mr. Planta, a witness says, in order to avoid a disclosure of the fraud that had been practised upon the company, the company's agent, Leighton (who was a party to the fraud throughout) procured his nephew, Walter Thompson, to enter into an agreement to purchase the property from the company, which he did, November 16th, 1903, A.B. 358, and that Walter Thompson was a fiction so far as any *bonâ fide* sale was concerned, all the payments that were made under the agreement being made by Leighton.

Finally, the company ascertained the true state of affairs, and this action was brought.

First, with regard to Caroline Morgan, she denies signing exhibit 1, application for loan; and exhibit 2, application for shares. I think it is clear that she did not sign these.

I am satisfied, however, that she did sign exhibit 3, mortgage; exhibit 4, statutory declaration; exhibit 5, assignment of shares for loan purposes; exhibit 7, authority to Leighton to receive the money, and exhibit 13, extension agreement.

Her explanation of the fact that her signature appears to these papers is that her husband informed her that he was buying shares in the company, and that she was to go down to the office of Yarwood & Young, solicitors, and sign certain papers in connection with same; that she went down and signed certain papers, but did not read them; that they were not explained to her; and she knew nothing of their contents, simply accepting her husband's word that it was in connection with the application for shares; and that when she signed exhibit 13 she understood it was merely a transfer of these shares to Leighton, who was buying them from her.

When one looks at these documents, it seems hard to realize that a woman, who is by no means illiterate, could have had no idea of their contents.

Yarwood's evidence is unsatisfactory; for instance, exhibit 4, which purports to be acknowledged before him, and which is a statutory declaration purporting to be made by Caroline Morgan, he said:—

"I would not say that she came in and ever acknowledged it," and it must be that the trial Judge to a great extent discarded his evidence.

B.C.

C. A.
1912

DOMINION PERMANENT v. MORGAN.

Gallihier, J.A.

Were it not for this and the credence given to Caroline Morgan's testimony by the learned trial Judge, I should have the gravest doubts as to the genuineness of her defence, but considering that, I am with considerable misgivings impelled to give her the benefit of the doubt, and to hold that *proof of deceit fails*, and that as against her this appeal should be dismissed, but under all the circumstances, without costs.

As to the husband, Thomas C. Morgan, I entertain no doubt whatever, that he signed the name "Caroline Morgan" to exhibit 1, application for loan; and exhibit 2, application for shares; and that he was from the beginning a party to the fraud practised against the company.

Considering that he swears that he never saw any of those papers until years afterwards, I place no credence whatever in his testimony.

Looking at exhibit 1, application for loan, we find some twenty questions answered, including value of buildings, description of buildings, amount due on same, rental value, etc., buildings which never existed on the premises. One would indeed need to be credulous to assume that he signed this document and knew nothing of its contents. It is as deliberate and brazen a piece of fraud as could be perpetrated, and I find the evidence fully connects Thomas C. Morgan with it.

The appeal will be allowed as against him with costs.

I desire to call attention to the manner in which the appraiser performed his duties. Mr. Forman, the appraiser, and a director of the local board, in his report taking the form of a statutory declaration, fixes the value of the property including the buildings, states that he has a knowledge of the property described in the application, and when it is pointed out to him on examination that there were no buildings on this particular property, excuses himself by saying that the property that was pointed out to him had buildings as described, but although supposed to make a declaration having the solemnity of an oath, he does not take the trouble to verify the lots in question as being the ones on which the buildings are situate.

Further, he says at page 51 of the appeal book, that he generally made a memorandum, filled in the forms, and handed them into Mr. Leighton's office without making a declaration, in other words, the paid appraiser for the company purports to furnish the company with a sworn statement without swearing to it.

*Appeal allowed in part.*

## CLARK v. WIGLE.

ONT.

*Ontario High Court. Trial before Falconbridge, C.J.K.B. July 4, 1912.*

H. C. J. 1912

July 4.

1. CONTRACTS (§ I D—51)—DIFFERENCE IN CONTRACTS—INTERLINEATION IN ONE COPY—SALE OF SHARES—CORROBORATION.

Where the question in an action by the owner of certain mining stock for the specific performance of an agreement which he alleged to be for the sale of the shares, was whether the instrument was an option or a contract for sale, and it appeared at the trial that the agreement was made in duplicate in the handwriting of the plaintiff and that his duplicate contained a statement following his agreement to sell that the purchaser agreed to take the stock, which statement was absent from the defendant's duplicate, and the evidence as to what occurred at the execution of the agreement consisted of conflicting statements of the parties and of the testimony of one witness who corroborated one party as much as the other, so that there was no preponderance in the plaintiff's favour, the fact that the instrument contained the further provision that the stock was to be transferred three months after the date of the instrument "without interest" while hardly applicable to the case of a mere option, was not sufficient to establish the plaintiff's claim that it was a contract for sale.

Statement

ACTION for specific performance of a contract.

The action was tried before FALCONBRIDGE, C.J.K.B., without a jury, at Sandwich and was dismissed.

*E. S. Wigle*, K.C., for the plaintiff.

*H. Clay*, and *W. A. Smith*, for the defendant.

Falconbridge, C.J.

FALCONBRIDGE, C.J.:—The plaintiff claims specific performance of the following contract:—

"Ohio City, Col., July 14th, 1911.

"This agreement made in duplicate this 14th day of July, 1911, between T. Clark, of Kingsville, Ont., and Darius Wigle, of same place. I hereby agree to sell two thousand shares of Sandy Hook to Darius Wigle, mining stock, *Wigle agrees to take said stock*, which mine is located on the Ohio Creek, Gunso County, Cal., at seventy-five cents per share, the same to be transferred three months from this date without interest, the parties hereto set their hand and seal in the presence of

"Norman Peterson, Thos. Clark.

"Witness Darius Wigle."

At the trial the plaintiff's counsel put in a few questions from the cross-examination of the defendant, admitting his signature to the document; and closed his case. The defendant, being called on his own behalf, testified that the writing was drawn up by the plaintiff in a tent at the mine in California, in presence of one Norman Peterson. He swore that the writing was not in the same condition as when he signed it; that the italicised words, "Wigle agrees to take said stock," had been inserted since he signed it; and he produced the paper which he said was written and signed at the same time. It is also in the plaintiff's writing, but does not contain these words. This, he says, is the real agreement "as near as possible;" that he never

ONT.

H. C. J. 1912

CLARK v. WIGLE.

Falconbridge, C.J.

heard of the alteration until last winter, about February, or perhaps just before the issue of the writ (11th January, 1912).

Norman Peterson was called by the defendant, having heard the evidence of both the plaintiff and the defendant. He says that the defendant said something about if everything went as he calculated he would take it, i.e., the stock, or be able to take it. He says he paid very little attention to what was going on. He cannot say if the writing is in the same condition, or whether the two writings were just alike. And on cross-examination he says, "he thought it was a sale in the tent, the way they talked."

The plaintiff was then called in reply. He said that the defendant dictated this agreement, and he, the plaintiff, wrote it out; that he, the plaintiff, said it ought to have those words in it; that he, the plaintiff, reached over for the other copy to interline them, and the defendant said: "It is no matter; this binds you to give it, and that binds me to take it;" and that the defendant consented to have the underlined words inserted. That was done there at the same time, and it was signed after the interlineation. He says the words "option" was never mentioned, and there was no condition about the matter, nor any words uttered by the defendant to the effect that, if matters turned out as he calculated, he would take the stock. This latter statement the defendant had sworn to.

The burthen is undoubtedly on the plaintiff to shew that the document which he propounds, differing as it does from the document produced by the defendant (both being in the plaintiff's own handwriting), represents the true agreement.

Unless I found that one or other of the parties, from his demeanour or otherwise, was manifestly lying, it is plain that, without the evidence of Peterson, the plaintiff could not succeed. Now, Peterson's evidence is partly corroborative of the plaintiff's story, and equally corroborative of the defendant's. Therefore, it goes for nothing. I do not overlook the argument based on the expression "without interest," as being inapplicable to the case of a mere option; but I do not think it is sufficient to turn the scale.

Therefore, on the application of the rule regarding the burthen of proof, the plaintiff fails.

It may be that the plaintiff's explanation is true; and, if so, it is very unfortunate for him that he did not insist on having the interlineation made in both documents. He looked like a man of ordinary business capacity, and ought not to have allowed himself to be induced to neglect this reasonable precaution.

Entertaining, therefore, the doubt which I have expressed as to the correctness of this decision (I do not mean the legal correctness, as to which I have no doubt), in dismissing the action I make no order as to costs.

Action dismissed without costs.

*Action dismissed.*

## ATTORNEY-GENERAL v. ESQUIMAULT AND NANAIMO R. CO.

B.C.

C. A.
1912

June 4.

*British Columbia Court of Appeal, Macdonald, C.J.A., Irving, and Galliher, JJ.A. June 4, 1912.*

1. SCHOOLS (§ IV—77)—LANDS SET APART FOR SCHOOL PURPOSES—DEDICATION—NON-USER FOR TWELVE YEARS—SUBSEQUENT GRANT.

Waste Crown lands that were, by an order of the Lieutenant-Governor in Council set apart for school purposes pursuant to the Public School Act, 35 Vict., No. 16 (1872), were thereby absolutely and unqualifiedly dedicated for school purposes, and such order constituted an alienation by the Crown within the meaning of sec. 6 of ch. 14 of 47 Vict. (1884), so that such lands could not be subsequently granted by the Crown to another without the consent of the trustees of the school district under the 1882 amendment to the School Act, notwithstanding a school house was not erected thereon until twelve years later, although sec. 30 of the Public School Act of 1872 required that the trustees should take possession of land acquired or given for school purposes.

Statement

AN appeal by the defendants from judgment holding that an order in council setting apart certain waste lands of the Crown, for school purposes was an "alienation" within the meaning of 47 Vict. (B.C.) 1884, ch. 14, sec. 6.

The appeal was dismissed.

*H. A. Maclean*, K.C., for appellant.

*E. V. Bodwell*, K.C., for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The appellant's right to the parcels of land in question in this appeal depends upon the true construction of the grant to their predecessor in title, the Dominion of Canada, contained in the Provincial Statute (1884), 47 Viet. ch. 14.

By section 3 of the said Act a block of land, the boundaries of which are roughly defined, was granted to the Dominion within which boundaries it is admitted the parcels in question here lie. Section 6 provides:—

> The grant mentioned in section 3 of this Act shall not include any lands now held under Crown grant, lease, agreement for sale, or other alienation by the Crown, nor shall it include Indian reserves, or settlements, nor naval or military reserves.

Section 5 of the same Act provides for lieu lands "equal in extent to those alienated up to the date of this Act by Crown grant pre-emption, or otherwise, within the limits of the grant mentioned in section 3 of this Act."

The parcels in question being parts of lots 9 and 10, R. 1, Comiaken District, North Cowichan, were, on the application of the Board of School Trustees for the North Cowichan School District, by order in council, dated 4th July, 1872, "set apart for school purposes," and the order was duly gazetted on the 13th July of the same year. The order in council was made pursuant to power given to the Lieutenant-Governor in Council by the Public School Act, 35 Viet. No. 16 (1872) "to set apart

B.C.

C. A. 1912

ATTORNEY-GENERAL v. ESQUIMALT AND NANAIMO R. CO.

Macdonald, C.J.A.

in every school district such a quantity of the waste lands of the Crown as in his opinion may be necessary for school purposes in such district."

By the said School Act, school trustees were created bodies corporate, and certain powers and duties were given to and imposed upon them. It was declared that "the trustees shall take possession and have the custody and safe keeping of all public school property which has been acquired or given for public school purposes in such district, and shall have power to acquire and hold as a corporation by any title whatsoever." In 1882, the School Act was amended to declare that "no public school reserve shall be alienated without the consent of the trustees of the school district in which such reserve is situated."

It does not appear in the evidence that there was a school building on these lands at a date earlier than 1885. Since then there appears to have been such a building on the lands in question in use for public school purposes.

The appellants appear not to have attempted to take possession or deal with these lands until 1905, and their claim to do so was then denied by the respondent.

In the light of these acts and circumstances, do the lands in question fall within the exceptions mentioned in said section 6 already quoted? Not without some hesitation I have come to the conclusion that the setting apart of these lands on the application of the school board for purposes of this school section, followed by the legislative declaration that they should not be alienated without the consent of the trustees, constituted a declaration of trust by the Crown in favour of the school section, represented by the trustees thereof, and that such declaration of trust falls within the meaning and intent of the words "other alienations" in said section 6. It is true that the trust is a voluntary one, but it was created in favour of a corporation competent to take the benefit thereof, and at the date of the grant to the Government of Canada remained unrevoked unless it were revoked by that grant itself, which does not either in express terms or by necessary implication derogate from what was recognized by the legislature as an interest created for the benefit of the trustee corporation. Reading the word "alienation" *ejusdem generis* with the preceding words does not I think weaken the conclusion at which I have arrived. If I am right, in thinking that what took place amounted to the creation of a trust, then the trustees held an equitable interest in these lands, just as a person or corporation having an agreement of purchase from the Crown holds an equitable interest. Again, the interest held by the pre-emptor is not the legal one; by obtaining his pre-emption record he becomes entitled only to an inchoate right in the land which may or may not finally ripen into a title in fee simple. What the province intended to convey to the

Dominion by the grant in question were, I think, lands, the equitable as well as the legal interest in which was in the Crown.

Some argument was directed to the alleged fact that a couple of townsite reserves in existence at the date of the grant passed or were assumed to have passed to the appellants, although not specifically mentioned in the grant. Even if such had been properly proved, I do not see that it affects the question involved in this appeal, because in townsite reserves no one other than the Crown has any interest. Such reserves were not set apart for the benefit of any person or corporation, but remained wholly the property of the Crown.

IRVING, J.A.:—I would dismiss this appeal. The scheme of the Island Railway Act was to grant to the Dominion Government all lands within the limits mentioned, which were then within the disposing power of the provincial Parliament. Irving, J.A.

The question is whether the setting apart, or reserving, of the lots for school purposes by the order in council did amount to an "alienation" by the Crown.

"Alienation" is a word of circumstance. If possession of the land had been taken by the school trustees, that possession following the order in council would undoubtedly amount to an alienation; but does the mere "reserving the property for school purposes" constitute an alienation?

When we look at the Public School Act, 1872, we see that the power conferred in the Lieutenant-Governor in Council, is, "to set apart in every school district such a quantity of the waste lands of the Crown as in his opinion may be necessary for school purposes in such district."

The order in council does not follow the wording of the statute, but I think it must be read as if it expressed the intention that it was reserved for "school purposes of the Comiaken District."

Turning to the Public School Act, 1872, we find (sec. 30), that it was the duty of the "trustees to take possession . . . of all public school property which has been acquired or given for public school purposes in such district," and to do what they shall deem expedient with regard to the keeping in order the . . . school lands held by the" etc.

Now, these being the provisions of the Public School Act, 1872, and present to the mind of the Executive Council at the time the order in council was passed, what action was necessary to create a trust, other than the passage of the order in council and the enactment of the statute of 1882?

The argument put forward by the railway company is that by the Act of 1882 the Crown alone has the power of alienation, the school trustees have merely a status to object.

B.C.

C. A.
1912

ATTORNEY-GENERAL
v.
ESQUIMAULT AND NANAIMO R. CO.

Irving, J.A.

It is true that in ordinary cases between individuals in order to render a voluntary settlement valid and effectual, the settler must have done everything which, according to the nature of the property comprised in the settlement was necessary to be done, in order to transfer the property and render the settlement binding on him.

It is not easy to apply the ordinary law of trusts to cases where the relationship is brought about (if brought about at all) by statute, because Parliament has at all times a power of repealing. The relationship is not voluntary, we are not dealing with a gift; the statute in question was passed in order that "provision might be made for the establishment, maintenance and management of public schools throughout the province."

What the order in council did was to alter the interest or right which the Crown had in the land dealt with. From being "waste lands of the Crown," it was changed to "lands set apart for the school purposes of Comiaken District." There was something more here than a mere change of administration. It is a fundamental principle of law that rights and duties considered with reference to their duration continue to exist until some special circumstance arises which causes them to cease.

In my opinion the order in council in effect was an absolute unqualified and unconditional dedication to school purposes of Comiaken District.

It appears that after the order in council was passed, a school house was erected on the lot. Undoubtedly it would be contrary to principles of equity to allow a private landowner to make over to a third person land so built upon or occupied. I would therefore hold that this land had been "alienated."

Galliher, J.A.

GALLIHER, J.A., concurred in dismissing appeal.

*Appeal dismissed.*

## MUNN v. VIGEON.

(Decision No. 2.)

ONT.

C. A.
1912

June 28.

*Ontario Court of Appeal, Garrow, Maclaren, Meredith, and Magee, JJ.A., and Lennox, J. June 28, 1912.*

1. CONTRACTS (§ V C—397)—OPTION—CONDITIONS—RESTORING BENEFITS—CONSTRUCTION.

An option for the purchase of property providing that a specified sum of money deposited by the person to whom the option was given, should be returned to him "if contract not completed" calls for a return of such sum to the person who furnished the money and for whom the person who secured the option was acting, where no further steps were taken to carry out the contract except the writing of a letter by the vendor authorizing its agent and the agent of the purchaser to insert in the option the name or names of the persons for whom the latter assumed to act.

2. CONTRACTS (§ V C—397)—RETURN OF CASH PAYMENT IF "CONTRACT NOT COMPLETED"—RESCISSION.

Where an offer to sell property was accepted in writing on condition that a cash payment should be returned "if the contract was not completed," it is sufficient to permit the purchaser to rescind where it was shewn that such condition was inserted at his instance for his own benefit, since it would be difficult to perceive how it could benefit the purchaser unless it conferred the right to rescind.

Statement

APPEAL by the defendants, the Ontario Lumber Company, from the judgment of BRITTON, J., *Munn* v. *Vigeon* (*No.* 1), 3 O.W.N. 811, 2 D.L.R. 246, 21 O.W.R. 660.

The appeal was dismissed.

*J. Bicknell*, K.C., for the appellants.

*Leighton McCarthy*, K.C., for the plaintiff.

Meredith, J.A.

The judgment of the Court was delivered by MEREDITH, J.A.:—The appellants have failed to convince me that this appeal should be allowed.

The writing in question was an "offer to purchase," and the acceptance in writing at the foot of it is of "the above offer;" the most material term of the offer is, that the cash payment of $5,000, to be made when the agreement was effected, was "to be returned without interest if contract not completed."

Ordinarily these words should not give an absolute right on the purchaser's part to rescind: if that right had been intended to be reserved, there would have been no difficulty in finding words well fitted to give expression to it. On the other hand, the whole of the testimony shews that this term was inserted at the purchaser's instance and for his benefit; and it is hard to see how it would be beneficial to the purchaser except in the way of a right to rescind.

The words are ambiguous; the case is not one in which to give the relief sought would be to disregard words of but one meaning; and, putting one's self as nearly as one can in the position of the parties at the time of the making of the agreement, I am not prepared to say that the interpretation of the words in question by the learned trial Judge is wrong.

ONT.

C. A.
1912

MUNN
v.
VIGEON.

Meredith, J.A.

It is not an uncommon thing for a vendor to provide that he may in certain events—but not at will—rescind on returning the deposit of purchase-money; but it is at least quite unusual for a purchaser to provide for rescission at his will. If it be held that a right to rescind vested in the vendor alone, and at will, it would be unusual, and rather hard upon the purchaser; whilst, if it give each such a right, it would be substantially no agreement. It may, of course, be that the parties were really never at one: and in that case the result would be the same.

If the case were one of words of unquestionable meaning, I cannot think that a case for reformation would have been made at the trial.

Under the circumstances, the action might very well have been dismissed without costs; the lack of any sort of reasonable care in signing the very doubtful "offer to purchase" has really brought about this litigation. As the plaintiff was given his costs at the trial, I would make no order as to costs here.

*Appeal dismissed.*

---

SASK.

S. C.
1912

Jan. 15.

## ROBERT BELL ENGINE CO. v. BURKE.

*Saskatchewan Supreme Court. Trial before Newlands, J. January 15, 1912.*

1. SALE (§ III A—57)—FAILURE TO GIVE NOTICE OF BREACH OF WARRANTY —PRECLUDING SETTING UP BREACH AS DEFENCE.

Upon the failure of an engine to conform to a written warranty, the neglect of the purchaser to give notice thereof to the vendor by registered mail at his place of business, as the contract required, precludes the setting up the breach of warranty in an action to recover the purchase money.

2. SALE (§ II A—26)—CONSTRUCTION OF EXPRESS WARRANTY—NOTICE OF FAILURE OF SUBJECT-MATTER—STRICT COMPLIANCE WITH CONTRACT.

A notice of the failure of an engine to fulfil a warranty, sent by the purchaser to the vendor at Winnipeg, and not to him by registered mail to Seaforth, as the contract of sale required, is not a sufficient compliance therewith.

3. PRINCIPAL AND AGENT (§ II A—6a)—AGENT'S STATEMENT AS TO WARRANTY—CONCLUSIVENESS OF WRITTEN CONTRACT.

Where a contract for the sale of an engine declared that every term of the agreement was therein expressed, and that its terms and conditions could not be varied, altered, or changed, except in writing signed by the vendor, the promise of an agent of the latter, upon the engine not fulfilling its warranty, upon persuading the vendee not to return the engine, that he would rectify it, which was never satisfactorily done, cannot be set up as a defence to an action to recover the purchase price where the vendee afterwards continued to use the engine for nearly a year.

4. CONTRACTS (§ IV A—319)—PERFORMANCE—USER OF MACHINE—FAILURE TO GIVE NOTICE OF BREACH OF WARRANTY.

There cannot be a recovery for a breach of warranty in the sale of an engine, where the purchaser did not give notice of its failure to work properly in the manner required by the contract of sale, but continued to use it for nearly a year afterwards.

SASK.

S. C.
1912

ROBERT BELL ENGINE CO. v. BURKE.

5. SALE (§ II A—27)—IMPLIED WARRANTY—PROVISION THAT CHATTEL NOT SOLD BY DESCRIPTION.

An implied warranty on the sale of a chattel exists, where the contract of sale provides that it was not sold by description, and that there was no condition or warranty either general, express, or implied, other than the condition and warranties set forth therein.

[*Sawyer and Massey Co.* v. *Ritchie*, 43 Can. S.C.R. 614, referred to.]

Statement

THE agreement under which the engine and appurtenances were purchased is in writing, and contains a warranty, for a breach of which the defendant counterclaims in a sum equal to the amount of the plaintiff's claim.

Judgment was given for the plaintiffs.

*T. S. McMorran*, for the plaintiffs.

*G. H. Barr*, for the defendant.

Newlands, J.

NEWLANDS, J.:—This warranty is as follows:—

That said machine is well built, and with proper use and management capable of doing well the work for which it was intended, and that the engine is capable of developing its rated power, conditioned, however, that the purchaser shall set up, start and operate the same in a proper and skilful manner, and without changing the original construction of any part of it. The purchaser shall have three days after it is first started to ascertain whether such machinery is or is not as warranted or represented. If then the purchaser deems it is not, he shall at once discontinue the use of it, and state full particulars wherein it fails, by registered letter, mailed at once to the Robert Bell Engine and Thresher Company, Limited, Seaforth, Ont., and wait a reasonable time until the said Robert Bell Engine and Thresher Company, Limited, sends a man to put it in order. The purchaser shall render the man sent necessary and friendly assistance, and after he is through shall at once give the machinery a fair trial of two days, and whatever part of said machinery is not as warranted, or represented, he shall then return such part to where he got it, giving the company immediate written notice of such return by registered letter, mailed at once to the Robert Bell Engine and Thresher Company, Limited, at Seaforth, Ont., of such return, and the Robert Bell Engine and Thresher Company, Limited, may either furnish another part or may require the return by the purchaser of the remainder of said machinery to where he got it, and then furnish other machinery in its place or refund cash and notes received for same, thereby rescinding the contract *pro tanto*, or in whole as the case may be, and thereby releasing the company from any further liability whatever herein. The use of part or all of said machinery after said first three days' trial, or failure to give notice as herein provided, shall be conclusive evidence that said machinery is so warranted and represented; it is also agreed that in case of a second trial of two days as provided herein, the use of the machinery thereafter shall be conclusive evidence that the same is as warranted and represented; and in either case shall estop the purchaser from all defences on any ground to the payment therefor, and any assistance rendered by the company, its agents or employees, in operating or in remedying any actual or alleged defect,

SASK.

S. C.
1912

ROBERT BELL ENGINE CO. v. BURKE.

Newlands, J.

either before or after the first trial of three days, or the second trial of two days, shall in no case be deemed any waiver of or excuse for any failure of the purchaser to fully keep and perform the conditions of this warranty, nor operate as an extension or renewal of the conditions thereof, and the purchaser shall pay all expenses incurred by the company incidental to rendering such assistance. No claims, counterclaims, demands or off-sets shall ever be made or maintained by the purchaser on account of delays, imperfect construction, or any cause whatever, except as herein provided, and purchaser expressly waives all claim for damages on account of the non-performance of any of the above described machinery.

The engine did not answer the warranty. The boiler was badly put together, and the rivets did not fit the holes through which they were put. The defendant, did not, however, comply with the condition of giving notice. He never sent a notice by registered letter to the Robert Bell Company at Seaforth, Ontario. He did, on the 25th October, 1909, write a letter to the plaintiff company at Winnipeg, in which he said:—

> The plow engine I got from you, there is two of the brackets leaked badly, that bad that it will empty the boiler over-night. This bracket is in front of the fire-box. The gearing is bolted to the boiler, it seems to me these bolts are too small to fill the holes. You had better send out a man and see what can be done with it. It was leaking this way before we took her off the car. I thought it would fill up through time, but it seems not. The engine works fine, everybody thinks she is the best plow engine ever came here. I think another year a few of these can be placed here as plow engines. The Gaar-Scott put a 25 h.p. plow engine here, it is not in it with this engine. We do not burn half the coal the Gaar-Scott takes, about half the water runs her also. Please send out a man as soon as possible.

As this letter was not sent to the company at Seaforth, Ontario, it is not in compliance with the agreement. The plaintiff company sent out a man, and, after several attempts extending over a considerable time, stopped the leakage. The defendant did not discontinue the use of the engine. In fact he continued to use it until the end of the season of 1910. In the spring of 1910, the axles bent, and from that time on the defendant had considerable trouble with the engine, and it never afterwards did good work. The defendant complained several times, and was going to send it back to where he got it, but the plaintiffs' agent persuaded him not to, promising to fix it. It was, however, never fixed satisfactorily. This latter circumstance cannot be set up as a defence, because the agreement provides:—

> The purchaser further agrees that every consideration, term, and condition for his execution and delivery of this contract are herein expressed, and that the terms and conditions hereof shall not be waived, altered or changed except by a special written agreement, signed by the said Robert Bell Engine and Thresher Company at Seaforth, Ont.,

and this was never done.

SASK.

S.C. 1912

ROBERT BELL ENGINE CO. v. BURKE.

Newlands, J.

As the defendant did not send the notice required by the agreement, and did not discontinue the use of the engine until about a year after he purchased the same, he cannot recover upon the warranty contained in the agreement.

The defendant also endeavoured to counterclaim on an implied warranty of fitness. He cannot do this, as the contract provides:—

> The above description is for the purpose of identification only, and the buyer expressly agrees that the said machinery is not sold by description, and that there are no conditions or warranties, either general, express, or implied, other than the conditions and warranties set forth below: *Sawyer and Massey Co.* v. *Ritchie*, 43 Can. S.C.R. 614.

There will, therefore, be judgment for the plaintiffs with costs.

*Judgment for plaintiffs.*

---

## LIVINGSTON v. LIVINGSTON.

ONT.

H. C. J. 1912

April 16.

*Ontario High Court, Middleton, J. April 16, 1912.*

1. EVIDENCE (§ I E 4—161)—PURCHASE BY ONE PARTNER OF INTEREST IN COMPETING BUSINESS—PRESUMPTION AS TO CONSENT SURROUNDING FACTS AND CIRCUMSTANCES.

The consent of one of the members of a partnership to the acquirement and ownership by the other of an interest in a business competing with that of the firm may be inferred from the surrounding facts and circumstances, and such consent, if established, will relieve the partner so interested from the obligation to account to his firm for the profits derived from such interest.

[*Kelly* v. *Kelly*, 20 Man. L.R. 579, referred to; *Aas* v. *Benham*, [1891] 2 Ch. 244 at p. 255, applied.]

2. EVIDENCE (§ II J—308)—CIRCUMSTANCES TO DETERMINE WHETHER BUSINESS IS COMPETITIVE OR NOT—PARTNERSHIP.

Whether or not a separate business, in which one of the members of a partnership is interested, competes with the business of his firm, so as to render him liable to account to his firm for the profits derived by him from his interest therein, is a question of fact to be decided upon the circumstances of each case.

3. PARTNERSHIP (§ VI—28)—DISSOLUTION—POWER OF SURVIVING PARTNER TO PURCHASE PARTNER'S INTEREST.

A surviving partner engaged in the liquidation of the affairs of the partnership cannot himself become interested either directly or indirectly in the purchase of any part of the partnership property, without the full knowledge and consent of the representatives of the deceased partner.

4. PARTNERSHIP (§ VI—28)—PURCHASE BY SURVIVING PARTNER—RE-SALE—LIABILITY OF SURVIVING PARTNER.

Where a surviving partner engaged in the liquidation of the affairs of the partnership improperly purchases part of the partnership property himself, and, before the transaction is impeached, transfers the property so purchased to one who is not before the Court, his liability to the partnership estate is limited to the real value of such property, and does not extend to profits realized by him from his subsequent dealings therewith.

[*Atkinson* v. *Casserly*, 22 O.L.R. 527, referred to.]

5. PARTNERSHIP (§ VI—28)—SURVIVING PARTNER—CLAIM FOR REMUNERATION FOR LIQUIDATING PARTNERSHIP.

A surviving partner is not entitled to any remuneration for his services in the liquidation of the partnership affairs.

ONT.

H. C. J.
1912

LIVINGSTON
v.
LIVINGSTON.

6. TRUSTS (§ II B—57)—SURVIVING PARTNER—NOT AN EXPRESS TRUSTEE—REMUNERATION—TRUSTEE ACT, R.S.O. 1897, CH. 29, SEC. 40.

While the position of a surviving partner imposes certain obligations and duties which are in their nature fiduciary, he is not an express trustee and, therefore, has no statutory right to remuneration under and by virtue of the Trustee Act, R.S.O., ch. 129, sec. 40.

[*Knox* v. *Gye*, L.R. 5 H.L. 656, and *Re Lands Allotment Co.*, [1894] 1 Ch. 616, specially referred to.]

Statement

AN appeal by the defendant and a cross-appeal by the plaintiffs from the report of George Kappele, K.C., an Official Referee, dated the 7th December, 1910, upon a reference for taking the accounts of a partnership which formerly existed between John Livingston and James Livingston. John Livingston died in 1896; and this action was brought by his representatives against James.

The appeal and cross-appeal were both allowed in part.

*I. F. Hellmuth*, K.C., and *J. H. Moss*, K.C., for the defendant.

*Wallace Nesbitt*, K.C., and *H. S. Osler*, K.C., for the plaintiffs.

Middleton, J.

April 16. MIDDLETON, J.:—The facts are fully set forth in the very elaborate and careful report of the learned Referee, and I do not need to set them forth at length. Three distinct matters were argued, and those require to be separately dealt with.

In 1856, the late John Livingston and James Livingston came to Canada—young men—without any capital, and throughout their lives worked together as partners. From very small beginnings their business prospered, until, at the death of John, the elder brother, in 1896, their joint property amounted to more than half a million dollars. During all this time, the brothers appear to have had perfect confidence in each other, and each seems to have accorded to the other the greatest liberty in respect to the assets of the firm. There do not appear to have been any of the restrictions that would usually have existed in the case of a partnership. Each brother was practically allowed to do as he pleased. If he wanted money, he took it, and it was charged to him. There was no fixed capital. Each brother took what he needed, and what was left was used for the purposes of the business.

In the course of time, new problems arose. Some members of the family were taken into the business. Ultimately, when McColl, a son-in-law of James, and Peter Livingston, a nephew, in 1887 desired to be taken into the business, James came to the conclusion that it was inadvisable to introduce into the concern any more relatives, and he told these young men to endeavour to establish a business for themselves in Michigan, and that he would assist them. It appears that John was asked to join in

this, but declined. Finally an arrangement was come to between the two young men and James, by which they formed a partnership to operate at Yale, Michigan; and there is no doubt that James was the financial backer of this business. He desired to open a separate bank account for its financing; and, at the suggestion of the local bank manager, he opened a special account—"J. & J. Livingston Special." This was for the purpose of avoiding any discussion with the bank's head office.

This business was carried on in Michigan for nine years before John's death, and from small beginnings grew to be a very substantial affair. There was no secrecy in connection with it. It had many dealings with the firm of J. & J. Livingston; and, when the United States tariff was changed so as to make it unprofitable for certain branches to be carried on from Canada, some business formerly done by the Canadian firm appears to have been substantially transferred to the American firm.

Annual statements were prepared by the accountant, and were submitted to John Livingston. In none of these statements was the Michigan business treated as being an asset of the Canadian firm. No objection whatever was ever taken by John; in fact, from the beginning of the whole matter, each brother seems to have been entirely content to abide by the actions of the other.

After the death of John, those claiming under him appear to have felt themselves aggrieved by the dilatoriness of James in the winding-up of the partnership; and in 1901 an action for the dissolution of the partnership was brought. This action has dragged on to the present time.

In 1902, by consent, a judgment for a dissolution was pronounced, in the ordinary form, save for the reservation to James of the right to make a claim to be remunerated for his services in connection with the liquidation. When the accounts were brought in under this judgment by the defendant, a surcharge was filed, claiming, among other things, that this Yale business was an asset of the firm.

The other members of the Yale firm were not before the Court; yet both the Master to whom the matter was originally referred, and the learned Referee, have, in the absence of the other members, assumed to deal with the question of ownership. The learned Referee has found that the business is and always was a separate business, and that it was not owned by the partnership; and no appeal has been had from this decision. The Referee has, however, found that the facts bring the case within the rule of law laid down by Lindley, L.J., in *Aas* v. *Benham*, [1891] 2 Ch. 244, 255: "It is clear law that every partner must account to the firm for every benefit derived by him

ONT.

H. C. J. 1912

LIVINGSTON v. LIVINGSTON.

Middleton, J.

without the consent of his co-partners from any transaction concerning the partnership or from any use by him of the partnership property, name or business connection. . . . It is equally clear that if a partner without the consent of his co-partners carries on a business of the same nature as, and competing with, that of the firm, he must account for and pay over to the firm all profits made by him in that business."

Upon that assumption, he has directed the defendant to bring into the partnership accounts all the profits received by him from the Yale business; and I understand this ruling to include not merely the profits which have actually been divided, but profits which have gone to increase the capital of that concern.

Upon the argument before me it was admitted that this was too wide, and that James's liability, if any, to account, must be taken to have terminated upon the dissolution of the Canadian firm by the death of his brother John.

With great respect for the learned Referee, and realising the advantage he had in hearing some portion of the evidence, I find myself unable to agree with him. I think the irresistible inference from the facts is, that what was done by James was done with the assent and approval of John; and that, therefore, the rule has no application.

The case in this aspect is singularly like *Kelly* v. *Kelly* (1911), 20 Man. L.R. 579, decided since the learned Referee's report.

Had I not come to this conclusion, I would have hesitated long before determining that this business was a competing business within the rule in question. When the business was established, the intention undoubtedly was to locate the young men far from home, where the business would not compete. They were to go to another country, and earn their own experience, and to establish an independent business for themselves; James became a partner in the Yale business for the purpose of remunerating him for his advice and counsel, and above all for his financial assistance. None of the cases upon competing business at all resemble this; and, when the relationship which existed between the brothers is borne in mind, it seems, to me at least, that the case is very far removed from the facts of the cases which have given rise to the rule.

Upon the argument, the Wurth-Hairst business was mentioned as forming the subject of a separate ground of appeal. This was not argued in detail, as I was told that my decision in connection with the Yale business would govern it.

The second ground of appeal is in connection with an oil mill owned by the firm. After the dissolution and after the parties were at arms' length and represented by separate solicitors, negotiations took place between James Livingston and the representatives of John for the purchase of this mill. James

offered $45,000. This was at first accepted, but the acceptance was withdrawn. The property was then offered for sale, and was purchased by one Erbach, brother-in-law of James, for $38,500. This sale was attacked before the Referee as being a sale at an undervaluation; but the Referee found, upon the evidence, that the sale was provident, and the price realised was as much as the mill was worth. This finding is well warranted by the evidence. The valuation obtained on behalf of John's representatives, of something over $48,000, was accompanied by the statement that no such price could be realised at a sale, but that it represented the actual value of the machinery as a running concern, and that the value placed on the buildings could not be realised, because, apart from the oil business—for which the buildings were adapted—they had no utility.

This sale was further attacked upon the ground that James Livingston was, in truth, himself the purchaser, and that Erbach was a mere trustee for him; and the Referee has so found. A company was incorporated shortly after the purchase, and the property was turned over to it; and this company has, in its turn, sold to the Dominion Oil Company. The whole transaction was financed upon James Livingston's credit; and neither the purchaser nor any of the shareholders of the company had ever put any money into the concern. I do not think it was open to the Referee to inquire into the title of the purchasers, in their absence. The company, although the creation of James Livingston, and in one sense almost identical with him, was still a legal entity, and could not be deprived of its property in its absence; but James Livingston can be made to account, upon a proper basis if he has been guilty of any wrongdoing.

Upon the appeal before me it was argued that the Referee's finding of fact was not correct. No doubt, the finding is opposed to the oath of all those concerned; but actions frequently speak louder than words; and the conclusion appears to me irresistible that Livingston was, in truth, the purchaser.

I was urged to find that the correct inference from the evidence is, that Livingston was not the purchaser at the sale; that Erbach was not a trustee for him; but that, after the contract had ceased to be executory, Livingston had purchased from Erbach. The difficulty is, that there is no evidence to support this contention, and that it is quite opposed to what is stated by every one. It was suggested that to find otherwise would be to impute some improper conduct or some ignorance of the law to the late Mr. Barwick. It do not think it is necessary to do this. I think it extremely unlikely that Mr. Barwick knew the facts. Livingston, no doubt, was advised, and, no doubt, knew, that he could not buy directly or indirectly; but, nevertheless, I think that Erbach did buy for him; and everything that has taken place subsequently is consistent only with this view.

ONT.
H. C. J.
1912
LIVINGSTON
v.
LIVINGSTON.
Middleton, J.

But I cannot at all agree with the consequences the Referee has attributed to this finding of fact. He says that the defendant must account to the estate for what was received by the James Livingston Linseed Oil Company when it went into the oil merger and transferred its property to the Dominion Linseed Oil Company.

I do not think that this is the result. Before the transaction was attacked, Erbach had conveyed the property to the James Livingston company. Its title has not been impeached. This transfer was at the same purchase-price, and merely involved the assumption of the liability to pay the $38,500 to the estate; so there was then no profit. Nevertheless, Livingston would be liable to account for the real value of the property which he had improperly purchased; but it has been found that the property sold for its full value, and this finding has not been appealed from; and I think this ends his liability.

The consequences of the Referee's findings appear to be most serious. The James Livingston Linseed Oil Company carried on business for years. The buildings and machinery formed a very small part of its real assets. It was, as a going concern, transferred—probably at a fictitious price—to the Dominion company; and it would be an extraordinary thing if the result should be that the estate should receive much more than the buildings and machinery were worth, and much more than these buildings and machinery cost or could be duplicated for. The question involved somewhat resembles that discussed in Lindley on Partnership, 7th ed., p. 634, concerning the liability of partners who carry on a partnership business, after their dissolution, and the profits made arise, not so much from the partnership assets which are used, as from the skill, industry, and ability of the surviving partners.

The question of the measure of damages of a trustee who becomes himself a purchaser is dealt with in the Divisional Court in the case of *Atkinson* v. *Casserley* (1910), 22 O.L.R. 527.

The third question is the propriety of the allowance made by the Referee to the defendant for his services in connection with the liquidation of the partnership. No doubt, the defendant has rendered great services to the partnership; and, as a matter of fairness and equity, his services ought to be remunerated; but I fear that the law is against his claim. In England it is well settled, though I have been unable to find any case indicating the precise ground upon which such a claim is disallowed. It may be because of the nature of the partnership contract; or it may be because in England trustees render their services gratuitously, unless it is otherwise expressly provided in the trust-deed. More probably there has never been any exact statement of the reason for the rule, because no English lawyer

would think of placing the right of a surviving partner higher than the right of a trustee.

I can find no trace of any such allowance having been made in Ontario. The right, if it exists, must be based upon the Trustee Act. For convenience I refer to the Act in the revision of 1897, ch. 129, which in this respect is similar to the Act of 1887, which probably applies. The sections dealing with this matter are 40 *et seq.* Section 40 provides that "any trustee under a deed, settlement or will . . . or any other trustee, howsoever the trust is created," shall be entitled to an allowance. These words, it seems to me, apply only to express trustees; and this impression is strengthened by reference to sec. 27, which provides that the expression "trustee," in the next five sections of the Act, includes "a trustee whose trust arises by construction or implication of law, as well as an express trustee." So, even if a surviving partner could be regarded as a trustee, he would not be within the provision of the statute relating to remuneration.

Besides this, there is authority for the statement that a surviving partner is not a trustee at all: *Knox* v. *Gye* (1872), L.R. 5 H.L. 656. His position, no doubt, imposes certain obligations and duties which are in their nature fiduciary; but it is not every one who is subjected to these obligations and restraints who can claim to be a trustee and entitled to all the privileges of a trustee. A wider construction has been adopted in the interpretation of the statutory provision corresponding with sec. 27; see *In re Lands Allotment Co.*, [1894] 1 Ch. 616, at p. 632; but I am precluded from applying this reasoning to the case in hand because of the view I entertain that sec. 40 applies only to express trustees.

The result is, that both appeal and cross-appeal succeed to the extent indicated; and, as success is divided, there should be no costs.

*Report varied.*

ONT.
H. C. J.
1912
LIVINGSTON v. LIVINGSTON.
Middleton, J.

---

## McCLEMONT v. KILGOUR MANUFACTURING CO.

**(Decision No. 2.)**

ONT.
C. A.
1912
June 10.

*Ontario Court of Appeal, Garrow, J.A., in Chambers. June 10, 1912.*

1. APPEAL (§ III F—98)—EXTENSION OF TIME FOR APPEALING—SUBSTANTIAL QUESTION OF LAW—OVERSIGHT IN SOLICITOR'S OFFICE.

Where the judgment of a Divisional Court is for such an amount that an appeal therefrom to the Court of Appeal lies as of right, and a substantial question of law of general interest is involved in the action, and there is an intention, communicated to the respondent's solicitors, to appeal within the proper time, but, owing to an oversight in the office of the appellant's solicitors, notice of appeal has not been served in time, the time for appealing may be extended.

[*Ross* v. *Robertson*, 7 O.L.R. 494, referred to.]

ONT.

C. A.

1912

MCCLEMONT v. KILGOUR MFG. CO.

GARROW, J.A.

APPLICATION by the defendants to extend the time for appeal to the Court of Appeal from the order of a Divisional Court, *McClemont* v. *Kilgour Mfg. Co.*, 3 D.L.R. 462, 3 O.W.N. 999, notice of appeal not having been served in time.

*T. N. Phelan*, for the defendants.

*W. M. McClemont*, for the plaintiff.

GARROW, J.A.:—The judgment is for $1,000 and costs. And the question of law relied on by the defendants is, that the defence known as volenti non fit injuria applies to the breach of a statutory obligation, which was denied in the Divisional Court.

The question is substantial and of general interest; and the leave should, I think, be granted, it appearing that there was an intention to appeal within the time, communicated to the plaintiff's solicitors, and that the failure to serve the notice was through an oversight in the defendants' solicitors' office. See *Ross* v. *Robertson*, 7 O.L.R. 494.

The case must be set down in time to be heard at the September sittings; and the costs of the application will be to the respondent in any event of the appeal.

*Application granted.*

---

ONT.

H. C. J.

1912

June 14.

## CITY OF TORONTO v. WHEELER.

*Ontario High Court, Middleton, J. June 14, 1912.*

1. MUNICIPAL CORPORATIONS (§ II C 3—66)—VALIDITY OF BY-LAW INTERFERING WITH VESTED RIGHTS.

Vested rights cannot be interfered with by municipal by-laws except where the language of legislation conferring power to enact them clearly discloses such intent.

2. MUNICIPAL CORPORATIONS (§ II C 3—67)—EFFECT OF BY-LAW PROHIBITING ERECTION OF GARAGES—PERMIT TO BUILD ISSUED PREVIOUS TO PASSING OF BY-LAW.

The completion of a building on a certain street, which was begun under a permit from a city, for use as a garage for hire and gain, cannot be prevented by a municipal by-law prohibiting the "location" of structures of that character on such street, which was adopted subsequently to the granting of such permit.

3. BUILDINGS (§ I A—9a)—"LOCATION" OF GARAGES—"ERECTION AND USE"—BY-LAW PROHIBITING ERECTION AFTER PERMIT ISSUED TO BUILD.

The prohibition of the "location" of garages on certain streets of a city by a by-law is a different thing from the "erection and use" thereof, and a garage that was in the course of construction under a permit from the city, at the time such by-law was adopted, was completely "located" by virtue of such permit, so as not to be affected by the subsequent adoption thereof.

Statement

MOTION by the plaintiffs, the Corporation of the City of Toronto, for an injunction restraining the erection by the defendant of a building intended to be erected and used as a garage for hire or gain.

By consent of counsel, the motion was turned into a motion for judgment in the action.

Judgment was given dismissing the action with costs.

*H. Howitt*, for the plaintiffs.

*W. C. Chisholm*, K.C., for the defendant.

MIDDLETON, J.:—By sec. 10 of the Municipal Act, 1912, 2 Geo. V. ch. 40, sec. 541a of the Municipal Act, 1903, as amended by 4 Edw. VII. ch. 22, sec. 19, was further amended by conferring upon cities the power "to prohibit, regulate, and control the location on certain streets, to be named in the by-law of . . garages to be used for hire or gain." This statute was assented to on the 16th April, 1912.

A by-law in the terms of the statute was passed on the 13th May. Prior to the coming in force of the statute, the defendant, desiring to erect a garage upon one of the streets subsequently included in the by-law, entered into treaty with the owner of the lands in question, and, contemporaneously, plans of his proposed building were prepared and submitted to the City Architect for his approval, under the requirements of the building by-law. On the 17th April, the defendant received a building permit, authorising the construction of the building in accordance with the plans and specifications submitted. He thereupon completed his purchase of the land and proceeded to make contracts for the erection of the buildings, and at the present time has the excavation well under way.

The sole question is, whether the municipality can at this stage interfere with what was sanctioned by the permit issued on the 17th April.

With reference to legislation of this kind, it is, I think, a sound principle that the Legislature could not have contemplated an interference with vested rights, unless the language used clearly required some other construction to be given to the enactment.

The language here used is by no means free from difficulty and ambiguity. What is prohibited is not, as in sub-sec. (b), the "location, erection, and use of buildings," for the objectionable purpose, but the "location" only; and, I think, it may fairly be said that what had been done previous to the enactment of the by-law in question constituted a complete location of the garage. The context indicates that "location" is used in some sense differing from "erection and use."

It would be manifestly most unfair so to construe the statute as to leave the defendant in the position in which he

ONT.

H. C. J.
1912

CITY OF TORONTO v. WHEELER.

would find himself if, on the faith of the municipal assent indicated by the building-permit, he had purchased the lands and entered into contracts for the erection of his building, and was then enjoined from the completion of the work already entered into upon the ground.

For this reason, I think the action fails, and must be dismissed with costs.

*Action dismissed.*

---

SASK.

S. C.
1912

March 26.

## WRIGHT v. MacLACHLAN.

*Saskatchewan Supreme Court. Trial before Johnstone, J. March 26, 1912.*

1. BROKERS (§ II B—12)—COMPENSATION—PAYMENT FOR LOTS ACTUALLY SOLD—CLAIM FOR COMMISSION ON LOTS SOLD BY OTHER PARTIES.

An action by an agent for commissions for sales of land against the owner will be dismissed, where the plaintiff claims that there was an agreement between him and the defendant whereby the plaintiff was entitled to a certain commission on all sales of certain land whether such sales were effected through the plaintiff or not, which agreement the defendant denied, and it appeared that the plaintiff had been paid his commission for lands actually sold by him and made no claim to the payment of other commission until after the relationship of principal and agent had been severed by the defendant and the defendant's books which contained entries of the commissions received by the plaintiff for sales actually made by him contained no entries of the commissions claimed in the suit and the plaintiff's memory in giving his testimony as to what was said on the occasion when the alleged agreement was entered into was defective as to nearly every important event.

Statement

THE plaintiff seeks to recover in this action $1,768.50 being the alleged balance due to him from the defendant on account of commission earned by the plaintiff on sales effected of various lots in what is known as the Watrous MacLachlan Sand Beach Subdivision.

There was judgment for the defendant.

*J. M. Stevenson*, for plaintiff.

*W. M. Rose*, for defendant.

Johnstone, J.

JOHNSTONE, J.:—The plaintiff claims that by the arrangement entered into between him and the defendant, he (the plaintiff) is entitled to charge and to be paid a commission of fifteen per cent. on all sales of lots in the subdivision named, whether such sales were effected through the plaintiff or through the other agents of the defendant or through the defendant personally.

Certain sales of the property referred to were effected through different agencies to the value of $14,015.00 or thereabouts, as to which sales the plaintiff, it is conceded, was directly instrumental in effecting a portion, the commission on which amounted to $333.75. This sum was received by the plaintiff in cash either from the defendant or through deductions made by the plaintiff out of purchase-moneys passing through his hands, entries of which made by him from time to time in the books of the defendant then in the plaintiff's possession.

The agreement between the plaintiff and the defendant was a verbal one, and no one was present when it was made.

The defendant on the trial, in giving evidence, insisted, just as positively as did the plaintiff in giving his version of the arrangement, that the plaintiff, it was agreed, should be entitled to fifteen per cent. on such sales only as were due to the exertions of the plaintiff; that the plaintiff had no right to be paid under the arrangement entered into for sales effected through other agencies; that the plaintiff, it was agreed, should be paid on the basis of a ten per cent. commission on account of such sales with the additional commission of five per cent. for keeping the books of the defendant containing the accounts relating to the dealings with the subdivision.

The plaintiff's memory as to what was said on the occasion on which the alleged agreement was entered into was not at all satisfactory; in fact, it was defective as to nearly every important event where, to a certain extent at least, it would be expected there would be some shew of recollection. Having recourse to the circumstances surrounding the dealings between the parties; that plaintiff at no time made a demand upon the defendant for commissions other than those received by him and hereinbefore referred to, entries as to which were religiously entered in the books of the defendant, and moreover the books contained no entries of commissions to which the plaintiff ultimately claimed to be entitled, that is, commissions other than those he got. In fact, no claim was made for payment of other commissions until after the relationship of principal and agent had been severed at the instance of the defendant, because of the conversion by the plaintiff to his own use of moneys of the defendant passing through the plaintiff's hands as the agent of the defendant.

On the facts, I find for the defendant, and there will be judgment for the defendant with costs.

*Judgment for defendant.*

ONT.

C. A.
1912

March 6.

## REX v. SOVEREEN.

*Ontario Court of Appeal, Moss, C.J.O., Garrow, Maclaren, and Magee, JJ.A., and Latchford, J. March 6, 1912.*

1. JURY (§ I B 2—20)—WHEN RIGHT TO ELECT TRIAL WITHOUT A JURY EXISTS.

The Criminal Code does not prescribe that an accused can elect to be tried without a jury when without a preliminary inquiry, or a committal, or an admission to bail, a bill of indictment has been preferred against him by the Crown Attorney with the written consent of a Judge of a Court of criminal jurisdiction.

[*The King* v. *Wener*, 6 Can. Crim. Cas. 406, followed.]

2. JURY (§ I B 2—20)—ABSENCE OF ELECTION—RIGHT TO TRIAL BY JUDGE WITHOUT A JURY.

If no election has been made before an indictment is returned founded on the facts disclosed by the depositions taken at the preliminary inquiry, the accused has no statutory right to demand a trial before a Judge of Sessions without a jury and avoid a trial on the indictment.

[*The King* v. *Wener*, 6 Can. Cr. Cas. 406; *Rex* v. *Thompson* (1908), 14 Can. Cr. Cas. 27, 17 Man. L.R. 608, dissented from.]

3. DISORDERLY PERSONS (§ I—5)—KEEPER OF BAWDY HOUSE—INDICTMENT —SUMMARY CONVICTION—CRIMINAL CODE, SEC. 239.

The offence, under Cr. Code sec. 228, of keeping a bawdy house, being punishable, upon indictment, there is no limitation of time for commencement of a prosecution for it by indictment, although the keeper is also declared by the Criminal Code, sec. 239, to be a loose, idle or disorderly person or vagrant, punishable in this character upon summary conviction, subject to the six months' limitation of Cr. Code 1142. (*Per* Magee, J.)

4. CRIMINAL LAW (§ II G 2—83)—PRIOR CONVICTION OF ANOTHER PERSON FOR SAME OFFENCE—KEEPING DISORDERLY HOUSE.

The fact that another person, who had been separately charged with the like offence, in respect of the same house, and at the same time, was convicted thereof, is no defence to an indictment for keeping a disorderly house.

5. CRIMINAL LAW (§ II A—49)—CONSENT OF JUDGE TO PREFER INDICTMENT —CRIM. CODE (1906) SECS. 871, 873.

Where the depositions and the committal for trial were both ignored by the prosecution, and instead, the County Crown Attorney, under Cr. Code sec. 873, obtained the written consent of the Judge to prefer the indictment on which a true bill was returned by the grand jury, and on which the petty jury returned a verdict of "guilty" and the depositions taken before the magistrate were not made a part of the case reserved for the opinion of the Court of Appeal in respect of the regularity of a refusal of a claim by the accused to be tried without a jury under the speedy trials clauses, the Court of Appeal may properly assume that the charge in the indictment is not the same as that for which the prisoner was committed, or any other charge appearing in the evidence before the magistrate, as, in either of these events, the County Crown Attorney would not, under sec. 871, have needed the consent of the Judge to prefer the indictment. (*Per* Maclaren, J.A.)

Statement

CASE stated by the Chairman of the General Sessions of the Peace for the County of Norfolk.

The accused, Wilbert Sovereen, was indicted at the Sessions in December, 1911, for that he on the 23rd July, 1911, and on

he pleaded "not guilty." At the close of the trial, the Judge, on the application of the prisoner's counsel, reserved for this Court the following questions:—

1. Was there any valid evidence that the prisoner was the keeper of a disorderly house?

2. Was my charge erroneous as regards the reference made therein to the woman who had been previously convicted?

3. Was the prisoner, in the circumstances above stated, entitled to make an election for speedy trial?

As to the first question, I am of opinion that there was ample evidence, if believed by the jury, to prove that the house in question was a disorderly house, and that he was the keeper. The house belonged to him and also the furniture, and he used it when working the farm with which it was connected, which was some two or three miles from his homestead. The evidence points strongly to his having been a joint occupant or keeper with the woman said to have been convicted in October, 1910, and to his being the sole keeper after that time, the house being occupied from time to time by disreputable women. The house retained the same character and reputation after October, 1910, as before; and the admissions made by the witness who did the chores about the house for the prisoner—and made very reluctantly—are quite sufficient alone to justify the conviction. This question should be answered in the affirmative.

As to the second question, what the trial Judge said in his charge on the subject was this: "It has been suggested that the woman who has been already convicted was the keeper; but I think that we have nothing to do with that in this case. I think that, no matter whether she was convicted or not, you have got to try this case upon the evidence that has been presented before you; and, if you come to the conclusion that the prisoner is the keeper or was at any time the keeper of this house, you should find him guilty, giving him, of course, the benefit of any doubt that you may have." I fail to see on what grounds the prisoner could properly complain of this charge. This question should, in my opinion, be answered in the negative.

The third question should also, in my opinion, be answered in the negative. Part XVIII. of the Criminal Code (secs. 822 to 842 inclusive), relating to "Speedy Trials of Indictable Offences," has reference exclusively to prosecutions based upon an information or complaint and a preliminary examination before a magistrate. It is true that there was in this case a preliminary examination before a magistrate, and the prisoner was committed for trial. But this was not followed up by an indictment based upon the charge for which he was committed, "or for any charge founded upon the facts or evidence disclosed on the depositions taken before the Justice," as might have been done under the provisions of sec. 871 of the Criminal Code. It does not appear from the reserved case whether or not the complainant before the

ONT.

C. A.
1912

REX
v.
SOVEREEN.

Moss, C.J.O.

March 6. MOSS, C.J.O.:—We are all agreed that the questions submitted by the learned Chairman of the General Sessions should be answered adversely to the contentions made on behalf of the prisoner.

As to the first and second questions, having regard to the evidence and the charge to the jury, which are made part of the stated case, there can be no reasonable doubt.

The third question affords more room for difference of opinion—not, however, as to what the proper conclusion should be, but rather as to grounds upon which it should be based.

Speaking for myself, and with the utmost respect for those who have indicated or expressed a different view, I think that where, as here, a person committed for trial, and whether in custody or upon bail, has not, before a bill of indictment has been found against him by a grand jury, taken the steps necessary to enable him to elect to be tried by a Judge without a jury, he is not, upon bill found and arraignment thereon, entitled as of right to ask to be allowed to elect to be tried without a jury. If that is not the effect of the legislation, it places it in the power of the accused not merely to postpone his trial, but to render futile all that has been done by the grand jury, and necessitate a compliance with all the forms prescribed by sec. 827 of the Code, including the preparation and preferring by the prosecuting officer of a charge in accordance with the directions given in sec. 827 (3).

I am unable to think that it was the intention to give an accused person the general right to elect to be tried without a jury. On the contrary, I think that the intention was to give it only in cases in which the exercise of such an election would or might effect a speedy trial of an accused person, and thereby save the delay which waiting for a trial by jury might involve.

And I do not think the legislation extends the right beyond that point.

I agree that the first question should be answered in the affirmative and the second and third in the negative, and that the conviction should stand.

Garrow, J.A.

GARROW, J.A., concurred.

Maclaren, J.A.

MACLAREN, J.A.:—The accused in this case was tried at the General Sessions of the County of Norfolk before Robb, County Court Judge, and a jury, and was convicted of keeping a disorderly house. He had been committed for trial by a magistrate, but the indictment on which he was convicted was not preferred by the person bound over to prosecute, but by the County Crown Attorney, with the written consent of the trial Judge, under sec. 873 of the Criminal Code. After a true bill had been found by the grand jury, and before arraignment or plea, the prisoner desired to elect to be tried before the County Court Judge without a jury, under the Speedy Trials Act (Part XVIII. of the Criminal Code). On its being held that he was not entitled so to elect,

ONT.

C. A.
1912

REX
v.
SOVEREEN.

other days and times before that date, did keep a disorderly house, that is to say, a common bawdy house, contrary to secs. 228 and 225 of the Criminal Code, and was found guilty by the jury.

The indictment was not preferred at the instance of the person bound over to prosecute, but by the County Crown Attorney, with the written consent of the Chairman, under sec. 873 of the Criminal Code. After a true bill had been found by the grand jury, but before arraignment or plea, the prisoner desired to be allowed to elect to be tried before the County Court Judge without a jury, under the Speedy Trials sections of the Code. On its being held that he was not entitled so to elect, he pleaded "not guilty."

Statement

The Chairman, on the application of the prisoner's counsel, reserved for the Court the following questions:—

1. Was there any valid evidence that the prisoner was the keeper of a disorderly house?

2. Was my charge erroneous as regards the reference made therein to the woman who had been previously convicted?

3. Was the prisoner, in the circumstances above stated, entitled to make an election for speedy trial?

The conviction was affirmed; the first question being answered in the affirmative and the second and third in the negative.

Argument

*J. B. Mackenzie*, for the prisoner, argued that the evidence as to the character of the house under the previous occupant was inadmissible; and that, as the law now stands, a person out on bail is entitled to elect to be tried by a Judge without a jury: Criminal Code, sec. 825, sub-secs. 6 and 7, added by 8 & 9 Edw. VII. ch. 9.* There is no reported case since the amendment of the Code by the statute of 8 & 9 Edw. VII. Reference was made to the following cases: *Rex* v. *O'Gorman* (1909), 15 Can. Cr. Cas. 173, 18 O.L.R. 427; *The Queen* v. *Laurence* (1896), 1 Can. Crim. Cas. 295; *The King* v. *Komiensky* (1903), 6 Can. Crim. Cas. 524; *The King* v. *Wener* (1903), 6 Can. Crim. Cas. 406; *Regina* v. *St. Clair* (1900), 3 Can. Cr. Cas. 551, 27 A.R. 308; *Regina* v. *McNamara* (1891), 20 O.R. 489.

*J. R. Cartwright*, K.C., for the Crown, argued that the evidence was sufficient to support the conviction, and that the prisoner was not entitled to elect to be tried without a jury after a bill of indictment had been found against him.

*6. A person accused of any offence within sub-section 1 of this section, who has been bound over by a Justice or Justices under the provisions of section 696 and is at large under bail, may notify the Sheriff that he desires to make his election under this Part, and thereupon the Sheriff shall notify the Judge, or the prosecuting officer, as provided in section 826.

7. In such case, the Judge having fixed the time when and the place where the accused shall make his election, the Sheriff shall notify the accused thereof, and the accused shall attend at the time and place so fixed, and the subsequent proceedings shall be the same as in other cases under this Part.

ONT.

C. A.
1912

REX
v.
SOVEREEN.

Maclaren, J.A.

magistrate was present at the Sessions; but, whether or not, the County Crown Attorney might prefer an indictment for the charge upon which the prisoner was committed or for any charge founded on the facts or evidence disclosed in the depositions: Criminal Code, sec. 872. The Deputy Attorney-General informed us at the argument that his instructions were, that no one was bound over to prosecute, although the reserved case would lead one to infer that some one had been so bound; but, in my opinion, in the circumstances of this case, this was quite immaterial.

The fact is, that the depositions and the committal were both ignored, and were not followed by the person bound over to prosecute, if there was such a person, or by the County Crown Attorney. Instead of this, the County Crown Attorney, under sec. 873, obtained the written consent of the Judge to prefer the indictment set out in the reserved case, on which a true bill was returned by the grand jury, and on which the petty jury returned a verdict of "guilty." The depositions taken before the magistrate were not made a part of the reserved case, and counsel for the prisoner did not, before us, ask or even suggest that they should be made a part of it. In the circumstances, we must, I think, assume that the charge in the indictment is not the same as that for which the prisoner was committed, or any other charge appearing in the evidence before the magistrate, as, in either of these events, the County Crown Attorney would not, under sec. 871, have needed the consent of the Judge to prefer the indictment.

It is quite clear from sec. 825 and the succeeding sections of the Code that a speedy trial before a Judge can be had only upon a charge on which the magistrate has committed the accused, or upon one which appears in the evidence before him. As said by Wurtele, J., in *The King* v. *Wener*, 6 Can. Crim. Cas. 406, at p. 413: "The Criminal Code does not prescribe that an accused can elect to be tried without a jury when, without a preliminary inquiry or without a committal or an admission to bail, and subsequent custody for trial, a bill of indictment has been preferred by the Attorney-General or by any one by his direction, or with the written consent of a Judge of a Court of criminal jurisdiction, or by order of such Court, and thus remove the prosecution from the forum to which it properly belongs to another to which jurisdiction has not in such case been given by law. In the absence of any statutory provisions or statutory authority an accused has no right in such a case to demand and obtain a trial in any other Court than the one in which the indictment was found, and which has jurisdiction over the case, and is seized with it."

As stated above, the indictment in this case did not originate with and is not based upon a charge or depositions taken before a magistrate, but is based solely upon the written consent given by the trial Judge, and the Code does not provide for a trial before a Judge without a jury in such a case.

ONT.

C. A.

1912

REX v. SOVEREEN.

Maclaren, J.A.

But, even if the indictment had been based upon a charge for which the accused had been committed or which appeared in the depositions, I am of opinion that he should have elected before the true bill was found by the grand jury. I agree with what is said by Wurtele, J., in the *Wener* case, at the page above cited. He there says: "If no election has been made before an indictment is returned founded on the facts or evidence disclosed by the depositions taken at the preliminary inquiry, the accused has no statutory right to demand a trial before a Judge of Sessions without a jury, and avoid a trial on the indictment." In another case of *The King* v. *Komiensky*, in the same volume, 6 Can. Cr. Cas., at p. 528, the same Judge says: "On the finding of true bills, the Court is finally seized with the prosecution, and exclusive jurisdiction over them is vested in the Court, which is the only competent forum or tribunal to carry them in due course and in the ordinary way to their final stage of either conviction or acquittal by the petty jury." On the other hand, in a Manitoba case, *Rex* v. *Thompson* (1908), 14 Can. Cr. Cas. 27, 17 Man. L.R. 608, it was held by Howell, C.J.A., that a prisoner may elect up to the time of pleading. I can find nothing in the Code to justify this position, and, in my opinion, it is quite contrary to the genius and spirit of the Speedy Trials Act (now Part XVIII. of the Code). I am of opinion that the correct doctrine is that laid down as above by Wurtele, J. To hold otherwise would be to defeat the very object and purpose of the legislation, and the title of "Speedy Trials" would become a veritable misnomer, and provisions that were designed and enacted to speed trials would be converted into machinery to retard and delay.

But there is also, in addition, another difficulty in the way of the prisoner. Having been bound over under sec. 696, and being under bail, if he desired to elect, he should have given the notice of such desire to the Sheriff, as required by sub-sec. 6, added to sec. 825 of the Code by the amending Act of 1909, 8 & 9 Edw. VII. ch. 9. This he did not do, so that he did not take the first step to secure such right. It may be said that this objection is a technical one. But, if the prisoner is claiming a privilege so much at variance with the spirit and object of the legislation, he should at least shew some compliance with the plain provisions laid down in the legislation.

For these reasons, and especially on the ground first set forth, which, in my judgment, is quite sufficient, I am of opinion that the third question should be answered in the negative.

Magee, J.A.

MAGEE, J.A.:—Reserved case stated by the Chairman of the General Sessions of the Peace for the County of Norfolk.

The accused, Wilbert Sovereen, was indicted before that Court in December, 1911, for that he, on the 23rd day of July, 1911, and on other days and times before that date, did keep a

ONT.
C. A.
1912
REX
v.
SOVEREEN.
Magee, J.A.

disorderly house, that is to say, a common bawdy house, contrary to secs. 228 and 225 of the Criminal Code. The jury found him "guilty."

Under sec. 228, this is an indictable offence. There is no limitation of time for the commencement of a prosecution for it. Consequently, it was open to adduce evidence such as was given going as far back as May, 1910. It was objected that such evidence was inadmissible, because, under sec. 1142, in the case of an offence punishable upon summary conviction, the complaint must be made or information laid within six months, and under sec. 774 (amended by 8 & 9 Edw. VII. ch. 9) a "magistrate," as defined in sec. 771, could, without the assent of the accused, summarily try a person charged with keeping a disorderly house. But Part XVI., which includes sec. 774, relates to indictable offences, and not to offences punishable under summary convictions, which are dealt with by Part XV. The only provisions of the Code under which the keeper of a disorderly house or bawdy house can be punished by summary conviction are secs. 238 and 239, the former of which declares every one who is the keeper of such a house to be "a loose, idle or disorderly person or vagrant;" and sec. 239 makes "a loose, idle or disorderly person or vagrant" liable to fine or imprisonment or both. But that punishment is not for keeping the house, it is for being "a loose, idle or disorderly person or vagrant." In *The Queen* v. *Stafford* (1898), 1 Can. Crim. Cas. 239, although the charge was for being "the keeper of a common bawdy house," it is evident that the proceedings must have been taken under the sections then corresponding to secs. 238 and 239, and the imprisonment was held to be unauthorised by them. As the offence here charged is punishable only by indictment, sec. 1142 does not apply.

It was shewn that the defendant was the owner of the house in question, which was situate on a parcel of 45 acres of land owned by him. He resided about two and a half miles away. The house was "formerly occupied" by one Mrs. Denby. There is some reference to the fact of her having been arrested and convicted, but for what does not appear. Presumably it was for keeping this disorderly house. She left in October, 1910. During her occupancy, there is evidence of other women being there at various times, and men, and of the evil reputation of the house, and of instances of prostitution by inmates, and of lewd conduct by this defendant with Mrs. Denby and another woman, and of his having been "hundreds of times" in the bed-room with the former, and of his having invited there one witness who was there several times, and says the house was one of ill-fame, and that this defendant and Mrs. Denby were the keepers—the people who were running the house. As to this, the witness was hardly cross-examined. This was clearly "some valid evidence" to shew that the defendant was a keeper of a common bawdy house, under sec. 228.

ONT.

C. A.
1912

REX
v.
SOVEREEN.

Magee, J.A.

Since October, 1910, the house, though furnished by the defendant, has been vacant, unless when he occasionally stopped there. The presence of one or two women there on three occasions, weeks apart, is shewn, but not the time of day, except once at night, nor the length of their stay. Both of them had been there in Mrs. Denby's time. There is no evidence of any improper conduct or of other men being there. There is not, I think, sufficient proof of the existence of a common bawdy house there during this period.

In his charge to the jury, the learned Chairman, after pointing out that the defendant was the owner of the house, said: "It had been suggested, however, that the woman who had already been convicted was the keeper; but I think that we have nothing to do with that in this case. I think that, no matter whether she was convicted or not, you have got to try this case upon the evidence that has been presented before you." I am at a loss to discover any objection to this, or indeed why the learned Chairman was indulgent enough to reserve any question upon it.

Another question remains as to the right of the Court to try the defendant. The statement of the case sets out these facts: "The prisoner had been committed for trial after the preliminary hearing, and admitted to bail, and appeared, as provided by his recognizances, for trial at the above-named General Sessions of the Peace. The bill of indictment was, however, not preferred by the person bound over to prosecute, but was preferred under directions given by the trial Judge, as provided by sec. 873 of the Criminal Code. Before arraignment or plea, the prisoner desired to elect trial by the County Court Judge, but it was held that he was not entitled, under the circumstances, so to elect." I assume that the information laid, the preliminary hearing had, and the defendant's recognizance to appear for trial, were all upon the same charge as the indictment.

It is only under sub-secs. 6 and 7 of sec. 825 of the Criminal Code, 1906, as added in 1909 by 8 & 9 Edw. VII. ch. 9, that the defendant, being not in custody but under bail, could have claimed any right to a trial before a Judge without a jury. Previously, he would have had to be in actual custody either upon the original commitment for trial by the magistrate holding the preliminary inquiry, or by virtue of a surrender into custody after bail, or "otherwise in custody awaiting trial on the charge."

The new sub-section (6) provides that a person accused who has been bound over by a Justice under sec. 696 (*i.e.*, to appear for trial), and is at large under bail, may notify the Sheriff that he desires to make his election under Part XVIII. (relating to Speedy Trials), and thereupon the Sheriff shall notify the Judge; and, by sub-sec. 7, the Judge having fixed the time and place for the accused to make his election, the Sheriff shall notify the accused thereof, and the accused shall attend, and the subsequent proceedings shall be as in other cases under Part XVIII.; and, by sub-sec.

ONT.
C. A.
1912
REX
v.
SOVEREEN.
Magee, J.A.

8, the recognizance taken when the accused was bound over shall be obligatory with reference to his appearance at the time and place so fixed, and to the trial and proceedings thereupon, as if originally entered into with reference thereto.

No time is specified for the giving of the notice to the Sheriff. If a notice were given in such a case, it would be material to consider at what time an election may be made by those in custody. The original Act providing for trials by a Judge without a jury, 32 & 33 Vict. (1869) ch. 35, was intituled "An Act for the more speedy trial in certain cases of persons charged," etc.—afterwards called the Speedy Trials Act—and this might give some colour to the idea that where the trial would not be speeded the Act was not intended to apply. But, excepting in the title, there was nothing in the wording of the Act itself so to indicate, except possibly the provisions that the prisoner might with his own consent be tried "out of Sessions," and that the Judge was to tell him that he had the option to "remain untried until the next sittings" of the Court of General Sessions of Oyer and Terminer. These words did not, in fact, I think, imply that the speedy trial must be before the session of the jury Court began—but subsequent amendments removed any possibility of such a construction. It must, I think, be taken that the object of speedy trials indicated by the title was to be attained by the creation of a new tribunal—a Court of record—which would not be limited to half-yearly or other periodical sittings, but could sit at any time, and that tribunal being created (see Ontario statute of 1873, 36 Vict. ch. 8, secs. 357, 358), the positive directions to the Sheriff and the Judge as to their duties towards prisoners, in effect, gave each prisoner to whom the Act applied an option and right of election as to which one of the tribunals he would be tried by, or rather the right to have an opportunity to say he chose trial by the Judge. I do not think it would have been any answer to a claim to exercise such right to say to the prisoner, "The jury Court is now sitting, and your trial there can take place to-day, or sooner than if you are to be tried by the Judge alone." It is now expressly declared in sec. 825 that the trial by the Judge shall be had whether the jury Court or the grand jury thereof is or is not then in session—and I agree with the opinion of Howell, C.J.A., in *Rex* v. *Thompson*, 14 Can. Cr. Cas. 27, 17 Man. L.R. 608, that this provision is not restricted to the trial itself.

Then, by sec. 828, even after a prisoner has elected to be tried by a jury, he may notify the Sheriff that he desires to re-elect, and this at any time before his trial has commenced, and whether an indictment has been preferred against him or not—unless the Judge is of opinion that it would not be in the nterest of justice to allow a second election; and, if an indictment has been actually preferred, the consent of the prosecuting officer must be obtained.

ONT.

C. A.
1912

REX
v.
SOVEREEN.

Magee, J.A.

In cases where, under Part XVI. or XVII., the prisoner had elected before the committing magistrate not to be tried by him, but by a jury, he may, under sec. 830, notify the Sheriff, before the sitting of the jury Court, that he desires to re-elect.

The Code, therefore, gives three periods for the election by an actual prisoner as of right—before the sitting, before the preferment of the bill, and before the trial has commenced. It would be difficult to say which of these should apply to the case of an accused person who is at large under bail; but I think it is clear that his notification to the Sheriff must be taken as the foundation of his right to put himself in the position of a prisoner as one entitled to be called upon to elect. That he was not in actual custody merely by reason of appearing, "as provided by his recognizance," is manifest from sec. 1092, which declares that a recognizance is not discharged by arraignment or conviction.

This defendant did not give any such notice, so far as appears; but, at the last moment, when called upon to answer to the indictment, said that he desired to elect. Without being in custody and without having given the notice to the Sheriff, he had not put himself in the position to claim that right. It appears that the Chairman of the Court of General Sessions held "that he was not entitled under the circumstances" so to elect. Therein the Chairman was right, as no notification had been given.

The defendant then pleaded to the indictment, or a plea must have been entered for him, as the trial proceeded, and he was by the jury found "guilty." There is nothing to indicate that any other result might have been arrived at if the Chairman had been trying the case without a jury, and there is no reason to suppose that there was any failure of justice through the defendant's omission.

I would answer the first question in the affirmative, the second and third in the negative.

LATCHFORD, J., concurred with the Chief Justice. Latchford, J.

*Conviction affirmed.*

ONT.

H. C. J.

1912

May 15.

## RICKART v. BRITTON MANUFACTURING CO.

*Ontario High Court, Middleton, J., in Chambers. May 15, 1912.*

1. DISCOVERY AND INSPECTION (§ IV—33)—EXAMINATION OF WITNESS—MOTION FOR INJUNCTION—LIMITS OF EXAMINATION.

Where it was alleged that a Canadian trade union adopted a label, to distinguish goods made by its members, that infringed the label of another trade union, on a motion for an interim injunction in an action wherein certain members of the latter union were plaintiffs and the defendant a manufacturer, who employed members of the Canadian union, and who affixed their alleged infringing label to his goods, the production of the books and records of the latter union cannot be required, nor can witnesses be examined as to the organization and conduct of such union, where it abundantly appeared from the evidence of the plaintiffs that their design was to embark, under colour of such motion, on a preliminary cross-examination of persons who might be hostile witnesses at the trial, or upon an enquiry to obtain discovery greater than that permitted, which testimony might afterwards be used in a contest not only with the defendant in the action, but with the Canadian trade union as well.

2. TRADE MARK (§ I—1*a*)—RIGHT OF EMPLOYEE OR TRADE UNION TO ADOPT.

A label adopted by a trade union does not answer the description of an ordinary trade mark, as it does not distinguish the goods of one person from those of another, and a member of the union has not a vendable interest in such label, but only a right to use it so long as he remains a member of the union.

[*Carson* v. *Ury*, 39 Fed. Rep. 777, specially referred to.]

3. LABOUR ORGANIZATION (§ I—5)—UNINCORPORATED BODY USING TRADE LABEL—UNFAIR COMPETITION.

The equitable relief granted to prevent unfair competition may reach far enough to afford redress to an unincorporated body from the unfair use and imitation of its union trade label by another union.

4. INJUNCTION (§ II—131*a*)—INTERIM INJUNCTION—NOVEL AND DIFFICULT QUESTION.

A novel and difficult legal question should not be dealt with upon a motion for an interim injunction, but the plaintiff will be left to his remedy at the trial.

Statement

MOTION by the plaintiffs for an order directing Cecil A. Burgess to attend and answer certain questions upon his examination as a witness on a pending motion for an injunction, and to produce the minute books, cash books, rule books and all other books and records of the United Garment Workers of Canada, and to submit to examination as to the organisation and conduct of such union and all other matters relating thereto, and in default thereof to be committed to the common gaol.

The motion was dismissed.

*J. G. O'Donoghue*, for the plaintiffs.

*C. G. Jarvis*, for Burgess and the defendants.

Middleton, J.

MIDDLETON, J.:—The action is brought by certain members of the United Garment Workers of America, on behalf of themselves and other members of that body, and by the United Garment Workers of America, for an injunction restraining the use of what is said to be an imitation of the plaintiffs' union label; and

a motion was made on the 30th March for an order for an interim injunction restraining the use of any such imitation, more particularly a certain label containing the words, "Issued by authority of United Garment Workers of Canada, general executive board, registered."

The defendants are a manufacturing company carrying on business at London, Ontario. There is a Canadian trade union, to which certain garment workers belong; and there is an agreement between the defendants and that union under which the defendants are compelled to employ only members of the Canadian union and to affix to the garments manufactured the label of that union.

There appears to be some conflict between the Canadian and American unions; and at one time there was an agreement between the defendants and the American union. This agreement was dated the 1st April, 1911, and terminated in one year from that date; so that the defendants' obligation towards the American union had ceased at the time this action was brought.

The notice of motion for the interim injunction was based upon an affidavit made by one Carroll, in which he says that the label which the defendants are using, and will continue to use, is a fraudulent imitation of the plaintiffs' union label. But, not content with this, it is sought to supplement the material by the depositions of the defendants "and such other persons as the plaintiff may be advised;" and, in pursuance of this, the evidence has been taken of some eight persons, from which it abundantly appears that the plaintiffs' design is to embark, under the colour of this motion for an interim injunction, upon a preliminary cross-examination of those who, they may anticipate, would be hostile witnesses at a trial, or upon a fishing excursion, in which they will obtain discovery greater than that permitted by our practice, and which they may hereafter use, not merely in a contest with the defendants, but in a contest with the Canadian union.

In the course of this examination the plaintiffs desire to inquire fully into the organisation, constitution, membership, financial position, and domestic concerns of the rival union. Burgess has declined to produce this information and to permit the plaintiffs' counsel free access to the documents. And I think that he is within his rights.

Upon the argument it was stated that the Canadian union have registered a label under the statute, and that this alone would indicate that there is such an issue to be tried as to render it unreasonable to suppose that any interim injunction will be granted. Besides this, a very serious legal question arises at the threshold of the plaintiffs' case. There is a wide divergence of view in American cases as to the status of a union label.

In many States the view entertained by Mr. Justice Thayer in *Carson* v. *Ury*, 39 Fed. Repr. 777, is accepted. He says: "It is,

ONT.

H. C. J.
1912

RICKART
v.
BRITTON
MFG. CO.

Middleton, J.

no doubt, true that the union label does not answer to the definition ordinarily given of a technical trade mark, because it does not indicate with any degree of certainty by what particular person or persons or firm the cigars to which it may be affixed were manufactured, or serve to distinguish the goods of one cigar manufacturer from the goods of another manufacturer, and because the plaintiff appears to have no vendible interest in the label but only a right to use it on cigars of his own make, so long, and only so long, as he remains a member of the union. In each of these respects the label lacks the characteristics of a valid trade mark."

There is also another difficulty. The American trade union does not appear to be an incorporated body, and it is hard to see how any property right in a trade label could be vested in such a loose aggregation. On the other hand, the principles upon which equitable relief is granted to prevent unfair competition may be found to reach far enough to afford the plaintiffs some redress, if the label adopted by the Canadian union is an unfair imitation of the American label. No Canadian case has yet determined a question of this kind; and, according to established principles, a novel and difficult legal question ought not to be dealt with upon a motion for an interim injunction.

All these considerations point to the impracticability of success upon the motion, and emphasise the vexatious nature of the course adopted by the plaintiffs.

Since the argument, the learned counsel for the plaintiffs has, I think, justified the suspicion that the plaintiffs' course is oppressive, by a memorandum which he has handed in, as follows: "In the case of *Canada Foundry Co.* v. *Emmett*, 5 or 6 years ago, the company got an interim injunction, and then was permitted by one Judge after another, during a period of five or six months, to examine witnesses to the extent of eight or nine thousand questions, before the motion to continue the injunction was heard."

I do not know the circumstances of that case, and probably the circumstances justify the course taken; but this naked statement is apparently relied upon as authority for the proposition that in all trades union cases there ought to be prolonged examination. At any rate there is nothing in this statement to justify the making of the order now sought.

The motion is dismissed, with costs to be paid by the plaintiffs to the defendants and to Burgess forthwith after taxation.

*Motion dismissed.*

# INDEX OF SUBJECT MATTER, VOL. IV., PART III.

## CASES REPORTED, VOL. IV., PART III.

## CHIZEK v. TRIPP.

SASK.

S. C. 1912

March 29.

*Saskatchewan Supreme Court. Trial before Johnstone, J. March 29, 1912.*

1. DAMAGES (§ III E—142)—MEASURE OF COMPENSATION—BREACH OF PROMISE OF MARRIAGE—ABSENCE OF ANXIETY OR SUFFERING.

Where the Judge trying an action for breach of promise of marriage without a jury finds in favour of plaintiff, but also finds that the defendant's refusal to marry the plaintiff caused her no anxiety or suffering, the damages will on that account be assessed at a lower figure than otherwise.

Statement

ACTION for damages for breach of promise of marriage. The case was tried before JOHNSTONE, J., without a jury.

Judgment was given for plaintiff.

*F. F. McDermid*, for plaintiff.

*A. M. McIntyre*, for defendant.

Johnstone, J.

JOHNSTONE, J.:—I find all the issues herein in favour of the plaintiff; but to say that the feelings of the plaintiff, through the refusal of the defendant to marry her as he had promised, were very much hurt, and that she had suffered in consequence in body and mind, would be exaggeration.

I am satisfied that the true condition surrounding the engagement was not disclosed. There were circumstances, I suspect, which if they had been made known might have rendered the promise to marry nugatory; but it was no part of my duty to delve into that which perhaps it was desirable to keep in the background.

I assess the damages to which the plaintiff is entitled at $200. She will also be entitled to costs of the action on the higher scale.

*Judgment for plaintiff.*

---

## McEWAN AND DOUGHERTY (plaintiffs, appellants) v. MARKS (defendant, respondent).

SASK.

S. C. 1912

April 12.

*Saskatchewan Supreme Court, Lamont, J., in Chambers. April 12, 1912.*

1. PLEADING (§ II A—174)—NECESSITY OF AVERMENT AS TO ASSETS WITHIN JURISDICTION—COSTS.

A foreign plaintiff need not set up in his statement of claim that he has assets within the jurisdiction of the Court sufficient to answer for costs.

2. COSTS (§ I—14)—SECURITY FOR COSTS—DISMISSAL OF APPLICATION—ASSETS WITHIN JURISDICTION.

It is only in cases where an interlocutory motion by the defendant for security for costs was rendered necessary by the fault of the plaintiff that the latter should be called upon, on security being ordered, to pay the costs of the motion in any event; ordinarily the costs of a motion for security in which fault cannot be attributed to either party should be made costs in the cause.

[*Lock* v. *Snyder*, 2 D.L.R. 414, 20 W.L.R. 466, distinguished.]

SASK.

S. C.
1912

McEWAN AND DOUGHERTY v. MARKS.

3. APPEAL (§ VII—1—346)—DISCRETIONARY MATTERS—COSTS.

An appellate Court will not set aside on appeal a discretionary order as to costs made by the Court below, unless it appears that there has been a violation of principle or a misapprehension of facts in making the order appealed from.

[*Lock* v. *Snyder*, 2 D.L.R. 414, 20 W.L.R. 466, approved.]

Statement

APPEAL by plaintiffs from an order of a Local Master directing certain costs to be paid by them.

An application had been made to the Local Master at Moose Jaw on behalf of the defendant for an order for security for costs, on the ground that the plaintiffs were residing beyond the jurisdiction. This motion the plaintiffs opposed successfully, by shewing that they had assets in the province sufficient to cover the costs.

The Local Master, in dismissing the application, ordered that the costs of the application should be paid by the plaintiffs in any event, and from this order the plaintiffs appealed, contending that the costs of such application should be costs in the cause.

The appeal was allowed.

Messrs. *Mackenzie, Brown and Co.*, for appellants.

Messrs. *Frame, Secord, Turnbull and Fisher*, for respondents.

Lamont, J.

LAMONT, J.:—I agree with the statement of the law laid down by my brother Brown in *Lock* v. *Snyder*, 2 D.L.R. 414, 20 W.L.R. 466, that in the case of a discretionary order an appellate tribunal will not interfere unless there has been a violation of principle or a misapprehension of facts on the part of the Local Master in making the order. In this case, however, I am of opinion there has been a departure from the well-recognized rule as to the disposition of the costs.

The general rule as to costs of interlocutory motions is laid down in Widdifield on Costs (1911), p. 160, as follows:—

*First*, that the party making a successful motion is entitled to his costs as costs in the cause; but the party opposing it is not entitled to his costs, in the cause.

*Second*, that the party making a motion which fails is not entitled to his costs, as costs in the cause, but the party opposing it is entitled to his costs, as costs in the cause.

*Third*, that when a motion is made by one party and not opposed by the other the costs of both parties are costs in the cause.

The exceptions to these rules occur chiefly:—

(1) Where on the merits the costs are reserved until the trial or other disposition of the action.

(2) The party moving, although successful, must pay the costs of the application if it is rendered necessary by his own default; or where he is asking an indulgence; or where he raises a new defence by amendment.

(3) Where the motion is rendered necessary by the respondent's default the respondent must pay the costs of it.

There are no special circumstances in this case to be considered. It is the ordinary case of a defendant moving for security on the ground that the plaintiff is resident outside of the jurisdiction of the Court, which fact appears from the statement of claim, and the plaintiff then coming in and shewing that he has property within the jurisdiction sufficient to answer for all costs that may be awarded against him.

The defendant under Rule 714 had a right to make his motion and was *primâ facie* entitled to an order for security, and the plaintiff was within his rights in shewing that he had sufficient assets within the province and, therefore, that further security was not required. If the defendant has a good defence to the action and establishes it, he is entitled to the costs of his motion. But if he has not a good defence he should not have made the motion, and should not get the costs thereof in any event. It is only in cases where the motion was rendered necessary by the fault of the plaintiff, as in *Lock* v. *Snyder*, 2 D.L.R. 414, 20 W.L.R. 466, that the plaintiff should be called upon to pay the costs in any event.

The learned Local Master held that the plaintiff was at fault in not setting out in his statement of claim that he had assets in the province sufficient to answer for costs. This view I think erroneous. I know of no authority or practice for holding that a foreign plaintiff should set out in his statement of claim the fact that he has assets within the jurisdiction sufficient to answer for costs. To my mind this is a case in which fault cannot be attributed to either party. The application was simply one step in the action, and although the order asked for was not made, the plaintiff is not in the position of one who has successfully opposed the application. What he practically says to the defendant is, "You are entitled to security, but you have your security already in the assets I have within the jurisdiction of the Court." He is, it seems to me, rather in the position of one not opposing the defendant's application, in which case, according to the third of the above rules, the costs of both parties should be costs in the cause.

The appeal will be allowed with costs, and the order of the Local Master varied so as to make the costs of the application for security "costs in the cause."

*Appeal allowed.*

SASK.

S. C.
1912
July 15.

**SCOTT (plaintiff, appellant) v. MOACHON (defendant, respondent).**

*Saskatchewan Supreme Court, Wetmore, C.J., Johnstone and Lamont, JJ. July 15, 1912.*

1. BROKERS (§ II B—12)—REAL ESTATE AGENT—RIGHT TO COMMISSION—PURCHASER FOUND BY ANOTHER BROKER—"QUANTUM MERUIT."

The plaintiff, a real estate agent, in whose hands the defendant had placed property for sale, but not exclusively, cannot recover commissions from the latter on a *quantum meruit*, where a purchaser was found by another broker purporting to act independently of and without the plaintiff's assistance, although the attention of the other broker, to whom a commission had been paid by the defendant for effecting the sale, had been called to the property by the plaintiff but without notice from the latter to the owner that such other broker had been referred to the property by him, was paid a commission by the defendant on the sale being made.

Statement

APPEAL by plaintiff from the judgment of Newlands, J., at the trial dismissing the plaintiff's action for commission on the sale of land.

The appeal was dismissed.

*G. F. Blair*, for appellant.

*E. J. Brooksmith*, for respondent.

Wetmore, C.J.

WETMORE, C.J.:—This is an action to recover commission on the sale of land. The plaintiff is a real estate broker, and he claimed that the property in question was listed with him for sale by agreement in writing. The trial Judge found that the agreement was not proved. I have come to the conclusion that he was correct in that respect. The statement of claim contained a count on a *quantum meruit*. The trial Judge found that the evidence upon this count "did not shew that the plaintiff obtained a purchaser for the defendant's land as alleged in his statement of claim but that he found another real estate agent who obtained the purchaser and was paid by the defendant his commission for such services;" and he arrived at the conclusion that under such evidence the plaintiff was not entitled to recover on a *quantum meruit* for services rendered in procuring a purchaser for the defendant's lands, and he gave judgment therefore, for the defendant with costs; and the plaintiff appeals.

The evidence in my opinion establishes that the defendant had placed the land in the hands of the plaintiff to procure a purchaser, and that he was to be paid $1 an acre as commission for selling it. There may be some question whether the defendant, who appears not to be able to speak English very well, was aware that he placed the property in the hands of the plaintiff to procure a purchaser at the start of the transaction, for he really placed it in the hands of one McDonald, who turned out to be a clerk in the plaintiff's office, but I am of opinion that before the transaction was closed he was aware that McDonald was the agent of Scott, and that he had really placed the matter in Scott's hands. The plaintiff, through his agent

SASK.

S. C.
1912

SCOTT
v.
MOACHON.

Wetmore, C.J.

McDonald, performed some services in endeavouring to obtain a purchaser. For instance, he brought down a couple of parties at different times to inspect the land, but none of these persons closed the deal. Eventually one Smith, a real estate broker from Balgonie, appeared at Forget, where the defendant resided and brought a proposed purchaser with him. The defendant states that he mentioned the plaintiff's name when he came there, but represented himself to be an independent broker, and a sale was effected, and Smith was paid $1 an acre as commission, which he evidently kept. Scott claims $1 an acre also because he was the person who brought this land to Smith's notice, that is, knowing that Smith had a purchaser he sent Smith down. Smith swears that he was acting as an independent broker, and at the same time he claimed that the defendant should pay $1 an acre to the plaintiff as well. Now it seems to me that if he was the plaintiff's agent, the plaintiff is entitled to receive from him a portion, at any rate, of the commission paid to him by the defendant, and if he was not the agent of the plaintiff, the plaintiff did not introduce the purchaser. And it also seems to me that Mr. Smith has striven very hard, if I may use the expression, to sail between wind and water.

There is one branch of the case I must draw attention to, and that is this. Smith swore that the defendant, in consideration of being about to get a larger price than he had listed the property for with Scott, agreed to pay an additional dollar to Scott on the sale. The defendant utterly denies that, and I gather from the learned trial Judge's judgment that he did not accept that proposition. For my own part, if the question of fact is left to my opinion, I may say that I cannot find under the evidence that the defendant agreed to pay two commissions. It is unreasonable and improbable. It seems to me that if the plaintiff desired to work through Smith, whom he knew to be a real estate broker, that some more definite information on the subject ought to have been given to the defendant. The price paid for commission on the sale of lands is quite large enough to make one hesitate before allowing a double price for it.

In my opinion the judgment of the trial Judge is correct, and the appeal should be dismissed and the judgment affirmed with costs.

JOHNSTONE, J., concurred with WETMORE, C.J.

Johnstone, J.

LAMONT, J.:—This is an action for commission on the sale of the defendant's farm. The defendant listed his land for sale with the plaintiff through one W. H. McDonald, an employee of the plaintiff, and agreed to pay a commission of $1 per acre in case of a sale. The plaintiff in turn gave the listing to V. H. Smith, a real estate agent at Balgonie, who found a purchaser

Lamont, J.

SASK.

S. C.
1912

SCOTT
v.
MOACHON.

Lamont, J.

in one James Blair and took him to the defendant, and a sale was completed. Before taking Blair out to see the land, Smith stipulated with the defendant for a commission of one dollar per acre, which the defendant, upon the completion of the sale, paid him. The plaintiff then demanded a commission of one dollar per acre from the defendant on the ground that he had through Smith procured the purchaser. The defendant refused to pay, and the plaintiff brought this action. The matter was tried before my brother Newlands, who gave judgment for the defendant. From that judgment the plaintiff now appeals.

To succeed the plaintiff must shew that he either directly or through some person acting on his behalf, found a purchaser for the defendant's farm. He did not do it directly, for he had no knowledge of the purchaser until after the completion of the sale. But he contends that he found the purchaser because it was through him that Smith was introduced to the land. It is true that the plaintiff introduced Smith to the land and gave him the listing thereof, but it is also true that he did this for the express purpose of having Smith find a purchaser. Smith found the purchaser; and if, in so doing, he had been acting on behalf of the plaintiff, the plaintiff would have been entitled to his commission. But what were the facts? Smith in his evidence stated emphatically that in making the sale he was not acting as the agent of the plaintiff but was acting as an independent agent. The plaintiff, in giving his testimony, was asked this question, "He (Smith) was acting as your agent throughout, was he not?" To which he answered, "No, not acting as my agent, he was acting independently, because I gave Mr. Smith the price of the land net to me." If Smith, in finding the purchaser, was acting on his own account, and by virtue of the listing given him for that purpose by the plaintiff, the plaintiff cannot be said to have found the purchaser at all, and is therefore entitled neither to a commission nor on a *quantum meruit*.

It was argued before us that the plaintiff was entitled to recover the amount sued for by virtue of a verbal agreement made by Smith with the defendant at the time of the sale to Blair. Smith in his evidence stated that when he took Mr. Blair down to see the land he told the defendant before they went out that he was acting independently of Mr. Scott, and that if a sale went through he would have to pay him (Smith) one dollar per acre, and that he would also have to pay Mr. Scott one dollar per acre commission as well, and that the defendant said that would be satisfactory. This the defendant denies. He said no mention was made of a commission to Scott until after the deal with Blair was closed, that then Smith said to him, "What do you think about Scott's commission?" to which he replied, "I have nothing to do with Scott." The defendant's version of this conversation seems to me the more probable.

SASK.

S. C. 1912

SCOTT v. MOACHON.

Lamont, J.

It is not at all likely that Smith, who was acting independently and was desirous of making a sale, would run the risk of blocking the sale by demanding at the outset two commissions from the defendant. The defendant says if he had known he was to pay two commissions he would not have sold. To my mind the defendant's version is more in accord with the usual practice of real estate agents, and I accept it as correct. The plaintiff, therefore, having failed to establish that he is entitled to the amount claimed by him, this appeal should be dismissed, and the judgment of my brother Newlands affirmed with costs.

*Appeal dismissed.*

---

ALTA.

S. C. 1912

Feb. 8.

## LAVALLEE v. THE CANADIAN NORTHERN RAILWAY CO. RIOPEL v. THE CANADIAN NORTHERN RAILWAY CO. MEUNIER v. THE CANADIAN NORTHERN RAILWAY CO.

**(Decision No. 1.)**

*Alberta Supreme Court, Scott, J. February 8, 1912.*

1. CONTINUANCE AND ADJOURNMENT (§ I—3)—LAPSE OF MOTION—LEAVE TO RENEW.

The Court may extend the time for renewing a motion if it has lapsed through a misunderstanding as to the date to which the previous motion was enlarged, particularly where the enlargement was not recorded.

2. CONTINUANCE AND ADJOURNMENT (§ I—3)—ENLARGEMENT UNTIL AFTER "VACATION"—NO DATE BEING FIXED—EFFECT OF.

Where there are no fixed days for holding Chambers, and an enlargement is made of a summons upon an application to vary the clerk's report, and for other purposes, until after vacation, without a date being fixed for hearing the application, it need not be taken up on the first day after vacation when Chambers may be held, but may be heard at any time upon giving the opposite party two clear days' notice.

Statement

APPLICATION by the plaintiffs to vary the clerk's report and for other purposes.

The application was granted.

*E. B. Edwards*, K.C., for plaintiffs.

*S. B. Woods*, K.C., for defendants.

Scott, J.

SCOTT, J.:—The summons on the applications were returnable in Chambers on 27th June. They were then enlarged until 30th June, when they were again enlarged until after vacation. There is no record of the terms of the enlargement or as to whether a certain date after vacation was agreed upon or fixed.

On 13th October last the plaintiffs' solicitor served defendant company's solicitor with notice that the application would be renewed on 17th October. They were renewed before me on the latter date, when counsel for the defendant company contended that they were adjourned until the first Chamber day after vacation, and that, as they had not then been spoken to, they must be treated as having been abandoned. Counsel for plaintiffs contended that the adjournment was until after vacation without a day having been named. Affidavits as to the terms of the

ALTA.

S. C.
1912

LAVALLEE
v.
CANADIAN
NORTHERN
R. Co.

Scott, J.

adjournment were afterwards filed by both counsel. Their statements differ as to the terms of the adjournment and they raise a question of veracity which I should not be called upon to decide.

The matter is at most a question merely of the costs of the application, as, even if I held that the application had been abandoned, and that the time had expired for making a fresh application, I would have no hesitation under the circumstances in extending the time for making one. If the contention of the defendant company's counsel were upheld I doubt whether he would be entitled to claim the costs of the motion as they were not applied for on the first Chamber day after the return day. See *Woodcock* v. *Oxford &c. Rly. Co.*, 17 Jurist 33.

Even if the adjournment had been for the first Chamber day after vacation, I think that, in view of the conditions prevailing in the Court here at the present time, the strict practice which may be enforced in England in like cases should not be insisted upon here. There, Chambers are held at regular times. Here, the same regularity cannot be maintained. I doubt whether in this Court there was any fixed day for Chambers for many weeks after vacation, and, in my view, it would be unreasonable to hold that the plaintiffs' solicitor should, in order to keep his application alive, be forced to attend day after day during those weeks in order to ascertain whether Chambers would be held on the usual days.

In view of what I have stated I hold that the summons referred to have not been shewn to have been abandoned.

I direct that the applications may be brought on for hearing by either party upon giving two clear days' notice to the other party.

*Order accordingly.*

---

ALTA.

S. C.
1912

March 8.

**LAVALLEE v. C. N. R.**
**MEUNIER v. C. N. R.**
**RIOPEL v. C. N. R.**
**(Decision No. 2.)**

*Alberta Supreme Court, Harvey, C.J. March 8, 1912.*

1. COURTS (§ II A 1—150)—JURISDICTION OF SUPREME COURT, ALBERTA, TO VARY REFEREE'S FINDING AS TO DAMAGES.

The Supreme Court of Alberta cannot entertain an application to vary the finding of a clerk of the Court on a reference to him to ascertain damages, since that can be done only on an appeal from the final judgment in the action.

[*Marson* v. *G.T.P. R.*, 17 W.L.R. 693, on appeal, 1 D.L.R. 850, 20 W.L.R. 161, followed.]

2. REFERENCE (§ I—4)—POWERS OF REFEREE—ASCERTAINMENT OF DAMAGES —CONSIDERATION OF QUESTION OF LIABILITY.

The clerk of a Court cannot, upon a reference to him to ascertain the plaintiff's damages, consider the question of the liability of the defendant in the action, since that was settled by the order of reference.

ALTA.

S. C.
1912

LAVALLEE
v.
C. N. R.
(No. 2).

3. REFERENCE (§ I—7)—APPLICATION TO VARY REPORT—REFERENCE BACK —MISCONCEPTION OF DUTY.

If the clerk of a court, on a reference to ascertain the plaintiff's damages, misconceiving his duty, hears evidence and, determining that the defendant was not liable, refuses to assess damages in the plaintiff's favour, the Supreme Court of Alberta, may, on an application to vary the clerk's report, direct him to proceed with the assessment of damages.

4. PLEADING (§ I N—118)—AMENDMENT OF STATEMENT OF CLAIM—AFTER JUDGMENT ON MOTION TO VARY REPORT—DESCRIPTION OF DAMAGE.

Leave to amend a statement of claim from which was inadvertently omitted particulars of the plaintiff's damages, will be granted by the Supreme Court of Alberta, on an application to vary the findings of the clerk of the Court as to assessment of damages, where such omission was not discovered until the hearing of such application.

Statement

THIS is an application by the plaintiffs in each of the above cases to have the report of the clerk of the Court as to damages varied by inserting the proper amount of damages they were entitled to or to have the report referred back to have damages assessed, the clerk, after taking evidence, having found no special sum as damages, but expressed the opinion that such damage was caused by the plaintiffs or some third person.

An order was made referring the matter back to the clerk to complete the reference and certify the amount of damages.

*E. B. Edwards*, K.C., for plaintiffs.

*S. B. Woods*, K.C., for defendants.

Stuart, J

These cases came on for trial before Mr. Justice STUART on November 11th, 1910, when, on the pleadings and admissions of counsel, he directed judgment for the plaintiffs and a formal judgment was taken out in each case containing the following term:—

> It is this day adjudged that the plaintiff do recover against the defendants such amount for damages for the wrongs complained of as shall be found and ascertained by the clerk of this Court at Edmonton, to whom it is referred to ascertain the same.

The wrongs complained of are the same in each case and are set out in the statement of claim as follows:—

> In or about the months of May and June, 1909, the defendants wrongfully and unlawfully broke and entered upon the said lands and cut and broke down the fences thereof, etc.

Under the reference evidence was taken before the clerk tending to shew the breaking and non-repair of the fences and damage by cattle obtaining access thereby. In each case the clerk has made a report finding no amount for such damage, but expressing the opinion that such damage was due to the plaintiffs themselves in two of the cases and of a third person in the other case in not repairing the fences. The plaintiff in each case now applies on various grounds specified to have the report varied by inserting the proper amount of damages or to have it referred back with directions or for such other order as may

ALTA.

S. C.
1912

LAVALLEE
v.
C. N. R.
(No. 2).

Stuart, J.

seem just. Counsel for the defendants objects that there is no jurisdiction to hear the application, which is in the nature of an appeal from the clerk's report.

In *Marson* v. *G.T.P.*, 17 W.L.R. 693,* Mr. Justice Beck points out the usual practice in this Court to be the making of references, not for trial, but for enquiry and report, involving a motion for adoption or as the case may be and the advisability of such a practice. I think without exception the references I have directed have been of that character, but in my opinion the reference in this case is not of that character. The judgment of the trial Judge distinctly states that the plaintiff shall be entitled to final judgment for the amount the clerk may ascertain. If that judgment is wrong I certainly cannot change it, and inasmuch as it has been confirmed by the Court *en banc*, 17 W.L.R. 539, though not questioned on this ground, I think I may consider that its validity cannot be questioned.

In my opinion the amount of damage as found by the clerk as referee must be the amount of the final judgment, and any appeal from his finding must be as an appeal from the final judgment. I think, therefore, the defendants' counsel's objection is well taken to the form of the application. The referee, however, has made no finding of the amount of damages, and if, in reaching the conclusion he has, he has misconceived his duty and has failed to make the finding directed, the matter is still open and as an officer of the Court he is subject to direction as to the performance of his duty. In that aspect I think I have jurisdiction to deal with the application, though its form is in reality that of an appeal from the referee's report.

In my opinion the referee has misconceived his duty. The question of liability is settled by the order of reference, and it is not within the scope of the referee's power to relieve the defendants of the liability with which they are fixed by finding that the damage could have been avoided if something else had been done by the plaintiffs or anyone else. The only matter referred to him is the amount of the damage. That should be ascertained and certified by him and final judgment can then be entered for that amount.

In each statement of claim particulars of the character of damage are given, but in the *Riopel* case particulars of damage by trespassing cattle are omitted. This, plaintiffs' counsel explains, was due to inadvertence and apparently it was only discerned by counsel on this application, as the proceedings in all the cases have been taken together and evidence on this point was given before the referee. Plaintiff asks to have the claim

*The judgment of Beck, J., in *Marson* v. *Grand Trunk Pacific R. Co.*, 17 W.L.R. 693, was varied on appeal to the Supreme Court of Alberta *en banc*, by reducing the damages awarded, see *Marson* v. *Grand Trunk Pacific R. Co.*, 1 D.L.R. 850, 20 W.L.R. 161.

ALTA.

S. C.
1912

LAVALLEE
v.
C. N. R.
(No. 2).

Stuart, J.

amended in this respect, and if I have power to make the amendment at this stage it is certainly a proper one to make. In one of the cases also the evidence indicates that the breaking of the fences occurred at two different times in the same season, the second not being specified, and leave to amend to specify this is asked. As the case is still open and properly before me, though not free from doubt, I think I have power. It is not necessary, however, to consider the matter fully because I understood counsel for defendants to consent to the amendments being made if there were no costs of the application which, in my opinion, there should not be, both because of this indulgence and because, if the application had been for only what the plaintiff is entitled to, the defendants might, perhaps, not have opposed it, indeed, in the argument defendants' counsel offered to consent to the order I am making if there were no costs. The order will go, therefore, without costs for amendment as asked and directing the referee to complete the reference and certify the amount of damages.

*Order made referring report back to referee.*

---

## McNICHOL v. WINNIPEG.

MAN.

C. A.
1912

May 20.

*Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue and Cameron, JJ.A. May 20, 1912.*

1. APPEAL (§ I B—18)—EMINENT DOMAIN PROCEEDINGS—SECOND APPEAL—WINNIPEG CHARTER, SEC. 823.

The power of the Court of King's Bench, under sec. 823 of the charter of the city of Winnipeg, pertaining to the award by arbitrators of compensation for land taken for a public street, is not exhausted upon that Court setting aside an award, and an appeal lies from such order to the Court of Appeal, which, thereupon, has all the powers set forth in that section upon the Court of King's Bench. (*Per* Cameron, and Richards, JJ.A.)

2. APPEAL (§ VII K—445)—WAIVER OF OBJECTION—APPEARANCE ON MOTION TO SET ASIDE AN AWARD—FAILURE TO RAISE QUESTION.

An objection that a submission to arbitration had not been made a rule of Court, will be considered waived and not open to consideration on appeal where the parties appeared before the Court of King's Bench and submitted a motion to set aside the award of an arbitrator without raising such question. (*Per* Perdue, J.A.)

3. ARBITRATION (§ IV—42)—WHAT IS SUFFICIENT SUBMISSION.

Where, without objection by the parties to the proceeding, the Court of King's Bench made an order remitting to a single arbitrator, as provided by the charter of a city, an award of damages made by three arbitrators in a proceeding to open a public street, upon the award of such single arbitrator being set aside by the Court on motion, such proceedings before the Court constituted a sufficient submission by order of Court. (*Per* Perdue, J.A.)

4. DAMAGES (§ III L 5—276)—MEASURE OF COMPENSATION—EMINENT DOMAIN—ESTABLISHMENT OF HIGHWAY.

The fact that upon the opening of a public street across the plaintiff's property a small triangular piece of land, left on one side of the street was reduced in value, does not entitle him to special compensation over and above the general damage awarded for the injury sustained by the whole tract of land. (*Per* Howell, C.J.M.)

MAN.

C. A.

1912

McNICHOL v. WINNIPEG.

5. APPEAL (§ I B—18)—RIGHT OF APPEAL—ORDER SETTING ASIDE AWARD—EMINENT DOMAIN—MAN. KING'S BENCH ACT, SEC. 58.

An appeal lies, under sec. 58 of the King's Bench Act, to the Court of Appeal from an order setting aside an award of damages made by an arbitrator in a proceeding to open a public street over private property, notwithstanding that the provisions of the city charter, under which the proceedings were instituted, did not provide for an appeal from the order of the Court of King's Bench. (*Per* Cameron, and Richards, JJ.A.)

6. STATUTES (§ II D—125)—RETROSPECTIVE OPERATION OF 1 GEO. V. (MAN.), CH. 13, SEC. 2—REPEALING RULES 773 AND 774—EFFECT ON PRIOR RIGHTS AND LIABILITIES.

A proceeding to ascertain by arbitration the compensation for land taken for a public street, which has been referred to a single arbitrator by the Court of King's Bench by virtue of a provision of a city charter under which the proceedings were instituted, constitutes a "legal proceeding or other remedy for ascertaining or enforcing" a liability, which was exempted by 1 Geo. V. ch. 13, sec. 2, in repealing Rules 773 and 774, pertaining to the power of the Courts of King's Bench to deal with awards on motion, as to any rights acquired or liabilities incurred before the coming into effect of the repealing Act. (*Per* Cameron, and Richards, JJ.A.)

7. ARBITRATION (§ IV—42)—WHAT IS SUFFICIENT SUBMISSION—ORDER OF THE COURT—JURISDICTION OF (MAN.) COURT OF KING'S BENCH.

Where a city charter under which proceedings were instituted to open a public street did not provide for a formal submission to arbitration of the question of compensation for the land taken, but clearly shewed that the Court of King's Bench was to have summary jurisdiction over the proceedings, the practice provided by the Land Clauses Act is to be followed, and the appointment by such Court, under the provisions of such charter, of a single arbitrator to consider the award made by three arbitrators, will be considered a sufficient submission of the question to arbitration by order of Court. (*Per* Cameron, and Richards, JJ.A.)

8. APPEAL (§ VII E—302)—POWER OF COURT OF APPEAL TO AMEND ON AN APPEAL.

Where the Court of King's Bench, had objection been made to its jurisdiction because a submission to arbitration of the question of compensation for land taken for a public street was not made a rule of Court, could have granted an adjournment for the purpose of having the submission made a rule of Court, the Court of Appeal has the like power on an appeal from the order of the Court of King's Bench quashing the award made. (*Per* Cameron, and Richards, JJ.A.)

9. DAMAGES (§ III L 5—276)—COMPENSATION FOR LAND TAKEN FOR STREET—PROVISIONS OF CITY CHARTER.

A provision of a city charter that arbitrators in awarding damages for land taken for public streets should determine "(1) the intrinsic value of the property taken; (2) the increased value of the residue, and (3) the damage to the residue; and (that) the difference between (1) and (2), or (1) and (3) shall constitute the compensation" to which the landowner shall be entitled, amounts to a limitation as to the damages that may be awarded, and there cannot be included in an award the portion of the cost of opening a public street which would be assessed against the landowner. (*Per* Cameron, and Richards, JJ.A.)

[*Christie* v. *Toronto*, 25 Can. S.C.R. 551; *Pryce* v. *Toronto*, 20 O.A.R. 16; *Richardson* v. *Toronto*, 17 O.R. 491, distinguished.]

10. DAMAGES (§ III L 5—276)—MEASURE OF COMPENSATION—GENERAL DAMAGES—SUBSTANTIAL DAMAGES.

Where it was impossible to open a public street across a tract of land without leaving a small triangular piece separated from the remainder, or without the street crossing diagonally on one side of the

land so as to leave it in bad shape to be divided into city lots, substantial damages cannot be awarded in addition to the general damages awarded for injury to the entire tract of land.

11. DAMAGES (§ III L 5—276)—MEASURE OF COMPENSATION—SUBSTANTIAL DAMAGES—TAKING LAND FOR PUBLIC STREET.

In a proceeding to take land for a public street, special damages cannot be awarded for shortening the remaining land between the street and a river bank, thereby injuring it for sub-division into city lots, where the street was laid out in the best possible manner in view of the topographical surroundings of the land. (*Per* Cameron, and Richards, JJ.A.)

Statement

APPEAL by McNichol, asking for the reversal of an order made by Metcalfe, J., whereby an award made by a single arbitrator, under sec. 823 of the Winnipeg Charter was merely set aside on his appeal therefrom instead of the award being referred back with directions for an increase of the amount awarded or a larger sum awarded by the Court.

The Court of Appeal ordered that the award made by Mr. Macdonald, the single arbitrator, be restored.

Messrs. *J. B. Coyne* and *J. P. Foley*, for the plaintiff.

Messrs. *T. A. Hunt* and *C. S. Blanchard*, for the city.

Howell, C.J.M.

HOWELL, C.J.M.:—The by-law No. 3649, taking the property of the plaintiff for the opening of the street, fixes the proportion of the cost of the property which shall be charged upon the adjacent lands assumed to be benefited. About one-third of the cost the by-law charges upon the plaintiff's lands and the other two-thirds is charged upon other lands. This by-law is not impeached and we have nothing to do with the question whether or not the others have been let off too cheaply. It is admitted on both sides that the plaintiff's land is of little value unless it is subdivided into city lots, and in order to subdivide it the plaintiff must comply with the law. When he bought the property the river was as now on the south side of the property and the adjoining and abutting streets as they now exist were then highways vested in the city. It is not the fault of the city that the peculiar shape of the land does not permit it to be laid out advantageously in harmony with existing streets, as the plaintiff claims.

It seems to me the city would be acting properly if upon a submission by the plaintiff of a plan for subdivision of this land they required him to dedicate a street to the public in the identical place where the street in question has been placed, and if he had done this in order to subdivide his property he would not have received any recompense and the adjacent holders would not have been called upon to pay any portion of it.

As above mentioned, a subdivision will greatly enhance the value of the plaintiff's land, but the right to subdivision and the placing of streets which the city must take care of and for

MAN.

C. A.
1912

McNICHOL
v.
WINNIPEG.

Howell, C.J.M.

which they are responsible, is subject to their control, and so the plaintiff must lay out the streets by the consent of the city or must leave his land unsubdivided.

I cannot keep from my mind my knowledge of the locality, and it seems to me beyond question that this tract of land, unsubdivided as it now is with the street now taken from a part of it, is much more valuable than it would be if it remained as it formerly was without having lost the area taken for this street, and in that view of it the plaintiff has rather gained than lost by the action of the city.

Looking at it from another aspect, I think the plaintiff cannot complain, for I think the balance of the tract can be readily and profitably subdivided in harmony with the street in question, and I think the city's suggestion for subdivision would make the property more valuable to the plaintiff than the way he suggests. The new street gives to the plaintiff a street sixty-six feet wide along the north side of his property a portion of the way, and then through the remainder and thus gives the property access to a long and prominent street and a portion of the land for this street is contributed by the owner on the north side and in addition he gets by the award of Mr. Macdonald the sum of $3,556.67 over and above any charge upon his land.

I think Mr. Macdonald's award grants to the plaintiff the due compensation provided for by section 774, and it seems to me that the rules laid down by section 818 have been followed.

The plaintiff's counsel argued at length that there was damage to the triangle of the plaintiff's land which was left on the north side of the street, but the question is not one as to the increase or reduction in value of this triangle; the question is as to the effect of this street upon the value of the whole tract of land belonging to the plaintiff, and I think, on this ground, the plaintiff has no cause to complain of Mr. Macdonald's award.

Our statute is quite different from the Ontario statute and I see no reason for any discussion of the Ontario cases.

If the points had been raised in argument I can see many difficulties in the way, many of which are discussed in the judgment of my brother Cameron, which I have had an opportunity of reading, but as counsel on both sides have asked for a decision on the merits, I have not considered them.

Professional testimony was given on both sides, but as usual each swore in favour of the side on which he was called. My own observation and knowledge of the locality harmonizes as to value with that of the arbitrators.

I would set aside the judgment of Mr. Justice Metcalfe and restore Mr. Macdonald's award as to the amount payable to the plaintiff. The plaintiff should get the costs of the arbitration proceedings before Mr. Macdonald and the costs of this appeal.

RICHARDS, J.A., concurred in the judgment pronounced by Cameron, J.A.

Perdue, J.A.

PERDUE, J.A.:—An objection on behalf of the city was taken before this Court that no rule or order had been obtained making the submission a rule of Court, as a foundation for the proceedings by way of appeal. This objection was not taken before Metcalfe, J., and in my view no weight should be given to it by the Court of Appeal. The questions raised in the Court of King's Bench were dealt with by the Judge before whom they were argued, both sides taking it for granted that these questions were properly before the Court. We might well assume that under such circumstances the omission of a formal preliminary step had been waived. In any event an order had been made by Metcalfe, J., on 3rd May, 1910, remitting the award of the three arbitrators to Mr. Macdonald, who was appointed arbitrator under the provisions of section 823 of the City Charter. That order was duly issued by the Court of King's Bench. No objection was made to the order; it was acted upon by both parties and an award was made in due course by the arbitrator in pursuance of it. On an appeal from his award the order was pronounced which is the subject of this appeal. I think that the matter was sufficiently before the Court, the submission to Mr. Macdonald being, in fact, by an order of the Court.

I think the order appealed from was wrong in that it simply set aside the award and made no provision for determining the matter submitted to the arbitrator or for referring back the award. Two awards have already been made on the material before the Court. It would be difficult for this Court to make an award upon the same material which would deal satisfactorily with the amount of compensation to be paid. To remit the matter to the same or other arbitrators would involve great additional expense. I was impressed with Mr. Coyne's argument that the amount of compensation should be increased, but on reflection I have come to the conclusion that Mr. Macdonald's award has done substantial justice. It differs but little in amount from that arrived at by a majority of the original board of arbitrators. That the two awards so nearly agree in the findings is some ground for believing that the compensation allowed is not far wrong.

I think the order of Metcalfe, J., should be reversed and the award of Mr. Macdonald restored. The city should pay the costs of the appeal and also the costs of the proceedings before Mr. Macdonald.

Cameron, J.A.

CAMERON, J.A.:—By-law No. 3649 of the city of Winnipeg, to provide for the extension of Ida avenue across lot 71, St. James, was passed January 22, 1906. Pursuant to that by-law it was referred to J. T. Latimer for the city, W. M. Fisher for

MAN.

C. A.
1912

MCNICHOL
v.
WINNIPEG.

Cameron, J.A.

A. R. McNichol, and W. J. Christie, the third arbitrator named by the other two, to determine the compensation payable to the said A. R. McNichol in respect of that portion of said lot 71 owned by McNichol and taken by the city or injuriously affected by reason of the said extension.

Latimer and Christie, after hearing the evidence, made their award June 30, 1909, fixing the compensation at $6,210 as of January 22, 1906, the date of the by-law. Fisher did not join in the award, holding McNichol entitled to a much larger sum. From this award McNichol appealed to Mr. Justice Metcalfe, who, on May 3, 1910, made an order remitting the matter to the consideration and determination of Mr. P. A. Macdonald, under section 823 of the Winnipeg Charter, with power to act upon the evidence already taken and, in addition, to hear any further evidence he might deem necessary.

July 20, 1910, Mr. Macdonald made his award fixing the compensation payable to McNichol at $5,710. He set forth in a schedule to it the reasons influencing him in coming to this conclusion.

From this award McNichol once more appealed to the Court of King's Bench, whereupon on September 26, 1910, Mr. Justice Metcalfe made an order setting aside the award and making no other order except further to reserve the costs of the various proceedings.

From this order McNichol now appeals to this Court, asking that the order be reversed or varied and that an increased amount be awarded to him.

The principal points of objection taken to Mr. Macdonald's award were as follows:—

In the first place, it is urged that he was in error in not allowing, in addition to the damage awarded, the amount of assessment charged against the property for the cost of the work.

Next, Mr. Macdonald erred in not allowing substantial damages for the awkward shape of the triangle left on the property according to the plan Ex. 10. Mr. Macdonald held this was, in view of the surroundings, unavoidable.

Third. Damage was done to the property by reason of the street cutting diagonally through the property on its south side.

Fourthly. The distance between Ida avenue as it is and the top of the river bank, is so shortened that the property cannot now be subdivided to advantage. This is a damage to the whole property for which allowance should be, but has not been, made.

It was further urged that McNichol is entitled to interest since the date of the by-law, and to the costs of all the arbitrations and other proceedings. The original offer of the city was $4,350.

Objection was taken by Mr. Hunt that this appeal was not properly before this Court, there being no express provision for

such under the Winnipeg Charter. But the order appealed from must, like other orders and decisions of Judges of the King's Bench, be subject to the appellate jurisdiction of this Court under section 58 of the King's Bench Act.

It is further objected that Mr. Justice Metcalfe had no jurisdiction to entertain the application made to him. The point is that before the motion to set aside the award was made the submission or proceedings upon which the award was based should have been brought into Court and made a rule of Court upon an application by motion for that purpose. This was, no doubt, the well-defined practice.

> The jurisdiction to set aside an award, in old times, whether at common law or under the statute of William III, could alone be exercised on motion made for that purpose openly in the Court of which the submission had been made a rule.

Russell on Arbitration (ed. 1891), 653. The remedy by action or suit, always available in the Court of Chancery (save in cases coming within 9 and 10 Wm. III. ch. 15, Russell, p. 695) still exists in full force.

The provisions with reference to the powers of the Court to deal with awards on motion prescribed by rule 773 of the King's Bench Act, were applicable only for the purpose of enforcing awards. By rule 774 it was provided that

> The former practice with respect to awards shall not be abolished, but the same shall only be followed by special leave of the Court or Judge.

These rules have been repealed by 1 Geo. V. ch. 13, sec. 2 (which came into force November 1, 1911); but such repeal does not affect any rights acquired, duty imposed or liability incurred before the coming into force of the repealing Act, "or the institution or prosecution to its termination of any legal proceeding or other remedy for ascertaining or enforcing any such liability, right or duty." Is this a legal proceeding or other remedy to ascertain or to enforce a right acquired, duty imposed or liability incurred prior to November 1, 1911? Originally the proceedings were instituted to ascertain McNichol's right to compensation, and they have not lost that character. Therefore the provisions substituted for rules 773 and 774 by sec. 1 of ch. 13, 1 Geo. V. are not in force so far as this proceeding is concerned, and we have it that the old practice with respect to awards is, for these present purposes, still subsisting.

As we have seen, the old jurisdiction of the Court to deal with awards could only be exercised on motion when the submission had been made a rule of Court. Section 823 of the Act does not abrogate this requisite.

> Every award . . . shall be subject to the jurisdiction of the Court of King's Bench, as if made on a submission . . . containing an agreement for making the submission a rule of . . . Court.

MAN.
C. A.
1912
McNICHOL
v.
WINNIPEG.
Cameron, J.A.

It is the submission that is to be made a rule of Court. Here there is no submission. The arbitrators are appointed under sections 796 *et seq.* "Either party may appoint an arbitrator." A written appointment is not necessary, except that the city must surely act by by-law. But if the appointment be by the mayor it may apparently be verbal. Notice of the appointment must be in writing, however: sec. 798. Under the Lands Clauses Consolidation Act, 1845, sec. 25, the appointment of an arbitrator "shall be deemed a submission to arbitration": Russell 584. There is no provision similar to this in the charter. So here we are without any submission and without any statutory provision making the appointment of the arbitrators or any other proceeding equivalent to a submission. How then is the Court, no action having been brought either to enforce or set aside this award, to acquire jurisdiction over it and the parties to it?

It was the express intention of the Legislature that the Court of King's Bench should have summary jurisdiction. This clearly appears from 823 and from 827 also. And in the absence of any definite provision as to the procedure, it would seem to me that the practice outlined by the Lands Clauses Act could be followed and the arbitrators' appointments considered a submission. Some authority for this is found in Russell at p. 589, where it is said that the practice under the Railway Clauses Act and other Acts would probably be analogous to that under the Land Clauses Act. The objection to the jurisdiction was one not raised before Mr. Justice Metcalfe, but is raised before us for the first time. Had it been taken below it could have been met by an adjournment until the necessity for making a submission a rule had been complied with. That is only an *ex parte* proceeding after all. The lapse of time could not be considered as effective to prevent that step in view of such remedial rules as 341, 384 and 426 of the King's Bench Act. And if the Judge had such powers this Court certainly has, and I see no reason why they should not be exercised in this case.

The further objection that inasmuch as Mr. Justice Metcalfe has exercised the powers set out in section 823, those powers are now exhausted, is met by the consideration already referred to that an appeal to this Court from the Judge's order does exist and that thereupon this Court has all the powers in said section set forth.

I wish first to consider the bearing upon this case of the principle laid down by Mr. Justice Maclennan in *Pryce* v. *Toronto*, 20 A.R. 16, and by Mr. Justice Street in *Richardson* v. *Toronto*, 17 O.R. 491.

In the first place, there is no provision in the Ontario Act similar to section 818 in the charter. There is section 437 practically identical with our 774. The meaning of the Ontario section is set out by Gwynne, J., in *Christie* v. *Toronto*, 25 Can

S.C.R. 551, at p. 561. Maclennan, J.'s, opinion at p. 24, in the *Pryce* case, is not founded on any provision of the Ontario statute, but solely upon the reasoning which there appealed to his mind as fixing a just method of arriving at the compensation. Now, in section 818 we have for the guidance of arbitrators the rules upon which they are "to proceed to appraise and determine the amount of the price, indemnity or compensation" when part only of the property is taken. They are to determine: (1) the intrinsic value of the property taken; (2) the increased value of the residue, and (3) the damage to the residue. And the difference between (1) and (2), or (1) and (3) "shall constitute the . . . compensation which the party . . . interested shall be entitled to." It is argued that the principles laid down in the cases arising under the Ontario Act are identically those set forth in 818. But there is no limitation in the Ontario Act such as we find in the latter. The arbitrators are told to find one thing and then another, and the difference between the two "shall constitute the compensation." There is nothing said about and there is no room for, taking into consideration the "land owner's share of the cost of the work." Justly or unjustly, the Legislature has not permitted the arbitrators to take that element into their calculations. To put it in another way, had this award contained a provision adding the special assessment required to pay for the expenses of opening this street to the damages sustained by the owner, then it seems to me the award would have been open to attack on the ground that the arbitrators had exceeded their statutory powers. It must not be lost sight of, moreover, that the by-law, No. 3649, is not impeached in any way. It stands a valid by-law and now to give effect to the appellant's contention would be, in fact, to set aside or to ignore section 2 of that by-law. It would throw all the cost of the extension on the owners on both sides of Ida street west of the extension provided for. My conclusion is that I cannot see any way to interfere with the award on this ground.

As for the next objection, that the award makes no allowance for the triangle left as a consequence of the plan followed by the city, I am prepared, after a good deal of consideration, to adopt the reasoning of Mr. Macdonald, that is to say, that, in view of the facts and circumstances naturally and properly influencing the action of the city authorities, and in view of the topographical surroundings, it was inevitable that a portion of the property should be left in this, or a similar, condition. The same considerations apply to the third and fourth grounds. As to none of these, do I think a case has been made for increasing the compensation awarded.

Mr. Coyne pressed his client's claim for interest. But even if there could be read into section 818 a power on the part of the

MAN.

C. A.
1912

McNICHOL
v.
WINNIPEG.

arbitrators to give interest (which I consider at least doubtful), it does not appear to me that this is a case where it could be properly exercised.

I would set aside the order appealed from and restore the award made by Mr. Macdonald.

*Appeal allowed.*

ALTA.

S. C.
1912

Feb. 17.

## ALFRED THIEN v. THE BANK OF BRITISH NORTH AMERICA and ISRAEL UMBACH.

*Alberta Supreme Court, Scott, J. February* 17, 1912.

1. BANKS (§ VIII—160)—ASSIGNMENT OF LIEN NOTE—STATUTORY SECURITY TO BANK—R.S.C. 1906, CH. 29, SEC. 76, SUB-SEC. 2(*c*).

Where a borrower from a bank gave his own notes for the money loaned, and at the same time and as part of the same transaction, he transferred a lien note given by a buyer of horses sold by him for the price thereof and endorsed on such lien note an assignment of his interest therein and all his right, title and interest in and to the property covered thereby, such assignment of the borrower's interest in the horses is a violation of sub-sec. 2*c*. of sec. 76 of the Bank Act, R.S.C. 1906, ch. 29, forbidding banks to lend money upon the security of any goods, wares and merchandise, and therefore, the bank to whom such note was assigned cannot enforce any claim against the horses covered thereby.

[*Bank of Toronto* v. *Perkins*, 8 Can. S.C.R. 603, applied.]

2. BILLS AND NOTES (§ V B—132)—INVALID ASSIGNMENT OF PROPERTY COVERED BY LIEN NOTE—RIGHT TO RECOVER ON NOTE.

The fact that the assignment of property covered by a lien note transferred to a bank, as security for money borrowed from the bank by the payee thereof, was invalid, would be no bar to the right of the bank to recover on the note itself.

[*National Bank of Australasia* v. *Cherry*, L.R. 3 P.C. 299, specially referred to.]

3. FORCIBLE ENTRY AND DETAINER (§ I—1)—ILLEGAL DETAINER—LIABILITY OF HOLDER OF LIEN NOTE FOR.

Where a bank's representative gives instructions to seize horses covered by a lien note assigned to the bank as security for money borrowed by the payee thereof, and the person so instructed seizes horses other than those covered by the note, at two different times, and the bank's representative ratified the act of such person in the second seizure and detaining of horses and instructed him not to take back the first horses seized until he saw that he had the right ones, the bank is liable for the acts of such person in seizing such horses.

4. DAMAGES (§ III E—144)—ILLEGAL DETENTION—SEIZURE OF WRONG GOODS UNDER LIEN NOTE.

Where the lien note of a buyer of horses was transferred to a bank by the payee thereof as security for money borrowed for him from the bank endorsing thereon an assignment of all his interest in the horses which was invalid and an agent of the bank seized an old crippled team for the horses covered by the note and the plaintiff admitted that he was willing that the bank should take such team in place of the one covered by the note, he is not entitled to damages for the illegal detention of that team.

5. COSTS (§ I—2*b*)—ON ADJOURNMENT OF TRIAL—WITNESS FEES.

Where immediately before the time set for the trial of an action the party who finally prevailed changed his solicitor and was therefore not ready to proceed to trial at that time, the other party will be entitled to the costs occasioned by the delay and the prevailing party will be entitled only to the same fees for the attendance of his witnesses as if the trial had proceeded on the day fixed for it.

THE plaintiff's claim is for damages for the unlawful seizure and detention of four horses, the property of the plaintiff.

Judgment was given for the plaintiff and the counterclaim of the defendant bank was allowed in part; the counterclaim of defendant Umbach was dismissed.

*O. M. Biggar*, for plaintiff.

*G. B. O'Connor*, for defendant bank.

*L. W. Brown*, for defendant Umbach.

SCOTT, J.:—On 20th June, 1911, the plaintiff purchased from one Shwalbe a team of horses described as a black gelding and a gray gelding, and gave him a lien note thereon for $550, payable on 1st October, 1911. On the same day Shwalbe, in the presence of the plaintiff, borrowed $250 from defendant bank, giving his own notes therefor and at the same time and as part of the same transaction he transferred plaintiff's lien note to the bank and endorsed thereon an assignment of his interest therein and in the moneys payable thereunder and all his right, title and interest in and to the property therein mentioned. Also at the same time and as part of the same transaction, Shwalbe by writing pledged the lien note to the bank as a continuing collateral security for, among other things, payment of the then present or any future liability of the pledger on his own behalf, or as guarantor or endorser for another.

On 13th July, 1911, Shwalbe obtained a further loan of $155 from defendant bank, and gave his own promissory note therefor payable one month after date, and on 27th July, 1911, one Jennson obtained a loan of $200 from defendant bank and gave his promissory note therefor endorsed by Shwalbe.

On 25th September, 1911, defendant bank's manager at Edmonton wrote defendant Umbach, enclosing plaintiff's lien note and instructing him to seize the horses mentioned in the lien note. On 2nd October following Umbach went to plaintiff's farm and there seized a team of horses, believing them to be the horses mentioned in the lien note, and removed them from the premises. From information he afterwards obtained he was led to believe that he had seized the wrong team, and on 7th October, without returning the team already seized by him, he again went to plaintiff's farm and there seized and removed another team. The team first seized and removed was returned to the plaintiff on 21st October, but the defendants still retain possession of the second one.

The evidence leaves it at least open to doubt whether either of the teams seized by the defendant bank was the team mentioned in the lien note, but, owing to the view I entertain upon another question arising in the case, it is unnecessary for me to decide that question.

ALTA.

S. C.
1912

THIEN
v.
BANK OF
BRITISH
NORTH
AMERICA.

Scott, J.

It was contended on behalf of the plaintiff that the advance to Shwalbe of the $250 was made on the security by him to the bank of the plaintiff's lien note and of Shwalbe's interest in the horses mentioned therein, that the assignment of the interest in the latter case was a violation of sec. 76 (2) of the Bank Act, that such assignment was therefore invalid, and the bank did not thereby acquire any interest in the team. Counsel for the defendants objected that that issue was not raised by the pleadings. Upon referring to the pleadings I expressed the view that it had not been raised, whereupon plaintiff's counsel applied to amend his reply by raising that question.

I think the amendment is one that should be allowed in view of the fact that upon an application by the plaintiff for judgment heard by Beck, J., in November last, that question appears to have been raised without objection and considered by him (see 19 W.L.R. 549) and that all the evidence necessary to decide that issue was given at the trial.

In *The National Bank of Australasia* v. *Cherry*, L.R. 3 P.C. 299, and *Ayres* v. *The South Australian Banking Co.*, L.R. 3 P.C. 548, the effect of a provision in the charters of those banks similar in substance to the provision of the Bank Act I have referred to, was considered and commented upon. Lord Cairns, in the first case, expressed the view that a security taken under those circumstances would be void, while Lord Justice Mellish, in the latter case, expressed the contrary view, viz., that it would not prevent the property in the goods passing to the bank.

Both these cases, however, were considered in *The Bank of Toronto* v. *Perkins*, 8 Can. S.C.R. 603, and that Court adopted the view expressed by Lord Cairns and held that, under a similar provision of the Bank Act then in force here, a transfer of a mortgage to the bank to secure an advance upon a promissory note discounted at the time of the transfer, was null and void.

I cannot draw any distinction between the circumstances of the present case and those which appear in *The Bank of Toronto* v. *Perkins*, 8 Can. S.C.R. 603. It is true that Mr. Henderson, the manager of defendant bank, states that he made the first advance of $250, on condition that he hypothecated plaintiff's lien note as security, but I have already held that the advance and the hypothecation and the assignment of the note and of the property mentioned in it were parts of the same transaction, and that being the case, it must, I think, be assumed that the assignment of the property was taken as a security for the advance and that it was made at least partially on the strength of that security.

The first team seized was not the team mentioned in the lien note. The plaintiff and Shwalbe both state that the second team seized was not that team, and they further state that the team

covered by the note was taken away by them in order that it should not be taken by the bank under the note, and was afterwards sold by them. When the first team was seized the plaintiff offered no objection. In fact, he admits that he was desirous that the bank should take it, as it was an inferior team to that mentioned in the note. When the second team was seized the only objection he raised was that before taking it they had not returned the first one. I was not favourably impressed by the evidence of either the plaintiff or Shwalbe, and it appeared to me that before they became aware of any defect in the bank's claim to the team they were acting in concert in endeavouring to prevent the bank obtaining possession of it.

Mr. Henderson's instructions to defendant Umbach were to seize the team mentioned in the lien note, and it was contended on behalf of the bank that as the plaintiff states that neither of the teams seized were those mentioned in the note, the bank is not liable for the acts of Umbach in seizing other teams.

The evidence shews that Mr. Henderson by his subsequent conduct ratified the act of Umbach in seizing and detaining the second team, and the latter states that Henderson told him not to take the first team back until he saw that he had the right team.

During the trial counsel for the plaintiff stated that in the event of my finding that the defendant bank was not entitled under the lien note to seize the second team, he was willing to take it back and to accept damages for its detention only.

The plaintiff admits that he was willing that the bank should take the first team seized and states that he thought that, if he could palm off an old, crippled team for the one in the note, he would let Umbach take it. I therefore think that he should not be awarded damages for the detention of that team. For the detention of the second team I award him $230, being at the rate of $2 per day for each week day since the seizure. I fix the value of the second team seized at $500.

I give judgment for the plaintiff for $730 and costs, subject to the proviso that if the defendants return the team to the plaintiff within fifteen days the plaintiff shall be entitled to judgment for $230 only with costs on the higher scale.

The defendant bank counterclaims for the amount of plaintiff's lien note and interest and for the delivery up of the horses mentioned therein.

I am of opinion that the defendant bank is entitled to judgment for the amount of the note and interest. I hold that the plaintiff was aware that the note was transferred by Shwalbe to the bank as security, not only for the payment of the $250 then advanced, but also for any future indebtedness or liability as endorser or otherwise. The latter is still liable to the bank as endorser of the Jannsen note for $200, which is still unpaid, and

ALTA.
S. C.
1912
THIEN
v.
BANK OF
BRITISH
NORTH
AMERICA.
Scott, J.

therefore the bank is entitled as against the plaintiff to recover the full amount of his note and interest subject only to the liability to account to Shwalbe alone for any excess it may recover over the amount of his liability. The fact that the assignment of the property covered by the note is held to be invalid is no bar to the right of the bank to recover upon the note itself. See *National Bank of Australasia* v. *Cherry*, L.R. 3 P.C. 299, at p. 307.

I give judgment for the defendant bank in respect of its counterclaim upon plaintiff's note for $571.60 and costs. I dismiss the counterclaim in so far as it relates to the claim for delivery of the horses.

The defendant Umbach counterclaims for the costs and expenses of the seizure and detention of the horses seized by him and for damages for the wrongful conduct of the plaintiff in depriving him of the possession of the horses covered by the lien note. I dismiss his counterclaim with costs.

The costs of the motion of the plaintiff for judgment heard by Beck, J., were reserved by him to be disposed of by the trial Judge. I hold that neither party is entitled to those costs.

The action was set for trial on the first day of the sittings at which it was heard, but by reason of the fact that the plaintiff changed his solicitors immediately before the trial, he was not then ready to proceed at that time. The defendants, upon taxation, will be entitled to the costs occasioned by the plaintiff's delay, and the plaintiff will be entitled only to the same fees for the attendance of his witnesses as if the trial had proceeded on the day fixed for it.

*Judgment accordingly.*

---

SASK.
S. C.
1912
July 18.

**THE GREAT WEST LIFE ASSURANCE CO. (plaintiffs) v. Frederick LEIB, the New Hamburg Manufacturing Company, Limited, Parsons Hawkeye Manufacturing Company, Limited, Balcovski & Wodlenger, D. A. McDonald, The American Abell Engine and Thresher Company, Limited and the J. I. Case Threshing Machine Company (defendants).**

*Saskatchewan Supreme Court (Judicial District of Regina), Brown, J., in Chambers. July* 18, 1912.

1. SALE (§ I C—17)—CONDITIONAL SALE—MARKING OR STAMPING VENDOR'S NAME—NECESSITY OF NOTICE OF SALE—R.S.S. 1909, CH. 45, SECS. 8 AND 11.

A vendor of goods or chattels of the value of $15 or over, who has an office in the province, and whose name is stamped thereon or affixed thereto, as required by section 11, of chapter 45, R.S.S. 1909, relating to lien notes and conditional sales, need not, upon the vendee's default in payment, give the vendee the notice of re-sale required by section 8 of the Act, since by the express terms of section 11, the Act is not applicable to sales of goods and chattels marked with the vendor's name.

2. SALE (§ I C—18)—CONDITIONAL SALE—RE-SALE—VENDOR'S NAME STAMPED OR AFFIXED—R.S.S. 1909, CH. 45, SEC. 11.

The provision of section 11, chapter 45, of R.S.S. 1909, respecting lien notes and conditional sales, exempting from the operation of the

Act as to recording the agreements, sales of goods or chattels of the value of $15 or over, where the name of a vendor, who has an office in Saskatchewan, is plainly stamped thereon, or affixed thereto, is not limited in its operation to the original sale only, but applies as well to re-sales by the vendor upon the vendee's default in making payment therefor.

3. RECORDS AND REGISTRY LAWS (§ III C—21) — CONDITIONAL SALES OF GOODS.

The requirement of R.S.S. 1909, ch. 45, relating to the registration of lien notes and conditional sale agreements, does not, by the express provisions of section 11 thereof, apply to the re-sale by a vendor under such a note or agreement, upon a vendee's default, of goods or chattels of the value of $15 or over, which have the name of the vendor, who has an office in Saskatchewan, stamped thereon or affixed thereto.

4. MORTGAGE (§ VI H—131)—RIGHT OF SECOND MORTGAGEE TO SURPLUS ON SALE BY FIRST MORTGAGEE.

The vendor of goods or chattels who, in addition to taking a lien note or conditional sale agreement, obtains a second mortgage on land as additional security, if there is a deficiency upon a re-sale of the goods or chattels for the vendee's default, is entitled to have it satisfied from the surplus arising from the sale of the land under the first mortgage.

Statement

APPLICATION for payment out of Court of the surplus moneys paid in under mortgage sale proceedings which were taken under a mortgage given by Leib to the plaintiffs.

*J. E. Doerr*, for Leib.

*T. S. McMorran*, for American Abell Engine & Thresher Co., Ltd.

*C. W. Hoffman*, for D. A. McDonald and the partnership Balcovski & Wodlenger.

*W. M. Blain*, for the sheriff.

Brown, J.

BROWN, J.:—The sheriff had served notice claiming the moneys paid into Court, but through his solicitor he now abandons such claim. The only claim made on behalf of the parties represented by Mr. Hoffman is for $5 by way of costs, and as this claim is admitted by all parties it will be allowed and ordered to be paid out to the solicitors as a first charge on the moneys now in Court. The contest is between Leib and the American Abell Company, hereafter referred to as "the company." In the year 1908 Leib purchased from the company a traction engine and a combination separator under the usual form of lien agreement taken by machine companies. At the same time he also executed a mortgage in favour of the company on the land which has been sold under the plaintiffs' mortgage, the same being executed as collateral security for the full amount of the purchase price, and such mortgage was duly registered. Nothing appears to have been paid by Leib under his agreement, and in the fall of 1909 the company repossessed themselves of the machinery and sold the same, crediting the proceeds on Leib's indebtedness. It is admitted that the re-sale was made without any notice having been given to Leib thereof, and it is contended on behalf of Leib that, as section 8 of the

SASK.

S. C. 1912

GREAT WEST LIFE ASSURANCE CO. v. LEIB.

BROWN, J.

Act respecting Lien Notes and Conditional Sales, being ch. 45, R.S. Sask., requires such notice to have been given, the company's action in so re-selling without notice amounts to a rescission of the contract, and that in consequence they are not entitled to any of the moneys in Court. In support of this contention the following cases were cited on the argument: *Sawyer* v. *Dagg*, 18 W.L.R. 612; *American-Abell* v. *Weidenwilt*, 19 W.L.R. 730; *North-West Thresher Co.* v. *Bates*, 13 W.L.R. 657; *Sawyer* v. *Bouchard*, 13 W.L.R. 394.

On the other hand it is also admitted that both the engine and the separator had the name of the company properly stamped thereon or plainly attached thereto, and that the company keep an office in the province, all as contemplated by section 11 of the Act referred to.

The company contend that under the circumstances, by virtue of section 11, none of the provisions of the Act apply to them, and consequently they were not under any obligation to give any notice of the re-sale. It is not suggested that on the re-sale the company did not realize the full value of the machinery.

Section 11 of the Act in part reads as follows:—

> Nothing in this Act shall apply to the sale or bailment of any manufactured goods or chattels of the value of $15 or over which at the time of the actual delivery thereof to the buyer or bailee have the manufacturer's or vendor's name painted, printed or stamped thereon or plainly attached thereto by a plate or similar device; provided that such manufacturer or vendor (being the seller or bailor of such goods or chattels) keeps an office in Saskatchewan where inquiry may be had and information procured concerning the sale or bailment of such goods or chattels.

When the name of the company is on machinery, and there is an office in the province where intending purchasers can ascertain whether or not the same has been fully paid for, the need for registration of the agreement seems to be fully met, and that was evidently the view of the Legislature.

I cannot see that having the name so attached and such offices in the province can in any way be regarded as a substitute for giving notice to the original purchaser of an intended re-sale; in point of reason, one has absolutely no bearing on the other. We must, however, take the language which the legislature has used and give to it its natural meaning.

The language of section 11, "nothing in this Act," surely means, none of the provisions of this Act, not even those contained in sections 7 and 8. But it is contended that the word "sale" should be emphasized in section 11, and that this section really means, "nothing in this Act shall apply to the first or original sale," and therefore, inferentially, that all of the provisions shall apply to any subsequent or re-sale.

SASK.

S. C.
1912

GREAT WEST LIFE ASSURANCE CO. v. LEIB.

BROWN, J.

I cannot, however, accept that view of the section, because to do so would mean that registration was necessary on a re-sale even though the name of the company was affixed and they had the proper office in the province. Such a result could never have been intended. The cases cited do not assist in any way, for it is apparent that either the facts were not the same or the point in question was not raised in any of those cases. I cannot, without unduly straining the language of section 11, agree with the contention made on behalf of Leib, but am of opinion that under the circumstances of this case the provisions of sections 7 and 8 do not apply, and I therefore hold that the American-Abell company are entitled to the money claimed, or at least to sufficient of it to satisfy their claim.

I direct a reference to the Chamber clerk to ascertain the amount due the company under their mortgage, and that, with the exception of the $5 to be paid to the solicitors of D. A. McDonald *et al.*, the money in Court be paid out to the company, or at least sufficient thereof to satisfy their claim so ascertained and their costs, and that the balance, if any, be paid out to the defendant Leib.

*Reference directed.*

---

## BATES v. KIRKPATRICK.

MAN.

K. B.
1912

June 11.

*Manitoba King's Bench. Trial before Macdonald, J. June 11, 1912.*

1. BANKS (§ VIII—160)—STATUTORY SECURITY—LENDING MONEY ON SECURITY OF GOODS, ETC.—THE BANK ACT, R.S.C. 1906, CH. 29, SEC. 76, SUB-SEC. 2(*c*).

The advancement by a bank of money on a demand note under a contemporaneous agreement that a chattel mortgage should be given as security therefor as soon as it could be prepared, constitutes a violation of sec. 76, sub-sec. 2(*c*) of ch. 29, R.S.C. (the Bank Act), which prohibits a bank, either directly or indirectly, lending money or making advances upon the security of any goods, wares, and merchandise.

2. BANKS (§ VIII—160)—CHATTEL MORTGAGE COLLATERAL TO ADVANCE ON DEMAND NOTE—ADDITIONAL SECURITY—THE BANK ACT, R.S.C. 1906, CH. 29, SEC. 80.

A chattel mortgage taken by a bank cannot be sustained under sec. 80 of ch. 29, of the Bank Act, as one given for additional security for a debt contracted in the usual course of business, where money was advanced upon a demand note under an agreement that it should be secured by a chattel mortgage as soon as it could be prepared.

[*Bank of Toronto* v. *Perkins*, 8 Can. S.C.R. 603, referred to.]

Statement

THIS suit was instituted by W. H. Bates, assignee of D. W. Kirkpatrick, suing on behalf of all creditors against D. W. Kirkpatrick and the Union Bank of Canada. It was brought to set aside a chattel mortgage made by D. W. Kirkpatrick to the Union Bank as having been made in violation of the Bank Act, R.S.C. 1906, ch. 29, sec. 76, sub-sec. 2 (*c*).

Judgment was given the plaintiff for $1,457.10 with costs.

MAN.

K. B.
1912

BATES
v.
KIRK-
PATRICK.

Macdonald, J.

Messrs. *J. P. Curran*, K.C., and *C. Y. Mackenzie*, for the plaintiff.

Messrs. *A. E. Hoskin*, K.C., and *J. H. Chalmers*, for the Union Bank.

The defendant D. W. Kirkpatrick was not represented.

MACDONALD, J.:—At the conclusion of this case I found as a fact that the money was advanced by the defendant bank on the understanding and agreement that a chattel mortgage would be given as security additional to a note, and that the demand note was given for the purpose and with the intention of creating an indebtedness for which the chattel mortgage would be given.

When Kirkpatrick was introduced to the bank manager by a mutual friend, the latter was asked by the manager if he would endorse for Kirkpatrick, and not receiving any reply, he then asked the latter if he would give a chattel mortgage, to which he agreed. Kirkpatrick was then requested to call upon the bank's solicitor and give him particulars and description of the chattels for the purpose of having chattel mortgage prepared, which he did. The bank manager called upon this solicitor the same evening to see if he got particulars from Kirkpatrick, and to further instruct him with respect to the chattel mortgage.

The money was advanced three days before the chattel mortgage was executed, and at the time of its execution a note was given as collateral at three months, and although the chattel mortgage was not executed for three days after the moneys were advanced, yet instructions for its preparation were given on the day before the money was advanced. The chattel mortgage was therefore clearly understood by and in contemplation of the parties at the time of the agreement to advance the money and as security for such advance. The demand notes were given to create an indebtedness for which it was considered that three days afterwards a chattel mortgage could be given as for an existing past indebtedness; clearly a colourable transaction to evade the provisions of sec. 76, sub-sec. 2(*c*) of ch. 29, R.S.C., known as the Bank Act, under which a bank shall not either directly or indirectly lend money or make advances upon the security of any goods, wares and merchandise.

It is urged by counsel for the bank that under sec. 80 of the said Act the bank can take this security by way of additional security for debts contracted to the bank in the course of its business. The circumstances disclosed here do not bring the bank within this section. It was never intended to advance the money on the demand notes. Kirkpatrick needed some considerable time for the repayment of the moneys, and it was the understanding that reasonable time would be given, but not until the chattel mortgage was executed would such time be fixed. The

demand notes were simply a temporary arrangement and the real transaction would follow in the execution of the mortgage.

Where security is given to cover a contemporaneous loan, and in my opinion that is the effect of what was done here, it is a contravention of the section of the Bank Act above cited: *Bank of Toronto* v. *Perkins*, 8 Can. S.C.R. 603.

It is not in the course of business for a bank to advance moneys on demand notes with a contemporaneous agreement that a chattel mortgage is to be given as security as soon as the same can be prepared and then take the position of mortgagees taking additional security for a past due indebtedness.

The moneys would not have been advanced had it not been agreed that the security was to be given. I cannot, therefore, see it in any other light than that the security was actually for a present advance, and therefore in contravention of the Bank Act. The defendants seized and sold the goods and chattels mortgaged, realizing in gross the sum of $1,520.10. The auctioneer's fees reduced this amount to $1,457.10, for which latter amount there will be judgment for the plaintiff together with costs.

*Judgment for plaintiff.*

---

## THE KING v. CHARTRAND.



*Saskatchewan Supreme Court, Newlands, Johnstone and Lamont, JJ. July 15, 1912.*

1. INDICTMENT, INFORMATION AND COMPLAINT (§ II F—55)—INDICTMENT FOR SHOOTING WITH INTENT—CONVICTION FOR COMMON ASSAULT.

A conviction for a common assault may be sustained under an indictment for shooting at a person with intent to kill, where an accused person, when within shooting distance, pointed a gun at another, the bullet from which struck a horse the latter was riding.

[*Regina* v. *St. George*, 9 C. & P. 483, followed.]

CROWN case reserved on a conviction made for common assault upon an indictment for shooting with intent.

*T. A. Colclough*, for the Crown.

*W. B. Willoughby*, for the convict.



The judgment of the Court was delivered by NEWLANDS, J.:—The defendant was charged with having, on the 15th day of March, 1912, unlawfully shot at Francois Gosselin with intent to kill the said Francois Gosselin. The Chief Justice, who tried the case, in the stated case which he has referred to this Court says that in charging the jury:—

> I directed them that if they found that the prisoner presented the rifle in question in the general direction of Gosselin, and they could form their opinion as to that from the evidence as to where the bullet struck the horse, and the other testimony which I have set forth, they could find him guilty of common assault.

SASK.

S. C. 1912

THE KING v. CHARTRAND.

Newlands, J.

The question reserved is:—

Was my direction and charge to the jury correct with respect to the right of the jury to find the prisoner guilty of common assault (*a*) in view of the nature of the charge as originally preferred, (*b*) in respect to what constituted a common assault?

I think both of these questions are answered by the case of *Regina* v. *St. George*, 9 C. & P. 483. In that case the indictment was for feloniously attempting to discharge loaded firearms. Parke, B., said, p. 491:—

> The crime charged here is an attempt to discharge a loaded pistol; if a pistol was presented close to the person of the prosecutor, that is an assault, and it is included in the charge.

And further on, at p. 493, he says:—

> I think that if in this case it should be proved that the prisoner presented a pistol purporting to be a loaded pistol, and the jury are satisfied that it was so near as to produce danger to life if the pistol had gone off, that that would be an assault in point of law, and that the prisoner might be convicted of that assault upon this indictment.

The evidence in this case shews that Gosselin was within shooting distance of the accused, because the bullet from the rifle he fired hit the horse he was riding. I think, therefore, that the pointing of a loaded rifle at a person within shooting distance is an assault, and that that offence is within the charge as laid.

*Conviction affirmed.*

---

SASK.

S. C. 1912

July 15.

**John McENROE (plaintiff, appellant) v. C. J. TRETHEWEY, S. D. McKine, T. G. Pugsley, and R. D. Bell (defendants, respondents).**

*Saskatchewan Supreme Court, Wetmore, C.J., Newlands, Johnstone and Lamont, JJ. July 15, 1912.*

1. APPEAL (§ VII L 3—492)—REVIEW OF FINDINGS OF COURT—GRATUITOUS SERVICES.

Where there was ample evidence to warrant the trial Judge in his finding that the plaintiff's services as a real estate broker in listing for sale at the instance of a person other than the owner, property which was afterwards sold through another broker, were rendered gratuitously, an appellate Court should not reverse the trial judgment based upon such finding whereby the broker's action for commission was dismissed.

Statement

APPEAL by the plaintiff from the judgment delivered at the trial dismissing the plaintiff's action for commission on the sale of lands.

The appeal was dismissed.

*W. F. Dunn*, for appellant.

*N. R. Craig*, for respondent.

The judgment of the Court was delivered by

Wetmore, C.J.

WETMORE, C.J.:—This is an appeal from the judgment of the District Court Judge for the judicial district of Moosejaw,

SASK.

S. C.
1912

McENROE v. TRETHEWEY.

Wetmore, C.J.

The question to be decided by this Court is one entirely of fact. The action is brought to recover commission on the sale of property owned by one Bratt. The trial Judge gave judgment for the defendants, and the plaintiff appeals. I may state by the way that the testimony of the plaintiff himself seems to point very strongly in the direction that in making the arrangement he relies on, with the defendants, he was perpetrating a fraud upon Bratt, who was his employer, and who resided in Marshalltown, Iowa. However, as that has not been set up in the pleadings it is not necessary to decide it. There was very considerable contradictory testimony in the case, and the learned Judge's judgment as it bears upon the plaintiff's claim is as follows:—

> I find on the evidence that the plaintiff has failed to make out his case, and I am convinced that there was no such contract as he alleges. The evidence of the witness Bell was direct and positive, and I was much impressed with his testimony. I find that the defendants' version of the facts is the true one, and there will be judgment dismissing the plaintiff's claim with costs.

There was ample evidence to warrant the Judge in finding that the property was not listed with the defendants by the plaintiff at all, but that it was listed by one Morse; and there was also evidence to warrant the Judge in finding that the plaintiff's services were rendered gratuitously and not with a view to compensation. That is practically sworn to by the witness Bell, in whom the Judge seems to have placed so much confidence, and was to a certain extent corroborated by two other witnesses. Under such circumstances I am of opinion that this Court should not interfere with the judgment. There was a counterclaim in this case, and on the counterclaim the Judge found in favour of the plaintiff, and no appeal was taken from that judgment.

In my opinion the appeal should be dismissed with costs, and the judgment below affirmed.

*Appeal dismissed.*

---

## JOHNSON v. MOORE.

B.C.

S. C.
1912

June 18.

*British Columbia Supreme Court, Hunter, C.J. June 18, 1912.*

1. COSTS (§ II—32)—POWERS OF TAXING OFFICER—CROSS-EXAMINATION.

A taxing officer has jurisdiction to order the cross-examination of a party on his affidavit of disbursements.

Statement

APPEAL by defendant from the order of a taxing Master directing the cross-examination of plaintiff on his affidavit of disbursements, presented to the Master on the taxation of costs between party and party. Marginal rule 1002, sub-section 25 of

B. C.
S. C.
1912
JOHNSON v. MOORE.

the B. C. Supreme Court Rules, 1906, (Order 65, rule 27), provides as follows: "The taxing officer shall, for the purpose of any proceeding before him, have power and authority to administer oaths."

*Harper*, for defendant:—The taxing officer is given the power contended for by Order 65, r. 27 (25). See also *In re Evans* (1887), 35 W.R. 546.

*Macdonell*, for plaintiff:—There being no provision in the rules for an affidavit of disbursements, the taxing officer can have no power to order cross-examination upon such an affidavit.

HUNTER, C.J.

HUNTER, C.J.B.C.:—I think the taxing officer has jurisdiction. The appeal is allowed, with costs.

*Appeal allowed.*

---

SASK.
S. C.
1912
May 25.

## BELL v. SCHULTZ et al.

*Saskatchewan Supreme Court. Trial before Wetmore, C.J. May 25, 1912.*

1. SALE (§ III B—61)—OMISSION OF VENDOR'S NAME FROM LIEN NOTE—TERMS OF SALE.

The failure to insert the name of the vendor in the space intended therefor in a lien note given for property purchased at an auction, which provided that "the title, ownership and right of possession of the goods for which [the] note [was] given shall be and remain at my risk in . . . until this note . . . is paid in full," does not affect the vendor's title to and ownership of the personalty sold, where the terms of sale, which were known to the vendee, required such a note to be given.

[*Kirk* v. *Unwin*, 20 L.J. Ex. 345, applied.]

2. BILLS AND NOTES (§ I—4*a*)—RIGHT OF VENDOR OF GOODS TO FILL IN BLANK LEFT FOR HIS NAME IN LIEN NOTE.

A vendor may, after the execution and delivery of a lien note from which his name was omitted, given for personalty purchased at an auction sale, the terms of which required such a note to be given, insert his name in the blank spaces intended therefor.

3. CONTRACTS (§ I D 4—63)—OFFER TO ACCEPT CERTAIN PERSON AS ENDORSER—WITHDRAWAL BEFORE ACTUAL SIGNING OF NOTE.

The vendor of goods sold at auction who agreed to accept a designated person as accommodation signer to the note to be given for the purchase money, may retract such consent and refuse to accept such signer at any time before the note was actually signed, where the conditions of sale provided that for goods not paid for in cash, the vendor should receive the note of the purchaser and of an accommodation maker satisfactory to the vendor, particularly where an enquiry by the latter as to the financial standing of the proposed surety disclosed misrepresentations of the buyer with reference thereto.

4. SALE (§ I C—15)—CONDITIONAL SALE—RETAKING POSSESSION OF GOODS SOLD—MISREPRESENTATION AS TO SOLVENCY OF INDORSER.

The vendor of goods sold at auction, upon discovering that the accommodation signer to a lien note given for the purchase money, as the terms of sale required, had made false statements as to his solvency, may retake the goods from the vendee, where the latter failed to secure another satisfactory signer.

5. COSTS (§ I—10)—UNTRUE AND UNCALLED FOR DEFENCES—AWARDING AGAINST SUCCESSFUL PARTY.

Where the prevailing party to an action raised untrue and uncalled for issues by his pleadings, costs as to such issues will be awarded against him.

SASK.

S. C.
1912

BELL
v.
SCHULTZ.

Wetmore, C.J.

TRIAL of an action for trespass and counterclaim.

*H. Y. MacDonald*, and *J. M. Crerar*, for plaintiff.

*A. D. MacIntosh*, for defendants.

WETMORE, C.J.:—This is practically an action of trespass *de bonis asportavit*. The defendant Schultz held an auction sale at his place at which the plaintiff bid in a bay mare, a bay gelding, and a set of double harness, for which he agreed to pay $456. The sale advertisement, with the contents of which the plaintiff was acquainted, stated (as set forth in the statement of claim) that for all sums below the sum of $10 cash was to be paid, and for all purchases above that sum a lien note was to be given payable on the 1st December, 1911, signed by the purchaser and an accommodation party satisfactory to the defendant Schultz and payable to him. Upon the sale above mentioned to the plaintiff, and upon the afternoon of the day of sale, a document was drawn up by the defendant Schultz and signed by the plaintiff and one Arthur B. Baker, as his surety. That document is as follows:—

$456 No. Humboldt. March 30, 1911.

On or before the 1st day of December, 1911, for value received, I promise to pay Daniel L. Schultz or order, at the Canadian Bank of Commerce, Humboldt, the sum of Four hundred and Fifty-six dollars, with interest at 9 per cent. per annum until due, and 10 per cent. per annum after due till paid.

Given for one team of horses and harness Bay mare
1 mare, eight years—one horse, 12 yrs. old. Dark bay horse.

The title, ownership, and right to the possession of the goods for which this note is given shall be and remain at my own risk in until this note or any renewal or renewals thereof is fully paid with interest at said rate. I further agree to furnish security satisfactory to him at any time if required; and if I fail to furnish such security when demanded, or if default in payment is made of this or any other note in his favour, or should I sell or dispose of or mortgage or attempt to sell the undermentioned land which I own, or if for any reason should consider this note or any renewal or renewals thereof insecure, he (*or* they) have full power and authority to declare it and all other notes made by me in his (*or* their) favour due and payable at any time, and suit therefor may be entered, tried and finally disposed of in any Court having jurisdiction; and also to take possesssion of the said goods and hold the same until this note or any renewal or renewals thereof is paid with interest or sell them at public or private sale, the proceeds thereof to be applied on the amount unpaid after deducting all expenses connected with such taking possession and sale; and taking and sale of said goods shall not be a release of my liability for the balance of said price, which balance I agree to pay. Should this note not be paid when due, I agree to pay all reasonable costs of collection of the same, including Court and bailiff's fees and solicitor's charges and disbursements. For the purpose of taking possession and recovering said property of their agent or agents may enter into or upon any building, enclosure

SASK.

S. C.
1912

BELL
v.
SCHULTZ.

Wetmore, C.J.

or lands, using such force as may be necessary for such purpose. The destruction or damage of said property by fire or by any other means, whatever, shall not release me from any liability for payment. I hereby agree to the above terms, all agreements and conditions being stated herein.

The land above referred to and which I own is NE sec. 26, Tp. 36, Rg. 24 West 2nd.

Arthur E. Bell.
Witness: S. L. B. Campbell. Arthur R. Baker.

That document was partly written and partly printed. All of that portion of it in which the blanks left for a name appear was printed. The plaintiff swore that he noticed at the time he signed the document that the name was not filled in in those blanks, but he knew that a lien note was necessary because it was advertised. The same afternoon, and after this document was signed by the plaintiff and Baker, the horses and harness were delivered to the plaintiff, who took them to his place. At the time that Schultz accepted Baker as surety, he asked him if his place was clear, and he told him it was. Schultz learned later on in the day, and shortly after the plaintiff had gone away with the horses and harness, and also after Baker had gone away, that Baker had not told him the truth. He proceeded at once, on the same day, with one Seeley, to Baker's place, when Baker told him that his place was mortgaged, and Schultz at once told him that he could not accept him as a backer on the note, and thereupon Schultz, Seeley and Baker went to the plaintiff's place and interviewed him. Schultz told him that he had found out that Baker's place was mortgaged, and he would not accept him as a backer, and he wanted the team back. The plaintiff demurred to this, and wanted to give him someone else as surety. The name of one Tom Smith was mentioned by Schultz, but the plaintiff demurred to asking him, as he was not on friendly terms with him, and he suggested one Ed. Smith and one Albert Farr as sureties. Schultz consented to go and see these persons, and he and the plaintiff, with Seeley and Baker, went over to where they resided, and the plaintiff and Schultz interviewed Smith and Farr, who both consented to become surety on a note with the plaintiff. The evidence up to this stage was not very contradictory. The only matter of difference that can be considered material is that the testimony on the part of the plaintiff was that Schultz stated in the plaintiff's yard that he would accept a note if Ed. Smith signed it. I am not satisfied that Schultz did say that, but if he did he certainly shewed a disposition to change his mind before he got to Smith's place, for he expressed an intention to turn back to the plaintiff's place and take the team, but was persuaded to go on to Smith's place, but I am of opinion that when he got to Smith's place he was afforded a very good reason for not accepting him as surety. The testimony on the part of the plaintiff

was that Schultz at Smith's place consented to accept him and Farr as backers of the plaintiff's note, and as he had not a form of note with him he went away promising to return next morning at nine o'clock and have a note signed by the plaintiff and these persons. Schultz denies that he so consented to accept those men as backers, and I find that he did not so consent. To have done so would be entirely at variance with his conduct from the inception of the matter of taking a surety on the plaintiff's note. Just before the making of the note, Schultz inquired as to the standing of every person suggested as a surety. He refused Whitaker, because he had not got his patent. He asked Baker if his land was clear, and rejected him when he subsequently discovered that it was not. It seems to me quite inconsistent for him to have accepted Smith, who in answer to his question whether his place was clear told him that he was too inquisitive, and to have accepted Farr, who could only tell him that he had made all the payments that were *due* on his place, and gave him a boastful but somewhat unsatisfactory statement as to his other property. As a matter of fact it turned out that Smith's place was mortgaged. Schultz did not come back to Smith's place the following morning, but he appeared at the plaintiff's place about seven o'clock that morning, and the security offered not being satisfactory, told him that the security offered was no good to him (Schultz), demanded the return of the team, and offered to give up the note to the plaintiff. The plaintiff did not give up the team, whereupon Schultz went away and sent the other defendant (Bushey) out with a warrant, who on the afternoon of the same day seized the horses and harness and took them away. This constituted the trespass complained of herein. Schultz inserted his name in the blanks in the note after seeing the plaintiff at seven o'clock in the morning of the day of the seizure and before delivering the warrant to Bushey.

It is claimed that the defendants were not justified in seizing the property, on three grounds:—

(1) Because, the blanks in the agreement not having been filled in, the provisions respecting the lien and the right to take the property were inoperative;

(2) Because the defendant Schultz had no right to fill his name in those blanks after the note was signed;

(3) Schultz having consented to accept Ed. Smith and Farr as sureties, he ought not to have taken the property.

As to the first question raised: I have already drawn attention to the facts that the sales advertisement under which the sale was held stated that a lien note would be required for purchaser over $10, that the plaintiff knew it, and knew that a lien note was necessary, and that the statement of claim describes the document which the plaintiff and Baker signed as a lien

SASK.

S. C. 1912

BELL v. SCHULTZ.

Wetmore, C.J.

agreement. If the contention for the plaintiff is well taken, that document is not a lien agreement, as stated in the statement of claim, it is to all intents and purposes a promissory note, and nothing more. If the contention is well taken, there is only one clause in the whole of the provisions referring to a lien and the right to retake the property which is effective, namely:—

> Should this note not be paid when due, I agree to pay all reasonable costs of collection of the same, including Court and bailiff's fees and solicitor's charges and disbursements,

a provision which, in so far as recovering the amount due on the promissory note, (if that was all the document amounted to), would mean little or nothing. I find that the plaintiff and the defendant Schultz, both intended that the document should be a lien note, and that the omission to fill in the blank spaces was an oversight. That being so, in whose favour did the lien attach, just as a matter of construction of the agreement (apart altogether from any question or rectification of it). The document specifies the property for which the promise to pay the $456 mentioned in it was given, and then goes on to state that

> the title, ownership and right to possession of the goods for which this note is given shall be and remain at my own risk in until this note is paid.

Remain in whom? Who could it be except the party who delivered or was about to deliver the actual possession to the purchaser of the property who gave the note in question? It was to remain or continue in the person who up to that time held the title, ownership and right of property in this case of Schultz. I think this is very obvious, and ample authority can be proved for so holding. I wish to point out that the agreement in question is not under seal. In *Kirk* v. *Unwin et al.*, 20 L.J., Ex. 345, a submission to arbitration provided that an award in writing

> was to be delivered to the parties or any of them on or before the 30th of December next or on such further or later day as the said Joseph Hayward by a memorandum under his hand indorsed hereon

and stopped there. Alderson, B., in delivering the judgment of the Court, states as follows, at p. 347 of the report:—

> No one can doubt who reads the words that the words "shall appoint" have by some accident been left out by mere carelessness. The question is, whether sufficient does not appear on the face of the agreement to enable the Court to supply that defect. We think there does. We must give the same effect to the words of the provision which cannot be treated as wholly insensible; and a literal reading of the words would make it wholly insensible. We think, therefore, we may fairly read it as providing that the award may be made either on the day mentioned in the submission, or within such further time as shall be indorsed by the arbitrator in writing on the instrument of submission.

SASK.

S. C.
1912

BELL
v.
SCHULTZ.

Wetmore, C.J.

I think that this case is very much in point with the question I am now discussing as it arises in the case before me, only in this last mentioned case the facts bearing on the question are stronger by reason of the allegations in the statement of claim and the facts testified to by the plaintiff as to the character of the document that was intended to be given. In *Wilson* v. *Wilson*, 5 H.L. Cas. 40, a suit had been instituted by Mary W. H. Wilson against her husband John W. H. Wilson, for nullity of marriage and with the view of putting a stop to that suit articles of agreement were drawn up for a separation, which contained a clause that so long as he the said John W. H. Wilson performed certain covenants, etc.,

> he, the said John W. H. Wilson his heirs, executors, etc. . . . shall be indemnified from all the present debts and liabilities of the said John W. H. Wilson

by the joint and several covenant of the trustees. It was set up that this provision was an error and it was intended to indemnify Wilson the husband, from the present debts and liabilities of his wife. Lord St. Leonards so held. He is reported at pp. 66 and 67 as follows:—

> But the question still arises, what is the true construction of the contract? Now it is a great mistake if it is supposed that even a Court of law cannot correct a mistake, or error, on the face of an instrument . . . Both Courts of law and of equity may correct an obvious mistake on the face of an instrument without the slightest difficulty. . . . There was no question about going contrary to the intention. *It was a question of construction.*

And at p. 68 he proceeds:—

> What, then, is the plain construction of this instrument? I am clearly of opinion that, upon the proper construction of these articles, without doing the slightest violence to words, this is a covenant to indemnify the husband against the wife's debts, and not a covenant to indemnify him against his own debts.

Of course this conclusion was reached upon consideration of the object of the articles and of the provisions and language used in the several clauses thereof. The other members of the Court do not seem to have been so pronounced on the question as Lord St. Leonards. Nevertheless, I gather that they were practically of the same opinion: *Burchell* v. *Clark*, 2 C.P.D. 88. See also *Adsetts* v. *Hives*, 33 Beav. 52. I hold, therefore, that on the true construction of the document in question in this case the title, ownership and right to the possession of the horses and harness was to remain in Schultz until the note or any renewal of it was paid, and that the document is to be read as if Schultz's name had been inserted in each one of the blank spaces in question.

This conclusion disposes of the next objection, namely as to Schultz's right to fill in the blanks with his name. By so doing

SASK.

S. C. 1912

BELL v. SCHULTZ.

Wetmore, C.J.

he did not affect the agreement or the rights of any party to it in the slightest degree, and therefore the clause in question was valid.

As to the third objection, I have found that Schultz did not consent to accept Ed. Smith and Farr as securities, but assuming that he did so consent on the evening before the date of the seizure, I am of opinion that he would be at liberty to change his mind any time before they signed a new note or became bound in some way, and I think that there were, as I have before intimated, very good reasons which might influence him to change his mind. I hold that the defendants were justified in seizing the property in question and taking it away.

The plaintiff caused the horse and harness to be replevined. There will be judgment for the defendant for the return of the property, with general costs of the action. There will also be judgment for the defendant for that part of the counterclaim which refers to paragraphs 13 and 14 of his statement of defence for $5 damages and costs. I cannot give substantial damages, because none were proved. The defendant Schultz by his statement of defence set up a number of untrue and in my opinion utterly uncalled for matters of defence. He denied the auction sale, and that the plaintiff bought the property in question at such sale, when as a matter of fact that sale and purchase and the circumstances in connection with it to a very large extent were necessary for the successful maintenance of his real defence. He also denied that Baker signed the note in question, and that he, Schultz, delivered the property to the plaintiff. He also denied the seizure by Bushey. Bushey denied that he demanded the $456 and on the plaintiff's refusal to pay it made the seizure. Every single matter so pleaded was untrue to the personal knowledge of the defendants. It serves no other purpose that I can discover than to give the Judge the opportunity of wading through a lot of meaningless trash. I think that a practice has grown up (in my opinion too general) of pleading false pleas, and, I may add, without any apparent object in so far as disposing of the merits of the case is concerned, and I am of opinion that this practice ought to be stopped. Therefore, with a view of endeavouring to attempt something in that direction, I will order judgment for the plaintiff upon the issues joined upon the first, second, fourth and fifth paragraphs of the statement of defence, and upon that part of the third paragraph thereof which denies that the defendant, Schultz, delivered to the plaintiff possession of the goods and chattels in question, with the costs exclusively applicable to those issues, such last mentioned costs to be taxed and deducted on the judgment hereby awarded to the defendants.

*Judgment accordingly.*

## Re F. H. PRICE.

SASK.

S. C.
1912
May 16.

*Saskatchewan Supreme Court, Wetmore, C.J., in Chambers. May 16, 1912.*

1. EVIDENCE (§ IV D—406)—LAND TITLES—PRODUCTION OF EVIDENCE THAT EXECUTION FILED ON DIFFERENT DATE THAN STATED IN CERTIFICATE—CONFIRMATION OF SHERIFF'S SALE.

The production of further evidence to shew that an execution was lodged in the land titles office on a day prior to that stated in the certificate of execution issued by the registrar, may be permitted by the Court on an application to confirm a sale of land by the sheriff under such writ.

2. EXECUTION (§ I—4)—FILING IN LAND TITLES OFFICE—TIME OF GOING INTO EFFECT—PRIORITY—SASK. RULES OF COURT 466.

An execution lodged in the land titles office and duly renewed, will, by virtue of Rule 346 of the Judicature Ordinance of 1898 (Sask.) (now Rule 466 of the Sask. Rules of Court), have effect, and priority from the time of the original filing thereof.

3. LAND TITLES (§ IV—40)—CAVEATS—PRIORITY OF EXECUTION—AGREEMENT TO PURCHASE SUBSEQUENT TO FILING EXECUTION.

Priority is not acquired by the filing of a caveat by one who became interested in land under an agreement for its purchase after an execution had been lodged and registered against it in the land titles office.

[*Wilkie* v. *Jellett*, 26 Can. S.C.R. 282, distinguished.]

4. MOTIONS AND ORDERS (§ I—4)—AFFIDAVITS READ PURSUANT TO LEAVE—NECESSITY OF FILING PRIOR TO SERVICE OF NOTICE OF MOTION.

Affidavits that are read, pursuant to leave granted, on the hearing of an application, need not be filed before service of notice of the motion, as required by Rule 418 of the Judicature Ordinances in the case of affidavits upon which the motion was originally based.

5. MOTIONS AND ORDERS (§ I—4)—FAILURE TO FILE AFFIDAVITS READ WITH LEAVE—MISLEADING NO ONE—IRREGULARITY—SASK. RULE 747.

The failure to file, at the time of making a motion, affidavits which were read, with leave of the Court, on the hearing, is, at most, an irregularity, which misled no one, and, under Rule 747, Sask. Judicature Act, may be disregarded by the Court.

6. MOTIONS AND ORDERS (§ II—8)—APPLICATION TO CONFIRM SHERIFF'S SALE—MISSTATEMENT IN AFFIDAVIT—ABSENCE OF ANY MISLEADING.

A statement in an affidavit of the sheriff that an execution was renewed in the office of the "local registrar" of the District Court, instead of that of the registrar of the land titles office, will not defeat an application to confirm a sale of land under the writ, since, as there was no such office as the local registrar of such Court, no one could have been misled by such error.

7. MOTIONS AND ORDERS (§ II—8)—MOTION TO CONFIRM SHERIFF'S SALE—MISSTATEMENT IN SHERIFF'S TRANSFER—EFFECT ON APPLICATION.

The erroneous statement in a sheriff's transfer of land under an execution sale, that the writ was issued out of the Supreme Court, instead of the District Court, will not defeat an application to confirm the sale, notwithstanding a new transfer will be necessary.

8. LEVY AND SEIZURE (§ II—32)—SUFFICIENCY OF SHERIFF'S RETURN—"NULLA BONA"—SASK. RULE 365.

A sheriff's return of *nulla bona* to an execution is a sufficient compliance with Rule 365, of the Judicature Ordinance (C.O. 1898, ch. 21, Sask.), to permit a levy upon and sale of land under the writ.

SASK.

S. C.
1912

RE
F. H. PRICE.

9. EVIDENCE (§ IV D—408*a*)—DOCUMENTARY EVIDENCE—SHERIFF'S RETURN—RIGHT TO QUESTION ON INTERLOCUTORY MOTION.

The truth of the sheriff's return of *nulla bona* to an execution, cannot be questioned on an application to confirm a sale of land thereunder, without a substantive application to set aside the return as a matter of record.

10. EVIDENCE (§ IV G—423)—AFFIDAVIT OF SHERIFF SHEWING RETURN OF "NULLA BONA"—NECESSITY OF PRODUCING ORIGINAL WRIT—RECOGNIZED PRACTICE.

It is unnecessary in Saskatchewan to produce the original or certified copies of the execution, and its renewal, as well as the sheriff's return of *nulla bona* thereof, on an application to confirm a sale of land thereunder, the practice of the Court for many years in that province having permitted such facts to be shewn by affidavit.

11. EVIDENCE (§ II I—300)—BURDEN OF PROOF AS TO SHERIFF'S SALE—APPLICATION TO CONFIRM.

The onus of shewing that all of the requirements pertaining to a sheriff's sale of land under execution were complied with, rests on the person applying for confirmation thereof.

12. LEVY AND SEIZURE (§ III B—49)—RIGHTS AND LIABILITIES OF PURCHASER AT SHERIFF'S SALE—EVIDENCE THAT SALE HELD AT TIME SPECIFIED IN NOTICE.

The failure to shew, on an application to confirm a sale of land by the sheriff under an execution, that the sale was held at the hour specified in the notice of sale, vitiates the proceedings.

13. EVIDENCE (§ IV G—423)—AFFIDAVIT PROVING SALE HELD AT TIME SPECIFIED IN NOTICE OF SALE.

The Court may permit it to be shewn by affidavit that a sheriff's sale of land under an execution was held at the hour specified in the notice of sale, where the application to confirm the sale did not disclose such fact.

14. HOMESTEAD (§ IV A—30)—EFFECT OF ALIENATION OF LAND ON WHICH EXECUTION WAS LEVIED.

Whether land on which an execution was levied was a homestead, or whether a sale thereof to another rendered it liable to an execution registered in the land titles office prior to such sale, are mixed questions of law and fact.

Statement

THIS is an application on behalf of the sheriff of the Saskatoon District to confirm a sale of lands made by him under an execution issued against the lands of Price at the suit of the Saskatchewan Elevator Company.

Judgment was given directing the trial of an issue.

*T. S. McMorran*, for the sheriff.

*Alex. Ross*, for Zufelt, a caveator.

Wetmore, C.J.

WETMORE, C.J.:—The application came on in the first instance before my brother Lamont, and was adjourned by him in order to enable further material to be produced on the part of the sheriff. I have interviewed that learned Judge, and he informs me that he gave the sheriff leave to produce further material with the view of establishing that the execution in question was lodged in the land titles office in 1909, and was properly renewed in so far as that office was concerned. I therefore allow the additional material offered before me on

SASK.

S. C.
1912

RE
F. H. PRICE.

Wetmore, C.J.

behalf of the sheriff to be read. It now appears that the execution in question was lodged in the land titles office on the 24th August, 1909, and renewed on the 24th August, 1911. Therefore it had, by virtue of Rule 346 of the Judicature Ordinance of 1898* then in force, effect and priority "according to the time of the original delivery thereof." It appears by the affidavits on the part of the sheriff that it was received in his office about the 25th August. It must have been received on the 24th, for it was registered on that date. No point was raised upon this slight variance. Price became registered owner on the 5th April, 1909. One George A. Zufelt, on whose behalf this application is opposed, became interested in the land by virtue of a written agreement between him and Price dated 23rd July, 1910, to purchase the land, and he lodged a caveat based on that agreement in the land titles office on 8th September, 1910. All that it is necessary to say for the purposes of the question I am now considering is that Zufelt, at the time of the registration of the Elevator Company's execution, had no equity as against that execution, because it was registered before Zufelt's agreement with Price was made, and *Wilkie* v. *Jellett*, 26 Can. S.C.R. 282, does not apply. Evidently the first certificate as to executions issued by the registrar of land titles and produced before Judge Lamont was erroneous in stating that the original execution was registered on the 25th August, 1911. The matter came before my brother Lamont on the 9th April, and before me on the 3rd May. The affidavits upon which the application was originally founded were filed on the 6th April. The further affidavits used before me on the 3rd May. The notice of motion was served on Price on 14th March, and on Zufelt on 1st April. It is claimed that the affidavits should, under Rule 418, have been filed before the notice of motion was served. That would have been the correct practice as respects the affidavits filed on 6th April, but not in respect to those filed on the 3rd May, because they were read pursuant to leave granted. The omission to file the affidavits filed on the 6th April before that time is at

*Can. Ord. N.W.T. (1898), 346, has been superseded by sec. 466, of the Saskatchewan Rules of Court, which is as follows:—

Every writ of execution shall bear date the day of its issue, and shall remain in force for two years from its date (and no longer, if unexecuted, unless renewed) but such writ may at any time before its expiration, and so from time to time during the continuance of the renewed writ, be renewed by the party issuing it for two years from the date of such renewal, by the local registrar; and the production of a writ of execution marked ing: "Renewed for two years from the day of A.D. 19 ," signed by the local registrar; and the production of a writ of execution marked as renewed in manner aforesaid, shall be sufficient evidence of its having been so renewed; and a writ of execution so renewed shall have effect, and be entitled to priority according to the time of the original delivery thereof. The forms Nos. 60 to 68 in the appendix shall be used with such variations as circumstances may require. [E. 592] C.O. 21, R. 346.

SASK.

S. C. 1912

RE F. H. PRICE.

Wetmore, C.J.

most nothing more, under Rule 747,* than an irregularity, and as no person has been in any way misled by it, I will not allow the application to be defeated on that ground. The affidavit of Orge, the deputy sheriff, filed on the 6th April, stated that the execution was duly renewed in the office of the local registrar of the District Court. The execution was issued out of the District Court. There is no such officer as the local registrar of the District Court for the judicial district of Saskatoon. There is an officer of that name in the Supreme Court: the officer who performs the corresponding duties in the District Court is called the clerk. It was clearly a clerical error in the affidavit in describing the officer intended as the local registrar, and nobody could have been misled by it. Moreover, the sheriff, in his affidavit filed the 3rd May, states that the execution was duly renewed on the 23rd May. I will not allow this objection to defeat the application. The sheriff's transfer of the land stated that the execution issued out of the Supreme Court, judicial district of Saskatchewan. Of course that is erroneous, and a new transfer must be executed, but that is not sufficient to defeat the application. It was further urged that the material did not shew that the sheriff was warranted in selling the land, because it was not established that the personal property had been exhausted. The affidavit of Orge as to that matter stated that an execution against goods came into the sheriff's office at the same time as the execution against lands did, and that

> the sheriff did endeavour to realize on the said writ of execution against goods but was unable to realize any sum whatever thereunder . . . . and did as a consequence . . . on the 25th day of May, 1911, make a return of *nulla bona* with respect to the said writ of execution against goods.

The sale took place on the 2nd November, 1911. Rule 365 of the Judicature Ordinance (C.O. 1898, ch. 21), provides that

> No sale shall be had under any execution against land until after a return of *nulla bona* in whole or in part with respect to an execution against goods in the same suit or matter by the same officer.

That provision has been complied with. That return is a record, and I will not inquire on the application as to whether it is a false return or not. If it is false, an application can be made to set it aside, or the sheriff may be liable to an action for a false return. In the meanwhile, I must assume the return to be true. It was also set up that the material used was not properly established, that the execution against land and the renewal or a

*Rule 747 Sask. Judicature Act (1911) is as follows:—

Non-compliance with any of these rules or of any rule of practice, for the time being in force, shall not render any proceedings void, unless the Court or a Judge shall so direct, but such proceedings may be set aside either wholly or in part as irregular or amended, or otherwise dealt with in such manner and upon such terms as the Court or Judge may think fit.

certified copy of them should be produced, and that the execution against goods, with the sheriff's return thereof or a certified copy thereof should also be produced. For over 25 years the material upon which an application to confirm a sale of lands by a sheriff was based, was of the same general character as that upon which this application is based (except that they have not as a rule been so replete with careless errors and mistakes as in this case). I am of opinion that after a practice extending over so many years it is too late to hold it irregular or insufficient. I have never heard of any evil consequence or any deprivation of rights ensuing as a consequence of that practice.

The next objection raised is that it is not disclosed that the property was sold at the time specified in the notice of sale. These notices stated that the property would be sold at the hotel, in Asquith, on the 2nd day of December, 1911, at two o'clock in the afternoon. The affidavit of Orge was the only one bearing on this question, stated in effect that he, on the 2nd day of December, 1911, offered the lands for sale by public auction at the hotel in the town of Asquith, and sold the same to George G. Calder for the sum of $2,175, he being the highest bidder, and that there were present at the sale about fifteen other persons besides himself and the said Calder. There is no evidence that this sale was held at the hour specified. I am of opinion that all the requirements for a sale of this character must be strictly complied with, and the onus is on the party applying to confirm the sale to prove that they have been. I so decided some years ago in the *Massey Mfg. Co.* v. *Pollock* (unreported). I allowed an affidavit to be produced to establish the fact that the sale took place at the hour specified in the notice, and such affidavit was produced and read, and established that the sale was so held. It was conceded by counsel for both parties that an issue must be directed to determine whether the land in question was at the time of the sale to Zufelt, the homestead of Price. I am of opinion that this and the question whether the sale to Zufelt makes the land liable to the executions of the Saskatchewan Elevator Co., registered against it would be a mixed question of law and fact.

I will direct an issue, in which Zufelt will be plaintiff, and the Saskatchewan Elevator Company defendant, and the question in such issue will be, first, whether the land at the time of the agreement of sale with Zufelt was Price's homestead; secondly, if it was, whether Price gave up and Zufelt went into the possession of such land under the agreement, and when; thirdly, what effect, if any, did the sale of the land to Zufelt and the conduct of Zufelt and Price in respect to such land have to render the land subject to the executions of the Saskatchewan Elevator Company.

Such issue to be tried at the next regular non-jury sittings to be held at Saskatoon.

SASK.

S. C.
1912

RE
F. H. PRICE.

Wetmore, C.J.

The material read on the part of the sheriff on this application was so carelessly prepared that leave to produce further material had to be given twice. The original material not only teemed with irregularities, but it was not sufficient to support the application, and so the leave referred to had to be given. In the case of the first abstract of title produced, blame is to be attached to the officers in the land titles office. But that does not excuse the solicitor; if he had read it over he must have noticed (and if he did not he must have read it over very carelessly) that it very likely would not support the application as against what Zufelt might set up in support of his caveat. Moreover, it did not bear out Orge's affidavit as to the original execution being registered. That ought to have put him on his guard. I regret to say that there is too much of this kind of carelessness. Material to which a very perfunctory attention is given to ascertain whether it is sufficient or not (possibly left to an inexperienced student-at-law) is flung to the Judge to perform the work that the solicitor ought to have attended to. Possibly there may be an impression that the Judges in this Province have very little or nothing to do. If so, that is quite a mistake. I may say as a general rule the Judges of the Supreme Court of this Province are always pressed with work; at present I am especially pressed; and I have been kept occupied in looking into the application fully a day and half trying to get over objections to irregularities so as if possible to be able to do substantial justice. Under these circumstances I will not allow the sheriff or the Saskatchewan Elevator Company any costs of this application as against Zufelt except the costs of taking out the order for the issue, which will be costs to the sheriff or the company, as the case may be, to abide the event of the issue. The costs of Zufelt to this application will be costs to him to abide the event of the issue ordered.

*Judgment directing trial of an issue.*

MAN.

C. A.

1912

March 4.

## PEARSON v. O'BRIEN.

## O'BRIEN v. PEARSON.

*Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, and Cameron, JJ.A. March 4, 1912.*

1. CONTRACTS (§ I D—2)—LACK OF MUTUALITY—MATERIAL ALTERATION—PLACE OF PAYMENT.

In a land contract the place of payment of the purchase-money is a material term, and where an intending purchaser, without the knowledge or consent of the vendor, alters the formal contract of sale, which had been executed by the vendor, by changing the place of the payment of the purchase-money, such amounts to a material alteration, and the contract may be avoided by the vendor even after he has cashed the cheque for the initial payment forwarded by the purchaser with a letter purporting to accept the terms of the informal offer to sell, not knowing of such alteration of the place of payment named in the contract.

[*Burchfield* v. *Moore*, 3 E. & B. 683; *Master* v. *Miller*, 4 T.R. 320, followed.]

2. ALTERATION OF INSTRUMENTS (§ II B—19)—CHANGING PLACE OF PAYMENT—MATERIALITY.

An acceptance of an offer to sell, which varies the amount of the cash payment, and increases the amounts of the deferred payments, is merely a counter offer to purchase and no contract is made by it although the total price is not thereby changed.

[*Pearson* v. *O'Brien*, 18 W.L.R. 563, affirmed on appeal.]

3. CONTRACT (§ I D 4—62)—OFFER AND ACCEPTANCE—ACCEPTANCE CHANGING PLACE OF PAYMENT.

The place of payment is a material term of a contract, and acceptance of an offer which changes the place of payment is merely a new offer and not an acceptance which concludes a contract.

[*Birchfield* v. *Moore*, 3 E. & B. 683.]

4. CONTRACTS (§ I E 6—121)—INCOMPLETE AGREEMENT OF SALE—PURCHASER GOING INTO POSSESSION OF LAND—PAYMENT OF MUNICIPAL TAXES.

No taking of possession sufficient to operate as a part performance so as to satisfy the requirements of the Statute of Frauds, occurs where the intended purchaser, under an incomplete and unfinished contract, without the privity or consent of the owner goes into possession of the land being negotiated for and also pays part of the municipal taxes levied against the same.

[Fry on Specific Performance, 5th ed., par. 587, specially referred to; *Pearson* v. *O'Brien*, 18 W.L.R. 563, affirmed on appeal.]

5. CONTRACTS (§ I E 5—97)—STATUTE OF FRAUDS—SEVERAL WRITINGS.

A party seeking to make out a memorandum to satisfy the requirements of the Statute of Frauds, cannot select some of the writings and say that they sufficiently evidence a contract, regardless of the fact that there were other important conditions of the intended contract which were not embraced in the writings and were still unsettled.

[*Hussey* v. *Horne-Payne*, 4 A.C. 311; *Bristol Co.* v. *Maggs*, 44 Ch.D. 616; *Stow* v. *Currie*, 21 O.L.R. 486; *Queen's College* v. *Jayne*, 10 O.L.R. 319, and *Bohan* v. *Galbraith*, 15 O.L.R. 37, specially referred to.]

6. CONTRACTS (§ II A—132)—PLACE OF PAYMENT.

Where a contract for sale of lands made by offer and acceptance is silent as to the place of payment of the purchase-money, the presumption is that the price is payable at the place where the party made the offer and was domiciled.

[*Fessard* v. *Mugnier*, 34 L.J.C.P. 126, and *Robey* v. *Snaefell*, 20 Q.B.D. 152, followed.]

MAN.

C. A.

1912

PEARSON v. O'BRIEN.

7. LAND TITLES (§ V—51)—CERTIFICATE—"INTERESTS" AND CLAIMS.

The word "interests" in a land titles certificate in Manitoba, includes interests merely claimed, as well as those established or admitted and a certificate under the Manitoba Real Property Act, R.S.M. 1902, ch. 148, is evidence that the person named in the certificate is entitled to the land for the estate or interest therein specified subject to the right to prove fraud or the exceptions stated in that statute.

[*Re Moore and Confederation Life Association*, 9 Man. L.R. 453, distinguished.]

8. LAND TITLES (§ IV—41)—MANITOBA REAL PROPERTY ACT—CAVEAT—CERTIFICATE OF TITLE SUBJECT TO CAVEAT.

The intention of sec. 132 of the Manitoba Real Property Act, R.S. M. 1902, ch. 148, is that a transfer or other dealing with land may be put through by the district registrar subject to any existing caveat filed after the first certificate of title has been issued, and in such case the rights of the caveator, whatever they may be, are preserved, but no additional force should be given to the claim set out in the caveat, by making a new certificate of title, subject to it.

9. LIS PENDENS (§ II—9)—LAND TITLES ACT—CAVEAT.

The filing of a caveat, under the Manitoba Real Property Act, R. S.M. 1902, ch. 148, has no greater effect, so far as the rights or interests of the caveator are concerned, than a certificate of *lis pendens*.

Statement

APPEALS by Pearson from the judgment of Mathers, C.J. K.B., in both actions, *Pearson* v. *O'Brien* and *O'Brien* v. *Pearson*, 18 W.L.R. 563, dismissing the first action and in the second action discharging the caveat filed.

The appeals were both dismissed.

Messrs. *C. P. Wilson*, K.C., and *W. H. Trueman*, for Pearson.

Messrs. *I. Pitblado*, K.C., and *H. V. Hudson*, for Douglas.

Messrs. *J. E. O'Connor*, and *A. G. Kemp*, for O'Brien.

Richards, J.A.

RICHARDS, J.A.:—The facts are set out in the judgment of the learned trial Judge who found that there was no evidence of a completed contract between Douglas and Pearson. I agree fully with the views taken by him and shall try to not repeat his grounds.

Apparently before him the contract relied on was the formal agreement prepared by Douglas' solicitors and sent to Pearson, and which Pearson altered after its execution by Douglas. Before this Court a strong argument was made that a contract was shewn by the option—I mean by that the informal instrument entered into at Moose Jaw at the end of the first negotiation between Pearson and Douglas. It is said that this was in itself a contract and that in any event the use by Douglas of the cheque is a ratification of it.

This latter view, I think, is met by the fact that even if the option and the cheque could together form a contract, they do not refer to each other. Further, they differ in their terms, as pointed out by the learned trial Judge. Also as pointed out by him, when Douglas banked the cheque he used it supposing it

to be a payment under the formal agreement and was not aware of the alteration made by Pearson in that agreement.

What seems to me a fatal objection to treating the option as a contract is that it not only does not say whether the vendor or vendee is to make the further mortgage contemplated by it, but it also does not state any of the terms of that mortgage, or the rate of interest it is to bear. The object of it, patently, was to raise as much cash as possible for Douglas, but the amount of cash which could be raised would be materially influenced by the rate of interest, a larger sum being likely to be advanced in consideration of getting a higher rate of interest. Is it to be assumed that Douglas in order to increase this amount, could make or insist on the new mortgage bearing 12 per cent. or 15 per cent. interest; and what terms of repayment of the principal could Pearson be forced to agree to? If not, where is the certainty as to the terms of the new mortgage? I think, too, that the correspondence and acts of the parties shew distinctly that the option was not to be the final contract, but that the only final contract intended was to be the formal agreement.

It is argued that the terms of the agreement were that the purchase money was to be payable in Winnipeg and not in Moose Jaw. There is nothing in the option referring to this, and the fact that Pearson made his cheque for the cash payment of $2,000 payable at par in Moose Jaw seems to me strong evidence that his understanding was that the purchase money should be payable there. Pearson relies on the possession taken by him, and on the payment of part of the taxes by him, as part performance to take the case out of the Statute of Frauds. The payment of the taxes is, I think, no part performance. Douglas also was paying a portion of the taxes, and it is evident, I think, that payment of a part by each was meant to be only a temporary arrangement until the rights of the parties could be settled, because they were then at arm's length.

As to the possession, in addition to the fact pointed out by the learned trial Judge, that Pearson did not get this possession with Douglas' privity or consent, it seems to me that, in any event, it was not such a possession as Pearson could rely upon. Possession to be of any value as against the statute, must be in pursuance of a completed agreement, whether verbal or written, and such as could be enforced by the Court if in writing; and I find none such here. Furthermore I do not see that any injustice would result to Pearson from his taking possession, as he did, if specific performance is not ordered. He merely took the property and collected rents, and it would, therefore, be no fraud upon him to refuse to carry out the contract. But counsel for Pearson, on the hearing of the appeal, raised a question, apparently not discussed before the learned

MAN.

C. A.
1912

PEARSON
v.
O'BRIEN.

Richards, J.A.

trial Judge, and which is not taken in the præcipe on appeal, and which was not pleaded in the sense in which the question is now raised. I refer to the argument that the acceptance by O'Brien of the certificate of title, subject to Pearson's caveat, is, by virtue of the Real Property Act, an admission that the contract upon which the caveat was filed is a valid, complete and binding contract upon O'Brien, and enforceable against him.

In favour of that argument the only two points that I can see are, first, the provisions of section 132 of the Real Property Act, and second, the decision of the Court of King's Bench, in *Re Moore and Confederation Life Association*, 9 M.R. 453.

Section 132 says:—

> So long as any caveat prohibiting the transfer . . . remains in force, the district registrar shall not register any instrument purporting to transfer . . . the land . . . unless such instrument be expressed to be subject to the claim of the caveator.

*In re Moore and Confederation Life*, 9 Man. L.R. 453, the certificate of title was in favour of a woman as "sole surviving executrix and devisee under the will of . . . " subject to certain encumbrances. Certain of these encumbrances had been put on by herself as against her interest as devisee. It was held that the reference to her as "sole surviving executrix and devisee" were words of description, and did not enable her, while holding the certificate in that form, to exercise certain powers under the will by which she could give priority to a transfer by her, as executrix, over the instruments created by herself as devisee. In giving the judgment of the Court, Mr. Justice Killam uses this expression:—

> Here the district registrar has found in the registered owner a power inconsistent with two of the encumbrances named, which seems to us wholly opposed to the principles of the Real Property Act, *as that Act makes a certificate of title final at each stage.*

The underlined words are relied on as a holding sufficiently broad to cover the contention that, in the present case, the taking of the certificate of title, subject to the caveat, is an admission that the agreement on which that caveat was founded was binding on the certificatee, O'Brien.

The purpose of the caveat is to give notice of a claim, but not in any way to validate or better the condition of that claim; and all reasonable purposes of the Act are fulfilled by continuing notice of that claim upon a certificate issued after it is filed. That leaves the caveator in precisely the same position, as against the new certificatee, as he had been in against the old one. An interpretation which would give a caveator by virtue of the statute a right which did not previously exist, could only be upheld on the strength of legislation so worded as to have no other meaning; and I do not find such legislation in the Real Property Act. The words "unless such instrument be expressed to be subject to the claim of the caveator" seem

to me merely such claim, if any, as the caveator had by virtue of that alleged right upon which his caveat was filed, whatever that might be. Referring to *In re Moore and Confederation Life*, 9 Man. L.R. 453, section 71 of the Act says that

> Each certificate of title . . . shall . . . be conclusive evidence at law and in equity . . . that *the person named in such certificate* is entitled to the land described therein for the estate or interest therein specified.

It is only as in the sense above mentioned that the judgment *In re Moore and Confederation Life* says that the Act makes a certificate of title final at each stage. The certificate there had issued, as stated above, subject to two encumbrances put on by the certificatee herself, and if the words "surviving executrix and devisee" were merely descriptive of the certificatee, then the judgment was right in saying that, while the certificate stayed in force, it was final as against her, the certificatee's right to prefer a new party to certain of these encumbrances which she herself had placed upon the property. I cannot see that the words could be in any way stretched so as to upheld the present contention of Mr. Pearson's counsel.

Section 70 says that the land mentioned in any certificate of title shall by implication be deemed to be "subject to" any certificate of *lis pendens* issued out of any Court of competent jurisdiction in this Province, and duly registered since the date of the certificate of title. A *lis pendens* is notice of a claim, and that action has been taken to enforce an alleged right, just as a caveat is notice of a claim to an alleged right. The words, "subject to" are used in section 70 as in section 132. If the wording of section 132 means that the validity of the agreement upon which the caveat is filed is admitted, then I see no reason why it should not equally be held that, under section 70, the mere filing of a *lis pendens* against land, the title to which is under the Act, should, in itself, prove the claim of the plaintiff in the action on which the *lis pendens* was filed. The answer to this, I assume, would be that the filing of the *lis pendens* in no way depends on the volition of the certificatee while the taking of a new certificate subject to a caveat is an act which does depend on the volition of the new certificatee. Though there is that difference, I am unable to see why that construction should be put upon section 132 merely because of that act of volition. The words in both sections are "subject to."

It may be a matter of great importance to a purchaser to get his certificate at once. He may have the fullest knowledge that the claim of the caveator is shadowy and insubstantial, and quite incapable of being enforced. He may have further parties to whom he is willing to sell, who are willing to take it without having the caveat taken off, yet if the plaintiff's contention is correct, he must wait until he might lose his own sale,

MAN.
C. A.
1912
PEARSON
v.
O'BRIEN.

while he takes proceedings to get rid of a caveat. It seems to me that, to uphold the contention of the plaintiff, would be to put it in the power of unscrupulous persons to levy blackmail by placing caveats under such circumstances. There is no principle of justice or merit involved in the contention, but rather one of possible great injustice.

I would dismiss the appeals with costs.

Perdue, J.A.

PERDUE, J.A.:—These two actions were tried together. The facts involved are fully set forth in the judgment of Mathers, C.J.K.B.

On 24th May, 1910, the defendant, at Moose Jaw, gave to the plaintiff a written offer to sell the land in question for $9,750, on the terms mentioned in the writing. The document is set forth in full in the judgment from which this appeal is brought. One of the terms was, payment of $2,000 by 26th May. A further term was that the defendant was to receive the difference between what could be borrowed upon the property in excess of the existing mortgage as soon as the new mortgage could be completed. These two sums, the $2,000 and the balance of the new loan after paying the existing mortgage, would together make up the amount which the defendant expected to receive in the way of payment down, as distinct from the postponed payments. The remainder of the purchase money, after deducting the above two sums, was to be paid in three equal annual instalments with interest at six per cent. per annum.

On 25th May, the plaintiff, who resides at Winnipeg, wrote the defendant forwarding him a cheque for $2,000, payable at par in Moose Jaw, where the defendant resides. There was not in the letter any explicit acceptance of defendant's offer. Written into the body of the cheque were the words:—

> Being first payment in full on lot 26 and S. half of lots 23, 25 in 85 St. James, plan 127, price $9,750, payable $2,000 cash, balance of equity in 1-2-3 years at 6 per cent. annually.

The terms as set forth in the cheque differ from those in the offer in that nothing is said as to the amount to be raised by loan. This is a substantial difference, as the terms mentioned in the cheque would give the defendant less in the way of early payment and would increase the amount of the postponed payments. There was not, therefore, an unqualified acceptance of the terms contained in the offer.

Enclosed with his letter of 25th May the plaintiff forwarded a formal agreement which had been signed by him and which he requested the defendant to sign. This document contained a number of provisions in addition to, or differing from, the terms mentioned in the defendant's offer. Two of them are of importance. The purchase money was, in the first place, made payable, by the terms of this document, to the vendor at Winnipeg. In the next place it provided that upon payment of . . .

dollars (the amount being left blank) of the purchase money, the purchaser might ask for and the vendor should give a deed or transfer of the land upon the purchaser giving a first mortgage on the land to secure the balance of the purchase money.

The defendant did not execute this agreement, but his solicitors prepared a new one containing for the most part terms similar to those contained in the agreement forwarded by the plaintiff. But in the document prepared at defendant's instance, the purchase money was made payable at Moose Jaw, Saskatchewan, and the whole provision as to the purchaser obtaining a transfer, upon giving a mortgage was struck out of the printed form. The document also contained a covenant that the plaintiff would indemnify the defendant against liability on the new mortgage to be placed upon the land. This document was executed by the defendant and sent by his solicitors to the plaintiff, they in their letter calling particular attention to the covenant of indemnity. On receiving this document from the defendant, the plaintiff altered it by inserting in the clause stating the place of payment the words "but" and "at par in Winnipeg." He then executed the document and returned it to the defendant's solicitors, with a letter in which he thus refers to the change he had made:—

> You changed the place of payment from Winnipeg to Moose Jaw, and as the property is here, it is only proper to have the payments payable at par in Winnipeg, which you will see I have changed.

This letter was written on 30th May. On 2nd June defendant's solicitors wrote to the plaintiff saying that he had changed the agreement so that as it stood it was not the contract executed by the defendant. They said the change was not satisfactory to their client and that he withdrew from the agreement.

It rests upon the plaintiff to shew that there was a concluded agreement between himself and the defendant, and that there was a sufficient memorandum in writing signed by the defendant to satisfy the requirements of the Statute of Frauds. I cannot find from the above correspondence and documents that there was at any time a concluded agreement arrived at between the parties. It has already been shewn that there was no straight acceptance of the offer of 24th May. The agreement sent by the plaintiff on 25th May was altered by defendant in three respects (1) as to place of payment; (2) by striking out the clause as to giving a transfer and accepting a mortgage; (3) by inserting a covenant for indemnity. This agreement was in turn altered by the plaintiff, after it had been signed by the defendant, by inserting a provision which, although it left Moose Jaw as the place of payment, made the money payable at par in Winnipeg. This would throw upon the defendant the expense of transmitting the money from Winnipeg and paying it at Moose Jaw. It is argued that this was not a

MAN.
C. A.
1912
PEARSON
v.
O'BRIEN.
Perdue, J.A.

material alteration. I do not think that effect can be given to such a contention. The place of payment is a material matter in a contract: *Burchfield* v. *Moore*, 3 E. & B. 683. The defendant insisted upon making Moose Jaw the place where payment should be made. The plaintiff, while agreeing to this, interpolated in the contract a new or added condition that would impose upon the defendant the expense of the transmission and payment of the money. This would clearly affect the defendant adversely and was a material alteration. This addition to the document, made after it had been signed by the defendant and without his consent avoided it as against him: *Master* v. *Miller*, 4 T.R. 320; Leake on Contracts, 6th ed., 589. If the agreement had been silent as to the place of payment the law would presume that the money should be paid at Moose Jaw where the defendant resided and where the offer was made: *Fessard* v. *Mugnier*, 34 L.J.C.P. 126; *Robey* v. *Snaefell*, 20 Q.B.D. 152. But, in any event, the defendant imposed the condition that the money should be paid to him at Moose Jaw.

The fact that the defendant cashed the cheque cannot assist the plaintiff. It was cashed before the defendant knew of the alteration made by the plaintiff in the agreement, and in the belief that the form of contract executed by the defendant would be accepted by the plaintiff. After the negotiations fell through the defendant offered to return the money and he repeats this offer in his pleading.

The plaintiff's own evidence shews that the whole terms of the alleged purchase were not settled at the interview with the defendant at Moose Jaw when the written offer or option of 24th May was given. The plaintiff admits that certain terms were left indefinite. He does not clearly state whether he or the defendant should execute the new mortgage. He says he was to get an agreement of sale when O'Brien's caveat should be discharged. While admitting that the terms were left indefinite on 24th May, he relies upon the subsequent settlement of the terms set out in the formal agreements. It is clear that neither of these formal agreements was definitely accepted by both of the parties before the defendant declared the negotiations off. Looking at all the writings that passed between the parties it does not appear that at any point there was a concluded contract between the parties expressed in these writings. All the documents must be taken into consideration in finding such a contract. The plaintiff cannot select some of the writings and say that these sufficiently evidence a contract, regardless of the fact that there were other important conditions of the intended contract which were not embraced in the writings and were still unsettled: *Hussey* v. *Horne-Payne*, 4 A.C. 311, 323; *Bristol, etc., Co.* v. *Maggs*, 44 Ch. D. 616; *Stow* v. *Currie*, 21 O.L.R. 486; *Queen's College* v. *Jayne*, 10 O.L.R. 319; *Bohan* v. *Galbraith*, 13 O.L.R. 301, 15 O.L.R. 37.

MAN.

C. A.

1912

PEARSON v. O'BRIEN.

Perdue, J.A.

I agree with the learned trial Judge's finding as to the effect of the plaintiff's possession of the premises and the payment by the plaintiff of a portion of the taxes. The plaintiff was not put in possession by the defendant, and the latter was not aware that such possession had been taken until after he had declared the contract off. Taking possession, if relied on as a part performance, must be taken with the knowledge of the person to be charged: Fry, Specific Performance, 5th ed., pars. 587, 588. Besides, there was no concluded contract of which there could be part performance: Fry, Specific Performance, par. 597.

Mr. Wilson advanced a new point upon the argument before this Court, one which had not been taken before the trial Judge or raised in the præcipe. O'Brien, who is a defendant in the suit brought by Pearson and is plaintiff in the suit brought to set aside Pearson's caveat, had taken a transfer from Douglas, subject to Pearson's caveat, and had obtained a certificate of title subject to the last mentioned caveat. Mr. Wilson contended that the effect of O'Brien's taking a certificate of title subject to Pearson's caveat was that O'Brien thereby admitted the claim set forth in the caveat and that such claim was no longer controversial but became an established interest in the land. The effect of this startling proposition would be that a mere *lis* or disputed claim would, if it formed the subject of a caveat filed against the land, become, as against a transferee who took his certificate of title subject to the caveat, an actual and indisputable interest in, or charge upon the land. The point was argued very fully by counsel upon both sides and it becomes necessary to consider it at some length.

The Real Property Act, R.S.M. ch. 148, in sections 127-145, treats of caveats, their effect and the procedure to be followed in dealing with them. Sections 127-129 relate to caveats filed where an application is pending to bring the land under the operation of the Real Property Act and before a certificate of title has been issued to any person. In such cases the district registrar shall not bring the land under the new system until all caveats shall have been disposed of: section 128. Where a caveat is filed forbidding the bringing of the land under the Act, it operates as an injunction against the issue of a certificate of title to the person applying to be registered as owner of the land.

Sections 130-132 deal with caveats filed after the land has been brought under the new system. Section 130 is as follows:—

> 130. Any person claiming an estate or interest in land, mortgage or incumbrance under the new system, may file or cause to be filed on his behalf with the district registrar a caveat in the form in schedule H. to this Act, forbidding the registration of any person as

MAN.

C. A.

1912

PEARSON v. O'BRIEN.

Perdue, J.A.

transferee or owner of, or of any instrument affecting such estate or interest, or unless such instrument be expressed to be subject to the claim of the caveator.

Section 131 declares that such caveat shall be deemed to have lapsed upon the expiration of fourteen days after notice given to the caveator to take proceedings in Court on his caveat, unless certain procedure is followed and certain things are done as provided by the section.

Section 132 is as follows:—

> 132. So long as any caveat prohibiting the transfer or other dealing with any land, mortgage or incumbrance remains in force, the district registrar shall not register any instrument purporting to transfer, mortgage or incumber the land, mortgage or incumbrance in respect to which such caveat is lodged, unless such instrument be expressed to be subject to the claim of the caveator.

It is to be observed that section 130 enables the caveator to forbid (1) the registration of any person as transferee or owner of the estate or interest claimed by the caveator, or (2) he may forbid the registration of any instrument affecting such estate or interest, or (3) he may forbid the registration unless the instrument is expressed to be subject to the claim of the caveator. Whichever of these modes of procedure the caveator adopts, the district registrar is prohibited from registering any instrument purporting to transfer, mortgage or incumber the land, etc., in respect of which the caveat is lodged unless such instrument is expressed to be subject to the claim of the caveator: section 132.

The form of caveat provided by the Act, schedule H, and referred to in section 130, is not altogether appropriate to the several things permitted by the section, but this is not very material in view of the effect which is given by section 132 to all caveats filed after the land is brought under the Act. By that section, if a caveat has been filed after the land has been brought under the Act, even if the caveat absolutely forbids the transfer or other dealing with the land, etc., the district registrar is prohibited from registering an instrument purporting to deal with it "unless such instrument be expressed to be subject to the claim of the caveator." The intention of this would seem plainly to be that a transfer or other dealing with the land may be put through by the district registrar subject to any existing caveat filed after the first certificate of title has been issued, and that in such case the transferee would take his rights subject to the claim set out in the caveat, whatever that claim might be, so that the right of the caveator might be preserved and remain as valid against the transferee as it was against the transferor, but that no additional force should be given to such claim by making the new certificate of title subject to it.

Mr. Wilson argued that the form of the certificate of title given in schedule A to the Act, which declares that the title mentioned in the certificate is "subject to such incumbrances, liens and interests as are notified by memorandum underwritten (or indorsed hereon)," makes no mention of "claims" and that anything underwritten or indorsed upon the certificate must be taken to be an actual, established interest. I think it is clear that the word "interests" includes interests that are merely claimed as well as those that are established or admitted.

Section 70 makes the land in the certificate subject, by implication, to caveats affecting the land registered since the date of the certificate of title: sub-section (*j*). If, in such a case, the registered owner transfers to a third party, subject to the caveat, who takes a new certificate, subject to the caveat, the caveator's position is not altered, he has the same rights against the transferee that he had against the transferor, but it would be unreasonable to expect that he should have more. That the Act intended to do more than preserve his rights in case of a dealing with the land cannot be gathered from its provisions.

Section 145 provides that

> Any person claiming any estate or interest in land, mortgage or incumbrance subject to or under the new system may in lieu of or after filing a caveat, proceed by way of statement of claim, and may file with the district registrar a certificate of *lis pendens* or other proper evidence of such proceedings.

It will be seen that this provision extends to all persons referred to in section 130 and applies not only to lands, etc., under the new system, but also to lands, etc., "subject to" the new system. The words "subject to" refer to lands in respect of which an application to bring them under the Act has been made, but in respect of which a certificate of title has not yet been issued. Such lands, covered by a pending application, are by section 34, declared to be "subject to the new system" and no registration under the old system affects them until the application is withdrawn or rejected. Section 145, therefore, permits the bringing of a suit and the filing of a certificate of *lis pendens* in lieu of a caveat whether before or after the issue of a certificate of title. This clearly shews that the filing of a caveat has no greater effect, in so far as the rights or interests of the caveator in the land are concerned, than if the same person had proceeded by statement of claim and had filed a certificate of *lis pendens*.

Mr. Wilson based his argument upon this branch of the appeal largely upon some expressions that occur in the judgment of the Court of King's Bench in *Re Moore* and *Confederation Life*, 9 Man. L.R. 453. In that case a certificate of title had been issued to Emma Moore, sole surviving executrix and

MAN.
C. A.
1912
PEARSON
v.
O'BRIEN.
Perdue, J.A.

devisee under the will of William Beall, deceased, subject to certain incumbrances consisting of a mortgage made by the testator, a charge of a legacy under his will to his daughter, a mortgage made by Emma Beall upon her own interest as devisee only and a writ of *fi. fa.* lands against Emma Beall's interest as devisee only. Emma Moore was the widow of the testator and after the death of her husband had married one Moore. She was the same person as Emma Beall. The executrix attempted to sell the property for the purpose of paying debts and legacies, under power conferred on her by the will, and thus to cut out the two latter of the incumbrances. It was held that the certificate of title did not shew that she possessed a power inconsistent with her right as devisee or enabling her to override these incumbrances. The whole point in that case was that a certificate issued to E. M. "sole surviving executrix and devisee under the will, etc.," did not shew that she had powers enabling her to nullify incumbrances against her as devisee. The words "sole surviving executrix, etc." were taken as mere description and not as shewing that the certificate of title had been issued to her in her capacity of executrix and with the powers given her by the will. If the certificate had been issued to E. M. as executrix and the will had been sufficiently embodied in the certificate, the difficulty that arose in the case would have been obviated. I am informed by the district registrar that the certificate was afterwards amended by him and the will was spread upon its face. This overcame the difficulty. Section 69 of the present Act prevents any such question from arising in the future. Much was sought to be made of an expression used by Killam, J., in delivering the judgment of the Court, that the Act makes a certificate of title final at each stage. That is true to this extent, that every certificate of title has the conclusive effect given to it by the Act: sections 71, 77. The want of finality in the certificate in *Re Moore and Confederation Life*, 9 Man. L.R. 453, was that a person apparently registered as owner in one right sought to exercise powers in another right. The certificate is conclusive evidence that the person named in the certificate is entitled to the land for the estate or interest therein specified, subject to the right of any person to shew that the land is subject to any of the exceptions or reservations mentioned in the seventieth and seventy-fourth sections or to shew fraud: section 71. This fraud must be one wherein "the registered owner, mortgagee or *incumbrancer* (*sic*) has participated or colluded," and must be shewn "as against such registered owner, mortgagee or incumbrancer." The meaning of this seems to be that a certificate of title may be set aside for fraud in the registered owner in obtaining it and that his mortgagee or incumbrancee may also be attacked if such mortgagee or incumbrancee has participated

in the fraud: compare section 76, sub-section (c). The mortgagee or incumbrancee has only a security upon the land, he has no estate or interest in it: section 100. The estate or interest referred to in section 71, of which the certificate of title is made conclusive evidence, is only the estate or interest of the registered owner specified in the certificate. It may be shewn that a registered mortgage has been paid off, that a judgment appearing on the certificate of title has been satisfied, or that the judgment debtor is not in fact the same person as the registered owner, or that a caveat should be removed, although the instrument in each of these cases has been entered upon the certificate of title.

I think that when O'Brien took a transfer and certificate of title, both subject to the caveat filed by Pearson, the rights of the latter, if any, as against the land were in no wise diminished or improved. When the new certificate of title was issued, with his caveat endorsed upon it, Pearson's rights or interests in the land, whatever they might be were left exactly as they were before the transfer, so that he might proceed to enforce his interest against the land in O'Brien's hands, in the same manner as if Douglas were still the registered owner.

I think the appeals in both suits should be dismissed with costs.

Cameron, J.A.

CAMERON, J.A.:—The certificate of title to the lands in question, No. 160860 in the name of Thomas Richard O'Brien is expressed to be subject to such encumbrances, liens and interests as are notified by memorandum underwritten or indorsed thereon, viz.: A mortgage to Thomas Fish for $3,000 and two caveats, one registered May 21, 1910, by Thomas Richard O'Brien and the other registered, May 31, 1910, by George Anthony Pearson.

In the case of an application to bring lands under the Real Property Act any person claiming an estate or interest therein may file a caveat forbidding such being done, and the district registrar shall not bring the lands under the new system until such caveat shall have been disposed of (sections 127 and 128). Such caveat shall, however, lapse unless steps are taken within one month to establish the right set out in the caveat (sec. 129).

In the case of lands under the new system any person claiming an estate or interest therein may file a caveat forbidding the registration of any person as transferee or owner, or of any instrument affecting such estate or interest, or unless such instrument be expressed to be subject to the claim of the caveator (sec. 130). By section 131 provision is made for notice to the caveator to take proceedings on his caveat and for the determination of the caveat on default of proceedings or, in

MAN.
C. A.
1912
PEARSON
v.
O'BRIEN.
CAMERON, J.A.

the event of the caveator appearing, then for such order by the Court as may be directed. And by section 132 it is provided that so long as the caveat remains in force the district registrar shall not register any instrument purporting to transfer, mortgage or incumber the land "unless such instrument be expressed to be subject to the claim of the caveator."

It is contended on behalf of Pearson that the transfer of the lands in question from Douglas to O'Brien and the certificate of title thereto in the name of O'Brien, being expressly subject to the caveat of Pearson, O'Brien cannot now dispute the validity of Pearson's claim. It is argued that the caveat having been filed, it was open to O'Brien to adopt one of two courses. In the first place he could have decided to contest the claim set forth in the caveat, and take proceedings for its removal under section 131, and other provisions of the Act. Or, on the other hand, he could accept the transfer and the certificate subject to Pearson's claim as set out in his caveat. The former course he did not follow. The latter he deliberately adopted, so that he is now by his own acts, precluded from contesting Pearson's claim.

In this view each certificate forms a fresh root of title and its terms are absolute. The policy of the Act is that all caveats should be disposed of at the time of the issue of the certificate. If the land be not already under the Act the certificate cannot be issued until the caveat is out of the way. If the land be under the Act, then either the caveat must be disposed of or the certificate issued recognizing the claim set forth in the caveat. The policy of the Act provides for registration of title and not of instruments, and intends that conflicting claims shall be disposed of on the granting of each successive certificate, either by being put an end to or by being recognized as valid.

Under the provisions of our Real Property Act as originally passed in 1885, any person claiming to be interested in any land might lodge a caveat

> to the effect that no disposition of such land be made either absolutely or in such manner and to such extent only as in such caveat may be expressed, or until notice shall have been served on the caveator, or unless the instrument of disposition be expressed to be subject to the claim of the caveator, as may be required in such caveat, or to any lawful conditions expressed therein (sec. 107);

and by sub-section (3) thereof, so long as any caveat remains in force prohibiting the transfer or other dealing with any land, the Registrar-General shall not enter in the register book any memorandum of transfer or "other instrument purporting to transfer or otherwise deal with or affect the land in respect to which such caveat is lodged." There was thus no distinction drawn in the orginal Act between the caveats filed before and after lands were brought under the system. In both cases the

prohibition was absolute and the lands could not be dealt with by the registrar until the caveat had been disposed of.

Evidently objections were found to these provisions as the sections were repealed in 1887, 50 Vict., ch. 11, and certain sections substituted therefor and the substituted sections were amended in 1888, ch. 22, sec. 13, by adding "unless such instrument be expressed to be subject to the claim of the caveator as may be required in such caveat" to sub-section 9 of section 107 of ch. 11, and the sections as then substituted as so amended are to be found substantially in the consolidating Act of 1889, 52 Vict. ch. 16, section 130, where the distinction now existing between the effect of caveats filed in respect of lands to be brought under and the effect of caveats in respect of lands already under the new system appears. In the former case the registrar was absolutely prohibited from bringing the lands under the new system until and unless the caveat had been disposed of. These provisions are now to be found in sections 127, 128, and 129 of the present Act. In the other case where the lands are already subject to the new system, the provisions made in the Act of 1886 and in the consolidating Act of 1887 were, in substance, the same as those now to be found in sections 130, 131 and 132 of the present Act.

Since the amendment in 1888 above referred to, it has been the practice to accept transfers and issue and accept certificates subject to the claims set out in caveats therein referred to without any idea being entertained that the transferees or holders were thereby recognizing as valid the claims alleged in such caveats. By the legislation expressed in the amendment of 1888 the policy of the law was assumed to be that in the case of lands under the new system caveats might be filed for the purpose of giving notice of claims the merits of which should be thereafter investigated and decided and that until they were so disposed of certificates and instruments might be issued subject to such investigation and ultimate decision. Until now it has not been contended that the acceptance of an instrument under the Act expressed to be subject to a claim on a caveat placed the caveator in any stronger or better position than he was before its issue.

It was held by the Court *en banc* in *Alexander* v. *Gesman*, 4 Sask. 111, that a caveat under the Land Titles Act of Saskatchewan was "more than a notice." But the decision in that case does not go to the extent we are asked to go here.

"A caveat is not to be regarded as notice to all the world—actual registration is notice to all the world—but only as a means of conveying notice and as a statutory injunction against dealing with the property": Hogg, Australian Torrens System, p. 886. "A caveat is worthless unless there is in existence, at the time of its entry in the register, an enforceable right of

MAN.
C. A.
1912
PEARSON
v.
O'BRIEN.
Cameron, J.A.

some kind relating to the land": *Ib.* p. 1040. The lodging of a caveat against registration of any transfer of land under the Act only throws a cloud upon the title of the registered proprietor, which it is the duty of the vendor, as between himself and a purchaser, to have removed: *Taylor* v. *Land Mortgage Bank*, 12 Viet. L.R. 748.

According to the Victorian statute, section 144, Hogg, p. 543, a caveat may forbid the registration of any person as transferee or any instrument, either absolutely or until after notice to the caveator "or unless such instrument be expressed to be subject to the claim of the caveator as may be required in such caveat." And by section 146, "So long as any caveat shall remain in force prohibiting any registration or dealing, the registrar shall not enter in the register book any change in the proprietorship of or any transfer or other instrument purporting to transfer or otherwise deal with or affect the estate or interest in respect to which such caveat may be lodged." The provisions of the Western Australian Act are similar: *Ib.* 632, 633. In the other Australian colonies, there does not appear to be provision for the issue of certificates or instruments subject to the claim set out in a caveat.

So far as I can gather from Mr. Hogg's work, no case has arisen under the statutes of Victoria regarding the effect of the issue of a certificate subject to a caveat. In the other jurisdictions the case could not arise at all as the registrar is absolutely prohibited from dealing with the title, so long as the caveat remains in force, as was our law under the original Act of 1885, until amended in 1888.

In the case of *Taylor* v. *Land Mortgage Bank*, 12 Viet. L.R. 748, *supra*, the action was brought by a purchaser against the holders of certificates of title to lands against which a caveat had been lodged, and the real question there was to determine whose duty it was to have the caveat removed, and it was held that the existence of the caveat was not such evidence as to want of title as to refuse relief.

The term "caution" is used in the Land Transfer Act, 1875, sections 53-59. "A caution is a mere temporary suspension of the right of the proprietor to deal with the property registered in his name and has no other direct effect—either in the nature of the interest put forward by the cautioner or in restricting the property rights of the proprietor": Hogg, Ownership and Encumbrance, p. 231.

We were pressed with the judgment of the late Chief Justice Killam in *Re Moore* v. *Confederation Life*, 9 Man. R. 453. There it was held that the district registrar had found in the registered owner a power inconsistent with two of the encumbrances named in the certificate. It was not shewn that Mrs.

Moore had, as executrix, any power inconsistent with her interest as devisee so as to make the proposed transfer override the incumbrances against her as devisee. The term executrix is descriptive and does not shew her power. Had the will been set out in the certificate there would apparently have been no question. But the statement of the Court that the Act makes the certificate of title final at each stage must, it seems to me, be construed with the whole statute in view. And here we have a provision of the Act permitting the issue of a certificate subject to whatever claims may be set forth in a caveat. In my opinion, it would be going too far to say that the policy of finality of a certificate demands that we must read those words as converting a doubtful and perhaps worthless claim into one which the registered owner is not at liberty to question.

I have given the best consideration I am able to the wording of section 132. The contention practically is that this section should be construed as if the concluding words read "unless such instrument be and be expressed to be subject to the claims of the caveator, whether that claim is capable of being established or not." Surely had that been the intention of the legislature, care would have been given to give it clearer expression in words. If, on the other hand, the intention of the legislature was to facilitate the registration of instruments and the issue of certificates and at the same time to make provision for the preservation of the rights and interests of parties who may have claims against the lands by virtue of unregistered instruments or otherwise, until such claims shall be ultimately disposed of, than it seems to me the language used is apt and clear and it appears to me the legislature had no other object in view. The word "expressed" as used in both sections 130 and 132 and in reference to this discussion is a significant term. The caveator has no objection to registration provided it is "expressed" to be subject to his claim set out in the caveat, that is, provided that it is made absolutely clear to all parties interested in the title to the lands, that the registration does not affect his claim which, thereafter as before, he remains at liberty to establish or defend according to the nature of the proceedings which may be taken.

Upon consideration, I am of opinion that the provisions of the Act in question are not open to the restricted construction for which counsel contends, and that O'Brien's position has not been altered or affected by the memoranda on the transfer and certificate. Was there in this case an agreement actually concluded between Pearson and Douglas? If there was no completed contract, then Pearson must fail. Obviously, if there is no concluded contract, if there have been negotiations never crystallized into a contract, then there can be no evidence of a contract within the Statute of Frauds. It was on this ground

MAN.

C. A.
1912

PEARSON
v.
O'BRIEN.

Cameron, J.A.

*Hussey* v. *Home Payne*, 4 A.C. 311, was decided in the House of Lords. Lord Cairns examined the whole correspondence to find if it evidenced a complete contract and found that, although two of the letters taken by themselves and separately from the others might lead the reader to think they amounted to a concluded agreement, yet "there was in point of fact no completed agreement between the parties" p. 321. Mr. Justice Kay in *Bristol, etc.* v. *Maggs*, 44 Ch. D. at p. 623, sets forth his understanding of the decision in *Hussey* v. *Home Payne*, 4 A.C. 311:—

> Both he (Lord Cairns) and Lord Selborne seem to me to lay down broadly that, where it is sought to make out a binding contract from correspondence, the whole of it, as well as the verbal communications at interviews, should be regarded, and it is not right to stop at one letter of the correspondence which, with what preceded, might constitute a sufficient agreement within the Statute of Frauds; whereas if the whole of the correspondence were considered . . . it may clearly appear that those letters were in truth, only part of an uncompleted negotiation.

"The question is really one of fact": *per* North, J., in *Bellamy* v. *Debenham*, 45 Ch.D. 494. Pearson did not agree to the formal document submitted to him for execution by Douglas, but made an alteration in it. Douglas thereupon withdrew from the negotiations as he had a right to do, and there was, to my mind, no contract. The minds of the parties had not in point of fact met.

The position of the parties seems to be this: A. offers to sell B. certain property for $10,000: one half cash, balance in one year. B. accepts in writing, saying: I will pay one-half cash and the balance in one year by paying you $4,975. In reality it is not an acceptance of an offer, but a counter offer, and therefore, tantamount to a refusal.

I concur in the judgment of the Chief Justice of the King's Bench and think the appeals must be dismissed.

Howell, C.J.M.

HOWELL, C.J.M., concurred.

*Both appeals dismissed.*

## LEMBKE v. CHIN WING.

B. C.

S. C.
1912

July 23.

*British Columbia Supreme Court, Murphy, J. July 23, 1912.*

1. JUDGMENT (§ I F—46)—SUMMARY JUDGMENT—LIQUIDATED DEMAND.

In order to obtain summary judgment for a liquidated demand on affidavits negativing any possible defence the indorsement on the writ must shew beyond question that the claim is for liquidated damages.

2. DAMAGES (§ III A 7—95)—LIQUIDATED DAMAGES—BUILDING CONTRACT—DELAY IN COMPLETION.

A stipulation in a building contract for the payment by the builder to the property owner of a fixed sum per day as liquidated damages for delay in completion of the building after the time limited for completing the work will be presumed to apply only where the work of building has been entered upon, not where there has been a total failure to perform the contract.

Statement

MOTION for judgment under Order XIV. B. C. Supreme Court Rules, 1906, (marginal rule 115), heard by Murphy, J., at Vancouver.

*Griffin*, for plaintiff.

*Killam*, for defendant.

Murphy, J.

MURPHY, J.:—The indorsement does not shew that the contract to put up the buildings was ever attempted to be carried out. From what was said in argument and from the affidavit of defendant I gather that the fact is that no beginning to build has ever been made.

Whether this be so or not, I think in order to entitle a plaintiff to obtain judgment under Order XIV., his indorsement must shew beyond question that the claim is for liquidated damages. It may well be that the claim of $25 per day is a claim for liquidated damages, provided the agreement to build was actually entered upon and the building not completed in time, but the indorsement must clearly shew this. Otherwise, this $25 per day claim never arises, and the action is for unliquidated damages for breach of contract to build, not for damages under the demurrage clause.

This $25 per day assessment was clearly only intended to cover delay in completion, not damages for total failure to perform the contract. The wording of the clause shews this, and to hold otherwise would be to make the plaintiff the arbiter of the *quantum* of damages, which he could increase at will by delaying action. The only limit would be that set by the Statute of Limitations.

The application is dismissed.

*Application dismissed.*

MAN.

K. B.
1912

May 8.

## SHEPHERD v. ROSS.

*Manitoba King's Bench. Trial before Robson, J. May 8, 1912.*

1. DAMAGES (§ III A 3—64)—MEASURE OF COMPENSATION—BREACH OF LESSOR'S COVENANT—FURNISHING HORSE TO WORK DEMISED PREMISES.

The measure of damages for the breach of a lessor's covenant to furnish a lessee with a horse for working demised premises, is the cost of supplying another, and not the value of crops lost by reason of such default.

2. DAMAGES (§ III A 3—64)—BREACH OF CONTRACT TO SUPPLY TEAM—USE BY LESSOR UNDER TERMS OF LEASE.

A lessor is not liable in damages for failing to supply a tenant with a team for working demised premises, where the lessor required them for working other land, which use was justified by an exception or reservation for that purpose provided by the terms of the lease.

3. COSTS (§ I—10)—DISCRETION—ACTION FOR WRONGFUL EJECTMENT.

The landlord may be refused his costs of successful defence of an action by the tenant for damages for wrongful ejectment if the ejectment be shewn to be wrongful, but the plaintiff fails by reason of omission to prove any damage therefrom.

4. LANDLORD AND TENANT (§ III D 1—100)—RENT—PART OF CROPS—DELIVERY OTHERWISE THAN STIPULATED IN LEASE.

A tenant is not in default in the payment, as rent, of part of the crops raised on demised premises, because of his failure to deliver them, on demand of his landlord, in a manner different from that specified in the lease.

5. DAMAGES (§ III E—144*a*)—MEASURE OF COMPENSATION—WRONGFUL EVICTION.

A tenant who was wrongfully evicted by his landlord, and suing for damages must prove the value of the unexpired portion of his term, if damage is claimed in respect of the latter for the excess in the value thereof over the share of rent from payment of which the tenant was absolved by the eviction.

6. LANDLORD AND TENANT (§ III D—99)—LIABILITY OF TENANT FOR RENT AFTER EVICTION.

A tenant is not liable for rent of demised premises after he has been evicted therefrom by his landlord.

7. DAMAGES (§ II A—6)—PUNITIVE DAMAGES FOR WRONGFUL EVICTION—AVOIDANCE OF LOSS BY EXERCISE OF DILIGENCE.

Punitive damages will not be awarded a tenant for an eviction by his lessor from demised premises, where all loss might have been avoided if the tenant had acted diligently.

Statement

AN action for damages for alleged breach of covenants contained in a lease and for damage for wrongful eviction.

The action was dismissed.

*N. F. Hagel*, K.C., for plaintiff.

*H. V. Hudson*, for defendant.

Robson, J.

ROBSON, J.:—By indenture of 19th April, 1911, defendant demised to plaintiff "part of legal sub-division 13 in section 16, township 11, range 4, east of the principal meridian in Manitoba, said part being in the north-westerly corner of said legal

sub-division, and containing 10 acres, more or less, with reservation of certain buildings, from that date to 31st March, 1912. The rent reserved was "one hundred bushels of potatoes, to be delivered to the lessor when demanded in the fall," and certain other produce.

The indenture contains provisions as follows:—

> The said lessor agrees to supply for the use of the lessee on the said land one team of horses and implements that are already on the land, reserving the right, however, of using the aforesaid horses or implements, if required, on the balance of W. ½ 16, 11, 4 E.
>
> The said lessee covenants and agrees with the lessor that he the said lessor shall have the exclusive use of the dwelling house thereon except the use of the kitchen, of which there shall be joint use, and kitchen-bedroom thereof, also the use of the stable for the team of horses to be used on the form and such other horses as he may desire.
>
> The said lessee further covenants and agrees to build in such a manner and place as designated by the lessor a rockery, also to terrace around the dwelling, as required by the lessor, also to trim and prune all shade trees on said land as directed by the lessor.
>
> Provided also and it is hereby expressly agreed and understood by and between the parties hereto that if the said lessee should fail to fulfil the covenants and agreements as aforesaid and fail to keep the place in neat order, then after two weeks' notice in writing delivered to the lessee, if the said lessee still fail to fulfil the covenants and agreements, this lease shall immediately become null and void and the lessee covenants to give up quiet possession.

Plaintiff entered on the premises and proceeded to use the land as a market garden during the season of 1911.

On 19th October, 1911, defendant gave notice to plaintiff as follows:—

> Springfield, Oct. 19th, 1911.
>
> Robert L. Shepherd, Esq.,
> Springfield, Man.
>
> Take notice that I want you to live up to the covenants in the lease given you on the 19th April last. You have not been keeping down the noxious weeds, or have you finished the rockery, or are you working the land in a good husbandlike manner, or have you been manuring the land, or are you doing the fall plowing as you agreed to do.
>
> You are hereby notified that unless you fulfil the covenants in the lease above mentioned two weeks from this date your lease ceases and determines and you are called upon to give up quiet possession after you have delivered to me one hundred bushels of potatoes, five bushels of beets, five bushels of parsnips, five bushels of carrots, and two dozen head of cabbage at my residence, 372 Gertrude avenue, Fort Rouge, Winnipeg. You are not under any circumstances to take a horse from off the premises leased to you as it is distinctly agreed that the horses are to be used by you only on the place rented to you.
>
> D. A. ROSS, *Lessor for the owner.*

Plaintiff firstly complains that defendant prevented him from using the horses and implements as agreed, and as a result the

MAN.

K. B.
1912

SHEPHERD
v.
ROSS.

Robson, J.

plaintiff was unable to remove the produce from the ground, whereby the plaintiff suffered damage. At the trial I was forced to think that defendant had been overreaching towards plaintiff and that plaintiff too readily submitted. I think that had plaintiff asserted himself and looked after his own interests he need not have lost any part of his garden crop. Even if the defendant wrongfully withheld the use of the horses the measure of damage would not be the loss of the crop but the cost of supplying the necessary force another way. I was not satisfied that plaintiff could not have otherwise protected himself. It seems that he did not do so. Under these circumstances, I cannot see that the defendant is liable for the loss of the crop.

Defendant says the horses were required by him for use on other parts of the half section. That is not open to question on the evidence and in itself would be an answer to this complaint.

Plaintiff further complains that on the 3rd of November, 1911, defendant wrongfully ejected plaintiff from the premises and forcibly removed his goods out of the house.

The evidence seemed to me to establish an eviction on or about the date named. At that time there was little left of value in the lease. It was merely the use of a bedroom and joint use of a kitchen and possibly use of outbuildings for storage.

Defendant justifies on different grounds. 1. That the rent was in default. It will be seen from the demand contained in the notice, recited above, that it demanded delivery of the produce in a manner to which the defendant was not entitled. I cannot find that there had been default in this stipulation. 2. That the weeds were not kept down, nor rockery built, nor trees pruned, nor land worked properly and manured. Considering the conditions, I think that up to the time of the notice plaintiff had reasonably fulfilled his covenants regarding these matters.

There was no evidence as to the value of the unexpired portion of the lease. It could not have been very great. The period of importance was the growing season of 1911, of which the plaintiff had the benefit. He had satisfied part of the rent, and owing to the eviction is not liable for any more. I was asked to award punitive damages, but I cannot see my way to that. I cannot avoid thinking that plaintiff by diligence might have avoided any loss he sustained. Certain allegations in the statement of claim as to loss of profits by plaintiff owing to defendant having informed parties that plaintiff would not be able to fulfil his contracts were not supported by evidence. There is nothing of substance involved in the action and I think there should be a dismissal without costs.

*Action dismissed.*

## THE RURAL MUNICIPALITY OF MINTO v. MORRICE.

MAN.

K. B.
1912

May 8.

*Manitoba King's Bench. Trial before Robson, J. May 8, 1912.*

*Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron, and Haggart, JJ.A. June 17, 1912.*

1. TAXES (§ III B 1—116)—ASSESSMENT—FAILURE TO DESCRIBE PROPERTY AS UNPATENTED—MUNICIPAL ASSESSMENT ACT (MAN.) SEC. 31.

The failure to note on an assessment roll, as imperatively required by sec. 31 of the Municipal Assessment Act of Manitoba, the fact that land assessed was unpatented, will render the assessment invalid.

[*Haisley* v. *Somers*, 13 O.R. 600, applied; see also *Hall* v. *Farquharson*, 15 A.R. 457.]

2. DEFINITIONS (§ I—10)—MEANING OF "UNPATENTED LANDS"—MUNICIPAL ASSESSMENT ACT (MAN.) SEC. 31.

The term "unpatented lands" in sec. 31 of the Municipal Assessment Act, is used in the special sense of lands vested in the Crown, in which a purchaser takes merely such interest as the Crown or its officers may be willing to recognize in the particular case.

3. TAXES (§ III B 1—116)—ASSESSMENT—AGREEMENT TO PURCHASE PROVINCIAL LANDS—MUNICIPAL ASSESSMENT ACT (MAN.) SEC. 31.

Provincial lands held by one under an agreement for purchase thereof from the Crown are "unpatented" lands within the meaning of sec. 31 of the Municipal Assessment Act, which requires the fact that where lands assessed for taxes are unpatented, the fact is to be noted on the assessment rolls.

4. STATUTES (§ II B—116)—CONSTRUCTION OF ACT VALIDATING ASSESSMENTS—EFFECT ON ILLEGAL ASSESSMENT.

An Act legalizing and confirming all assessments made in rural municipalities in a designated year, when based upon the assessment rolls of the previous year, does not validate an assessment not made according to law.

Statement

AN action by the plaintiff municipality to recover from defendant $424.84 taxes against section 35, township 16, range 17, West, for the years 1908, 1909, 1910 and 1911, with penalties for non-payment of the taxes for the three first-mentioned years.

The action was dismissed with costs.

*F. M. Burbidge* for plaintiffs.

*J. E. O'Connor*, for defendant.

Robson, J.

ROBSON, J.:—The parties have agreed upon a statement of facts.

I infer from the admissions that the land was among those embraced in the agreement between the Crown (Manitoba) and the Manitoba and North Western Railway Company, appearing in 62 & 63 Vict. (Man.) ch. 19, mentioned in section 2 of the Provincial Lands Act. The lands were probably granted by the Crown (Dominion) under legislation such as 48-49 Vict. ch. 60, and 49 Vict. ch. 11. A certificate of title was issued to the Crown (Manitoba) 28th June, 1905, and so remains.

The land was provincial land within the Provincial Lands Act. Defendant had agreed to purchase. He has paid part of the purchase money. The agreement is still extant. One of the defendant's contentions is that the land was "unpatented lands"

MAN.
K. B.
1912
RURAL MUNICIPALITY OF MINTO v. MORRICE.
Robson, J.

within the meaning of the Municipal Assessment Act and that the assessments are void in that, as the fact is, they did not state that the land was unpatented.

Taxes may be recovered by distress by sale of the land or in action of debt. The interest of a person holding a contract of sale of provincial lands may be affected by a municipal tax sale: Provincial Lands Act, sec. 16. The construction, of the taxing provisions will be the same, whichever method of recovery may be adopted. In *Haisley* v. *Somers*, 13 O.R. 600, at 605,* Proudfoot, J., states the principle of construction in such cases. I take it to be simply that the requirements of a taxing statute are imperative in the absence of a contrary intendment.

By section 13 of the Municipal Assessment Act the assessor is required, after diligent inquiry, to proceed to make a valuation of all the rateable property in the municipality and to make an assessment roll

> in which he shall set forth correctly all the particulars and information required to be contained in order to comply with the form in Schedule A. . . in case of a rural municipality.

The form schedule A required a statement of whether the land was patented or unpatented.

Section 31 of the Act reads as follows:—

> 31. In the case of unpatented lands, there shall be an entry made on the assessment roll shewing that the same are unpatented, and that the assessment is made in respect of such right, interest, estate, business or occupation of the occupant as aforesaid, but it shall not be necessary to the validity of the assessment to set forth correctly or at all the particular nature of the right, interest, or other matter so assessed.

By repeating the requirement of an entry when the land is unpatented section 31 emphasises the imperative nature of that provision. The latter part of section 31 refers to a right, interest, estate, business or occupation as mentioned in section 7. See 60 Vict. ch. 21, sec. 15. Omission to state the nature of the interest held in Crown land is excused but not the fact that the lands are unpatented.

Section 18 required the assessor to make search of certain records to enable him to assess lands liable thereto. This would not be an exhaustive definition of an assessor's duty under section 13. The assessor is to obtain the information specified not only for the assessment but evidently for the guidance of the officers engaged in the subsequent steps. For instance, a treasurer proceeding to sell for arrears of taxes, would, in preparing

*An appeal from the decision in *Haisley* v. *Somers*, 13 O.R. 600, was taken to the Queen's Bench Division and was dismissed, that Court affirming the decision below on the ground that the sale was not fairly conducted but expressing no opinion upon the other grounds upon which the decision reported in 13 O.R. 600 was based. See also *Hall* v. *Farquharson*, 15 A.R. 457.

his list under section 162, act on the assessor's return as to whether land was patented or not.

The necessity of shewing in the advertisement that the land is unpatented, if the fact is so, is shewn by the judgment in *Haisley* v. *Somers*, 13 O.R. 600, at 603, 604. This is an additional reason for holding that the opening provision of section 31 is imperative.

I would hold that if in fact the land was "unpatented" within the meaning of the Act it was imperative that the assessment roll should so state and that without an entry therein to that effect the proceedings towards taxation were deficient.

So the question is, Was the land "unpatented"?

There is no evidence of the steps by which the title passed from the Crown (Dominion) through the railway company to the Crown (Provincial). Doubtless there was a grant by the Dominion which was by patent or equivalent proceeding. In that sense it might be said that the land had been patented. But I think that the expression "unpatented lands" in section 31 and elsewhere in the Assessment Act has a special meaning with regard to the subject matter. That meaning may be extracted from certain provisions of the Assessment Act. The Provincial Lands Act is also illustrative.

As above stated in advertising lands for sale for taxes the treasurer distinguished unpatented lands from those patented. This, as stated in *Haisley* v. *Somers*, 13 O.R. 600, is so that purchasers may know what they are getting. Apparently sales for taxes of assessable lands carry an estate in fee simple in every case where an estate in fee simple has been granted by the Crown. Where the Crown owns the land a tax sale is operative only to the limited extent mentioned in the two statutes referred to. I think it thus clearly indicated that "unpatented lands" are those which are in the Crown and regarding which the purchaser takes merely such interest as the Crown or its officers may, in the particular case, be willing to recognize.

A key to the meaning of "unpatented lands" in the Assessment Act, where provincial lands are involved, may be derived from certain provisions of the two Acts.

To call the land in this case "patented" might lead possibly to a tax sale purporting to be of an estate in fee simple whereas in fact all that could be so reached would be the purchaser's right under his agreement with the Crown.

A summary County Court method of collecting taxes on "unpatented land" was provided by section 146. Clause (*h*) as amended, 1906, ch. 52, sec. 4, made *primâ facie* evidence the certificate of the Provincial Lands Commissioner or Deputy that the land was unpatented or patented. No such certificate is being resorted to here but light is thrown by this provision

MAN.

K. B.
1912

RURAL MUNICIPALITY OF MINTO v. MORRICE.

Robson, J.

on the legislative intention, for in the Provincial Lands Act, by which the Commissioner would be governed, provision is made for patent to complete sale by the Crown. See section 15. I take it that lands being administered under that Act would, before patent issued thereunder, be deemed, as far as that Act would extend, unpatented. The Provincial officers in giving certificate under 146 would no doubt be so guided.

In my opinion the lands in question were "unpatented lands" within the imperative direction of section 31 and the assessment was void for not containing an entry to that effect.

I have noticed section 5 of ch 36, 9 Edw. VII. by which all assessments made in rural municipalities for the years 1908 and 1909, based upon the previous year's assessment rolls thereof are legalized and confirmed. That would in this case ratify the adoption by plaintiff municipality for 1908 of the assessment of 1907, as was done. No argument was based on this, obviously because the validating provision merely removes question as to the adoption of the roll for the previous year. It does not legalize an attempted assessment of such previous year not made in accordance with the law. Several instances of such legislation and the principle applicable will be found in Endlich on Statutes at paragraph 385.

Other questions were raised which it is not necessary to consider.

The plaintiff appealed to the Court of Appeal.

C. A.
1912

June 17.

June 17, 1912. The Court of Appeal (HOWELL, C.J.M., and RICHARDS, PERDUE, CAMERON, and HAGGART, JJ.A.), dismissed the appeal with costs, without calling on respondent's counsel.

*Action dismissed with costs.*

---

SASK.

S. C.
1912

July 15.

**WALLACE BELL CO., Ltd. (plaintiffs, appellants) v. CITY OF MOOSE JAW (defendants, respondents).**

**(Decision No. 2.)**

*Saskatchewan Supreme Court, Newlands, Johnstone, and Lamont, JJ. July 15, 1912.*

1. CONTRACTS (§ I D 4—62)—SUFFICIENCY OF ACCEPTANCE—MATERIAL MODIFICATION IN TERMS OF EXISTING CONTRACT—CONDITION—NEW CONTRACT TO BE REDUCED TO WRITING.

The mere acceptance of a proposal to materially modify the terms of an existing contract, will not have that effect when the proposal was made subject to the express condition that it should not have legal effect on such contract until its terms were reduced into a new written agreement.

[*Chinnock* v. *Marchioness of Ely*, 4 DeG. J. & D. 638, and *Rossiter* v. *Miller*, 3 A.C. 1124, followed.]

2. ESTOPPEL (§ III—87*a*)—AS TO MODIFICATION OF TERMS OF CONTRACT—ACQUIESCENCE—WAIVER.

A condition that a proposal to modify the terms of an existing contract should not become effective until a new written agreement was entered into, is not waived by the conduct of the parties where they did nothing whatever in reliance upon such proposal after it was made.

SASK.

S.C.

1912

WALLACE BELL CO., LTD. v. CITY OF MOOSE JAW.

3. CONTRACTS (§ I F—121z)—VARYING WRITTEN CONTRACT—INCORPORATING EXTRINSIC DOCUMENT—SOLICITOR'S LETTER CONTAINING TENTATIVE SUGGESTION.

The terms of a written contract with a municipal corporation, under its seal, can not be varied so as to result in a binding agreement, by a written acceptance of a proposition to enter into a new and modified contract, contained in a letter written by the city solicitor, under directions from the city council, where such letter expressly stated that the offer therein contained was merely a tentative suggestion which was not to have any legal effect on the existing contract until reduced into a new written agreement.

[*Wallace Bell Co.* v. *Moose Jaw* (No. 1), 3 D.L.R. 273, affirmed on appeal; *Rossiter* v. *Miller*, 3 A.C. 1124; *Stow* v. *Currie*, 21 O.L.R. 486, and *Chinnock* v. *Marchioness of Ely*, 4 DeG. J. & S. 638, at p. 645, applied.]

4. CONTRACTS (§ IV E—369)—BREACH OF CONTRACT TO DIG A WELL—COMPLETION CONDITION PRECEDENT TO PAYMENT.

Upon the failure to sink a well to the depth specified in a contract, money advanced the contractor by the other party to the agreement may be recovered back where the contract expressly provided that boring the well to the depth specified should be a condition precedent to the contractor's right to retain any money advanced him.

[*Wallace Bell Co.* v. *Moose Jaw* (No. 1), 3 D.L.R. 273, affirmed on appeal.]

Statement

APPEAL by plaintiff from the dismissal of an action brought upon an alleged contract for work and labour.

The decision appealed from was given by Wetmore, C.J., *Wallace Bell Co.* v. *Moose Jaw*, 3 D.L.R. 273.

The appeal was dismissed.

*W. F. Dunn*, for appellants.

*W. B. Willoughby*, for respondents.

The judgment of the Court was delivered by

Newlands, J.

NEWLANDS, J.:—The city of Moose Jaw entered into a contract under seal with the plaintiffs to bore a dry well for them to a depth of three thousand feet in search of natural gas. The plaintiffs ceased operations after boring to a depth of about one thousand feet, being prevented, as they alleged, by the inflow of water from proceeding further. Some correspondence was then had between the plaintiffs and the city solicitor acting on behalf of the defendants, which resulted, the plaintiffs allege, in the old contract being cancelled and a new contract being entered into between the parties by which the city agreed to pay them the sum of $2,500 upon certain conditions. These conditions, the plaintiffs further allege, were afterwards waived by the city, and they brought this action to recover the said $2,500.

The letters which, the plaintiffs allege, cancel the old and make a new agreement are as follows:—

Moose Jaw, Sask., Feb. 21, 1911.

The Wallace Bell Co., Ltd.,
City.

Dear Sirs,—Inasmuch as you have applied to the council of the city at previous times and again by your letter of February 14th, as to a

SASK.

S. C.
1912

WALLACE BELL CO., LTD.
v.
CITY OF MOOSE JAW.

Newlands, J.

variation of the contract between the city and yourselves for digging the test well, you ascertained that the well cannot be completed as the water cannot be shut off, and have requested the city to take the matter up and give you an answer. We beg to advise you that the matter has been considered in council and the city has decided to make you a final proposition as to what it will do. It is first to be clearly understood that any negotiations with you in reference to a change in the contract are carried on on the express understanding that they are to in no way affect the contract now in force unless the same result in a proposition or agreement suitable to both parties. For the present they are merely tentative suggestions on the part of each party to the contract, and until such time, if any, as they are reduced into a new written agreement they shall have no legal effect on the existing contract. Premising this much we may say that the city asks the privilege of calling in an expert to examine the condition of the well with your well-boring plant and machinery, to ascertain whether or not the water can be closed off in such a way as to allow the well to be completed. If, in the opinion of the experts, to be approved by the city council, the water can be closed off so as to enable the well to be completed, then the city will expect and insist on the contract being completed as per its terms. If the water cannot be closed off to the satisfaction of the council the city will pay you a further $2,500 and take over the well and casing. The city is to have a reasonable time to make the necessary experiment and do the necessary testing. You are given two weeks from this date to say whether or not you accede to this proposition, which is final on the part of the city, and if you do not accede within that time, then the city will insist on the existing contract being carried out according to its terms.

Yours truly,

W. B. WILLOUGHBY,
*City Solicitor.*

March 1, 1911.

Mr. W. B. Willoughby,
City Solicitor,
Moose Jaw, Sask.

Dear Sir,—We are in receipt of your letter of the 21st ult., re city well. The terms of your letter are satisfactory and we accept them.

We understand that by the words "take over the well and casings" on the second page you refer to the casings already in the well.

Ask the city council to please inform us when they will be ready to have an expert start operations so that the writer can arrange to be at the plant to have our representative there to give any assistance that might benefit in trying to shut off the water.

Yours truly,

THE WALLACE BELL CO., LIMITED.
*Per*.....

These letters, the plaintiffs contend, form a complete contract, containing all the terms upon which the parties have agreed. But is this the case?

One of the terms contained in the letter of Mr. Willoughby which the plaintiffs have accepted is that "until such time, if

any, as they (the terms)" are reduced into a new written agreement they shall have "no legal effect on the existing contract." This brings this case within the language used by Lord Westbury in *Chinnock* v. *The Marchioness of Ely*, 4 DeG. J. & S. 638, and approved of by Lord Cairns in *Rossiter* v. *Miller*, 3 A.C. 1124. I quote from the latter case, at p. 1138:—

> And then Lord Westbury uses these words, "I entirely accept the doctrine contended for by the plaintiff's counsel, and for which they cited the cases of *Fowle* v. *Freeman*, 9 Ves. 351; *Kennedy* v. *Lee*, 3 Mer. 441, and *Thomas* v. *Dering*, 1 Keen 729, which establish that if there had been a final agreement, and the terms of it are evidenced in a manner to satisfy the Statute of Frauds, the agreement shall be binding, although the parties may have declared that the writing is to serve only as instructions for a formal agreement, or although it may be an express term that a formal agreement shall be prepared and signed by the parties. As soon as the fact is established of the final mutual consent of the parties to certain terms, and those terms are evidenced by any writing signed by the party to be charged or his agent lawfully authorized, there exist all the materials which this Court requires to make a legally binding contract." Up to that point it appears to me that these words exactly describe the case which your Lordships have before you. But the words which are relied upon by the learned Judges in the Court of Appeal are the words which follow: "But if to a proposal or offer an assent be given subject to a provision as to a contract, then the stipulation as to the contract is a term of the assent, and there is no agreement independent of that stipulation. And this appears to me to be the real state of the case before me, for I am clearly of opinion that the true and fair meaning and legal effect of the letter of the 19th of November may be expressed in these words: 'I will go on with the treaty for the sale to you of my house, and for that purpose will send you the form of the contract which I am willing to enter into.' I take, therefore, the letter of the 19th November either as a conditional acceptance of the plaintiff's terms, subject to the draft contract being agreed to, or as an expression of willingness to continue the negotiation, and for that purpose to propose a form of agreement." My Lords, I can only say that I am willing to accept every word of Lord Westbury as there given. I assume that the construction put by him upon the letter I have quoted was a proper construction and I entirely acquiesce in what he says, that if you find, not an unqualified acceptance of a contract, but an acceptance subject to the condition that an agreement is to be prepared and agreed upon between the parties, and until that condition is fulfilled no contract is to arise, then undoubtedly you cannot, upon a correspondence of that kind, find a concluded contract. But, I repeat, it appears to me that in the present case there is nothing of that kind; there is a clear offer and a clear acceptance. There is no condition whatever suspending the operation of that acceptance until a contract of a more formal kind has been made.

Now, the legal effect of the letter of Mr. Willoughby and the acceptance of the terms of that letter by the plaintiffs is that there shall be no agreement between the parties until a new

SASK.

S. C. 1912

WALLACE BELL CO., LTD. v. CITY OF MOOSE JAW.

Newlands, J.

written agreement is entered into. Therefore the original contract was not altered nor was the city bound to carry out the offer contained in Mr. Willoughby's letter. The offer was conditional upon its being reduced to a formal written agreement, and the acceptance was upon the same condition. This never having been done, there is no new agreement between the parties. This being the legal effect of the letters it is unnecessary for me to discuss the further objection to this alleged agreement that the city of Moose Jaw can only be bound by a formal agreement executed under their corporate seal, the proposed agreement never having been reduced to a formal agreement in writing as intended.

It is further urged on behalf of the plaintiffs that the defendants acted upon the proposals and allowed the plaintiffs to act thereon, and that they thereby waived the execution of a formal contract. According to the evidence, the plaintiff had stopped work before Christmas, 1910, and their plant, with their manager, remained in Moose Jaw until Mr. Willoughby's letter of February 21st, 1911. After that date they did nothing more than they had done on ceasing work, so I do not see how it can be contended that the defendants allowed the plaintiffs to act on the proposals, the evidence shewing that what they claim as action was that they did nothing.

In my opinion the appeal should be dismissed with costs.

*Appeal dismissed.*

---

SASK.

S. C. 1912

June 15.

**SAWYER MASSEY COMPANY Limited v. FEDO SZLACHETKA and DURYTER SZLACHETKA.**

*Saskatchewan Supreme Court. Trial before Newlands, J. June 15, 1912.*

1. CONTRACTS (§ I D—46)—FIXING DAMAGES FOR BREACH—ILLITERACY OF PURCHASER—PARTIAL INVALIDITY.

Where a contract for the sale of certain machinery was neither read over nor explained to the purchasers other than the part that dealt with the description of the machinery, and a provision that the damages for a breach thereof should be a certain per cent. of the price of the machinery was not read over to them or in any way brought to their notice, and the vendor's agent knew that one of the purchasers could neither read nor write and that the other could not read the proposed contract so as to understand it, both being foreigners with little if any education, there was no agreement on their part to the per cent. fixed as damages for breach or to any other part of the contract than the order for the machinery.

2. DAMAGES (§ III A 4—76)—CONTRACT FOR SALE OF MANUFACTURED ARTICLE—CANCELLATION BY BUYER BEFORE TIME FOR SHIPPING.

Under a contract for the sale of goods giving the purchasers no right to cancel the same, an attempt at cancellation by them before the date fixed for shipping the goods, does not deprive the vendors of the right to carry out their part of the contract and, if they afterwards shipped the goods, they are entitled to recover damages for their non-acceptance.

SASK.

S. C. 1912

SAWYER MASSEY CO., LTD. v. SZLACHETKA.

Newlands, J.

THIS is an action for breach of contract in failing to take certain Sawyer Massey machinery ordered.

Judgment was given for plaintiffs for $140.00 and costs.

*C. D. Livingstone*, for plaintiffs.

*W. A. Boland*, for defendants.

NEWLANDS, J.:—I find the fact that the defendants ordered the machinery in question and that they intended to order Sawyer Massey machinery. I also find that the contract was neither read over nor explained to them, excepting the part that dealt with the description of the machinery; that the clause that provided the damages at fifteen per cent. of the price in the event of breach was not read over to them nor in any way brought to their notice; that the agents of the plaintiffs knew that one of the defendants could neither read nor write, he having to sign the contract by his mark, and that the other defendant could not read the proposed contract so as to understand it. Both defendants were foreigners with but little if any education. They therefore did not agree to fifteen per cent. being fixed as the damages for breach, nor to any other part of the contract than the order for the machinery.

The plaintiffs are entitled to damages for non-acceptance. They claim as damages $140 demurrage charges of the machinery shipped to the defendants. Though the defendants cancelled the order before the date fixed for shipping same, the plaintiffs still had the right to carry out their part of the contract, the defendants having no right to cancel the order under the contract. I will therefore allow them that amount as damages. The plaintiffs, relying on the fifteen per cent. clause in their contracts, proved no other damages, and it is too late for them to do so now. No other damages will therefore be allowed.

Judgment for the plaintiffs for $140 and their costs.

*Judgment for plaintiffs.*

---

## REX v. DANIEL.

B. C.

S. C. 1912

May 6.

*British Columbia Supreme Court, Hunter, C.J. May 6, 1912.*

1. INDICTMENT, INFORMATION, AND COMPLAINT (§ I—3)—LEAVE OF COURT—CRIMINAL LIBEL.

Only in rare cases will the Court grant leave to prefer an indictment for criminal libel at the instance of a private prosecutor who has not been bound over at the preliminary inquiry.

Statement

IT appearing that the private prosecutor had not been bound over at the preliminary hearing to appear and give evidence,

*S. S. Taylor*, K.C., applied at the Assizes for an order directing the indictment to be preferred for criminal libel.

*R. L. Maitland* appeared for the Crown, stated that he had been instructed not to take any part in the prosecution.

B. C.

C. A. 1912

REX v. DANIEL.

HUNTER, C.J.:—The function of the Judge is not to initiate prosecutions, but to try them. It is only in rare cases, such as where he is an eye-witness of a breach of the law, that he should initiate a prosecution, and even then, with the exception of contempts of the Court, he should not be the trial Judge.

*Order refused.*

N.B.—*Maitland*, for the Crown, was subsequently instructed to prefer the indictment.

---

ALTA.

S. C. 1912

July 6.

## CLARKE v. BRITISH EMPIRE INSURANCE COMPANY, LIMITED.

*Alberta Supreme Court. Trial before Beck, J. July 6, 1912.*

1. INSURANCE (§ VI A—246)—NOTICE OF LOSS—REJECTION FOR MISREPRESENTATION IN APPLICATION—WAIVER OF IRREGULARITY IN NOTICE OF LOSS.

Where an insurance company receives a notice of loss under a policy issued by it and after an investigation rejects the claim on the ground of misrepresentation in the insured's application there is a waiver of any irregularity in the giving of the notice of loss.

2. INSURANCE (§ VI A—247)—PROOFS OF LOSS—REJECTION FOR MISREPRESENTATION—WAIVER OF CONDITION.

Where an insurance company receives proofs of loss under a policy issued by it and after an investigation rejects the claim on the ground of misrepresentation in the insured's application, there is a waiver of the condition in the policy that the proofs of loss must be sent to the insurer within a certain time.

3. INSURANCE (§ VI A—247)—TIME IN WHICH PROOFS OF LOSS MUST BE DELIVERED.

A condition in a policy of insurance that the proofs of loss must be delivered within thirty days, to the secretary of the insurer on blanks furnished by it means within thirty days after the insurer supplied the blanks.

4. INSURANCE (§ III D—66)—VALUE OF SUBJECT OF INSURANCE—MISREPRESENTATION.

A misrepresentation of the value of a stallion must be wilful or fraudulent to avoid the policy covering the same, value being a matter of opinion.

5. INSURANCE (§ III E 1—77)—GOOD FAITH OF INSURED—OVERSTATEMENT OF AGE WITHIN LIMIT.

Where a table of rates and classifications attached to a policy of insurance on a horse shewed that the limit of age for such an animal was ten years and that the rate under that age did not vary, an inadvertent overstatement within such limit of age by the assured of the horse's age which was eight years, was immaterial to the risk.

6. EVIDENCE (§ II E 7—193)—BURDEN OF PROOF—MISREPRESENTATION IN APPLICATION FOR INSURANCE—MATERIALITY.

In an action on a policy of insurance exempting the insurer from liability if statements material to the risk made in the application upon which the policy was issued, were untrue, where it appears that the insured made a misrepresentation in his application and that the insurer relies thereon as a defence, the burden is upon the insurer to establish the materiality of the matter misrepresented unless the circumstances themselves raise that inference.

ALTA.

S. C.

1912

CLARKE v. BRITISH EMPIRE INSURANCE CO., LTD.

7. INSURANCE (§ III D—65)—EFFECT OF PROVISION EXEMPTING INSURER FROM LIABILITY—WARRANTY BY INSURED—MATERIALITY OF MISREPRESENTATION.

A provision in a policy of insurance that the insurer shall not be liable for loss where it shall be found that the material statements set forth in the application upon which acceptance of the risk was based were untrue or, if the insured misrepresented or omitted to communicate any circumstances which were material to be known to the company in order to enable it to judge of the risk withdraws the effect of a warranty by the insured in the application that his answers therein are true and introduces materiality as an essential of the misrepresentation, which shall relieve the company from liability.

[*Anderson* v. *Fitzgerald*, 4 H.L. Cas. 484, and *Fitzrandolph* v. *Mutual Relief Society*, 17 Can. S.C.R. 333, distinguished.]

Statement

THIS action is brought upon a policy of insurance issued by the defendant company on the 27th October, 1910, for $1,000 upon the life of a stallion. The animal died on the 2nd August, 1911.

Judgment was given for the plaintiff for $1,000 and costs.

*L. W. Brown*, for plaintiff.

*O. M. Biggar* and *S. W. Field*, for defendants.

Beck, J.

BECK, J.:—The conditions relied upon by the defence are

No. 5. Providing that the company does not insure for more than 2-3 of the value and that in no event shall the company be liable for more than 2-3 of the actual cash value in the nearest local market nor except under certain stated circumstances for more than 2-3 of actual cost.

No. 8. Providing for notice of loss within two days of its occurrence which it was provided could be given by mailing the notice as a registered letter within that time.

No. 11. Providing for the delivery of proofs of loss "within thirty days to the secretary of this company with (of?) statutory declaration, on blanks furnished by the company, of three reliable persons, shewing," etc.

No. 13. Providing that 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 the risk was based, were untrue or that any fraud was practiced by the insured or . . . if the insured misrepresents or omitted to communicate any circumstance 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 for indemnity or in the proofs of loss.

Attention is called by counsel for the defendant company to the words of the policy:—

In consideration of the representations made in the application for this policy and in accordance with the stated conditions herein printed;

to the words of the application,

and the truthfulness of the answers I hereby warrant,

and to conditions of the policy, No. 14, that

if the insured fails to comply with all the terms and conditions hereof the company shall not be liable for any loss occurring under this contract.

ALTA.

S. C.
1912

CLARKE
v.
BRITISH
EMPIRE
INSURANCE
CO., LTD.

Beck, J.

and No. 15, that

> no agreement either verbal or otherwise made by agents or employees shall be binding on the company or the insured, other than the conditions named in the application and contract and no agent shall have any right or authority to waive any condition or stipulation of this policy or of the application.

The defences sought to be established under the foregoing provisions are:—

(1) Absence of notice of loss within two days;
(2) Absence of proof of loss within thirty days;
(3) Misrepresentation as to:—
  (a) Value;
  (b) Age;
  (c) The name of the party from whom the insured purchased and the price paid;
  (d) The length of time the insured was the owner.

(1) As to the absence of notice of loss within two days: the death of the animal occurred on the 2nd August, 1911. The proofs of loss delivered by the plaintiff and produced on the trial from the custody of the defendant company have endorsed upon them, in the part especially reserved for notes by the head office only the words: "Date of notice of loss, Aug. 3rd, 1911," and the notes embodying this statement are subscribed: "W. J. Walker, Mgr." I think there is no evidence to displace this.

Furthermore, the proofs of claim are endorsed in the same part under the heading "Remarks" with the words "Rejected as insurance was obtained by misrepresentation set forth in the application." The claim having been investigated and the decision of the company being placed on the ground of misrepresentation only, there was in my opinion a waiver of any irregularity, if there was one, in the giving of the notice of loss.

(2) As to the absence of proof within thirty days: I interpret the condition to mean within thirty days of the company supplying the blanks. The condition does not say within thirty days of the occurrence of the loss. It does say that the proofs shall be on blanks furnished by the company.

The endorsement to which I have already referred upon the proofs of loss has these notes:—

> Date of execution of proof, Aug. 21, 1911. Received at Main Office, Sept. 16th, 1911.

This—at all events taken in connection with the fact that the company considered the claim and rejected it on other grounds—I think, affords a presumption of fact that the proofs were delivered within thirty days of the furnishing of the blanks. The consideration of the claim and its rejection on other grounds would, I think, also constitute a waiver of the condition.

(3) Misrepresentation:—

(*a*) As to value, I am satisfied on the evidence that there was no wilful or fraudulent misrepresentation as to value.

Unless a misrepresentation of value is of that character it will not avoid a policy. Value is much a matter of opinion. I am not sure that I am in a position to say that $2,000 is more than could have been got for this horse. Condition No. 5 itself contemplates, inasmuch as it protects the company by way of reducing the amount recoverable, unintentional over-valuation. In addition to this a table of rates and classification attached to the policy shews that the limit of insurance upon animals of the class into which the animal in question fell was $1,000 so that any statement of value in excess of $1,500 would appear to be useless and immaterial. The statement of value being a matter of opinion is not, I think, included in the warranty of truthfulness unless merely as to the fact that the insured held that opinion.

(*b*) Misrepresentation as to age: It appears that the animal was foaled June 26th, 1902. The application was made on the 21st October, 1910. The animal would then be over eight years of age. It is evident from an inspection of the form of application that "8" without more would have been the correct answer. A reference to the above mentioned table of rates and classification shews that the "limit of age" for such an animal as this is ten years and that under that age the rate does not vary. The insured could not possibly have supposed that overstating the age was to his advantage. It must have been by inadvertence that he did so; and the mistake is evidently immaterial to the risk.

(*c*) Misrepresentation as to the name of the party from whom the insured purchased and the price paid; and

(*d*) As to the length of time the insured was the owner: The insured's answers stated that "the name of the party from whom purchased" was "A. J. Layton"; the "price paid" was "$2,000." These answers are contained, by way of endorsement, in the application. In the "Description for pedigreed stock application," on which there is the direction, "Agents—attach this when used to back of regular application and have both signed," the insured's answer to a question stated that he had owned the animal for three months, that he had purchased it from A. J. Layton; that he had paid for the animal $2,000.

The facts in this connection are, as I find them, as follows: The plaintiff had the custody of a certificate in the following form which he produced at the trial:—

No. 33123

THE JOCKEY CLUB.

CERTIFICATE OF FOAL REGISTRATION.

1902.

THIS IS TO CERTIFY that the Br. Colt named "Buckingham," by Buckler

ALTA.

S. C
1912

CLARKE
v.
BRITISH
EMPIRE
INSURANCE
CO., LTD.

Beck, J.

out of School Girl, foaled June 26th, 1902, is duly registered by THE JOCKEY CLUB.
Marks: Star in forehead.

(Sgd.) F. K. Sturgis,
*Secretary.*
(Sgd.) James F. Wheeler,
*Registrar.*

Issued to Dr. W. B. Scammon,
Marysville, Kansas.

New York, Oct. 24th, 1902.

Certificate to be preserved and transferred to the purchaser if this horse is sold—record transfer on reverse side.

This certificate was endorsed as follows:—

Transferred to Harvey Scaman, of Marysville, Kansas.
Date, July 20th, 1904. (Sgd.) W. B. Scammon.
Transferred to Robert M. Barber, of Strathcona, Alberta,
Date, April 14th, 1906. (Sgd.) Harvey T. Scaman.
Transferred to A. J. Layton, of Edmonton.
Date, 7th Oct, 1910. (Sgd.) R. M. Barber.
Transferred to E. I. Clarke, of Edmonton,
Date, 8th Oct, 1910. (Sgd.) A. J. Layton.
Transferred to John Stevenson, of Edmonton,
Date, 12th Oct., 1910. (Sgd.) E. I. Clarke.
Transferred to E. I. Clarke, of Edmonton.
Date, 15th Oct., 1910. (Sgd.) John F. Stevenson.

The certificate was evidently handed over to the purchaser upon each of the sales noted.

The application for insurance was taken by one Paton who was a witness at the trial. Where he differs from the plaintiff I prefer the plaintiff's evidence. The answers to the questions are, with one unimportant exception, all in the handwriting of Paton. The certificate, with the endorsements of the transfers upon it, was produced by the plaintiff at the time of Paton's taking the application and I am satisfied that he saw the certificate and the various transfers and that he himself suggested that the length of the plaintiff's ownership should be stated untruly as three months and that the plaintiff merely acquiesced. I am satisfied too that the price of the animal agreed upon between Clarke and Stevenson was $2,000. How Layton's name came to be stated instead of Stevenson's is not explained. It may be surmised that the matter was discussed and suggestion made—I suspect by Paton—that Clarke had in fact first bought from him; that the intermediate sales from Clarke to Stevenson and from Stevenson to Clarke might properly be disregarded; as the latter effected a cancellation of the former; that Layton was the last seller who signed a printed form of transfer; the subsequent ones being wholly in writing; and it was best to throw the date of the insured acquiring the animal back as early as possible; that these things were some justification or excuse for giving Layton's name instead of Stevenson's.

The fact remains there was this misrepresentation of fact—that the insured had owned the animal for three months. I think there was no misrepresentation of the price paid, namely $2,000, but an ambiguous statement from which the more natural inference was that the immediate seller to the insured was Layton and that it was to him that the price of $2,000 was paid. I fancy it should be treated as a misrepresentation of fact. Then were these misrepresentations material?

I do not believe Paton when he says that had he known the true facts he or the company probably would not have accepted the application. I believe that he knew the true facts and with no knowledge of the views of the company—it was his first application—he thought he could improve the actual facts, which I find no reason to doubt would have not prevented the company from effecting the insurance and I see no reason to believe that the difference between the truth and the statements made were in any way material to the risk. That they were material, unless the circumstances themselves raise the inference—which it seems to me they do not—is a fact which, in my opinion, the company bears the burden of establishing.

It was strongly urged by counsel for the defendant company that by his application the plaintiff warranted the truth of his answers and that where there is a warranty as distinguished from a mere representation, the immateriality of the answer will not save the policy. This seems to be established by the cases of *Anderson* v. *Fitzgerald*, 4 H.L. Cas. 484, 10 E.R. 551; and *Fitzrandolph* v. *Mutual Relief Society of N.S.*, 17 Can. S.C.R. 333.

I have, however, come to the conclusion that these cases are distinguishable and inapplicable inasmuch as, so it seems to me, the condition (No. 13) withdraws this effect of the warranty and introduces materiality as an essential of the misrepresentations, which it provides shall relieve the company from liability.

The words of the condition so far as they affect this question are:—

> 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 the risk was based, were untrue or . . . . if the insured misrepresents or omitted to communicate any circumstance which is material to be known to the company, in order to enable it to judge of the risk.

I am, I think, rightly applying the principle of the maxim *expressio unius exclusio alterius*. For the foregoing reasons I direct judgment for the plaintiff for $1,000 and costs.

There will be a stay for thirty days.

*Judgment for plaintiff.*

ALTA.

S. C.
1912

May 23.

## NICHOLS AND SHEPARD CO. v. SKEDANUK.

*Alberta Supreme Court, Beck, J. May 23, 1912.*

1. DISCOVERY AND INSPECTION (§ IV—20)—EXAMINATION OF SALESMAN—COMMISSION—OFFICER—ALBERTA RULE 201.

One, who, subject to the approval of a company, solicits orders and sells machinery for it, and receives a commission on all sales effected by him, is an "officer" of the company, within the meaning of Sask. Rule 201, which permits the examination of the officers of a company for discovery, since the word "officer" must receive a wide interpretation.

[*Powell* v. *Edmonton, Y. & P. R. Co.*, 2 Alta. L.R. 339, followed.]

Statement

THIS is an application for an order to examine one Alexander Shandro, for discovery under Rules 201 *et seq.* as being an "officer" of the plaintiff company.

The order was granted.

*S. E. Bolton*, for plaintiff.

*A. C. Grant*, for defendant.

Beck, J.

BECK, J.:—The company is a dealer in farm implements and machinery. The action is, I gather, one for the price of a separator and traction engine bought by the defendant and three others from the plaintiff company.

From the material before me, I gather that Shandro is what is popularly called an "agent" for the company, and that he is supplied with the company's "literature" and with forms of "orders" for the company's machinery, and no doubt with the usual full instructions to agents, and that he canvassed the defendant and his associates and induced them to sign an order for the machinery in question. It is stated by the plaintiff's collection agent that Shandro is entitled to compensation by way of commission "for finding prospective purchasers who became purchasers of machinery from the said plaintiff company," and that he has "no authority to close any sales or (express authority) to bind the plaintiff by any contract with any party."

I conclude that Shandro represented the plaintiff company in the district in which he carries on business; that he is commonly known as the plaintiff's "agent;" that the practical effect of the relationship between the plaintiff company and Shandro is that the company expect him to sell as much of their machinery as he can to people apparently able to pay for it, and to take orders accordingly, which will be subject to the approval of one of the higher officers of the company, and that he is authorized so to act on behalf of the company. I think, to use my own words in *Powell* v. *Edmonton, Y. & P. R. Co.*, 2 Alta. L.R. 339, at p. 340, he is one

> engaged in such a capacity that the primary purpose and effect of his engagement is to delegate to him a portion of the company's authority.

though only the authority to offer the company's property for sale subject to approval of the proposed sale; a thing which no one rightfully could do without authority—"and to constitute him its agent to deal with third parties within the general scope of his employment."

ALTA.
S. C.
1912
NICHOLS & SHEPARD CO. v. SKEDANUK.
Beck, J.

The word "officer" in the rules ought to receive a wide interpretation, and I hold that Shandro is an "officer" for that purpose. I refer in addition to the case already cited, to *Goring* v. *Lon. Mut. Fire Ins. Co.*, 10 Ont. P.R. 642; *Hartnett* v. *Can. Mut. Aid Assn.*, 12 Ont. P.R. 401; *Odell* v. *Ottawa*, 12 Ont. P.R. 446.

An order will therefore go for Shandro's examination. If it is not convenient that the clerk should be the examiner, I will appoint a special examiner. The costs of this application will form part of the examination for discovery and be dealt with accordingly.

*Order granted.*

---

## DUNLOP v. BOLSTER.

ALTA.
S. C.
1912
March 14.

*Alberta Supreme Court. Trial before Simmons, J. March 14, 1912.*

1. SPECIFIC PERFORMANCE (§ I E—30)—RIGHT TO SPECIFIC PERFORMANCE AFTER ACTION BROUGHT FOR PURCHASE MONEY—NOTICE OF CANCELLATION—TENDER OF AMOUNT OVERDUE.

Where the vendor, upon failure to pay an instalment of the purchase price under an agreement for the sale of land, brings an action for the recovery of the whole purchase price under an acceleration clause in the agreement, which he subsequently discontinues, and the purchaser then, while the vendor's intentions are unknown, tenders the purchase money overdue, and begins an action for specific performance, after which the vendor serves notice of cancellation of the agreement, under a provision in that behalf contained therein, the vendor cannot insist on cancellation, but the purchaser may be compelled to pay the whole purchase money at once as a term of obtaining specific performance.

Statement

AN action for specific performance of an agreement for the purchase of certain land.

Judgment was given for specific performance by the defendant of the agreement for sale upon payment of the full purchase price into Court.

*H. H. Parlee*, for plaintiff.
*G. B. O'Connor*, for defendant.

Simmons, J.

SIMMONS, J.:—By an agreement in writing of June 20th, 1911, under seal, the plaintiff and defendant agreed that the defendant should sell to the plaintiff, who agreed to purchase from the defendant the north-east quarter of section 35, township 53, range 25, west of the 4th meridian, containing 160 acres, at $125 per acre, payable $50 cash and $4,950 in 30 days, and the balance in equal payments of $7,500 in one and two years, with interest at 7 per cent. per

ALTA.

S. C.
1912

DUNLOP
v.
BOLSTER.

Simmons, J.

annum. It was provided that time should be of the essence of the agreement, and further provided that if default were made in the payment of the principal or interest or any part thereof, that the whole purchase money should become due and payable. It was also provided that in default of payment by the plaintiff of the purchase money and interest or any part thereof, as provided in the agreement, the vendor should have the right to determine the agreement and retain any sum paid thereunder by way of liquidated damages by mailing a registered notice signed by the vendor, intimating his intention to determine the agreement and addressed to the purchaser at post office, and if, at the end of 20 days from the time of mailing the said notice, the purchaser failed to pay the amount due, that the purchaser should deliver up possession of the lands at the expiration of the said 20 days.

The plaintiff did not make the payment of $4,950 in 30 days as provided for in the agreement, and on September 16th, 1911, the defendant wrote to the plaintiff, who resided at Eady, Ontario, complaining of the plaintiff's delay in making the said payment of $4,950, and asking the plaintiff to let him know by return mail "what you expect to do. I will give you time to get a reply to me." The plaintiff did not reply, apparently, to this letter, and the defendant on the 19th of October, 1911, commenced an action against the plaintiff, setting out the agreement hereinbefore referred to and the default of the vendor in making the payment of the instalment of $4,950, and claiming that by virtue of the acceleration clause in the agreement the whole purchase price of $20,000 and interest was due. The vendor, in this action, claimed:—

1. Payment of the said sum of twenty thousand three hundred and fifty-nine dollars and thirty-six cents ($20,359.36) and interest thereon and costs of this action.

2. That in default thereof the defendant's interest in the said lands (if any) may be sold and the proceeds of sale applied in or towards payment of the said debt and costs, and that the defendant may be ordered to pay the balance of the said mortgage debt and costs after deducting the amount realized by such sale.

3. Judgment for the immediate recovery of the said sum of twenty thousand three hundred and fifty-nine dollars and thirty-six cents ($20,359.36) and interest and the costs of this action.

4. Recovery of possession of the said lands.

5. For the purposes aforesaid all proper directions to be given and accounts taken.

6. Such further and other relief as the nature of the case may require.

In order to obtain an order for service of the writ upon the defendant in Ontario, the vendor Bolster made an affidavit as follows:—

I, Ulysses S. Bolster, of the city of Edmonton, in the Province of Alberta, real estate agent, make oath and say:—

1. I am the plaintiff in this action.

2. I am desirous of commencing an action in this honourable Court, against the above named defendant, for the purpose of recovering the sum of twenty thousand three hundred and fifty-nine dollars and thirty-six cents ($20,359.36) and interest and the costs of this action, and such other relief as the nature of the case may require, under an agreement for sale dated the 20th day of June, A.D. 1911, respecting the north-east quarter of section thirty-five (35) in township fifty-three (53), in range twenty-five (25), west of the fourth meridian, the said lands being within the jurisdiction of this honourable Court.

3. Now shewn to me and marked as Exhibit "A" to this my affidavit, is a copy of the proposed statement of claim.

4. I have a good cause for action against the said defendant in respect of the matters aforesaid.

5. The said Samuel B. Dunlop resides at Eady, in the Province of Ontario, and is a British subject.

Sworn before me at the city of Edmonton,
in the Province of Alberta, this day
of October, A.D. 1911.
(Signed) J. MCCAFFREY.

(Signed) U. S. BOLSTER.

which said affidavit is filed on October 19th, 1911, the jurat having been left undated. To this action the plaintiff filed a discontinuance on the 29th day of November, 1911, and on the 30th November the purchaser, Dunlop, tendered $5,234.02 for the payment of principal and interest, which was to be paid 30 days after the date of the agreement. On December 19th, 1911, the vendor mailed to the purchaser at Eady post office, Ontario, by registered mail, the following notice:—

Take notice that I intend to determine the agreement made with you dated the twentieth day of June, A.D. 1911.

and on the 12th December, 1911, the purchaser Dunlop began this action for specific performance and paid into Court $5,216 for the instalment of $4,950 and interest which fell due 30 days after the date of the agreement.

The proceedings in the former action were put in as an exhibit by the plaintiff in this action, and the defendant's counsel made a statement in Court to the effect that the action of the 19th October was commenced through a misapprehension of the instructions of the client to his solicitor, and that the instructions were to take proceedings to have the contract cancelled. The defendant Bolster did not go into the witness-box to confirm this, and it is impossible to reconcile such an intention with the affidavit which he made, above quoted.

The plaintiff has also submitted evidence to the effect that the land was rapidly increasing in value between these periods and is now worth about $300 per acre. I think it is quite clear that in view of the small amount of principal moneys paid on the date of the execution of the agreement and the large payment which was to be made in 30 days having fallen in arrears, that the vendor might very properly have proceeded to have the

ALTA.

S. C.
1912

DUNLOP
v.
BOLSTER.

Simmons, J.

contract cancelled by serving a notice on the purchaser of his intention to do so if the payment of arrears was not made within the time called for in the notice. It is quite clear both from his letter and from the proceedings in the action of the 19th October instituted by the vendor that he was very anxious to compel the plaintiff purchaser to fulfil his contract by making the payment in arrears at least. What his intentions were between the date of discontinuance of this action and the service of the notice of cancellation is not disclosed, but in the meantime the purchaser made a tender of the payment in arrears which the vendor refused to accept, and at that time it is impossible to say what the vendor's intentions were, namely, whether he intended to insist upon payment of the instalment which had fallen in arrears, or the payment of the whole purchase price with interest, or cancellation of the agreement on account of default of payment of the whole purchase price. In view of this I fail to see why he can now claim the right to cancel the agreement.

As to the terms on which specific performance should be granted, the Court has a discretion; and the plaintiff was in arrears for a considerable period of time on a somewhat large payment, and it is quite clear that the intention of the agreement was that the whole purchase price should become due under such circumstances unless there was a waiver by the vendor of his right to insist on the same.

There will, therefore, be judgment for specific performance by the defendant of the agreement for sale upon payment by the plaintiff of the full amount of the purchase price, $19,950, and interest to this date into Court, within 10 days from this date, the amount paid into Court by the plaintiff to be supplied on account thereof; the question of costs reserved until subsequent to the expiry of the said ten days, with leave to either party to apply at the end of the said ten days as they may be advised.

*Judgment for plaintiff.*

## THE NATIONAL TRUST CO., Ltd. v. THE WESTERN TRUST COMPANY, and SASKATCHEWAN HOTEL COMPANY, Ltd.

SASK.

S. C. 1912

June 14.

*Saskatchewan Supreme Court. Trial before Newlands, J. June 14, 1912.*

1. EASEMENTS (§ II C—26) — SUPPORT FOR BUILDING — EXTENSION INTO ANOTHER LOT—RIGHT OF OWNER OF LOT—SASK. LAND TITLES ACT, R.S.S. 1909, CH. 50, SEC. 3.

Where the defendant, while owner of two lots of land, extended the footings of a building into one of the lots so that they were concealed from view, one who subsequently purchased the latter lot without knowledge of the existence of the footings therein, under a certificate of title free from reservation, by reason whereof the defendant could not acquire an easement to maintain them in such a lot, except by a writing duly recorded under sec. 3 of ch. 50 of the Sask. Land Titles Act of 1909, such defendant cannot require their removal, as by his purchase, the former became the owner of the footings.

[*Corbett* v. *Hill*, L.R. 9 Eq. 671; *Laybourn* v. *Gridley*, [1892] 2 Ch. 53, referred to.]

2. EVIDENCE (§ II E 5—166)—PRESUMPTION AS TO KNOWLEDGE—PURCHASER OF LAND—CONCEALED FOOTINGS SUPPORTING ADJACENT BUILDING.

In the absence of actual knowledge, it cannot be assumed that one who purchased land under a certificate of title free from any reservation, without notice of the existence therein of footings, which were concealed from view, for sustaining a wall of a building on an adjoining lot, knew of their existence, where the wall could have been built without extending any of the footings into the land so purchased.

Statement

THE Saskatchewan Realty and Improvement Company were the owners of lots 17 to 21, block 284, Regina, and on the 21st February, 1910, they transferred lots 18 to 21 to John Heber Haslam, who afterwards transferred the same to the defendant the Western Trust Company, and on the 20th February, 1911, they transferred lot 17 to the National Trust Company, Ltd. At the time these lots were owned by the Saskatchewan Realty and Improvement Company there was a building upon lots 18 to 21 called the King's Hotel, and a part of the footings upon which the north wall of this building was erected extended over into lot 17, and so continued until the present time. These footings are under ground, and cannot be seen unless the ground above is removed. In none of these transfers are the footings under the north wall of the King's hotel mentioned, and no easement is reserved or created in favour of lot 18. The transfers described the land transferred by the numbers of these lots as described in plan, old No. 33, on record in the land titles office for the Assiniboia Land Registration District, upon which plan these lots are outlined. This action is brought by the National Trust Company, the owners of lot 17, to compel the Western Trust Company, the owners of the adjoining lot 18, to remove the footings on which the north wall of the King's hotel is erected, and which extend over into lot 17.

The action was dismissed.

*J. A. Cross*, for plaintiff.

*J. F. Frame*, for defendant the Western Trust Company.

*C. W. Hoffman*, for defendant the Saskatchewan Hotel Co.

SASK.

S.C.
1912

NATIONAL TRUST CO., LTD.
v.
WESTERN TRUST CO.

Newlands, J.

NEWLANDS, J.:—The plaintiffs the National Trust Company have a certificate of title for lot 17, without any reservation, and therefore according to section 65 of the Land Titles Act, they hold the same absolutely free from "all incumbrance, liens, estates or interests whatsoever." By section 3 of chapter 50 of the Revised Statutes (Sask.), 1909,

> no right to the access or use of light or any other easement, right in gross or *profit a prendre* shall be acquired by any person by prescription, and no such right shall be deemed to have been acquired prior to the coming into force of this Act.

And by section 71 of the Land Titles Act when any right-of-way or other easement is intended to be created or transferred, the owner shall execute a transfer describing the land and containing an accurate description of the estate, interest or easement intended to be transferred or created. And by section 73 of that Act, whenever any easement is created for the purpose of being annexed to or used and enjoyed together with other land, the registrar shall make a memorandum of the instrument creating such easement upon the certificate of title of such other land. Therefore the Western Trust Company, the owners of lot 18 and the King's hotel, could not acquire an easement by prescription, nor has any easement been transferred to or created in their favour. Whether an "easement of necessity" can be created except in the manner specified by section 71 of the Land Titles Act, it is unnecessary for me to decide, because it was proved at the trial that the north wall of the King's hotel could be supported by footings entirely in lot 18, and that it was not necessary for them to be extended into lot 17, it being a question of expense only which method should be used.

"Now the ordinary rule of law is, that whoever has got the *solum*—whoever has got the site—is the owner of everything up to the sky and down to the centre of the earth": James, V.-C., *Corbett* v. *Hill*, L.R. 9 Eq. 671, and in *Laybourn* v. *Gridley*, [1892] 2 Ch. 53, North, J., decided that the part of an attic which overhung premises conveyed by reference to a ground plan passed to the owner of the ground underneath. In that case, as in this, the two adjoining properties belonged to the same owner, and were conveyed to separate purchasers by reference to the ground plan.

I am therefore of the opinion that the part of the footings under the north wall of the King's hotel which is in lot 17 passed to the National Trust Company by the transfer to them of lot 17, and as they are the owner of these footings they can do as they like with them, and no action will lie against the Western Trust Company, the owner of lot 18, to compel them to remove them.

It was argued by Mr. Frame for the defendants that when the plaintiffs purchased this lot they did so with the knowledge

SASK.

S. C.
1912

NATIONAL TRUST CO., LTD. v. WESTERN TRUST CO.

Newlands, J.

that these footings were in lot 17. This was not, in my opinion, proved, as Mr. Mytton, the agent for the purchaser, who conduced the negotiation for the purchase in Regina, swore that he never heard of the footings, and no reference was made to these footings in the correspondence between the parties, and as the evidence shewed that the wall could have been constructed without putting any of the footings in lot 17, a purchaser without actual knowledge could not be presumed to know that they were there. As a matter of fact the plaintiffs did not ascertain that the footings were in lot 17 until July, 1911, after the defendants the Western Trust Company has extended the north wall of the King's hotel, which disposes of the further argument of Mr. Frame that the plaintiffs supplied money for, and stood by while the defendants added two stories to the height of this wall.

I have not referred to the question of lateral support, because the Western Trust Company would have no natural right to have their wall supported by the plaintiffs' property, and as I have already said, they could not acquire an easement of that character except by transfer.

The action will therefore be dismissed with costs to the defendants.

When I dismissed the action against the defendants the Mortgage Company of Canada I reserved the question of costs. They will now have their costs the same as the other defendants.

*Judgment for defendant.*

---

**MAGRATH et al. v. RANNEY et al.**

ALTA.

S. C.
1912

Feb. 9

*Alberta Supreme Court, Scott, J. February 9, 1912.*

1. VENDOR AND PURCHASER (§ III—39)—RIGHTS OF PARTIES PURCHASING FROM SUB-PURCHASER—FORECLOSING FOR NON-PAYMENT OF ORIGINAL PURCHASE MONEY.

Where a purchaser purchased from the vendor the larger proportion of city lots owned by the latter, subject to the payment of the purchase money that remained due on all the lots, and both of them sold a number of lots to persons who made part payments thereon, and afterwards, upon the vendor's default under the agreement by which he acquired title, his vendor foreclosed, and, after the claim of the latter had been satisfied from the proceeds of the sale of nearly all of the lots, the surplus was paid into Court, those who purchased lots from the vendor are entitled, in priority to all other claims, to reimbursement from such fund for the amount of their several payments to him.

2. VENDOR AND PURCHASER (§ III—39) — RIGHTS OF PARTIES — SUB-PURCHASERS—FORECLOSURE—SURPLUS.

Where the defendant, who owned two hundred city lots, sold one hundred and nineteen of them, together with others, subject to the payment of the remainder of the purchase money due on all the two hundred lots, it being understood that those retained by the defendant

ALTA.

S. C.
1912

MAGRATH
v.
RANNEY.

should be deemed fully paid for, and the purchaser sold a number of his lots to persons who made payments to him thereon, and afterwards, upon the defendant's default, under the agreement by which he acquired title, his vendor foreclosed, and, after his claim had been satisfied from the proceeds of the sale of nearly all of the lots, the surplus was paid into Court, the defendant is entitled to priority in payment therefrom, if the amount due him from the purchaser should exceed such surplus, and, in that event, neither the purchaser nor those who made payments on the lots purchased by them, are entitled to any part of the surplus.

Statement

THIS is an application by the defendant Ranney for the payment out to him of the moneys remaining in Court after payment of the plaintiffs' claim and costs.

An order was made directing filing certain accounts and reserving further directions.

*C. A. Grant*, for defendant Ranney.

*E. B. Williams*, for defendant Mitchell, and the plaintiffs.

Scott, J.

SCOTT, J.:—Ranney entered into an agreement for the purchase from the plaintiffs or some of them of 200 lots in certain subdivisions in Edmonton known as "Bellevue" and "Bellevue Addition." One Mitchell agreed to purchase from Ranney his interest in 119 of these lots and certain other lots for $800.00 subject to the payment of the balance due by Ranney on the purchase of the 200 lots, the understanding between them, although not so expressed in the agreement for sale, being that the purchase money of the remaining 81 lots retained by Ranney was to be deemed to be fully paid. Default having been made by Ranney under his agreement for purchase from the plaintiffs they commenced this action to enforce the performance of the agreement and such proceedings were had that 197 of the 200 lots were sold under the order of the Court and the moneys now in Court are the proceeds of that sale remaining after payment of plaintiffs' claim and costs.

Before the sale took place Ranney had sold some of the 81 lots and Mitchell had sold some of the 119 lots and each had received payments on account of such sales from their respective purchasers. Those purchasers were not represented upon the application and it is impossible for me, upon the material before me, to ascertain with certainty how many lots were so sold and what amounts were received from the purchasers on account of such sales. The purchasers from Ranney who have paid him on account of their purchase money would, in my opinion, be entitled in priority to him to repayment out of the fund in Court of the moneys paid by them to him. Whether Mitchell or the purchasers from him are entitled to any portion of the fund will depend upon the state of the account between Ranney and him respecting the purchase by Mitchell of the 119 lots. If the balance, if any, found to be due by him to Ranney in respect of those lots, exceeds the amount of the fund in Court I am of opinion that neither Mitchell nor the purchasers from him are entitled to any portion of it.

Although I have endeavoured to do so I find it impossible to ascertain from the material before me the state of the accounts between Ranney and Mitchell or the amount, if any, that is due by the latter to the former. In fact I have concluded that it will require the services of an expert accountant to ascertain those matters. The question is further complicated by the fact that the agreements between them relate to the purchase not only of the 119 lots but also of a number of other lots, the purchase money being one lump sum for the whole and there is no means of ascertaining the relative value of the different lots.

I direct that Ranney and Mitchell shall each file within three weeks an account verified under oath shewing which of the 200 lots were agreed to be sold by him, the amounts received from each purchaser and the dates of the receipt thereof.

I also direct that Mitchell shall within the same time file an account, so verified, shewing in detail the amounts paid by him on account of the purchase from Ranney and the dates of the payment thereof.

On the hearing of the application it was agreed by counsel for Ranney and Mitchell that if, upon the taking of the accounts between them, I should find that there was a balance due by either of them to the other I should give judgment for the amount found due and, as it appears that Mitchell, acting as agent for Ranney, had sold certain of his lots, I direct that Mitchell shall within the same period file an account verified in same manner shewing in detail the lots so sold by him for Ranney, the names of the purchasers thereof, the amounts received by him on account of the purchase money giving the dates of the receipt thereof and the disposition made by him of the moneys so received.

I reserve further directions until after the filing of the accounts I have directed.

*Order accordingly.*

ALTA.

S. C.

1912

May 31.

**Thomas D. EDGAR, John A. Ganton, and Andrew B. Agar, carrying on business under the name of Edgar-Agar Company v. James A. CASKEY, John Dale and J. Horner.**

*Alberta Supreme Court. Trial before Scott, J. May 31, 1912.*

1. PRINCIPAL AND AGENT (§ II B—17)—RIGHTS AND LIABILITIES OF PRINCIPAL—UNDISCLOSED AGENCY—PURCHASE OF LAND FROM.

Where the plaintiffs, who agreed to purchase land from one who did not disclose his agency for the defendant, made a cash deposit thereon, and afterwards sent the agent an agreement of purchase for execution, with directions that, when executed, the agreement, together with a draft for the first payment be sent to a designated bank, but the defendant, who was not informed by the agent of such direction, sent the executed agreement, together with a draft, to a different bank, which returned it to the defendant without making any attempt to collect or notifying the plaintiffs thereof, a delay of a month on the part of the plaintiffs before notifying the agent of the non-receipt of the agreement, when they stated that if they could not get the land they would be pleased to have the deposit returned, is not so unreasonable as to amount to an abandonment or waiver of the right to compel the defendant to specifically perform such agreement.

2. FRAUD AND DECEIT (§ II—5)—FAILURE TO DISCLOSE FACT OF AGENCY—PURCHASE OF LAND BY REAL ESTATE BROKER.

Where an agent of a vendor through whom a purchase of land was negotiated by the plaintiffs, a firm of real estate brokers, ostensibly for a customer, must have had knowledge of the fact that the purchaser was a member of such firm, the plaintiffs' failure to disclose such fact to the vendor did not make them the agent of the latter so as to invalidate the sale on the ground of non-disclosure of material facts.

[*Dunne* v. *English*, L.R. 18 Eq. 524, at pp. 533-4, and *Pommerenke* v. *Bate*, 3 Sask. R. 417, at p. 425, 15 W.L.R. 542, at p. 545 (affirmed *sub nom. Coy* v. *Pommerenke*, 44 Can. S.C.R. 543), specially referred to.]

3. PLEADING (§ I N—114)—AMENDMENT OF STATEMENT OF CLAIM AT TRIAL.

The plaintiffs, a firm of real estate brokers, in an action for the specific performance of a contract to sell lands, may be permitted at the trial thereof to amend their statement of claim so as to shew that such agreement was made in the name of a member of the firm for its benefit.

[*Gandy* v. *Gandy*, 30 Ch. D. 57; and Fry on Specific Performance, 5th ed., 80, specially referred to.]

4. LAND TITLES (§ I—10)—CAVEAT—FILING IN LAND TITLES OFFICE—PRIORITY.

One who first acquires the right to purchase land and files a caveat in the land titles office, is entitled to priority over a person claiming to be a subsequent purchaser.

5. COSTS (§ I—19a)—LIABILITY FOR—SPECIFIC PERFORMANCE—AGENT CLAIMING INTEREST.

Costs will be granted against a defendant in an action for the specific performance of an agreement to sell land, who, although in fact he was an agent for the owner, negotiated a sale with the plaintiff, claiming an interest in the land without disclosing that it was that of an agent only.

6. BROKERS (§ II B—11)—COMPENSATION—BROKER—ACTING AS AGENT FOR PURCHASER—NON-DISCLOSURE THAT HE WAS MEMBER OF FIRM PURCHASING.

A firm of real estate brokers is not entitled to a commission from a vendor for securing a purchaser for land, who was, without the fact being disclosed to the vendor, a member of such firm and bought the land for its benefit.

ALTA.

S. C.
1912

EDGAR
v.
CASKEY.

AN action by the plaintiffs for possession of land, and for damages for breach of contract. At the trial, plaintiffs made application to amend their claim by claiming specific performance of the agreement to purchase.

Judgment was given for the plaintiffs for specific performance, for possession and for all costs.

*Frank Ford*, K.C., and *E. S. McQuaid*, for plaintiffs.

*S. B. Woods*, K.C., for defendants Caskey and Horner.

*H. H. Robertson*, for defendant Dale.

Scott, J.

SCOTT, J.:—The defendant Caskey was the owner of lot 252, block 4, Hudson's Bay Reserve, Edmonton, having purchased same through defendant Dale for $1,200. At or shortly after the time of the purchase, Caskey placed the property in the hands of Dale for sale, agreeing to pay him one-half the profits realized from the sale. On 18th May, 1911, plaintiffs, who carry on business in Edmonton as real estate agents under the name of the Edgar-Agar Company, wrote Dale as follows:—

> Understanding that you are the owner of lot 252, block 4, in the Hudson's Bay Reserve here, we should be glad to have your price and terms as we have buyers for property in that neighbourhood.

On 19th May, 1911, Dale wrote to the plaintiffs acknowledging receipt of their letter and further stating as follows:—

> My price is $2,000, ½ cash, balance in 6 and 12 months at 8 per cent. There is another man interested in this, so in making out papers leave name blank and I will have papers sent to him to sign.

On the last mentioned date plaintiffs wrote Dale enclosing cheque for $50 by way of deposit on the purchase and stating that they would forward the agreement with the balance of the first payment less the commission, and on the 22nd of same month they forwarded Dale, for execution by the vendors, agreements for the sale of the property to plaintiff Edgar. In their letter enclosing them they asked him to get them filled in and witnessed and return them with draft attached for $895 to the Traders' Bank here. This letter contained a statement shewing that the amount of the draft was made up as follows:—

| | |
|---|---|
| Cheque for deposit ..... | 50.00 |
| Commission which plaintiffs were holding.... | 75.00 |
| Balance of first payment of $1,000..... | 875.00 |
| | $1,000.00 |

This letter and the accompanying agreements were mailed by Dale to Caskey at Madoc, Ontario, where he resides, but they never reached him. Dale wrote him on 15th June, asking about the agreements, and, upon learning from him that they had not been received, he (Dale) saw the plaintiffs who thereupon drew up new agreements dated 23rd June, 1911, and handed them to Dale who forwarded them to Caskey on 29th June, 1911, asking

ALTA.

S. C.
1912

EDGAR
v.
CASKEY.

Scott, J.

him to execute same and draw on the purchaser for the balance less $75.00 commission. Caskey duly executed the agreement for sale and on 17th July, 1911, drew on plaintiff Edgar for $875.00 attaching to the draft a copy of the executed agreement. The draft was forwarded to the Canadian Bank of Commerce here for collection but was never presented to Edgar nor had he any intimation from any source that it had been drawn upon him. It was addressed to Thos. D. Edgar, Edmonton. He then resided at 12 Heiminch Street and the bank messenger states that when he received the draft for presentation he found in the city directory that one Thos. D. Edgar resides there but, as that address was too far out from the centre of the city to personally present the draft, he, on 25th July, 1911, mailed him a notice addressed Thos. D. Edgar, Edmonton, stating that the draft was held by the bank for acceptance and payment. This notice was never received by Edgar and the bank shortly afterwards returned the draft, stating that the drawee had been notified and no attention paid.

On 24th August, 1911, plaintiffs wrote Dale informing him that the agreements had not been returned, asking him what he intended to do in the matter and further stating: "If we cannot get the property as promised we shall at least be glad if you will send the $50 deposit back." Dale thereupon wrote Caskey enclosing plaintiffs' letter and the latter, on 30th August, replied to Dale's letter as follows:—

> Just received your letter re lot 252. I sent papers duly signed through J. C. Dale & Co. and no attention was paid to either papers or draft so I concluded the purchaser had decided to not take the lot and to forfeit the deposit of $50.00. In that case I cannot see how Edgar is entitled to any commission.

On 12th September, 1911, Dale wrote plaintiffs as follows:—

> Received letter from Mr. J. A. Caskey, Madoc, but stating that he drew draft with papers attached as per your instructions, the draft was returned unpaid so you forfeit your deposit and the lot. The draft was sent to Bank Commerce, Edmonton, by J. C. Dale & Co., Bankers, Madoc, Ont.

On 26th September, 1911, Caskey resold the property to the defendant Horner who has filed a caveat against the property and now claims to be entitled thereto as against the plaintiffs.

The plaintiff claims possession of the property in question, $1,000 damages of breach of contract and the costs of the action. At the trial the plaintiffs applied to amend their claim by also claiming on behalf of the plaintiffs specific performance of the agreement of 23rd June, 1911, or, if that should not be allowed, by substituting Thos. D. Edgar as plaintiff and claiming specific performance on his behalf.

It was admitted by Edgar at trial that although the purchase was made in his name it was made by him on behalf of

the plaintiffs' firm and he states that it was made in his name as a matter of convenience.

I held at the conclusion of the trial that the plaintiffs were not guilty of *laches* or unreasonable delay in fulfilling the terms of the agreement of 23rd June. It is true that by the terms of that agreement $1,000 was to be paid on account of the purchase money upon the signing of the agreement, but the plaintiffs requested defendant Caskey to draw for the amount and attach to it the executed agreement and he assented to that variation of the terms by complying with their request. The fact that the draft was not presented and paid was due to what appears to me to be neglect on the part of the bank in not taking reasonable steps to present the draft for payment or, at least, in not giving the drawee reasonable notice of it and not to any neglect on the part of either the plaintiffs or Caskey. The letter of the plaintiffs suggesting that Caskey should draw through the Traders' Bank never reached him and he had no means of ascertaining plaintiff Edgar's address in Edmonton. The plaintiffs forwarded the agreement for execution on 20th May and made no further inquiry about the matter until 24th August following. This I do not consider an unreasonable delay. The fact that in their letter of 24th August they state that, if they cannot get the property as promised, they would at least be glad to receive the deposit back, cannot, as was contended on behalf of the defendants, be construed as an abandonment or waiver of their right to obtain the property.

It is contended on behalf of Caskey that as the plaintiffs were his agents for the sale of the property and as they did not disclose to him the fact that they were themselves the purchasers they are not entitled to claim under their agreement for purchase.

It is a well-settled principle of law that an agent purchasing from his principal is bound to disclose to the latter that he is the purchaser and that any underhand dealing on the part of the agent in the transaction will vitiate the contract. *See Dunne* v. *English*, L.R. 18 Eq. 524, at pp. 533-4, and *Pommerenke* v. *Bate*, 3 Sask. L.R. 417, at p. 425, 15 W.L.R. 542, at p. 545 (affirmed *sub nom. Coy* v. *Pommerenke*, 44 Can. S.C.R. 543), and the cases there cited.

It is true that the plaintiffs in their letter of 18th May, 1911, to Dale asked him to state his price for the property and terms of sale and stated that they had buyers for the property in that neighbourhood, and it is also true that they later claimed to be entitled to deduct a commission of $75.00 on the sale to themselves, but I cannot hold that there was any underhand dealing on the part of the plaintiffs. Dale, who, as I have already stated, appears to have had practically unlimited authority for Caskey as to the sale of the property, was aware that Edgar, whose

ALTA.
S. C.
1912
EDGAR
v.
CASKEY.
Scott, J.

name appeared in the agreements as purchaser, was a member of plaintiffs' firm, as, on the letter-heads of all letters written by them to him, Edgar's name appears as a member of the firm and I cannot see that it would make any material difference to either Caskey or Dale whether it was the plaintiffs' firm or one of its members who had purchased.

Although there is nothing in the evidence to shew that Caskey knew that Edgar was an agent or one of the agents for the sale, yet I think it must be assumed that he had that knowledge as he appears to have recognized Edgar's claim to a commission and in his letter of 30th August, 1911, his only objection to its payment was merely that Edgar had not fulfilled his agreement to purchase.

It also appears to me to be open to question whether the plaintiffs were the agents of Caskey or anything more than the agents of Dale, who, as I have already stated, had practically unlimited powers as to the disposal of the property. It appears that the commission claimed by the plaintiffs was to be paid entirely out of Dale's share of the profits as in his letter to Caskey of 29th June, 1911, he asked Caskey to let him take his share of the profits less the $75.00 commission.

I allow the plaintiffs to amend by claiming, in addition to the relief already claimed by them, specific performance of the agreement of 23rd June, 1911. As they are shewn to be beneficially entitled under that contract they are entitled to so claim under it. See *Gandy* v. *Gandy*, 30 Ch. D. 57, and Fry on Specific Performance, 5th ed., p. 80.

The plaintiffs on 30th September, 1911, filed a caveat in the proper land titles office. As their purchase was prior to that of defendant Horner, and as they were the first to file a caveat, I hold that they are entitled to priority over him.

I hold that the plaintiffs are entitled to specific performance of the agreement of 23rd June, 1911, and to an order for possession and the costs of suit against all the defendants.

It was contended on behalf of defendant Dale that the plaintiffs cannot recover against him as he is shewn to be merely the agent of his co-defendant Caskey. I am of opinion, however, that the plaintiffs are entitled to costs as against him, as in his dealings with the plaintiffs with respect to the property, he, from the first, claimed to be entitled to an interest therein and throughout he appears to have omitted to inform them of the nature of his interest.

The defendant Caskey counterclaims for the removal of plaintiffs' caveat. There will be judgment for them against the former upon the counterclaim with costs.

I further hold that the plaintiffs are not entitled to deduct from the purchase money any sum by way of commission on the sale of the property.

*Judgment accordingly.*

## DODGE v. WESTERN CANADA FIRE INSURANCE CO.

ALTA.

S. C.
1912

March 9.

*Alberta Supreme Court. Trial before Harvey, C.J. March 9, 1912.*

1. INSURANCE (§ III E I—87)—BUILDER'S RISK—"IN COURSE OF CONSTRUCTION"—SUSPENSION OF WORK—LIABILITY OF INSURANCE COMPANY.

A contract of fire insurance on a building, described in the policy as being "in course of construction" is void, where, without the knowledge of the defendant company or of the agent who issued the policy, work on the building had been suspended, and it remained in an uncompleted state until destroyed by fire, where the plaintiff in his application stated that he desired a "builder's risk rate" for a short time only, which, at the trial, he explained as meaning a risk on a building that was in course of construction, since such description was misleading and inaccurate, as, under the circumstances, it meant that the work of completing the building was in active progress.

[*Dodge* v. *York Fire Ins. Co.*, 2 O.W.N. 571, 18 O.W.R. 241, specially referred to; and see footnote.]

Statement

THIS is an action for indemnity for loss by fire. The plaintiff lives in Massachusetts; the defendant has its chief place of business in this Province. The property insured and destroyed was situate in Ontario, and the policy covering it is on the Quebec statutory form. The plaintiff sued another company in Ontario, the York Fire Insurance Co., in respect of the same fire and succeeded in recovering, the case going to the Supreme Court of Canada, but not yet reported. The report in the Ontario Courts is to be found in *Dodge* v. *York Fire Insurance Company*, 2 O.W.N. 571, 18 O.W.R., at p. 241.* Certain of the evidence taken in that case is by consent put in evidence in this case, in addition to which there is evidence taken on commission, but no oral evidence was given.

The action was dismissed.

*J. M. Carson*, for plaintiff.

*A. H. McGillivray*, for defendant.

*The judgments in *Dodge* v. *York Fire Insurance Co.*, 1 O.W.N. 1098, and 2 O.W.N. 571, are as follows:—

Action to recover $2,000 on a policy issued by the defendants insuring against fire buildings while in course of construction—a "builder's risk." The buildings were being put up for the North Ontario Reduction and Refining Co., and the plaintiff was a mortgagee. The buildings were damaged by fire on the 1st November, 1909. No work was done on the premises during the currency of the policy; the buildings were never completed; the workmen left in April. A watchman was employed from the 15th April to the 18th May, when he too was discharged. Then he nailed up everything and put padlocks on doors, etc. He continued to take a sort of neighbourly interest in the premises up to the time of the fire.

FALCONBRIDGE, C.J.K.B.:—Held that, on this state of facts the building could not in any fair sense be considered as "in course of construction"—it was not like the case of operations being suspended temporarily by reason of stress of weather or other immediate conditions. Upon this and other grounds, the action was dismissed with costs.

The plaintiff appealed from the judgment of Falconbridge, C.J.K.B.,

The appeal was heard by MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

MACLAREN, J.A.:—The action was brought on an insurance policy for

ALTA.

S. C.
1912

DODGE
v.
WESTERN CANADA FIRE INS. CO.

Harvey, C.J.

HARVEY, C.J.:—The pleadings raise many defences, but by reason of certain admissions and of the decision in the other case, most of these are unavailable. The only defences which were raised by counsel on the argument before me are:—

(1) There was no watchman at the time of the fire.

(2) The buildings were not "in course of construction" as described in the policy.

(3) There was further insurance and it does not appear that it was consented to.

I consider only the second of these defences because it appears to me to be valid. In the York case the trial Judge, one of the Judges of the Court of Appeal, and one of the Judges of the Supreme Court of Canada, considered that the description "in course of construction," which was furnished them as here to the

---

*Dodge* v. *York Fire Ins. Co.* (continued).

$2,000 issued by the defendants in favour of the plaintiff, as second and third mortgagee, on certain buildings, etc., at Sturgeon Falls, which were being erected for a smelter by the North Ontario Reduction and Refining Company.

The principal grounds of defence were: 1. That the buildings were not in course of construction, as represented by the plaintiff, but were really abandoned; (2) that the insurance was void under the 4th addition to the statutory conditions, which provided that, "if any building herein described be or become vacant or unoccupied, and so remain for the space of fifteen days, or, being a manufactory, shall cease to be operated for that length of time, this policy shall be void;" and (3) that the defendant had no insurable interest in the property, it not being worth more than the insurance in favour of the first mortgage.

The trial Judge gave effect to the first of these grounds and dismissed the plaintiff's action.

In effecting the insurance in question the plaintiff acted through A. M. Thompson, of Burruss and Sweatman, insurance agents of Toronto, and the defendants through J. C. Wilgar, their assistant manager at their head office in Toronto. These two were examined as witnesses on behalf of their respective principals. They differed on some material points as to what had taken place between them, and the learned Chief Justice states that he would prefer and adopt the evidence of Thompson as against that of Wilgar. The material facts may be summarized as follows:—Negotiations for the insurance in question were begun by Thompson speaking to Wilgar over the telephone on the 24th June, 1909. He stated that the property was the same as that covered by a policy No. 035751, issued by the defendants in favour of the North Ontario Reduction and Refining Company on the 9th March, 1909; told him of the other insurance on the property, and that the plaintiff wanted $2,000 insurance on his interests as second and third mortgagee; that, on account of the watchman having been withdrawn since the issue of the defendant's previous policy, the rate had been raised to three per cent.; that, on account of financial difficulties, the company had not been able to complete the buildings and plant; and that the plaintiff hoped before the expiry of the policy to have control of the premises and to complete and operate the smelter, when the insurance would be adjusted. The following day, Thompson called at the defendant's office and delivered to Wilgar a slip containing a detailed description of the property and particulars. This referred to the property as "buildings and additions now in course of construction," "machinery," etc., to be occupied when completed as a customs smelter, and contained a warranty by the plaintiff "that the premises will not go into operation during the currency of this insurance." The defendants issued a policy, dated the 25th, with the slip attached, to expire on the 2nd November, 1909. The property was burnt on the morning of the 1st November. The first and main question is whether the insurance was

company, was an inaccurate description of the insured premises. The other members of both Courts of Appeal were of opinion that under the circumstances of the case and with the information conveyed to the company, it could not be misled by the description, which is declared to be "ambiguous." The buildings were partly constructed, but the work of construction ceased at the end of February. A watchman remained on the premises until the 18th of May, when he left, having first fastened the doors and boarded up the windows; the buildings remained in that condition till the fire. On the 8th of February the York Company had insured the buildings in the name of the owner, with loss payable to the plaintiff as mortgagee for the sum of $2,500 for one month, the premium being $3.75, or at the

---

*Dodge* v. *York Fire Ins. Co.* (continued).

void on the ground of misdescription of the buildings as being "in course of construction." The facts were that the buildings had not been completed nor the machinery and plant installed, on account of the financial difficulties of the company; the last of the workmen left at the end of February, and the watchman on the 18th May, when he fastened the doors and boarded up the lower windows, although he continued to live near-by and keep an eye on the property; the first mortgagee had taken steps to foreclose, and the plaintiff was making arrangements to acquire and complete the smelter, which were interrupted and put an end to by the fire.

Whether these buildings were properly described as being "in course of construction," as contended by the plaintiff, or whether they were really abandoned or vacant buildings, within the meaning of the 4th addition to the statutory conditions, as contended by the defendants, is really a question of fact, to be determined by the evidence and what passed between and was within the knowledge of the contracting parties. Recourse should be had to all the surrounding circumstances which may throw light upon the actual situation.

It is admitted that the work of constructing these buildings was not going on either at the time of the insurance or up to the time of the fire. But there are circumstances in which the description would be quite accurate, although no work was going on at the time. In most buildings there are intervals, longer or shorter, between the operations of the different trades. Such intervals, it is well known, are frequently prolonged much to the annoyance and loss of the owners; but it would scarcely be contended that under ordinary circumstances this would void such a policy as this. Again, it is quite common in this climate that construction is suspended during the whole winter, and that the buildings like those in this case are without a watchman on the premises. Every such case must stand on its own facts and what is the agreement and understanding of the parties. It cannot be said that the proper interpretation or construction of these words is a question of law or that a definition can be given that would apply to all cases.

Here we have buildings begun but not completed. During the early part of the period in question the company intended to complete them; during the latter part the plaintiff was making arrangements to do so. The defendants, having previously had insurance on them, issued a policy to the company on the 8th March, 1909, when the same language was used as in the present case, and the circumstances were the same, except that there was then a watchman. They were correctly informed on the 24th June of the condition of the premises and that the watchman had been withdrawn; and, in consequence of this change, they charged and were paid a higher premium. The time mentioned to them as that at which the plaintiff hoped to get the control of the premises and resume active construction and complete and operate the smelter had not arrived at the time of the fire.

ALTA.

S. C.
1912

DODGE
v.
WESTERN
CANADA
FIRE
INS. CO.

Harvey, C.J.

rate of $45 a year, being 1 4/5%. On 9th March a new policy was issued in the same terms, for the same amount. In June an application was made for insurance in respect of which the action in Ontario was brought. It was stated that the property was the same as covered by the former policy, but that the watchman had been withdrawn and the rate raised on that account to 3% and that the buildings had not been completed owing to financial difficulties, and that the plaintiff hoped to have control before the expiry of the policy, $2,000 being applied for to make up $8,100, the particulars of the other $6,100 being given. The policy was issued on 25th June, covering the property from 24th June to 2nd November. The premium is stated

---

*Dodge* v. *York Fire Ins. Co.* (continued).

In the circumstances, I am of opinion that the defendants accepted the risk on the understanding that the words in the application and the policy correctly described the premises as they stood; and the defendants, having accepted the higher premium with full knowledge and on this understanding, are now estopped from asserting the contrary.

It is also to be noted that the plaintiff gave a warranty that the smelter was not to go into operation during the currency of the insurance.

I do not think that the insured premises were or became "vacant or unoccupied," within the meaning of the 4th addition above quoted. These words were clearly intended to apply to buildings that were finished or occupied or ready for occupation.

If the claim of the defendants is well founded, then the insurance never attached, as there would be no such buildings on the property of the company as those described in the policy. And yet it may be noted that the defendants have made no offer of a return of the premium.

On the question of value and insurable interest, it is proved that the buildings, machinery, etc., cost about $60,000, and there is evidence that they were worth at the time of the fire from $40,000 to $50,000. It is true that the president of the company said he would not give more for them than $25,000 or $30,000; but he does not say that they were not worth much more. The claim of the first mortgagee was only about $29,000, so that there is no evidence to sustain this claim of the defence.

On the whole, I am obliged to come to the conclusion that the learned Chief Justice gave too narrow a construction to the words of the application and policy, and did not give sufficient weight to some of the proved facts and circumstances that shew what was within the knowledge and in the minds of the parties.

MOSS, C.J.O., GARROW and MAGEE, JJ.A., concurred.

MEREDITH, J.A. (dissenting):—I entirely agree with the learned Chief Justice in his view of this case.

Unless we are to distort the plain meaning of the words "now in the course of construction" because this is an insurance case, that judgment must be affirmed.

How a building upon which "construction" has been stopped and may never be resumed, and which is entirely vacant, as this building was, can be said to be a building now in course of construction, I cannot, having regard to the plain meaning of plain words, understand. The building was simply a vacant one, upon which all work had ceased.

To compare the case to one in which the work of construction is delayed by stress of weather, or such like unavoidable causes, is to compare it to something of an entirely different character, almost as much unlike as black and white.

From the insurer's point of view there is the utmost difference; the one, is a reasonably fair "risk;" the interests of those who are hopefully constructing a building, and the interests of the builders and their workmen, are vigilant and potent safeguards of the insurer's interests; whilst a vacant building is, generally speaking, uninsurable; and a vacant building

to be $31.80. It may be observed that this is about 4½% and not 3%, but the letter of the agents applying for it indicates that 53% is added to the 3% to make up the premium of $31.80.

On the 14th of August the defendant company issued a policy for $1,000, covering the property, described in the same terms as in the York Co. policies, from the date of the policy to November 2nd, the premium being $11.55, which a computation shews is at a rate in excess of 4½%, though the evidence of the agent who placed it is that the rate was to be 3%. On the 1st of November, the day preceding the expiration of the policies, the buildings were entirely destroyed by fire.

---

*Dodge* v. *York Fire Ins. Co.* (continued).

such as that in question is exceptionally objectionable. The venture in which it was to be used looked very like a failure; the president of the company described the condition of affairs thus:—

Q. You did not think you were any too safe with your twenty-nine thousand dollar mortgage on that plant, did you—you used a good deal of pressure to try and get your money? A. No.

Q. Did not you have any communication with Mr. Dodge about your mortgage and what should be done with it? A. No, we had some communications between us as to getting home and putting more money into the thing and saving the investment sending good money after bad.

Q. And the conclusion you came to was it would be wrong to send any more good money after the bad? A. Until we had further evidence; we were looking into it; we were going into the proposition at that time.

Q. Until you had further evidence that there was some hope of getting it out? A. Yes.

Q. You were not willing to put any more money into the deal? A. Not until I had some evidence it was going to go.

Q. In other words, you told them you would not put any more money into it? A. I certainly would not do it blindly anyway.

Q. Did not you tell them you would not put any more in it? A. Yes, we had come to our limit.

Q. You had no more faith in the investment? A. As it stood.

The outlook was not such as to cause any great dread of fire, as a cause of money loss, or any unusual efforts to prevent it, by anyone insured; and the much greater danger of fire in an unoccupied building than in an occupied one, is obvious; a danger which is again increased when the building is uncompleted. This building was both unoccupied and unfinished; and being the property of a company was less likely to be well cared for than if it had been that of an individual, who in protecting it would be protecting his own interests only, not also those of others who might contribute nothing, not even their thanks.

The meaning of the words "now in course of construction" are made even plainer by the context, which includes building material, etc., and provides that if any building included in the policy should be or become vacant or unoccupied, and so remain for the space of fifteen days, or, being a factory, should cease to be operated for that length of time, the policy should be void. The building was simply a vacant unfinished and unprotected one.

I am quite unable to find any evidence of knowledge on the part of any agent of the defendants of the actual condition of affairs regarding the building, when the insurance in question was effected. There is no finding to that effect; on the contrary the learned trial Judge, at the conclusion of the testimony of the witness Thompson, declared it to be "not very material," p. 63.

It is through that witness alone that the information is said to have been imparted; but he himself had no information except through a letter from the plaintiff's solicitor asking that insurance be effected, a letter which is not produced.

ALTA.

S. C.
1912

DODGE
v.
WESTERN CANADA FIRE INS. CO.

Harvey, C.J.

There is no evidence fixing the defendants in the present case, or their agents, with knowledge of the facts which were within the knowledge of the York Company's officers which I have mentioned, and while I would be of opinion that the term "in course of construction" might be an apt description of a condition as well as of a process, what evidence there is leads me to the conclusion that in the present case it should be construed as meaning "in process of construction," indicating proceedings for construction, for the plaintiff's witness, who procured the insurance, states that he said, "I only want it until the second of November; this is builder's risk, rate 3%." When he was asked in cross-examination what he meant by "builder's risk," plaintiff's counsel objected to his giving expert evidence and he gave no further explanation than, "It is chiefly one in

---

*Dodge* v. *York Fire Ins. Co.* (continued).

Difficulty had been experienced in placing this insurance, it had been refused by several companies, and so it is hardly probable that too much information would be volunteered.

Then it is to be borne in mind that the witness Thompson was an insurance broker, and I think must have known that in taking the policy which he got—a "builder's risk"—he was taking one not applicable to a building in the condition of the building in question at the time; but he is not perhaps altogether, if at all, blamable for that because he was not himself at the time aware of the actual condition of affairs, having only the information conveyed by the solicitor's letter which, as I said before, was not produced at the trial, and so it is not likely that it would have helped the plaintiff's case.

In looking at the testimony of the witness Thompson and the defendant's agent, it must be remembered that these men were not in the position we are now in, knowing all the facts and circumstances from the iteration and reiteration upon argument here as well as from being spread out in the appeal book; Thompson knew only as much as the solicitor's letter told him, and the agent only as much as Thompson told him and the former "builder's risk" policy and the application for it, shewed, which latter must have impressed upon his mind the belief that the building was actually in course of construction and properly the subject of a "builder's risk."

And I am unable to find anything in the testimony of the witness Thompson to disabuse any reasonable mind of such an impression; indeed I can find nothing from which it could properly be found that Thompson had up to this time any knowledge to the contrary; the probabilities are altogether against it. All that this witness said upon the subject is contained in these extracts from his testimony at the trial:—

Q. Did you know that this is the insurance that was put on to replace the Rimouski and Crown? A. Yes.

Q. You told him the Rimouski were on and the Crown were; what else did you tell him? A. That a new wording was being prepared specifically covering Mr. Dodge's interest in this property as second and third mortgagees, that there was insurance in force then in tariff companies aggregating in the neighbourhood of twenty-six thousand dollars, covering the interests of first mortgagee, the Union Trust Co., that this risk comes to us from McWhinney & Co. for insurance covering the interest of their client in this property as second and third mortgagees.

Q. Mr. McWhinney is your brother-in-law? A. I have that honour.

Q. What else did you tell him? A. I spoke of the rate as being formerly two and a half per cent. but increased to three on account of the withdrawal of the watchman.

Q. Who told you the watchman had been withdrawn? A. We received that information from Mr. McWhinney's office and verified, I think, by our Mr. Sweatman.

which a building is in course of construction as the wording of the application called for." There may be a technical meaning for the term, but at any rate it suggests that there is a risk connected with building which this came within and that therefore it was for the purpose of covering building operations.

In view of the actual circumstances of these buildings, a description which indicated that building operations were proceeding which the term "in course of construction," coupled with the statement made by the applicant for insurance, did, was a misleading and inaccurate description and under the conditions avoids the policy.

---

*Dodge* v. *York Fire Ins. Co.* (continued).

Q. Mr. Sweatman verified it? A. Yes.

Q. What else did you tell him? A. That the premises practically remained the same as formerly written by his company in the policy referred to, and the mill would not go into operation during the currency of this insurance and that this insurance was carried for short periods on account of the buildings and plant not being completed pending certain moneys being paid into Court in proceedings payable on or about the expiration of this insurance.

Q. Did you tell him that the manager of the company and all the staff and all the people there had left the premises? A. No, sir.

Q. Did you tell him the place was boarded up? A. No, sir.

Q. Did you tell him this smelter proposition had failed, they could not make it a success? A. No, sir.

To a mind not informed of any other facts, and dealing with the renewal of a builder's risk, what is there, in this, giving reasonable knowledge of the true condition of affairs, which would exclude the risk not only from the category of builder's risks, but indeed from that of any insurable property? There is nothing in it inconsistent with the work of construction then going on, though delayed in completion.

Then it is not to be forgotten that the conversation between these men was not face to face but was over the telephone wires and so even less to be implicitly relied upon than evidence of conversation given from memory only a good while after, and when events have happened which must tend, consciously or unconsciously, to colour the relating of them, are.

But, fortunately for the interests of truth, the witness, like an ordinarily prudent business man, was not content to rely upon a telephone message and the mistakes and misunderstandings to which it is obviously open, but at once put his position as an applicant for the insurance in writing in the form of a confirmatory letter, written immediately after the conversation, in which the very thing in question is dealt with in these words: "These buildings are still under construction, and the premises will not go into operation during the currency of this builder's risk." How is it possible for anyone, in the face of these unmistakable words, reasonably to contend that the defendants' policy is not and should not merely be such a risk; that is a risk applicable only to buildings upon which building work is going on, and which is to cease when such work ends, or when the operations to be carried on in the building begin; because then it becomes, as the witnesses said, a different kind of and less desirable risk.

But apart from all this are the agreements which the Court ought to enforce, those which are deliberately put in writing and given by the one party to the other and accepted by him, both being insurance agents; or those which one witness only says was agreed to in a conversation over the telephone; and which the other person positively denies, and which are in the teeth of the writings and the probabilities of the case?

Reformation of the policy is, of course, out of the question.

ALTA.
S. C.
1912
DODGE
v.
WESTERN
CANADA
FIRE
INS. CO.
Harvey, C.J.

Were it not for the suspicion which naturally arises from the burning of heavily insured buildings, which were in the physical and financial condition these were, within a day of the expiration of the policies, which suspicion, however, may be entirely without foundation in fact, I should regret very much being obliged to come to the conclusion I do, for the defendants had the benefit of the premium, and, from the evidence given, I do not doubt that the insurance would have been accepted even though all the facts had been made known.

The action is dismissed with costs.

*Action dismissed.*

---

*Dodge* v. *York Fire Ins. Co.* (continued).

If I could otherwise have been persuaded that an unfinished building could not be "unoccupied" or "vacant" or "occupied" in fact of having to pass from day to day, both an unfinished building which has for many years been occupied, and other unfinished houses which for years have been vacant and unoccupied, I am irretrievably unpersuadable upon this question, if I may call it such.

In my opinion therefore, and as I find, the building in respect of which this action is brought, was not that which was insured there was no agreement to insure any such building; but if that were not so, if the policy could in any way be said to cover such a building, it became void under the conditions respecting vacancy. I would dismiss the appeal.

---

CAN.
Ry. Com.
1912
May 27.

## EDMONTON STREET R. CO. v. GRAND TRUNK PACIFIC R. CO.

**File 19435.**

*Board of Railway Commissioners. May 27, 1912.*

1. RAILWAYS (§ II B—17*a*)—CROSSING OF STEAM RAILWAY BY MUNICIPALLY OWNED STREET RAILWAY—STREET SENIOR OF RAILWAY—LIABILITY FOR COST OF INSTALLATION, ETC.

Where, in point of time, a city street is senior to the tracks of a steam railway that cross it, the tracks of a municipally owned street railway which are subsequently laid across the tracks of the steam railway, are not junior thereto so as to require the whole cost of the installation, maintenance and protection of the crossing to be borne by the city, but it will be divided equally between them.

2. RAILWAYS (§ II B—17*a*)—NECESSITY OF A MUNICIPALLY OWNED STREET RAILWAY SUBMITTING APPLICATION TO CROSS TRACKS OF STEAM RAILWAY TO LIEUTENANT-GOVERNOR IN COUNCIL—RAILWAY ACT (DOM.), SEC. 227.

An application of a street railway to cross the tracks of a steam railway company at a place where the latter crosses a city street, need not be submitted to the Lieutenant-Governor-in-Council for approval, under sec. 122 of ch. 8, of the Alberta Statutes of 1907, as to steam railways under federal control, since such application falls within sec. 227 of the Railway Act, R.S.C. (1906), ch. 37.

Statement

APPLICATION of the Edmonton Street Railway to cross the tracks of the Grand Trunk Pacific at Twenty-first street, city of Edmonton.

Com. McLean.

MR. COMMISSIONER MCLEAN:—The Grand Trunk Pacific in consenting to this crossing submits:—

(*a*) That in terms of the agreement entered into between the city and the railway on March 6th, 1906, under which the

railway was allowed to lay its tracks on the street in question, the Edmonton Street Railway is junior at the point of crossing and should, therefore, bear the whole cost of installation, maintenance, and protection of the crossing.

(*b*) That under section 122 of chapter 8 of the statutes of Alberta, 1907, an application must first be submitted to the Lieutenant-Governor-in-Council for approval of the crossing before application is made to the Board.

The first of these contentions had already been dealt with in the case decided on March 26th, 1909, in which the Board held that in the matter of the city carrying its municipally owned and operated street railway along or across its own street, the street being senior to the tracks of the steam railway located at the point of crossing, under such conditions the ordinary principle of seniority did not apply. The city has a right to carry its traffic along its streets by such means as it deems fit. The street being senior at the point involved in the present application, it cannot be claimed that the municipally owned street railway, which is one of the city's instrumentalities of carriage, is junior to the steam railway. Regarding the second point raised by the railway, it is not necessary to consider the pertinency of the provisions of the legislation referred to. What is before the Board is an application which falls squarely within section 227 of the Railway Act, R.S.C. (1906), ch. 37.*

*Section 227, ch. 37, Revised Statutes of Can. (1906), is as follows:—

The railway lines or tracks of any company shall not cross or join or be crossed or joined by or with any railway lines or tracks other than those of such company, whether otherwise within the legislative authority of the Parliament of Canada or not, until leave therefor has been obtained from the Board as hereinafter provided.

2. Upon any application for such leave the applicant shall submit to the Board a plan and profile of such crossing or junction, and such other plans, drawings and specifications as the Board may, in any case, or by regulation, require.

3. The Board may, by order—

(*a*) grant such application on such terms as to protection and safety as it deems expedient;

(*b*) change the plan and profile, drawings and specifications so submitted, and fix the place and mode of crossing or junction;

(*c*) direct that one line or track or one set of lines or tracks be carried over or under another line or tracks or set of lines or tracks;

(*d*) direct that such works, structures, equipment, appliances and materials be constructed, provided, installed, maintained, used or operated, watchmen, or other persons employed, and measures taken, as under the circumstances appear to the Board best adapted to remove and prevent all danger of accident, injury or damage;

(*e*) determine the amount of damage and compensation, if any, to be paid for any property or land taken or injuriously affected by reason of the construction of such works;

(*f*) give directions as to supervision of the construction of the works; and,

(*g*) require that detail plans, drawings and specifications of any works, structures, equipment or appliances required, shall, before construction or installation, be submitted to and approved by the Board.

CAN.

Ry. Com. 1912

EDMONTON STREET R. Co. v. GRAND TRUNK PACIFIC R. Co.

Com. McLean.

4. No trains shall be operated on the lines or tracks of the applicant over, upon, or through such crossing or junction until the Board grants an order authorizing such operation.

5. The Board shall not grant such last-mentioned order until satisfied that its orders and directions have been carried out, and that the provisions of this section have been complied with: 6 Edw. VII. ch. 42, sec. 15.

Order should therefore go for the crossing; the cost of construction, maintenance of the crossing, as well as installation and maintenance of the protection to be divided between the city and the Grand Trunk Pacific. The protection to be installed to be as recommended in the following extract from the report of the Board's chief engineer:—

> I am of the opinion that the crossing should be allowed, provided a half interlocker is installed with semaphores 500 feet distant from the diamond on the line of the steam railway and split point derails 100 feet from the diamond on each side on the lines of the electric railway. The normal condition of semaphores to be left clear for the steam railway and derails to be open for the street railway, which must come to a full stop, the conductor going ahead to the diamond, putting up the semaphore against the steam railway and closing the derails for the electric railway. After the car passes the derails, this operation is to be reversed and the electric car can proceed. The speed of the steam railway not to exceed 15 miles per hour at this point.

Com. Scott.

THE ASSISTANT CHIEF COMMISSIONER (MR. D'ARCY SCOTT) concurred.

*Order accordingly.*

---

SASK.

S. C. 1912

June 15.

## DELANEY v. DOWNEY.

*Saskatchewan Supreme Court. Trial before Newlands, J. June 15, 1912.*

1. SALE (§ III D—75)—RIGHTS OF BONA FIDE PURCHASERS—PURCHASE OF HORSE FROM DEALER.

A good title to a horse is acquired by one who, for a valuable consideration, purchased it from a dealer in such animals in the usual course of business, without notice that the person from whom the dealer obtained it had reserved the title thereto by an agreement that the law did not require to be registered, in which he was described as a dealer in horses.

[*Dedrick* v. *Ashdown* (1887), 15 Can. S.C.R. 227, followed. *McRorie* v. *Seward*, 3 Sask. L.R. 69, specially referred to.]

2. PLEADING (§ II G—210)—DEFENCE OF BONA FIDE PURCHASER FOR VALUE —AVERMENT AS TO OWNERSHIP.

The defence that a chattel was purchased *bonâ fide* for value, is sufficiently raised by an allegation that it was understood between the defendant's vendor and the person from whom the latter bought the chattel, who retained the title thereto, that the former was at liberty to sell and dispose of it.

SASK.

S. C.
1912

DELANEY
v.
DOWNEY.

Newlands, J.

ACTION to recover from the defendant certain horses sold by plaintiff to one Anderson upon a conditional sale agreement and purchased by the defendant from Anderson without notice.

The action was dismissed.

*E. B. Jonah*, for the plaintiff.

*P. H. Gordon*, for the defendant.

NEWLANDS, J.:—The plaintiff, who was the owner of certain horses, sold the same to one David Shaw Anderson, under an agreement by which these horses were to remain the property of the plaintiff until paid for. This transaction took place and the agreement was made in the province of Manitoba. Under the law of that province, it was unnecessary to register this agreement. Anderson subsequently brought the horses in question to this province, and sold them to the defendant. I find that there was no waiver of the terms of the agreement, nor had Anderson any authority from the plaintiff nor his agent Peltier to sell these horses. The property in these horses would not, therefore, pass to the defendant unless he was a *bonâ fide* purchaser without notice. Anderson was a horse-dealer, and is so described in the agreement of sale of these horses from Delaney to him, and he sold, or rather traded, them to the defendant in the ordinary course of his business. Downey swears that he had no notice that there was any trouble in connection with these horses until after he had made the trade with Anderson.

In *Dedrick* v. *Ashdown* (1887), 15 Can. S.C.R. 227, at p. 241, Gwynne, J., says:—

> So in *National Mercantile Bank* v. *Hampson*, 5 Q.B.D. 177, in which the point came up on the pleadings, the defence having been specially pleaded, the mortgagee of chattels brought an action of trover against a purchaser of some of the goods from the mortgagor, and the defendant pleaded that he bought the goods in the ordinary course of business and without notice that they were not the property of the vendor. Lush, J., held the defence good, saying: "Having regard to the terms of the bill of sale, there was an implied license for the grantor to carry on his business, . . . and any *bonâ fide* purchaser from him would have a good title." So in *Walker* v. *Clay*, 49 L.J.Q.B. 560, Grove, J., says: "The object of the bill of sale is to permit the grantor to carry on his business of an innkeeper and horse-dealer, and it must, therefore, be taken to have contemplated this sale. In his character of publican the grantor would, of course, be entitled, and the bill of sale must be taken to have intended him to be entitled, to sell wine and beer to his customers." And Lindley, J., says: "The object of the bill of sale is obviously not to paralyze the trade of the grantor, but to enable him to carry on his trade, and the bill of sale would be worthless if we were to construe it otherwise." And he concludes by saying that the title of the defendant, who was a purchaser from the grantor of the bill of some of the chattels covered thereby, is, to his mind, an extension of the doctrine that a *bonâ fide* purchaser for value without notice is to be protected. This observa-

SASK.

S. C.
1912

DELANEY
v.
DOWNEY.

Newlands, J.

tion was simply an enunciation of the principle upon which a purchaser of personal chattels from one who has the possession of them only, the property in them being in another, can be maintained against the true owner, and he says, in substance, that one who purchases *bonâ fide* from a trader goods in the ordinary course of the trader's business stands in the position well known in equity of a *bonâ fide* purchaser for value without notice. . . . . Upon this principle it was also held in *Taylor* v. *McKeand*, 5 C.P.D. 358, that a purchase from a trader, a mortgagor of goods, which the jury found to have been sold with a fraudulent intent by the mortgagor, and not in the ordinary course of business, could not maintain title against the mortgagee, although the purchaser was ignorant of the fraud and bought *bonâ fide*—thus shewing that the title of the purchaser depends on the fact of the sale to him being made in the ordinary course of the vendor's business: pp. 241, 242, 243.

And see *McRorie* v. *Seward*, 3 Sask. L.R. 69.

This defence of the defendant being a *bonâ fide* purchaser for value is not expressly raised by the statement of defence; but it is raised, I think, sufficiently for this decision by paragraph 6 of the statement of defence, where the defendant alleges that it was understood and agreed between the plaintiff and Anderson that Anderson should be at liberty to sell and dispose of these animals.

There will, therefore, be judgment for the defendant with costs.

*Judgment for defendant.*

---

YUKON.

Y. T. C.
1912

March 30.

**William R. BRADSHAW, John Royston, P. Nazzarino, Richard Morgan, Hilburn Potter, Milton R. Potter, Alexander Veale, M. McKenzie, A. Robertson, and Braga Guiseppe (plaintiffs) v. George W. SAUCERMAN, H. A. Duggan, and T. D. Davin, and J. E. Lilly & Company (defendants).**

*Territorial Court of the Yukon Territory, Macaulay, J. March* 30, 1912.

1. MINES (§ III D—95)—MINER'S LIEN FOR WORK PERFORMED—LIABILITY OF MINING CLAIMS—MINERS' LIEN ORDINANCE, Y.T.

All mining claims grouped under a certificate filed pursuant to the Placer Mining Act of Yukon Territory, in the office of the Gold Commissioner thereof, are subject to lien under the Miners' Lien Ordinance, for work or labour performed on any one of such claims.

2. MINES (§ III F—105)—MINER'S LIEN FOR WAGES—INTERESTS BOUND—NON-SERVICE OF ORIGINATING SUMMONS.

A lien under the Miners' Lien Ordinance does not attach to the interest in a mining claim of one who was not served with an originating summons or any of the proceedings, as required by such ordinance.

3. STATUTES (§ II B—117)—STRICT CONSTRUCTION OF "MINERS' LIEN ORDINANCE, Y.T."—INVALIDATION FOR IRREGULARITIES.

A person must bring himself strictly within the terms of the Miners' Lien Ordinance in order to secure the benefit thereof, since any irregularity in the proceedings will invalidate a lien claim.

4. MINES (§ III D—95)—SUFFICIENCY OF DESCRIPTION OF MINING CLAIMS—MINERS' LIEN ORDINANCE, Y.T.

A claim for a lien, under the provisions of the Miners' Lien Ordinance, sufficiently locates the mining claims on which it is sought, as being in the Yukon Territory, by describing them as being "all below Discovery on Thistle Creek and Discovery Claim, and numbers 1, 2, 3, 4, and 5, above Discovery on Statute Gulch, a tributary on the left limit of Thistle Creek, below Discovery," and owned by the defendants, who were named as residents of Thistle Creek, in the Yukon Territory.

5. MINES (§ III F—105)—MINERS' LIEN FOR LABOUR—SUFFICIENCY OF NOTICE—WRONGFUL DESCRIPTION OF OWNERS AND THEIR INTERESTS.

A notice of lien under the Miners' Lien Ordinance filed against several owners of mining claims, is not vitiated by the fact that in the operating part thereof the claims were referred to as belonging to one defendant who was in control of them, where, in a grouping certificate, filed under the Placer Mining Act, he was described as being the owner of the claims under an agreement for their purchase from his co-defendants.

6. MINES (§ III F—105)—MINERS' LIEN FOR WAGES—SUFFICIENCY OF STATEMENT OF AMOUNT DUE IN LIEN.

The fact that money, for which a lien is sought against mining claims under the Miners' Lien Ordinance, was due or to become due, is sufficiently shewn by a statement in the claim of lien that it was for wages due from the defendants for work and labour done and performed for them within the times mentioned, and that there was no period of credit agreed upon.

7. MINES (§ III F—105)—MINERS' LIEN FOR LABOUR—SUFFICIENCY OF LIEN—COMPLIANCE WITH STATUTORY REQUIREMENTS.

A statement in a lien claim that it was for work and labour done and performed on and in respect of described mining claims, is a sufficient compliance with the requirements of the Miners' Lien Ordinance, since it is not necessary to describe minutely the different kinds of work performed.

8. LOGS AND LOGGING (§ I—15)—MINERS LIEN FOR CUTTING AND SAWING—SALE OF LUMBER BY OWNER WITHOUT KNOWLEDGE—MINERS' ORDINANCE ACT, Y.T.

A lien on a mining claim, under the provisions of the Miners' Lien Ordinance, for cutting and sawing logs, will not be defeated by the fact that, without the knowledge of the plaintiff, the owner of the claim sold a small portion of the lumber for use elsewhere than on his own claim.

9. MINES (§ III F—105—ENFORCEMENT OF MINERS' LIEN—PROCEDURE AS TO MORTGAGES UNDER MINERS' LIEN ORDINANCE, Y.T.

It is not necessary in the first instance to make a mortgagee a party to a proceeding for a lien under the Miners' Lien Ordinance, since it is sufficient to file it against the owner or supposed owners, and, after an examination of the records of the office of the Gold Commissioner, to notify the mortgagee, and in the originating summons, make him a party to the action.

10. MINES (§ III C—90)—FOR WHAT WORK LIEN ATTACHES—COOKING—MINERS' LIEN ORDINANCE, Y.T.

Services performed as a cook on a mining claim are not of a lienable nature, under the Miners' Lien Ordinance.

[*Davis v. Crown Point Mining Co.*, 3 O.L.R. 69, followed.]

11. MINES (§ III B—85)—MINERS' LIENS — PRIORITIES — MORTGAGEE — MINERS' LIEN ORDINANCE, Y.T.

A lien on mining claims filed under the provisions of the Miners' Lien Ordinance, can be obtained only on an undivided one-half interest therein, as against the holder of a duly registered mortgage of the other undivided one-half of the claim.

YUKON.

Y. T. C.
1912

BRADSHAW
v.
SAUCERMAN.

12. MINES (§ III B—85)—PRIORITIES—MORTGAGEE IN POSSESSION—LIABILITY TO LIENHOLDER—UNDIVIDED ONE-HALF.

A mortgagee of an undivided one-half interest in a mining claim, who entered into possession and removed gold dust therefrom, must account for one-half thereof to a person who obtained a lien on the other undivided one-half of such claim by virtue of a proceeding under the Miners' Lien Ordinance.

13. MINES (§ III F—105)—PROCEDURE—PERSONAL JUDGMENT FOR AMOUNT OF LIEN.

Upon upholding the validity of a proceeding for a lien under the provisions of the Miners' Lien Ordinance, a personal judgment will also be rendered against the defendants for the amount of the lien claimed, together with costs.

Statement

THIS is an application by the plaintiffs to enforce a lien for work and labour performed in respect of certain mining claims on the credit of one of the owners, pursuant to the provisions of the Miners' Lien Ordinance, Y.T.

Judgment was given for the plaintiffs.

*J. L. Bell*, for plaintiffs.

*C. W. C. Tabor*, for defendants J. E. Lilly & Company, mortgagees.

The defendants G. W. Saucerman and T. D. Davin appeared in person.

Macaulay, J.

MACAULAY, J.:—This is an application by way of originating summons under the Miners' Lien Ordinance to enforce a lien for work and labour performed by the plaintiffs for, and upon the credit of, the defendant George W. Saucerman, against creek placer mining claims numbers 5, 35, 37, 39, 41, 45, 47, 48, 52, 53, 55, 56, 57, 59, 61, 63, 64, 65, 97, 98, 99, 100, 101, all below Discovery on Thistle Creek, and Discovery Claim and numbers 1, 2, 3, 4 and 5 above Discovery on Statue Gulch a tributary of Thistle Creek on the left limit below Discovery, in the Yukon Territory, the mines, dumps of pay dirt, the minerals and ores produced therefrom and upon the appurtenances thereto, the lands occupied thereby and enjoyed therewith, and the flumes, water rights, siphons, piping, monitors, sawmill plant, and the machinery and chattels upon said lands and mining claims; the said defendant Saucerman being a part owner of the said claims, and also the holder of an option to purchase the interests of his co-defendants Henry A. Duggan and Thomas Davin, which option was duly registered in the office of the Gold Commissioner at Dawson and was in force at the date of the commencement of these proceedings; there also having been a partnership entered into between the defendant owners, other than the mortgagee, for the working of the said claims, and a grouping certificate duly obtained and filed in the office of the Gold Commissioner of the Yukon Territory under the provisions of the Placer Mining Act of the Yukon Territory, and a fur-

ther grouping certificate dated the 28th day of June, 1911, under the provisions of the said Act, and filed in the office of the Gold Commissioner of the Yukon Territory on the 29th day of June, 1911, which said grouping certificate is still in force. Consequently, although the work performed by the plaintiffs was not performed upon all of the above mentioned mining claims still, if the lien of the plaintiffs should prevail, it will apply to all the said claims by virtue of the said grouping certificates.

The last day's labour for which the wages are claimed was performed on or about the 27th day of August, A.D. 1911, and the claim for lien was duly registered in the office of the Gold Commissioner at Dawson on the 9th day of September, A.D. 1911, within thirty days after the performance of the last day's labour for which wages are claimed.

A certificate of proceedings was duly obtained from this Court on the 26th day of October, 1911, and an originating summons obtained from this Court on the said 26th day of October, 1911, within the time prescribed by section 12 of the Miners' Lien Ordinance, and proper service of all proceedings effected upon the defendant George W. Saucerman and the defendant T. D. Davin, and also the mortgagees J. E. Lilly & Company.

The defendant H. A. Duggan was not served with the originating summons, or any of the proceedings, as required by the provisions of the Act; consequently, no lien, in any event, can attach to any interest he may have in any of the above mentioned properties.

There is no contest between the plaintiffs and the defendant George W. Saucerman, who admits the amounts due to the plaintiffs as claimed, and the time checks given by Saucerman to the respective plaintiffs and produced and filed as exhibit I in these proceedings, verify the claims made by the respective plaintiffs against him.

The defendants J. E. Lilly & Company, mortgagees, oppose the said lien, however, on grounds of irregularity, and argue, through their counsel, that the said lien is invalid on the following, amongst other grounds:—

1st. That the lien does not say that Thistle Creek or Statue Gulch are in the Yukon Territory.

2nd. That lien contradictory, as it refers to claims as belonging to defendant Saucerman exclusively in operative part.

3rd. That lien does not shew that money is due or to become due as required by Ordinance.

4th. That it does not shew the work done or wood furnished as required by Ordinance.

5th. That it does not shew the nature of the work done.

6th. That it does not shew that there is anything due, or to become due, as required by the Ordinance.

YUKON.

Y. T. C. 1912

BRADSHAW v. SAUCERMAN.

Macaulay, J.

Further, that part of the work performed was in cutting logs and sawing lumber, some of which lumber was not used in connection with the mining operations but sold to individuals not connected with the said mining operations, and that no lien should attach for such work so performed by any of the plaintiffs where the product of such work was not applied towards or used in connection with the said mining operations.

It was argued by counsel that when a statute gives a privilege in favour of the creditor the creditor must bring himself strictly within its terms, and, under the Miners' Lien Ordinance, a special privilege being granted to the plaintiffs, they must bring themselves strictly within the terms of the statute, and any irregularity in their proceedings is fatal to their claim.

Authorities were cited by counsel to shew that in actions for liens the plaintiffs are compelled to conform strictly to the terms of the statute; otherwise their actions would fail.

It is not necessary for me to cite the authorities produced by counsel in support of his contention, because I in no way disagree with his contention, and unless the plaintiffs have brought themselves strictly within the terms of the Miners' Lien Ordinance, under which they are proceeding, I am of opinion that their action must fail.

Now let us examine the first objection.

The plaintiffs claim a lien for wages due by George W. Saucerman, H. A. Duggan and T. D. Davin "of Thistle Creek, in the Yukon Territory, owners of the mining claims hereinafter enumerated and situate in the Thistle Creek Mining Division of the Dawson Mining District."

The claims are then enumerated and described as "all below Discovery on Thistle Creek and Discovery Claim and numbers 1, 2, 3, 4, and 5 above Discovery on Statue Gulch, a tributary on left limit of Thistle Creek, below Discovery."

In my opinion his objection cannot prevail, as it is impossible to be misled as to the whereabouts of Thistle Creek or Statue Gulch, as the defendants are spoken of as being residents of "Thistle Creek, in the Yukon Territory, owners of the mining claims situated in the Thistle Creek Mining Division of the Dawson Mining District." It is impossible, in my opinion, that any one reading the lien could be misled, or could conclude that the said creek or gulch could be situated elsewhere than in the Yukon Territory.

The second objection: That the lien is contradictory as it refers to claims as Saucerman's exclusively in operative part. I are of opinion that this objection could not prevail as Saucerman is described in the grouping certificates as the owner under his agreement of purchase from his co-defendants Duggan and Davin; (he was in control of the said mining properties); and

that such description of Saucerman is not contrary to the provisions of said Miners' Lien Ordinance.

I will now examine the third objection: That the lien does not shew that money is due or to become due as required by the Ordinance.

The claim of lien itself states that it is "for wages due by George W. Saucerman, H. A. Duggan and D. T. Davin, for work and labour done and performed on and in respect of the claims above enumerated, for, and upon the credit of, the said George W. Saucerman." That the work so performed by the said claimants in each case was performed within the times mentioned in the said lien, as is more fully shewn by the claimants' time checks; and describes the amount claimed in each case. The time checks verify the statements of the claimants in each particular case.

The claim of lien further states that "there was no period of credit agreed on with any of the claimants."

Although the lien in this respect might have been more happily framed, I am of opinion that the plaintiffs, in regard to objection number 3, have strictly complied with the terms of the statute.

Objection number 4: The lien states in each particular case that the claim is for wages for work and labour done and performed on and in respect of the mining claims mentioned in said lien, and the evidence in the case shews that this is the fact. I believe this is a sufficient description of the work performed to comply with the provisions of the statute. There is a multitudinous variety of work to be performed by a miner or labourer working upon a mining claim, and I do not think it was ever intended by the framers of this Act that in claiming a lien it was necessary for the miner to describe minutely the different kinds of work performed by him upon the said claim; and, in my opinion, the statement that it was "for work and labour done and performed on and in respect of the claims enumerated" was a sufficient description. There was no wood furnished by the workmen, nor is any such a claim made by them under their lien.

Objection number 5: That it does not shew the nature of the work done. The view expressed by me in regard to objection number 4 applies to this objection.

Objection number 6: That there is nothing to shew that there is anything due, or to become due. I have already expressed my views in regard to this objection; and in regard to all the objections raised, I find that the plaintiffs have brought themselves strictly within the terms of the statute; and upon examining the lien filed as a whole, and reading it as a whole document, I am of opinion that no other conclusion can be ar-

YUKON.

Y. T. C. 1912

BRADSHAW v. SAUCERMAN.

Macaulay, J.

rived at than that the plaintiffs have strictly brought themselves within the terms of the statute.

In regard to the further objection that all the lumber produced from the logs cut and sawn on the property was not used in connection with the mining operations, the evidence shews that only a small portion of this lumber was disposed of by the defendant Saucerman to persons other than those connected with the said mines or mining operations, and in the instances where such lumber was so sold it was for the purpose of obliging his neighbours, there being no other saw mill in that district; and, furthermore, there is no evidence offered to shew that the plaintiffs, when performing the work of cutting logs and assisting in having them manufactured into lumber, were aware that any of this lumber was to be used otherwise than in connection with the said mining operations; and even if Saucerman did divert some of that lumber, under the circumstances, in my opinion, such diversion could not affect the rights of the plaintiffs who were not shewn to have had any knowledge other than that the said lumber so obtained from the sawing of the logs, was to be used in connection with the mining operations being carried on, and about to be carried on, upon the said mining property.

It was further objected to by counsel that J. E. Lilly & Co. were not made parties to the lien. I am of opinion that it was not necessary for Lilly & Company, the mortgagees, to have been made parties to the lien in the first instance, as it was proper to file the lien against the owner, or supposed owner, of the property in the first place, and then, after a due examination of the records in the office of the Gold Commissioner, all parties interested should be notified, and Lilly & Company were duly notified and made parties to the action in the originating summons. This, I believe, was the proper course to have been followed.

In regard to the claim of the plaintiff, M. McKenzie, for $245.50, for services performed as a cook, said claim must be disallowed as it is of such a nature as not to be contemplated as coming within the provisions of the Miners' Lien Ordinance —see *Davis* v. *Crown Point Mining Co.*, 3 O.L.R. 69, which case has been followed in all mining lien cases that have been before the Courts in this Territory.

In regard to the other plaintiffs, in my opinion they have clearly established a right to their lien for the amounts claimed by them, except as to the interest of the defendant Duggan, who was not served with the proceedings. Consequently the said lien will not attach to whatever interest the defendant Duggan may have in the said claims.

There is no dispute as to the validity of the mortgages held by the defendants J. E. Lilly & Company. Consequently the said lien of the plaintiffs shall only take priority over the said

mortgages on the said property described in the said lien as to an undivided one-half interest in said mining claims, the appurtenances thereto, the lands occupied thereby or enjoyed therewith, and the machinery and chattels upon such lands, and as to one-half of the output from the said mining claims. The said J. E. Lilly & Company having entered into possession of the said premises under their said mortgages and obtained a certain amount of gold dust will, therefore, be obliged to account for one-half of the gold dust so obtained.

There will, therefore, be judgment for the plaintiffs other than the plaintiff McKenzie, for the amounts claimed by them respectively in the said lien, together with the costs of and incidental to registering the lien, as well as the costs of the action.

If the said claims of the plaintiffs are not satisfied within one month from the date of the judgment I direct a sale of the estate and interest charged with the lien; also any wood, machinery and chattels so charged; to satisfy the said claims.

If such sale is found necessary further directions as to the time and manner of the sale shall be given upon application to the Court.

There will also be a personal judgment against the defendant Saucerman for the full amount of all the plaintiffs' claims and costs.

*Judgment for plaintiffs.*

---

**J. W. PIGEON et al. (plaintiffs) v. R. F. PRESTON (defendant).**



*Saskatchewan Supreme Court, Johnstone, J., in Chambers. July* 16, 1912.

1. MOTIONS AND ORDERS (§ I—4)—AFFIDAVIT SWORN BEFORE SUMMONS ISSUED—USE ON MOTION FOR INJUNCTION—CONDITION.

An affidavit that was sworn on the day before a summons was issued in an action, cannot be read in support of a subsequent application for an interim injunction, unless, with the permission of the Court, it is taken from the files and re-sworn.

[*Green* v. *Prior* (1886), W.N. 50, specially referred to.]

2. MOTIONS AND ORDERS (§ I—4)—USE OF FURTHER MATERIAL THAN SPECIFIED IN NOTICE OF MOTION ON SUBSEQUENT MOTION TO CONTINUE INJUNCTION—LEAVE.

Where a notice of a motion for an interim injunction states that certain affidavits and exhibits will be read on the hearing thereof, other affidavits and exhibits cannot be read on a subsequent motion to continue such injunction, except with the leave of the Court.

Statement

MOTION to continue until the trial an interim injunction granted *ex parte*.

*J. N. Fish*, for applicant.

*Alex. Ross*, for defendant.

Johnstone, J.

JOHNSTONE, J.:—This action was commenced by writ of summons on the 30th of May, 1912. On the 5th of June the plain-

SASK.

S. C. 1912

PIGEON v. PRESTON.

Johnstone, J.

tiff obtained an interim injunction against the defendant restraining the defendant, his agents, etc., until the 19th of June or until such time as any motion to continue such injunction might be disposed of from distraining the goods and chattels of the plaintiffs in and upon lot seven in block 150, according to the plan of Saskatoon, etc.

In support of the motion for the interim injunction was read the affidavit of the plaintiff, Joseph W. Pigeon, and certain exhibits consisting of copies of a lease from one Buckley to the Starland, Limited, and of an agreement between the latter and the plaintiff. The affidavit referred to was sworn on the 29th of May, one day before the issue of the writ.

No leave was granted to use further or other material on the motion to continue, but the notice of motion served contains a notice that on the return of the motion would be read the pleadings and proceedings in the cause and the affidavit of the plaintiff Joseph Wilfrid Pigeon filed and the exhibits therein referred to.

The motion by the plaintiffs to continue, after several enlargements, came up before me for hearing on the 13th, when the plaintiffs sought to use fresh material in support of the motion, and material of which no notice of intention to read had been given, consisting of affidavits of R. H. Bertrand (with exhibits therein referred to). This was objected to by counsel for the defendant, who took exception as well to the reading of the affidavit used in the *ex parte* application for the interim injunction, on the ground that such affidavit was sworn before the issue of the writ.

No suggestion or application was made on the part of the plaintiffs that they be given leave to take this affidavit of the 29th May off the files for the purpose of having it re-sworn, as was done in *Green* v. *Prior* (1886), W.N. 50.

Without the new material sought to be used in support of the motion I could not grant the order continuing the injunction until the hearing; the material, apart from the objection to the affidavit of Pigeon, would be insufficient for that purpose. On the authority of *Walrond* v. *Hawkins*, L.R. 10 C.P. 342, following *Goodright* v. *Davids*, 2 Cowper 80, with the facts before me of the several payments to and the receipt without objection by the defendant of these payments of rent, which I think amounted to a waiver of the breach of the covenant not to sublet, I might grant the relief asked for, but I must reject all affidavits attempted to be used on the application, affidavits shewing these facts—Pigeon's—because it was improperly sworn, and the other two and the exhibits therein referred to, for the reason that leave was not given to read these, and the notice of motion omitted to give notice of an intention to read them. Some shew, at least, of an intention to be guided in practice by the rules of

SASK.

S. C.
1912

PIGEON
v.
PRESTON.

Johnstone, J.

Court should be in evidence, especially on an application of this kind.

The motion to continue will, therefore, be refused, with costs. Upon the filing, however, of a properly sworn affidavit in lieu of that of the 29th May, an interim injunction may issue restraining the defendant until the 17th of September now next.

*Order accordingly.*

---

## WHALEY v. O'GRADY.

**(Decision No. 2.)**

MAN.

1912
C. A.

*Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron, Haggart, JJ.A. June 24, 1912.*

June 24.

1. CONTRACTS (§ VI A—411)—RE-PURCHASE OF STOCK SOLD—RECOVERY OF MONEY PAID.

Where the sales agent of the defendants, an incorporated company empowered to engage in the business of company promotion and of selling corporate shares, induced the plaintiff to buy shares of another company by representing that the defendants had power to re-purchase this stock within a certain time if the plaintiff desired to sell, and the defendants received the purchase price therefor from the plaintiff and afterwards refused the purchaser's demand to re-purchase the shares, the plaintiff is entitled, upon surrendering the stock to the defendants, to recover the sum paid thereon with interest from the time of his demand on them to re-purchase, as the contract was unenforceable.

[*Whaley* v. *O'Grady* (*No.* 1), 1 D.L.R. 224, 19 W.L.R. 885, reversed on appeal.]

Statement

APPEAL by plaintiff from decision of Macdonald, J., *Whaley* v. *O'Grady*, 1 D.L.R. 224, 19 W.L.R. 885, dismissing an action for damages for breach of an agreement in writing purporting to be made by the defendant company through its sales agent to re-purchase from the buyer certain shares of a traction company sold by the defendant company to him, part of the consideration for the purchase being the agreement sued upon that the buyer should have the option of demanding the re-purchase by the defendant company from him of the shares at an advanced price within a time limited.

The appeal was allowed, with costs, and the judgment of the trial Court varied so as to permit the plaintiff to recover what he had paid for the stock with interest from the time of his demand on the defendants to re-purchase.

*W. J. Cooper*, K.C., and *A. Meighen*, for plaintiff.

*J. B. Hugg*, for defendants.

Howell, C.J.M.

HOWELL, C.J.M.:—It is conceded by all parties that Lyon was the defendants' agent to sell stock and that the latter was a joint stock company empowered by their charter to buy and sell stock in joint stock companies and generally to act as financial brokers and agents.

MAN.

C. A.
1912

WHALEY
v.
O'GRADY.

Howell, C.J.M.

Lyon entered into the contract which is set forth in Mr. Justice Macdonald's judgment, believing he had power to do so, and before he had any notice of the revocation of the terms as to re-purchase. If he had no authority to contract for the re-purchase of the stock, he was at all events, the agent of the defendants to sell.

Even if the sale made by Lyon was reconsidered between the vice-president Anderson and the plaintiff in Winnipeg it seems from the evidence that the sale was made on the same terms as the first one and I think this is the finding of the trial Judge. He, however, goes on to hold that because of there being no by-law there was no power to add the condition of re-purchase.

Mr. Anderson wrote two letters in the name of the company referring to the agreement, as if the original one made by Lyon was the real contract for the sale of stock to the plaintiff. These letters are dated December 20th, 1910, and January 12, 1911, and there is no pretence that the vice-president had not full authority to bind the company by the letters.

In the 9th paragraph of the statement of defence, there is a distinct statement of record that the sale was made by Lyon and that he was the authorized agent to sell and the defendants are bound by this, and in that paragraph they repudiate his power to make the re-purchase agreement.

On the argument the defendants relied strongly on section 68 of the Joint Stock Companies Act, and claimed that no by-law required by that section had been passed, and that, therefore, Lyon got no power under section 64 to enter into that portion of the contract relating to re-purchase. Certainly the vice-president assumed to give him power so to do, but let us examine the defendants' contention. Their agent to sell entered into a contract that cannot be carried out, without any notice or knowledge of this inability to the plaintiff. The company took the plaintiff's money and thus carried out part of the agreement. If Lyon had defrauded or made any fraudulent representation to the plaintiff the defendants would be bound to make it good as in *Kettlewell* v. *Refuge Ass. Co.*, [1908] 1 K.B. 545, affirmed in [1909] A.C. 243, *sub nom. Refuge Ass. Co.* v. *Kettlewell*.

> If the sale was of a chattel and
>
> if the agent has deceived the third party the person so deceived may on finding out the fraud retain the chattel and bring an action for any damage he has suffered or can insist upon being restored to his original position:

Wright's Principal and Agent, 418. The defendants sent out their agent to sell stock and they are answerable for the manner in which that agent has conducted himself in doing the business which they authorized him to do.

Howell, C.J.M.

Lyon represented that the defendants had power to re-purchase and would re-purchase this stock, which representation was a part of the contract of sale carried out by the defendants, and they received the purchase price. I see no difficulty in compelling the defendants to restore the plaintiffs to their original position.

Upon the plaintiff executing and leaving with the prothonotary an assignment of the stock to the defendants or their nominee in form to the satisfaction of that officer the defendants shall pay to the plaintiff the sum of $1,000 and a further sum equal to interest thereon at 5 per cent. from January 10th, 1911, to the date of the entry of this judgment, and the judgment in the Court of King's Bench will be varied accordingly and the plaintiff must be given the costs of the trial and judgment.

The appeal is allowed with costs.

Haggart, J.A.

HAGGART, J.A.:—I have read the reasons of His Lordship the Chief Justice and agree with his conclusions.

The substance of the transaction in question was the payment by the plaintiff of $1,000 for ten shares of stock and an undertaking to re-purchase them on a certain future date at an advance of 15 per cent.

If, as claimed by the defendants, the agent Lyon had no authority to give this undertaking, or if the defendants under their letters patent, or the provisions of the Manitoba Joint Stock Companies Act, had no power to make this re-purchase, then there was no real agreement between the parties. This $1,000 is traced into the treasury of the defendants. The plaintiff is entitled to recover that sum with interest from the time of the demand on the defendants to re-purchase.

The appeal should be allowed.

Richards, J.A.
Perdue, J.A.
Cameron, J.A.

RICHARDS, PERDUE and CAMERON, JJ.A., concurred.

*Appeal allowed.*

---

## McCUTCHEON BRICK CO. v. GARDINER.



*Manitoba King's Bench. Trial before Prendergast, J. April 15, 1912.*

1. CONTRACTS (§ IV—345)—RIGHT OF RECOVERY FOR INSTALMENT OVERDUE —ALLEGED CONTRACT OF SALE IN SETTLEMENT OF AMOUNT DUE.

In an action for an overdue instalment of the purchase money under an agreement for the sale of land, the defendant cannot set up as a defence that he paid the instalment by virtue of a new contract with the plaintiffs for the sale to them of an interest in other land at a price equivalent to the amount of the instalment sued for; where the evidence shewed that the new contract was only in the nature of a security and was upon a condition which was not performed and there was a total failure of consideration for it.

MAN.

K. B.
1912

Mc-CUTCHEON BRICK CO. v. GARDINER.

Statement
Prendergast, J.

THIS action is for $2,620, being one half of the second deferred payment due under an agreement for the sale of land wherein Albert N. McCutcheon, who subsequently assigned to the plaintiffs, was the vendor, and the defendant Elizabeth C. Gardiner, and one Robert Bickerton were the purchasers.

Judgment was given for the plaintiffs.

*M. G. Macneil*, and *B. L. Deacon*, for the plaintiffs.

*J. H. Chalmers*, for the defendant.

PRENDERGAST, J.:—On the signing of the agreement, which was November 15, 1905, the purchasers made the cash payment of $2,000 provided for therein, each contributing one half.

On February 15th, 1906, the purchasers made the first time payment then coming due, $1,282, each again contributing one half.

On November 15, 1906, the second deferred payment of $5,240 then becoming payable, Bickerton paid in cash one half of the said amount, leaving due $2,620. The latter is the amount sued for, the defendant alleging payment or dealings amounting to payment and satisfaction, the true nature of which constitutes the issue in this case.

On November 15, 1907, the last payment of $4,967 was duly made, Bickerton paying the whole of it out of his own money as I understand. At all events, Bickerton, having obtained at the time an assignment to himself from Eliza C. Gardiner of her interest, McCutcheon gave a transfer of the land to Bickerton alone.

On January 20, 1910, Albert N. McCutcheon assigned to the plaintiff the moneys alleged to be due herein.

I may say at once that all dealings were carried on for the defendant by her husband, J. B. Gardiner.

The defendant relies on three documents:—

First. A receipt (Ex. 2), dated November 15, 1906, in the following words: "Received from Elizabeth C. Gardiner, through John B. Gardiner, her agent, the sum of $2,625, being in full payment of second instalment and interest on Elizabeth C. Gardiner's share due November 15, 1906, in the following described property, purchased from A. N. McCutcheon on November 15, 1905, viz.: Those portions of lots . . . ," etc. (as in the agreement for sale), and signed by Albert N. McCutcheon.

Second. Agreement (Ex. 4) for the sale of a certain section of land in the Province of Alberta, dated November 15, 1906, wherein John B. Gardiner is the vendor and Edith Ada McCutcheon, wife of Albert N. McCutcheon, is the purchaser, the total consideration being $5,984, of which $1,920, is acknowledged to have been received at the time and the balance to be payable in nine equal annual payments.

Third. An agreement, under seal (Ex. 3) by J. B. Gardiner, dated also November 15, 1906, which reads as follows: "For value received I hereby agree to transfer to Albert N. McCutcheon, the clear title

in a 50-foot River lot on Capital Hill, City of Edmonton, in the Province of Alberta, the said lot to be 50 feet by 120 feet."

The section of land referred to in the above agreement for sale, was part of a block of over 19,000 acres for which the defendant and her husband had an agreement for sale from the Union Trust Co., the consideration therein stated being over $140,000. What the defendant and her husband ever paid on those lands, does not appear. At all events, in May, 1908, cancellation notice was served on the latter two, as well as on Mrs. McCutcheon, and the land ultimately revested in the Union Trust Co.

J. B. Gardiner says that on October 6, 1906, on his return from a trip to Edmonton, Albert N. McCutcheon told him that his wife wanted to buy a section of land in Alberta, that he met him two or three times after that and eventually sold him the section in question for $9.25 an acre, and agreed also to transfer a lot of a sub-division he had in Edmonton for $700. He says that the cash payment on this section was put, on the basis of $3.00 an acre, at $1,920, which, with $700 for the city lot, made $2,620, or the half of the second time payment sued upon.

Gardiner says:—

> He gave me a receipt and that was all about it. Of course, he accepted this as payment. The word "security" was never mentioned, never thought of. I sold the section and lot just the same as I would sell it to any other individual.

The last statement, however, cannot be absolutely correct, for the fact that the cash payment on this section and the price put on the city lot amounted exactly to the half instalment then just due on the prior agreement, could not be a mere coincidence.

Gardiner says also:—

> As to the number of the lot not being there, I told him to come up and select it or I would select it. I selected lot 4 in block 27 and offered him a transfer of it, but he would not take it, and the lot is still there.

Counsel for the defence also laid stress on the fact that the second agreement for sale (Ex. 4), is also an agreement to purchase, Mrs. McCutcheon, who signed the same, covenanting therein to pay the balance of the $5,984, in nine annual payments.

Albert N. McCutcheon's evidence is to the following effect: Bickerton having paid half of the second deferred payment in question, the defendant was unable to pay the other half, and her husband offered to sell him this section and a lot. McCutcheon says he refused. Gardiner then said: "If you take them, I will guarantee to sell them in two months and give you your money," to which McCutcheon says he replied that he would hold it a couple of months as security if he (Gardiner) could sell them in the meantime, and he agreed.

MAN.

K. B.
1912

MC. CUTCHEON BRICK CO. v. GARDINER.

Prendergast, J.

J. B. Gardiner, was using at the time the office of his brother Richard W. Gardiner, and it appears it was the latter who prepared the agreement for sale (Ex. 4), the undertaking to transfer a lot in Edmonton (Ex. 3), and probably also the receipt (Ex. 2). McCutcheon says he found the papers all prepared at Richard W. Gardiner's office. McCutcheon asked that the name of the purchaser in the agreement for sale as then drawn, be changed from his own to that of his wife, which was done, and he took the agreement to his wife and had her execute it. McCutcheon says that when J. B. Gardiner asked him to sign the receipt (Ex. 2), saying that he required it to shew Bickerton, that he objected at first; but that he finally signed it on Gardiner's representation that Bickerton was very particular and hard to satisfy in such matters, and his repeated assurances that he would sell the section in two months. He says, moreover, that two months after the last dealings, he went to see J. B. Gardiner about payment, but that the latter told him that he could not make any sales and had no money.

I have already stated that the section had in the meantime reverted to the Union Trust Co. McCutcheon also says that the defendant and her husband promised him repeatedly that they would repay him.

J. B. Gardiner says in this respect: "He kept after me five or six years, and he hounded me so much that I told him, if I could sell certain properties, I would pay him," and in his examination for discovery, to question 140: "Did you offer payment to him afterwards?" he replied: "I don't know, he has been after me so much that I told him I would, perhaps." McCutcheon also denies having ever offered a transfer of the Edmonton lot.

McCutcheon states that when Bickerton made the last payment in November, 1907, and asked for a transfer, he called his attention to the fact that there was one half of the second time payment not yet made, and that Bickerton then gave him a guarantee by letter that he would see him paid. McCutcheon swears that he shewed that letter to J. B. Gardiner, who took it with him and never returned it. The latter admits having received from McCutcheon a letter written by Bickerton, but says that it was about unimportant matters and that he mislaid or destroyed it.

McCutcheon further says, in explanation of Mrs. McCutcheon's covenanting to pay in the second agreement: "She would not be called upon to make the annual payments or pay anything, as Gardiner was to sell the section within two months."

With nothing else before me than the conflicting testimonies of McCutcheon and Gardiner, I would very probably find for the defendant, whose contention is undoubtedly supported by the documents as far as they go.

MAN.

K.B.
1912

Mc.
Cutcheon
Brick Co.
v.
Gardiner.

Prendergast, J.

But there is also the evidence of Richard W. Gardiner, which I take to be distinctly favourable to the plaintiff. He says in substance: "I was running that office, and my brother was coming in a great deal. The negotiations were carried on there. My brother told me the deal, and brought McCutcheon, and asked me to assist them with the papers. My brother and Bickerton had bought property from McCutcheon; an instalment was due; Bickerton was ready to pay but not my brother, and he was working some deal with McCutcheon to tide it over. McCutcheon evidently did not want the property; he wanted cash; but my brother said he would undertake to sell the property and give him the money in a very short time, within a few months, as I supposed.

The plaintiff also raises the issue in reply that J. B. Gardiner could not make title for the section of land, which I think is fairly well established. There is, moreover, nothing to shew what value should be put on the lot referred to but not particularized in Gardiner's undertaking (Ex. 3), and even the locality of which McCutcheon knew nothing about.

Of course, McCuteheon was more ill-advised than I could express in not taking a proper declaration from Gardiner, and the plaintiffs have surely a very grave obstacle to surmount in the three documents produced (Exs. 2, 3, and 4).

I believe, however, that the evidence, strengthened especially as it is by the testimony of Richard W. Gardiner, warrants the conclusion that the last agreements were only in the nature of security, that at most they were conditioned upon Gardiner selling within two months which he did not do, and that there was a total failure of consideration for the alleged new contract.

There will be judgment for the plaintiffs, with costs.

*Judgment for plaintiffs.*

---

## THE KING v. McLEOD.

B. C.

1912

C. A.

June 4.

*British Columbia Court of Appeal, Macdonald, C.J.A., Irving and Martin, JJ.A. June 4, 1912.*

1. Damages (§ III A 5—85)—Breach of contract of employment—"At the rate of" a fixed sum per annum.

Under an employment "at the rate of" a stated sum per annum, the salary is apportionable, and upon the discharge of the employee before the expiration of the year, he is entitled only to such proportionate part of his salary as he has actually earned.

2. Master and servant (§ I C—10)—Employee of the Crown—Payment out of fees up to fixed annual amount—Discharge of employee—Mode of computing compensation.

Where the statute (R.S.C. ch. 113) fixed the salary of a harbour master, whom the Crown could dismiss at any time, "at the rate of" $600 per annum, and provided that he should, on Dec. 31 of each year,

B. C.
C. A.
1912
THE KING
v.
MCLEOD.

pay to the Crown all harbour fees collected during the year, less his compensation, and that if the amount of fees should be less than $600, the lesser amount should constitute his salary, he can, upon his discharge after serving the first month of a year, retain as remuneration $50 only, the proportionate share of his annual salary he had actually earned, and not $229 in fees collected during the previous month, as his compensation will be determined by the contract of employment, and not by the manner and time of accounting for the fees received by him.

[*Boston Deep Sea Fishing Co.* v. *Ansell*, L.R. 39 Ch. D. 339, referred to.]

Statement

AN appeal by the defendant from judgment in favour of the Crown, in an action to recover fees collected by the defendant as harbour master of Vancouver, less his proportionate share of the same as salary.

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

The defendant was, on the 1st February, 1909, dismissed from his office of harbour master of the Port of Vancouver. The reason assigned in the letter of dismissal was "to promote efficiency in the public service," and he was informed that a successor was appointed to take over his office from that date.

By statute, R.S.C. ch. 113, and the order in council appointing him, his salary or remuneration is fixed and the manner of payment provided for. He was to receive a salary not to exceed "the rate of six hundred dollars per annum" and was required to pay over to the Minister of Finance the harbour fees collected by him each year on the 31st December, after deducting his salary therefrom, and it was provided that if these fees fell short of $600, then such lesser sum should be his salary.

The defendant collected in the month of January, 1909, fees to the amount of $229, and claims to retain the same. This action was brought to recover all but $50 thereof, that sum being regarded by the Crown as the proportion of salary apportionable to the period in that year during which the defendant held the office.

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

*D. G. Macdonell*, for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—No provision is expressly made by statute or regulation for the case which has arisen here. If the defendant's contention be right, then if he collected $600 in January he would be entitled to retain it; or if he collected $600 on the 1st day of January, and were then dismissed, he would have the right to retain it. Counsel for defendant conceded that that would follow if his contention in this action is upheld. I do not think this is the true construction to be placed on the provisions of the statute. It is conceded that the Crown had the right to dismiss with or without notice. The dismissal therefore was rightful. I think the fees collected by him belong to the Crown, and not to him, subject only to his right to deduct his salary therefrom. This was merely the mode of payment of

B. C.

C. A.

1912

THE KING v. MCLEOD.

his salary, and does not, I think, enlarge the defendant's right. What then would have been his position had he had no right to pay himself out of the moneys collected, and had brought action for salary claimed to be due him at the date of his dismissal? Could he have recovered more than a proportionate part of the $600? I think not. Here the Crown concedes his right to a proportionate part of the $600, and to more than that I do not think he is entitled.

I would dismiss the appeal.

Macdonald, C.J.A.

IRVING, J.A.:—The salary of the harbour master is to be such sum not exceeding $600 as the Governor in Council shall fix, provided that if the fees in any year do not amount to the sum fixed then he is to accept as his salary for that year the amount he collects.

Irving, J.A.

The defendant, who held the position of harbour master, was dismissed on the 8th January, 1909, and a dispute has arisen as to the amount of salary the defendant was entitled to in respect of his services subsequent to the 31st December, 1909. During January, 1910, prior to his dismissal, he had received in fees the sum of $229, and the department is willing that he should deduct therefrom as salary the sum of fifty dollars, but claims that he should remit to Ottawa the balance, $179, to form part of the consolidated revenue fund.

The order in council (p. 11) is "that the remuneration of Captain McLeod (shall) be fixed at the rate of $600 per annum of the fees collected." Counsel for the Government says this means $50 per month. The defendant says that he is entitled to hold all fees collected by him subsequent to last date fixed by statute not in excess of $600. I think there are two separate and distinct things—the amount of his salary, and the accounting for fees. The amount of his salary is not to be determined by the manner and time of the accounting for the fees. On his removal for office he, like any other agent, must at once account for all fees received. His salary must be determined according to the contract of employment. It, like all contracts of service with the Crown, except where otherwise provided by statute, was liable to be determined at any time.

If we read the contract into the statute and order in council, we would find it would run thus:—

> "The Crown agrees to employ Captain McLeod as harbour master during its pleasure. Captain McLeod's salary will be at the rate of $600 per annum."

The question of a manager's salary was discussed in *Boston Deep Sea Fishing Co.* v. *Ansell*, 39 Ch. D. 339. There Ansell's salary was during the broken period of 1885 at a rate varying with the business done. After the 1st January, 1886, his salary should be "after the rate of £800." The practice was to pay quarterly. "The agreement says he is to have a salary after the 1st January at the rate of £800 a year. That, to my mind," said Cotton,

B. C.
C. A.
1912
THE KING
v.
MCLEOD.
Irving, J.A.

L.J., "is a contract for a yearly service and a yearly payment." Bowen, L.J., at p. 366 said: "He was to be paid at an annual rate." Had this case been the case of an ordinary yearly employment of a person by an individual, and not an employment by the Crown; and had the determination been dismissal for misconduct, instead of by removal in the interest of economy, Captain McLeod would not be entitled to anything.

The contract being with the Crown at pleasure, if the salary were simply so much per annum, the defendant would be entitled to nothing if he were discharged during the year. It was to prevent such an injustice the words "at the rate of" were introduced. This expression "at the rate of" carries with it the idea of apportionment, and I think is very happily used where the relation of employment is at the Crown's pleasure.

I think Captain McLeod's contention fails, and that the appeal should be dismissed.

Martin, J.A.

MARTIN, J.A. (dissenting):—This is a peculiar case and unless the exact position of the plaintiff is clearly understood, there is danger of a misapplication of legal principles to his case, which are really foreign to it.

Secs. 861, 865 and 866 of the Canada Shipping Act, R.S.C. (1906), ch. 113, which govern the payment of harbour masters "solely by the fees hereinafter mentioned" are as follows:—

> 861. The harbour master shall be remunerated for his services, solely by the fees hereinafter mentioned, or such portion thereof as he is, from time to time, authorized to retain by the regulations made by the Governor in Council under this Part.
>
> 865. The salary or remuneration of each harbour master shall, from time to time, be fixed by the Governor in Council, but shall not exceed the rate of six hundred dollars per annum, and shall be subject to the provisions hereinafter contained.
>
> 866. The harbour master of each port shall pay over, as soon as possible after the thirty-first day of December, in each year, to the Minister of Finance, to form part of the Consolidated Revenue Fund, all moneys received by him for fees under this part, during such year, after deducting therefrom the salary or remuneration fixed as aforesaid.
>
> 2. If the moneys received by him for fees in any year amount to a less sum than is so fixed, then such less sum shall be his salary or remuneration for that year.

The order-in-Council of 14th January, 1897, by which he was appointed, provided, somewhat ungrammatically, "That he receive as remuneration at the rate of $400 per annum, of the fees collected by him from vessels entering the port."

By order-in-council of 16th April, 1898, this amount was increased to $600.

It will be observed that the sole obligation cast upon him in the way of accounting for "moneys received by him for fees" is to pay over "as soon as possible after the 31st day of December" the said moneys "after deducting therefrom the salary or remun-

eration fixed as aforesaid," and if he did not collect enough fees to make up the full amount allowed to him he had to lose the difference. But on the other hand, if he collected the full amount within the first month of the year, or the first day, he could pay himself in full at that time and continue to collect and use for the balance of the year, all the fees that he lawfully could get into his hands, and no one could call upon him to account therefor till the period fixed by statute had arrived. Also, he might not be able to collect anything at all till the last month, or even then only a small amount, or nothing, as vessels might be prevented from "entering the port" wholly or in part, all of which shews that there was no fund to which he could, on the one hand, look for payment, or to which the Crown, on the other, could resort to pay him. It follows from this that no question of "current" salary or "apportionment" or "rateability" of salary, or "*quantum meruit*" can possibly arise, here, because unless there was a fixed and regular fund available at the end of each month out of which an arbitrary monthly apportionment (as contended for by the Crown) could be made effectual, then there is no ground for fixing a regular period, weekly, fortnightly, or monthly, for the payment of the plaintiff at any "rate" whatever, otherwise it must be contended that the plaintiff could on his part call upon the Crown to pay him at the rate of $50 per month, at the end of every month, which is untenable. The fact is clear that his remuneration was not a regular and periodical one in any sense, but a wage of opportunity and once he got the full amount of his salary for a year in his pocket he could not be compelled to give it up by the method of discharging him the following day, or by abolishing the office, which well illustrates the point, because I do not think that it would be seriously contended that in such case he could be compelled to refund anything under $600. On his side the plaintiff took the chance of working perhaps a year for nothing, and the Crown took a similar chance of his paying himself at an early stage. There is nothing unfair in this, because the plaintiff ran the risk of being discharged at any time without cause assigned, and the Crown might use his services for six or eleven months and then discharge him without a cent in his pocket. In such unusual circumstances as these at bar it is only fair to hold that it must have been in the contemplation of the parties that these risks, or chances, should be reciprocal: one does not like to think that the Crown would make a contract or create a relationship by which it would take all the benefits and no chances and its servant all the disadvantages and all the risks.

Viewed in the light of the statute and circumstances the expression (in sec. 865) "shall not exceed the rate of six hundred dollars per annum" presents to my mind no more difficulty than

B. C.
C. A.
1912
THE KING
v.
MCLEOD.
Martin, J.A.

it takes to decide that the words "at the rate of" or similar expressions, as used in cases on contracts for fixed periods, have no application to this case.

The language, in sec. 865, before us is not that the plaintiff shall be paid "at the rate of" etc., but that his remuneration "shall not exceed the rate of $600; this is simply putting a limit upon the amount he may retain, and the word "rate" in such circumstances and in such context has and can legally have no more or further meaning than "sum" or "amount," and should consistently with legal principles be given that obvious construction.

But even if it be held that some "rateable" effect should be given to the words that view can clearly be satisfied by construing them to mean that, though the office was one at will and payable by fees, and might (and did) continue from year to year, yet in no one year was it to exceed the annual rate of $600.

I find no weight in the arguments that the plaintiff might in the first month have collected $600, and then refused to perform his duties; or that if the Crown discharged him, say within 3 months after he had collected $600 and appointed another in his place that the Crown might have to pay the remuneration twice over. It must be assumed that he was a trustworthy and capable servant, and if the Crown chose to prevent him from discharging his duties that is its own affair. The reason assigned here for his dismissal—"to promote efficiency in the public service"—carries with it no stigma and is consistent with the view, that the increasing responsibilities attached to a rapidly growing port required an official of a higher grade than formerly. The payment of a public officer by fees proceeds upon the assumption that all the fees he receives while he holds his office are, and have irrevocably become his property, and there must be clear and unequivocal language to change this principle and require him to hand over moneys which have come into his hands before his office is taken from him. I can find nothing in this statute to detract from this plaintiff's ordinary and well recognized rights. The mere fact that there is a limit placed upon the amount of fees he may retain for himself does not alter the principle or change the fundamental difference between his relationship to the Crown and that of periodical salaried officers in the true meaning of that term. Such a form of remuneration, in my opinion, is fundamentally opposed to the incidents of, or principles attaching to, a yearly or monthly salary or hiring, and I think that it is legally impossible to convert this relationship into a payment *per quantum meruit*, which is the real basis of a *pro rata* payment.

In my opinion, with all due deference to the contrary views of my learned brothers, this appeal should be allowed.

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

**George W. WRIGHT (plaintiff, appellant) v. J. H. EDWARDS (defendant, respondent).**

SASK.

S. C.

1912

July 15.

*Saskatchewan Supreme Court, Wetmore, C.J., Newlands and Lamont, JJ. July 15, 1912.*

1. CONTRACTS (§ II D 4—190)—DIGGING WELL—ABANDONMENT THROUGH NEGLIGENCE—SECOND WELL DUG—LIABILITY OF LANDOWNER.

Where, as the result of his own negligence, the plaintiff was compelled to abandon a well he had sunk for the defendant under an agreement to do so for a stated price per foot, but with no stipulation that he should go to any particular depth to obtain water, and without a new agreement, but with the knowledge and consent of the defendant, he began another, which, after going a considerable depth, he also abandoned without finding water, the defendant is answerable only for drilling the second well, since it became necessary to do so as the result of the plaintiff's own negligence.

Statement

APPEAL by plaintiff from the judgment of Johnstone, J., in so far as it disallowed a portion of the plaintiff's claim for drilling two wells.

The appeal was dismissed.

*T. D. Brown*, for appellant.

*W. J. Leahy*, for respondent.

The judgment of the Court was delivered by

Lamont, J.

LAMONT, J.:—The plaintiff sues the defendant for $1,086.55 under a contract by which the plaintiff was to sink a well for the defendant at a certain price per lineal foot. Under the provisions of the agreement the defendant was to find when required a sufficient amount of casing for the said well. The plaintiff commenced operations, and sunk a hole to a depth of 210 feet, when a section of the casing which he was putting in broke and blocked up the hole. The plaintiff then exploded a stick of dynamite in the hole, but this only destroyed another section of the casing and left the hole useless as a well. The reason the first section of the casing broke was, according to the evidence of the plaintiff himself, because it was crooked, and when being straightened by being driven down the five-inch hole it broke. The plaintiff claimed the casing was poor and that he told the defendant so. After the casing broke in the hole the plaintiff saw the defendant and told him about the trouble, and with the defendant's knowledge and consent began another hole close to the place where he put down the first one. He sunk this hole to a depth of 365 feet, when he quit without getting water. Under the terms of the contract the plaintiff was not obliged to dig any particular depth nor was he to get water suitable in quality or quantity for the defendant's purposes. The defendant had paid $175 during the sinking of the first hole, but refused to pay any further sum. The plaintiff then brought this

SASK.

S. C. 1912

WRIGHT v. EDWARDS.

Lamont, J.

action. It was tried before my brother Johnstone, and he gave judgment for the value of the work done in digging the second hole, but refused to allow the plaintiff the balance claimed for digging the first hole, although he allowed him to retain the $175 he had received therefor. From this judgment the plaintiff now appeals to this Court. There was no cross-appeal as to the $175 paid on account of the work done in the first hole.

I am of opinion that this appeal must be dismissed. The agreement only provides for the digging of one well. Both parties, in giving their evidence, testified that there had been no new agreement in respect to the second hole. In his statement of defence the defendant alleges that the first hole was rendered useless by reason of the plaintiff's negligence in drilling it. In reply to this the plaintiff contented himself with alleging that he ceased drilling the first hole and drilled the second at the request of the defendant. The evidence does not support this allegation. It goes no further than to shew that the plaintiff drilled the second hole with the knowledge and consent of the defendant, but it does not shew any agreement on his part to pay for more than one well. It also shews, as alleged in the statement of defence, that the first hole was rendered useless by the negligence of the plaintiff. He put in crooked casing which he knew was unfit for the purpose, with the result that the hole was blocked and had to be abandoned. The digging of the second hole must be considered as in substitution of the first, if it was, as the plaintiff alleges, sunk under the original contract and not as the result of a new agreement. It being in substitution of the first hole, and having been rendered necessary through the plaintiff's own negligence, the defendant in my opinion cannot be called upon to pay for the first hole.

The plaintiff's appeal will, therefore, be dismissed with costs.

*Plaintiff's appeal dismissed.*

---

SASK.

S. C. 1912

July 15.

## BRAITHWAITE v. BAYHAM.

*Saskatchewan Supreme Court, Wetmore, C.J., Newlands, Johnstone and Lamont, JJ. July 15, 1912.*

1. SALE (§ III B—66*a*)—ASSIGNMENT OF LIEN NOTE—RIGHT OF PAYEE TO BRING ACTION ON.

The fact that a lien note was assigned by the payee will not prevent him maintaining an action thereon, notwithstanding it was not re-assigned to him in writing before suit was begun, where the assignment was to a bank as security only.

[*Covert* v. *Janzen*, 1 Sask. L.R. 429, followed.]

2. SALE (§ III B—66*a*)—RIGHT OF LIEN NOTE HOLDER TO RETAIN EXPENSES ON A RE-SALE—FAIR AND REASONABLE.

In order to justify the retention by the holder of a lien note upon a re-sale of the chattels for which it was given, of the expenses of re-taking them, he must shew that the charges were fair and reasonable, and they were actually paid or incurred by him.

3. NOTICE (§ I—8)—NECESSITY OF PERSONAL SERVICE OF NOTICE TO MAKER OF LIEN NOTE OF RE-SALE OF CHATTELS.

Where the maker of a lien note, upon the re-taking of the goods or chattels for which it was given, had actual notice of the re-sale thereof within the time required by statute, personal service of notice thereof is unnecessary.

4. DAMAGES (§ III A 4—80)—BREACH OF WARRANTY—SALE OF STALLION—MEASURE OF COMPENSATION.

The measure of damages for the breach of warranty on the sale of a stallion that he was a 60 per cent. foal-getter, is the service charges the purchaser lost by reason of a large number of mares served by the horse, not proving to be in foal.

5. DAMAGES (§ IV—370)—MAKER OF LIEN NOTE—TREBLE DAMAGES—COSTS AND EXPENSES OF SEIZURE—R.S.S. (1909), CH. 51.

The maker of a lien note cannot recover treble the amount taken by the holder of the note for costs and expenses of a seizure of the chattels for which the note was given, as provided by R.S.S. (1909), ch. 51, where the note provided that the maker would pay "all reasonable costs of collection, including Court costs and bailiff's fees"; such agreement is a waiver of the benefit of the statute.

[*Union Bank* v. *McHugh*, 14 Can. S.C.R. 473, applied.]

Statement

APPEAL by defendant from the judgment entered at trial in favour of plaintiff in an action for balance of the purchase price of a horse. The plaintiff Braithwaite sold the defendant Bayham a horse for the sum of $400 for which the defendant gave the plaintiff a lien note. The sale was made on the first day of April, 1910, the note was due December 1st, 1910. Nothing was paid on the account of the note and on February 7th, 1911, the plaintiff seized the horse and sold it on March 4th, 1911, for the sum of $310 and from this amount the plaintiff deducted expenses as follows:—

| | |
|---|---|
| Bringing horse in 30 miles | $14.00 |
| Livery bill | 26.00 |
| Sale expenses | 15.50 |
| Warrant and solicitor's charges | 9.00 |
| | $64.50 |

and gave the defendant credit for $245.50 and issued a writ for the balance of the purchase price of the horse.

The defendant in his defence alleged that the note had been assigned to the Canadian Bank of Commerce and the plaintiff was not therefore entitled to sue on it. The defendant further claimed that the plaintiff was not entitled to charges deducted amounting to $64.50 but was willing to allow him $5. He also set up in his defence that he had not received sufficient notice of the sale of the horse. The fact was he received a letter notifying him of the sale, by registered mail, but had never been personally served with notice. He also counterclaimed for damages alleging that the horse was not as represented.

The action was tried before a Judge of the District Court who directed judgment to be entered in favour of the plaintiff as claimed which was the balance of $400 after deducting the

SASK.

S. C.

1912

BRAITHWAITE v. BAYHAM.

credit of $245 and allowed the plaintiff his costs of suit and found for the defendant on the counterclaim and allowed him $75 damages thereon. From this judgment the defendant appealed.

The appeal was allowed and judgment below varied.

*T. D. Brown*, for appellant.

*W. J. Leahy*, for respondent.

The judgment of the Court was delivered by

Lamont, J.

LAMONT, J.:—In this appeal the following questions present themselves for consideration:—

(1) Is the plaintiff debarred from recovering by reason of the fact that the lien note or agreement on which he has sued was assigned by him to the Canadian Bank of Commerce and there was no reassignment in writing of the same to him by the bank before action brought?

(2) Was the notice of the sale of the horse given by the plaintiff to the defendant sufficient to satisfy the requirements of the statute? and

(3) Should the damages awarded on the counterclaim be increased?

The first of the above questions is, in my opinion, answered in the negative by the judgment of this Court in *Covert* v. *Janzen* (*No.* 2), 1 Sask. L.R. 429, where it was held that a plaintiff, under circumstances somewhat similar to those in the present case, was entitled to maintain his action. The plaintiff is therefore entitled to recover the balance due on the lien note with interest, less the amount he received for the horse on the sale of it after the plaintiff had retaken possession. The amount recovered was $310.00, but the plaintiff claimed to be entitled to deduct from the amount the sum of $64.50 expenses in connection with the taking possession, keep and sale of the horse. This amount to the extent of $59.50 was disputed by the defendant as not being recoverable within the statute. Charges to the extent of $5.00 were admitted to be properly deducted. No evidence whatever was given as to the reasonableness of the charges made, nor that they were ever incurred or paid. In order to be entitled to retain moneys received on the ground that they were paid out for expenses, it is necessary to prove that the charges were legitimate ones and the amounts fair and reasonable. Until this is done they cannot be allowed. The defendant is therefore entitled to be credited with the $310.00 received less $5.00 admitted by him. There will be judgment for the plaintiff on the claim for $431.75, less $305, net amount received from the sale, that is, judgment for $126.75.

As to the second of the above questions, the evidence shewed that the defendant had actual notice of the sale from the plaintiff for the period required by the statute. This is sufficient.

SASK.
S. C.
1912
BRAITHWAITE v. BAYHAM.
Lamont, J.

The defendant counterclaimed for damages for breach of an alleged agreement on the part of the plaintiff that he would forward to the defendant a pedigree shewing the name and description of the stallion purchased as a purebred pedigreed Clydesdale stallion, immediately after the sale to him, at least in ample time to allow the defendant to register the pedigree in the Department of Agriculture for this Province and to obtain a certificate that the stallion was purebred under the provisions of the Horse Breeders Act before the season for travelling the said stallion in 1910 should arrive. The evidence does not satisfy me that there was any such agreement, and I find that there was no such agreement.

The defendant also counterclaimed for breach of an alleged warranty whereby the plaintiff warranted the stallion to be a purebred Clydesdale stallion. I also find that there was not any such warranty.

The defendant also counterclaimed for damages for breach of an alleged warranty whereby the plaintiff warranted that the stallion was a sixty per cent. foal-getter. The evidence establishes that the plaintiff did so warrant the stallion, and I find that there was a breach of that warranty. I find that the stallion was put to 65 mares, only 23 of which proved to be in foal. There were therefore sixteen short. Allowing the defendant $12 for each foal short, being his charge for service of the horse to ensure foal, would amount to $192. I am of opinion that this is a proper amount to award as damages. This is special damage, but it is claimed specifically in the counterclaim, and it naturally arises from the breach of warranty complained of. It is not prospective damage. It is the only species of damage claimed for such breach, and it not, therefore, necessary to discuss the matter of any other damage.

The defendant has also counterclaimed under ch. 51 of the revised statutes of Saskatchewan to recover treble the amount of money taken by the plaintiff for costs and expenses in making a seizure of the stallion under the lien note. In the lien note the defendant agreed to pay "all reasonable costs of collection including Court costs and bailiff's fees." In *Union Bank* v. *McHugh*, 44 Can. S.C.R. 473,* it was held that where the defendant had agreed to pay all costs and expenses incurred by the mortgagee . . . in consequence of sale or removal of the mortgaged property, the provisions of the statute as to treble damages did not apply because by such agreement the mortgagor must be taken to have waived such provisions. This case is binding on us, and the defendant cannot therefore recover the damages claimed.

**Union Bank* v. *McHugh*, 44 Can. S.C.R. 473, followed *Robson* v. *Biggar*, [1907] 1 K.B. 690, and reversed *McHugh* v. *Union Bank*, 3 Alta. L.R. 166, on this point.

SASK.

S. C.
1912

BRAITHWAITE v. BAYHAM.

Lamont, J.

The judgment of the Court below will therefore be varied so as to allow the plaintiff judgment on the claim for $126.75 with costs and the defendant judgment on the counterclaim for $192 and costs of the counterclaim on the cause set out in paragraph 3 of the counterclaim, with the right of set-off.

The plaintiff will pay the defendant his costs of this appeal.

*Appeal allowed and judgment below varied.*

---

CAN.

S. C.
1912

Feb. 20.

**THE SHAWINIGAN HYDRO-ELECTRIC COMPANY** (defendants, appellants) v. **THE SHAWINIGAN WATER AND POWER COMPANY** (plaintiffs, respondents).

*Canada Supreme Court, Sir Charles Fitzpatrick, C.J., Davies, Idington, Duff, and Anglin, JJ. February 20, 1912.*

1. MUNICIPAL CORPORATIONS (§ II F—272)—PURCHASE OF ELECTRIC LIGHT PLANT OUTSIDE BOUNDARIES.

Under sec. 5281 R.S.Q., 1909, providing that a municipal corporation shall have "jurisdiction for municipal and police purposes and for the exercise of all the powers conferred upon it, over the whole of its territory, and also beyond its territory in special cases where more ample authority is conferred upon it," a town has no authority to establish a light and power plant beyond its boundary unless there is something in the special Act by which the power is conferred indicating an intention that it is to be exercised beyond the municipal limits, and therefore, a by-law of the town authorizing the purchase of such plant so situated is invalid in the absence of statutory authority.

Statement

AN appeal by the plaintiffs from the judgment of the Quebec Court of King's Bench, appeal side, Q.R. 19 K.B. 546, reversing the judgment of the Superior Court, district of Three Rivers, annulling a by-law of the town of Shawinigan authorizing the purchase of the electric light and power plant of the Shawinigan Hydro-Electric Company and perpetually restraining the town and its officers from giving any effect thereto.

The appeal was dismissed.

By the judgment appealed from the municipal by-law in question, authorizing the purchase of the electric light and power plant of the Shawinigan Hydro-Electric Company, was quashed and the municipal corporation of the town of Shawinigan Falls and its officers were perpetually restrained from giving any effect thereto. The municipal corporation submitted to the judgment of the Court of King's Bench and the hydro-electric company took the present appeal.

A previous application to the Supreme Court upon an unsuccessful motion to quash the appeal is reported, *Shawinigan Hydro-Electric Co.* v. *Shawinigan Water and Power Co.*, 43 Can. S.C.R. 650.

The issues raised are stated in the judgments now reported.

*Aimé Geoffrion*, K.C., for the appellants.

*F. Meredith*, K.C., and *Holden*, for the respondents.

THE CHIEF JUSTICE.:—I agree that this appeal should be dismissed with costs.

DAVIES, J.:—This was an action brought to annul a by-law passed by the council of the town of Shawinigan Falls authorizing the purchase from the appellants of immovable property with a power-house and plant thereon for $40,750, the property being admittedly situated outside of and beyond the territorial limits of the town. The sum of $15,750, part of the purchase money, was to be paid the vendor company in certain specified yearly instalments for which promissory notes were to be given by the town to the company. The balance of the purchase money, $25,000, was made payable "to the succession of the late William Burn to discharge the hypothec for that amount created by the company in favour of such succession." In other words, the town proposed in its by-law to give its promissory notes in part payment of the purchase money and to assume an existing mortgage on the property for the balance. The by-law declared that the properties were being acquired by the town "for the purpose of an aqueduct and for the establishment of a system of electric lighting" for the town and its inhabitants.

The by-law was adopted without having been previously submitted to the town's electors for approval, and without incorporating in it, or otherwise providing for, a special annual tax to meet interest on the purchase money and provide a sinking fund. There was no indication in the by-law as to who or what property would be taxed.

The trial Judge dismissed the action holding the by-law to be valid. The Court of Appeal (Archambault and Lavergne, JJ., dissenting) allowed the appeal and annulled the by-law, on the grounds that the manner and way of establishing such a system of electric lighting as that contemplated was either that specially indicated in the Cities and Towns Act (1903), consolidated in the Revised Statutes of Quebec, 1909, arts. 5256 *et seq.*, namely, by the imposition of a special annual tax on certain specially designated properties to defray the annual interest and to provide a sinking fund and pay off the principal, or by the general method, namely, a loan with the approval of the ratepayers, neither of which was adopted by the council. The Court of Appeal further held that the town had not the power to issue promissory notes in part payment of the purchase money of the power-house and plant, etc., nor to assume the payment of the Burn mortgage which they held to amount indirectly to contracting a loan without the approval of the ratepayers.

The town submitted to the judgment of the Court of Appeal and the vendors (defendants) appeal to this Court.

The questions raised before us are of great general importance involving the proper construction of the Cities and Towns

CAN.

S. C. 1912

SHAWINIGAN HYDRO-ELECTRIC CO. v. SHAWINIGAN WATER & POWER CO.

Davies, J.

Act of the Province of Quebec, 1903, and the powers and limitations of the councils of the towns and cities which come under its operation.

The appellants deny the validity of each and all of the grounds invoked to annul the by-law, and contend that the council had full power to purchase as they did, and give the promissory notes and assume the hypothec for the purchase money.

The respondents, in addition to supporting the judgment of the Court of Appeal on the grounds stated in their judgment, contended that the by-law was illegal because the property attempted to be purchased was beyond the territorial limits of the town and necessarily involved, if purchased for the purposes intended, the carrying on of business outside of the town's territorial limits.

I have given much consideration to the questions involved and have reached the conclusion that the by-law is invalid and that the appeal should be dismissed on the two grounds, first, that neither the Act of 1908, 8 Edw. VII. ch. 95, revising and consolidating the charter of the town of Shawinigan Falls, nor the Cities and Towns Act, 1903, to the operation of which the town, by the second section of the Act of 1908, is expressly made subject, authorized the council to pass the by-law in question for the purchase of the power-house, plant and property outside of its territorial limits; and secondly, if the extra-territoriality of the property purchased was not a fatal objection, the absence of the statutory provision, either in the by-law itself or otherwise, for meeting the interest on the cost of the purchase and to establish a sinking fund to liquidate the principal as provided for in the section 5668, R.S.Q., of the Cities and Towns Act, was fatal.

These two clauses of the Act, R.S.Q., arts. 5667 and 5668, are so important and controlling that I set them out in full:—

> 5667. The council shall have all the necessary powers for the establishment and management of a system of lighting by gas, electricity or otherwise, for the requirements of the public and of private individuals or companies desiring to light their houses, buildings or establishments.
>
> 5668. The council may, by by-law, in order to meet the interest on the sums expended in introducing a system of lighting and to establish a sinking fund, impose on all the owners or occupants of houses, shops or other buildings, an annual special tax, on the assessed value of each such house, building or establishment, including the land.

I do not think the general loan clauses of the Act contained in para. 28, articles 5776 to 5789, could be invoked to borrow the purchase moneys required. If they could, any by-law under them would require the "approval of a majority in number and in real value of the proprietors who are municipal electors and who have voted." Of course no such approval was sought for in this case because no attempt to borrow money under the loan

clauses of the Act was resorted to; but it was strongly contended by Mr. Geoffrion that, if the council could resort to the general loan clauses of the Act to raise the money required and was not limited to the special method designated by article 5668, they could on similar reasoning resort to any other general power the Act gave and that the one they resorted to was, therefore, good.

It is true that article 5776 of these loan clauses authorizes the council to "borrow moneys generally for all objects within its jurisdiction," but I do not think these general words could be construed to apply "to the establishment and management of a system of lighting" as given in article 5667 because the method of raising the necessary funds for that special purpose is pointed out and defined in article 5668 and involves a special annual tax to defray interest and provide for sinking fund upon a special class of ratepayers and a special class of property.

The "special annual tax" required to be levied to meet the interest and the sinking fund, under the general clauses relating to loans, is to be levied upon all the ratepayers and the council is obliged to provide for such interest and sinking fund "out of the general revenues of the municipality" while the "special annual tax" required to be levied for the establishment and maintenance of a system of lighting is to be levied upon the special class of ratepayers who own or occupy houses, shops or other buildings, and upon this special class of property only. This would seem to my mind conclusive as against the right of the council to invoke these general loan clauses for the establishment of a system of lighting.

I do not agree with the contention that, because the legislature used the word "may" in this section of the Act and not "shall" that, therefore, the provision is to be construed as permissive only and not imperative. I think the intention of the legislature to authorize the establishment and management of a system of lighting is clearly expressed in article 5667 and the intention that the cost of such establishment and its maintenance should be imposed upon a specially designated class of citizens, and a specially designated class of property is equally clearly expressed in article 5668.

The exercise of the power to establish and manage the system necessarily involved resort to the special method prescribed of raising the necessary funds. It was not, in my opinion, open to the council to evade that expressed intention by adopting another and different system, such as borrowing the necessary moneys under the loan clauses of the Act, or issuing promissory notes for the purchase money, and so throwing the burden off the special class and the special properties the Act said should bear it, upon the shoulders of the ratepayers generally.

Something might possibly be said in favour of the council's power to raise the necessary moneys by "loan" because such

CAN.

S. C.
1912

SHAWINIGAN HYDRO-ELECTRIC CO. v. SHAWINIGAN WATER & POWER CO.

Davies, J.

method involved the submission of the by-law to the ratepayers for their approval and, from that standpoint at any rate, might not appear as unjust, but for the reasons I have given I do not think resort could be had to an ordinary loan to establish the lighting system.

But I certainly cannot find any reason for so construing articles 5667 and 5668 as to justify the council's action in evading the expressed intention of the legislature by adopting a method of establishing a lighting system which, if sustained, would impose upon the town and the ratepayers generally a heavy debt with its necessary accompanying taxation, without either submitting a by-law, for the power to borrow the money necessary, to the municipal electors or imposing the special tax prescribed upon the owners or occupants of the property built upon for the payment of the interest and the sinking fund.

This by-law, the annulment of which is sought for in this action, neither imposes the special tax required to be levied for the establishment of a lighting system nor provides for the raising of money by loan to pay for such establishment. The method adopted of giving the notes of the municipality for part of the purchase money and assuming the payment of the hypothec then upon the property for the balance of such money without either resorting to a loan which involved obtaining the approval of the electors, or to the prescribed taxation upon the house and building owners, was, in my judgment, a bold attempt to evade the expressed intention of the legislature.

It was sought to uphold the power to give the town's promissory notes for part and to assume the amount of the hypothec then upon the property for the balance of the purchase money under the general powers given to the council by article 5279, but, as I have already said, in my opinion, these general powers are like the loan clauses and have no application to the special power given to establish and maintain a lighting system which is coupled with a special and prescribed method of raising the moneys necessary for the purpose on special classes of ratepayers and property. This method and this alone, in my opinion, can be resorted to when carrying out the powers given to establish a lighting system and when the council formally determines to establish such a system the duty becomes imperative upon it to provide the means of paying the interest and the annual sinking fund in the special manner prescribed by the Act. The word "may" in the section must be read as "shall" and when imposing a debt upon the town for the establishment of a lighting system the council must at the same time provide for the imposition of the taxes prescribed by article 5668 necessary to pay the interest and the sinking fund to discharge that debt.

It is contended that the council may yet do this and that the by-law under which the property was purchased and the

debt imposed upon the town is not necessarily bad because neither in it nor otherwise concurrently with it was any attempt made to comply with these special provisions of the Act.

In my judgment it is entirely opposed to the scheme and objects authorized by the legislature that the council should in the first place establish the system and impose the debt upon the town and leave to the chapter of accidents the adoption of the methods of defraying the expenditure specially indicated by the legislature. The establishing of the system and the incurring of the liability for the necessary expenditure were made, by the statute, duties to be exercised contemporaneously with the imposition of the taxes specially authorized to meet that expenditure.

Difficulties of one kind and another have been suggested as to the working out of the statutory scheme, but I do not see any that are insuperable, and if there are any such they can be met only by amending legislation and cannot affect the proper construction of the articles and clauses of the Act as they now stand.

The next reason why I hold the by-law to be illegal is that the property purchased by virtue of it and the business to be carried on and in connection with the power-house to generate the electricity required, is beyond the territorial limits of the town and not authorized by the Act.

Article 5667 of the Cities and Towns Act, R.S.Q., 1909, which confers the power to establish and maintain a lighting system was amended by the special Act of 1908 revising and consolidating the charter of the town of Shawinigan Falls, section 18, by adding words authorizing the council to sell

> the surplus power produced by the power generating the electricity which it may have acquired or established for such purpose to the municipality of the village of Shawinigan Falls or to its inhabitants and to the Grand'Mère Electric Company or its successors.

The village and the company alike are beyond the territorial limits of the town of Shawinigan Falls, and it has been suggested that the amendment conferred upon the town other and broader powers than the article 5667 of the Cities and Towns Act gave. It certainly does so far as the sale of surplus power is concerned; but not otherwise. The legislature evidently thought that the right to sell surplus power outside the town's territorial limits required express words to confer it, while if the appellants' contention is sound that the general words of the section as amended authorized the establishment of power-houses to generate electricity outside the territorial limits of the towns, the lesser power of selling the surplus power to other towns or companies would be necessarily implied and the express power to sell outside unnecessary. The amendment, therefore, rather indicates that the legislature did not intend, in passing article 5668 of the Cities and Towns Act, to confer the greater power

CAN.
S. C.
1912
SHAWINIGAN HYDRO-ELECTRIC CO. v. SHAWINIGAN WATER & POWER CO.
Davies, J.

upon the towns and cities of establishing power-plants for lighting purposes beyond their limits.

But, assuming the amendment not to have any effect upon the construction of article 5667 beyond the express powers the words of the amendment give—what is the true construction of this article 5667 of the Cities and Towns Act?

The consolidated Act of 1909, by its first section, is made applicable not only to all cities and towns thereafter incorporated by statute or letters patent, but to all cities and towns under special Acts which shall be declared subject to the general Act and to all cities and towns which had become subject to the Cities and Towns Act of 1903.

It is, therefore, practically a general Act applicable to the towns and cities of the whole Province brought within its operation and is to be construed as such and not with reference to any special local conditions of particular cities or towns.

No language of any kind is used indicating an intention that the powers given might be used outside of the territorial limits of the municipality, and to give such a construction to the section it would be essential to hold that the application of such powers extra-territorially was clearly intended because they were necessary to the exercise of the powers themselves.

Reading the Act as a whole, I am drawn to the conclusion that general words conferring powers upon a municipality brought within its operation must be given a territorial limitation unless from the very nature of the power it must be held that it was to be exercised extra-territorially, and that where it is intended that general powers, not absolutely necessary to be exercised extra-territorially, should, nevertheless, be so exercised, apt language must be shewn to evidence such a legislative intention.

Read articles 5280 and 5281, R.S.Q., 1909, which are as follows:—

> 5280. The territory of the municipality shall be that specified by its charter.
>
> 5281. The corporation shall have jurisdiction for municipal and police purposes, and for the exercise of all the powers conferred upon it, over the whole of its territory, and also beyond its territory in special cases where more ample authority is conferred upon it.

Here is found an express declaration that not only for municipal and police purposes, but for the exercise of all the powers conferred upon it the corporation should only have jurisdiction "beyond its territory in special cases where more ample authority is conferred upon it." That declaration seems to me to impose upon a corporation, acting under the powers given in that Act, the duty of shewing either that the powers the exercise of which were challenged as illegal were exercised within territorial limits, or, if beyond those limits, were only carried beyond to an extent necessary for their exercise, and so fairly to be

implied from the language conferring the power, or that express power to exercise the challenged powers beyond territorial limits was given.

Then article 5588 (section X.), under the heading or subtitle "Powers of the Council," repeats over again the statutory limitation as to territory in the exercise of the council's jurisdiction which article 5281 above quoted enacted. It says:—

> The council shall have jurisdiction throughout the extent of the whole municipality, and beyond the limits thereof in special cases where more ample authority is conferred upon it.

Now it is generally the case that special powers to act or carry on works extra-territorially are found in special charters given to municipalities and the general Act I am discussing in several analogous instances to the immediate one before us has conferred the "ample authority" required by article 5281 for special cases of extra-territorial work.

Take section X., para. 10, relating to "Water Supply" for the towns and cities. One would suppose that the necessity in obtaining such supplies of going beyond its limits and constructing the necessary waterworks would, in such a case above any other, necessarily be implied, but in this section conferring the powers the legislature first in article 5645 gives in general terms the power to provide for the establishment and maintenance of waterworks, reservoirs, etc., to supply water to the municipality and then takes special care in article 5646 to give the municipality power to "construct and maintain in and beyond its limits for a distance of twenty miles the waterworks," etc., authorized by article 5645; also in article 5647 power is expressly given the municipality to "acquire and hold any land, servitude or usufruct, within its limits or within a circuit of twenty miles thereof."

Take also paragraph 15, relating to "Abattoirs." Article 5679 gives in express words power to "establish, regulate and manage public abattoirs, either within or without the municipality."

Here we find two instances at least of analogous powers conferred, one with respect to providing waterworks to supply the towns with water and the other with respect to abattoirs, which concerned the health of the citizens, and in both cases we find extra-territorial powers expressly given while with respect to lighting the town with electricity any such extra-territorial powers are absent and withheld.

Construing, therefore, these sections providing for the establishment of "a system of lighting by gas, electricity or otherwise" in the cities, and towns in which sections no reference whatever is made to the exercise beyond the municipality's limits of the powers conferred, with the sections relating to waterworks and water and to abattoirs where it is specially declared that the

CAN.

S. C.
1912

SHAWINIGAN HYDRO-ELECTRIC CO. v. SHAWINIGAN WATER & POWER CO.

Davies, J.

powers given may be exercised extra-territorially, and construing them in the light of article 5281, above quoted, which gives jurisdiction to the municipalities (*inter alia*) for the exercise of all powers conferred upon them over its territory and beyond when specially conferred, I have no difficulty in limiting the exercise of the lighting powers they confer territorially, nor have I for the same reasons any difficulty in construing the general article 5279 giving the municipality the power to acquire movable and immovable property and to draw promissory notes, etc., in the execution of any of the powers conferred upon it by law as being confined to the territorial limits of the municipality and not exercisable with respect to property beyond them unless in cases where express extra-territorial powers have been given or where they will be necessarily implied from the very nature of the power exercised.

No such express extra-territorial power is given with respect to the lighting contracts; it should not in my opinion be implied as existing and arising necessarily out of the power to establish a lighting system, and, therefore, does not exist at all.

I have referred to and read the authorities which the respondents cite in their excellent factum, but I agree with Mr. Geoffrion that the question we have to decide is not one upon which authorities will help us very much. It is one of the fair and reasonable construction of the powers conferred on the councils of cities and towns by a general Act of the legislature of Quebec.

I do not understand Mr. Geoffrion to controvert or question the general rule that a municipal corporation can exercise its corporate powers only within its territorial limits.

What he contended was that the general powers of the Cities and Towns Act were expressed in terms amply broad enough on a fair and reasonable construction to vest the council with the power of purchasing this power-house and plant admitted to be outside of the municipality, and that the method adopted for its purchase was also within the council's powers.

For the reasons given I cannot agree to either of his contentions, but conclude that the by-law in controversy is *ultra vires* and illegal.

I would, therefore, dismiss the appeal with costs.

Idington, J.

IDINGTON, J.:—This appeal is taken by a corporate body that claims to have entered into a contract with the municipal corporation known as the town of Shawinigan Falls, in the Province of Quebec, for the purpose of selling to the latter corporation an electric plant, including therewith a real estate property beyond the limits of the town.

The council of the town passed an alleged by-law to carry out said purchase involving a price of about $40,000.

The respondent, the Shawinigan Water and Power Company, being ratepayers, objected and instituted this suit to set aside

such proceeding on the grounds, amongst others, that, unless and until the ratepayers had approved, the council could not make such a contract, and that, in any event, the municipal corporation had no power to buy such real estate beyond the limits of the town.

We must never forget that a municipal corporation is the mere creature of a statute and can only exercise such powers as the statute gives it and in the manner given thereby.

It is urged that power was given by statute to the council to establish a system of gas or lighting by electricity and a further power to sell the surplus product when established.

These powers pre-suppose that the purpose permitted must be exercised in the manner in and by which the council, by its general power of creating debt, is enabled to so act.

If the establishment of either system had been possible within the means of the taxing power the council possessed, it was quite competent for it to have installed such a system.

It is conceivable a small beginning of that kind might have been instituted, but this far exceeded such a thing.

It is entirely beyond the purview of the special and general statutes on which the council of this municipal corporation rests for all its authority that it without the ratepayers' vote can make such a contract as herein is involved.

If the price to be paid had been such as to fall within the powers of the then existent council relative to the imposition of rates or taxes, it might by virtue of the authority given and exercised have contracted for an electric plant.

Indeed, had it been attempted to found the contract upon an exercise of the special taxing power given by article 5668, R.S.Q., 1909, relative thereto, I am not prepared to say it would have been absolutely impossible to bind such specially selected classes of ratepayers as there had in view. I have not fully considered what are the possibilities involved therein, for it is entirely another thing that is being attempted. The vendor is not, by the terms of the by-law or bargain, to look to any special class, but to the entire body of ratepayers. We must, therefore, consider it as seeking by this by-law to bind the entire body of ratepayers. It is not a mere question of making one by-law as to part of a project and another later on, as may occasionally happen, in order to complete the business. The attempt is to mortgage, once and forever, the whole ratepaying property of the town, and contract on that basis. It is no answer to say the town had another power even if it had in truth as to which I say nothing.

The truth is the whole business seems to have been gone about under a misapprehension of the powers of the council, or disregard thereof.

The price exceeded the taxing powers of the council for the then current year and the ordinary power to contract or which

CAN.
S. C.
1912
SHAWINIGAN HYDRO-ELECTRIC CO. v. SHAWINIGAN WATER & POWER CO.
Idington, J.

by any reasonable implication could extend to a contract covering the long term over which the payments to be made in liquidation were spread.

Cases have been cited where a town has been made to pay for a fire-engine when the sale had been fully executed by the delivery and use thereof by the corporation, even when a doubt existed as to the council having acted properly. In all these cases I have seen, no doubt existed of the power to enforce by sufficient levy the price in any given year.

Even of such like cases when, as in the case of *Waterous Engine Works Company* v. *Town of Palmerston*, 21 Can. S.C.R. 556, which came to this Court, the transaction has been nipped in the bud, as is sought to be done here, it has been held null when the goods had not been fully delivered and accepted, and the necessary forms had not been gone through for so completing the contract to make the town a debtor.

A clumsily worded section in question here seems to give ground for saying some one contemplated the extensive system of the town not only supplying its own wants and those of its inhabitants, but also undertaking to produce and sell to an unlimited extent to others. But the very words imply that the usual powers vested in the council for the legal establishment of such works must be resorted to. To permit the execution of such a remarkable scheme was going a long way, but for us to tack on to it the power to dispense with the sanction of the people to pay would be going still further.

The council never sought the proper means of referring the question to the ratepayers to pass upon it. Appellants should have got a further amendment to the charter, either imposing the imperative duty on the council to carry out the scheme which might have implied dispensation from consulting the people, or by express language dispensing therewith.

It is not merely the form of a loan that is in question, but the absence of any distinct power in the council enabling the creation of an indebtedness which has to be provided for over a term of years in the future. In the absence of any such power to create indebtedness the municipal council has no implied power.

Borrowing to pay any debt extending over a period of years is what the general power contemplates. Certainly the council cannot do that indirectly which the law does not permit to be done directly.

It is urged that the power of establishment having been given everything else is to be implied, including the power to buy real estate outside the town.

Where a duty had been imperatively imposed upon a municipality and had to be discharged in obedience to a statute things necessary to be done to obey the law have been held impliedly

as within a council's absolute power. The case of *Pratt* v. *City of Stratford*, 16 Ont. App. R. 5, was such a case. The obligation of the city there rested on a statute imposing a duty, and similar cases are to be found cited in the argument or judgment in said case. No such duty had been imposed here. It was left entirely optional.

If every power a municipal council has entrusted to it were to be held as carrying therewith every possible implication of power needed to execute it and to create without regard to the ratepayers debts to be met in future years, I fear our municipal system would receive some severe strains. It is urged that the town had power to buy land outside the municipal limits for waterworks. Such a power has existed ever since 1857 by statute. But this transaction does not proceed thereupon. And, indeed, that power could not be used for any indirect purpose of trying to produce something else.

The two purposes might well be executed together if the legislature had said so, but it has not. And the mere fact that such express power had to be given by statute to enable the town to acquire land outside, is evidence of what the law has ever been held to be.

Some American cases are cited to shew this power exists by implication.

Of those cited a number clearly give no countenance to the proposition, but rest on statutory powers expressly given.

I was surprised to hear it said that the late Judge Cooley had given his sanction to such a proposition in the case of *The Mayor of Detroit* v. *The Park Commissioners*, 44 Mich. 602. But, on reference to that case, p. 605, I find his position entirely misconceived. He said in his judgment therein:—

> But if we were to concede all that respondents claim in this regard the case would be still undetermined. This is not the ordinary case of a city park. Belle Isle is outside the city limits, and it is not pretended that the city could have purchased, improved and controlled the same as a public park except by virtue of special legislation. This legislation was obtained (Local Acts, 1879, p. 215), and it not only empowered the city to purchase and create a debt therefor, but to erect a toll-bridge across to the island, and to extend its police authority over the territory. Here were very important franchises which the city could not pretend to claim except by this sovereign grant.

In the same case there is an expression in relation to some cases cited which to a hasty reader might suggest some such notion as advanced in argument. But an examination of the sentence does not warrant it and a reference to the cases in question shews clearly the learned Judge spoke of something else and in no way related to this point.

Another of these cases illustrates how difficult another able Judge felt it to maintain even a small contract to procure an outlet to a sewer. The contract only involved the expenses of

CAN.

S. C.
1912

SHAWINIGAN HYDRO-ELECTRIC CO. v. SHAWINIGAN WATER & POWER CO.

Idington, J.

procuring labour, so far as I can see. And the case might well have rested on the imperative statutory duty to avoid a nuisance. The head-note is entirely misleading in this latter case.

It is not necessary, as this case has been fully dealt with in the Court below, again to analyze as has so well and exhaustively been done in the Court appealed from, all the statutes bearing upon it. I do not bind myself to uphold every opinion on minor details expressed in course of that work, but reaching, in the main, the same results, I do not see fit to enter upon the repetition of what I approve.

I think the appeal should be dismissed with costs.

Duff, J.

DUFF, J.:—I think the appeal should be dismissed on the short ground that section 18 of the special Act of 1908 (ch. 95) does not authorize the establishment or maintenance outside the municipal boundaries of the works to which that section refers. Article 5281, R.S.Q. (1909), which admittedly governs the municipal corporation in question, provides:—

> 5281. The corporation shall have jurisdiction for municipal and police purposes and for the exercise of all the powers conferred upon it, over the whole of its territory, and also beyond its territory in special cases where more ample authority is conferred upon it.

It seems to me to be indisputable that the "power to establish and maintain a system of lighting" by gas or electricity with which this municipality is invested by its special Act is one of the "powers" referred to in this article. Ambiguity, no doubt, lurks in the word "powers" and there are some corporate capacities and faculties commonly described as "powers" (the capacity to contract as suggested by Mr. Geoffrion is an instance of them), the exercise of which outside the municipal limits the legislature cannot have intended to prohibit. It is not necessary for the purposes of this case to define with precision the classes of powers which fall within the scope of the section in question. I see no reason to doubt that it does apply to all powers in respect of the establishment or operation of municipal undertakings which are *privilegia* in the strict sense. Wherever a corporation to which article 5281 applies is empowered by the legislature to construct or operate works which may in the construction or operation of them affect others prejudicially and where, by reason of such statutory authority, the responsibility of the corporation for harm caused by acts done in the course of exercising or professing to exercise such powers is determined by a rule which is not the same as that applicable to determine the responsibility of persons doing the like acts without statutory authority—then unless there be some legislative provision which expressly or impliedly provides to the contrary the powers so conferred are powers which under the terms of that article must be exercised within the municipal limits. It seems to me to be incontestable that the powers conferred by section 18 are powers

of this character. If the corporation were, for example, to establish a system of lighting by electricity under that section, it is not doubtful that their responsibility for harm arising from the operation of such a system would be governed by the principles of *Canadian Pacific Railway Company* v. *Roy*, [1902] A.C. 220, and *Dumphy* v. *The Montreal Light, Heat and Power Company*, [1907] A.C. 454, and not by articles 1053 and 1054 of the Civil Code. It was clearly not intended that the municipality should enjoy such a qualified immunity in respect of works established outside the municipal limits except in cases in which it is otherwise specially provided.

I should notice Mr. Geoffrion's contention that it is impracticable to establish within the municipal limits such works as those contemplated by section 18 and that, consequently, the authority to exercise the powers conferred by that section beyond those limits must be implied as necessarily incidental to the powers expressly conferred. Now such an implication is not permissible unless, on reading the relevant provisions of the Act as a whole, you find that they are not incompatible with the inference that the legislature intended to give the authority which is to be implied. It appears to me that article 5281 in terms forbids such an inference unless there is something in the language of the enactment by which the power is conferred indicating an intention that it is to be exercisable beyond the municipal limits. In the special Act there is in respect of the establishment and maintenance of a system of lighting (whatever may be said respecting the authority to sell surplus power) nothing in the least degree indicating any such intention.

ANGLIN, J. (dissenting):—In this action the validity of a by-law of the town of Shawinigan Falls providing for the purchase of the plant and undertaking of the Shawinigan Hydro-Electric Company (the appellants) is impugned by a rival company (the respondents). Anglin, J.

The grounds of attack are:—

(1) That the plant to be purchased is situate outside the limits of the town.

(2) That the purchase involves the making of a loan by the corporation without the assent of the ratepayers required by law.

(3) That the by-law does not provide for an annual special tax on the owners or occupants of buildings to meet the interest on, and to provide a sinking fund to repay, the debt to be incurred.

(4) That the scheme includes the giving of promissory notes by the town corporation for a considerable part of the purchase price.

Other grounds of attack were abandoned.

Without determining whether or not, if its powers depended solely on the general provisions of "The Cities and Towns Act"

CAN.
S. C.
1912
SHAWINIGAN HYDRO-ELECTRIC CO. v. SHAWINIGAN WATER & POWER CO.
Anglin, J.

(R.S.Q. 1909, arts. 5256 *et seq.*), the acquisition by the town of Shawinigan Falls of a power plant and electric light undertaking partly situate outside the town limits would be *ultra vires* (*vide* Dillon's Mun. Corporations (5th ed.), sec. 980, note 1), I am of the opinion that, having regard to the peculiar circumstances and to the special legislation enacted for the town, it was within its powers, if otherwise properly exercised, to acquire this property beyond the municipal limits.

Article 5667 of the Revised Statutes of Quebec reads as follows:—

> The council shall have all the necessary powers for the establishment and management of a system of lighting by gas, electricity or otherwise, for the requirements of the public and of private individuals or companies desiring to light their houses, buildings or establishments.

The corresponding provision in the charter of the town of Shawinigan Falls (8 Edw. VII. ch. 95, sec. 18) reads:—

> The council is vested with all the necessary powers for the establishment and management of a system of lighting by gas, electricity or otherwise, for the requirements of the public and of private individuals or companies desiring to light up their houses, buildings or establishments, and for selling the surplus power produced by the power generating the electricity which it may have acquired or established for such purpose to the municipality of the village of Shawinigan Bay or to its inhabitants, and to the Grand'Mère Electric Company or its successors.

The acquisition, as distinguished from the establishment, of a power development is clearly contemplated by this special article. It cannot have been the intention of the legislature to confine the town to the acquisition of a steam-power or plant in view of the many advantages of generating electricity by water-power, the general use now made of water-power for that purpose and the exceptionally favourable situation of the town for the utilization of such power. Moreover, the legislature would seem to have contemplated the acquisition of a power generating surplus energy. It provides for the disposition of the surplus power produced to another named municipality and to a named company. This provision obviously contemplates the acquisition of a water-power. It is most improbable that the legislature would authorize the town to embark in the business of producing power generated by steam in excess of its own requirements and selling the surplus to a neighbouring municipality and an electric company. The capacity of a steam plant can be accurately gauged. But in order to secure a suitable or available water-power it might be necessary to acquire one which would produce considerable surplus energy. It would perhaps be too much to infer that the legislation of 1908 was enacted to enable the town to acquire the plant of the appellant company, which was actually supplying electric energy to the municipality and the company to which the town is authorized to sell its surplus power, although

if this was not intended it is a little difficult to understand why these two bodies were named as prospective purchasers of the surplus. But it is certainly not unreasonable to assume that the legislature was informed of the situation at Shawinigan Falls in regard to water-powers: that it knew that no water-power within its limits was available to the town; that, by its ownership of the lands along the river bank, the respondent company was in a position to prevent the town acquiring any water-power within its limits; and that, if a water-power was to be acquired by the town, it must be in adjacent territory outside its limits. The evidence establishes these facts. When, therefore, the legislature specially provided for the acquisition by the town of a "power" and for the disposition to a neighbouring municipality and to a company of the surplus energy produced from such power, it seems a reasonable, if not a necessary inference, that it contemplated and intended to sanction the acquisition of a water-power situated outside the town limits. Of course this purpose might have been more clearly expressed. Had it been, we probably should not have had this litigation.

Moreover, under the by-law, the property in question is to be acquired not merely for electric lighting purposes, but also for the establishment of waterworks. Under the provisions of "The Cities and Towns Act," now consolidated as articles 5646-7, R.S.Q., 1909, the town had the right to acquire for waterworks property situate within a radius of twenty miles beyond its limits. The property in question is within that radius. There is nothing in the record which warrants an inference that the town council did not *bonâ fide* intend to utilize it for the establishment and maintenance of waterworks—nothing to justify the conclusion that the reference in the by-law to the establishment of waterworks was introduced merely as a cloak to cover up any possible illegality in the acquisition of outside property for the purpose of an electric lighting system.

Articles 5281 and 5588 of the Revised Statutes of Quebec bear upon the governmental authority of the municipality, not upon its right to own and use property. Dillon on Municipal Corporations, sec. 980, n. 1 (5th ed.).

For these reasons I think the first objection to the by-law fails.

Neither can I accept the view that a purchase of property by a municipality on credit involves the contracting of a loan within the purview of articles 5776 *et seq.*, R.S.Q. That it involves contracting an indebtedness is clear; but I think the distinction between the borrowing of money and the contracting of a debt as the result of a purchase on credit is equally clear. Dillon's Municipal Corporations (5th ed.), sec. 279 (*n*). The Cities and Towns Act, in article 5783, R.S.Q., marks the distinction between loan and other municipal indebtedness. A perusal of the articles

CAN.

S. C.
1912

SHAWINIGAN HYDRO-ELECTRIC CO. v. SHAWINIGAN WATER & POWER CO.

Anglin, J.

1762-1786 of the Civil Code, defining and dealing with loans, has satisfied me that the legislature did not intend to include under the term "loans" in "The Cities and Towns Act" debts incurred for purchases made on credit.

Nor does the fact that the property is acquired subject to a hypothec put the purchaser in the position of a borrower or give to the transaction any of the legal notes of a loan. True, the borrower obliges himself to pay to the hypothecary creditor the part of the purchase price represented by the amount secured by the hypothec; but he pays it as purchase money, not as the return of money borrowed. Of course, there might be a case in which a vendor had been induced to hypothecate his property on the eve of selling it to a municipality in order to enable the latter to evade the provisions of the law restricting its borrowing powers. When such a case is made out the Court will, no doubt, find means to prevent an evasion of the law. This is not such a case. It is an ordinary purchase on credit of property subject to a hypothec with the result that part of the purchase price becomes payable not to the vendor, but to the hypothecary creditor to satisfy his charge.

I agree, however, with the majority of the learned Judges of the Court of King's Bench that the provisions of article 5668, R.S.Q., should, notwithstanding the use of the word "may," be construed as imperative in the event of the exercise by the council of the power conferred by article 5667 in such a manner that it involves incurring a debt.

Money for the purchase or establishment of a municipal electric lighting system might, I incline to think, be raised by a loan contracted under the provisions of articles 5776 *et seq.*; and, in procuring money in this way, submission to the "proprietors who are municipal electors" would be requisite (art. 5782, R.S.Q.). Provision for re-payment of such a loan would, of course, be made under article 5777, R.S.Q. The money to pay it having been thus procured, no provision for future expenditure on account of the purchase price would be necessary and the duty imposed by article 5668, R.S.Q., would, in that case, not arise.

But if, instead of borrowing the money for that purpose, the municipal corporation purchases its plant upon credit, thus incurring a debt—a course which the provisions of articles 5667-8, R.S.Q., clearly imply its power to adopt—the council is obliged to exercise the powers conferred by article 5668 to meet the interest on the debt and to establish an adequate sinking-fund to pay the principal. The Cities and Towns Act contemplates indebtedness being incurred otherwise than by loan (article 5783), but it contains no provision, such as is frequently found in municipal legislation (*vide* Ontario Municipal Act, 1903, sec. 389), prohibiting the raising on the credit of the

municipality of any money not required for ordinary expenditure and not payable within the municipal year otherwise than under a by-law submitted to the ratepayers. The burden of the special tax for payment of the expenditure being imposed upon the "owners or occupants of houses, shops or other buildings" (article 5668), and the total debt of the town not amounting to twenty per cent. of the value of the taxable immovable property (article 5783), no reason exists for requiring the approval of other ratepayers or proprietors. Not only do articles 5667 *et seq.* contain no reference to an approval of the expenditure for establishing a lighting system by electors or taxpayers being required, but there is no means provided in the statute for obtaining the approval of "owners or occupants of houses, shops, or other buildings." If, without the authority of express legislation, such as we find in articles 5667 *et seq.*, a town council would possess the power to make such an extraordinary expenditure as is involved in the acquisition or establishment of an electric lighting system, it certainly would not have the still more extraordinary power to make such a purchase on credit and to impose the debt thus created as a burden upon present and future owners or occupants of buildings without their assent. That a town council has the latter powers is an implication from article 5668. It follows, I think, that in exercising them, while the assent of owners or occupants of buildings or of ratepayers or electors is not required, the provisions of article 5668 are obligatory.

But, must the council, in the same by-law which provides for the purchase, or concurrently with its passage, at the peril of its being held invalid and quashed should it omit to do so, provide for the imposition of the special annual tax directed by article 5668? I think not. The exercise of the power conferred by article 5667 entails the obligation to provide for interest on any debt thus created and for a proper sinking-fund. To create this obligation a declarative recognition of it by by-law is not required and would serve no purpose. The obligation arises out of the incurring of the debt. To provide when enacting the purchase by-law for the levy of the annual special tax to meet interest and sinking-fund seems to be both unnecessary and impracticable. Revenue from the system may provide the amount needed in whole or in part. That revenue will vary from year to year. The special tax to be imposed for the annual interest and the sinking-fund, or for so much of them as the revenue, if applied to that purpose, does not cover, is to be an annual tax. The value of the property assessable may also vary from year to year. If the council were obliged to provide at the time of the purchase for the annual rate of the special taxation to be levied in each year, a figure too large or too small might be named. It is the right of the creditor that adequate

CAN.

S. C.
1912

SHAWINIGAN HYDRO-ELECTRIC CO. v. SHAWINIGAN WATER & POWER CO.

Anglin, J.

provision be made; it is that of the taxpayer that the tax shall not be excessive. The rate of the tax may, no doubt, be struck in advance in each year upon an estimate of the amount required to be raised and of the value of the assessable property. An annual by-law imposing it and directing its levy would seem necessary. The council may be restrained from paying any part of the debt, principal or interest, out of its general funds or revenues. In proper proceedings, it may be compelled, by mandamus, to impose in any year a special tax under article 5668, adequate to provide for the interest and a proper sinking-fund so far as they are not met out of the revenue. But I find nothing in the Act which requires the council, when enacting the by-law for the acquisition or establishment of a lighting system, to provide even for the imposition of the annual special tax for the first year—still less for imposing that tax during the whole term of the debt.

The obligation to impose an annual and an adequate tax exists. The council may be compelled to discharge that duty from year to year. It may be restrained from diverting other funds or sources of revenue to that purpose. The interests of the creditors on the one hand and of the general ratepayers on the other being thus protected, I see no reason to hold the by-law in question invalid because the council has not by it, or by a by-law enacted concurrently, formally declared that interest on the debt incurred and a sinking-fund to meet it shall be provided for by the annual special tax mentioned in article 5668, or that owners or occupants of buildings in the town shall be liable to such tax when annually imposed. *Lex neminem cogit ad inutilia.*

The failure to provide in the impugned by-law, for the imposition of the special tax under article 5668 is not alleged in the declaration as a ground of its invalidity. This point was raised for the first time in the judgment of the majority of the learned Judges of the Court of Appeal.

If empowered to acquire the property in question and to incur a debt in acquiring it, the town would appear to have the right to give its promissory notes to evidence that debt (art. 5279, R.S.Q., pars. 2 and 4). The provision in it for the giving of such notes would not in any case suffice to render the by-law void although the notes themselves should be held invalid.

For these reasons I would with respect allow this appeal with costs in this Court and in the Court of King's Bench and would restore the judgment of the learned trial Judge.

*Appeal dismissed.*

**Andrew SMITH (plaintiff, respondent) v. CITY OF SASKATOON and Western Pavers, Limited, (defendants, appellants).**

SASK.
S. C.
1912
July 15.

*Saskatchewan Supreme Court, Newlands, Johnstone and Lamont, JJ. July 15, 1912.*

1. LAND TITLES (§ VII—71)—REFERENCE IN CERTIFICATE TO RECORDED PLAN —INCORPORATION INTO THE DESCRIPTION.

A reference in a certificate of title to city lots, issued under the Land Titles Act, to a plan recorded in the land titles office, thereby incorporates such plans into the description contained in the certificate so as to make it a part thereof.

[*Grasett* v. *Carter*, 10 Can. S.C.R. 105, followed.]

2. TRESPASS (§ I C—17)—DEFENCE—STREET LINE OF LOTS—PLAN FILED IN LAND TITLES OFFICE—INCORRECT BY MISTAKE IN SURVEYING.

A city cannot, as a defence to an action of trespass for laying a sidewalk that encroached upon lots owned by the plaintiff, shew that, as the result of a mistake in surveying the block in which the lots were located, the plan thereof, as filed in the land titles office, and to which the plaintiff's certificate of title referred, was incorrect, and that, therefore, he did not own the *locus in quo*.

[*Smith* v. *Millions*, 16 A.R. (Ont.) 140, applied.]

Statement

APPEAL by defendants from a judgment in favour of plaintiff in an action of trespass in building a cement walk and involving the location of the boundary between plaintiff's lands and the street.

The appeal was dismissed.

*R. W. Shannon*, for appellants.

*A. M. McIntyre*, for respondent.

The judgment of the Court was delivered by

Newlands, J.

NEWLANDS, J.:—This is an action of trespass brought by the plaintiff against the defendants for building a cement sidewalk across the plaintiff's property.

It is admitted by the pleadings that the plaintiff is the owner of the following land in the city of Saskatoon, viz., lots five (5) and six (6) in block one hundred and twenty-three (123), according to a plan of record in the land titles office for the Saskatoon land registration district as number "Q." At the trial a certified copy of the plaintiff's certificate of title issued under the provisions of the Land Titles Act and a certified copy of plan "Q" were put in. The certificate of title describes the property as set out in the pleadings.

On the part of the defence, evidence was given that a mistake had been made in the survey of block 123; that, taking the distances and courses given on the plan, the figure would not close, and that, on a re-survey by surveyors employed by the city the mistake had been corrected and a new plan made which changed this block as shewn on register plan "Q." It was also shewn that the place where the mistake was made

SASK.

S. C.
1912

SMITH
v.
CITY OF
SASKATOON.

Newlands, J.

could not be ascertained. It was not, however, disputed that lots 5 and 6 could be found as located on plan "Q."

The only question for this Court to decide is the location of lots 5 and 6 according to plan "Q"; we have nothing to do with the location of any other lots and blocks.

The lots being described in the certificate of title as according to plan "Q," that plan is a part of the description of the lots. Strong, J., in *Grascett* v. *Carter*, 10 Can. S.C.R. 105, at p. 114, said:—

> When lands are described, as in the present instance, by a reference either expressly or by implication to a plan, the plan is considered as incorporated with the deed, and the contents and boundaries of the land conveyed, as defined by the plan, are to be taken as part of the description, just as though an extended description to that effect was in words contained in the body of the deed itself.

The westerly corner of block 123 at the junction of 16th street and Broadway is agreed upon by all parties. Broadway from this point runs north 26 degrees 30 minutes east, for 150 feet, according to plan "Q," and from thence north 54 degrees, east to the road allowance. Following this description, lots 5 and 6 are where the plaintiff says they are. By the new survey made by the defendant the city of Saskatoon, Broadway, from the easterly corner of block 123 at the junction of 16th street, runs north 26 degrees 30 feet, east for a distance of only 87.55 feet, and from there to the same point on the road allowance as shewn on plan "Q." By this survey, the front of lots 5 and 6 is cut off. By following this latter description, the plaintiff would not be given his lots according to plan "Q," but a different piece of land. This would not be construing the certificate of title, but making a new one, and we cannot do this.

The language of Maclennan J., in *Smith* v. *Millions*, 16 A.R. (Ont.) 140, at p. 148, applies directly to this case. That learned Judge said:—

> But in my judgment that is not construing the deed, but making a new deed. When O'Brien, the owner of the lots, has conveyed lot 2 *as laid out on his plan*, what has his grantee to do with the way other lots are laid out, or with mistakes in their bearings or dimensions or quantities? I cannot see that any such mistakes affect the matter in the least. The sole question is how is lot 2 laid out, and he is entitled to it just as it is. It is said that the shape of lot 2 must be altered because otherwise lot 1 will not be as wide in the rear as designated on the plan. Does that not mean that lot 2 is to be laid out *de novo* and that the grantee of lot 2 is after all *not* to have it as laid out in the plan? It would surely not be allowable for O'Brien after making this deed to say: "I find there is a mistake in the plan. The rear of lot 1 in the plan is only 44 feet instead of 54. So you must submit to have the plan rectified and to have your lot in the shape of a rhomboid instead of a rectangle." The answer would surely be: "I have nothing to do with your other lots. I bought a lot plainly laid down in the plan as a rectangular lot and if you made any mistake that is your

affair." The consequences of any other rule would be sufficiently startling. In this case the number of lots in the plan is small, four on each side of the street. But the rule must be the same whether there are four or four hundred adjacent lots.

For these reasons I think the judgment of the learned Chief Justice should be sustained and the appeal dismissed.

*Appeal dismissed.*

SASK.

S. C.
1912

SMITH
v.
CITY OF
SASKATOON.

---

## DAVIDSON v. CITY OF LETHBRIDGE.

ALTA.

S. C.
1912

May 3.

*Alberta Superior Court. Trial before Stuart, J. May 3, 1912.*

1. MUNICIPAL CORPORATIONS (§ II G 2—224)—LIABILITY FOR DAMAGES WHERE SERVANTS OF MUNICIPALITY NEGLIGENTLY FILL IN SEWER CONNECTION.

It is actionable negligence for the servants of a municipality to leave a trench connecting the plaintiff's premises with a public sewer, in a street, partly filled with frozen chunks of earth so that water caught therein during a sudden thaw, percolated through them and followed the trench into the plaintiff's cellar causing damage therein, notwithstanding that the last few feet of the trench were filled in the same manner by the plaintiff.

[*Renwick* v. *Vermillion Centre School District*, 15 W.L.R. 244, and *Ashely* v. *Port Huron*, 35 Mich. 296, specially referred to.]

Statement

ACTION for damages against a municipal corporation for trespass and negligence in allowing sewage water to escape from a municipal sewer into the cellar of plaintiff's house.

Judgment was given for the plaintiff.

*John Palmer*, for plaintiff.

*W. S. Ball*, for defendants.

Stuart, J.

STUART, J.:—I have had more hesitation about the proper conclusion on the facts in this case than in regard to the law.

The plaintiff, in October last, owned a house and lot in the city of Lethbridge, which faced westward upon 11th street south. About the 1st November, he made application to the defendants for sewer and water connections. A main sewer and water pipe ran along the street. The defendants' servants dug a trench from the main to the plaintiff's property-line, a distance of about 15 feet, and also in through the plaintiff's property towards his house and up to about two feet from the house. In this trench the necessary connecting pipes were laid.

The plaintiff employed a plumbing company to do the work in his house and to connect with the pipes laid by the defendants. He paid the defendants $35 as the cost of making the connection. Underneath the plaintiff's house, which was twenty-two feet by twenty, was a cellar about sixteen feet square. The house itself rested on a cement foundation, which was placed upon the original surface of the ground, and did not extend into the cellar, but was some two feet or so from the edge of the cellar.

ALTA.

S. C.
1912

DAVIDSON
v.
CITY OF
LETHBRIDGE.

Stuart, J.

On the west side of the cellar, the plaintiff had built a cement wall up to the level of the earth, and the earth between the cellar wall and the house foundation had been also covered by cement so as to form a sort of shelf in the cellar.

On the north side of the cellar, the same thing had been done, except that the cement wall did not extend all along that side, but only back as far as the stairs leading up to the kitchen. Beneath the stairs the earth had not been excavated.

On the south side there had also been some cement work done, but it was difficult from the personal view of the house which I took to discern how much had been done.

The plaintiff in his evidence stated that there was a cement wall on the south side, and said nothing of the north side having cement in it. The western cement wall had been built before the sewer and water connections had been made. The plaintiff himself broke a hole from top to bottom in the western cement wall just at the north corner and excavated outward and under the house foundation until he reached the work done by the defendants. The plumbing company then made the connection with the house. The sewer pipe was not brought within the cement wall at all, but rose from the trench perpendicularly so as just to come within the line of the foundation and within the side of the house after passing through the floor. The water pipe came through the opening in the cement wall into the cellar. This opening was never closed up by the plaintiff. What he did was to insert about three boards vertically in the trench so as to rest against the outer side of the sewer pipe as it rose from below and against a vertical ledge made in the earth on each side of the trench. Then he filled in the earth against these boards and up to the top.

On Sunday the 14th January, 1912, the plaintiff noticed about a bucketful of water in his cellar. He got the plumbing company to turn off the water, and next morning he excavated the trench for about three feet from his house. The city authorities, who had been informed of the leak, opened up the main sewer for about fourteen feet. This was done also on Monday the 15th. On Tuesday morning the portion excavated by the defendants was full of water. This water was pumped out and the trench refilled. There was no evidence given by any one to explain the presence of this water.

The weather was very cold and frosty, and it could not have been surface water. The plaintiff did not say definitely that he found nothing wrong at the inner connection near the house, but the presence of the water further out is sufficient to shew, I think, that the plumbing company had done their work satisfactorily. The defendants' servants who gave evidence said nothing at all about anything but the original excavation in November. I assume, therefore, that, if a leak was found, as it

surely must have been, the workman repaired it properly. The plaintiff says that no more water trickled into his cellar during the week. The weather continued cold, and there was considerable snow on the ground. On Saturday night a sudden thaw occurred, and on Sunday morning the plaintiff found his cellar flooded five feet deep. He went outside and saw a great deal of water lying in the neighbourhood of his house on the north side and flowing south-westward towards the street, but not across the corner of his lot.

The complaint of the plaintiff is, that, both at the time of the original excavation in November and at the time of the search for the leak earlier in the week, the surface of the ground was frozen; that, in filling in the excavation, the earth was not packed or tamped down sufficiently; that the upper portion of the trench was filled only with frozen lumps of earth; and that these were heaped up upon the street, with the result that, when the sudden thaw came, the surface water, not merely from his own lot but from adjoining lots, which, owing to the gradual slope of the ground down to the westward and upward, both north and south from the portion of the street in front of his house, should have flowed on across the street westward, was caught by the mound of lumps and in the trench filled by the lumps and flowed along the main trench and into the connecting trench through the lumps, and so, percolating through the soil which had not been properly tamped or packed down, eventually found its way into his cellar and caused the same to be inundated, thereby damaging a quantity of goods lying therein, as well as permanently impairing the cement walls thereof. The plaintiff says that a large quantity of water was flowing from the north-east over the lot adjoining his own on the north, and, not touching his own lot, reached the street through another main-sewer where the lumps of frozen earth had been piled.

Upon the view I took, I found that the ground immediately surrounding the plaintiff's house on the west and north had been slightly raised above the natural surface of the soil by a layer of earth. The whole appearance of the locality tended to confirm the plaintiff's statement that all the surface water arising from snow melting on the land lying north and north-east of his lot would and did flow down past the north side of his lot to the street. Arriving at the street, there is no doubt that it was caught and checked, not merely by the heap of frozen lumps, but by the partially empty trench, into which it would sink through and around the lumps.

There is no doubt, either, that the water did not enter the cellar from the surface. The appearance of the hole in the cement wall through which it apparently had flowed, the slightly raised condition of the surface of the ground immediately surrounding the house, and the nature of the foundation of the

ALTA.

S. C.
1912

DAVIDSON
v.
CITY OF
LETHBRIDGE.

Stuart, J.

house, all tend to shew that such a means of entrance for the water must be put aside as altogether improbable. Where else, then, could the water have come from? It seems to me that I am driven to the conclusion that the plaintiff's theory is the correct one. A week before, water had been found entering the cellar. No leak was found near the house. A leak was evidently found out at the main sewer, because, when this was opened up, it was filled with water in very cold weather.

The inference is unavoidable, it seems to me, that water could and did percolate from the main sewer through the connecting trench into the cellar. If it could do so from a leak in the pipes in the cold weather, it could just as well do so from the surface of the trench when a sudden thaw came. This is the only explanation I can find for the presence of the water in the cellar.

The question of liability upon such facts is simple. The plaintiff rested his case upon the ground of negligence in constructing the sewer, such negligence consisting in leaving the earth in such a loose condition as to allow water to percolate into the cellar.

There is, it seems to me, only one possible answer to this, namely, that the inner three feet or so of the connecting trench had been filled in by the plaintiff himself or by his agents. I do not think, however, that this is a sufficient answer. The water, as I find, came from the street. The defendants should never have allowed it to get in upon the plaintiff's land at all. Even aside from the question of negligence, I think, as I indicated at the hearing, that the defendants are liable as for a trespass.

The case is the same in principle as that of *Renwick* v. *Vermillion Centre School District*, 15 W.L.R. 244, decided by the Court *en banc*. The judgment of the Court there pointed out the distinction between preventing surface water lying on or flowing across a person's lot from getting away and turning upon that person's lot by artificial means surface water which otherwise would never have gone there at all. In the absence of a defined watercourse, the former furnishes no ground of action. The latter is clearly actionable.

In *Ashley* v. *Port Huron*, 35 Mich. 296, cited in Dillon on Municipal Corporations, 5th ed., sec. 1735 (note), Chief Justice Cooley said:—

> If the corporation send people with picks and spades to cut a street through it (an owner's premises) without first acquiring the right of way, it is liable for a tort; but it is no more liable under such circumstances than it is when it pours upon his land a flood of water by a public sewer so constructed that the flood must be a necessary result. The one is no more unjustifiable and no more actionable than the other. Each is a trespass, and in each instance the city exceeds its lawful jurisdiction.

In the present case, I find that the defendants, by means of the heaped up earth and by means of the trench practically open to a depth of a foot or eighteen inches, caught surface water not coming from the plaintiff's land at all and turned it back upon him to his damage.

Even aside from negligence, this is actionable. And it is no answer to say that his cement cellar wall was defective in that he did not tamp his own part of the trench well enough. An owner is not bound to build any defensive works to ward off a trespass, and he is entitled to have any kind of a hole in his own land that he pleases as long as he creates no nuisance.

As to the amount of damage, the amount claimed is, of course, and as usual, excessive. The estimate given to Cruttenden as to the cost of repairing the cement wall included the cost of cement floor, and of additional walls on the east and half of the north side, which were not there before. He estimates the cost of the walls alone at $90, but I could see no need of the east wall at all. The eastern wall is practically as good as ever. I allow $70 for the walls. According to the evidence of the plaintiff and his wife, the materials spoiled would amount in value to $217.95. The plaintiff was, however, uncertain as to amounts in many cases. It would not be safe to allow him more than $150.

There will be judgment, therefore, for the plaintiff for $220, and costs on the lower District Court scale, but without any right of set-off.

*Judgment for plaintiff.*

---

## FROST AND WOOD CO. v. HOWES.



*Alberta Supreme Court, Walsh, J., in Chambers. May 17, 1912.*

1. COSTS (§ I—14)—SECURITY FOR COSTS—FOREIGN CORPORATION AS PLAINTIFF—REGISTRATION IN PROVINCE.

The registration of a foreign company in a province and the appointment of an attorney upon whom process may be served, does not give it any residential status, so as to absolve it from liability to give security for costs as a non-resident in an action brought by it in such province.

[*Ashland* v. *Armstrong*, 11 O.L.R. 414, and *Canadian Railway Accident Co.* v. *Kelly*, 5 W.L.R. 412, followed.]

2. CORPORATIONS AND COMPANIES (§ VII C—376)—ACTIONS BY FOREIGN CORPORATIONS DULY REGISTERED IN PROVINCE—NECESSITY OF FURNISHING SECURITY FOR COSTS.

A foreign company by registration in Alberta, although clothed with all the rights, powers, and privileges of companies incorporated under the Companies Ordinance, is not thereby absolved from giving security for costs as a non-resident in an action brought by it, since there is nothing in such ordinance exempting companies so incorporated from giving security for costs.

Statement

MOTION by defendant for an order for security for costs. The application was granted.

ALTA.

S. C.

1912

FROST AND WOOD CO. v. HOWES.

Walsh, J.

*François de Roussy de Sales*, for defendant.
*G. H. Ross*, for plaintiffs.

WALSH, J.:—The defendant applies for an order for security for costs, upon the ground that the plaintiff company resides out of the province. The writ and statement of claim disclose the fact that the plaintiff is a corporation having its head office at Winnipeg. The plaintiff meets the application with proof of the fact that it is registered in Alberta under the Foreign Companies Ordinance.

The neat point for decision is, whether such registration is sufficient to relieve the plaintiff from the liability which it would otherwise be under to furnish security for the defendant's costs. On the argument I expressed the opinion that it did not, but I reserved the matter to enable me to read the case of *Newby* v. *Von Oppen*, L.R. 7 Q.B. 293, which Mr. Ross, for the plaintiff, cited to me as decisive of the point in his favour and against my own view. I have been unable to find this volume in the library, and am, therefore, obliged to dispose of the application without having had the advantage of reading this case.

In the course of my own research, however, I have found an Ontario case, *Ashland* v. *Armstrong*, 11 O.L.R. 414, and a Manitoba case, *Canadian Railway Accident Co.* v. *Kelly*, 5 W.L.R. 412, in the former of which Chancellor Boyd, and in the latter of which Chief Justice Mathers, decide the exact point adversely to the plaintiff's contention.

Though not binding upon me, these decisions commend themselves to me, perhaps because they happen to coincide with my own preconceived views upon the subject; and I will, therefore, follow them.

The registration of a foreign company clothes it with the power to carry on its business within the province, but does not of necessity give it any residential status. It is not necessary that it should have any office or place of business in the province.

It must appoint a resident of the province as its attorney for the service upon it of process; but this is the only provision requiring of it anything approaching a residential character; and it is in the person of the attorney that this qualification must exist.

Of course, a foreign company may so reside in the province as to enable it to sue without furnishing security for the defendant's costs, but that is not this case. I am dealing simply with the abstract case of a company which shews registration and nothing more.

I do not think that the plaintiff can get the help which Mr. Ross contended for from that provision of the Foreign Companies Ordinance which gives to it, by virtue of its registra-

tion, all the rights, powers, and privileges conferred upon companies incorporated under the Companies Ordinance.

It is not by virtue of anything contained in that Ordinance that a domestic company enjoys the immunity which it possesses from liability to secure the payment of the defendant's costs in an action brought by it.

The order will go for security in the usual form, for $200, if paid into Court, or $300, if by bond. Costs in the cause.

*Security ordered.*

---

## HAFFNER v. GRUNDY.



*Manitoba King's Bench. Trial before Mathers, C.J.K.B. June 4, 1912.*

1. BROKERS (§ II B—12)—REAL ESTATE AGENT—COMMISSION—LIABILITY OF OWNER OF LAND—PROPOSED PURCHASE ON UNAUTHORIZED TERMS.

The defendant, the owner of property that he had placed for sale in the hands of the plaintiff, a real estate agent, is not liable to the latter for commissions where the agent found a purchaser for the property on terms he had no authority to offer, and which the defendant refused to accept, notwithstanding that the proposed purchaser testified at the trial that he had been and was ready and willing to buy upon the defendant's terms, which fact he had not until then communicated to either the plaintiff or the defendant.

Statement

AN action by an agent against his principals for a commission for procuring a purchaser of real estate.

The action was dismissed with costs.

Messrs. *A. J. Andrews*, K.C., and *F. M. Burbidge*, for plaintiff.

Messrs. *D. A. Stackpoole* and *E. J. Elliott*, for defendant.

Mathers, C.J.

MATHERS, C.J.K.B.:—At the conclusion of the plaintiff's case I dismissed the action as against the defendant William Grundy and it proceeded as to the defendant Amelia Charlotte Grundy only.

The agent's instructions were contained in letters, which authorized him to find a purchaser at the price of $93,500, one-third cash, balance in one, two and three years, with interest at six per cent., subject to confirmation at the time of sale.

The agent found a purchaser who was willing to buy at the price named and who paid $1,000 deposit to, and took a receipt from, the agent. This receipt embodied all the terms contained in the instructions from the principal to the agent and certain additional terms. After providing for payment of the deferred instalments of purchase money, the receipt continued:—

> Such balance to be secured by a mortgage upon the property; the vendor to give a title to the said property under the Real Property Act. If there are any encumbrances upon the said property which are not now due and payable, these are to be paid by the vendor and the purchaser is to have a right to pay same when due and deduct the amount of said encumbrances out of the first moneys payable to

MAN.

K. B.
1912

HAFFNER
v.
GRUNDY.

Mathers, C.J.

the vendor from the purchaser. Any and all encumbrances upon the property which are due and payable are to be paid forthwith by the vendor. Taxes, rents, interest and insurance to be adjusted from and to time of delivery of title by vendor. The vendor to give delivery of the property within thirty days from this date.

A telegram was sent to the defendant William Grundy, who was the agent of his co-defendant, at Long Beach, California, where the defendants then resided, advising him of the sale made, which read as follows:—

> Have sold lots 1, 2 and 3, block C, 83 St. James, plan 420, for ninety-three thousand five hundred, one-third cash, balance one, two and three years, interest six. All encumbrances to be paid by vendor at maturity; usual agent's commission; everything adjusted at date delivery title; deal to be closed by transfer and mortgage. Please confirm by wire and have Amelia join and instruct what lawyer to employ.

To this William Grundy replied by telegram:—

> Cannot accept. Terms unsatisfactory. Leaving for Winnipeg Sunday.

It was admitted by counsel for the plaintiff that the receipt which the agent gave and the telegram of advice to William Grundy contained terms which the agent had no authority to make, and that the principal was not bound to accept.

No further negotiations took place between the parties and no other offer was ever communicated to the defendant by the plaintiff.

The proposed purchaser said at the trial of this action that he was at the time of paying the deposit, and always has been, willing to buy the property on the defendant's terms. If so he did not then, or at any time up to the trial of this action, communicate that fact to the defendants or to the plaintiff. On the contrary, he unsuccessfully endeavoured to enforce by action the contract entered into by the agent.

It is not enough for an agent to find a purchaser who is willing to buy on his principal's terms; he must communicate the fact that he has found such a purchaser to his principal and give him an opportunity of effecting a sale; otherwise the principal derives no benefit from the services of the agent. So far as the evidence discloses, the vendor had no reason to suppose that the suggested purchaser was willing to modify the terms of his offer communicated by the telegram quoted. The agent had no right to impose the terms tendered by his proposed purchaser, and he never got an offer from him to buy on any other terms.

On the ground, therefore, that the agent has failed to shew that he found a purchaser ready, willing and able to buy on the vendor's terms, the action must be dismissed with costs. Fiat for costs of examination for discovery.

*Action dismissed.*

**Annotation—Brokers—(§ II B—12) — Real estate agent's commission—Sufficiency of services.**

MAN.

Annotation

Commission of real estate agents.

*The General Principles Applicable to Commission on Sales.*

In order to found a legal claim for commission on a sale, there must not only be a casual, but also a contractual relation between the introduction of a purchaser and the ultimate transaction of sale: *Toulmin* v. *Millar*, 58 L.T. 96.

An agent who brings a person into relation with his principal as an intending purchaser, has done the most effective and possibly the most labourious and expensive part of his work, and if the principal takes advantage of that work and, behind the back of the agent and unknown to him, sells to the purchaser thus brought into touch with him, the agent's act may still well be the effective cause of the sale, though he advised the principal not to accept the terms offered by the purchaser: *per* Lord Atkinson in *Burchell* v. *Gowrie and Blockhouse Collieries*, [1910] A.C. 614, 80 L.J.P.C. 41, 103 L.T. 325, reversing the judgment of the Supreme Court of Canada (not reported) which affirmed the judgment of the Supreme Court of Nova Scotia, 43 N.S.R. 485, and restoring the judgment of the referee, who held the agent entitled to the full commission stipulated for in the agency agreement under the circumstances shewn.

An agent of an absent principal entered into negotiations with a person who was anxious to buy certain hotel property belonging to the principal, but no sale was completed at the time because the prospective purchaser found the cash payment required too much for him to handle. He then called the attention of two of his acquaintances to the desirability of the property and the three entered into an agreement among themselves that they would buy it. The amount of the cash payment, however, was still too large even to the three, and, the owner having returned, they carried on all further negotiations in regard to a sale with him personally without any further intervention on the part of the agent. The property was finally sold to the two acquaintances of the person with whom the agent negotiated on the same terms as it had been offered through the agent, excepting that the cash payment was smaller. It also appeared that the agent did not know the two purchasers until after the sale was completed. It was held that, though the person whose attention the agent had called to the land withdrew from the transaction and the sale was made to his associates without him, the agent was the efficient cause of the sale of the property, and that he was therefore entitled to recover a commission on such sale: *Stratton* v. *Vachon*, 44 Can. S.C.R. 395, reversing *Vachon* v. *Stratton*, *sub nom. Vachon* v. *Straton*, 3 Sask. L.R. 286.

Where the contract is that the agent is merely to find a purchaser willing to purchase and he fulfilled it by finding such person, the agent is entitled to his commission, though the sale fell through, if the cause of the failure was the fault of the principal and not of the agent: *per* Chief Justice Ritchie in *MacKenzie* v. *Champion*, 12 Can. S.C.R. 649.

Where an owner placed his farm in the hands of a real estate agent for sale at a fixed price under an agreement in writing whereby, in consideration of the agent registering the farm in a real estate register issued by him describing properties for sale, the owner agreed to pay him a commission of a certain per cent. on the price obtained "whenever

MAN. Annotation (*continued*)—Brokers—(§ II B—12)—Real estate agent's commission—Sufficiency of services.

Annotation

Commission of real estate agents.

a sale of the property or any part thereof takes place," to be paid when the farm was sold, either at the price fixed or at such other price that the owner might accept, and the agent did nothing apart from including the property in his register towards affecting a sale and the property was sold by the principal about a year after without the interposition of the agent, the agent was entitled to recover commission on the selling price of the farm at the rate stipulated in the agency agreement: *McCallum* v. *Williams*, 44 N.S.R. 508.

Where the agent introduced a purchaser with the result that a contract for the sale of land was executed which contract was replaced by a later one whereby the price of the land was reduced in consideration of an incumbrance thereon being paid by the purchaser who borrowed the money for the purpose and assigned his interest in the contract to the lender, and the owner afterwards sold the mining lands to a person buying for such lender, such sale was not a transaction independent of the contract of the purchaser introduced by the agent but was a continuance thereof and the agent was entitled to a commission on the full amount received for the land as finally sold: *Glendinning* v. *Cavanagh*, 40 Can. S.C.R. 414, affirming *Cavanagh* v. *Glendinning*, 10 O.W.R. 475 (Ont. C.A.).

Where the owner of farm lands authorises an agent to dispose of them and agrees to pay him the usual commission, and the latter succeeds in bringing about an agreement whereby the lands were taken as part payment in an exchange for city property, the owner of the farm lands is liable to the agent for commission on the sale: *Lewis* v. *Bucknam*, (Man.), 1 D.L.R. 277, 20 W.L.R. 4.

A principal is not liable to a real estate agent for commission who found a purchaser for the principal's property on terms that he had no authority to make and which the principal refused to accept, though the proposed purchaser testified at the trial of an action brought by the agent for his commission that he had been and was ready and willing to buy upon the principal's terms where he had not disclosed such fact until then to either the principal or the agent: *Haffner* v. *Grundy*, 4 D.L.R., p. 529, *supra* (Man.).

To entitle an agent to recover a commission he must find a purchaser ready and willing to complete the purchase on the terms fixed by his principal unless the principal agrees to a change. It appears, therefore, no commission is recoverable where the agent was instructed to sell the property on the terms of a specified sum in cash and the balance in one, two, three and four years and that as a result of his negotiations with an intending purchaser he gave him a receipt for a deposit paid in cash in which the same cash payment was provided for but which further stipulated that a certain mortgage would be assumed by the purchaser and that the balance should be made payable in one, two, three and four years in equal payments and that the purchaser should have the privilege to pay off at any time to which last additional term the owner refused to agree: *Egan* v. *Simon*, 19 Man. L.R. 131. Attention may here be called to the fact that in an action which finally reached the Supreme Court of Canada, *Gilmour* v. *Simon*, 37 Can. S.C.R. 422, affirming 15 Man. L.R. 205, and in which the judgment was delivered before *Egan* v. *Simon* was

**Annotation (*continued*)—Brokers—(§ II B—12)—Real estate agent's commission—Sufficiency of services.**

MAN.

Annotation

Commission of real estate agents.

heard by the Manitoba Court of Appeal, it was held that the additional term incorporated into the receipt given by the agent was unauthorized.

An agent is entitled to a commission for the sale of land where it appeared that his principal entered into negotiations looking to a purchase with a proposed purchaser introduced by the agent and while a purchase was not then made, subsequently and as a result of the negotiations the principal made to the prospective purchaser a lease for three years with a collateral agreement giving the lessee the option of purchasing within a year, which the latter exercised: *Morson* v. *Burnside*, 31 O.R. 38.

Under an agreement whereby an agent was to receive a certain sum of money as commission if he found for his principal a purchaser who would pay not less than a specified amount in cash, the agent, upon finding a purchaser who paid only half such sum down but who was accepted by the owner the latter promising after the sale to pay the agent the sum stipulated as commission in the agreement of agency, was permitted by the trial Judge to recover on the common counts a sum equal to the amount promised him as commission on the grounds (1) that he could not have recovered on the contract itself "because of his non-literal performance of its terms" and (2) that the owner had made the subsequent promise. On appeal by the principal, the Court of Queen's Bench (Ont.) affirmed the trial Judge's decision as to the amount due the agent though they declared that while they did not hold that the agent should recover the exact sum stipulated as commission in the agreement by which he was hired, he was entitled to some remuneration—how much it was unnecessary to say in view of the subsequent promise of the owner and of the fact that no objection was taken to the amount of damages below: *Wycott* v. *Campbell*, 31 U.C.Q.B. 534.

An agent is entitled, if there has been no revocation of his authority and his contract of employment specified no time limit, to his commission for a sale by his principal to a purchaser to whose notice the property was brought by the agent though the sale was made without the owner knowing that the purchaser came to him through his agent: *Rice* v. *Galbraith*, 2 D.L.R. 859, 26 O.L.R. 43, 3 O.W.N. 815, 21 O.W.R. 571.

Unless there is a specific agreement to the contrary, the putting of a house into the hands of an agent for sale does not prevent the owner of the house from selling it himself to a person not introduced by the agent, or from selling it through a different agent. Accordingly, where a house is put into the hands of an agent for sale, and the agent finds a person willing to purchase it, but who cannot purchase it because the house has already been sold by the owner, the agent is not entitled to commission: *Brinson* v. *Davies*, 105 L.T. 134, 27 Times L.R. 442, 55 Sol. Jo. 501.

Under an agreement entitling the agent to a commission when the property was "disposed of," the remedy of the agent upon the wrongful refusal of his principal to sell is not by action for the commission which he can earn only in the terms of the contract. *Per* Patterson, J., in *Adamson* v. *Yeager*, 10 O.A.R. 577, at p. 486. That, in the learned Justice's opinion, the proper remedy for the agent under such circumstances was an action for damages for refusing to sell, or an action on a *quantum meruit*, may be inferred from his adding to the above statement that the

MAN.

Annotation

Commission of real estate agents.

**Annotation (*continued*)—Brokers—(§ II B—12)—Real estate agent's commission—Sufficiency of services.**

damages in an action for refusing to sell or the amount to be recovered as a *quantum meruit*, would necessarily be governed by the amount of commission stipulated to be paid when the property was disposed of. Mr. Justice Osler in the same case also said that on the wrongful refusal of the owner to sell, the agent was not entitled to sue for or to recover the commission, *qua* commission on the terms of the agreement, though he added that in that case the measure of damages might well have been the full amount of the commission.

Where the authority of an agent employed to sell on commission is revoked by the principal before a sale has been effected, the right of the agent to remuneration for what he has done in endeavouring to effect a sale depends on the terms on which he was employed. Thus, where clerical agents employed by the defendant to sell an advowson upon a commission upon the purchase money when the contract was completed, agreed as the purchase money was likely to be large, to forego a claim of three guineas which they ordinarily made for entering such property on their books, and for the trouble of answering inquiries respecting it, are not entitled to recover anything upon the principal having afterwards sold the advowson himself, and having revoked the plaintiffs' authority to sell, the agents as they had not effected the sale, and there was no evidence of their having done more than was ordinarily covered by the charge of three guineas, which they had agreed to forego: *Simpson* v. *Lamb*, 17 C.B. 603, 25 L.J.C.P. 113, 2 Jur. (N.S.) 91, 4 W.R. 328.

A firm of real estate brokers is not entitled to a commission from a vendor for securing a purchaser for land, who was, without the fact being disclosed to the vendor, a member of such firm and bought the land for its benefit: *Edgar* v. *Caskey*, 4 D.L.R. 460 (Alta.).

*The Right to Commission as Affected by the Employment of Two or More Agents.*

Where an owner, dissatisfied with his agent's failure to sell, placed his property with other agents but did not withdraw it from the first agent and it was sold by one of the agents at the same price net to the owner as the price he offered to the first agent, such first agent is not entitled to a commission: *Johnson* v. *Appleton*, 11 B.C.R. 128.

Where the owner of land, being hard pressed by the mortgagees thereof, employed an agent to sell the land at a specified price and the agent failed to make a sale at such price to a person he was negotiating with, and such person, through his banker, afterwards got into communication with a real estate agent employed by the mortgagees and, as a result of the work of the mortgagees' agent in the matter, finally purchased the property at a much less price than that at which it was offered through the owner's agent, the mortgagees' agent and not the owner's agent brought about the sale and the owner's agent is not entitled to any commission, although the owner was chargeable with the commission payable to the mortgagees' agent: *Bridgman* v. *Hepburn*, 13 B.C.R. 389, affirmed 42 Can. S.C.R. 228.

Where an owner who had employed an agent to sell his land subsequently and without notice to the agent gave an option to another real estate agent known to him to be such, who had the property conveyed to a person originally found by the first agent and with whom he was

**Annotation (*continued*)—Brokers—(§ II B—12)—Real estate agent's commission—Sufficiency of services.**

MAN.

Annotation

Commission of real estate agents.

negotiating, the second agent having secured the purchaser not by reason of anything the first agent had done, the first agent is entitled to no commission in the absence of shewing any collusion on the part of the owner to deprive him of his commission, the owner believing at the time that the option holder was purchasing it himself: *White* v. *Maynard*, 15 B.C.R. 340.

An agent employed to sell at a specified price entered into negotiations with a prospective purchaser but nothing came of it. Subsequently the same person and the owner were brought together by another agent who had to conduct the further negotiations before the prospective purchaser agreed to buy at all. The property was finally sold to him at a price less than that offered through the first agent. The trial Court gave the agent half the amount agreed upon and on an appeal by the agent the Court of Queen's Bench refused to disturb the verdict so as to give him the full amount stipulated.

As the principal failed to appeal the question of the agent's right to recover anything at all was, of course, not decided: *Glines* v. *Cross*, 12 Man. L.R. 442.

An agent who actually sold the land in *Glines* v. *Cross*, 12 Man. L.R. 442, *supra*, had to sue for his commission and in the action he recovered the full amount claimed. On an appeal by the principal the full Court sustained the trial Judge's refusal of the owner's application for a new trial or to vary the judgment, relying on the fact that another real estate agent had recovered a verdict against him for half the usual amount the full Court declared that the fact of the recovery by another agent of the amount with respect to the same sale was *res inter alios acta* and not in itself material: *Douglas* v. *Cross*, 12 Man. L.R. 534.

A real estate agent who was not an exclusive agent for the sale of the property cannot recover a commission where the land was sold by the efforts of another agent though the first agent had introduced the property to the purchaser at an earlier date than the other agent: *Robins* v. *Hees*, 2 O.W.N. 1115, 19 O.W.R. 277. Mr. Justice Middleton in delivering the opinion of the Court said: "A fisherman who actually lands the fish is entitled to it, even though it was first allured by the bait of another."

A broker who introduced a purchaser is entitled to his commission even though the sale to such purchaser was effected wholly through another agent: *Osler* v. *Moore*, 8 B.C.R. 115.

An estate agent appointed at an annual salary with an additional commission upon the first year's rent for every house which he should let on the estate, is entitled to such commission for letting houses for his principal, though the evidence was that the agreement for the letting was entered into with another agent, where it appeared the tenants were introduced to him by the first agent: *Bray* v. *Chandler*, 18 C.B. 718.

Land agents were severally employed to sell an estate. A person called on one of the agents to inquire after another estate, and was told by him that it was not in the market, but that the estate above first mentioned was to be sold. The enquirer took from this agent particulars of the estate and afterwards meeting the other agent negotiated with him the terms of the purchase which was afterwards completed. The agent first approached brought an action for commission on the sale, payable

MAN.

Annotation

Commission of real estate agents.

**Annotation (*continued*)—Brokers—(§ II B—12)—Real estate agent's commission—Sufficiency of services.**

to the agent who found the purchaser. It was held (1) that the question for the jury was, whether they thought that, in fact, the plaintiff had secured the purchaser and (2) that if they thought he had, and gave their verdict for them, they were not bound to give him the full amount of the commission, though the fact of that commission being usually paid was some evidence to guide them in their decision: *Murray* v. *Currie*, 7 Car. & P. 584.

*The Right to Commission as Affected by the Taking of a Secret Profit by the Agent.*

Where the agent negotiated with a person who was anxious to buy but wanted time to arrange for funds and the agent gave him time upon his promise to pay the agent a certain sum of money and the sale was finally made to him, it was held in an action by the agent for his commission brought before he had received the money promised him by the purchaser that his consent to accept such sum from the purchaser was such a breach of his duty as agent for the vendor as to disentitle him to recover his commission: *Manitoba and North West Land Corporation* v. *Davidson*, 34 Can. S.C.R. 255, reversing *Davidson* v. *Manitoba North West Land Corporation*, 14 Man. L.R. 233. The language of Mr. Justice Nesbitt in delivering the opinion of the Court is such a clear and concise statement of the principles governing cases where the agent by some service to the purchaser against the interest of his principal attempts to obtain a secret profit on the sale as to merit quotation in full. "I think that the non-receipt of the money makes no difference; the bargain was that he should get the money and it is that which would affect the mind of Davidson (the agent); he expected to get the money at the time and the question is: Does such a transaction as this disentitle him to the payment of his commission assuming that he is otherwise entitled to such a commission? I think the test is: Has the plaintiff by making such an undisclosed bargain in relation to his contract of service put himself in such a position that he has a temptation not faithfully to perform his duty to his employer? If he has, then the very consideration for the payment for his services is swept away. I think that the making of such a bargain necessarily put Davidson in a position where it was to his interest that Grant should become the purchaser, in which case he would receive not only the commission but $500 commission as a secret profit. It put him in a position where he was getting pay for the very time which the company were agreeing to pay him for while securing the purchaser, and his duty as agent was to get the highest price possible for his employer; and it is perfectly evident from his own statement that Grant was a person who was willing to pay at least $500 more for the property and probably a considerable advance on that: *Manitoba and N. W. Land Corpn.* v. *Davidson*, 34 Can. S.C.R. 255."

Where a person knowing that another person was an agent for the sale of certain lands entered into an agreement with him for the purchase thereof on joint account in his own name, upon the understanding that they should each be owners of one-half the lands and share profits equally upon a re-sale and the agent transferred one-half his interest to a third person who gave valuable consideration therefor, with knowledge, how-

**Annotation (*continued*)—Brokers—(§ II B—12)—Real estate agent's commission—Sufficiency of services.**

MAN.

Annotation

Commission of real estate agents.

ever, at the time of his transferor's agency for the sale of the lands, and shortly after the conveyance of the land by the owner to the first party above mentioned they were re-sold to a fourth person at a large profit, the owner was allowed, in an action brought by him against the three after he had discovered the nature of the transaction, to recover the amount of the profits which they had realized upon the re-sale of the land made by the three together with the amount of the commission paid by him on the sale of the lands as shared in by each: *Pommerenke* v. *Bate*, 3 Sask. L.R. 51, *per* Johnstone, J. Attention should be called to the fact that this judgment was varied by the Supreme Court of Saskatchewan (*Pommerenke* v. *Bate*, 3 Sask. L.R. 417), in which it was held that the transferee of the agent was under no obligation to account for profits, he being a *bonâ fide* purchaser for valuable consideration and this latter judgment was affirmed by the Supreme Court of Canada *sub nom. Coy* v. *Pommerenke*, 44 Can. S.C.R. 543. The agent did not appeal and therefore as to him the trial Court's judgment remained in force.

It is well established that the acceptance of an agent of a secret commission from the other side disqualifies him from recovering any remuneration from his principal: *Miner* v. *Moyie*, 19 Man. L.R. 707.

The principal may in an action for that purpose recover back the commission which he has paid to the agent notwithstanding that he has already recovered from the agent the secret commission paid him by the purchaser for effecting the sale: *Andrews* v. *Ramsay*, [1903] 2 K.B. 635, 72 L.J.K.B. 865, 89 L.T. 450, 52 W.R. 126, 19 Times L.R. 620. Lord Chief Justice Alverstone said: "A principal is entitled to have an honest agent, and it is only the honest agent who is entitled to any commission. In my opinion, if an agent directly or indirectly colludes with the other side, and so acts in opposition to the interest of the principal, he is not entitled to any commission."

Attention may here be called to a case distinguishing *Andrews* v. *Ramsay*, [1903] 2 K.B. 635, *supra*, though not strictly in point in this note as it is concerned with the sale of goods, in which an auctioneer was held not to be disentitled to retain his commission under an agreement providing that in addition to a lump sum by way of commission he was to be paid all "out-of-pocket expenses" including the expenses of printing and advertising, where it appeared that in his account of such expenses to his principal he debited the latter with the gross amount of the printer's bill and of the cost of advertising in the newspapers though he had, in fact, without the principal then knowing it, received discounts both from the printers and the newspaper proprietors according to a general custom on the part of printers and newspaper proprietors to allow auctioneers a trade discount off their retail charges which discount they did not allow to the auctioneers' customers if they dealt with them directly, and where the auctioneer in omitting to disclose the fact of his discounts to his principal did so in the honest belief that he was ' wfully entitled under the custom to receive the discounts and retain them for his own use: *Hippisley* v. *Knee*, [1905] K.B. 1, 74 L.J.K.B. 68, 92 L.T. 20, 21 Times L.R. 5. Lord Chief Justice Alverstone declared that he was satisfied that there was no fraud on the part of the agent and that what was done by him was done under a mistaken notion as to what he was

MAN.

Annotation

Annotation (*continued*)—Brokers—(§ II B—12)—Real estate agent's commission—Sufficiency of services.

Commission of real estate agents.

entitled to do under the contract which was enough to differentiate the case of *Andrews* v. *Ramsay*, [1903] 2 K.B. 635, *supra*, where the Court was dealing with an agent who acted downright dishonestly. He added that he was not prepared to go to such a length as to hold the agent not entitled to receive any commission if he failed to account for a secret discount received even though that failure might be due to an honest mistake. "If the Court is satisfied that there has been no fraud or dishonesty upon the agent's part, I think that the receipt by him of a discount will not disentitle him to his commission unless the discount is in some way connected with the contract which the agent is employed to make or the duty which he is called upon to perform. In my opinion, the neglect by the defendants to account for the discounts in the present case is not sufficiently connected with the real subject-matter of their employment. If the discount had been received from the purchasers the case would have been covered by *Andrews* v. *Ramsay*, [1903] 2 K.B. 635, *supra*; but here it was received in respect of a purely incidental matter; it had nothing to do with the duty of selling. It cannot be suggested that the plaintiff got by one penny a lower price than he would otherwise have got."

In another case dealing with the sale of goods and therefore not strictly in point with this annotation it was held that where the agent in numerous instances did not forward the invoices to purchasers of the goods which were made out in the name of the customer but were sent to the agent, and forwarded invoices made in his own name as agent at an increase over the price set in the principal's invoice and retained for himself the excess in that price while crediting only the written price to the principal, such act was a dishonest one in each transaction and deprived the agent of any right to commission in such transactions but did not deprive him thereof in other sales by him where he honestly acted within the terms of the contract of agency and credited his principal with the full amount received by him from the purchaser: *Nitedals Tacadstikfabrik* v. *Bruster*, [1906] 2 Ch. 671, 75 L.J. Ch. 798.

An agent is not entitled to any remuneration in respect of a transaction in which he has been guilty of any misconduct or breach of faith towards his principal and therefore a recovery of commission will be denied a company in business as a real estate broker, where it appears that the owner of the property employed the company to sell the same, the listing thereof being done by a clerk, who introduced to the owner another clerk of the company, as a gentleman recently arrived from England and anxious to buy property; that in the negotiations that followed the owner set a certain price which the intending purchaser having been previously informed by his fellow-clerk that the property could be bought for a less sum, refused to pay, and that the other clerk without disclosing that he and his companion were in the agents' office and that the intending purchaser had seen the listing or had been told the minimum figure at which the owner would sell, took part in the discussion that was going on between the owner and "the gentleman from England," and acting as well for the seller as for the buyer, brought the parties together, with the result that the owner agreed to accept the minimum price, but afterwards

Annotation (*continued*)—Brokers—(§ II B—12)—Real estate agent's commission—Sufficiency of services.

MAN.

Annotation

Commission of real estate agents.

repudiated the contract: *Canadian Financiers, Ltd.* v. *Hong Wo* (B.C.), 1 D.L.R. 38.

To the same effect are *McLeod* v. *Higginbotham*, 18 W.L.R. 296 (B.C.); *Myerscough* v. *Merrill*, 12 O.W.R. 399; *Price* v. *Metropolitan House Investment and Agency Co.*, 25 Times L.R. 630 (C.A.).

Where a land agent in the course of his employment after negotiating with an intending purchaser effected a sale by having land of the purchaser taken in part satisfaction of his principal's price after the agent on his demand had been paid by the purchaser a commission for effecting such exchange, of which payment his principal was aware and made no objection to his retaining it and the principal afterwards negotiated with the agent for a settlement of his remuneration, the principal cannot afterward in an action by the agent for his commission set off the sum paid the agent by the purchaser: *Culverwell* v. *Campton*, 31 U.C.C.P. 342.

The owner of land who, before he closed the transaction, was informed by one of the intending purchasers that the agent he had employed to sell the same was to be paid by the purchasers a certain sum of money if the sale was completed, cannot, after he went on and effected the sale, recover the commission he paid the agent: *Webb* v. *McDermott*, 5 O.W.R. 566, affirming 3 O.W.R. 644, which reversed 3 O.W.R. 365.

*Cases in which the Right Commission was Upheld.*

An agent is entitled to his commission if he shews that in accordance with his contract he has obtained a purchaser ready and willing and able to buy on the terms offered who was accepted by the principal after the latter had succeeded in adding additional terms upon which he insisted where the sale finally fell through because of the sole fault of the principal: *Bagshewe* v. *Rowland*, 13 B.C.R. 262.

Where a person opened negotiations with an agent for an exchange of property of his, for property listed with the agent for sale or exchange, and before the deal was closed between the agent and the prospective purchaser the principal telephoned the agent asking if any disposition of his property had been effected and was replied to in the negative and then said that he withdrew the property, but at or about the same time he consummated a deal for the same property with the prospective purchaser upon negotiations made directly with the principal, the relationship of vendor and purchaser was held to have been brought about by the agent and the agent was therefore entitled to the commission: *Lalande* v. *Caravan*, 14 B.C.R. 298.

An agent is entitled to his commission where he introduced a purchaser who obtained from the principal an option which he finally allowed to lapse and a small portion of the property was afterwards sold to another person, the agent being paid a commission thereon and subsequently the option holder entered into negotiations with the owner without the intervention or knowledge of the agent, although the sale which resulted was made at a price less than the price offered through the agent: *Lee* v. *O'Brien*, 15 B.C.R. 326.

An agent employed to sell land at a net price to the owner introduced a purchaser to the owner whom he privately told the price at which he offered it, the price quoted being higher than the net price, and asked to

MAN.

Annotation

Commission of real estate agents.

**Annotation** (*continued*)—**Brokers—(§ II B—12)—Real estate agent's commission—Sufficiency of services.**

be protected in getting his commission to which the owner assented. Sometime after this interview, when the agent was not present, the purchaser asked the owner his price and the latter gave the same price as the price he had offered it to the agent and it was sold at that price to this purchaser. The agent was held to be entitled to recover as his commission the difference between the net price to the owner stipulated in the agreement of agency and the price at which the agent offered it to the purchaser: *Rowlands* v. *Langley*, 16 B.C.R. 72, 17 W.L.R. 443.

An agent is entitled to a commission where he produced a purchaser between whom and the owner it was agreed that upon the payment of a certain price, part of which was to be paid in cash, everything went with the property just as it was with the exception of certain personal property then designated and the purchaser afterwards got a certified cheque for the amount of the cash payment and was prepared to give the same to the owner until the latter expressed a desire to exclude other personal property from the sale which the purchaser would not accede to unless a reduction was made in the price of the property which the owner refused to accede to and the sale consequently fell through: *Cuthbert* v. *Campbell*, (B.C.), 12 W.L.R. 219.

An agent employed to sell lands at a specified price who found a purchaser willing to buy but at a much less price than the one specified, but who was nevertheless accepted by the owner who agreed to the reduction in the price, is entitled to his commission on the sale: *Wolf* v. *Tait*, 4 Man. L.R. 59.

An agent is entitled to a commission on the full price where having secured a purchaser ready, able and willing to complete the purchase, as the contract of agency called for, though no agreement of sale binding on the purchaser was entered into because the owner refused to execute an agreement unless it should provide for the forfeiture of the deposits paid at first by the purchaser if there should be default in carrying out the transaction and the purchaser would not consent to such a provision being inserted: *MacKenzie* v. *Champion*, 4 Man. L.R. 158, 12 Can. S.C.R. 649.

Persons whom the owner of land knew to be real estate agents called on the owner and ascertained through him that his house was for sale at a certain price and during the conversation nothing was said about the commission. Shortly afterwards the agents introduced a prospective purchaser who after inspecting the property authorized the agents to offer a sum less than that which was set on the house by the owner. When this offer was communicated to the owner he told the agents that he would not accept any less than the price he had stated and that he wanted that net, that is, clear of commission, and the agents tried to induce the prospective purchaser to buy on these terms but the latter afterwards dealt with the owner directly and bought the property at the exact price quoted to the agents. The agents were held entitled to recover the full amount of the usual commission on the price at which it was sold: *Aikens* v. *Allan*, 14 Man. L.R. 549.

After the agent had procured a purchaser ready and willing to carry out the purchase on terms satisfactory to the principal the proposed purchaser discovered that one of the walls of the building on the property

**Annotation (*continued*)—Brokers—(§ II B—12)—Real estate agent's commission—Sufficiency of services.**

MAN.

Annotation

Commission of real estate agents.

sightly overhung the adjoining lot and called on the owner to make good the title to such building. Being unable or unwilling to make good the defect in the title or to make satisfactory terms with the owner of the adjoining lot, the principal proposed to the purchaser that the agreement of sale should be cancelled and it was so done. The trial judge awarded compensation to the agent equivalent to the amount of the commission agreed on had the sale gone through. On appeal it was held that the agent had earned and was entitled to be paid a compensation for his services in finding a purchaser though he had not procured a purchaser to execute a binding agreement to purchase and that such recovery need not be the amount agreed on as commission but a compensation as on a *quantum meruit* or by way of damages, but that under the circumstances it was competent for the trial judge to award the sum he did: *Brydges* v. *Clement*, 14 Man. L.R. 588.

A person who was not known to the owner of the property to be a real estate agent, and who had no office as such, went to the owner and ascertaining that the property was for sale obtained the terms on which it would be sold. At a subsequent interview this person told the owner he had found a purchaser and in answer to a request by the owner gave the latter the name of the purchaser. The owner stated the terms as before but said he would require a larger cash payment than the agent had previously understood would be accepted. The agent then said that the purchaser would take the property on such terms and brought him to the owner. The purchaser then proposed that instead of the cash payment he should pay half thereof in cash and the other half in six months, the other payment to be as agreed on to which the owner acceded and the sale was carried out. The trial judge dismissed the action because there was a conflict of testimony as to whether the owner understood that the person who introduced the purchaser was working for a commission on the sale. On appeal the court, declaring itself to be in as good a position to judge of the facts as the trial Judge, held the person who introduced the purchaser to be entitled to the usual commission on the sale: *Wilkes* v. *Maxwell*, 14 Man. L.R. 599. Attention may be called to the following ground on which the Court of Appeal reviewed the evidence and decided that the right to maintain the action was established. "Where there are two persons of equal credibility and one states positively that a particular conversation took place while the other positively denies it, the proper conclusion is to find that the words were spoken and that the person who denies it has forgotten the circumstances."

A son of an owner resident in another country placed a farm in the hands of two different real estate agents for sale. One of the agents found a purchaser and informed the owner's son by letter, and the latter replied accepting the offer but asking the agent to call on the other agent and arrange regarding commission so that the writer of the letter would have to pay no more than one commission. The agent who found the purchaser did not communicate with the other agent but introduced his purchaser to the son's solicitor. The purchaser paid the solicitor a substantial sum to be applied on the purchase and was ready and willing to pay the balance on receipt of a transfer. In the meantime the other agent also made a sale of the farm at the same price as the first agent and this sale

MAN.

Annotation

Commission of real estate agents.

**Annotation (*continued*)—Brokers—(§ II B—12)—Real estate agent's commission—Sufficiency of services.**

was completed by the owner's son who paid such other agent the usual commission. It was held that the first agent was entitled to his commission as he had done all that was necessary to earn it and as the son held a power of attorney from his father to sell and convey the property he was personally liable therefor: *Bell* v. *Rokeby*, 15 Man. L.R. 327. (Dubuc, C.J., and Perdue, J.)

Agents were held to be entitled to one-half the commission they would have earned if they had affected a sale of the property where they introduced to the owner a probable purchaser who afterwards arranged with the owner an exchange of some property of his own for the principal's: *Thordarson* v. *Jones*, 17 Man. L.R. 295.

Under an agreement whereby the principal promised to pay his agent a commission "on the completion of such sale" and "on completion of the deal," the expressions quoted are to be construed to mean on the execution of a binding agreement of sale, and, upon the happening of that event, the agent is entitled to recover his commission even though the purchaser afterwards defaulted: *Haffner* v. *Cordingly*, 18 Man. L.R. 1.

The tenants of certain property not in the business of real estate agents having learned that the owner of the property was anxious to sell the same discussed the price and terms with the latter with the view of effecting a sale and as a result had on one occasion introduced to him a prospective purchaser when the owner agreed that if the sale went through the tenants should have a commission; but no general agency to sell was conferred upon them. A person passing by the property and thinking that it might be suitable for his purpose entered the tenants' place of business on it and inquired of one of them if the property was for sale and was told that it was, and this tenant telephoned the owner and told him he had a prospective purchaser and asked his best terms which the owner told him and agreed to pay the tenant a commission out of the price fixed. The tenant then quoted the price to the inquirer and sent him to the owner. The prospective purchaser met the owner upon the same evening and after some negotiations the sale was completed on the next day for a price somewhat less than that offered through the tenant. The purchaser did not mention the tenant's name to the owner and the owner testified that he did not connect the purchaser with his telephone conversation with the tenant. It was held that he was put upon inquiry when a prospective purchaser appeared a few hours after the conversation with the tenant; that he should have ascertained if such person was the one referred to by the tenant; and that upon the facts shewn he and his fellow-tenant were entitled to a commission on the price for which the property was sold: *Robertson* v. *Carstens*, 18 Man. L.R. 227.

An agent is entitled to a commission if he has found a purchaser ready, willing and able to carry out the purchase at the price set by the principal when employing the agent where the latter on obtaining a purchaser informed the principal and the principal then ignored the agent and sold the land to such purchaser at the price offered through the agent less the commission promised the agent: *Ross* v. *Matheson*, 18 Man. L.R. 350, 13 W.L.R. 490.

Owners of property which they wished to sell prepared a large number

MAN.

Annotation

Commission of real estate agents.

**Annotation** (*continued*)—**Brokers**—(§ II B—12)—**Real estate agent's commission—Sufficiency of services.**

of identical statements describing the same in detail and containing the price and terms on which they would sell and distributed the same to many real estate agents in the city where the owners had their office. One of the agents entered into an arrangement with a provincial officer, who was, of course, not in the business of a real estate agent, to assist him in finding a purchaser, and the agent gave the officer several copies of the statement before mentioned. The latter gave one to a person who called at his office for the purpose of getting information as to homesteads after convincing him that it was better to buy an improved farm and gave him a card of introduction to the owners of the property in question without indicating in any way that he was an agent for the sale thereof. The inquirer then went to the owners' office but did not there shew the card of introduction to the owners' manager. The manager asked him if he came from any real estate agent and he said "no," stating what he believed to be the truth. After this assurance the manager made an agreement of sale with him after having made a reduction in price to meet the purchaser's offer, for an amount slightly more than the regular commission would have been under the belief that no commission would be payable. It was held that the facts above shewn were such as to put the owners upon inquiry, and that their manager had failed to make sufficient inquiry and that it was by the instrumentality of the agent who gave the circular to the provincial officer that the purchaser was procured and consequently the agent was entitled to commission on the sale: *Hughes* v. *Houghton Land Co.*, 18 Man. L.R. 686.

An agreement between an agent of a vendor company and the company's manager for an equal division of the agent's commission upon the latter's sale of the company's real property, does not disqualify the agent from recovering his half of the commission from the company if the sale has been effected by him, as such an agreement could not create either in the agent or in the company's manager an interest in conflict with the interests of the owning company, although the fact that the agreement for division of the commission was not known to the directors of the company: *Miner* v. *Moyie*, 19 Man. L.R. 707, 10 W.L.R. 242.

An agent who has been promised a commission on the sale of land, if made within a limited time at a price and on terms stipulated, although he had not an exclusive agency, is entitled to payment *quantum meruit* for his expenditure of time and money paid for advertising which resulted in his finding within the time limited a purchaser for the property able and willing to carry out the purchase, although the agency was revoked before the proposing purchaser had actually bound himself to buy the property, in a case in which the principal, at the time of creating the agency, knew that the agent would, in reliance upon the terms of his employment, spend time and money in the hope of earning the commission agreed on, was given judgment for half the amount of the commission plaintiff would have earned if the sale had been carried out: *Aldous* v. *Grundy*, 21 Man. R. 559 (C.A.).

A person not usually engaged in the real estate was employed by the owner of land to sell or exchange the same for him, nothing being said as to the rate of compensation for his services and he went to a real estate agent and asked him to take the matter up and to endeavour to

MAN.

Annotation

Commission of real estate agents.

**Annotation (*continued*)—Brokers—(§ II B—12)—Real estate agent's commission—Sufficiency of services.**

make a deal, and he himself took no further part in the negotiations which followed. The real estate agent wrote to the owner and submitted some propositions to him. The latter knowing that the real estate agent had been brought into this transaction by the party he had employed, and regarding one of the propositions admitted favourably, referred the real estate agent to another agent in the same business and finally from the result of the two agents getting together the exchange of lands resulted. The person first employed by the owner was held to be the cause of bringing the parties together and was entitled to remuneration for his services: *Barteaux* v. *McLeod*, 19 W.L.R. 138 (Man.).

An agent employed to find a purchaser for property at a price named who finds a purchaser satisfactory to his principal and procures a binding contract to be entered into, is entitled to his commission although the sale does not go through owiag to the default of the buyer, especially where the principal signified in the written offer of the purchasers his acceptance thereof and added thereto an agreement to pay the agent his commission upon the purchase price: *Copeland* v. *Wedlock*, 6 O.W.R. 539.

Where the agent procured a purchaser able and willing to pay the price asked by the principal for his property and submitted a written offer to which the principal made no objection saying that he wanted to look into the matter and used the offer as a lever to move a prospective purchaser with whom he had already entered into negotiations to purchase the property at the same price as offered through the agent, in order to escape paying any commission, the agent is entitled to be awarded as damages for the breach of the implied agreement on the part of the principal to accept a purchaser, an amount equal to the commission which he was promised, the Court being of the opinion that it was immaterial, however the case be put, that is, whether the agent was entitled to a commission or only to a *quantum meruit* or to damages, he was entitled to receive the sum awarded: *Marriott* v. *Brennan*, 14 O.L.R. 508, 10 O.W.R. 159.

A person who knew the property in question went to agents employed by the owner to sell the same by reason of having seen a board on the premises with the agents' name on it offering the property for sale, but nothing was done, the agents not even getting an offer or attempting to get one, apparently because an offer had already been sent the owner which offer fell through. The land was finally sold by the owners to the person who saw the agents' board. The trial Court allowed a five per cent. commission on the price at which the property was sold, apparently upon the ground that that was the usual rate of commission. Upon an appeal to a Divisional Court Mr. Justice Britton, in delivering its judgment, declared that it seemed clear to him that upon the evidence the agents did not find and were not intrumental in finding a purchaser but that they were entitled to be paid something by their principals and the amount of the judgment was cut in two: *Waddington* v. *Humberstone*, 15 O.W.R. 824. It seems strange that if the agents neither found nor were instrumental in finding a purchaser they could recover a commission upon any principle.

A real estate agent is entitled to the commission agreed to be paid him though the sale was actually made through other agents where the pur-

**Annotation (*continued*)—Brokers—(§ II B—12)—Real estate agent's commission—Sufficiency of services.**

MAN.

Annotation

Commission of real estate agents.

chaser was first introduced by the agent and the continuity of the transaction was not broken. For example, where he took a prospective purchaser to inspect the property and informed the owner that he had done so and the prospective purchaser having become hostile to the agent would not deal with him and other real estate agents having got into communication with such prospective purchaser succeeded in affecting a sale, though not until they had furnished the owner with an agreement to accept a certain sum as commission for the sale much smaller than the owner agreed to pay the first agent, and to be responsible for any other agent claiming commission for the property: *Sager* v. *Sheffer*, 2 O.W.N. 671, 18 O.W.R. 485.

A real estate agent who has done all that is necessary in the securing of a purchaser on the terms and conditions imposed by the owner, the contract signed by the purchaser being in proper and intelligible terms, is entitled to his commission even though the purchaser refuses to carry out the contract: *Hunt* v. *Moore*, 2 O.W.N. 1017, 19 O.W.R. 73.

A real estate agent hearing that the Government of Canada wanted an armory site approached the owner of certain land and procured from him a document providing that he would at any time within 30 days accept a certain amount net for such land and the next day the agent finding that it was necessary that the owner himself offer an option to the government induced the owner to submit an option to the Government at an advance on the price fixed in the document aforesaid, which option stated no time for acceptance and which provided that all buildings were to be retained and removed by the owner on or before a specified date considerably more than 30 days from the date of the option to the agent and that the owner was to have free use of the land until that date. The Government finally accepted the option and purchased the property, but not until after the expiration of the 30 days and after the owner had notified the agent that he had cancelled the agreement which attempted cancellation took place also after the 30 days had elapsed. In an action by the agent for his commission the agreement was construed to mean that the owner of the land authorized the agent to sell the land at the price stipulated thereon within 30 days from the date thereof and that any sum over and above that price which the agent could get for the property would go to him as commission for making the sale. It was also held that the agent having procured by means of the option to the Government a customer who ultimately and within a reasonable time purchased the property, he secured a purchaser within 30 days as required by his agreement and, therefore, he was entitled to recovery for the difference between what the Government paid for the land and the price fixed in the agreement aforesaid: *Meikle* v. *McRae*, 3 O.W.N. 206, 20 O.W.R. 308.

Where an agent secured a purchaser who could not pay the agreed amount as deposit but who was accepted by the owner who signed an agreement with him to sell and received from him a smaller cash deposit upon an understanding with the agent that the payment of his commission should be postponed until the purchaser could get a loan to pay for the property or resell it, such agent, in the absence of an agreement to the contrary, was entitled to his commission though subsequently the purchaser failed to make any further payment than the cash deposit resulting in the

MAN.

Annotation

Commission of real estate agents.

**Annotation** (*continued*)—**Brokers—(§ II B—12)—Real estate agent's commission—Sufficiency of services.**

vendor cancelling the contract, basing the agent's right so to recover apparently upon the fact that the principal himself cancelled the agreement of sale thus putting it out of the purchaser's power to raise the means out of which the commission was to come: *McCallum* v. *Russell*, 2 Sask. L.R. 442.

An agent whose agency was not an exclusive one and who sold the land on terms to which the owners agreed and forwarded a deposit on such sale, stating that the balance of the purchase money would be forwarded in a few days, is entitled to his commission on the sale, though before the balance was forwarded the owners advised him that the land was no longer available and returned the deposit, it not being shewn that the inavailability of the land was due to it being previously sold by the owners or to any other cause: *Hammans* v. *McDonald*, 4 Sask. L.R. 320, 19 W.L.R. 741.

Real estate brokers employed to find purchasers who found persons willing and able to purchase upon terms varied from those proposed by the principal when the agents were employed, which terms were satisfactory to the owner and to which he offered no objection, are entitled to a compensation for their services though no sale was actually completed because of the refusal to do so on the part of the principal on the sole ground that the proposed purchasers were in the same business as himself: *Boyle* v. *Grassick*, 6 Terr. L.R. 232.

An agent who took a prospective purchaser to inspect the land and as a result of this inspection the purchaser went to the owner and entered into personal negotiations with him without any further act on the part of the agent, which negotiations resulted in the sale of the land, the agent is entitled to his commission as agreed even though the purchaser was not personally introduced to the vendor by the agent and though there was included in the sale some other property not listed with the agent: *Ings* v. *Ross*, 7 Terr. L.R. 70.

Certain house agents employed on commission if they found a purchaser, but to be paid one guinea only if the premises were sold "without their intervention," entered the particulars on their books and gave a few cards to view. A person who had observed on passing that the house was to be sold called at the agents' office and obtained a card to view the premises, the selling terms being written by their clerk on the back of the card. The prospective purchaser went to the house, but thinking the price too high he made no further communication with the agent. He subsequently, however, entered into negotiations with a friend of the owner and though the same were at first broken off, he renewed them and ultimately purchased the property at a much less sum than the price offered through the agents. It was held that there was sufficient evidence for a jury to find that the purchase of the premises had been accomplished through the agents' "intervention" and consequently they were entitled to the stipulated commission: *Mansell* v. *Clements*, L.R. 9 C.P. 139.

Where it appeared that the agent introduced a prospective purchaser to the owner who was then in insolvent circumstances, but no agreement could at that time be come to as to terms, and the owner a few days afterwards presented his own petition in bankruptcy, that further negotiations took place between the person so introduced and the trustee in bankruptcy

MAN.

Annotation

Commission of real estate agents.

**Annotation (*continued*)—Brokers—(§ II B—12)—Real estate agent's commission—Sufficiency of services.**

in respect of the property; and that a week afterwards, the purchase was completed, a sale of property is brought about in consequence of an introduction by the estate agent and is traceable thereto so as to entitle him to a commission: *Re Beale; Ex parte Durrant*, 5 Morrell's Bankruptcy Cases 37.

Five years after the owner of an estate had employed real estate brokers to sell it at a minimum price fixed at a specified sum, a certain person applied to the agents for information regarding another estate. In reply he was sent particulars not only of the property inquired about, but of others including the one first above mentioned, of which he thought well but considered the price too high, and negotiations ceased in that regard. Three years after, the same person applied to the same brokers for particulars regarding the same property and obtained them and was urged by the agents to make an offer for it, but he did not do so. Somewhat more than a year thereafter the same person inserted in a newspaper an advertisement for estates of the description he desired, and soon after he received from the owner of the property first mentioned a letter calling attention to it, on which negotiations followed between them, resulting in the sale of the property to such person at a price much less than the minimum price set by the owner when he employed the real estate brokers to sell it. In an action by the agents against the owner for commission, it was held that their exertions, as duly authorized agents of the seller, did to a material degree contribute to the sale of the estate to the purchaser, and, therefore, that they were entitled to a commission on the price at which it was sold: *Walker* v. *Fraser's Trustees*, [1910] Scot. L.R. 222.

An agreement with auctioneers provided that if the property should not be sold at auction but should be sold within, "say," two months afterwards, to a purchaser who has been found by means of the agents' advertisements or posters or introduction, then the agents were to receive half of the commission they would have received if the property had been sold at auction, and that if a sale should take place either before the sale under the hammer or before a specified date, the usual commission was to be paid to the agents, such commission to include all out-of-pocket expenses, and that if the property remained unsold at such date, then no charge of any description, whether for out-of-pocket expenses or services, was to be made by the agents. The agent's commission was held to be payable on the property being knocked down to a purchaser at auction, who signed a contract and paid a deposit, though subsequently the contract was rescinded by the vendor in consequence of a requisition being made by the purchaser which the vendor could not comply with: *Skinner* v. *Andrews*, 54 S.J. 360, 26 Times L.R. 340 (C.A.).

In an action for damages by a commission agent for wrongfully preventing him from earning his commission, the damages recoverable where nothing remained to be done by the commission agent to entitle him to his commission if the transaction had gone through, are the full amount of the commission which he would have earned: *Roberts* v. *Barnard*, 1 Cab. & E. 336.

An agent employed to find a purchaser for some land, at a commission on the purchase money if a sale was completed, is entitled upon his principal's refusal to complete the sale with a purchaser found by the agent, to recover on a *quantum meruit* for the work and labour done, as he had

MAN.

Annotation

Commission of real estate agents.

**Annotation (*continued*)—Brokers—(§ II B—12)—Real estate agent's commission—Sufficiency of services.**

performed his part of the contract, and the principal prevented its completion: *Prickett* v. *Badger*, 1 C.B.N.S. 96, 26 L.J.C.P. 33, 3 Jur. (N.S.) 66, 5 W.R. 117.

Where an agent instructed by his principal to find a purchaser for his house, found a purchaser who was accepted by the owner, and subsequent negotiations took place between the owner and the purchaser, but the purchase finally went off, the owner, having accepted the purchaser, is liable to the agent for commission on the purchase price: *Passingham* v. *King*, 14 Times L.R. 392 (C.A.).

When all the terms of an agreement are stated except the terms as to the time when it is to be carried out, and there is no express stipulation as to the time, then it is an implied term that the agreement is to be performed within a reasonable time; and, therefore, an agent is entitled to his commission, where instructed by his principal to find a purchaser for his house for a specified price, he found one on 16th January ready and willing to pay that sum, who required possession by March 15th, and the principal refused the offer on the ground that he could not give up possession so soon as 15th March, the jury finding that from 16th January to 15th March was a reasonable time: *Nosotti* v. *Auerbach*, 79 L.T. 413, 15 Times L.R. 41, affirmed 15 Times L.R. 140 (C.A.).

A jury is entitled to find that the ultimate sale was not due to any introduction of the agents whereby they could recover any commission, where it appears that the estate which the agents were employed to sell was divided into lots, some of which was purchased and upon the completion of that purchase the agents received their commission; that the owner then withdrew his authority to sell from the agents and the same purchaser subsequently bought the remainder from the owner by private contract: *Lumley* v. *Nicholson*, 34 W.R. 716.

Under an agreement that the agent's commission should become payable upon the adjustment of terms between the contracting parties in every instance in which any information had been derived at, or any particulars had been given by, or any communication whatsoever had been made from the agent's office, however and by whomsoever the negotiation might have been conducted and notwithstanding the business might have been subsequently taken off the books, or the negotiation might have been concluded in consequence of communications previously made from other agencies, or on information otherwise derived, or the principals might have made themselves liable to pay commission to other agents; and that no accommodation that might be afforded as to time of payment or advance should retard the payment of commission, the agent through whom a contract of sale was arranged and duly executed, on which a deposit was paid, the residue of the purchase money being payable on a later specified date, is entitled to his commission, at all events on the later date, although the balance of the purchase price was not, for some unexplained reason, then paid: *Lara* v. *Hill*, 15 C.B. (N.S.) 45.

Under an agreement an auctioneer and estate agent was to receive a commission if an estate should be sold, and, if not sold, he was to be paid a specified sum as a compensation for his trouble and expense. Where the agent after failure to sell on putting the property up at auction, was asked

MAN.

Annotation

Commission of real estate agents.

**Annotation (*continued*)—Brokers—(§ II B—12)—Real estate agent's commission—Sufficiency of services.**

by a person attending the sale for the name of the owner of the property and referred him to his principal; and ultimately that person without any further intervention of the agent, became the purchaser, the sale was effected through the means of the agent and he was entitled to the stipulated commission: *Green* v. *Bartlett*, 14 C.B. (N.S.) 681, 32 L.J.C.P. 261, 8 L.T. 503, 11 W.R. 834.

The plaintiffs, who were auctioneers and land agents, wrote to the defendant, who was also an auctioneer and land agent, that they were acting for a certain person in seeking a house in their neighbourhood, asking if he had any house on his books that would be suitable, and adding that they presumed the defendant would divide commission with the plaintiffs. The defendant replied giving particulars of a house and adding that in the event of business ensuing he would be pleased to share commission with the plaintiffs. Negotiations for that house fell through, but afterwards negotiations were entered into between such prospective purchaser and the defendant on behalf of the owner of another house, and these negotiations resulted in a contract for the sale of such house. The contract was signed by the defendant purporting to act for the owner, but in an action for specific performance the owner pleaded that the defendant had no authority to make the contract and the action was abandoned. The defendant then sued the owner for his commission and that action was settled, the owner paying the amount claimed. It was held that the plaintiffs were entitled to half the commission so recovered by the defendant from the owner: *Bell* v. *Carter*, 16 Times L.R. 240.

In the following additional cases the agents were allowed to recover their commission: *Duck* v. *Daniels*, 7 W.L.R. 770 (B.C.); *Buckworth* v. *Nelson*, 8 W.L.R. 43, 9 W.L.R. 490 (B.C.); *Cunningham* v. *Hall*, 17 W.L.R. 497 (B.C.); *Schuchard* v. *Drinkle*, 1 Sask. L.R. 16; *Gartney* v. *Oleson*, 3 W.L.R. 80 (Sask.); *Monsees* v. *Tait*, 4 W.L.R. 322 (Sask.); *Scott* v. *Benjamin*, 2 W.L.R. 528 (N.W.T.).

*Total or Partial Failure of Claim to Compensation.*

An agent taking upon himself a position incompatible with his duty to his principal, is not entitled to be paid for his services, and, therefore, where an owner of land, by his single writing, authorized either one of two agents to sell or exchange his land and in the writing stipulated to pay a commission to the one affecting the sale or exchange, no commission is recoverable by one of the agents for affecting an exchange of the land of his principal for land belonging to the other agent, especially where the evidence shewed that the agents were to divide the commission between them: *Onsun* v. *Hunt*, 2 Alta. L.R. 480.

An agreement was entered into by an owner of land and a real estate agent whereby the owner agreed to pay the agent a specified sum as a commission payable by instalments, the dates of the payment thereof being contemporaneous with the dates agreed upon by the owner and the purchaser for the payment of the instalments of the purchase money, and in which it was also provided that the commission should be paid only in case the owner received the payments from the purchasers due under the contract of sale. The agent received his proportion of all the money received by the owner under the agreement with the purchaser up to the

MAN.

Annotation

Commission of real estate agents.

**Annotation (*continued*)—Brokers—(§ II B—12)—Real estate agent's commission—Sufficiency of services.**

time at which the purchaser defaulted. Upon the default, it was agreed between the purchaser and the owner that the agreement for sale should be cancelled and that the money that the purchaser had paid should be forfeited to the owner. The agent was held to be entitled to no further commission though such purchaser some months after the cancellation of the agreement of sale bought the land, which was the subject of such agreement, together with other lands, upon the refusal of the owner to sell him the other lands unless he also bought the lands covered by the first agreement of sale: *Hammer* v. *Bullock*, 14 W.L.R. 652 (Alta.).

Where an agent is employed by the owner to sell land at a commission, and himself becomes the purchaser he is not entitled to remuneration: *Calgary Realty Co.* v. *Reid*, 19 W.L.R. 649 (Alta.).

An agent for the sale of certain mineral claims procured a person to take an option to purchase the same before a certain day, which document provided that the holder thereof should pay the owners a certain sum in cash and that, if he should on or before a certain date pay to them a further sum, the period of the option would be extended to a later date and that the option might be exercised at any time up to such date by a written notice and by the payment of a further sum on or before that date, whereupon the agreement should cease to be an option and become a contract of purchase and sale, in which event the sums aforesaid if paid were to be credited on the purchase price. After this option was obtained the agent drew up a written agreement to be signed by him and the owners stipulating that the agent's commission should be a certain per cent. on all instalments or payments made to the owner under the option agreement, which the owners refused to sign as offered them because it called for commissions under any agreement which might thereafter be substituted by the holder of the option or his assigns, and only signed the agreement after such clause was struck out of the agreement. The first two payments required by the option were made by the holder thereof and the agent received his stipulated commission on these sums. The holder of the option made no further payment and later informed the owners that he could not carry out the option at all and finally threw it up altogether. Afterwards he entered into new negotiations with the owners which culminated in a new agreement between the latter and an associate of the original holder of the option named by him at the suggestion of the owners after they declined to enter into a new agreement with him because they were afraid they would get into a dispute with the agent about his commission. This agreement stipulated that the owners were to be paid for the mineral claims by the once holder of the option and his associates the original purchase price stipulated for in the option aforesaid, a portion in cash, a part in shares of a company to be formed, another part by giving credit for the sums paid under the option and the balance in promissory notes. It was held in an action by the agent for the alleged balance of his commission that the new agreement was not such a continuation of the old option as to give him a right to a commission at the rate stipulated in the option on the whole purchase price and that he was not entitled to anything more than the commission that he received on the payments paid under the option as aforesaid: *Beveridge* v. *Awaya Ikeda & Co.*, 16 B.C.R. 474, 17 W.L.R. 674.

MAN.

Annotation

Commission of real estate agents.

Annotation (*continued*)—Brokers—(§ II B—12)—Real estate agent's commission—Sufficiency of services.

A real estate exchange was engaged in the business of obtaining the listing of properties from their owners for sale upon commission and while it did not make the sale itself it published lists which were sent to the real estate brokers subscribing thereto from day to day and any alterations in terms or otherwise or withdrawals or sales were noted on these lists against the respective property. For this information the subscribers paid and the first one of them obtaining a purchaser for property so listed in making a deposit with the exchange was to have a commission and was given a receipt for the deposit with an order of the vendor for the commission. A subscriber to the exchange received a list containing, among others, a certain piece of property, and sometime in the month following the first publication the same property appeared in the list with a statement of a reduction in the price, and four months thereafter the subscriber, because of the time that had elapsed since the property had first appeared in the lists made inquiry of the exchange as to whether the property was "still good," to which he received the answer: "Yes, it has not been withdrawn." On the strength of this, the subscriber proceeded to advertise the property and made the sale on which he took a deposit which he handed over to the exchange and obtained from it a receipt and an order on the owner for the amount of the subscriber's commission. When the subscriber went to the owner to complete the deal with the purchaser and to get his commission, he was informed that the owner had sold the property herself to another purchaser some months before. The subscriber then brought an action against the owner for his commission and alternatively against the listing exchange for a breach of warranty for authority to list the property. The trial Judge found that there was no such listing as claimed by the exchange, but that they had received the listing as a genuine one and had acted *bonâ fide* in so holding it out to their subscribers and dismissed the action against the owner. He also held, however, that the good faith of the real estate exchange did not relieve it from liability to the subscribers for the misinformation contained therein and that the measure of damages was the commission the subscriber would have earned if he had been able to complete the sale to the purchaser: *Austin* v. *Real Estate Exchange*, 2 D.L.R. 324, 20 W.L.R. 921 (B.C.).

A prospective purchaser made an offer to the sub-agent of the owner's agent to purchase certain lands on the terms fixed by the owner, which, however, contained a further statement that if not accepted before a certain time on the third day after the date of the offer the offer would be withdrawn. The sub-agent at once wrote to the agent informing him of the offer and its condition and urging haste in communicating it to the owner, but without disclosing the name of the purchaser. The agent received the letter on the next day after the offer was made and made every effort to induce the owner who lived in another place to accept the offer, informing him fully of its terms and conditions, but not, of course, giving the name of the purchaser as he did not then know it. The owner wrote by first mail to his solicitor in the city where the agent lived instructing him to see the agent and make inquiries and communicate the result by telephone in the evening of the day before the offer expired. The solicitor met the agent in the afternoon of such day and ascertained all particulars, including the name of the purchaser and reported to the

MAN. Annotation (*continued*)—Brokers—(§ II B—12)—Real estate agent's commission—Sufficiency of services.

Annotation

Commission of real estate agents.

owner that evening and was instructed by him to accept the offer, but through some mischance the agent was not informed of this in time to allow him to notify the purchaser of the acceptance before the hour on which the offer expired and the offer was withdrawn on that hour. It was held that the agent was not entitled to recover any commission: *Rogers* v. *Braun*, 16 Man. L.R. 580.

Agents were not permitted to recover either a commission on a sale or anything for their services by way of *quantum meruit* where it appeared that they mentioned the property to one who thereafter negotiated with the owner for the purchase of the property and who concealed from him the fact that the agents had sent him and the owner without any knowledge of the agent's intervention or of facts to put him on his inquiry as to whether the agent had sent such person to him, sold the property to such person on terms less advantageous to the owner than those contemplated in the agency agreement: *Locators* v. *Clough*, 17 Man. L.R. 659.

Where a director of a company in conversation with a real estate agent assured him that if he would procure a purchaser for certain property owned by the company that he, the director, felt sure the company would quote the price at a certain figure and in the event of a sale would pay the agent a specified sum as a commission to be substracted from the purchase price, but that any abatement of the price below a certain figure was to be borne by the agent, the company is not liable to the agent for a commission or for the value of his services as on a *quantum meruit* on the sale of the property after such director had become president of the company, though made to a purchaser who had been introduced to the property by the agent for the exact sum from which, by the statement of the director, any abatement was to be borne by the agent, in the absence of evidence that the director had any authority from the company to sell the property or to employ an agent to find a purchaser: *Bent* v. *Arrowhead*, 18 Man. R. 632. To the same effect is *Haffner* v. *Northern Trusts Co.*, 14 W.L.R. 403 (Man.), where the agent dealt with a clerk of the defendant company.

It is part of the duty of an agent to let his principal know before the latter has agreed to sell, that the purchaser was procured through the agent's instrumentality. That is part of his contract with the vendor, and in order to recover in an action for commission the onus is upon the agent to shew that the vendor knew or, had he made proper inquiries, would have known that the purchaser had been sent by the agent: *Per* Mathers, J., *Hughes* v. *Houghton Land Co.*, 18 Man. L.R. 686.

An agent who had been given the exclusive sale of real estate for a limited period on terms of being paid a commission in case of sale is entitled to substantial damages upon a revocation of his authority, if he has, within the time limited, found a purchaser for the property as the result of special efforts and the expenditure of money in advertising and otherwise which the principal knew or had reason to believe the agent would make and incur to find a purchaser: *Aldous* v. *Swanson*, 20 Man. L.R. 101.

Real estate agents undertook to sub-divide certain land for the owner and to sell it which gave the agents a certain "per cent. commission for making sales, drawing of agreement, making all collections and generally

MAN.

Annotation

Commission of real estate agents.

Annotation (*continued*)—Brokers—(§ II B—12)—Real estate agent's commission—Sufficiency of services.

looking after the property." It appeared that they made no sales or no collections unless sums paid by applicants (who were not, however, legally bound to any purchase) secured by them could be treated as such, and that the owner had cancelled the contract under a right reserved so to do. It was held, that under the agreement there must be an actual sale to entitle the agents to the commission agreed upon, though they are entitled to be paid, as upon a *quantum meruit* for their actual services and their expenses in connection with the property: *McMillan* v. *Barratt*, 16 W.L.R. 209 (Man.).

Where an agent failed to make any sale or to find any purchaser ready and willing to buy before the time his contract for agency expired, though he had attempted to form a military club to which, when organized, he hoped to sell the property for the purpose of a club house, which idea was abandoned apparently because it was to be a mixed club of military men and civilians and this was distasteful to the officers of the various military corps and the officers of a certain new regiment to be afterwards formed in the city where the property was, some of them having been, apparently, among the people approached by the agent, decided three days before the expiration of the agency to form a military institute which would have some of the characteristics of a club and at the same time to carry on certain educational work, and a committee was appointed to look for suitable property, and this committee inspected several properties that were offered them, including the one in question, which they knew from previous interviews was for sale, and liking it best requested one of their number to see the owner and get his price, which he did, after the expiration of the agent's agreement, and upon incorporation of the institute a binding agreement was entered into by it to buy such property at a price less than that offered through the agent, the agent, under the circumstances shewn, did not perform his contract and, therefore, could not recover any commission: *Counsell* v. *Devine*, 16 W.L.R. 675 (Man.).

A real estate agent who had been attempting to sell a certain tract of land for the owner, and who afterwards took from the latter an option for its purchase made in his own favour, which contained no stipulation that if the agent produced another purchaser to take his place under the instrument the agent was to have a commission for the sale of the land to the substitute, and there was no other contemporaneous agreement to that effect, cannot claim any commission after the transfer of the property to a new purchaser, especially where it is shewn that the owner, upon being so requested, refused to stipulate in his contract of sale with the substituted purchaser that the agent should have a commission, and the latter then abandoned his claim rather than have the sale fall through: *Nixon* v. *Dowdle* (*No.* 2), 2 D.L.R. 397 (Man.), 20 W.L.R. 749, reversing *Nixon* v. *Dowdle*, 1 D.L.R. 93, 19 W.L.R. 775.

Where an agreement was entered into between the owners of a mining property and another person whereby it was provided that the latter party had the option to purchase the mine for himself for a specified sum and also that he was to be remunerated with a specified sum as agent for the introduction of a purchaser who would purchase at the figure named in the option and that if it be found necessary to reduce the price to get a purchaser he was to have, after the sale was affected, a commission at a cer-

MAN.

Annotation

Commission of real estate agents.

Annotation (*continued*)—Brokers—(§ II B—12)—Real estate agent's commission—Sufficiency of services.

tain per cent. and before the expiration of this agreement the second party wrote the owner that he had failed to bring about a sale of the property and that he had induced a person to join him in purchasing it and made a cash offer payable in thirty days, saying, among other things: "I am now a buyer instead of a seller," which offer was not carried into effect, the relation established between the agent and the owner under the first agreement was practically that of principal and agent and was terminated when the agent made his offer of purchase, and he was, therefore, estopped from claiming any remuneration from the owners on any contract of sale subsequently made by them with a company which included the associate of the agent on whose behalf and his own the agent had offered to purchase: *Fleming* v. *Withrow*, 38 N.S.R. 492.

An agreement for the agency for the sale of land in which no time limit was set for its continuance must be construed as only to be for a reasonable and not for an indefinite time and in deciding what was a reasonable time, verbal testimony as to the time spoken of by the parties when the agreement was entered into as being two years might be properly considered. Therefore, under such an agreement the agent is not entitled to the commission stipulated for therein where he did not procure an offer to purchase it until three years after the date of the agreement when, through one of the advertisements that the land was for sale which he had continued to publish during these three years apparently without the knowledge of the owners he procured an intending purchaser who went to see the land and was informed by its owner whom he then saw that the agent was not at that time authorized to sell it and the purchaser in spite of this information later made an offer through the agent at a sum in cash equal in amount to the amount for a time sale stipulated in the agreement of agency, which offer the owner refused to accept: *Adamson* v. *Yeager*, 10 O.A.R. 477.

It has been declared to be the law that the agent's introduction of a person who does not in fact purchase the land and who himself afterwards procures a purchaser, though it may be a *causa sine qua non*, is not the *causa causans* of the sale and the agent is not entitled to his commission. This proposition was applied in an action to recover a commission where it appeared that the defendant, endeavouring to sell certain lands for the owners thereof, agreed with two of the plaintiffs that he would pay them a commission; that these two plaintiffs associated the third plaintiff with them in the matter, promising him one-half of the commission if he should procure a purchaser; that he introduced a person interested in a syndicate which was endeavouring to purchase lands in that locality to the defendant as a prospective purchaser and that such party himself after the syndicate refused to purchase, later procured a purchaser and was paid by the defendant a commission on the sale. The Court, after distinguishing *Stratton* v. *Vachon*, 44 Can. S.C.R. 395, *supra*, declared that the sale was a new and distinct transaction; that the plaintiff's acts were not the effective cause of the sale which actually took place; and that when the member of the syndicate secured a purchaser not interested in the syndicate, it was a distinct act intervening between the introduction of such member and the sale, was the real *causa causans* of the purchase and was a new transaction attributable to the member's finding a purchaser and not to the

Annotation (*continued*)—Brokers—(§ II B—12)—Real estate agent's commission—Sufficiency of services.

MAN.

Annotation

Commission of real estate agents.

original introduction, though without the latter a sale would not have occurred: *Imrie* v. *Wilson*, 3 D.L.R. 826, 3 O.W.N. 1145, 21 O.W.R. 964.

Where a real estate agent procured a written offer from a person to purchase land owned by the vendor, which the latter accepted, and the only agreement shewn as to the payment of the plaintiff's commission was a stipulation in such offer that it was to be paid out of the purchase money, the agent is not entitled, upon the refusal of the purchaser to complete the purchase, to recover a commission from the vendor, unless the latter is at fault in not carrying out the purchase: *Robinson* v. *Reynolds*, 4 D.L.R. 63, 3 O.W.N. 1262, 22 O.W.R. 124.

Where an agent promised by his principal a commission providing he sold the property for a specified sum introduced to the principal a third party capable of buying on his own account, to whom the owner gave an option and the option holder offered the property to certain persons at a price above the price at which it was offered to him and they refused to buy and finally, being unable to find any purchasers, he threw the matter up and told the owners that he was unable to do anything with the option and that they were free to deal with the property without reference to him, and he informed the agent who introduced him that he had done so, such agent is entitled to no commission on a subsequent sale by the owners for a price less than that offered through the agent after the expiration of the option to the same persons to whom the holder of the option had offered the property and whose name was given to the owners by him after the expiration of the same: *Pardee* v. *Ferguson*, 5 O.W.R. 698, affirmed, 6 O.W.R. 810.

Where a person entered into a contract to purchase certain property with an implied agreement on the part of the owner that he would be paid commission if he secured some one else to buy, and he endeavoured in vain to get up a syndicate to buy the property and he failed to effect a sale through anybody else, and one of his quondam associates afterwards got up a syndicate of which the person first mentioned was not a member and went to the owner, and upon being informed that the property was still in the market brought about a sale to another party with whom, however, the person effecting the sale and third party were equally interested in the transaction and the owner paid the person who first approached him a commission as an ostensible agent by whom the sale was effected, the party who entered into the first contract of sale has no claim against the owner for any commission: *Murray* v. *Craig*, 10 O.W.R. 888, affirmed without written opinion, 11 O.W.R. 265.

Under an agency agreement which was not an exclusive one, the agent cannot recover a commission for a sale by him to a purchaser whom the agent did not even know until after the sale of the property and with whom the principal was not acquainted until he entered into negotiations with him after the agency agreement had been entered into, though the purchaser's attention had been called to the property by a neighbour of the owner who had seen an advertisement issued by the agent that the property was for sale: *Willis* v. *Colville*, 14 O.W.R. 1019.

Where an agent was informed by his principal that a third party had been inquiring about the land with a view to purchase resulting in the agent opening negotiations with such third party but either from negligence or as a tactical proceeding on his part to make the prospective purchaser "sweat" as he put it, he failed to sell and the principal after

MAN.

Annotation

Commission of real estate agents.

**Annotation** (*continued*)—**Brokers—(§ II B—12)—Real estate agent's commission—Sufficiency of services.**

trying to get the agent to attend to the matter opened negotiations directly with the third person and effected a sale at practically the same price as that originally offered through the agent, the agent did not under such circumstances find the purchaser or assist to affect a sale so as to entitle him to recover any commission: *Thompson* v. *Milling*, 1 Sask. L.R. 150.

Where the owner of land instructed his agent by letter to sell at a certain price net to him and with the letter included a document stating the terms of the sale and fixing the price at a higher rate than his net price to the agent and he subsequently sold the land to a purchaser found by himself at a price less than the net price to the agent and all that the agent did was to shew the property to the son of the purchaser at one time and the purchaser himself at another time upon their coming down to see the property, and on the last occasion to wire his principal to come and close the contract which was answered by a telegram from an employee of the principal that the principal was not at home but was coming that night and to have the purchaser come to the principal's place of residence to close the deal which the agent did not do, the agent's employment was of a special character, namely, to sell the land at a specified price, which he failed to do, and he was not, under the circumstances shewn, instrumental in bringing the parties together and therefore he was not entitled to recover anything at all either by way of commission or on a *quantum meruit*: *Munro* v. *Beischel*, 1 Sask. L.R. 238.

Where a broker was instructed to procure a purchaser for land who was to deposit with a certain bank a specified portion of the purchase price pending the arrival of a clear title on the contract, and the purchaser deposited the sum required in the bank but left the same to his own credit without appropriating it to the purchase as the terms of the broker's employment required, the broker was not entitled on the refusal by the vendor to complete the sale, to recover a commission for his services in procuring a purchaser: *Reser* v. *Yates*, 41 Can. S.C.R. 577, reversing *Yates* v. *Reser*, 1 Sask. L.R. 247.

An agent is not entitled to a commission on the sale of certain hotel property where it appears that the owner agreed with him to have the only right and privilege to sell the same until a certain date and to pay him a specified commission and at the time the agreement was entered into the owner told the agent of a certain person who would probably purchase and the agent saw such person in regard to buying the property but nothing came of this meeting then, though the property was, after the date set for the expiration of the agreement with the agent, sold by the owner himself to the person so approached by the agent at a price a little less than that at which it was listed with the agent: *Blackstock* v. *Bell* (Sask.), 16 W.L.R. 363, affirming *Blackstock* v. *Bell*, 3 Sask. L.R. 181, 14 W.L.R. 519.

The owner of land failing to come to terms with a prospective purchaser, subsequently listed the land for sale with the defendant company. The plaintiff having learned that the party with whom the owner had negotiated still wished to buy the land, secured an agreement from the defendant company, that in the event of his making the sale of the land he would be paid one-half the commission, and, without disclosing the source thereof, submitted various offers to the owner on the part of the

**Annotation** (*continued*)—**Brokers—(§ II B—12)—Real estate agent's commission—Sufficiency of services.**

MAN.

Annotation

Commission of real estate agents.

same party, all of which were refused. Afterwards the owner met this party again and without knowing that the offers aforesaid came from him, made the sale of the land on terms similar to those of the last offer made through the plaintiff and refused. In an action brought by the plaintiff for his commission, it was held, that neither he nor the defendant company was an efficient cause of the sale and that therefore he could not recover any commission: *Dicker* v. *Willoughby Sumner Co.*, 4 Sask. L.R. 251, 19 W.L.R. 142.

An agent whose agency was not an exclusive one, is not entitled to any commission on the sale of the land on the terms fixed by the owners where, upon forwarding a cash payment made by the purchaser thereon, the same was returned by the owner with the information that the land had already been sold: *Hammans* v. *McDonald*, 4 Sask. L.R. 320, 19 W.L.R. 741.

Where an agent introduced to his principal a person with whom the principal finally made an agreement by which he was to take in exchange for the land which he desired to sell certain lands of the other person which were represented by the agent as being worth a certain sum per acre and the principal, upon an inspection of the lands to which the contract entitled him, found that their value had been grossly misrepresented by his agent and that they were worth only about one-fourth the price the latter placed upon them, repudiated the contract and revoked the agent's authority, the agent is not entitled to recover any commission though the owner subsequently sold the land for a different consideration to the person introduced by the agent: *Northern Colonization Agency* v. *McIntyre*, 4 Sask. L.R. 340, 17 W.L.R. 270.

A broker obtaining an option in his own name and therefore putting himself in the relation of a purchaser as regards the owner of the land, is not entitled to claim commission, in the absence of a special agreement to that effect, on a sale afterwards made without reference to the option by the owner to a prospective purchaser whom the broker had introduced within the time limit of the option, the option not having been taken up by the broker: *Sutherland* v. *Rhinhart*, 2 D.L.R. 204 (Sask.), 20 W.L.R. 584, affirming *Sutherland* v. *Rhinhart*, 19 W.L.R. 819.

Where the owner refused to give an agent an exclusive right to sell a piece of property for her but on his representations that she would still have the right to sell it herself without becoming liable to him for commission she was induced to sign a written agreement prepared by him giving him for thirty days the exclusive right of selling the property at an agreed commission, the agent could not upon the owner making a sale of the property herself without any assistance from him, recover such agreed commission though he advertised the property in a newspaper: *Cadwell* v. *Stephenson*, 3 D.L.R. 759 (Sask.).

Where a real estate broker having an exclusive right to sell property who did nothing towards making a sale but to advertise it in a newspaper before the owner effected a sale herself without his intervention, such sale revoked the agency and the agent is entitled to recover on a *quantum meruit* only for the services actually performed by him and not the commission if he made the sale: *Cadwell* v. *Stephenson*, 3 D.L.R. 759 (Sask.).

A surveyor was retained by the defendant to negotiate with the commissioners of woods and forests for the sale to them of certain premises

MAN.

Annotation

Commission of real estate agents.

**Annotation (*continued*)—Brokers—(§ II B—12)—Real estate agent's commission—Sufficiency of services.**

of the defendant, for which he was to receive a commission of £2 per cent. "on the sum which might be obtained either by private treaty, arbitration, or trial by jury." Private treaty proving unavailing, a jury was empannelled, by whom the value of the property was assessed at a certain price; but, in consequence of a defect in the defendant's title, arising out of an annuity charged upon part of the premises, which the commissioners required the defendant to buy off, the money was not paid to him, but was placed in the hands of the accountant-general to await the adjustment of the difference. The surveyor was not previously aware of the existence of this charge. It was held that he was, nevertheless, not entitled to his commission until the money awarded was actually received by the defendant: *Bull* v. *Price*, 5 M. & P. 2, 7 Bing. 237, 9 L.J. (O.S.) C.P. 78.

Under an agreement whereby the owner of an advowson contracted to pay his agent, if the latter brought to pass an exchange thereof for another advowson, a specified sum for commission, one-third down and the remaining two-thirds when the abstract of conveyance was drawn out, the agent cannot recover the two-thirds of the commission remaining after the down payment of the other third, where all that he did towards an exchange was the delivery of his principal's abstract of title to the other party who declined to proceed any further in the matter, upon the ground that the event—the drawing of the abstract of conveyance—had not happened, for which the commission was to be paid: *Alder* v. *Boyle*, 4 C.B. 635, 16 L.J.C.P. 232, 11 Jur. 591.

An agent is not entitled to recover commission under an agreement whereby the owner of certain houses, who was desirous of selling, was to accept a specified sum for the property, and the agent was to be at liberty to receive anything over and above that as a commission, it being understood that the owner was to receive the full sum specified without deduction, where the agent found a purchaser who entered afterwards into a contract to purchase for the sum specified but who afterwards defaulted and the purchase was, therefore, never completed owing to this default: *Beale* v. *Bond*, 84 L.T. 313, 17 Times L.R. 280 (C.A.).

An agent is not entitled to a commission under an agreement whereby the owner of a hotel, if the agent introduced a friend within one week, who would become the purchaser of the hotel, was to pay the agent a certain sum "by way of commission . . . . when and if the purchase is completed by private treaty," where the agent's friend upon being introduced by the agent signed a formal contract to purchase the hotel for a specified price, a part of which was paid at once, the balance to be paid upon completion, and the purchaser, being unable to find the balance of the purchase-money and to carry out the contract, was released by the defendant who retained the sum paid as a deposit: *Chapman* v. *Winson*, 91 L.T. 17, 53 W.R. 19, 20 Times L.R. 663 (C.A.).

If an auctioneer employed to sell an estate is guilty of negligence, whereby the sale becomes nugatory, he is not entitled to recover any compensation for his services from the vendor: *Denew* v. *Daverell*, 3 Camp. 451.

The owner employed agents to find a purchaser or mortgagee of his estate. Thereupon they went down to the estate, valued it, put it in their books, advertised it in their circulars and in newspapers, and took

**Annotation** *(continued)*—**Brokers—(§ II B—12)—Real estate agent's commission—Sufficiency of services.**

MAN.

Annotation

Commission of real estate agents.

some journeys, and had communications about it, and ultimately, while negotiating with a person upon the matter, the agents and the owner agreed that a letter should be written by the agents to such person and that if such letter induced him to become a purchaser or mortgagee the agents should be paid a certain sum. Such person ultimately became mortgagee, but denied that he was influenced in any way by the letter. It was held that the plaintiffs could not recover on a *quantum meruit* for work and labour upon a claim for an agreed commission: *Green* v. *Mules*, 30 L.J. C.P. 343.

The mortgagees of an estate agreed to pay to their agent in addition to a commission on the purchase money of the estate further remuneration if the purchase was completed by a certain date, and that the purchase would be considered completed if a definite offer and acceptance were made. Before the specified date a memorandum of agreement between the intending purchaser and the principals was signed, by which the former undertook to send professional persons to verify the particulars of the property; and, provided he received a satisfactory report, he undertook to enter into a formal contract for the purchase of the estate for a named sum. The contract for the purchase was not signed until some time after the specified date. In an action by the agent to recover the additional commission it was held that as the memorandum of agreement contemplated a formal contract, the terms of which would require settlement, that there was no definite offer and acceptance made on or before the specified date, and that therefore the additional commission was not payable: *Henry* v. *Gregory*, 22 Times L.R. 53.

A firm of auctioneers who sold for one of its members certain property which had been mortgaged to him with power of sale, was held not entitled to a commission: *Matthison* v. *Clarke*, 3 Drew. 3, 24 L.J. Ch. 202, 18 Jur. (N.S.) 885, 11 W.R. 1036; but an express contract with the mortgagor may entitle the mortgagee to an allowance of the usual commission for sale in the taking of the mortgage account: *Douglas* v. *Archbutt*, 2 DeG. & J. 148, 27 L.J. Ch. 271.

No such contract or continuous retainer as will entitle the estate agents to commission on a sale of an estate is shewn where it appears that the agents were employed to find a purchaser, or failing a purchaser a tenant for such estate; that they introduced a person and tried to bring about a purchase; that such person did not then purchase but took a lease of the property for seven years and the owner paid the agents a commission on the letting; and that after the tenant had been in possession for fifteen months, he bought the property from the owner: *Millar* v. *Radford*, 19 Times L.R. 575 (C.A.).

The Court refused to sustain a verdict rendered in an action by real estate brokers claiming commission on the purchase-money of a sale of certain property that such sale really and substantially proceeded from the agents' acts, and that they were entitled to a commission therefor, where it appeared that the agents' employment was on the terms that they were to receive a commission if they found a purchaser, but that if no sale took place there was to be no charge, and they advertised the property for sale and introduced to the owner a certain person as a possible purchaser who inspected the premises and stock but made no offer; that

MAN.

Annotation

Commission of real estate agents.

**Annotation (*continued*)—Brokers—(§ II B—12)—Real estate agent's commission—Sufficiency of services.**

thereafter the owner with the agents' approval decided not to sell, and the agents claimed and were subsequently paid a small sum for their out-of-pocket expenses in the matter; that subsequently the owner consulted a friend as to the sale of the property who knew the person introduced by the agents, and knew he was looking out for a business of the kind, but did not know of his introduction to the owner by the agents, that he suggested this person as a likely purchaser and subsequently communicated with him advising him to purchase, that he inspected the premises and stock, and made an offer, and that after some negotiations between him, the owner and a third party, a price was fixed at which he bought the property: *Brandon* v. *Hanna*, [1907] 2 Ir. R. 212 (C.A.).

Recovery of their commission was denied the agents in the following additional cases: *Macleod* v. *Peterson* (Alta.), 18 W.L.R. 162; *Holmes* v. *Lee Ho*, 16 B.C.R. 66, 17 W.L.R. 428, affirming 15 W.L.R. 226; *Galloway* v. *Stobart*, 14 Man. L.R. 650, affirmed, 35 Can. S.C.R. 301; *Lawrence* v. *Moore* (Man.), 3 W.L.R. 139; *Hunter* v. *Bunnell* (Man.), 3 W.L.R. 229; *Couse* v. *Banfield* (Man.), 7 W.L.R. 19; *Elim* v. *Clough* (Man.), 8 W.L.R. 590, reversing 7 W.L.R. 762; *McCuish* v. *Cook* (Man.), 10 W.L.R. 349, reversing 9 W.L.R. 304; *Coward Investment Co.* v. *Lloyd* (Man.), 11 W.L.R. 338; *Prittie* v. *Richardson*, 8 O.W.R. 981; *Wiley* v. *Blum*, 10 O.W.R. 565; *Holliwey* v. *Covert*, 11 O.W.R. 433; *Markle* v. *Blain*, 11 O.W.R. 505; *Millar* v. *Napper* (Sask.), 4 W.L.R. 335; *Land* v. *Gesche* (Sask.), 2 W.L.R. 456.

# INDEX OF SUBJECT MATTER, VOL. IV., PART IV.

*(For Table of Cases Reported see end of this Index.)*

## CASES REPORTED, VOL. IV., PART IV.

662
697
595
662
712
567
707
691
663
591
648
624
655

## Re CORKETT.

ONT.

D. C.
1912

April 22.

*Ontario Divisional Court, Boyd, C., Latchford, and Middleton, JJ.*
*April 22, 1912.*

1. WILLS (§ III L—198)—DIVISION OF RESIDUE—REVOCATION OF BEQUEST TO ONE LEGATEE.

Where a will directing that the testator's residuary estate should be invested and the profits applied to the maintenance of his three children, that the share of each child in the residuary estate should be paid as each reached a specified age, and that upon the youngest one reaching such age the "whole" balance was to be paid to him, was changed by a codicil which revoked the bequest to the second child of his share in the residuary estate and gave him in lieu thereof a certain sum in cash thereby diminishing his share in the residuary estate, and which then directed the balance to be divided among the other two children, "according to the terms and conditions specified as to the other bequests" in the will, the testator did not die intestate as to the balance of the second child's share in the residuary estate given him by the will left after paying him the cash sum provided by the codicil, nor should the words in the will that the youngest child should have the "whole" balance paid to him after paying the second child's share be applied so as to give the youngest child all the balance of the share given to the second child by the will, after paying the latter the cash sum acquired by the codicil; the balance of the second child's share in the residuary estate, given him by the will, will in such case be divided equally between the other two children.

[*Re Corkett*, 3 O.W.N. 761, 21 O.W.R. 468, varied on appeal.]

Statement

APPEAL by Margaret J. Kee, one of the legatees under the will of George Corkett, deceased, from the judgment of CLUTE, J., *Re Corkett*, 3 O.W.N. 761, 21 O.W.R. 468, declaring the construction and interpretation of certain clauses of the will.

The judgment was varied with costs out of the estate.

The judgment appealed from was as follows:—

Clute, J.

CLUTE, J.:—The testator, George Corkett, by his will devised his farm, the west half of lot 4 in the township of Albion, to his executors and trustees until his son William George should arrive at the age of twenty-five years, and then to his said son in fee simple. He directed the rents and profits thereof to be applied to the support, maintenance, and education of his children.

He then devised his house and lot in Brampton to his trustees to hold in trust until his youngest child arrived at the age of twenty-one years, the residence to be used as a home for his children "until such time;" and, after the youngest child arrived at twenty-one years, he directed a sale and division of the proceeds to be made equally among his three children.

He also gave his executors power to sell the residence before the youngest child arrived at twenty-one years of age, and purchase another, if they thought proper, for the use of his children until the youngest child arrived at twenty-one years of age, the new purchase to be held upon the same conditions and trust as his said residence.

He directed his executors and trustees to invest the residue

ONT.
D. C.
1912
RE CORKETT.
Clute, J.

of his estate, and to apply the interest, dividends, and profits arising from such investment, as might be necessary, to the support, maintenance, and education of his children until his daughter Margaret should have attained the age of twenty-one years, at which time he directed the executors to pay over to her the sum of $1,000, and to keep the residue invested and apply the interest therefrom to the support of his children until his said daughter should have arrived at the age of twenty-six years, at which time he directed that she should be paid "the one-third of the said residue of my estate, after deducting the $1,000 previously paid to her," and that the trustees should keep the residue then remaining invested and apply the interest arising therefrom to the support, maintenance, and education of his children William George Corkett and Cecil Mansfield Corkett till William George should have arrived at the age of twenty-five years, at which time he directed the executors to pay over to his son William George one-half of the residue then remaining, and thereafter directed the executors and trustees to invest the then residue and apply so much of the interest arising therefrom as might be necessary for the support and maintenance of his son Cecil Mansfield Corkett till he should have attained the age of twenty-one years, at which time the balance or residue then remaining should be paid to his said son Cecil Mansfield.

He directed, if necessary, portions of the principal to be used for the support, maintenance, and education of his children.

In his codicil, after reciting that he had bequeathed to his son William George one-half of his estate, after payment to his daughter Margaret her one-third share, he declared it to be his will that, "instead of my said son being bequeathed the said one-half of the residue as aforesaid, he be and he is hereby bequeathed the sum of $1,500 in cash and the one-third part or share of the proceeds of the sale of my said residue, the balance to be divided between my said daughter Margaret Jennie Corkett and my son Cecil Mansfield Corkett according to the terms and conditions specified as to the other bequests made by my said will."

The questions submitted in the notice of motion do not cover the grounds taken in argument, as to the construction of the will. I am of opinion that, by the true construction of the will, the expense for the maintenance of the dwelling-house as a residence for the children for the period limited by the will should be paid out of the income of the estate, if that be sufficient, as it would appear that it is, and, if not sufficient, out of the corpus.

That such support shall continue for the benefit of the three children until Margaret arrives at the age of twenty-one years, when she shall receive $1,000, and that the interest upon the resi-

due shall then be applied for the support, maintenance, and education of all the children until Margaret arrive at twenty-six years of age.

That she is then entitled to receive one-third of the residue of the estate, after deducting $1,000 previously paid to her; that is, as I understand the rather obscurely expressed will, that, whatever the residue may be, she is entitled to one-third of that; but, inasmuch as she has received the $1,000, that sum is to be deducted from her share. Thus, if the residue before the $1,000 was paid was $6,000, she would be entitled to $2,000, and, having received $1,000, she would be entitled to the balance of $1,000. It does not mean, I think, that the $1,000 paid to her is to be first deducted from the residue, that from that sum then she is to receive one-third, and that the $1,000 should again be deducted from it. That would, in effect, be deducting the $1,000 twice.

I am also of opinion that the children Margaret and William George are entitled to what is a fair allowance for their maintenance, whether that maintenance, support, and education be upon the premises or not. In case the parties differ as to what a reasonable sum would be, the Surrogate Court may adjust that matter in settling the accounts of the executors.

It will be noticed that the one-half of the residue given to William George is the one-half remaining after one-third of the whole residue had been paid to Margaret, that is, it is one-third of the residue. In the codicil it is this one-third of the whole residue or one-half of the remaining residue that is referred to; and, instead of William George being bequeathed one-half of the residue after the payment to Margaret, he is bequeathed the sum of $1,500 in cash, and he is also given a one-third share of the proceeds of the residence.

Then comes the expression, the meaning of which is disputed: "The balance to be divided between my said daughter Margaret Jennie Corkett and my son Cecil Mansfield Corkett according to the terms and conditions specified as to the other bequests made by my will." What balance? Does it mean the balance of the residue after paying one-third to William George, or the balance of the residue of the estate, or both? Some light is thrown upon it by the last clause. The division is to be made according to the terms and conditions specified in the other bequests of the will. What other bequests? Clearly, I think, the bequests which affect the half residue mentioned, and also the bequests upon the sale of the residence.

By a former provision, upon a sale of the residence, the proceeds were to be equally divided "amongst my three children in equal shares." Before the codicil was made, Margaret had received her $1,000 and one-third of the residue, and was yet entitled to receive one-third of the proceeds from the sale of the

ONT.

D. C.
1912

RE CORKETT.

Clute, J.

residence, and any amount remaining unpaid for maintenance, etc.

William George Corkett, by the codicil, is now given $1,500 and one-third of the proceeds of the residence, instead of his one-half of the residue after Margaret had been paid. The residue of the estate, in my opinion, goes to the younger son, Cecil Mansfield Corkett, each of the three children receiving one-third of the proceeds from the sale of the residence.

Costs out of the estate. The costs of the executors between solicitor and client.

The appeal was heard by BOYD, C., LATCHFORD and MIDDLETON, JJ.

*A. McLean Macdonell*, K.C., for the appellant.
*B. F. Justin*, K.C., for William George Corkett.
*E. C. Cattanach*, for the infant Cecil M. Corkett.
*Featherston Aylesworth*, for the executors.

Boyd, C.

BOYD, C.:—The testator by his will gives to his son William George the west half of lot 4; to his daughter Margaret all his household effects. His residence is to be sold, and the proceeds equally divided among his three children, William George, Margaret, and Cecil. These provisions are not disturbed but confused by the codicil. The will then deals with his residuary estate, which is to be invested, and the profits applied to the maintenance, etc., of the children till Margaret attains twenty-one, when she is to receive thereout $1,000. The residue is to be kept invested and applied as before till Margaret has attained twenty-six years, and then the residue goes into thirds, of which—

A. One-third, less the $1,000, is to be paid to Margaret; the balance to be invested and so applied till the son William attains twenty-five years of age.

B. And the one-half of the residue is to be paid to William George; the balance to be kept invested and so applied till Cecil attains twenty-one years.

C. And then the whole balance or residue is to be paid to Cecil.

This residuary clause is disturbed by the codicil; the share (one-half) given to William is revoked; and, instead of that, he is to get $1,500 in cash (as well as the third part of the proceeds of the sale of the residence), and the balance is to be divided between Margaret and Cecil "according to the terms and conditions specified as to the other bequests made by the will."

Any difficulty created by these words is cleared by simply deleting the words in clause B. (as I have divided it) of the residuary portion of the will, and inserting from the codicil

these words, "one-half of the residue to be divided between Margaret and Cecil." Then the terms and conditions specified as to the other bequests in the will require to be applied *cy près* to the new bequests given to Margaret and Cecil; so that one-half of the residue intended for William is to be divided between Margaret, who gets her half of it forthwith, as she has reached twenty-six years of age, and Cecil, whose half of the portion intended for William is to be kept invested for his maintenance till he attains twenty-one years, when it is to be paid to him, with the original one-half of the residuary estate given to him by the will.

The costs below and of appeal to be borne by the estate in such wise that each child's share bears a third of the whole costs.

Latchford, J.

LATCHFORD, J.:—The only alteration made by the codicil of the bequest to William is to substitute for his one-third of the residue mentioned—amounting, it would appear, to $7,039—a specific sum of $1,500, plus one-third the proceeds of the sale of the residence—disposed of for $2,000—or, in all, about $2,200. "Instead of my said son being bequeathed one-half of the residue," he is to have much less; "the balance is to be divided between Margaret and Cecil." The balance of what? The balance, I think, of the share which, but for the codicil, William would have received. It cannot be the balance of the proceeds of the sale of the residence. That had been disposed of by the will, and is not affected by the codicil. Nor can it be the balance of the residue after deducting the share of Margaret, the specific legacies, and the bequest to William by the codicil. For the effect of that construction would be to cut down the legacy of Cecil, which the codicil confirms. According to the statement made by counsel of the executors' accounts, Cecil's share under the will is, like Margaret's and William's $7,039. Reduced by the $2,200 bequeathed by the codicil, there remained of William's third, $4,839. If this went into the general residue, and were added to what remained —$7,039—the residue would amount to nearly $12,000. One-half of this to Cecil would be less, by upwards of $1,000, than what he is given by the will, confirmed by the codicil. Margaret, on the other hand, would upon that construction receive about $13,000.

The testator by his will manifested an intention to treat all his children approximately alike, the elder ones being given a slight advantage—the son the farm, and the daughter the furniture. For some reason, he afterward desired to diminish the share of the elder son. He intended, in my opinion, to divide what was then left of that son's share between his other two children, and used language sufficient to carry out his

ONT.

D. C.
1912

RE CORKETT.

Middleton, J.

intention. The "balance to be divided" is the balance of William's share under the will.

I think the appeal should be allowed.

MIDDLETON, J.:—The questions argued do not depend upon any general principle, but entirely upon the will itself.

Although somewhat clumsily expressed, the intention of the testator is clear. The three children are to share equally in the residuary estate, each being paid off as he or she attains the stipulated age.

The testator, by his will, had directed that his residence should be held until his youngest child came of age, when it should be sold, and the proceeds divided between these three children. He had also given his farm to his eldest son, William, and his household furniture to his daughter Margaret.

By a codicil, the testator evidently intended to modify the provision made for his son William. The codicil recites the gift to him of his one-third share in the residue; and, instead of this, the testator gives him $1,500 in cash, in addition to his share of the proceeds of the sale of the residence, and directs "the balance to be divided between my said daughter Margaret and my son Cecil according to the terms and conditions specified as to the other bequests made by my said will."

The question is as to the meaning of the words quoted. The appellant, Margaret, contends that no disposition has been made of the difference between the $1,500 given to William by the codicil and the third of the residuary estate given to him by the will; and that, as to this, there is an intestacy. Her counsel treats the quoted words as being merely a confirmation of the provisions made in the will.

The judgment in review accepts this construction of the codicil, but holds that the effect is not an intestacy, but that the undisposed of fund falls into the ultimate residue given to the infant.

I find myself unable to accept either view. It appears to me that the codicil was intended to deal with the share of the residuary estate given by the will to William. Out of this portion of the residue William is to receive $1,500, plus his share of the proceeds of the residence; and the balance—that is, the balance of William's share—is to be then divided between the other two children, Margaret and Cecil.

The judgment appealed from should be varied accordingly, and costs of all parties here and below should be paid out of the estate. These must be so allocated that one-third of the total cost will be borne by each of the beneficiaries. The whole burden must not be placed upon the infant's share.

The principle on which costs must be dealt with is indicated in *Hilliard* v. *Fulford*, 4 Ch. D. 389; *In re Bell*, 39 L.T. N.S. 423; and *In re Giles*, 55 L.J. Ch. 696, 55 L.T. 51, 34 W.R. 712.

*Judgment varied.*

## RUDD v. CAMERON.

ONT.

D. C.

1912

April 10

*Ontario Divisional Court, Meredith, C.J.C.P., Teetzel and Kelly, JJ. April 10, 1912.*

1. LIBEL AND SLANDER (§ II F—85)—PROCURING UTTERANCE OF SLANDER—WHAT CONSTITUTES PUBLICATION.

The defendant who, on the application of a stranger, utters to him the slander which defames a third person, publishes the slander, even though the stranger had been sent for the purpose of procuring the defamer to speak on the subject-matter with a view to ascertaining the source of slanderous imputations which such third person had learned were in circulation concerning himself.

[*Duke of Brunswick* v. *Harmer* (1849), 14 Q.B. 185, followed; *Smith* v. *Wood*, 3 Camp. 323, 14 R.R. 751, and *King* v. *Waring*, 5 Esp. 13, distinguished.]

2. LIBEL AND SLANDER (§ II F—85)—MATERIALITY OF PUBLICATION—PROCUREMENT BY PLAINTIFF OF PUBLICATION.

The fact that the slanderous utterance was spoken by the procurement of the plaintiff is not material to the question of publication or no publication.

[*Duke of Brunswick* v. *Harmer* (1849), 14 Q.B. 185, applied; and see Odger on Libel and Slander, 5th ed., pp. 179, 180.]

3. LIBEL AND SLANDER (§ II E—59)—PRIVILEGED OCCASION—RECKLESS STATEMENTS—QUALIFIED PRIVILEGE IN SLANDER.

Where slanderous statements are known by the defamer to be untrue, or he makes them recklessly not caring whether they were true or false, the qualified privilege which would otherwise attach because of a common interest in the subject-matter of the inquiry, is not available as a defence in slander.

Statement

AN appeal by the defendant from the judgment of BRITTON, J., of the 15th November, 1911, in favour of the plaintiff, upon the verdict of a jury at the trial at Pembroke, in an action for defamatory words alleged to have been spoken by the defendant of the plaintiff in the way of his trade.

The appeal was dismissed.

The principal grounds of the appeal were: (1) Want of proof of publication and (2) Privilege and lack of malice.

Argument

*W. M. Douglas*, K.C., for the defendant, argued that there was no evidence of publication, and that the words were spoken on a privileged occasion, and there was no evidence of malice. In any event, the damages, if any, should have been merely nominal. On the question of publication, he contended that, where the plaintiff procures some one to go to the defendant for the purpose of provoking him to utter defamatory words, there is no publication. In support of this proposition he cited Starkie on Slander, 3rd ed., pp. 381 and 514, where the cases of *King* v. *Waring* (1803), 5 Esp. 13, and *Smith* v. *Wood* (1813), 3 Camp. 323, are referred to; and *Weatherston* v. *Hawkins* (1786), 1 T.R. 110.

*E. F. B. Johnston*, K.C., for the plaintiff, urged that there was sufficient evidence of malice to take away the qualified privilege. He also pointed out that there had been no evidence called for

ONT.
D. C.
1912
RUDD
v.
CAMERON.
Argument

the defence. As to publication, it was true that there were cases which said that if a trap were laid to make a man say what he would not have said voluntarily, there would be no publication. But here there had been no trap laid. The detectives did not go to the defendant to get him to make the slanderous statements, but to find out if he had been making them. There had been publication in this case. He referred to *Duke of Brunswick* v. *Harmer* (1849), 14 Q.B. 185.

*Douglas*, in reply, referred to Odgers on Libel and Slander, 5th ed., p. 296.

Meredith, C.J.

April 10. The judgment of the Court was delivered by MEREDITH, C.J.:—The appeal is rested upon two grounds: (1) that there was no evidence of publication; and (2) that the occasion upon which the words were spoken was privileged and there was no evidence of malice; and it was also contended that the damages awarded ($1,000) are excessive.

According to the testimony of the respondent, having learned that statements affecting him similar to those alleged to have been made by the appellant, and which form the basis of the action, were in circulation, and being unable to trace them to their source, he employed two detectives "for the purpose of ascertaining the facts and getting information for his solicitors," which I understand to mean for the purpose of finding out the author of the statements and bringing an action against him.

The detectives, having made the acquaintance of the appellant, adopted the ruse of telling him that they were going to erect a club house in the vicinity of Arnprior, and that the respondent was anxious to secure the contract for building it. Their object, no doubt, was to induce the appellant to speak his mind as to the respondent, and in this they appear to have succeeded, for it is upon what was then said by the appellant that the action is based.

The occasion upon which the words were thus spoken was privileged; but it is contended by the learned counsel for the appellant that, the speaking of them having been brought about by the action of the respondent himself, there was no publication; and in support of that contention he cited *King* v. *Waring*, 5 Esp. 13; *Smith* v. *Wood*, 3 Camp. 323, 14 R.R. 752; and Starkie on Slander, 3rd ed., pp. 381 and 514.

*King* v. *Waring* was an action for a libel contained in a letter written by the female defendant, and Lord Alvanley, C.J., having stated that it had been decided that giving a character to a servant however injurious to him, yet if fairly given, would not sustain an action, went on to say: "But if the letter was procured by another letter, not written with a fair view of inquiring a character, but to procure an answer, upon which to found an action for a libel, such evidence, I think, ought not to be admitted;" but, as the learned Judge held that this was not proved, his statement is but an *obiter dictum*.

In *Smith* v. *Wood*, 3 Camp. 323, 14 R.R. 752, the action was for a libel upon the plaintiff in the shape of a caricature print entitled, "The inside of a parish workhouse with all abuses reformed." A witness having stated that, having heard that the defendant had a copy of this print, he went to his house and requested liberty to see it, and the defendant thereupon produced it, and pointed out the figure of the plaintiff and the other persons it ridiculed; and this, Lord Ellenborough ruled, was not sufficient evidence of publication to support the action; and the plaintiff was nonsuited.

It does not appear from this statement of the facts that the plaintiff had sent the witness to request liberty to see the caricature. Mr. Odgers, however, in his work on Libel and Slander, 5th ed., p. 179, states as the facts of the case that "the plaintiff, hearing that defendant had in his possession a copy of a libellous caricature of the plaintiff, sent an agent who asked to see the picture, and the defendant shewed it to him."

In stating that the person to whom the caricature was shewn was sent to request that it should be shewn, Mr. Odgers is, I think, in error; and in this view I am supported by the report of the case and by what appeared in the earlier editions of Mr. Starkie's treatise, where attention is called to the fact that "there was no evidence to shew that the plaintiff was in privity with the witness:" 2nd ed., vol. 2, p. 87, note (*i*). In the same edition, vol. 1, p. 456, the facts of the case are stated as they appear in the report in 3 Camp. See also 3rd ed., p. 381, and note (*i*) on p. 514; 4th ed. (Folkard), p. 374, note (*s*), p. 524, note (*n*); 5th ed. (Folkard) p. 409, note (*f*), p. 441, note k.; 6th ed. (Folkard), p. 409, note (*f*), and p. 441.

In the last edition of Folkard (7th ed.), *Smith* v. *Wood* is referred to, on pp. 166 and 263. In this edition the matter has been re-arranged, and the reference on p. 166 appears in chapter 11, which deals with communications in discharge of duty; and the statement in the text is, that, "where the publication of the defamatory matter was procured by the contrivance of the plaintiff, with a view to the foundation of an action against the defendant, the communication may be privileged on the ground that the plaintiff himself was the voluntary author of the mischief complained of;" and *Smith* v. *Wood*, 3 Camp. 323, 14 R.R. 752, *Weatherston* v. *Hawkins*, 1 T.R. 110, and *Warr* v. *Jolly* (1834), 6 C. & P. 497, are referred to as the authority for the statement.

The dictum of Lord Alvanley, C.J., in *King* v. *Waring*, 5 Esp. 13, and what was said by him in *Rogers* v. *Clifton* (1803), 3 B. & P. 587, at p. 592, are also referred to for the statement that, "where a plaintiff, knowing the character which his master will give, procures it to be given for the sake of founding an action upon it, he will not be allowed to recover."

The reference on p. 263 [Folkard on Libel and Slander, 7th ed.] is merely a statement of the facts of *Smith* v. *Wood*, 5 Esp.

ONT.
D. C.
1912
RUDD
v.
CAMERON.
Meredith, C.J.

13, and of the ruling of Lord Ellenborough, C.J., as reported in 3 Camp.

It would appear, therefore, that the first ground of appeal has no judicial decision, but only the *dictum* of Lord Alvanley, C.J., in *King* v. *Waring*, to support it.

Mr. Odgers points out (p. 180) that "in many of the older cases the Judges say, 'there is no sufficient publication to support the action,' when they mean in modern parlance that the publication was privileged by reason of the occasion;" and this may have been what was meant by Lord Alvanley, C.J., as, I think, appears from what was said by him in *Rogers* v. *Clifton*, 3 B. & P. 587, at p. 592. That was an action by a servant against his former master for an alleged libel contained in a letter written by the master to a Mr. Hand, to whom the plaintiff had applied for a place, and Lord Alvanley, speaking of this, said: "It is material also to observe that, when the plaintiff in this case applied to Mr. Hand for his place, and referred him to the defendant, he did not tell him that the defendant would give him a good character; had he done so, I should have suspected that he wished to lay a trap for the defendant, and procure evidence to support this action; in such a case I should hold a party not at liberty to ascribe the character given by his master to malice, when he had only drawn from him that which he had a right to expect."

However this may be, in the comparatively recent case of *Duke of Brunswick* v. *Harmer* (1849), 14 Q.B. 185, a different view was taken by the Court of Queen's Bench. The action was for libel published in a newspaper more than seventeen years before action; the Statute of Limitations was pleaded, and it was held that it was negatived by proof that a single copy had been purchased from the defendant for the plaintiff by his agent within six years. The libel was originally published in 1830; two copies of the newspaper were produced at the trial; one copy had been obtained from the British Museum, and the other had been purchased, before the commencement of the action in 1848, at the newspaper office of the defendant, by a witness who on cross-examination stated that he had been sent by the plaintiff to make the purchase and had handed the paper when purchased to the plaintiff. It was contended by the defendant that this latter was not such a publication as would support the issue. The presiding Judge overruled the objection. On a motion for a new trial the objection was renewed, and it was argued by counsel for the defendant that the publication proved was in law a publication to the plaintiff himself, and that it could not be the foundation of a civil action. Coleridge, J., in delivering the judgment of the Court, after referring to the facts and the contention of the defendant's counsel, said: "And, in some sense, it is true that it was a sale and delivery to the plaintiff; but we think it was also a publication to the agent. . . . The defendant, who, on the

application of a stranger, delivers to him the writing which libels a third person, publishes the libellous matter to him, though he may have been sent for the purpose of procuring the work by that third person . . . The act is complete by the delivery; and its legal character is not altered, either by the plaintiff's procurement or by the subsequent handing over of the writing to him. Of course that this publication was by the procurement of the plaintiff is not material to the question we are now considering."

In the view of Mr. Odgers, pp. 179-180, this case, so far as the question of publication merely is concerned, overrules *King* v. *Waring* and *Smith* v. *Wood*; and Sir Frederick Pollock's note to *Smith* v. *Wood* (14 R.R. 752) is, that Lord Ellenborough's ruling "does not seem consistent with *Duke of Brunswick* v. *Harmer*."

Neither *King* v. *Waring* nor *Smith* v. *Wood* was cited or referred to in *Duke of Brunswick* v. *Harmer* (1849) 14 Q.B. 185; the former probably for the reason suggested by Mr. Odgers, that it related only to the question of privilege; and the latter for the same reason, if the facts of it were as stated by Mr. Odgers, or for the reason that it had no application, if the facts were as stated in the report in 3 Camp.

The question has been discussed and passed upon in many cases in the United States, and among them in *Gordon* v. *Spencer* (1829), 2 Blackf. (Ind.) 286, 288; *Yeates* v. *Reed* (1838), 4 Blackf. (Ind.) 463, 465; *Jones* v. *Chapman* (1839), 5 Blackf. (Ind.) 88; *Haynes* v. *Leland* (1848), 29 Me. 233, 234, 243; *Sutton* v. *Smith* (1850), 13 Mo. 120, 123, 124; *Nott* v. *Stoddard* (1865), 38 Vt. 25, 31; *Heller* v. *Howard* (1882), 11 Ill. App. 554; *White* v. *Newcomb* (1898), 25 App. Div. N.Y. 397, 401; *O'Donnell* v. *Nee* (1898), 86 Fed. Repr. 96; *Railroad* v. *Delaney* (1899), 102 Tenn. 289, 294, 295; and *Shinglemeyer* v. *Wright* (1900), 124 Mich. 230, 240. See also Cyc., vol. 25, pp. 370-1. In most of these cases the supposed ruling of Lord Ellenborough, C.J., in *Smith* v. *Wood* and the opinion expressed by Lord Alvanley, C.J., in *King* v. *Waring* were recognised as correct statements of the law, and followed.

Upon the whole, we are of opinion that we should follow *Duke of Brunswick* v. *Harmer* (1849), 14 Q.B. 185, and, following it, hold that there was evidence for the jury of publication, and that the first objection, therefore, fails.

The second ground of appeal also fails; there was evidence, which the jury believed, that there was no truth in the statements made by the defendant; and there was ample evidence, out of the appellant's own mouth on his examination for discovery, that he knew they were untrue, or that he made them recklessly, not caring whether they were true or false; and there was evidence from which malice might be inferred, in the bad feeling which had existed on the part of the appellant towards the respondent, and his state-

ONT.

D. C.
1912

RUDD
v.
CAMERON.

ments to the respondent's book-keeper and stenographer, Alice Miller.

The damages are substantial; but, in view of the appellant's conduct throughout and his not having gone into the box to testify on his own behalf, we cannot say that they are so excessive as to warrant the Court in setting aside the verdict.

The appeal is dismissed with costs.

*Appeal dismissed.*

---

Annotation

**Annotation—Libel and slander (§ II E—56)—Repetition of slanderous statement to person sent by plaintiff to procure evidence thereof—Publication and privilege.**

Every repetition of a slander is a wilful publication of it, rendering the speaker liable to an action. "Tale-bearers are as bad as tale-makers." It is no defence that the speaker did not originate the scandal, but heard it from another, even though it was a current rumour and he *bonâ fide* believed it to be true: *Watkin* v. *Hall*, L.R. 3 Q.B. 396, 37 L.J.Q.B. 125, 16 W.R. 857, 18 L.T. 561. It is no defence that the speaker at the time named the person from whom he heard the scandal: *McPherson* v. *Daniels*, 10 B. & C. 270, 5 M. & R. 251; Odgers on Libel and Slander, 5th ed., 173.

For a defendant to prove that he said at the time that he heard the tale from A., and that A. did in fact tell it to the defendant, was no justification; it must be proved that the defendant repeated the story on a justifiable occasion, and in the *bonâ fide* belief in its truth, and that is a defence of privilege. See *Bromage* v. *Prosser*, 4 B. & C. 247, 6 D. & R. 296, 1 C. & P. 475.

A rumour was current on the Stock Exchange that the chairman of the S. E. Ry. Co. had failed; and the shares in the company consequently fell; thereupon the defendant said, "You have heard what has caused the fall—I mean, the rumour about the South-Eastern chairman having failed?" It was held that a plea that there was in fact such a rumour was no answer to the action: *Watkin* v. *Hall*, L.R. 3 Q.B. 396, 37 L.J. Q.B. 125, 16 W.R. 857, 18 L.T. 561.

So the prior publication of a libel is no justification for its being copied and republished. If the first publication be privileged, that will not render the second publication privileged.

There is a distinction to be here noted between libel and slander. Odgers (5th ed., p. 177), says: "The actual publisher of a libel may be an innocent porter or messenger, a mere hand, unconscious of the nature of his act; and for which, therefore, his employers shall be held liable, and not he. Whereas in every case of the republication of a slander, the publisher acts consciously and voluntarily; the repetition is his own act. Therefore, if I am in any way concerned in the making or publishing of a libel, I am liable for all the damage that ensues to the plaintiff from its publication. But, if I slander A., I am only liable for such damages as result directly from that one utterance by my own lips. If B. hears me and chooses to repeat the tale, that is B.'s own act; and B. alone is answerable, should damage to A. ensue. In an action against me such special damage

**Annotation** (*continued*)—Libel and slander (§ II E—56)—Repetition of slanderous statement to person sent by plaintiff to procure evidence thereof—Publication and privilege. Annotation

would be too remote. For each publication of a slander is a distinct and separate tort, and every person repeating it becomes an independent slanderer, and he alone is answerable for the consequences of his own unlawful act.

"Thus by the law of England, as it at present stands, the person who invents a lie and maliciously sets it in circulation may sometimes escape punishment altogether, while a person who is merely injudicious may be liable to an action through repeating a story which he believed to be the truth, as he heard it told frequently in good society. For if I originate a slander against you of such a nature that the words are not actionable *per se*, the utterance of them is no ground of action, unless special damage follows. If I myself tell the story to your employer, who thereupon dismisses you, you have an action against me; but if I only tell it to your friends and relations and no pecuniary damage ensues from my own communication of it to any one, then no action lies against me; although the story is sure to get round to your master sooner or later. The unfortunate man whose lips actually utter the slander to your master, is the only person that can be made defendant; for it is his publication alone which is actionable as causing special damage. The law is the same in America: *Gough* v. *Goldsmith*, 44 Wis. 262, 28 Amer. R. 579; *Shurtleff* v. *Parker*, 130 Mass. 293, 39 Amer. R. 454. But this apparent hardship only arises where the words are not actionable without proof of special damage. Where the words are actionable *per se*, the jury find the damages *generally*, and will judge from the circumstances which of the defendants is most to blame."

There are two apparent exceptions to this rule: (1) Where by communicating a slander to A., the defendant puts A. under a moral obligation to repeat it to some other person immediately concerned; here, if the defendant knew the relation in which A. stood to this other person, he will be taken to have contemplated this result when he spoke to A. In fact, here A.'s repetition is the natural and necessary consequence of the defendant's communication to A. See the judgment of Lopes, L.J., in *Speight* v. *Gosnay*, 60 L.J.Q.B. 231, 55 J.P. 501.

(2) Where there is evidence that the defendant, though he spoke only to A., intended and desired that A. should repeat his words, or expressly requested him to do so; here the defendant is liable for all the consequences of A.'s repetition of the slander; for A. thus becomes the agent of the defendant: *Whitney* v. *Moignard*, 24 Q.B.D., at p. 631.

It has sometimes been held, on the principle of *volenti non fit injuria*, that if the only publication proved at the trial be one brought about by the plaintiff's own contrivance, the action must fail: Odgers on Libel and Slander, 5th ed., 179. Thus, in *King* v. *Waring et ux.*, 5 Esp. 15, Lord Alvanley decided that if a servant, knowing the character which his master will give him, procures a letter to be written, not with a fair view of inquiring the character, but to procure an answer upon which to ground an action for a libel, no such action can be maintained. So in *Smith* v. *Wood*, 3 Camp. 323, where the plaintiff, hearing that defendant had in his possession a copy of a libellous caricature of the plaintiff, sent an agent who asked to see the picture, and the defendant shewed it him at his request, Lord Ellenborough ruled that this was no sufficient evidence of publication, and nonsuited the plaintiff. But these cases, so far as the question of *publication* merely is concerned, must be taken to be overruled by the

Annotation

**Annotation** *(continued)*—**Libel and slander (§ II E—56)—Repetition of slanderous statement to person sent by plaintiff to procure evidence thereof—Publication and privilege.**

*Duke of Brunswick* v. *Harmer*, 14 Q.B. 185, 19 L.J.Q.B. 20, 14 Jur. 110, 3 C. & K. 10; Odgers, 5th ed., 180. Whether or no the plaintiff's conduct in himself provoking or inviting the publication on which he afterwards bases his action may amount to a ground of privilege as excusing the publication made, is a different question. And indeed in many of the older cases the Judges say, "there is no sufficient publication to support the action," when they mean in modern parlance that the publication was privileged by reason of the occasion: Odgers, 5th ed., 180, referring to the judgment of Best, J., in *Fairman* v. *Ives*, 5 B. & Ald. 646, 1 D. & R. 252, 1 Chit. 85, and *Robinson* v. *May*, 2 Smith 3.

A publication induced by the prosecutor is sufficient in a criminal case: *R.* v. *Carlile*, 1 Cox C.C. 229.

If the only publication that can be proved is one made by the defendant in answer to an application from the plaintiff, or some agent of the plaintiff, demanding explanation, such answer, if fair and relevant, will be held privileged; for the plaintiff brought it on himself. But this rule does not apply where there has been a previous unprivileged publication by the defendant of the same libel or slander, which causes the plaintiff's inquiry; for in that case it is the defendant who brings it on himself: Odgers on Libel and Slander, 5th ed., 294.

A plaintiff is not to be allowed to entrap people into making statements to him on which he can take proceedings. And, again, if rumours are afloat prejudicial to the plaintiff which he is anxious to sift and trace to their source, all statements made *bonâ fide* to him or any agent of his in the course of the investigation are rightly protected. But it makes a great difference if the rumours originated with the defendant, so that what he has himself previously said produces the plaintiff's inquiry: *Per* Lord Lyndhurst in *Smith* v. *Mathews*, 1 Moo. & Rob. 151. If in answer to such an inquiry the defendant does no more than acknowledge having uttered the words, no action can be brought for the acknowledgment; the party injured must sue for the words previously spoken, and use the acknowledgment as proof that those words had been spoken. But if besides saying "Yes" to the question asked, he repeats the words in the presence of a third person, asserting his belief in the accusation and that he can prove it, such a statement is slanderous and is not privileged, although elicited by the plaintiff's question. See *Griffiths* v. *Lewis*, 7 Q.B. 61, 14 L.J.Q.B. 199, in which case Lord Denman remarks: "Injurious words having been uttered by the defendant respecting the plaintiff, the plaintiff was bound to make inquiry on the subject. When she did so, instead of any satisfaction from the defendant, she gets only a repetition of the slander. The real question come to this, does the utterance of slander once give the privilege to the slanderer to utter it again whenever he is asked for an explanation? It is the constant course, when a person hears that he has been calumniated, to go, with a witness, to the party who, he is informed, has uttered the injurious words, and to say, 'Do you mean in the presence of witnesses to persist in the charge you have made?' And it is never wise to bring an action for slander unless some such course has been taken. But it never has been supposed, that the persisting in and repeating the calumny, in answer to such a question, which is an aggravation of the

**Annotation** (*continued*)—Libel and slander (§ II E—56)—Repetition of slanderous statement to person sent by plaintiff to procure evidence thereof—Publication and privilege. Annotation

slander, can be a privileged communication; and in none of the cases cited has it ever been so decided."

And see *Richards* v. *Richards*, 2 Moo. & Rob. 557; *Force* v. *Warren*, 15 C.B.N.S. 806.

If, however, the second occasion on which the words were spoken is clearly privileged and justifiable, the mere fact that defendant had previously spoken them will not of itself destroy the privilege; the plaintiff must rely on the first utterance: that may be privileged as well or may be barred by the statute.

This rule is sometimes cited as an instance of the maxim "*volenti non fit injuria*," and is then not classed as a ground of privilege, but would rather be stated thus: If the only publication proved at the trial be one brought about by the plaintiff's own contrivance, this is no sufficient evidence of publication; it is as though the only publication were to the plaintiff himself, which would give him no right of action.

Such was the ruling of Lord Ellenborough in *Smith* v. *Wood*, 3 Camp. 323; but this is inconsistent with *Duke of Brunswick* v. *Harmer*, 14 Q.B. 185, and in *Warr* v. *Jolly*, 6 Car. & P. 497, it was expressly held that a communication purposely procured by the plaintiff was privileged.

In answer to plaintiff's inquiry as to a rumour against himself, defendant told him, in the presence of a third party, what someone had said to his (defendant's) wife. There was no proof that the defendant had ever uttered a word on the subject till he was applied to by the plaintiff. It was held that the answer was privileged: *Warr* v. *Jolly*, 6 Car. & P. 497, as explained by Lord Denman in *Griffiths* v. *Lewis*, 7 Q.B. 67, 14 L.J.Q.B. 199, 9 Jur. 370. And see *Richards* v. *Richards*, 2 Moo. & Rob. 557.

The *Weekly Dispatch* libelled the Duke of Brunswick in 1830. In 1848 the Duke sent to the office of that newspaper for a copy of the number containing the old libel, and obtained one. Held, that he could sue on this publication to his own agent, though all proceedings on the former publication were barred by the Statute of Limitations: *Duke of Brunswick* v. *Harmer*, 14 Q.B. 185, 19 L.J.Q.B. 20, 14 Jur. 110, 3 C. & K. 10.

Every repetition of a slander is, of course, a separate cause of action, to which the defendant must find a separate defence. But where the words are only uttered once, there is only one tort, and only one occasion: Odgers on Libel and Slander, 5th ed., 300. If that occasion be privileged it is immaterial how many persons heard the words; the privilege attaching to the occasion is a defence to the whole action. But of course the number of persons present on any occasion is a most material factor in deciding the question. Was the occasion privileged? As a rule, the defendant should not speak while persons unconcerned are by. But there are many cases where the matter is urgent, where, if he does not speak at once, the order will be given, or the resolution will be carried, or some other thing will happen which it is his duty, or his interest, to prevent. On such occasions, the accidental presence of an uninterested bystander will not take the case out of the privilege. And there are other cases in which it is only prudent, and is, therefore, permissible, to make the privileged communication in the presence of witnesses: Odgers on Libel and Slander, 5th ed., 300.

ONT.

D. C.
1912

May 22.

## L. M. ERICSSON TELEPHONE MANUFACTURING CO. v. ELK LAKE TELEPHONE AND TELEGRAPH CO.

*Ontario Divisional Court, Mulock, C.J.Ex.D., Clute and Sutherland, JJ. May 22, 1912.*

1. SALE (§ I C—17) — STATUTORY REQUIREMENTS — CONDITIONAL SALE — AFFIXING NAME—ABBREVIATIONS.

In order that a vendor may obtain protection thereunder, there must be a literal compliance with the provisions of sec. 1, ch. 145, R.S.O. 1897, of the Conditional Sales Act, that sales of manufactured goods or chattels on condition that the title shall not pass, shall be valid only "as against a subsequent purchaser or mortgagees without notice in good faith for a valuable consideration . . . which, at the time possession is given to the bailee, have the name and address of the manufacturer, bailor or vendor . . . . painted, printed, stamped or engraved thereon, or otherwise plainly attached thereto," and, under such Act the use of the synonymous words in lieu of the actual name of the manufacturer or vendor is not permissible.

[*Toronto Furnace Co.* v. *Ewing*, 1 O.W.N. 467, 15 O.W.R. 381, followed; see also *Mason* v. *Lindsay*, 4 O.L.R. 365.]

2. SALE (§ III D—75)—RIGHTS OF BONA FIDE PURCHASERS—NON-COMPLIANCE WITH PROVISIONS OF THE CONDITIONAL SALES ACT, R.S.O. 1897, CH. 145, SEC. 1.

Where "The L. M. Ericsson Telephone Manufacturing Company," the vendor of a telephone switchboard, affixed its name thereto as the L. M. Ericsson Tel. Mfg. Co.," it is not entitled to a lien thereon, under ch. 145, sec. 1 of the Conditional Sales Act, R.S.O. 1897, for unpaid purchase money as against a purchaser who, in good faith, for a valuable consideration and without notice, acquired title through the vendee, as there was not a sufficient compliance with the provisions of such Act.

Statement

APPEAL by the defendants from the judgment of Denton, Jun. Co. C.J., York, declaring the plaintiffs entitled to a lien on two telephone switchboards in the possession of the defendants; and appeal by the plaintiffs from part of the same judgment, finding that the defendants were not personally liable for the balance due to the plaintiffs upon the sale of the switchboards to the Norton Telephone Company of Toronto.

The appeal was allowed and cross-appeal by defendants was dismissed, Sutherland, J., dissenting.

*George Wilkie*, for the defendants.

*F. Arnoldi*, K.C., for the plaintiffs.

Mulock, C.J.

MULOCK, C.J.:—The defendants in partnership operate a telephone system in the Elk Lake District. The plaintiffs are manufacturers of telephone supplies in Buffalo, in the State of New York, and as such made and sold the switchboards in question, partly for cash and partly on credit, to the Norton Telephone Company of Toronto. Part of the purchase-money remained unpaid, and this action is brought to recover the same, and, in default of payment, for a declaration that the switchboards are the property of the plaintiff company.

The Norton company sold the switchboards to the Silver Belt Company, who gave back a mortgage upon them for the

unpaid purchase-money. Default having been made by the Silver Belt Company, one Seymour bought the switchboards under the mortgage, and, in turn, sold them to the defendants, who became bona fide purchasers for value without notice of the plaintiffs' alleged lien.

The Norton Company having made default in payment to the plaintiffs, the latter, through their solicitors, notified the defendants of the alleged lien. Thereupon Mr. Reece, one of the partners in the defendants' firm, proceeded to Buffalo, and there had an interview with certain of the plaintiffs' representatives; and it is contended on the part of the plaintiffs that on that occasion an agreement was reached between the parties whereby the plaintiffs agreed to reduce the amount of their claim to $400, and that Reece, for the defendants, agreed to pay the same and to recognise the plaintiffs' alleged lien. The defendants deny any concluded agreement on the occasion in question.

The onus is upon the plaintiffs to establish the alleged agreement, but a careful examination of the evidence fails to satisfy me that Reece made any concluded bargain with the plaintiffs. I, therefore, agree with His Honour that the defendants did not become personally liable; and, therefore, the plaintiffs' appeal should be dismissed.

As to the defendants' cross-appeal that the plaintiffs are not entitled to a lien, reliance is placed upon the Conditional Sales Act, R.S.O. 1897 ch. 149, which enacts (sec. 1) that a condition that the ownership in a chattel shall not pass "shall only be valid as against subsequent purchasers or mortgagees without notice in good faith for valuable consideration in the case of manufactured goods or chattels, which, at the time possession is given to the bailee, have the name and address of the manufacturer, bailor or vendor of the same painted, printed, stamped or engraved thereon or otherwise plainly attached thereto." The name of the plaintiffs, the manufacturers of the switchboards, at the time of their sale, was "The L. M. Ericsson Telephone Manufacturing Company," and when possession of them was given to the Norton Company there was attached to them a metal plate having stamped thereon the following words:—

"Patented in United States, Canada, England, France, Germany, Russia, Austria, Hungary, Belgium, Spain, Italy, Sweden, Norway, Australia.

"L. M. Ericsson Tel. Mfg. Co.
"Buffalo, N.Y."

If it were permitted to speculate as to the meaning of the words "Tel. Mfg. Co." here used, it might, with reasonable certainty, be assumed that they were intended as abbreviations

ONT.

D. C.
1912

ERICSSON TELEPHONE MFG. CO. v. ELK LAKE TELEPHONE AND TELEGRAPH CO.

Mulock, C.J.

of the words "Telephone Manufacturing Company," part of the company's name, although the word "Tel." is equally an abbreviation of the words "telegraph" and "telephone." But the statute does not permit synonymous words to be used in lieu of the actual name of the manufacturer, etc., but requires a literal compliance with its provisions. This the plaintiffs have not done, and have, therefore, failed to secure to themselves the benefit of R.S.O. 1897 ch. 149, sec. 1. Thus the title in the switchboards passed to the Norton Company on the sale to them, and is now in the defendants.

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

Clute, J.

CLUTE, J.:—There is no pretence that the defendants were originally liable for the claim or liable at all except under an alleged new agreement, which is said to have been made on the 29th March, 1910. At the time Seymour sold the property to the defendants, Reece, who it is said made the new agreement, was not a member of defendants' firm, but became such after the purchase of the property in question. The case turns largely upon what took place on the 29th March, 1910, at Buffalo, when Reece went there to see what terms could be made in respect of the lien claimed against the switchboards, and also to make some arrangement in respect of a general account held by the plaintiffs against the defendants, which is not in question in this action.

It is alleged by the plaintiffs that the defendants obtained further time as to the general account, and that they also acknowledged the existence of the lien and agreed to give their notes for the same. Reece saw Hemenway, the manager of the company, and was taken by him to the office of the vice-president, Mr. Smith.

Smith in his evidence states that time was given the defendants on the general account, and with reference to the switchboards the plaintiffs agreed to accept $400. The terms of payment of the $400 were finally arrived at as satisfactory, and he then proceeds:—

> I reached for a blank note supposing that he would make the notes and he said that he would like to go back and talk it over with his people, at least, but that he would see that the notes were executed immediately and forwarded.

Smith was recalled, and denies that the arrangement was "tentative" as alleged by Reece, and states that he supposed it was a completed agreement.

> Q. I understand you to say that he wanted to consult someone?
>
> A. Yes, when I reached, as I have already testified, I reached for the blank notes to have him sign them, supposing that he would sign

them right here, and he said that he wanted to consult someone and would see that the notes were signed and sent back to us as soon as he got back.

Hemenway's evidence is much to the same effect:—

Q. He said he wanted to consult his partner and probably his solicitor when he went back?

A. He said nothing about talking it over with his partner or his solicitor except to advise with them of the settlement he had made, and then we wanted further signatures on the notes.

It cannot, I think, be said upon this evidence that there was a concluded arrangement made at Buffalo, although no doubt it was expected both by the plaintiffs and Reece that the arrangement would be concluded upon his consulting his partner and solicitor.

The evidence of Reece is important. He states that he had paid for the equipment, including the switchboards in full; that on the 10th of January, he received a letter from the plaintiffs' solicitors claiming a lien for $516; not having obtained any satisfaction from the plaintiffs' solicitors he decided to visit Buffalo with a view of arriving at some settlement in regard to the general account, and the alleged lien.

The defendants' business had been seriously affected by fires destroying portions of their property, and in this way making it impossible for the defendants to meet their obligations to the plaintiffs upon the general account. He says the terms were discussed as mentioned in the above letter, but that he had to consult his partner and he desired also to consult his lawyer before signing any notes. He says:—

My intention was to eventually carry out the agreement, that is conditionally. The arrangement had to be completed and only completed by the giving of the notes. My intention was to give the notes. And if I did not give the notes the switchboards were subject to the same conditions as they were prior to my visit to Buffalo. It had not affected their lien in any way. The lien was quite as much in effect.

He says that the reason he did not answer the letter of the 29th was that his affairs were entirely in the hands of his lawyer, and when he returned his lawyer handled them and advised him not to enter into the agreement or any agreement of that kind. He says he admitted the plaintiffs' claim throughout, and intended that their claim should be satisfied; that he intended to give the notes when he was able to meet them, but he did not consider that he was bound to give the notes; that he had tentatively agreed to give the notes; that the object of delaying payment of the notes was to reach a point where they were able to take care of the notes. He admits that he believed he was liable on the lien, but on his return he was advised that he was not. I think it reasonably clear that what took place was a tentative arrangement on the basis of the letter of the 29th of March, sub-

ONT.
D. C.
1912
ERICSSON TELEPHONE MFG. CO. v. ELK LAKE TELEPHONE AND TELEGRAPH CO.
Clute, J.

ject to Reece consulting his partner, and his legal adviser, and signing the notes. In this connection it is of importance to remember that the plaintiffs' manager required some other signatures than Reece's to the notes, as he states himself.

It does not seem to me probable that Reece having bought into the company after the goods in question were purchased would make an arrangement rendering his firm liable for an account, which had been paid in full without consulting his partner, and this taken with the evidence of Smith, that the notes were not signed because he desired to consult his partner, and the evidence of Hemenway that the plaintiffs required a signature other than the defendant Reece to the notes renders it exceedingly probable in my judgment that no binding agreement was made by the defendants' firm to become personally liable for the amount claimed by the plaintiffs as a lien. I should have arrived at this conclusion independently of the findings of the trial Judge, upon reading the evidence, and I agree with him upon this branch of the case.

I think that the plaintiffs' appeal should be dismissed with costs.

Then as to the defendants' appeal. It is contended that the plaintiffs' lien is invalid, relying on the *Toronto Furnace Co.* v. *Ewing*, 15 O.W.R. 381, and the cases there cited. The plaintiffs are manufacturers in Buffalo. The switchboards are patented and there was fastened to the boards a plate containing the following words:—

> Patented in United States, Canada, England, France, Germany, Russia, Austria-Hungary, Belgium, Spain, Italy, Sweden, Norway, Australia; L. M. Ericsson Tel. Mfg. Co., Buffalo, N.Y.

It is urged by the defendants that this plate with its printed matters is a compliance with the patent laws of the United States and not with the Ontario Act. Treating the names of the countries where the article has been patented as surplusage, are the words "L. M. Ericsson, Tel. Mfg. Co., Buffalo, N.Y.," a compliance with the Ontario Act? There is no doubt that with the knowledge of the information there given the plaintiffs' place of business could be found, but under the strict construction which the Act has received, I am of opinion, that it is not a compliance with the Act, and if the case rested here I should feel compelled to hold that the plaintiffs had no lien; but it is further urged by the plaintiffs that in the original sale to the Norton Company, it was declared that the right of property should not pass, and that irrespective of the lien claimed the property remained in the plaintiffs, but I think R.S.O. 1897, ch. 149, sec. 1, is an answer to this contention.

A conditional sale is only valid as against subsequent purchasers, without notice, in good faith for valuable consideration

where the Act is complied with. Here it is clear, I think, that the plaintiffs are *bonâ fide* purchasers for value, without notice of the lien and not, therefore, bound by the condition. There is nothing, in my opinion, that took place subsequent to the 29th of March, which would create a lien if the alleged agreement of that date cannot be supported, as I think it cannot. The defendants' appeal should be allowed with costs.

SUTHERLAND, J. (dissenting):—By this letter the plaintiffs indicate that under the agreement which they claimed to have made with Reece the defendants were to get time on their general account as they desired, that the plaintiffs' lien on the switchboards was acknowledged, that the plaintiffs had substantially reduced their claim in connection with the switchboards and fixed the amounts and time when the sum agreed upon was to be paid. They also intimate that according to the defendants' own "advice," notes were to be sent covering said amount with interest at 6 per cent. from date, and that on receipt of the payments represented by the notes they would release all claim on the switchboards. No reply having apparently been meantime received, the plaintiffs again wrote to the defendants addressing them in the same way on the 29th April, 1910, which letter contains the following:—

> Not having heard from you in reply to our letter of March 29th, we take the liberty of writing you again as we wish to have you send the notes covering the terms agreed upon so that we may close the matter with our attorneys in Toronto.

On the 29th June, 1910, the defendants wrote to the plaintiffs, a letter which contains the following:—

> I have this date addressed a formal letter to the company regarding the outstanding general account. I regret that we were unable to make payment on June 15th as promised, but found it absolutely impossible.

And—

> I am not trying to make excuses for not making settlement as promised, but believe if you fully understand conditions in this wooden country it would be to our advantage. Cannot promise just what date we will make a remittance, but it will be early in July, and for as much as we can possibly send.

On the 14th July the defendants again wrote to the plaintiffs, and I quote from this letter:—

> Regarding switchboard account. Until we have completed payment of general account it will be impossible for us to do anything regarding same. There would be no use our giving you notes as until we pay our already outstanding paper, I would not know how to make same so as to meet them when due. Our entire revenue and more is going towards the settlement of accounts incurred under other management, and everything will be paid as promptly as possible. In the meantime you hold lien as security, and trust you will try to view matters from our standpoint and not insist upon notes which given at

ONT.

D. C.
1912

ERICSSON TELEPHONE MFG. CO. v. ELK LAKE TELEPHONE AND TELEGRAPH CO.

Sutherland, J.

the present time might only embarrass us when due. Will send cheque covering balance of general account as soon as possible, and will then arrange switchboard matter, I trust to our mutual satisfaction.

To this letter the plaintiffs replied on July 18th, in part, as follows:—

> We will, therefore, not insist upon notes, but will wait until you have settled your general account so that you can determine when you can take care of the switchboard account, and send us notes accordingly.

On the 27th September Reece wrote to the plaintiffs a letter, from which I quote as follows:—

> What I wish to ask might better be done verbally, but as we cannot afford the expense of trip at present, must resort to a letter. The question is, to what further extent are the Ericsson Tel. Mfg. Co. willing to assist the Elk Lake Tel. & Tel. Co? Without referring to the past; wherein they have shewn a desire to be as lenient and fair as possible, what arrangements can we hope to make for payments in future on switchboard account? It simply amounts to this—if we cannot make such terms of payment that will not only allow us to meet those payments when due, but also provide for other amounts which we were compelled this summer to borrow, on account of exceptional expense (from sources already explained in former letter), and which fall due now and six months hence. If we cannot make such arrangements, then it were better for the Ericsson Company to exercise the authority they possess, with the object of repossessing switchboards . . . I realize that some time ago, I asked you not to press us for notes on switchboard account, until settlement was made on general account, and that the above looks like side-stepping, but at that time, it appeared reasonable to suppose, that in perhaps October, we might make a note with reason to believe it would be met when due.

On October 11th, 1910, the plaintiffs wrote to Reece in part, as follows:—

> The situation as you remember, Mr. Reece, is this. When you were in Buffalo you agreed for your company with Mr. Smith, and with me for our company, to pay us $400 on the switchboard, we in turn on receipt of this payment to release our lien against the board. Now, you were to give us notes in payment of this, due at certain periods. From time to time you have written us about this and we have extended the time of payment and not demanded notes. This has run on a long time, however, and we feel that now you should give us the notes asked for. In fact, this is insisted upon by the company. Now, as stated before, the company wants to give you every opportunity to take care of this without embarrassment, therefore, what we propose to do is that you sign the enclosed note for $400 in this instance we have made it one note instead of several—which you will note is due in ninety days from date of this letter, although the note is dated at the time we reached this conclusion, etc.

Getting no reply the plaintiffs wrote to Reece, care of the defendant company, again on 19th October, and again on November 1st. I quote from this letter:—

> The matter of your company's account has just been called to my attention, and I am at a loss to understand why you do not carry out your agreement and send us the notes as promised. Mr. Hemenway and Mr. Smith say that they acceded to your request only on your positive promise to send those notes immediately, and I cannot understand why you failed to carry out your word.

On November 4th the defendant company, *per* A. E. Taylor, presumably the other partner, wrote Mr. Hemenway of the plaintiff company in reply apparently to the last mentioned letter, as follows:—

> Replying to your letter *re* notes, Mr. Reece is engaged at present connection with matters on account of death of his father who died in Toronto recently. As soon as possible—which will be in a very few days—the matter of switchboard notes will be taken up.

And on December 3rd the defendant company, *per* Reece, wrote to the general manager of the plaintiff company, and in his letter appears the following statement:—

> I realize and appreciate your past liberality and leniency, but you cannot appreciate the efforts and sacrifices we have made, in order to remit to the company the amount you have already received. I have just returned to Elk Lake, and am now prepared to do what is possible in connection with switchboard matters. Will be glad if you will outline a plan to the company, and if possible we will meet with it.

The plaintiff wrote further letters on December 9th, and 21st, 1910, and again on January 19th, 1911. No replies to these letters were put in at the trial. Throughout this long period of time and correspondence there is no repudiation by the defendant company or Reece or Taylor of the plaintiffs' statement that part of the agreement made at Buffalo as mentioned was that the defendants were to pay the $400 and give notes.

The trial Judge has found as follows:—

> The letter from the defendants to the plaintiffs of July 14th, 1910, read in connection with the other letters make it perfectly clear that they recognized the plaintiffs' lien for this amount. The other question as to whether or not the defendants have made themselves personally liable to the plaintiffs for this $400 is not so clear. I think I must find on the evidence that while Reece was perfectly willing to do so, he did not, at Buffalo, wish to assume personal liability for his firm without seeing Taylor. I formed the impression at the trial that he wanted to see Taylor only for the purpose of deciding upon the giving of the notes, but a careful reading of the correspondence since the trial has led me to conclude that the giving of the notes and the assumption of personal liability, were in the eyes of the defendants, synonymous terms. I have not been able to find anywhere in the correspondence a direct promise on the part of the defendants to give these notes or assume personal liability. There is no doubt that the defendants were putting the plaintiffs off and gaining more time by leading them to think that these notes would be given, and that personal liability would be assumed, but that they did make themselves personally liable to the plaintiffs is very doubtful.

ONT.

D. C.
1912

ERICSSON TELEPHONE MFG. CO. v. ELK LAKE TELEPHONE AND TELEGRAPH CO.

Sutherland, J.

With respect I am unable to agree with the trial Judge in his view of the effect of the correspondence. It discloses that the defendants, knowing that the plaintiffs had a claim on general account, which they were pressing for settlement, and alleging that they hold a lien on the switchboards, which were in the possession of the defendants and which the latter were desirous of retaining, approached the plaintiffs and made an arrangement with them by which the matters in question and dispute were arranged in such a way as that the plaintiffs did give the defendants time in connection with the payment of the general account; the defendants did acknowledge the plaintiffs' lien on the switchboards; a reduced sum, viz., $400, was discussed and arranged between them on payment of which by the defendants the lien on the switchboards, which the defendants acknowledged, was to be released in full by the plaintiffs, and the giving of notes to represent said reduced sum was discussed.

I am not at all sure that a promise in writing is necessary under the statute in these circumstances. I quote from the Encyclopædia of Law and Procedure, vol. 20, 167:—

> Even though when the oral promise is made the primary debt is still subsisting and may have been antecedently contracted, such promise is original and valid if it is supported by a new consideration moving to the promissor and beneficial to him and is such that the promisor thereby comes under an independent duty of payment irrespective of the liability of the principal debtor.

But it seems to me that where the bargain is so definitely stated by the plaintiffs in the correspondence as here and letters received from the defendants referring thereto without any repudiation of such a promise, the principle recently discussed by Mr. Justice Riddell in *Meikle* v. *McRae*, 20 O.W.R. 308, at 310-311, is applicable: "Silence is sometimes conduct," says Bramwell, B., in *Keen* v. *Priest*, 1 F. & F. 314, at p. 315; and where, from the relations of the parties, a reply might naturally and ordinarily be expected, silence is strong evidence of acquiescence." In *Weidemann* v. *Walpole* (1891), 2 Q.B. 534, this principle is discussed. Lord Esher, at p. 537, says:—

> Now there are cases—business and mercantile cases—in which the Courts have taken notice that, in the ordinary course of business, if one man of business states in a letter to another that he has agreed to do certain things, the person who receives that letter must answer it if he means to dispute the fact that he did so agree. So, where merchants are in dispute one with the other in the course of carrying on some business negotiations, and one writes to the other, "but you promised me that you would do this or that," if the other does not answer the letter, but proceeds with the negotiations, he must be taken to admit the truth of the statement.

Kay, L.J., at page 541, says:—

> There are certain letters written on business matters, and received

ONT.

D. C.
1912

ERICSSON TELEPHONE MFG. CO. v. ELK LAKE TELEPHONE AND TELEGRAPH CO.

Sutherland, J.

by one of the parties to the litigation before the Court, the not answering of which has been taken as very strong evidence that the person receiving the letter admitted the truth of what was stated in it. In some cases that is the only possible conclusion which could be drawn, as where a man states, "I employed you to do this or that business upon such and such terms," and the person who receives the letter does not deny the statement and undertakes the business. The only fair way of stating the rule of law is that in every case you must look at all the circumstances under which the letter was written, and you must determine for yourself whether the circumstances are such that the refusal to reply alone amounts to an admission.

On the question of the cross-appeal, of the defendants against the finding of the Judge in favour of the plaintiffs' lien, a finding I think clearly warranted by the evidence and correspondence, I would have had some doubt in the face of the strict construction which has been given to the Conditional Sales Act in such cases as the *Toronto Furnace Co.* v. *Ewing*, 15 O.W.R. 381, that the plaintiffs had complied with the Act with sufficient definiteness to entitle them to succeed.

I agree, however, with the trial Judge that an agreement has been shewn to have been entered into on the part of the defendants to recognize the lien of the plaintiffs. I would allow the appeal of the plaintiffs and hold the defendants personally liable for the $400 and interest, and dismiss the defendants' appeal, each with costs.

*Defendants' appeal allowed; and plaintiffs' appeal dismissed;* SUTHERLAND, J., *dissenting.*

---

## LAKE ERIE EXCURSION CO. v. TOWNSHIP OF BERTIE.

ONT.

H. C. J.
1912
May 1.

*Ontario High Court. Trial before Kelly, J. May 1, 1912.*

1. EVIDENCE (§ II K 2—343)—ONUS—BOUNDARY OF LOT.

In an action to restrain a municipality from interfering with a fence erected by the plaintiff along the centre line of land used as a highway, upon the ground that such centre line forms the boundary of the plaintiff's property, the onus is upon the plaintiff to establish that the boundary is as he alleges.

2. EVIDENCE (§ II K 2—343)—ONUS—BOUNDARY OF HIGHWAY.

In an action or counterclaim by a municipality for the removal of a fence erected upon and to restrain the obstruction of land alleged to form part of an allowance for road, the onus is upon the municipality to establish the existence and location of the allowance for road.

ACTION to restrain the defendants from interfering with or removing a fence alleged by the plaintiffs to be the western

Statement

ONT.

H. C. J. 1912

LAKE ERIE EXCURSION CO. v. TOWNSHIP OF BERTIE.

boundary of part of lot 26 in the broken front concession on Lake Erie, in the township of Bertie, of which part of the lot the plaintiffs claimed to be the owners, and from entering on the plaintiffs' land, and for damages.

The defendants by their counterclaim asked that the plaintiffs should be ordered to remove the fence and should be restrained from incumbering or obstructing the roadway.

The action was dismissed.

*W. M. German*, K.C., and *H. R. Morwood*, for the plaintiffs.
*E. D. Armour*, K.C., and *G. H. Pettit*, for the defendants.

Kelly, J.

KELLY, J.:—The part of lot 26 owned and occupied by the plaintiffs fronts on Lake Erie.

For at least thirty years prior to June, 1899, there was open for travel a road running southerly, between lot 26 and lot 27, from the concession road, which runs easterly and westwardly, to another road running easterly, known as the Haun road, and which is a considerable distance north of the north line of the plaintiffs' property.

On the 1st June, 1899, the Crystal Beach Steamboat and Ferry Company, the plaintiffs' predecessors in title of that part of lot 26 so occupied by it and a large number of other property-owners and residents in that locality, presented a petition to the defendants, setting forth that "a portion of the Government allowance for road between lots 26 and 27 in the broken front concession, Lake Erie, has not yet been declared open for public travel;" that the petitioners believed "it to be in the public interest to have said road opened from the Haun road to the lake shore;" and the petitioners asked the defendants "to take the steps necessary according to law to make this road allowance a highway."

The petition was signed by the Crystal Beach Steamboat and Ferry Company, by their general manager, J. E. Rebstock; and he and the president of the company, with others, attended at a meeting of the defendants' council and urged the granting of the petition. J. E. Rebstock is, and was as early as 1902, a director of the plaintiff company; who acquired their property in June, 1902.

On the 9th September, 1899, the defendants passed a by-law declaring open for public travel "the Government allowance for road from the road known as the Haun road south between lots 26 and 27 broken front, Lake Erie, to the shore of Lake Erie." The land which was so opened for roadway at or adjoining the plaintiffs' land is 25 feet on each side of a fence then existing, which was thought by some to be the boundary line between lots 26 and 27, and which was the dividing line between the property then occupied by the plaintiffs' predecessors in

title (the Crystal Beach Steamboat and Ferry Co.) and the property to the west thereof. This is the line which the plaintiffs now allege to be the westerly boundary of their property.

The defendants, when opening the road, did not employ a surveyor to fix its location.

Soon after the passing of the by-law, work was commenced to put the roadway in condition for traffic, by cutting through a hill near the lake, and filling in the marshy part of the road north of the hill; and work in the way of improvement and repair to the roadway has been done by the defendants year after year since that time.

In 1903, the defendants constructed a sewer leading from a point in the new road, north of the north limit of the plaintiffs' property, through the road as so opened to the lake, the north end of the sewer commencing in the east ditch of the roadway and bearing somewhat to the west as it proceeds to the south, so that the northerly portion of it is to the east of the centre line of the road, as so laid out, and the southerly portion of it is to the west of that line.

In 1905, the sewer having been damaged, the defendants repaired it.

The road has continued as a public travelled road from the time it was opened; and the traffic upon it has been partly on the land east of the line fence erected by the plaintiffs and partly to the west of it. The width of the old road north of the Haun road varies from 36 feet to 40 feet, while the part opened in 1899 has a width of 50 feet from a short distance south of the Haun road to the lake.

In 1911, the plaintiffs, asserting that the west boundary of lot 26 extended to the centre of the road as opened, erected a fence along the boundary so asserted, and the defendants removed it.

Looking at the language of the petition and of the by-law which followed it, the petitioners and defendants seem to have believed that there existed an unopened allowance for road to the lake between lots 26 and 27; and defendants also believed that the fence between the lands occupied by the Crystal Beach Steamboat & Ferry Co. and the property to the west thereof was the centre line of this unopened allowance for road.

It has not been made clear, however, that an allowance for road existed between lots 26 and 27; and there is also grave doubt as to the true location of the west boundary of lot 26.

The evidence of George Ross, O.L.S., who was called by plaintiff at the trial to prove the line of this west boundary, failed in fixing its location or in establishing that an allowance for road had existed between lots 26 and 27.

ONT.

H. C. J. 1912

LAKE ERIE EXCURSION CO. v. TOWNSHIP OF BERTIE.

Kelly, J.

Having been asked, about three years ago, by plaintiff to mark out the northerly boundary of its property, he says he also marked the north-westerly corner of it in the centre line of the 50 feet roadway, but he admits that he took as his guiding point the location of a tree pointed out to him about 20 years previously by some person who had heard from De Cew, a former surveyor, that the tree was in the west boundary of lot 26. He did not, however, examine the patent to ascertain the width of the lot, and says that without having done so, it is impossible to say what the width of the lot ought to be; that he found no old monuments, that he had doubts whether there was a road allowance between lots 26 and 27 or not, that the location of the side-roads or where they ought to be has always been a disputed matter, that he did not know the distance between the tree in question and the limit between lots 25 and 26, although he did give the distance from the tree to the sideline between lots 24 and 25, and that the road running southerly from the concession road to the Haun road was accepted as the sideline between lots 26 and 27.

If, on the other hand, there did not exist an allowance for road, the road opened in 1899 to the lake must have been taken from lot 26 or lot 27, or partly from one and partly from the other.

The plaintiffs, on whom rests the burden of proving that the line where they erected the fence on the roadway is the west limit of their property, have failed to shew where the westerly boundary of lot 26 lies, or that it falls within the boundaries of the land laid out in the roadway. Especially have they failed to shew that the fence which they erected, and which was removed by the defendants, was the westerly boundary of lot 26. Even had the plaintiffs established that line, there would still have to be considered the circumstance of the plaintiffs' predecessors in title having petitioned to have the road north of the Haun road opened to the lake shore; and whether their action and the action of the defendants in opening the road constituted a dedication of the road.

There was no complaint or objection on the part of the plaintiffs or their predecessors, except some objection to the location of the sewer made to the contractors who were engaged in its construction; but this objection was not made to the defendants, and did not come to their knowledge.

I do not, however, rest my judgment on the question of dedication.

Since the plaintiffs have not established that the line of the fence which they erected is the west limit of their property or of lot 26, and have not proved that any part of the road opened is on their land, they are not entitled to succeed; and I dismiss their action with costs.

ONT.

H. C. J. 1912

LAKE ERIE EXCURSION CO. v. TOWNSHIP OF BERTIE.

In the absence of some positive evidence shewing whether there existed an allowance for road between lots 26 and 27 and fixing the westerly boundary line of lot 26, I make no order on the counterclaim that the plaintiffs be ordered to remove the fence and be restrained from incumbering or obstructing the road.

*Action dismissed.*

---

## Re MERCER.

ONT.

H. C. J. 1912

May 18.

*Ontario High Court, Middleton, J. May 18, 1912.*

1. COURTS (§ II A 5—172)—JURISDICTION OF THE SURROGATE COURT—STATUTORY POWERS.

The Surrogate Court is one of probate only, without inherent jurisdiction, and possesses only such powers as are conferred by the Surrogate Court Act.

2. COURTS (§ II A 5—174)—JURISDICTION OF SURROGATE COURT AS TO INFANTS—PAYMENT INTO COURT—1 GEO. V. (ONT.) CH. 26, SEC. 36, SUB-SEC. 2.

The Surrogate Court is without jurisdiction to order an administrator upon his discharge, to pay into that Court money belonging to an infant, and the Trustees Act, 1 Geo. V. sub-sec. 2, of sec. 36, ch. 26, does not confer jurisdiction on such Court to make an order of that character, but only to order it paid into the High Court, which is the only Court entitled to receive money belonging to infants and lunatics.

Statement

AN appeal by the Official Guardian from an order of the Judge of the Surrogate Court of the County of Oxford, directing payment of money into the Surrogate Court.

The appeal was allowed, and order varied by directing payment in the High Court.

*F. W. Harcourt*, K.C., as Official Guardian, representing the infant John H. Mercer.

*C. A. Moss*, for the administrator.

Middleton, J.

MIDDLETON, J.:—Upon the appointment to pass the administrator's accounts, it appeared that the administrator had in his hands $214.33 belonging to the infant; and, the administrator desiring to be discharged from his trust with respect thereto, the Surrogate Court Judge directed that the administrator do pay this sum into the Surrogate Court to the credit of the infant, less $10 allowed for the costs of payment in; this sum to be paid out to the infant upon his attaining his majority.

This direction was made against the protest of the Official Guardian, who contended that the money should be paid into the High Court under the provisions of the Trustee Act, 1 Geo.

ONT.

H. C. J. 1912

RE MERCER.

Middleton, J.

V. ch. 26, sec. 37, sub-sec. 2; which provides that where a Surrogate Court Judge, in passing accounts before him, finds that an executor or administrator, guardian or trustee, has money or securities in his hands belonging to an infant or lunatic, he may make a "like order;" that is, an order similar to that referred to in sec. 37, sub-sec. 1, permitting the payment into the High Court of the moneys in question.

The Surrogate Court is a Court of probate only; it has no inherent jurisdiction. It is a creature of the statute; its jurisdiction and powers are found in the Surrogate Courts Act. It can grant probate, letters of administration, and letters of guardianship, and can hear and determine questions arising in all causes and matters testamentary; but neither it nor the Court of Probate, which it succeeded, ever had the right to the custody of the property of infants or lunaties; and, although new jurisdiction has recently been conferred upon it, enabling it to pass executors' accounts and deal with certain matters ordinarily arising in administration suits, no such power as that suggested has yet been conferred.

There is not to be found in the Surrogate Rules any machinery for payment into Court. The Surrogate Court has no accountant and no officer who is entitled to receive and hold the moneys.

I asked counsel what was meant by "paying money into the Surrogate Court;" and he told me that the procedure adopted was the payment of the money into a bank. He did not know whether it was paid to the credit of the person entitled, either solely, or jointly with the Surrogate Registrar or the Surrogate Judge. The bank pass-book is then deposited with the Surrogate Registrar. Upon this deposit being made, the bank allows three per cent. interest.

Apart from the question of the absence of jurisdiction, the practice is most inconvenient and is not in the interest of the infant. The expense of paying money into the Surrogate Court in this way is fully as great as upon payment into the High Court; and the money carries three per cent. interest, instead of four and a half per cent., as now allowed by the High Court. The funds are subject to no supervision or control. There is no audit, and no one is responsible in any way.

The appeal should be allowed, and the order varied by directing payment into the High Court. No costs.

*Appeal allowed.*

## SUTHERLAND v. SUTHERLAND.

ONT.

H. C. J.
1912
June 10.

*Ontario High Court. Trial before Riddell, J. June 10, 1912.*

1. TAXES (§ III F—146*a*)—NOTICE OF SALE—SUFFICIENCY OF PUBLICATION—THE ASSESSMENT ACT, 4 EDW. VII. (ONT.) CH. 23, SEC. 143, SUB-SEC. 3.

The abbreviated notice permitted by sub-section 3 of section 143 of the Assessment Act, 4 Edw. VII. (Ont.) ch. 23, in the case of a sale of land for arrears of taxes must be published for 13 weeks. A single publication thereof is insufficient.

2. TAXES (§ III F—146)—VALIDATION OF DEED AND SALE FOR ARREARS—THE ASSESSMENT ACT, 4 EDW. VII. (ONT.) CH. 23, SEC. 173.

After the expiration of 2 years from the time of a sale of land for arrears of taxes, section 173 of the Assessment Act, 4 Edw. VII. (Ont.) ch. 23, validates not only the deed but also the sale of the land, and it is not necessary to shew that the sale was openly and fairly conducted.

[*Hall* v. *Farquharson*, 15 A.R. 457, distinguished.]

3. TAXES (§ III F—146)—STATUTORY TIME FOR VALIDATING TAX DEED—WHEN IT COMMENCES TO RUN.

The period of 2 years from the time of sale, on expiration of which a sale of land for arrears of taxes is validated by section 173 of the Assessment Act, 4 Edw. VII. (Ont.) ch. 23, runs from the time of making the tax deed, and not from the time of the auction sale of the land.

[*Donovan* v. *Hogan*, 15 A.R. 432, followed.]

4. TAXES (§ III F—145)—REQUISITES AS TO A FAIRLY AND OPENLY CONDUCTED SALE FOR ARREARS OF TAXES—4 EDW. VII. (ONT.) CH. 23, SEC. 172.

In order that a sale of land for arrears of taxes may be openly and fairly conducted, within the meaning of section 172 of the Assessment Act, 4 Edw. VII. (Ont.) ch. 23, something more is required than easy-going, unenquiring honesty on the part of the official who sells. The sale must be conducted as an ordinary business transaction is, where property is sold by auction with a view to obtain its fair market value, and fairness is required on the part of the vendee, as well as of the vendor.

[*Donovan* v. *Hogan*, 15 A.R. 432, followed.]

5. TAXES (§ III F—148*a*)—SETTING ASIDE TAX SALE—NON-COMPLIANCE WITH STATUTORY CONDITIONS—"OPENLY AND FAIRLY CONDUCTED" SALE.

Where land is sold for arrears of taxes, and there is no local advertisement, except a bill posted at the Court-house, and a single insertion in two papers of the abbreviated advertisement authorized by sub-section 3 of section 143 of the Assessment Act, 4 Edw. VII. (Ont.) ch. 23, and only three or four persons attend the sale, and only one bid was made which was of the exact amount of the arrears, offered by the brother of the owner, who had been anxious, though not to the knowledge of the municipal officials, to get the land, the sale is not openly and fairly conducted within the meaning of section 172 of the Assessment Act, 4 Edw. VII. (Ont.) ch. 23.

ACTION to set aside a tax sale.

Judgment was given for the plaintiff.

ONT.

H. C. J. 1912

SUTHERLAND v. SUTHERLAND.

Riddell, J.

*P. McDonald*, for the plaintiff.

*S. G. McKay*, K.C., and *J. G. Wallace*, K.C., for the defendants.

RIDDELL, J.:—The plaintiff was the owner of about an acre of land in the township of West Zorra, upon which was a brick dwelling-house and another building, worth in all about $800 or $1,000.

On the 27th October, 1909, the Treasurer of the County of Oxford sold this for taxes for the sum of $38.78 (the exact amount due) to John Sutherland, brother of the plaintiff. He died, and in January, 1911, the deed was made to his son, Robert John Sutherland, one of the defendants.

On the 4th December, 1911, the plaintiff brought her action to set aside the sale.

Full credence is to be given to the witnesses called for the defence. This, in the case of C.R., applies to what he swore to after the trial of the case was resumed—I found it necessary to postpone the further hearing of the case by reason of his condition. All the notices that were sworn to have been sent to the plaintiff, including those by her agent Wadland, I find she received, notwithstanding her denial.

But with all this, the proceedings bristled with irregularities, and such as, on the authorities, well known, rendered the sale voidable.

I mention in particular only one. The Assessment Act, 4 Edw. VII. ch. 23, sec. 143, sub-sec. 1, requires an advertisement "once a week for four weeks in the Ontario Gazette, and in some newspaper published within the county once a week, for thirteen weeks . . .," of the list of lands, etc. Then sub-sec. 3 provides that, instead of this advertising, "the Treasurer may have the advertisement published in the Ontario Gazette as hereinbefore provided, and then published in at least two newspapers, published as in sub-sec. 1 provided, a notice announcing that the list of lands for sale for arrears of taxes has been prepared, and that copies thereof may be had in his office, and that the list is being published in the Ontario Gazette . . . ."

This provision was simply to save the expense of publishing a long list of lands in the local papers: and it cannot, in my opinion, be considered that it did more than this. But the interpretation put upon this section by the county officials is, that a single publication is sufficient; and, accordingly, the publication required by sub-sec. 3 appeared only once in the local papers, instead of for thirteen weeks, as, I think, the statute requires.

The defendants, however, rely upon sec. 173.

*Hall* v. *Farquharson*, 15 A.R. 457, is relied upon by the plaintiff as shewing that the purchaser cannot claim the statutory protection, because, as it is argued, the sale was not "openly and fairly conducted."

That decision, it is contended on the other hand, was in a different state of the law. The statute there referred to is R. S.O. 1877 ch. 180. Section 155 of that Act is much the same as sec. 172 of the statute of 4 Edw. VII. Section 156, however, is different from sec. 173 of the present Act, and reads thus: "Wherever lands are sold for arrears of taxes, and the Treasurer has given a deed for the same, such deed shall be to all intents and purposes valid and binding except as against the Crown, if the same has not been questioned before some Court of competent jurisdiction by some person interested in the land so sold, within two years from the time of sale." There is here no validation of the sale; for that, sec. 155 had at that time to be applied to; and that required the sale to have been "openly and fairly conducted." Moreover, in *Hall* v. *Farquharson*, 15 A.R. 457, it was considered that only sec. 155 was or could be relied upon—the two years' time had not run. See p. 467.

This state of the law continued down through R.S.O. 1887 ch. 193, secs. 188, 189; 55 Vict. ch. 48, secs. 188, 189; R.S.O. 1897 ch. 224, secs. 208, 209; but the new Act 4 Edw. VII., while not substantially changing the earlier section by sec. 172, made a great change in the latter by sec. 173: "Wherever land is sold for taxes and a tax deed thereof has been executed, *the sale* and the tax deeds shall be valid and binding, to all intents and purposes, except as against the Crown, unless questioned before some Court of competent jurisdiction within two years from the time of sale." In the present state of the law, there is no need of calling in the aid of sec. 172 to validate a sale—if the sale have been two years before the issue of the writ, that is enough when a tax deed has been executed.

But it has been authoritatively decided in *Donovan* v. *Hogan*, 15 A.R. 432, that "two years from the time of sale" means "two years from the time of making the tax deed," not from the time of the auction sale of the land. While the Legislature has, in the Act of 1904, inserted the words "the sale" in the first part of the section, and it may be contended that this must mean the auction sale—and that the word "sale" at the end of sec. 173 must be read as meaning the same thing—I do not think it open to a Judge of first instance to question the applicability of a decision on the word by the Court of Appeal, on mere inference, except of the strongest kind. If a change is to be made, it should be made by the appellate Court. Section 173, then, does not here avail the defendants; and they

ONT.

H. C. J.
1912

SUTHERLAND
v.
SUTHERLAND.

Riddell, J.

must rely upon sec. 172. That protects only "provided the sale was openly and fairly conducted." These words are considered in *Donovan* v. *Hogan*, 15 A.R. 432, and Patterson, J.A., says (p. 446):—

> I have a strong feeling that something more must be required than easy-going, uninquiring honesty on the part of the official who sells. . . . What is aimed at is, that these sales shall be conducted as ordinary business transactions are, where property is sold by auction with a view to obtain its fair market value. . . . Fairness is required on the part of the vendee as well as the vendor.

Here there was no local advertisement, but a bill posted at the court house, and a single insertion in two papers of the skeleton advertisement authorised by the Act. There were only three or four attending the sale, and but one bid for the property, and that the exact amount of the charge against the property—this bid was made by the brother of the plaintiff, who had been anxious to get the property, although it is true that it was not proved that the county officials were aware of that fact. It is true, too, that the agent of the owner was at the sale, but he was not in funds. But can it be said that this sale was "conducted as ordinary business transactions are, where property is sold by auction with a view to obtain its fair market value?

I think the defence fails, and that the sale should be declared invalid. It is not a case for costs. The defendant Sutherland will have, of course, the benefit of the provision of 4 Edw. VII. ch. 23, sec. 176; the amount of damages to be assessed to him for purchase-money, interest, improvements, etc., under this section, and the value of the land, etc., will be determined by the Master (unless the parties agree); the costs of reference, etc., and further directions reserved.

I do not find fraud or evil practice by the purchaser (sec. 176 (3) (e)); nor does either of the other exceptions exist. It is to be hoped that aunt and nephew will be able to settle their dispute without further litigation.

*Judgment for plaintiff.*

## RICKLEY v. STRATTON.

ONT.

H. C. J.
1912
June 6.

*Ontario High Court. Trial before Middleton, J. June 6, 1912.*

1. PHYSICIANS AND SURGEONS (§ II—36)—DUTY AND LIABILITY OF PHYSICIAN—FREQUENCY OF VISITS.

A physician, employed to treat a child's broken leg, is not necessarily guilty of negligence, if he fail to make frequent visits for the purpose of inspecting the leg, where he lives at a considerable distance, and, after treating the leg for ten days, has left it properly bandaged and secured, and warned the parents against interfering with it, and instructed them that, if anything goes wrong, he is to be called by telephone, to which they have easy access.

Statement

ACTION by Benjamin Rickley, an infant of eight years, suing by his father and next friend, and by Elisha Rickley, the father, against a medical practitioner for malpractice in the treatment of the boy's broken leg, the boy claiming $600 damages and the father $400 damages.

The action was dismissed.

*J. L. Whiting*, K.C., and *J. E. Madden*, for the plaintiffs.
*W. S. Herrington*, K.C., for the defendant.

Middleton, J.

MIDDLETON, J.:—The child was injured on the 12th December, 1911. The defendant was called in upon the same day; and, after ascertaining the nature and extent of the injury, proceeded to treat the child in a way that is characterised by the witnesses on both sides as being exceedingly skillful: to use the words of one of the witnesses, it was "a good example of up-to-date surgery." The leg, after being straightened, was duly fastened to splints, a weight was attached and the patient was then left till the morning, when it was intended to set the broken limb. On the morning of the 13th, it was found that the bone was almost exactly in place, and the setting was accomplished without difficulty. The patient was made comfortable and was left to the care of the mother. The defendant called several times and examined the limb, doing all that was necessary; and, up to a date as to which there is some uncertainty—but which I fix as the 22nd December—there is no room for any adverse comment upon his treatment or conduct, and apparently the child was on the high way to recovery. This would be some ten days after the fracture.

I quite accept the defendant's statement as to the course adopted by him in the treatment of the child; and, speaking generally, I much prefer his evidence to the evidence of the parents.

On that day it appears that he had an idea that the bandaging of the leg or the weight attached had been tampered with, probably with the view of easing the pain which the child necessarily suffered, incident to the healing of the broken limb; and

ONT.

H. C. J. 1912

RICKLEY v. STRATTON.

Middleton, J.

he then very fully and carefully warned the mother, in whose care the child was, of the danger of deformity resulting from any interference with the bandaging and other appliances.

The plaintiffs lived a considerable distance from Napanee, the residence of the defendant, and travelling at this time was difficult, owing to the poor condition of the roads. The plaintiffs were poor people, and could only afford to pay very small remuneration. Up to this time the defendant had only received $5 on account of his services, and later on $5 more in full of his charges, and he looked upon the case as practically a charity case; though this can make no difference in his liability.

There was a telephone in the village, to which the father and mother and other members of the family had easy access; and the defendant came to the conclusion that the leg was so well bandaged in the splints, and that the mother so thoroughly understood the necessity for leaving it quite undisturbed, that further visits were not necessary. He, consequently, gave instructions that, if anything went wrong, he was to be called from Napanee by telephone, and he stated that there was no necessity for frequent visits.

There is a good deal of confusion upon the evidence as to what took place next. The defendant has no detailed record of the case to aid his memory. The mother is most positive in her statements, but I do not think she can be relied upon. She fixes the date of the next visit as being the 31st December, and says that upon that day the defendant stated that he would come in about a week and remove the splints. The defendant has no recollection of this visit, and places his next visit as being on the 7th January. The mother says that on the 5th January, a Friday, the doctor came and removed the splints, and that the limb was then found to be crooked, and in bad shape; that the doctor made light of the condition of the limb, and declared it was all right and would be a useful limb, and that the shortening was very trifling. The defendant denies this visit entirely.

It is common ground that on the 6th January, Saturday, the father called upon the defendant and told him that the limb was not straight, and that the mother was much dissatisfied with its condition. The defendant suggested that, if the bone had united improperly, the leg might have to be again broken. The doctor then called on the 7th, the occasion which he says was his first visit after the 22nd December. The leg was then undoubtedly in a most unsatisfactory condition. The broken bone, the part of which had been placed end to end, had slipped, the lower section had crossed over the upper section and had united at the point of crossing. The two portions of the bone were at an angle of 135 degrees.

The mother refused to allow the bones to be severed, and the

doctor tried to reduce the angle by a proper splint, but failed, as the adhesion was too firm. He advised an operation in the hospital; and there is a good deal of dispute as to the attitude of the different parties; but nothing turns upon this, as in the end the child was taken to the Kingston Hospital, and was there operated upon, very skillfully, by Dr. Anglin. The bone was separated where the improper union had formed; the broken ends were successfully united; and, after some weeks, the child was returned to its mother with the leg in an entirely satisfactory condition.

Save in respect to one matter, everything that has been suggested against Dr. Stratton is entirely without foundation; and, although the child is not now in a satisfactory condition, the defendant is in no way to blame for anything that took place after the child was taken to the hospital and placed in charge of the doctors there.

Doctor Anglin was a witness at the trial, and had not seen the child from the time it was discharged from the hospital early in April until the day of the trial. At the trial he examined the child, and found that, owing to the failure of the mother to obey his instructions and prevent the child standing upon the injured limb, most of the benefit of the operation had been lost; and the leg is now almost as crooked as before the operation at the hospital.

There is no doubt that on the 7th January the leg was in very bad shape, and that the condition of the bones then resulted in a shortening of over two inches. The question is as to the cause of this condition and the responsibility for it. On the 22nd December, the healing had undoubtedly reached a critical stage. The bone would not then have knit by the formation of any new bony structure, or, at most, the bony structure would have been of a very fragile nature; at the same time, the bone would have then united by the formation of callous or cartilaginous material; and, unless displaced by some misadventure, there was no reason why the healing should not satisfactorily progress.

At the hearing it was suggested that the mother must herself have loosened the splints or taken off the weight at some time between the 22nd December and the 7th January. She denies this. The husband denies it also, although he was not present more than a small portion of the time; and the child also denies it. Although I have grave suspicion, I do not think that, in the face of these denials, I can find in favour of this contention, more particularly as Dr. Anglin stated that the child was exceedingly restless, and that the displacement of the bone may have been occasioned by this, quite apart from any improper conduct on the part of the mother.

One thing is clear: that between the 22nd December and the

ONT.

H. C. J.
1912

RICKLEY
v.
STRATTON.

Middleton, J.

7th January, and probably almost immediately after the 22nd, the bone somehow became displaced and remained displaced sufficiently long to become firmly fixed by the 7th January.

The negligence which is now suggested—though this I think was not present to the mind of the parties when the action was brought—is that the defendant ought to have realised the necessity of inspecting the limb every four or five days, so that he might see if displacement had taken place, either by the restlessness of the patient or by the carelessness or worse of the mother, so that the bone might be restored to its proper position before an adhesion had taken place or it had become so firmly fixed as to necessitate a serious operation.

Upon this point there is a conflict of evidence. Some of the medical men thought that, under the circumstances, the defendant had done all that he was called upon to do; that, having explained the danger to the mother, he was justified in relying upon her communicating with him if any displacement took place. Dr. Anglin said that the danger was a real danger, and that Dr. Stratton "took a chance." Further than this he declined to go. Others went farther, and said that, having undertaken the case, the doctor was not justified in taking a chance which might result so seriously to the child.

After considering the matter as carefully as I can, I do not think that the defendant was guilty of any actionable negligence; and, in my view, the action fails.

Had I come to the opposite conclusion, the damages to be awarded would have been a comparatively small sum; as there is no possible liability of the defendant save for the failure to attend the patient between the 22nd December and the 7th January, which resulted in the improper union of the bone. This necessitated the operation in the Kingston Hospital. In Kingston, the child was treated as a free patient, and the items inserted in the bill with respect to hospital charges, Dr. Anglin's bill, and nursing, are fictitious. Dr. Wilson's bill is unpaid; and I am satisfied that it was prepared for the purpose of the litigation.

The whole financial loss to the father would be covered by a small sum, and I would assess his damages at $50. The infant plaintiff would be entitled to something, because of the pain and suffering incident to the operation at Kingston. I would assess these damages at $150; and I would, in that event, refuse to interfere with the operation of the rule as to setting off costs: because the claim made is, I think, unfair and exaggerated.

As it is, I dismiss the action with costs.

*Action dismissed.*

QUE.

K. B.

1912

June 15.

**THE CANADA PRODUCER AND GAS ENGINE CO. (defendants, appellants) v. THE HATLEY DAIRY, LIGHT AND POWER CO. (plaintiffs, respondents).**

*Quebec Court of King's Bench (Appeal Side), Archambeault, C.J., Trenholme, Cross, Carroll and Gervais, JJ. June 15, 1912.*

1. SALE (§ II A—27)—IMPLIED WARRANTY—GUARANTY IN WRITING—CONSUMPTION OF FUEL—DEFINITE POWER—CONDITIONS.

The warranty implied by law on the sale of a chattel is superseded by a guaranty in a written contract for the sale of an engine, that it was free from latent defects, and that it should, under certain fuel conditions, develop 50 horse power, without varying more than 2 per cent. in speed under differing load conditions.

2. SALE (§ II E—44)—WARRANTY—SHOP TEST OF MACHINERY—INDUCEMENT TO PURCHASE—CONDITIONS OF PURCHASE.

Where a contract for the purchase of a gas producer, a gas engine, and an air compressor for starting it, provided that the vendor should for one year replace, free of charge, all defective parts; that the vendee could not reject the plant except for failure to develop the power guaranteed, and that the machinery should be tested at the vendor's factory; and the vendee was, by the terms of the contract, "urged to be present at the final test," the vendee is not concluded by a shop test of which he was not notified and which he did not attend, since such test was intended as an additional inducement to purchase, and not to put a vendee in a position of having irrevocably committed himself to the purchase on the test proving satisfactory.

3. CONTRACTS (§ V C 3—407)—SALE OF MACHINERY—CONDITIONS—REASONABLE TIME TO TEST BEFORE RESCISSION.

Where a contract for the sale of a gas producer, a gas engine, and an air compressor for starting it, provided that the vendor would furnish free of charge for a month, the services of a superintending engineer, also stipulated against liability for defects in design, material, or workmanship, and guaranteed that the engine should develop 50 horse power when operated under certain fuel conditions, and that its speed should not vary more than 2 per cent. under changing load conditions, a contract relation in respect to the right of rescission, materially different from that existing in the ordinary sale of a chattel, is created, which will permit the vendee a reasonable time for experimentation and adjustment of the machinery before electing whether he will rescind.

4. CONTRACTS (§ V C 3—407)—BREACH OF CONTRACT—GROUND FOR RESCISSION—NOTES GIVEN FOR PURCHASE PRICE—NON-COMPLIANCE WITH GUARANTY.

Where the purchaser of a gas producer, a gas engine, and an air compressor for starting it, gave his notes for the purchase price, and after operating it for about two months, informed the vendor by letter that the machinery was working satisfactorily, although he stated the existence of what were then regarded as trifling defects, which were, however, of a more serious nature than they were then supposed to be, such conduct is not destructive of the right to rescind upon it subsequently becoming evident that the machinery would not comply with the written guaranty.

5. SALE (§ II C—35)—WARRANTY—FITNESS — LATENT DEFECT—OIL FAILING TO REACH BEARING SURFACE.

A defence that the failure of machinery to work satisfactorily was due to its ill-usage by the vendee in not properly oiling it, fails, where it is shewn that oil was properly applied, but by reason of a concealed defect in workmanship, it did not reach the proper bearing surface.

QUE.

K. B.
1912

CANADA PRODUCER AND GAS ENGINE CO. v. HATLEY DAIRY, LIGHT AND POWER CO.

6. CONTRACTS (§ V C 3—407)—RESCISSION FOR BREACH OF CONTRACT—LIMIT OF FLUCTUATION OF SPEED UNDER ANY LOAD.

A sale of a gas producer, a gas engine, and an air compressor for starting it, will be cancelled by the Court, where the vendor was unable, after fair trial, to get the engine to work without a larger fluctuation of speed than the limit of fluctuation warranted against by the contract.

7. DAMAGES (§ III C—83)—BREACH OF GUARANTY—FAILURE OF VENDOR TO INSTALL ENGINE—DELAY IN OPERATING MILL.

A stipulation in a contract for the sale of machinery that the vendor should not be liable for damages on account of delays or defects of design, material, or workmanship, other than to furnish, without charge, repairs or new parts therefor, does not preclude the recovering of damages by the vendee for delay in operating a mill, due to the vendor's failure to install an engine complying with a guaranty that its speed should not vary more than 2 per cent. under varying load conditions.

Statement

APPEAL from a judgment of the Superior Court for the district of St. Francis, Hutchinson, J., rendered on May 15th, 1911, maintaining respondent's action to set aside a deed of sale of machinery and also condemning appellant to pay $526.20 damages.

The appeal was dismissed with costs.

*A. C. Dobell*, for the appellant; (*C. D. White*, as counsel).

*J. S. Fraser*, for the respondent; (*C. J. Brooke*, K.C., as counsel).

Cross, J.

Montreal, June 15, 1912. CROSS, J.:—This is an action taken by a purchaser to rescind a contract of sale.

The ground of action set forth is that the seller—the present appellant—failed to fulfil its obligations and that the thing sold was defective and unfit for the purpose contemplated.

The grounds of defence are that the appellant did all that it contracted to do, that the plaintiff-respondent accepted the thing sold, and having accepted it, is not entitled to have the contract rescinded.

The Superior Court at Sherbrooke gave judgment for the plaintiff, cancelling the contract, ordering return of the notes given for the balance of the price, reimbursement of $950 paid on account of the price, and adjudging the defendant to pay $526.70 for damages.

The defendant has appealed from that judgment.

The controversy relates to a 50 horse-power three-cylinder gas engine, a gas producer and a six horse-power air compressor for starting, all of which, by a writing dated the 8th November, 1909, the defendant agreed to furnish to the plaintiff, also undertaking to superintend the erection and starting of the machinery in question.

The defendant is a manufacturer of machinery, doing business at Barrie, in Ontario. The machinery above mentioned was intended to operate a dairy, a grist and saw mill and electric

light works, all belonging to the plaintiff, at Hatley, in this Province.

The clauses of the contract which bear upon the questions raised by the present appeal are the following:—

6. Terms: 10 per cent. cash with this order; 15 per cent. when the company notifies the customer that machinery is ready to be shipped; and balance in 3, 6, 9 and 12 months from date of complete installation.

8. It is understood that the machinery is to be free from latent defect in material and workmanship, and should any part of it be found, within one year from date of shipment, to have been defective at the time furnished, the company will repair said part f.o.b. the company's works, or will furnish without charge, f.o.b. the company's works, a similar part to replace it; provided the original part is returned to the company's works, freight prepaid, and the company's inspection establishes the claim. The engine will be erected, operated and tested at company's works before shipment, and will be adjusted for load conditions. (You are urged to be present at the final test.) The plant shall not be rejected for any cause except for failure to meet the duty guaranteed.

9. The company is not to be liable for damages on account of delays or defects of design, material or workmanship, other than to furnish without charge repairs or new parts as mentioned in the preceding paragraph, and the company will make no allowance for repairs or alterations unless the same are made with the company's written consent or approval.

10. The title to the machinery or material the company furnished remains in the company until full purchase price hereunder (including any modifications or extensions of payments, whether evidenced by notes or otherwise) shall have been fully paid in cash.

13. The machinery shall be installed by the purchaser at the purchaser's expense unless otherwise expressly stipulated.

15. The company is to furnish an engineer who shall superintend for the purchaser the erection and starting machinery, for 30 days free.

19. The company will furnish a standard blue print shewing the proper foundations for the above machinery. The standard foundation is designed to go on solid rock or hardpan. The purchaser must make such additions to the foundations as may be necessary if the conditions are other than expressed above. The company will not assume responsibility beyond the accuracy of the plan. The engine foundations must not come in contact with building walls or columns. This is to prevent transmission of vibration.

20. The purchaser agrees to furnish, without charge, all the masonry and carpenter work, all help, skids, tools and other materials or supplies for the proper erection and operation of the equipment; a competent man (who is subsequently to operate the plant) to be under the instructions of company's engineer during the installation period.

Capacity.—The gas producer to be furnished shall be of 50-75 capacity, or of proper size to furnish gas to a 50 h.p. engine, steadily and regularly, having a heating value averaging 125 b.t.u.

Fuel.—The producer shall be adapted to operate on charcoal, anthracite coal, or coke (state which when ordering), the consumption per h.p. hour depending upon the calorific value of the above fuels.

QUE.

K. B.
1912

CANADA PRODUCER AND GAS ENGINE CO.
v.
HATLEY DAIRY, LIGHT AND POWER CO.

CROSS, J.

Type.—The engine . . . shall develop 50 actual brake horse power when operating on producer gas of 125 b.t.u., 300-325 r.p.m.

Testing.—The engine shall be thoroughly and carefully tested before leaving the works, on full and partial loads, with pony brake for actual horse power. The setting of the valves and time of ignition shall be determined by the use of an indicator.

Guarantee (Fuel).—The engine shall be guaranteed when operating at from 90 to 110 per cent. of its rate of capacity, on 125 b.t.u. producer gas, to develop one b.h.p. hour on a fuel consumption not to exceed 1¼ pounds of anthracite pea coal, coke or charcoal, having heating value of not less than 13,000 b.t.u. per pound, and not to exceed 8 per cent. in ash, 7 per cent. in volatiles, and 2 per cent. in sulphur.

Overload.—The company further guarantees that the engine and producer shall be capable of an overload of 10 per cent.

Regulation.—The company guarantees that the speed regulation of the engine shall not vary to exceed two per cent. when operating on any or all loads between 25 per cent. of full load and full rated load.

The complaint of the plaintiff is that the machinery would not work by reason of latent defects which neither the defendant nor itself have been able to discover; that the producer and engine have never furnished the power contracted for and would not run continuously; that it complained to the defendant and refused to accept the machinery; that the defendant requested it to keep the machinery, promising to set it right; and that the defendant has failed to remedy the defects though given every opportunity to do so.

In support of its defence, that it fulfilled the contract requirements, the defendant relies upon certain testimony tending to shew that the machinery was tested at Barrie before shipment and also that after having been set up afterwards at Hatley under the supervision of an engineer sent there for the purpose by the defendant, it was left there operating and in running order.

In support of its other ground of defence, namely, the defence that the plaintiff accepted the machinery, the defendant relies upon use by plaintiff of the machinery throughout the months of June and July, 1910, upon expressions of satisfaction with the machinery in letters from the plaintiff, upon delivery of promissory notes for the balance of the price, and upon ill-usage of the machinery by plaintiff's servants.

It should be said that the defendant has not specifically pleaded that the action was not taken in due time, so that the question of delay falls to be considered only in support of the plea of acceptance of the machinery.

The facts upon which these issues are to be decided—in addition to the contract covenants already quoted—are as follows:—

The engine was subjected to a shop test before it was sent from Barrie. Two witnesses have testified that the test was satisfactory and shewed the engine to be able to fulfil the contract requirements as to production of power. The evidence of these two witnesses was not contradicted, but the plaintiff was not represented at that test and it is not shewn that it had advance notice of it.

The machines were set up at Hatley under the supervision (pursuant to the contract) of Reginald P. Marshall, an engineer sent there for the purpose by the defendant. The setting up commenced about the 23rd April, 1910.

Marshall was occupied with setting them up and starting them for a month, that is, until about the end of May. On the 12th May Joseph White, who had previously worked in a grist mill operated by steam, commenced work at the machines under the instructions of Marshall, the intention being that, after having been instructed by Marshall, White would operate the machines in question, and be in charge of the grist mill as well. Marshall went away about the end of May. He had had difficulties to contend with in installing the machines, perhaps in a somewhat greater degree than usually attend the installation of new machinery. In his testimony he said that the pistons jammed in the cylinders, an occurrence which he attributed to the effect of lime and brick dust having been driven off from the newly lined gas producer and sucked into the piston chambers. He took the engine apart twice, cleaned and filed the pistons and set the machinery up again. He considered that the gas producer foundation had been laid too near the wall of the building to admit of a proper access to some of the grates to properly clear them of clinkers.

However, he went on and set up the machines on the foundations, such as they were, and he left the machines in such order as to operate the dairy and feed mill. The saw mill was not then ready to be operated, so that an opportunity did not present itself to give the engine sufficient work to call for the fifty or fifty-five horse-power stipulated for. Nevertheless the plaintiff gave its promissory notes for the balance of the price.

Reading the testimony of the plaintiff's manager and employees, one gets the impression that there was no satisfactory working of the machines at any time. Their minds were so influenced by realization of difficulties which came up at a later time that they appear to have lost sight of an interval of time during which matters seemed to have been satisfactory.

It was about the 29th June that the saw mill began to be operated and about the same time, or perhaps later, that the electric light began to be operated.

QUE.

K. B.

1912

CANADA PRODUCER AND GAS ENGINE CO. v. HAILEY DAIRY, LIGHT AND POWER CO.

CROSS, J.

In a letter to the defendant, dated 6th July, 1910, the plaintiff said:—

> In reply to yours of late in regard to the running of the engine, we are now sawing lumber and everything seems to be going well. We have had no trouble whatever with the engine, with the exceptions of one bolt broke that adjusts the wedge underneath the big box at the belt wheel, which we have got fixed and running again. We think we have 50 h.p., but it is really hard to tell running a board saw, as the power is so up and down it indicates by times on the meter of the electric plant as high as 60 h.p., but only for a few seconds, when the power drops down. It does quite a lot of back-firing by times; other times it will run for four or five hours and never back-fire at all. Can you tell us the cause and advise us how to remedy it? I must say that your Mr. Marshall took all the pains possible for to have the engine right and give us all the information he could in regard to the running of it. We certainly are getting along fine with it, 20 to 35 minutes is all that is necessary in the morning to get her started. If any of your men are down in this part have them come and look it over to see that everything is alright.

A week later, in a letter dated the 14th July, 1910, the defendant said:—

> In reply to yours of July 11th, and note what you say in regard to the back-firing, it does not bother us much, only occasionally; I presume it is on account of the fluctuating load which we are running it on; when we are running our grinder it hardly ever back-fires. We are getting along very nicely with the engine; have had to make some adjustments in the igniters, and in the crank we had to take out some chims.

There follows an inquiry about tightening the connecting rod and a request to "let me know about this by return mail," and the letter continues:—

> We are getting good power sawing hardwood lumber, our electric plant works fine and we have no occasion to kick about anything.

And in a letter, dated the 19th July, 1910, the defendant said: "She is running fine; does not back-fire any to speak of."

At this point one or two observations may be opportunely made. In the first place, if it were a case of an ordinary sale of an ordinary chattel, it would be out of the question for the buyer to pretend to ask for cancellation of the sale after he had given his notes for the price and besides had afterwards expressed himself about the thing bought, in such terms of approval and satisfaction as those just quoted.

In the second place, the testimony of the plaintiff's officers about defects in the machines would have been much more damaging if they had not been confronted in cross-examination with the letters just quoted from. The attempt of its manager, James D. Morrison, to diminish the effect of the letters disclosed by

the following extract from his testimony, is not very convincing:—

Q. But you say you were sawing hardwood lumber, you were getting good power, sawing hardwood lumber, and that your electric plant was working well, and that you had no occasion to kick about anything? Those are your own words?

A. Well, how that was, I will tell you; we were under the impression, you know, that it would keep on working as it did then at the start; it started well for a new plant, and anything that didn't come just up to expectations, we laid it to some little difficulties which will be found in any new machineries of this kind when set to work, starting operations and that, in time, everything would smooth off and the plant would turn out satisfactory, that we would get all the power we had bought and expected to get from that plant.

Q. Never mind about your impressions. I am now asking you if that was not stating the facts as they were then: "We are getting good power, sawing hardwood lumber, the electric plant works well and we have no occasion to kick about anything." That is in your letter?

A. Yes, that is right, but I am telling you, we were under the impression that the power might be all right in time, after the plant was in operation for a length of time and everything was settled down, smoothed off; but we were not getting the power then really. We were not getting power enough at the saw to run the mill on a paying basis then, as I explained before.

It is, however, opportune to consider what happened afterwards. Later in July the machines were giving trouble and the plaintiff applied to the defendant to have them set right. A man was sent early in August, but, after working for some time, he went away without having made things satisfactory. One of the sources of trouble was considered to be defective igniter plugs, and a new set of these were put in. Shortly afterwards a small gear wheel on the spindle of the governor was found to be broken and had to be replaced.

Operation still continued to be unsatisfactory, and, on the 15th August, the plaintiff wrote to the defendant stating that it rejected the plant.

In September Marshall, defendant's engineer, again examined the machines, but on the 21st of that month the plaintiff wrote to the defendant announcing that it adhered to its notice of rejection.

A day later, in another letter to the defendant, the plaintiff proposed, in order to minimize damages, that it should continue to use the machines without prejudice to its rights, until the cause of failure of power would be ascertained. There is a telegram from the defendant, dated 26th September, saying:—

Continue using plant; manager will call in a few days.

Mr. Marshall accordingly went to Hatley in October, and it was arranged to subject the machines to a test. It took some days of preparation before Mr. Marshall would proceed to the

QUE.
K. B.
1912
CANADA PRODUCER AND GAS ENGINE CO. v. HATLEY DAIRY, LIGHT AND POWER CO.
CROSS, J.

test, but it was ultimately made, the plaintiff having it watched by an engineer named Lockwood Burpee.

It is conceded that the test indicated that the engine would not give the stipulated amount of horse power, and that the speed was not constant, but fluctuated beyond the limits fixed by the contract.

That the test shewed failure to operate satisfactorily is ascribed by the defendant to poor fuel for gas production, bad location of the gas producer resulting in non-access to the grates and consequent accumulation of clinkers, and to ill-usage of the machines particularly in neglect of proper oiling, but generally in handling by incompetent attendants.

In so far as regards the possibility of developing fifty horse power and an additional overload of ten per cent., the test contemplated by the contract is not the test actually applied, because, while the contract provided that that was to be the amount of horse-power which should be produced, the stipulation was that the engine would develop that amount of power when operating on producer gas of a certain heating power, and there is no proof of the heating power of the gas actually used for the test.

I consider, however, that the defendant failed to make good the guarantee that the speed would not vary to exceed two per cent. It was shewn that, when a load requiring over 43 horse-power was applied, the speed fell away. There were other respects in which the engine failed to work properly. In the course of the test it had to be stopped because of knocking in one of the cylinders.

At the end of the test the defendant's engineer went away, and the defendant did nothing further except to offer to replace the engine by a 75 horse-power engine, an offer which was declined.

The principal question for decision is whether, upon the state of facts above set forth and having regard to the covenants of the contract, the plaintiff is to be held to have accepted the machines so far as to have lost the right to reject them as and when it did reject them.

I incline to agree with counsel for the appellant (defendant) when they say that in this case the seller's warranty, implied by law in the sale of a chattel, had been displaced, and that a contractual undertaking has been substituted for it.

Counsel for the appellant say that the contractual warranty was satisfied by the shop-test at Barrie and that thereafter the buyer's rights were limited to getting repairs and new parts free of charge for a year, as provided for by clause 9 of the contract. It appears to me that this argument is partly right and partly wrong.

The shop-test in question is provided for at the end of clause

8, and should be read in connection with the whole purport of that clause. That clause begins with the statement that the machinery is to be free from latent defect and goes on to provide that, if any part be found within one year to have been defective when supplied, the company will repair or replace it without charge subject to the qualification there stated. Then follow the provision about the shop-test and the concluding covenant that the plant shall not be rejected for any cause, except for failure to meet the duty guaranteed.

Having regard to the continuing obligation of the seller to repair or replace defective parts for a year, and to the implied recognition of the buyer's right to reject for the cause above stated, I consider that the object of the shop-test, as regards the buyer, is to give him an additional inducement to buy, but that it does not put him in the position of having been irrevocably committed to the purchase upon the test having proved satisfactory. If it were otherwise there would be no occasion for the provision about free repairs and renewals for a year or for the implied recognition of a right of rejection. So far the argument based upon the satisfactory result of the shop-test is untenable.

Now, taking account of the other covenants above quoted from the contract, namely, the stipulation against liability in damages for defects of design, material or workmanship in clause 9, the reservation of the seller's right of property in the machines in clause 10, the seller's undertaking to furnish the services of a superintending engineer free for a month; the seller's undertaking that the engine "shall develop 50 actual brake horse-power when operating on producer gas of 125 b.t.u.," and the guarantee covenants respecting amount of power per pound of fuel, overload and speed regulation, I am brought to the conclusion that a contract relation has been created materially different from that which would exist in a case such as I have referred to as an ordinary sale of an ordinary chattel, where a buyer who wishes to rescind must, at his peril, act with diligence.

The gas had to be made with the producer and transmitted to the engine, and the engine had to transmit the power to the dairy, grinders, saw mill, etc., and the whole had to be made to operate in a sort of unison. Hence the occasion for the special stipulations above spoken of as well as the propriety of allowing for a period of experimentation and adjustment: D. p. 98-2-441, note; D. p. 1900-2-190.

I infer, in these circumstances, that the plaintiff's expressions of satisfaction in the July correspondence are not to be taken as destructive of a right to complain later on when unsatisfactory conditions supervened.

It is significant that the expressions of satisfaction are accompanied by mention of what were considered trifling troubles, such as back-firing, loose piston rods, etc., but which were prob-

QUE.
K. B.
1912
CANADA PRODUCER AND GAS ENGINE CO. v. HATLEY DAIRY, LIGHT AND POWER CO.
CROSS, J.

ably more serious than they were then supposed to be. Besides, clauses 8 and 9 were there to shew the buyer's right to call for free repairs and renewals for a year. I have no doubt that both seller and buyer considered that to be their real positions and that throughout June and July, and perhaps also in August and September, both were desirous that the machines should be made to work satisfactorily.

Even as late as when it proceeded to make the test in October, the defendant had not yet shewn any sign of an intention to take up the position that the plaintiff had definitely accepted the machines and could not elect to rescind.

The plaintiff, too, appears to have realized that, in the face of clauses 8 and 9, it would have been premature for it to have taken suit for cancellation so long as the seller was willing to go on repairing defects and supplying new parts free of charge.

Thus far, then, I have come to the conclusion that the machines when supplied in May had defects which rendered them unsuitable for the uses to which they were to have been put, that they were defective in the same respects in August, September and October, and that the plaintiff had not lost its right to complain by having given notes for the balance of the price and by its expressions of satisfaction with the machines in July.

The defendant, however, has pleaded in effect that the defective condition of the machines was brought about by the plaintiff itself by ill-usage of them at the hands of incompetent attendants.

I consider that the evidence is against the defendant on this point.

The contract provided that the buyer should provide "a competent man (who is subsequently to operate the plant) to be under the instructions of company's engineer during the installation period." The witness Joseph White, a miller, was the man provided by the plaintiff to operate the machines. He was sufficiently competent and was instructed by the defendant's engineer. The principal thing charged against him is neglect to oil the engine properly. It was proved that the oil was applied and went into the machine. The testimony of the engineer Marshall is to the effect that it did not reach the proper bearing surface, but, as I understand it, that surface was enclosed and out of reach and if the oil once poured in did not go where it was needed, that would point to a defect for which the defendant and not White was to blame. White was also blamed for inefficient stoking and for having let clinkers accumulate in the producer, but the weight of evidence is against the defendant there also.

And over against these reproaches there are the proved facts

that the igniter plugs were defective, that there was pounding in the cylinders, and that the defendant's skilled mechanics themselves could not make the machines operate properly. In this relation I also attach weight to the testimony of Burpee as shewing that the engine could not be made to run properly and do its work, and that the Superior Court was right in deciding that the contract should be cancelled.

I conclude that the defective condition of the machines was attributable to the defendant.

A further question remains in respect of the sum of $526.70 adjudged against the defendant as damages.

We have seen that the plaintiff was entitled to call upon the defendant throughout a year to make good repairs and breakages attributable to defects in the machines. Of course, throughout the same period the buyer would be getting the benefit of such use of the machines as could be had out of them.

The contract would be a one-sided affair if this advantage to the buyer were not compensated by some benefit to the seller, and I consider that, over against it, there is the stipulation in clause 9 that

> the company is not to be liable for damages on account of delays or defects of design, material or workmanship, other than to furnish without charge repairs or new parts, etc.

I consider that it was for damages of this kind that the sum of $526.70 was allowed by the judgment and that the plaintiff contracted away its right to claim such damage. The plaintiff was satisfied with the working of the machines in June and July and it asked for and obtained the defendant's consent to go on using them afterwards. I consider that effect is to be given to the agreement whereby the right to claim these damages was taken away.

My conclusion is that the appeal should be maintained in so far as to strike out the sum of $526.70 from the adjudication, and that the plaintiff should pay the costs of the appeal.

The opinion of the majority of the Court was delivered by

GERVAIS, J.:—The juridical facts of this appeal have been most carefully explained by Mr. Justice Cross, and there is no need to revert to them. Gervais, J.

The Court is not unanimous in its opinion as to the interpretation of clause 9 of the agreement of November 8th, 1909, which absolves the appellant from all damages by reason of delays, defects of design, material or workmanship, with the exception only that the appellant is obliged to furnish and replace such pieces or parts as may be necessary.

The renunciation to a claim in damages is not presumed any more than that to any other kind of claim.

QUE.
K. B.
1912
CANADA PRODUCER AND GAS ENGINE CO. v. HATLEY DAIRY, LIGHT AND POWER CO.
Gervais, J.

The present action, as far as the damages, amounting to $526.20, are concerned, is not an action for damages resulting from delay in the repairing of the machine installed, but for damages resulting from the absence of any installation at all, according to the agreement in question.

The evidence discloses that the appellant, instead of perfecting the installation of two gas engines for a flour mill, a saw mill and a cheese factory, according to the terms of this agreement with Hatley, contented itself with making unsuccessful trials in the respondent's buildings of its machinery.

The evidence does not, in my opinion, disclose that the engine in question, which was to be operated by means of a certain kind of gas, generated in a gas producer attached to the engine, and fed by anthracite or other coal, never gave satisfaction. These engines, it is shewn, suffered from "back-firing."

If one may judge from the experience of experts, it is probable that American coal was used in the producer, which coal only contains about one-half of the carbon contained in Cardiff or French coal, and did not furnish the necessary quantity of gas to these engines, which are modelled on those manufactured in England on the Swiss model.

But, at any rate, this Court concurs with the trial Judge in finding that the engines in question were not of the quality stipulated in the agreement of November 8th, 1909, and that the said agreement should be cancelled and set aside as a result of the fault and negligence of the appellant. On this point this Court is unanimous in holding that the trial Judge was right, and his judgment is, therefore, confirmed.

The majority of this Court is also of opinion to confirm the last part of the judgment condemning the appellant to pay $526.20 to the respondent, as damages caused by the appellant, as a result of the faulty execution of the said agreement, that is to say, as a result of the inexecution or non-fulfilment of the said contract.

We are of opinion that there has been no renunciation to such damages in clause 9 of the contract.

For these reasons the majority of this Court is of opinion to confirm the judgment of the Superior Court with costs, purely and simply.

*Appeal dismissed.*

## REX v. PALANGIO.

ONT.

H. C. J. 1912

June 19.

*Ontario High Court. Motion before Riddell, J., in Chambers. June 19, 1912.*

1. ALIENS (§ I—3)—IMMIGRATION—FALSE NATURALIZATION PAPERS—STATUTES OF CANADA, 9 AND 10 EDW. VII. CH. 27, SEC. 33, SUB-SEC. 8.

One who, for a money consideration, furnished false naturalization papers to be sent by another to a person living in the United States, in order to permit the latter to enter Canada by misrepresentation, in violation of the Immigration Act, 9 and 10 Edw. VII. ch. 27, 1910, as amended by 1 and 2 Geo. V. ch. 12, 1911, is guilty of a violation of sec. 33 (8) thereof, which declares any person guilty of an offence who shall knowingly and wilfully land or assist to land or attempt to land in Canada any immigrant or person whose entry is forbidden by such Act.

2. ALIENS (§ I—3)—ASSISTING IMMIGRANT TO OBTAIN ENTRY INTO CANADA BY FRAUD.

Section 33 (8) of the Immigration Act, 9 and 10 Edw. VII. ch. 27 (D.), which declares it an offence for any person or transportation company to knowingly and wilfully land or to assist to land or to attempt to land in Canada any prohibited immigrant or person whose entry is forbidden by the Act, is not restricted to the prohibited classes mentioned in sec. 3 of the Act, but applies also to persons who are assisted to enter by misrepresentation.

Statement

MOTION by the defendant to quash his conviction by the Police Magistrate at Cochrane for an offence against the Immigration Act.

The motion was refused.

*J. M. Godfrey*, for the defendant.

No one appeared to oppose the motion.

Riddell, J.

RIDDELL, J.:—Vincenzio Palangio appeared before the Police Magistrate at Cochrane, on a charge set out in an information by a travelling Immigration Inspector, for that the defendant did "knowingly and wilfully assist to land or attempt to land in Canada one Michele Malerbo, a prohibited immigrant."

The charge is based upon sec. 33(8) of the Immigration Act, 1910, 9 & 10 Edw. VII. ch. 27 (D.) The Act of 1911 (1 & 2 Geo. V. ch. 12) does not modify this sub-section, which reads: "Any transportation company or person knowingly and wilfully landing or assisting to land or attempting to land in Canada any prohibited immigrant or person whose entry into Canada has been forbidden by this Act shall be guilty of an offence . . ."

At the trial it was made to appear that G. Malerbo, an Italian in Cochrane, had a brother, Michele Malerbo, in Schenectady; G. Malerbo spoke to the defendant about him, and the defendant furnished false naturalization papers to bring Michele Malerbo in, charging $15 for them. The defendant did not send the papers to Michele Malerbo, but handed them to the man who was doing the writing (that is how I interpret the magistrate's

ONT.

H. C. J. 1912

REX v. PALANGIO.

Riddell, J.

"dowing the wrighting"). The defendant told G. Malerbo, also, that his brother would have to have lots of money and good clothes and look intelligent to get into Canada, and then it would be a chance whether he could get in or not; and G. Malerbo sent his brother $40 and a ticket.

At the conclusion of the case, the magistrate wrote the following memorandum upon the papers: "The Court ajudgas James Plango guilty of furnishing Agostino Ballarine naturallzation papers to one John Patta to be enclosed in a letter and sent to Schenectady, N.Y. State, to be used as Micheal Malerbo papers of citizen of citizanship, thairby evading the Imegration Agents and landing in this Country under false ducomants;" and imposed a fine of $150 and $110.05 costs or three months' "Imprisament."

The defendant, who is said to have had two houses, two stores, and two banks, one at North Bay and one at Cochrane, richly deserves punishment — much more severe than that awarded. If his offence be such as the Police Magistrate could inquire into, and any proper amendment be made, I should not interfere.

It is said that sec. 33 (8) applies only to the prohibited classes mentioned in sec. 3* of the Act; but I do not think that it is so limited.

Section 33 (2) provides that "every passenger or other person seeking to land in Canada shall answer truly all questions put to him by any officer when examined under the authority of this Act." And sub-sec. 7 provides that "any person who enters Canada . . by . . . misrepresentation . . . shall be guilty of an offence under this Act . . . may be

*Section 3, Statutes of Canada, 9 and 10 Edw. VII. 1910, ch. 27, is as follows:—

3. No immigrant, passenger, or other person, unless he is a Canadian citizen, or has Canadian domicile, shall be permitted to land in Canada, or in case of having landed in or entered Canada shall be permitted to remain therein, who belongs to any of the following classes, hereinafter called "prohibited classes"—

(a) idiots, imbeciles, feeble-minded persons, epileptics, insane persons, and persons who have been insane within five years previous;

(b) persons afflicted with any loathsome disease, or with a disease which is contagious or infectious, or which may become dangerous to the public health, whether such persons intend to settle in Canada or only to pass through Canada in transit to some other country: Provided that if such disease is one which is curable within a reasonably short time, such persons may, subject to the regulations in that behalf, if any, be permitted to remain on board ship if hospital facilities do not exist on shore, or to leave ship for medical treatment;

(c) immigrants who are dumb, blind, or otherwise physically defective, unless in the opinion of a Board of Inquiry or officer acting as such they have sufficient money, or have such profession, occupation, trade, employment or other ligitimate mode of earning a living that they are not liable to become a public charge or unless they belong

arrested . . . and if found not to be a Canadian citizen . . such entry shall in itself be sufficient cause for deportation. . ."

Anything which is an offence under the Act is forbidden by the Act—it is forbidden by the Act that any one should enter Canada by misrepresentation. The defendant and his co-conspirators intended Michele Malerbo to enter Canada by misrepresentation of his citizenship—and I do not think it any stretch of the meaning of the Act to hold that Michele Malerbo was a person whose entry into Canada was forbidden under the Act, within the meaning of sec. 33(8).

Then the defendant knowingly and wilfully furnished, in Cochrane, what the Police Magistrate calls "papars" which "had fawling on the floore and got durty," when the letter was "a wrighting" to Michele Malerbo to be sent to him to be used as part of the misrepresentation which would effect his entry into Canada. This was, in my view, "an attempting to land in Canada" a "person whose entry into Canada has been forbidden by this Act."

The motion should be refused; as no one appeared contra, there will, of course, be no costs.

The Clerk in Chambers will send the papers to the County Crown Attorney and draw his attention to the conspiracy disclosed in the depositions, with a view to prosecution of the persons concerned. It is high time that the villainous practice of fraudulent immigration received a check, and that those who so brazenly attempt to circumvent the policy of the country should understand their true position.

*Motion refused.*

---

to a family accompanying them or already in Canada and which gives security satisfactory to the Minister against such immigrants becoming a public charge;

(*d*) persons who have been convicted of any crime involving moral turpitude;

(*e*) prostitutes and women and girls coming to Canada for any immoral purpose and pimps or persons living on the avails of prostitution;

(*f*) persons who procure or attempt to bring into Canada prostitutes or women or girls for the purpose of prostitution or other immoral purpose;

(*g*) professional beggars or vagrants, or persons likely to become a public charge;

(*h*) immigrants to whom money has been given or loaned by any charitable organization for the purpose of enabling them to qualify for landing in Canada under this Act, or whose passage to Canada has been paid wholly or in part by any charitable organization, or out of public moneys, unless it is shewn that the authority in writing of the Superintendent of Immigration, or in case of persons coming from Europe, the authority in writing of the assistant Superintendent of Immigration for Canada, in London, has been obtained for the landing in Canada of such persons, and that such authority has been acted upon within a period of sixty days thereafter.

QUE.

C. R.
1912

April 26.

**HOULE et vir v. QUEBEC BANK et al. and VIVIER et al. (plaintiffs by reprise d'instance).**

*Quebec Court of Review, Lemieux, A.C.J., Cimon and Dorion, JJ.*
*April 26, 1912.*

1. MINES (§ II A—30)—SALE OF RIGHT TO TAKE AWAY AND REMOVE MINERAL—IMMOVABLE RIGHT.

The sale of the right to take away and remove from now and for ever all the natural paint mineral or other minerals which may be found in a certain immoveable constitutes a sale of the mine carrying with it the concessions of the surface, and is not merely the sale of the right to work the mine; such a sale is the sale of an immoveable right with all the effects thereof, whereas the sale of the right to mine is the sale of a moveable right.

2. DEEDS (§ II A—19)—CONSTRUCTION—"FROM NOW ON AND FOREVER."

All the terms of a deed of sale must be examined in order to arrive at the true import thereof, and such words as "from now on and for ever" will not be held to be mere surplusage.

3. COURTS (§ I A—2)—INHERENT POWERS—JURISDICTION TO FIX DELAYS ON THE SALE OF A MOVEABLE RIGHT.

On the sale was of a moveable right for a fixed sum, as on the sale of the right to operate a mine, without any stipulation as to the time within which such right is to be exercised, i.e., within which the purchaser is to remove the balance of the mineral sold, the Courts have no jurisdiction under Quebec law to fix a term or delay within which the purchaser shall be restricted in the exercise of the rights contracted for.

[*Begin* v. *Carrier*, 33 Que. S.C. 1, specially referred to.]

4. MINES (§ I A—30*a*)—WHAT MUST BE CONSIDERED TO ASCERTAIN WHETHER SALE IS OF A MINE OR A RIGHT TO MINE.

There are three elements which must be taken into consideration to ascertain whether a sale is that of a mine itself or that of the right to mine; the mine itself, the ground and the rent.

5. DEEDS (§ II A—19)—CONSTRUCTION—ABSENCE OF MENTION OF RENT—FIXED AND DETERMINATE PRICE—ABSENCE OF RESTRICTION AS TO TIME AND DURATION.

Where there is no rent mentioned but only a fixed and determinate price, the sale will be held to be that of the immoveable property, especially if there be no restriction as to time and duration.

Statement

APPEAL from the judgment of the Superior Court for the district of Three Rivers, Cooke, J., rendered on March 20th, 1911, whereby the plaintiff's action to cancel a deed of mining rights and in damages was dismissed.

The appeal was dismissed with costs.

*L. P. Guillet*, for plaintiff, appellant.

*P. N. Martel*, K.C., for defendant, respondent.

The opinion of the Court of Review was delivered by the Acting Chief Justice.

Lemieux, A.C.J.

Quebec, April 28, 1912. LEMIEUX, A.C.J. (translated):—This case raises a most unique and interesting question. The plaintiff, Dame Houle, widow of the late J. E. Clermont by her first marriage, and now wife of Augustin Vivier, prays, by her

action, for the cancellation of the sale of a natural paint mine on the ground that the mineral has not been extracted with due diligence by the purchaser, and, failing such cancellation, that the Court be pleased to fix a delay within which the balance of the mineral situate in the territory described in the declaration be removed.

The mine was conceded by a deed on which this suit is based, which was made on October 27th, 1892, by J. E. Clermont, the plaintiff's predecessor in title, in favour of one Spénard, the predecessor in title of the defendant Argall.

By this deed of sale, of which each clause is important, Clermont sold, bargained, conveyed and assigned from this day on and forever, with warranty against all troubles, debts, mortgages and any impediments whatsoever, either of law or of fact, unto Spénard, the right to take, extract and remove and to cause to be taken, extracted and removed, by himself, his substitutes or representatives, all the natural paint mineral or any other minerals whatsoever which may be found in or form part of a certain immoveable party situate in Champlain and fully described in this deed.

This sale or concession was made subject to the following price and conditions:—

1st. The buyer to have a right of way both on foot or for vehicles and at all seasons to communicate from the front road to the natural paint land presently sold, and such right of way shall be both for his use and that of his successors or representatives and free of charge.

2nd. The buyer, his substitutes or representatives to have the right to erect all buildings and constructions necessary for the operation of said natural paint or other minerals, if any be found in the said territory.

3rd. The vendor to enclose at his own expense the part or parts of such territory operated upon by the purchaser without the latter incurring any obligation in regard thereto and without his becoming liable in any way for any accident resulting from any defects in such fencing and without his being obliged to pay any rent therefor.

4th. For the price and sum of $300, payable by instalments stipulated in the said deed.

We have to answer the following questions:—

Did Argall or his predecessor purchase the mine in question or simply the right to operate such mine?

What is the difference between the sale of a mine and the sale of the right to work such mine, and what are the results of this difference as regards the parties hereto?

From the nature of the contract, the past operation of the mine, the quantity of mineral removal remaining in the ground, is it possible in law either to cancel the deed of sale as a result of the failure of the purchaser to remove the mineral with due diligence, or else to fix a delay within which the purchaser will be obliged to remove the balance of the mineral?

QUE.
C. R.
1912
HOULE
v.
QUEBEC
BANK.
Lemieux, A.C.J.

First question:—Did Argall or his predecessor buy the ownership of the mine or simply the right to operate it?

This question is important, for if there were no difference between the sale of the ownership and that of the right to operate, it would be easier to adjudicate on the respective contentions of the parties.

Argall, on the one hand, contends that he has bought the mine outright, that the aforementioned deed of sale has constituted him irrevocable and perpetual owner thereof, with the right to dispose of it as he may see fit.

On the other hand, the female plaintiff contends that Argall bought a right of operation only, that this right is by its nature a moveable right, and therefore, that he is bound by law to extract and remove, within a delay to be fixed by the Court, the balance of the mineral remaining in the aforementioned territory.

The plaintiff bases her contentions on C.C. 1544 and 1165.

Art. 1544 states that "in the sale of moveable things the buyer is obliged to take them away at the time and place at which they are deliverable. . . . If there be no such agreement, after the buyer has been put in default in the manner provided in the title Of Obligations."

I may state at once that the authors and the jurisprudence in France, particularly that of the Court of Cassation, have established and determined the juridical distinction between the sale of a mine, which constitutes an immoveable right, and that of the right to operate a mine, which creates a moveable right only.

Dalloz (R.J. 22, p. 15, No. 2863) teaches that the working of a mine involves three distinct rights of ownership: as to the mine itself, as to the royalty to be paid by the grantee to the owner of the soil, and as to the soil. Every one of these different rights can be made the object of contracts and of transfers between individuals. 2869:—

> Quant à la mine elle-même, elle constitue une propriété immobilière comme le sol ou la surface et conserve ce caractère encore qu'elle se trouve divisée entre les mains de divers propriétaires. Mais il faut considérer la mine ou la concession qui en est faite du droit de l'exploiter. Ce dernier droit, se résumant dans le profit pécuniare qui est le but de l'exploitation, est purement mobilier par cela même.

Laurent on this subject expresses himself as follows (vol. 5, p. 504, No. 407):—

> Lorsque la terre renferme des substances minérales ou fossiles, on distingue trois sortes de propriétés: la surface, la mine et la redevance. . . . **Quand à la surface, elle constitue le sol lequel est essentiellement immeuble.** La loi dit aussi que la mine est immeuble mais il y a cette différence entre la mine et le sol que la mine se compose de substances qui, par elles-mêmes, sont meubles, qui sont destinées à être immob-

ilisées bien qre la nature les ait incorporées au sol. En ce sens, elles sont distinctes du dol qui les contient. La vente du sol, parce qu'il comprend la mine, est immobilière même quant à la mine, puisque la mine est considérée comme faisant corps avec le sol. Mais si c'est le droit d'exploiter la mine qui est l'objet du contrat, la mine devient mobilière puisqu'on la considère comme devant être détachée du sol. Or, dès qu'elle ne se confond plus avec le sol, elle est mobilière.

Besides, this is the teaching of our own code as regards immoveables and things which are joined thereto. Art. 414 C.C. says:—

> Ownership of the soil carries with it ownership of what is above and what is below it. . . . He (the proprietor) may make below it any buildings or excavations he thinks proper and draw from such excavations any products they may yield, saving the modifications resulting from the laws and regulations relating to mines.

The regulations relating to mines which will be found in the Revised Statutes (Quebec) of 1888, sec. 1424, and of 1909, sec. 2099, recognize the foregoing distinction.

In order to ascertain whether this sale is that of a mine or that of a right to operate, we must have regard to the character, the nature and value of the mine and of the ground in which it is, the method of operating the mine, and the circumstances under which the sale was made. In the present case, as in many others, in order to discover the true significance of the deed we should be guided not so much by the appellation given the deed by the parties as by the stipulations contained therein and by the nature of the things contracted over.

In 1892, the date of the deed in question, the operating of natural paint mines was unknown in Champlain and the neighbourhood. Since then several deposits have been discovered and acquired by several people.

Originally, as is often the case, the operations were rather slow. Only in time and with acquired knowledge of this new product, did the operations assume any importance.

From the evidence it may be stated that the working of such mines, and especially of the one now in question, began assuming importance about 1903, at which date or thereabouts Argall acquired the rights of Spénard.

From 1903 on Argall has extracted on an average between 1,000 and 1,500 tons per year. The extraction is done according to the orders received and as these orders come in. It is impossible, without loss, to extract in advance, remove and store away a large quantity of this mineral. The work must be carried on gradually and in the following manner: first of all the surface of the soil is removed, and then a slight layer of earth which covers the mineral. It is not necessary to dig deeply in order to reach it. It is impossible to extract per year more than two or three feet of this paint mineral at a given spot, as it is damp, spongy and clayey, and men and beast cannot work long without

QUE.
C. R.
1912
HOULE
v.
QUEBEC
BANK.
Lemieux, A.C.J.

sinking into it. But the following year work can be resumed at the same spot for another couple of feet in depth, and so on from year to year until a total depth, which varies, is reached, of from seven to twelve feet.

The soil surface covering this kind of mine is absolutely unproductive, so long as the paint has not been removed and cannot be used for cultivation. But after the paint has been removed it becomes fertile to a certain extent, at least for grazing and hay growing. All the territory sold in 1892 for a price of $300 was valueless but for paint therein contained and hardly seems to have been utilized before then.

Such are the most noteworthy circumstances of the present case. The trial Judge refused to cancel the contract and also refused to fix any delay within which Argall was to remove the rest of the mineral, and the reasons given are that Argall has operated this mine for several years according to the needs of his business and according to the stipulations of his deed of concession; that Argall had the right to work this mine as long as he could find any mineral, and that the Court had no power to fix a term or delay within which he should terminate his operations, and that the plaintiffs have not proved they have suffered the damages claimed by them as resulting from the operation of the mine.

We concur in the reasons of judgment of the trial Judge and now follow additional reasons in support thereof.

The deed granted a mining right which could not be exercised without a concession of the whole surface soil covering this mine. This mine could not be worked, like many other mines, below the ground and in the bowels of the earth. All the mineral is extracted and removed from pits or wells dug at intervals.

The mine in question extends over the entire ground and the concession of the mine carried with it the concession of the ground covering it.

This peculiarity of the sale—this concession of the surface and of the mine—constituted an alienation of the mine and of the realty and conferred upon it somewhat the character of the sale of an immoveable.

The second immoveable characteristic is to be found in the deed itself, which provides for a sale at a fixed and determinate price—there is no question of royalty or rent according to the distinction established by Dalloz and Laurent.

In the third place the deed is made without restriction as to time or duration, hence it has the characteristic of perpetuity to be found in a deed of sale. If it is the sale for ever of the right to take and remove mineral, then we must necessarily conclude that it is the sale of the mine itself, i.e., the right to take this mineral so long as it may be found, and when the buyer may see

fit to take it. In other words, the buyer may dispose of the mine at his will and desire.

Besides the deed itself contains characteristic expressions which shew the nature of the sale as immoveable and perpetual. For the deed says:—

> Le vendeur cède, transporte et abandonne de ce jour et à toujours à l'achateur, la droit de prendre, emporter et enlever toute la terre à peinture naturelle.

Under the circumstances these words "de ce jour et à toujours" (from this day on and for ever) cannot be considered as surplussage or as a mere formula without meaning. They have a literal meaning expressive of duration and lapse of time, and not, as claimed by the plaintiffs, simply of the irrevocable desire of the vendor to sell.

If the deed had stipulated that the sale was made, say, from this day on for a period of ten or twenty years, then there would be no difficulty, for a delay would have been stipulated within which the buyer could exercise his right. Why should the same deed become ambiguous and equivocal because it expresses the idea of perpetuity? These words, "from now and for ever" do away, in our opinion, with all idea of restriction as to time and delay, and mean, according to Littré and Larousse, without possibility of change, in a definitive and irrevocable manner, for ever.

We do not think that at the time of the deed the parties ever intended to limit the concession of the right of mining. At that time the ground was without any value, and it does not seem that the vendor ever hoped to utilize the same after the mineral paint had been removed, as shewn by the facts of record.

Besides, in every country, both in France and here, mining concessions are generally perpetual, and this for reasons of utility and public interest.

Here is what Fuzier-Herman says (vol. 27, vo. Mines, No 417):—

> Pour que les mines soient bien exploitées, pour qu'elles soient l'objet du soin assidu de celui qui les occupe, pour qu'il multiplie les fouilles d'exploitation, pour qu'il ne sacrifie pas à l'intérêt du présent l'espoir de l'avenir, l'avantage de la société à ses spéculations personnelles, il faut que les mines cessent d'être des propriétés précaires, incertaines, non définies. Il faut en faire des propriétés auxquelles toutes les définitions du code civil puissent s'appliquer. Aussi, les mines seront désormais une propriété perpétuelle.

This Court is therefore of the opinion that it was the right in the mine, and the mine itself, which were sold, and not the mere right to operate the mine.

But even supposing that it would be possible to interpret the deed, not as the sale of the mine, but as the sale of the right to operate the mine, is it possible in the present case to fix a delay

QUE.
C. R.
1912
HOULE
v.
QUEBEC
BANK.
Lemieux, A.C.J.

within which the buyer shall be obliged to remove the balance of the mineral?

Although the plaintiffs by their action prayed that a delay of thirty days be granted to Argall by the Court, they have stated, at the hearing, that they would be satisfied if the Court fixed this delay at ten, fifteen or even twenty years.

The evidence has disclosed the fact that there is a considerable quantity of mineral paint in the territory sold. Experts and engineers have testified on the subject, some that there were about thirteen or fifteen thousand tons, others one hundred thousand tons, and finally, Obalski, the expert who was appointed by the Court, and whose opinion is entitled to more weight, has reported that there were still about twenty-five thousand tons.

It must not be forgotten that it has been established that the mineral was worked both by Argall and other mining operators, as orders came in, and that this has been the way in which the operations have always been carried on; that it is impossible to act otherwise, at least in a profitable manner.

Under these conditions it might happen that for unforeseen reasons, as a result of the putting into operation of other mines, or the perfected treatment of the mineral, Argall should not receive any orders for a year or two, or else receive but few.

And it must also be borne in mind that the average yearly removal of mineral has been from one thousand to fifteen hundred tons.

Under these conditions at least twenty years or so would elapse before the mine is worked out. It would not be reasonable under such circumstances to fix beforehand a delay within which Argall should be obliged to remove the balance of the mineral.

In the case of *Begin* v. *Carrier* (Que. 33 S.C. 1), confirmed in appeal, we held that the Courts were generally without jurisdiction to fix a term or delay for the execution of a contractual obligation when no such stipulation was entered into between the contracting parties. And we added that such action or interference otherwise would be tantamount to substituting the act of the Court to the rights and the will of the parties, and that such an intervention could be but arbitrary, a danger which the Courts should avoid.

We also concur in the opinion expressed by the trial Judge, to the effect that the claim for damages alleged to have been caused by Argall to the territory or ground in question, is unfounded.

We are therefore of opinion to confirm.

*Appeal dismissed with costs.*

## MOSIER v. RIGNEY.

ONT.

H. C. J.
1912

June 28.

*Ontario High Court. Trial before Britton, J. June 28, 1912.*

1. WILLS (§ I E—51)—SETTING ASIDE PROBATE—WILL PROVED IN SOLEMN FORM—CAVEAT FILED ALLEGING MENTAL INCAPACITY—JURISDICTION OF HIGH COURT.

Where, in an action to set aside the probate of a will, the defendant does not plead as *res judicata* an order of the Surrogate Court admitting the will to probate as "proved in solemn form of law" after hearing evidence in support of a caveat filed on the ground of the testator's mental incompetency, nor has he asked that the action be stayed on that ground, the High Court may treat the question of mental capacity as if it were before it in the first instance.

Statement

ACTION to set aside the will of John Bowman; tried at Kingston, without a jury.

The action was dismissed without costs.

*J. A. Hutcheson*, K.C., for the plaintiff.

*J. L. Whiting*, K.C., for the defendants.

Britton, J.

BRITTON, J.:—John Bowman made his will on the 24th December, 1910, and on the same day died in L'Hotel Dieu Hospital at the city of Kingston.

On the 13th January, 1911, the plaintiff, Mary Mosier, who is a first cousin of the deceased, caused a caveat to be filed in the Surrogate Court of the County of Frontenac. J. McDonald Mowat was the plaintiff's solicitor in the matter. The grounds stated, on which the caveat was lodged, were, that, at the time when the paper writing alleged to be the last will of Bowman purported to be executed, the deceased was not in possession of his faculties, was not of a disposing mind, and was brought to sign the paper by undue and improper influence.

Baillie, one of the named executors, renounced probate. Rigney, the other named executor, filed in the Surrogate Court a statement of claim, and asked for probate.

On the 7th May, the plaintiff, by her solicitor, filed her statement, alleging want of testamentary capacity, undue and improper influence, and that the paper writing did not express the will of the testator. Upon motion made pursuant to leave of the Surrogate Judge, the matter came on for hearing. Evidence was taken—affidavit evidence and *viva voce*—and on the 14th March, 1911, that Court made an order that the paper then and now in question was the will of John Bowman, and that the same should be admitted to probate, as "proved in solemn form of law."

On the 16th March, 1911, letters probate issued. This action was commenced by the plaintiff—by Mr. Mowat, his solicitor—on the 30th January, 1911, and, pending proceedings in the Surrogate Court, nothing further was done after appearance until the 13th September, 1911, when the statement of claim was

ONT.

H. C. J.
1912

MOSIER
v.
RIGNEY.

Britton, J.

filed. In it the fact is stated that letters probate were granted to the defendant-executor, after proof in solemn form. The grounds of attack upon the will are precisely the same as taken in the Surrogate Court. Each defendant put in a statement of defence. No defendant asked to have the proceedings in this action stayed on the ground, or pleaded as a defence, that by the order of and the grant of probate by the Surrogate Court the mental capacity of the testator to make a will was *res judicata*. Under these circumstances, I deal with the case as if before me in the first instance.

The deceased was taken ill three or four days before the day of his death. Dr. Kilborn was called in. Upon the doctor's order, the deceased was taken at once to L'Hotel Dieu Hospital; and there the doctor—who was acquainted with the deceased—paid close attention to him during his short illness. The doctor visited the deceased on the 23rd December, and says that the deceased was on that day mentally all right. He saw the deceased again on the following day, after 9.30 a.m. and before 11.30 a.m. The deceased at that interview knew the doctor, spoke, said he was better, but immediately his mind began to wander. The doctor is of opinion that the deceased was not, at the time of the last interview, capable of making a valid disposition of his property. Death occurred shortly after 11.30 on the 24th December, 1911. The doctor stated that, in his opinion, the deceased may have been competent at 7 a.m. on the day of his death.

The circumstances attending the making of the will are, that, when the sickness of the testator seemed likely, and very soon, to terminate fatally, one of the Sisters in charge telephoned to the defendant Rigney. Mr. Rigney cannot be said to have been the general solicitor of the Corporation L'Hotel Dieu, nor did it appear that Mr. Rigney was asked for, or that any lawyer was asked for by the deceased. Rigney went at once. He did not know the relatives of the deceased, or the names of his friends, or the value of his estate.

Rigney's testimony was clear that the deceased intelligently gave instructions for the will; these instructions were taken down in writing by Rigney, before he drew the will itself; then the will was drawn. The will was carefully read over to the deceased, who seemed fully to understand it. The deceased named his sister-in-law, and gave reasons for leaving her only the interest on money to be invested. The deceased named Frank Blake, and at first named a smaller amount in giving instructions, but changed it to the sum of $500. So far as appears, nothing was said by the deceased as to the value of his estate or of what it consisted. It was in fact a large estate for a man of the mode of life and habits of the deceased. The deceased

was not interested in charitable work, and beyond a small donation on at least one occasion it was not shewn that he had given money to charities. None of the relations of the deceased could reasonably expects gifts by will or otherwise from him. The comparative large wealth of the deceased was simply the result of accumulations held to by him until obliged by death to let go—and, when about to give it up, there was apparently some indifference as to who should get or who should manage his estate.

The evidence of Rigney was fully corroborated by the affidavits of the subscribing witnesses to the will, and also by the oral testimony of witnesses in the Surrogate Court, and before me, except in the evidence of James T. Delaney. This witness says that his statement in the Surrogate Court was not a true statement; and, could I accept his evidence as true, I should be obliged to decide against the will. Considering Delaney's demeanour in the box, having regard to the affidavit he made, the evidence he gave before the Surrogate Judge, his contradiction by himself and by the other witnesses, I cannot accept as true what Delaney said before me.

Upon the whole case, the attack upon the will fails.

It was a proper case for a caveat, and to ask that the will be proved in solemn form of law. When that was done, the plaintiff, desiring to go farther, could not expect to do so and have her costs borne by the estate should she fail. I do not impute to the plaintiff any understanding with the witness Delaney by reason of which Delaney has given a false statement, as I think he has. Not knowing what to do in the face of the changed attitude of Delaney, she went on with her action—and had Delaney in Court. She has failed; and the most that, under the authorities, can be done, is to relieve her from paying the defendants' costs. This I will do—and the action will be dismissed without costs.

*Action dismissed.*

ONT.

D. C.
1912

June 28.

## VANHORN v. VERRAL.

*Ontario Divisional Court, Meredith, C.J.C.P., Teetzel and Kelly, JJ.*
*June 28, 1912.*

1. DAMAGES (§ III—I 4—192)—INJURIES FROM BEING STRUCK BY AUTOMOBILE—INCREASING DAMAGES ON APPEAL—INSTANCES OF AMOUNT.

In an action for damages for injuries sustained in being struck by an automobile, a judgment of a trial Court for $300 was, on appeal, increased to $700, $200 being awarded for loss of time, $400 for physical suffering, and $100 for expense incurred, where the plaintiff, a strong, healthy man sixty-two years of age, was, as the result of his injuries, confined to his bed for four weeks, underwent severe physical suffering, sustained displacement and impaired action of the heart, serious injury to his nervous system, great weakness and inability to do heavy work for a long time after the accident, and was thus prevented from superintending his farm work at a season when his services were greatly needed.

2. APPEALS (§ VII L 3—508)—INCREASE OF DAMAGES BY APPELLATE COURT—TRIAL BELOW WITHOUT A JURY.

Where an action for personal injuries sustained through the defendant's negligence is tried by a Judge without a jury and the damages awarded by him are so small as to shew that he must have omitted to take into consideration some of the elements of damage, the appellate Court may, on appeal by the plaintiff, increase the amount on a consideration of the trial depositions without remitting the case for a new trial.

[*Rowley* v. *London and N.W.R. Co.*, L.R. 8 Ex. 221, and *Phillips* v. *South Western R. Co.*, 5 Q.B.D. 78, applied.]

Statement

MOTION by the plaintiff by way of appeal from the judgment of BRITTON, J., at the trial without a jury of an action for damages for personal injuries sustained by the plaintiff, owing to the negligence of the defendant, as alleged, and for a new trial or an increase of the damages. The learned Judge awarded the plaintiff $300, which, the plaintiff asserted, was insufficient.

The motion was allowed in part and judgment below varied.

*J. W. McCullough*, for the plaintiff.

*W. G. Thurston*, K.C., for the defendant.

Teetzel, J.

The judgment of the Court was delivered by TEETZEL, J.:—Appeal by the plaintiff from the judgment of Mr. Justice Britton awarding the plaintiff $300 damages for injuries caused by the negligence of the defendant's servant in operating an automobile. The appeal is for a new trial or to vary the judgment by increasing the damages. The defendant does not appeal against the finding of negligence; so that the sole question for consideration is one of damages.

The collision in which the plaintiff was injured occurred on the 24th May, 1911; the plaintiff was thrown or pulled from his rig, and sustained several minor bruises and suffered considerable pain and distress in his chest and sides, but did not consult his physician until the 31st May. On that date, the physician says—"The plaintiff was in quite a nervous condition.

. . . In the examining I found that his nervous system seemed to be under a bit of a shock, and it seemed to disarrange his system sufficient to require some little help." The pain and distress continued to increase, and on the 10th June acute pneumonia, accompanied with pleurisy, developed. The learned Judge, accepting the evidence of two experts, found that this condition resulted from the injuries caused by the negligence found against the defendant.

The plaintiff was confined to his bed between three and four weeks, and was for a long time afterwards very weak and unable to do any heavy work. His physician examined him on the 12th September, and says that, at that time, "his heart was displaced to the right about an inch, from this pleural effusion in the pleural sac. It was very irregular and very rapid, and his nervous condition was very bad; he was extremely nervous."

On the 14th November, his physician again examined him, and found him very much improved, but says that "he had not regained his usual vigour; he was still weak."

The plaintiff is sixty-two years old, and before the casualty had been an unusually strong, healthy man. The learned Judge finds that at the trial he appeared to be as well as ever, although the plaintiff himself asserted that he had not regained his normal strength.

The plaintiff's actual expenditures directly attributable to the casualty would be about $100. He was unable to work or to devote himself to the superintendence of work on his farm at a time of year when both such work and supervision were greatly needed for the profitable operation of his farm; and, while the consequent actual loss is difficult to determine, I am satisfied, after a careful perusal and consideration of the evidence, that $200 would not be an excessive sum at which to fix that loss.

For several weeks after the accident, the plaintiff admittedly suffered much pain; and, even after he was able to be about, he must have suffered much physical discomfort from his nervous condition and the displacement of his heart, as described by the physician. For this pain and discomfort he is clearly entitled to compensation; and, in my opinion, the amount should not be less than $400.

The plaintiff was guilty of no wrong, but suffered a wrong at the hands of the defendant; and he is not only entitled to be fairly compensated for his pecuniary loss, but he is also entitled to a reasonable allowance for the months of pain, inconvenience, and loss of enjoyment sustained by him.

With great deference to the learned trial Judge, I am driven to the conclusion that he did not give due effect to the undisputed evidence as to the plaintiff's physical injuries and

ONT.
D. C.
1912
VANHORN v. VERRAL.
Teetzel, J.

suffering. As the sum awarded will not more than compensate the plaintiff for his pecuniary losses, I think it unreasonably inadequate, and that, in accordance with the principles laid down in *Rowley* v. *London and North Western R. Co.* (1873), L.R. 8 Ex. 221, and *Phillips* v. *South Western R. Co.* (1879), 4 Q.B.D. 406, 5 Q.B.D. 78, the judgment should be varied by fixing the damages at $700, with costs, including the costs of the appeal, to be paid by the defendant.

*Judgment below varied.*

---

ONT.
D. C.
1912
April 18.

## Re DENTON.

*Ontario Divisional Court, Boyd, C., Latchford and Middleton, JJ. April 18, 1912.*

1. WILLS (§ III B—88)—DISTRIBUTION—DECEASE OF LEGATEE PRIOR TO TESTATOR.

Under a will directing the testator's estate to be sold upon the death of his wife, certain legacies paid out of the proceeds and the remainder divided equally among all the testator's brothers and sisters, and providing further that, if any such brothers or sisters died before the final division of the estate, leaving lawful issue the share which the deceased brother or sister would have been entitled to, if living, should be equally divided among the children of such brother or sister, so that such child or children should take the portion which his or her, or their parent would have been entitled to, if living, the share of a sister who died after the execution of the will, but before the testator, belongs to her children surviving at the time of the final distribution.

[*Re Denton*, 25 O.L.R. 505, reversed; *Lanphier* v. *Buck* (1865), 34 L.J. Ch. 650 at p. 656, applied; *Christopherson* v. *Naylor*, (1816), 1 Mer. 320, and *Gray* v. *Garman* (1843), 2 Hare 268, specially referred to; *Ive* v. *King* (1852), 16 Beav. 46, at p. 53, *per* Romilly, M.R., disapproved.]

Statement

APPEAL by J. H. Dickenson, representative of Naomi Dickenson, deceased, from the order of RIDDELL, J., *Re Denton*, 25 O.L.R. 505, upon one of the questions submitted as to the construction of the will of John M. Denton, deceased.

The appeal was allowed with costs out of the estate.

The motion was by Eleanor Bolland, Edna Bolland, and Isabella Bolland, infants, under Con. Rule 938, for an order determining certain questions arising upon the will of John M. Denton, deceased.

February 10. The motion was heard by RIDDELL, J., in the Weekly Court at London.

*E. W. M. Flock*, for the applicants.

*M. D. Fraser*, K.C., for all other beneficiaries.

*J. P. Moore*, for the executor.

ONT.

D. C.
1912

RE DENTON.

Riddell, J.

February 14. RIDDELL, J.:—John M. Denton died in March, 1896, leaving a will dated in June, 1889—the provisions of which are as follows:—

"I give devise and bequeath to my friends John W. Jones and William M. Moore of the City of London Esquires all my real estate and remainder of my personal property of whatever nature or kind and wheresoever situated upon the following trusts.

"1. To sell and dispose of my real estate or any part thereof and to convert my personal property into cash as soon after my decease as my said trustees or the survivor of them may think proper so to do and until such sale to lease all or any portion of my said real estate.

"2. Out of the proceeds of my personal property to pay to the Protestant Orphans Home of London Ontario the sum of three hundred dollars.

"3. Out of the remainder of the proceeds of my said personal property and of the proceeds derived from such sale and leasing of my real estate as aforesaid to pay to my said nephew Edward A. Denton the sum of three hundred dollars.

"4. To pay to my sister Naomi Dickenson the sum of one hundred dollars per annum during the lifetime of my dear wife.

"5. To pay to my sister Mary Bolland during the lifetime of my said wife the sum of one hundred dollars per annum.

"6. After payment of the legacies before mentioned and of my lawful debts I desire my said trustees or the survivor of them to invest the remainder of my said estate in good securities and to lease such portion of my property as shall not be sold and to pay the interest and proceeds derived therefrom to my dear wife by quarterly payments during her life.

"7. After the death of my said wife to sell and dispose of all my real estate and property then unconverted and to pay to my sister Naomi Dickenson and to Mary Bolland each the sum of five hundred dollars to divide the remainder equally amongst all my brothers and sisters including the said Naomi Dickenson and Mary Bolland share and share alike.

"8. Should any of my brothers or sisters die before the final division of my estate leaving lawful issue then and in such case I desire that the share to which such deceased brother or sister would have been entitled if living shall be divided equally amongst the children of such deceased brother or sister so that such child or children shall take the portion to which his her or their parent would have been entitled if living.

"9. I appoint the said John W. Jones and William M. Moore the executors of this my will."

The widow died on the 23rd November, 1910.

Naomi Dickenson died on the 17th July, 1892, leaving her surviving a number of children, eight of whom survived the

ONT.
D. C.
1912
RE DENTON.
Riddell, J.

testator, and seven are still living; others of her children died leaving children, and others leaving grandchildren.

Mary Bolland survived the testator, but died before the widow. Some of her children died before her leaving children, and some of these children died leaving children.

Samuel Denton and William Denton, brothers of the deceased, died after the testator, but before his widow—Samuel leaving a number of children, some of whom have died leaving children, and William leaving one child, who also died before the widow.

Jethro Denton is still alive.

These are all the brothers and sisters of the testator, viz., (1) Naomi, (2) Mary, (3) Jethro, (4) Samuel, (5) William.

1. The first question is: "Has the annuity to Naomi Dickenson given by the 4th clause lapsed, she having predeceased the testator?"

Before the Wills Act, there can be no doubt that there was a lapse in such cases, and the Wills Act does not operate to prevent it in the present case. R.S.O. 1897, ch. 128, sec. 36*, applies only when the intended beneficiary is a "child or other issue of the testator." This proposed gift, therefore, fails entirely. The fact that it is an annuity and not a fixed sum is immaterial: *Smith* v. *Pybus* (1804), 9 Ves. 566, at p. 575, *per* Sir William Grant, M.R.

2. The second question is as to the $500 left to her specifically in clause 7; and this question must be answered in the same way and for the same reasons.

3. The third question is: "Mary Bolland having survived the testator, and so having become entitled to the annuity under clause 5, but dying before the wife, what becomes of the annuity between the deaths of Mary Bolland and the widow?"

As far back as 1687, Lord Jeffries, L.C. (whose ability and merits as a Judge in purely civil matters have not received the recognition they deserve), in *Gifford* v. *Goldsey* (1687), 2 Vern. 35, decided that if a man possessed of a term for years determinable on lives devises £20 *per annum* to J. S. to be paid out of this estate, if the *cestuy que vies* should so long live, and J. S. die in the lifetime of the *cestuy que vies*, the annuity is payable to his executors during the remainder of the term.

In 1710, the Lord Keeper (Sir Simon Harcourt, afterwards Lord Harcourt, L.C.), in *Rawlinson* v. *Duchess of Montague* (1710), 2 Vern. 667, held that in a bequest of £50 per annum to his executors during the lifetime of the Duchess of Montague, the wife of the testator, to be for the separate use of Mrs. R., when Mrs. R. died during the lifetime of the Duchess, the annuity should be paid to the executors of Mrs. R., during the Duchess's life.

*Now 1 Geo. V. ch. 57, sec. 37.

The same learned Lord Keeper decided that in a devise of a lease to A. for life, A. to pay an annuity of £10 to B., her son, during her life—if the son B. died before A. his mother, the annuity still continued during A.'s life and became payable to the executors of B.: *Lock* v. *Lock* (1710), 2 Vern. 666.

Lord Hardwicke, L.C., followed the first-mentioned case (see also 1 Rolle's Abr. 831, pl. 5) in *Savery* v. *Dyer* (1752), 1 Dick. 162, 1 Ambl. 139. There R. D., by will, gave to J. S., a kinsman, during the natural life of his executor, one annuity or yearly sum of £50 to be paid him by his executor. J. S. died; the plaintiff was his executor; and it was adjudged that the plaintiff was entitled to the annuity during the lifetime of the executor. In the report in Dickens the Lord Chancellor is made to say: "If a personal annuity is given to A., it shall go to him for life only." No such expression is found in Ambler's report.

The expression was quoted in argument in *In re Ord* (1878), 9 Ch.D. 667, at p. 671, thus: "As to the annuity, that was a gift to the son for his personal advantage, and it could not be made to extend to a period beyond his life: *Savery* v. *Dyer:*" but this argument was not acceded to by Vice-Chancellor Hall; and the Court of Appeal (1879), 12 Ch.D. 22, supported the Vice-Chancellor's decision. In that case there was a provision that A., if he should attain the age of twenty-one years, should be paid £40 annually from his majority to the death or marriage of the widow. He attained the age of twenty-one years, and died in the lifetime and widowhood of the widow. Hall, V.-C., 9 Ch.D. at p. 673, says: "I must give full effect to the language of the will, and I hold that the annual payment of £40 was to continue . . . and that it is now payable to his legal personal representative during the lifetime of the widow or her widowhood." James, L.J., says, 12 Ch.D. at p. 25: "It has never been doubted that the gift of an annuity for a term or *pur autre vie* is a gift to the annuitant and his personal representatives during the term or the life of the *cestui que vie.*" Baggalay, L.J., was at one time disposed to think that it was intended only for the personal enjoyment of the son (A.). "But, on further consideration, I have come to the conclusion that there is no such limitation." Thesiger, L.J., concurred.

*Lewes* v. *Lewes* (1848), 16 Sim. 266, is another very strong case. The testator directed the executors to pay £300 per annum toward maintenance, clothing, and education of all and every the children of his eldest son, in equal shares, during the son's life. The son had three children, all of whom attained the full age of twenty-one years—then one died, and the others claimed that, as he had no further need for "maintenance, clothing, and education," they should have all the annuity. But the Vice-Chancellor (Shadwell) held that the personal representative of the deceased child was entitled to be paid one-third of the £300 during the lifetime of the father (the eldest son of the testator).

ONT.

D. C.
1912

RE DENTON.

Riddell, J.

The same rule is laid down in *Attwood* v. *Alford* (1866), L.R. 2 Eq. 479. "A gift of the income to arise from a fund during the life of A. to B., for his maintenance, is an absolute gift to B., his executors and administrators, during the life of A., and is not confined to the joint lives of A. and B.:" *per* Lord Romilly, M.R.

The authorities are perfectly clear and are consistent in the one sense from the earliest times—and I am bound by them to hold that the personal representatives of Mary Bolland are entitled to the $100 a year from her death till the death of the widow.

4. "Mary Bolland having survived the testator, but dying before the wife, what becomes of the $500 legacy to her, contained in the 7th clause?"

That the rules of vesting applicable to bequests of personalty also apply to realty directed to be converted, is quite clear: Theobald, Can. ed., p. 580 *ad fin.* One of these rules is: When the only gift is found in the direction to pay (as in this instance) and the postponement is merely on account of the property, as, for example, if there be a prior gift for life, the gift in remainder vests at once: *In re Bennett's Trust* (1857), 3 K. & J. 280; *Strother* v. *Dutton* (1857), 1 DeG. & J. 675; *Parker* v. *Sowerby* (1853), 17 Jur. 752; *Adams* v. *Robarts* (1858), 25 Beav. 658; but the vesting is postponed if the payment be deferred for reasons personal to the legatee: *Hanson* v. *Graham* (1801), 6 Ves. 239; *Locke* v. *Lambe* (1867), L.R. 4 Eq. 372.

*Smell* v. *Dee* (1708), 2 Salk. 415, is an anomalous case and has no bearing upon the present will.

I think that the legacy vested at the death of the testator, and the $500 is payable to the personal representative of Mary Bolland.

5. "Are the children of Naomi Dickenson" (who died as we have seen before the testator) "entitled to share, under the provisions of clause 8, in the remainder of the fund formed under clause 7?"

It is to be observed that the gift to children is substitutionary and not substantive—the testator does not say "to my brothers and sisters then living and the children of those then dead," but the children are beneficiaries out of that which the parent would have received if living.

In *Ive* v. *King* (1852), 16 Beav. 46, Romilly, M.R., said (p. 53): "If a testator give a legacy to a class of persons, such as the children of A., and goes on to provide, that in case of the death of any one of the children of A. before the period of distribution, the issue of such child shall take their parent's share, such issue cannot take, unless the parent might have taken; and consequently, if a child of A. be dead at the date of the will

or at the death of the testator, the issue of that child cannot take anything." And he quotes *Coulthurst* v. *Carter* (1852), 15 Beav. 421; *Peel* v. *Catlow* (1838), 9 Sim. 372; *Waugh* v. *Waugh* (1833), 2 My. & K. 41; *Christopherson* v. *Naylor* (1816), 1 Mer. 320.

The same rule is laid down in *Congreve* v. *Palmer* (1852), 16 Beav. 435, by the same learned Judge.

In *In re Potter's Trust* (1869), L.R. 8 Eq. 52, there was a bequest to the testator's "nephews and nieces . . . in equal shares," and, in the case of the death of any of these leaving issue, such issue were to take the share the deceased parent would have taken if living. Malins, V.-C., regretting such cases as *Christopherson* v. *Naylor*, "by which the testator's intention has been totally frustrated, when a yielding to a common sense view would have carried it out," and following what he "must call the rational construction," holds that a child of a nephew or niece who was dead at the date of the will is as much entitled to take as the child of a nephew or niece who died after that time, but before the testator, and that in both cases the child will be substituted for its parent."

This case is explained in *In re Hotchkiss's Trusts* (1869), L.R. 8 Eq. 643, where James, V.-C., says: "In *In re Potter's Trust*, and the cases which it followed, words occurred which were sufficient to satisfy the Court that the gift was not a gift to a class, followed by a substitution of other persons for dying members of that class; but that it was a gift which, upon fair principles of construction, could be made out to consist of a gift to two classes; first, to one class of children or nephews; and then to the issue of another class of children or nephews." The learned Vice-Chancellor goes through the cases, and holds that *Christopherson* v. *Naylor* is still of authority.

But, while the cases upon which *Ive* v. *King* is based have been attacked, I cannot find that the case itself has been questioned or the principle which I have quoted disapproved, but the reverse.

Long before this, in a case of *Thornhill* v. *Thornhill* (1819), 4 Madd. 377, the will contained a direction that certain land should go to the wife for life, be sold as soon as might be after her decease, and the money arising therefrom equally divided among the nephews and nieces of the testator—"the children of such as should be then dead standing in the place of their father and mother deceased." Certain of the nephews and nieces died during the testator's lifetime leaving children, and the question was, did these children take? Sir John Leach, V.-C., held that the gift "must necessarily be confined to nephews and nieces living at the death of the testator, and that they were to take only if they survived the wife; and that if they died after the

ONT.
D. C.
1912
RE DENTON.
Riddell, J.

testator and before the wife, then their children were to stand in their place."

This case was approved and followed by North, J., in *In re Hannam*, [1897] 2 Ch. 39, the last case I have seen on the point. The learned Judge points out that in *Smith* v. *Smith* (1837), 8 Sim. 353, 357, the Vice-Chancellor (Sir Lancelot Shadwell) does say, "I think that the decision in *Thornhill* v. *Thornhill* is wrong," but that he gives no reasons whatever. North, J., finishes his judgment (p. 47): "I do not find *Thornhill* v. *Thornhill* impeached by any decision, notwithstanding that in Mr. Jarman's valuable book it is said that it has not been favourably received: and Sir John Romilly always regarded that case as rightly decided."

This line of decisions shews how dangerous it is to allow what one may consider to be common sense to be the final test in the determination of the meaning of a will, alluring as such a course may be and is. The difficulty is, that what one Judge considers "common sense"—far removed from its original meaning as that much abused term is—is not even common sense, let alone sense, to another. My common sense is like that of Malins, V.-C., and tells me that, if a legatee is dead at the date of the making of the will, he is dead at the date of the death of the testator; but it seems that this is not law. And my common sense tells me that when an annuity is left for the maintenance, clothing, and education of A. for the life of B., when A. dies and no longer can make use of money for maintenance, clothing, or education, the annuity should cease, though B. continue to live. But that is not law either. So my common sense tells me that in the present case Naomi, who was dead at the time of the death of the testator, died "before the final distribution of" the estate. But the law says that this is not so.

I am bound by authority to hold that Naomi's descendants do not share in the fund bequeathed by clause 7.

6. The remaining question is: "Do the children of those children of the deceased brothers and sisters take in competition with their uncles and aunts?"

It is perfectly clear law that the word "children" does not include grandchildren: *Radcliffe* v. *Buckley* (1804), 10 Ves. 195; *Moor* v. *Raisbeck* (1841), 12 Sim. 123; *Pride* v. *Fooks* (1858), 3 De G. & J. 252; *Higgins* v. *Dawson*, [1902] A.C. 1; *Re Williams* (1903), 5 O.L.R. 345; *In re Clark* (1904), 8 O.L.R. 599; *Paradis* v. *Campbell* (1883), 6 O.R. 632; *Rogers* v. *Carmichael* (1892), 21 O.R. 658; *Murray* v. *Macdonald* (1892), 22 O.R. 557; unless, indeed, the circumstances are such that, unless it does, it is meaningless: *Berry* v. *Berry* (1861), 3 Giff. 134; *Fenn* v. *Death* (1856), 23 Beav. 73; *Loring* v. *Thomas* (1861), 1 Dr. & Sm. 497; *Re Kirk* (1885), 52 L.T.R. 346; *In re Smith* (1887), 35 Ch.D.

558; *Morgan* v. *Thomas* (1882), 9 Q.B.D. 643, at p. 646, *per* Jessel, M.R.

There is nothing in law or in philology to prevent grandchildren, or even more remote descendants, being called "children"—the "children of Israel" are far removed in time and number of generation from their father Israel. But this is done in interpreting wills only where it is reasonably necessary to give sense or consistency to the will.

In the present instance there is no such necessity. If any brother or sister die before the final division of the estate, *i.e.*, before the death of the wife (see *Thornhill* v. *Thornhill*, *ut supra*), "leaving lawful issue," his or her "children" are to take. "Issue" is, of course, generic and covers all the lineal descendants *in infinitum*, including grandchildren—but the provision is not that the share shall go to such issue, but to the "children," so that such child or children (not "such issue") shall take the portion to which his, her, or their parent would have been entitled if living. And the use of the word "parent," instead of "ancestor," seems to make the interpretation I am giving still more likely—although, of course, "parent" is not uncommonly used of a more remote ancestor than father or mother.

We are able to give every word of the will its primary proper meaning by this interpretation, whereas that claimed for the grandchildren would require a wrench to be given to the meaning of both "children" and "parent."

The grandchildren do not take in competition with the children. The same interpretation, I may add, has been put upon the word "children" in our Statute of Distributions: *Crowther* v. *Cawthra* (1882), 1 O.R. 128; and in policies of insurance, etc., *Murray* v. *Macdonald*, 22 O.R. 557. There will be judgment accordingly.

Costs of all parties out of the estate; the executors' between solicitor and client.

April 3. The appeal was heard by a Divisional Court composed of BOYD, C., LATCHFORD and MIDDLETON, JJ.

Argument

*T. G. Meredith*, K.C., for the appellant. The question for decision arises under the 7th and 8th clauses of the will, and is, whether or not the children of Naomi Dickenson, who died after the date of the will, but predeceased the testator, are entitled to share in the remainder of the fund formed under clause 7—in other words, whether the gift under clause 8 is substitutionary or substantive. The learned Judge in the Court below held that the gift was substitutionary only, and accordingly excluded the children of Naomi, considering that he was bound by the principles and authorities cited by him, although the contrary view appeared to him to be more agreeable to common sense. The

ONT.
D. C.
1912
RE DENTON.
Argument

law is stated in Theobald on Wills, 7th ed., p. 671, and it is submitted that the appellant's case is supported by the principles there laid down, which are not affected by the cases cited on behalf of the respondents. In *Thornhill* v. *Thornhill* (1819), 4 Madd. 377, relied on by the learned Judge, the language is not the same as here, and that case has been disapproved of in *Smith* v. *Smith* (1837), 8 Sim. 353, *per* Shadwell, V.-C., at p. 357. *In re Potter's Trust* (1869), L.R. 8 Eq. 52, which the learned Judge says is explained in *In re Hotchkiss's Trusts* (1869), L.R. 8 Eq. 643, is in our favour and is good law to-day, and the appellant's case is even stronger. *In re Hannam*, [1897] 2 Ch. 39, has been referred to as against our contention, but falls far short of justifying such a conclusion. [MIDDLETON, J., referred to *Re Fleming* (1904), 7 O.L.R. 651.] Reference was made to *Cort* v. *Winder* (1844), 1 Coll. 320, and to *Loring* v. *Thomas* (1861), 1 Dr. & Sm. 497, where *Christopherson* v. *Naylor* (1816), 1 Mer. 320, is distinguished; also to *In re Woolrich* (1879), 11 Ch. D. 663. The appellant relies on *Loring* v. *Thomas*, which has never been disapproved, as giving the principle on which this case should be decided.

*M. D. Fraser*, K.C., for the beneficiaries under the will other than Naomi Dickenson, relied upon the judgment of Riddell, J., and the cases there cited, and the principle laid down in the line of authorities from *Christopherson* v. *Naylor*, in 1816, to *In re Hannam*, in 1897, as shewing that where the gift is, as here, by way of substitution, the children of a person predeceasing the testator are excluded. He referred to *Re Fleming, supra; Re Williams* (1903), 5 O.L.R. 345; *In re Clark* (1904), 8 O.L.R. 599. *In re Potter's Trust, supra*, on which the appellant relies, cannot be treated as a binding decision, and James, V.-C., discussing that case in *In re Hotchkiss's Trusts, supra*, holds that *Christopherson* v. *Naylor* is still an authority. It may be admitted that the appellant's case appeals to sympathetic feeling, but the law is the other way.

*Joseph Montgomery*, for the executor, took no part in the argument, but stated that his client would not be sorry if what had been called the "common sense" view of the case should prevail.

*Meredith*, in reply, argued that *Loring* v. *Thomas* covered the case, and had not been overruled. He referred to *In re Metcalfe*, [1909] 1 Ch. 424, in which the *Loring* case was followed.

Boyd, C.

April 18. BOYD, C.:—The 7th and 8th clauses of the will are these:—

(7) After the death of my wife to sell property and pay to sister Naomi and to Mary $500 and to divide the remainder

equally amongst all my brothers and sisters, including Naomi and Mary.

(8) Should any of my brothers or sisters die before the final division of my estate leaving lawful issue then and in such case I desire that the share which such deceased brother or sister would have been entitled (to) if living shall be divided equally amongst the children of such deceased brother or sister so that such child or children shall take the portion which his or her or their parent would have been entitled (to) if living.

Upon questions submitted to the Court touching the proper construction of John M. Denton's will, the fifth one was this: Are the children of Naomi entitled to share, under the provisions of clause 8, in the remainder of the fund formed under clause 7 of the will?

The Judge's answer is that these children are excluded. From this the present appeal is lodged.

The important dates are these. The will of the testator was dated and made the 24th June, 1889. The sister of the testator, Naomi, died in 1892, leaving children. The testator died in 1896. His widow died in 1910. At that time in 1910, his estate became finally divisible upon the death of the life-tenant. Naomi died before this final division; she also died before the testator; but the important point which appears to have been passed by unconsidered is, that she was alive at the date of the will, and formed then one of the class capable of sharing in the residue, when it should fall to be divided. The learned Judge, applying the solvent of "common sense," thought the testator intended to benefit the children of Naomi, but was compelled by authority to decide the other way. But, bearing in mind the cardinal fact that the sister was alive at the date of the will, there appears to be comparative concord in the later case-law in favour of the bequest to the children being well and legally bestowed.

Grant, M.R., in *Christopherson* v. *Naylor*, 1 Mer. 320 (1816), laid down the proper method of inquiry. Who are the primary legatees? Who are capable of taking in the first place by the terms of the will? Having found these, then the representatives or issue of these are by the will made to stand as substitutes in place of the original legatee who had died. Whether the time of death be before the death of the testator or the tenant for life or the period of distribution does not matter, so long as you find the primary legatee having capacity to take named in the will. This was in 1816: and in 1843 an accurate Judge summarised the state of decision on this point in *Gray* v. *Garman* (1843), 2 Hare 268: "It has, indeed, been made a question, whether the capacity of the primary legatee (at the date of the will) to take the legacy was alone

ONT.
D. C.
1912
RE DENTON.
Boyd, C.

sufficient, whether such legatee must not survive the testator, become a legatee *in esse*, and not have been a legatee *in posse* only to entitle his issue to claim in substitution . . . But later cases appear to sanction a more liberal, though still a literal, construction of language like that I am considering. And it has been held, that the issue of a person primarily pointed out as the object of a testator's bounty, and living at the date of the will, may take in substitution for that party dying in the lifetime of the testator" (citing cases); and the Vice-Chancellor (Wigram) ends by saying—"A construction which is certainly fortified by very important analogies:" p. 271.

The gloss of Sir John Romilly in *Ive* v. *King* (1852), 16 Beav. 46, at p. 53, cited in the judgment below, 25 O.L.R. at p. 511, and founded upon the cases he refers to, appears to be too wide: as *Coulthurst* v. *Carter* (1852), 15 Beav. 421, was a case where the parent was dead at the date of the will; so was *Waugh* v. *Waugh* (1833), 2 My. & K. 41; and so was *Peel* v. *Catlow* (1838), 9 Sim. 372; and the last case cited by the Master of the Rolls, Romilly, *Christopherson* v. *Naylor*, I have already referred to as being on the same state of facts. *Congreve* v. *Palmer* (1852), 16 Beav. 435, was in like manner a case where the sister was dead at the date of the will, and had, therefore, no capacity to take and did not take by the terms of the will.

*In re Potter's Trust*, L.R. 8 Eq. 52, is quoted in the judgment under appeal, and Malins, V.-C., there affirms the law to be on reason thus: "Wherever there is a gift to a class, with a gift by substitution to the issue or children of those who shall die, the children take what their parents would have taken if living at the testator's death, without regard to the question whether the parents died before or after the date of the will." That is an unquestioned statement of law, so far as relates to parents dying after the date of the will, but it has provoked controversy as to those who were dead at the date of the will. On this head it seeks to controvert *Christopherson* v. *Naylor*, but on this branch of the inquiry we have no concern in order to dispose of the present appeal. The controversy is raised in *In re Hotchkiss's Trusts*, L.R. 8 Eq. 643, 650; but the case itself is an express decision that where the gift is to a class of persons living at the date of the will, the children of those who died between the date of the will and the testator are entitled.

*Thornhill* v. *Thornhill*, 4 Madd. 377, is apparently an off-hand decision of the Vice-Chancellor, who had the reputation of determining without hearing, and is but meagrely reported. The case seems to have turned on the language of the will giving the children the share of the parent; and, as the parent died in the testator's lifetime, he never had a share to transmit to the children; and on this ground it may be supported, and it is so

treated by Mr. Theobald: see Theobald on Wills, 7th ed., p. 671. And he distinguishes it from cases where (as in the present will) what is given to the issue is the share or portion which a member of the class would have taken if he had lived, in which the substitution operates as regards a person who dies in the testator's life but who was alive at the date of the will. *Thornhill* v. *Thornhill* is approved and followed by North, J., in *In re Hannam*, [1897] 2 Ch. 39; but it has not otherwise been received with favour; and both cases are any way clearly distinguishable from this case, where the testator's language expressly provides for the case of one dying before getting or being entitled to any share prior to the final distribution.

The point is thus put by Kay, J., in *In re Webster's Estate* (1883), 23 Ch. D. 737, 739: "Where there is a gift to a class and then a substitutionary gift of the share of any one of the class who should die in the lifetime of the testator, no one can take under the substitutionary gift who is not able to predicate that his parent might have been one of the original class, and consequently if the parent was dead at the date of the will, and therefore by no possibility could have taken as one of the original class, his issue are not able to take under the substitutionary gift."

But I favour the construction of this will as one in which the gift is not strictly of substitutionary character, but as presenting two classes of original legatees: one, the primary legatees, the brothers and sisters of the testator who are alive at the time of final distribution after the death of the testator's wife; the other, the secondary legatees, consisting of the issue or the children of any of the primary legatees who may die leaving issue before the period of final distribution. I would adopt and apply the language of Kindersley, V.-C., as used in *Lanphier* v. *Buck* (1865), 34 L.J. Ch. 650, 656: "The gift is to two classes of objects, to such nephews and nieces as shall be living at a given time, and to the issue of such nephews and nieces as shall be dead at that time. Is that an original gift to the issue, or a gift by substitution? Clearly an original gift to them. It is true you may say in a sense they are substituted for their parents, because they take the share respectively among them which their parent would, if he had come under the first class, have himself taken, and in that sense (but that is not the accurate and proper sense) you may say that there is a substitution; but it is as much an original gift to the issue of such of the nephews and nieces as shall have died before the tenant for life" (or the period of distribution) "as it is an original gift to such of the nephews and nieces as shall be living at the death of the tenant for life" (or other fixed period).

ONT.
D. C.
1912
RE DENTON.
Boyd, C.

I find no authority preventing us from giving effect to the clear and obvious meaning of the testator, that the children of his sister should take the share intended for their parent had she been alive. The whole field of testamentary interpretation in this regard has been broadened, and, if I may say so, humanised, by the exposition of the subject by the Lords in *Barraclough* v. *Cooper* (1905), as reported in a note to the case of *In re Lambert*, [1908] 2 Ch. 117, at pp. 121-126. They repudiate any canon of construction beyond the fact that enough is found in the language of the instrument to shew what was the meaning of the testator. And Lord Macnaghten quotes with emphatic approval the words of Vice-Chancellor Kindersley in *Loring* v. *Thomas*, 1 Dr. & Sm. 510, as follows: "Now, of course the question is one of intention, and it is obvious that in cases of this kind a testator may mean to *include* as objects of his bounty, or he may mean to *exclude*, the issue of the predeceased children. When a testator directs that issue shall represent or stand in the place of or be substituted for a deceased child, and take the share which their parent would have taken if living, he may intend such representation or substitution to apply only to the case of the child dying subsequently to the date of his will and before the time of his own death; or he may mean it to extend also to the case of the child who was already dead at the date of the will. The solution of the question, which of the two he intended, must of course depend on the language he has used in indicating such representation or substitution. He may use language of such restricted import as to be inapplicable to any children but such as are living at the date of the will. But if he uses language so wide and general as to be no less applicable to a predeceased child than to a child living at the date of the will, then the direction as to such representation or substitution must be held to embrace both."

The House of Lords have in effect given their sanction to the vigorous words of James, V.-C., in *Habergham* v. *Ridehalgh* (1870), L.R. 9 Eq. 395. He says (p. 400): It was contended by Mr. Kay that a gift to A., and a class of persons, is also a gift to a class, and that with regard to that class this rule has been laid down: that in order to determine the class you must take the persons who answer the description at the death of the testator. That implies that where there is a gift to a class, that means a gift to such of the class as shall be living at the death of the testator; and it follows that no one member of the class who may have died in the lifetime of the testator will be entitled. That reasoning is a very good illustration of the process by which in this Court we have established a body of dogma, and developed a whole code of artificial rules, according to which a testator's will is treated as if it were something

written in cypher, and incapable of being construed except by those learned persons who have the key of the cypher. Nevertheless, sometimes the Court is enabled to determine questions arising upon wills according to the rules of common sense; either by playing off one rule against another, or by resorting to some general rule of construction which controls the rest." And the Vice-Chancellor proceeds to act accordingly.

ONT.
D. C.
1912
RE DENTON.
Boyd, C.

A case of *Re Fleming*, 7 O.L.R. 651, decided by Mr. Justice Street, supports the view taken on this appeal.

I agree with my brother Riddell as to the meaning of the testator; and I do not read the authorities cited as going to interfere with the operation of common sense in the construction of the testator's language.

I rather favour giving costs of this appeal out of the estate.

LATCHFORD, J.:—I agree. Latchford, J.

MIDDLETON, J.:—I entirely agree. Lindley, L.J., in *In re Palmer*, [1893] 3 Ch. 369, in dealing with a case where the Judge of first instance had thought that he was precluded by prior decisions from giving effect to the testator's intention, uses words peculiarly apt here (p. 373): "The result in all these cases has been, in my opinion, to miss the intention as expressed, and, unfortunately, to defeat it without sufficient grounds. This line of cases affords a striking illustration of the mischief done by construing one will by paying too much attention to decisions on other wills. Rules of law must be attended to; but if in any case the intention of a testator is expressed with sufficient clearness to enable the Court to ascertain it, the Court ought to give effect to it in that case, unless here is some law which compels the Court to ignore it; and the mere fact that in other wills more or less like it other Judges have not been satisfied as to the intentions expressed in them, is not sufficient ground for defeating an intention where the Court holds it to be sufficiently expressed in the particular will which it is called upon to construe." Middleton, J.

Quite apart from cases, the language of the testator here admits of no possible doubt. The testator has directed the property to be set apart and held during the lifetime of his wife. Upon the death of the wife, it is then to be divided equally amongst all his brothers and sisters, including Naomi Dickenson, who is expressly named; and the testator then provides that, should any of his brothers or sisters die before the final division of his estate, leaving lawful issue, the share which the deceased brother or sister would have been entitled to, if living, shall go to the children of the deceased brother or sister.

ONT.

D. C.
1912

RE DENTON.

Middleton, J.

The will as to persons speaks from its date. Naomi died during the testator's lifetime. I can find no warrant for reading into this will a provision which would exclude her children from sharing because she predeceased the testator. This would be clearly contrary to the express intention of the will. The analysis of the cases by my Lord makes it plain that there is no authority compelling us to do violence to the testator's language and frustrate his intention.

*Appeal allowed; costs out of the estate.*

---

QUE.

S. C.
1912

April 9.

## BOUTIN v. CORONA RUBBER COMPANY.

*Quebec Superior Court, Laurendeau, J. April 9, 1912.*

1. MASTER AND SERVANT (§ II A—35)—EXISTENCE OF RELATIONSHIP OF MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT, QUEBEC.

The Workmen's Compensation Act (Quebec) presupposes the existence of a legal contract for the hire of services between employer and workman.

2. MASTER AND SERVANT (§ II A 3—58)—INJURIES TO INFANT EMPLOYEE—INDUSTRIAL ESTABLISHMENTS ACT (QUEBEC)—C.C. (QUEBEC) ART. 1053.

Where a minor under fourteen years of age is illegally employed in an industrial establishment contrary to the provisions of the Quebec Industrial Establishments Act, there is no legal contract for the hire of his services, and if the minor suffers personal injuries, his remedy lies in an action for damages at common law (art. 1053 C.C.) and not in an action under the Workmen's Compensation Act.

Statement

THIS is a motion by the defendants by way of exception for the dismissal of the action on the ground that the plaintiff should have proceeded under the Workmen's Compensation Act, instead of by an ordinary action.

The motion was dismissed with costs.

*Archambeault, Robillard, Julien & Bérard,* for the plaintiff.

*Busteed & Lane,* for the defendant.

Laurendeau, J.

LAURENDEAU, J. (translated):—By its motion by way of exception to the form, the defendant asks for the dismissal of the action on the ground that the plaintiff should have proceeded under the Workmen's Compensation Act, instead of proceeding by means of an ordinary action. The plaintiff, both personally and in his quality of tutor to his minor son, Maurice, who is twelve years old, claims from the defendant the sum of $10,035.00 for damages resulting from an accident of which the child was a victim while he was in the defendant's employ in an industrial establishment governed by the Quebec Industrial

QUE.

S. C. 1912

BOUTIN v. CORONA RUBBER CO.

Laurendeau, J.

Establishments Act. The defendant employed the child contrary to law, without being furnished with a certificate of the child's age and without a certificate that he could read and write. Under the Quebec Industrial Establishments Act (art. 3833 *et seq.* of R.S.Q. 1909), an employer has no right to employ a child under fourteen years of age in establishments governed by the Act. This Act is a matter of public order and those who contravene it are liable to a fine. The Workmen's Compensation Act necessarily presupposes the existence of a contract for the lease and hire of services between the employer and the workman and the employer's obligation to indemnify the workman in case of accident is contractual. In the present instance the pretended contract for the lease and hire of services between the minor child and the defendant is absolutely null and never had any legal existence because it was made contrary to a law of public order. For this reason the remedy which opens in the plaintiff's favour for reparation of the damages suffered is the remedy at common law.

The defendant's exception to the form is dismissed with costs.

*Exception dismissed.*

---

**CANADIAN GAS POWER AND LAUNCHES Limited v. ORR BROTHERS Limited.**

ONT.

H. C. J. 1912

June 7.

*Ontario High Court. Trial before Boyd, C. June 7, 1912.*

1. SALE (§ III C—74*a*)—LIEN OF VENDEE FOR PURCHASE MONEY PAID—RESCISSION OF CONTRACT—DEFAULT OF VENDOR.

A vendee of chattels, upon rescission of a contract of sale for the default of the vendor, has a lien thereon for the purchase money he has paid on the contract, which lien is not displaced by the recovery of a judgment against the vendor for the amount so paid.

[*Swainston* v. *Clay*, 3 DeG. J. & S. 558, referred to.]

2. JUDGMENT (§ III B—210)—LIEN OF VENDEE FOR PURCHASE MONEY PAID—CONTRACT RESCINDED BY DEFAULT OF VENDOR—INSOLVENCY OF VENDOR.

Where, upon the rescission of a sale of a chattel for the default of the vendor, a judgment was given the vendee for part of the purchase money he had paid the vendor under the sale contract which did not provide for a lien therefor on the property, the vendee in an action brought after the vendor's insolvency to recover possession of the chattel from the vendee may be declared to have a lien thereon for the payments so made, and such lien may be realized by sale of the chattel after due notice.

Statement

ACTION to recover possession of an engine and other articles and for damages for detention.

The judgment of the Court of Appeal, in a previous action between the same parties, affirming the judgment of CLUTE, J., at the trial, is reported *Canadian Gas Power and Launches Ltd.* v. *Orr*, 23 O.L.R. 616.

ONT.

H. C. J.
1912

CANADIAN GAS POWER & LAUNCHES, LTD. v. ORR BROS. LTD.

Boyd, C.

The present action was tried before BOYD, C., without a jury.

*G. H. Watson*, K.C., for the plaintiffs.

*R. McKay*, K.C., for the defendants.

BOYD, C.:—The sale of the engine, etc., was rescinded by the Court because of the default of the vendors. At the date of the action to enforce the contract, part of the price had been paid by the purchaser, to the extent of $500; and it was found by Mr. Justice Clute that the vendors had made default, and had no *locus standi* to sue for the balance of the price; and the action was dismissed. Judgment was given for the return of the purchase-money already paid, and also for damages and costs. This judgment has been affirmed after two successive appeals to the higher Courts. At the trial the Judge said that the engine should be returned; but, as he tells me, this was on the supposition that the judgment against the vendors would be paid. The vendors had, pending action and before the trial and judgment, gone into liquidation; but the liquidator, *quoad* this contract, stands in the shoes of the insolvents, the vendors.

Had the learned trial Judge then been asked to frame his judgment so that the redelivery of the engine should be conditional on the repayment of the $500 paid as part of the price, he would (as he informs me) have so ordered. This is based upon the assumption that the purchaser had a lien for the purchase-money paid, the contract having gone off through no default of the purchaser; which is, I think, well-settled law, even in the case of chattels; and it is not displaced or disturbed by the mere recovery of judgment: see, in addition to the cases cited, *Swainston* v. *Clay*, 3 DeG. J. & S. 558. In the case of *Scrivener* v. *Great Northern R. Co.*, 19 W.R. 388, the Judge says that the lien may be displaced by proving in bankruptcy after judgment has been recovered; but his remark applies to cases where the creditor has come in and proved, not disclosing the lien. There is no such complication in this case; and the mere recovery of judgment does not extinguish the lien. The defendants are still entitled to hold their lien and to have it realised by sale of the property after due notice.

That relief may be given now, to end further applications to the Court: it should have been sought and would have been provided for by Mr. Justice Clute.

This new action is misconceived; but, as no objection was taken to the method in the defence, and as relief is now given to the purchasers, I think the best course is to give no costs of this action to either party.

*Judgment for defendants.*

## MORGAN v. JOHNSON.

ONT.

C. A.
1912

June 28.

*Ontario Court of Appeal, Moss, C.J.O., Garrow, Maclaren, Meredith, and Magee, JJ.A. June 28, 1912.*

1. PRINCIPAL AND AGENT (§ II A—8)—SALE OF LAND BY AGENT IN HIS OWN NAME—AUTHORITY OF AGENT—LIABILITY OF PRINCIPAL.

The agency of one who in his own name entered into an agreement for the sale of land he was duly authorized to sell, may be shewn, in order to bind his principal, in an action against the latter for specific performance of the agreement.

[*Morgan* v. *Johnson*, 3 O.W.N. 297, 20 O.W.R. 509, affirmed on appeal.]

2. PRINCIPAL AND AGENT (§ II A—7)—POWER OF ATTORNEY—SALE OF LAND BY AGENT—ENFORCEMENT BY PURCHASER AGAINST PRINCIPAL.

Notwithstanding it was stipulated in a power of attorney, under which an agent had authority to make a sale of land belonging to his principal, that any sale should be for "and in the name of" the principal a contract entered into by the agent in his own name is enforceable by the purchaser against the principal.

3. PRINCIPAL AND AGENT (§ II A—7)—APPARENT AUTHORITY OF AGENT.

Whenever the very act of the agent is authorized by the terms of the power, *i.e.*, whenever, by comparing the act done by the agent with the words of the power, the act is itself warranted by the terms used, such act is binding on the constituent as to all persons dealing in good faith with the agent, and the persons so dealing are not bound to inquire into facts *aliunde*.

[*Bryant* v. *La Banque du Peuple*, [1893] A.C. 170, applied; *Westfield Bank* v. *Cornen*, 37 N.Y. 322, specially referred to.]

4. EVIDENCE (§ II E 1—142*a*)—PROOF OF UNDISCLOSED AGENCY—STATUTE OF FRAUDS.

It is competent to shew that one or both of the contracting parties were agents for other persons, and acted as such agents, in making the contract, as to give the benefit of the contract on the one hand to, and charge with liability on the other, the unnamed principals; and this, whether the agreement be or be not required to be in writing by the Statute of Frauds; such evidence in no way contradicts the written agreement.

[*Rossiter* v. *Miller*, 3 App. Cas. 1125; *McClung* v. *McCracken*, 3 O.R. 596; *McCarthy* v. *Cooper*, 12 A.R. (Ont.) 286, specially referred to.]

5. EVIDENCE (§ VI M—586)—CONTRACT—PAROL PROOF OF AGENCY.

Parol evidence may be given to shew that a contract is binding not only on those whom, on the face of it, it purports to bind; but that it also binds another, by reason that the act of one of the contracting parties in signing the agreement was in fact done as the agent of such other and is in law the act of the principal.

[*Rossiter* v. *Miller*, 3 App. Cas. 1125, specially referred to.]

Statement

APPEAL by the defendants from the judgment of MULOCK, C.J.Ex.D., *Morgan* v. *Johnson*, 3 O.W.N. 297, 20 O.W.R. 509.

The appeal was dismissed.

The judgment appealed from is as follows:—

Mulock, C.J.

MULOCK, C.J.Ex.D.:—Briefly the facts are as follows. Shortly before the making of the contract, the plaintiff inquired of the defendant William A. Johnson whether the land in question was for sale, and, being informed by him that it was, and

ONT.
C. A.
1912
MORGAN
v.
JOHNSON.
Mulock, C.J.

desiring to purchase it, employed Mr. Hopkirk as his agent to complete negotiations. Thereupon Mr. Hopkirk put himself in communication with the defendant William A. Johnson, when a verbal bargain was reached that Johnson would sell the property to the plaintiff for $5,125, of which $100 was to be paid as a deposit, and the balance on the 1st July, 1911. Thereupon the plaintiff made a written offer for the purchase of the land in the words and figures following:—

Offer to Purchase.

To William A. Johnson,

I, Vivian E. F. Morgan, of the city of Toronto (as purchaser), hereby agree to and with you (as vendor) to purchase all and singular, etc. (describing the lands), at the price or sum of $5,125, as follows: $100 in cash as deposit on acceptance of this offer, and covenant, promise, and agree to pay $5,025 on the 1st July, 1911; possession to be given me of the property on the 1st August, 1911. (Then follow certain conditions as to title, possession, taxes, etc.) Time shall be of the essence hereof.

Dated 15 May, A.D. 1911.

V. E. F. MORGAN.

At the foot of this written offer, the defendant William A. Johnson signed an acceptance thereof, in the following words:—

I hereby accept the above offer and its terms, and covenant, promise, and agree to and with the said Vivian E. F. Morgan to duly carry out the same, on the terms and conditions above mentioned. Dated 15 May, A.D. 1911.

This offer and acceptance constitute the contract sued on. The deposit of $100 called for by the contract was duly paid.

In the course of Hopkirk's negotiations with Johnson, and before the contract was made, the latter informed Hopkirk that he had had the property put in the name of his brother, his co-defendant, Charles Calvin Johnson, "but that it would be all right," and Hopkirk reported to the plaintiff what William Johnson had thus stated. The plaintiff and Hopkirk were thus led to believe that William Johnson was the owner, but for some private reason had caused the property to be vested in his brother.

The 1st July, the time named for completing the purchase, being a statutory holiday, and the day thereafter being Sunday, Monday the 3rd July became the day when the remainder of the purchase-money became payable. The plaintiff had made arrangements for his money, but on the 3rd July his solicitors received a letter from William A. Johnson's solicitors, containing a cheque for the deposit of $100, and stating that the vendor was not prepared to proceed with the transaction. The reason assigned for the vendor withdrawing from the purchase was the unwillingness of the plaintiff to carry out certain alleged arrangements "made at the time when the proposed deal was

negotiated." This letter further states: "We regret that this should be the outcome of the negotiation, but our client's instructions are imperative."

On the following day the writ in this action was issued, the action being brought against Charles Calvin Johnson, in whose name the title stands, and also against his brother William, who entered into the contract. On the same day, the plaintiff's solicitors returned the cheque to the defendant's solicitors. On the 5th July, the defendants' solicitors sent their cheque for $100 by letter to the plaintiff, who on the 6th July answered, stating that "I cannot accept it" (the cheque), "as my solicitors advise me that the negotiations made between Mr. Johnson and myself are perfectly legal and binding, and they have therefore, under my instructions, entered an action for specific performance of contract. I will retain the cheque pending the settlement of this suit."

In his statement of claim the plaintiff states that Charles duly authorized William to sell the land in question. One defence is, that William had no authority from Charles to make the contract in question.

At the trial a power of attorney was put in bearing date the 28th February, 1910, whereby the defendant Charles Calvin Johnson appointed his co-defendant his attorney to sell all or any of his lands in Canada; and this power was in full force when William accepted the plaintiff's offer. The contract in question being between the plaintiff and William Johnson, Charles contends that, as a matter of law, he is not bound by it.

The defendants further contend that Charles, notwithstanding the written power, had given to his brother William certain verbal instructions requiring him to reserve a portion of the rear part of this lot; and it is contended that these verbal instructions limited William's power accordingly. As a matter of fact, no such verbal instructions were given by Charles to William after he received the power of attorney. Prior to receiving the power of attorney in question, the defendant William held another power from Charles; and at the time, it is said, there was an understanding between the two that, in exercising the power of sale, William should reserve a portion of the back part of the lot in question; but there was no such understanding between them after the giving of the second power, which accordingly superseded all prior verbal instructions. But, even if, at the time of making the contract, William had received from Charles verbal instructions not to sell a portion of the land in question, that circumstance, if not communicated to the plaintiff (and it was not), would not affect the transaction. When the plaintiff was about to enter into the contract, William gave him to understand that he held a power of attorney from Charles, fully authorizing him to enter into the contract. Such

ONT.
C. A.
1912
MORGAN
v.
JOHNSON.
Mulock, C.J.

was the case, and what William did was within the scope of such authority and is binding on Charles, the plaintiff being unaware of any such alleged instructions.

The law on this point is thus stated in *Westfield Bank* v. *Cornen*, 37 N.Y. (10 Tiff.) 322.

> Whenever the very act of the agent is authorized by the terms of the power, that is, whenever, by comparing the act done by the agent with the words of the power, the act is itself warranted by the terms used, such act is binding on the constituent as to all persons dealing in good faith with the agent. Such persons are not bound to inquire into facts *aliunde*. The apparent authority is the real authority.

This statement of the law is quoted with approval in *Bryant Powis & Co.* v. *La Banque du Peuple*, [1893] A.C. 170, and in *Hambro* v. *Burnand*, [1904] 2 K.B., at p. 22. Even if a duly authorized agent abuses his authority, nevertheless the act of the agent, if within the scope of his apparent authority, is binding on the principal, if the other party to the contract has acted in good faith. In this case, the plaintiff acted in good faith, and is not affected by any verbal limitation of the agent's authority as conferred upon him by the written power: *Duke of Beaufort* v. *Neeld*, 12 Cl. & F. 291.

Another defence is, that Charles Calvin Johnson is not bound by the contract because not named, and that parol evidence is inadmissible to shew that he was the real principal. The point thus raised is dealt with in *Higgins* v. *Senior*, 8 M. & W. 834, where Parke, B., says:—

> It is competent to shew that one or both of the contracting parties were agents for other persons, and acted as such agents in making the contract, so as to give the benefit of the contract on the one hand to, and charge with liability on the other, the unnamed principals; and this, whether the agreement be or be not required to be in writing by the Statute of Frauds; and this evidence in no way contradicts the written agreement. It does not deny that it is binding on those whom, on the face of it, it purports to bind; but shews that it also binds another, by reason that the act of the agent, in signing the agreement, in pursuance of his authority, is in law the act of the principal.

This view of the law has been adopted in numerous cases. See *Heard* v. *Pilley*, L.R. 4 Ch. 548; *Calder* v. *Dobell*, L.R. 6 C.P. 486; *Rossiter* v. *Miller*, 3 App. Cas. 1125; *McClung* v. *McCracken*, 3 O.R. 596; *McCarthy* v. *Cooper*, 12 A.R. 286.

I, therefore, think it was competent to shew that William was acting as agent for Charles, who is bound by his act.

The conduct of the defendant William Johnson, in returning the cheque for the deposit and refusing to complete the contract, relieved the plaintiff from the necessity for tendering the balance of his purchase-money or the conveyance before action. In view of William's attitude, it would have been useless for the plaintiff to have made the tender.

The plaintiff impressed me as a thoroughly truthful witness; and I accept his evidence against that of William A. Johnson, wherever they contradict one another.

The plaintiff is entitled to specific performance and to an order for possession as against Charles, and also William, who took possession of and was performing certain work on the lands when the action was commenced, together with costs of the action to be paid by Charles.

Mulock, C.J.

*E. F. B. Johnston*, K.C., and *D. Inglis Grant*, for the defendants.

*A. H. F. Lefroy*, K.C., for the plaintiff.

Garrow, J.A.

The judgment of the Court was delivered by GARROW, J.A.:—The action was brought to enforce the specific performance of an agreement for the sale of a parcel of land in the city of Toronto, by the defendant Charles Calvin Johnson, through his agent and co-defendant, to the plaintiff. The agreement is in writing, but is executed in the name of the defendant William A. Johnson, the agent, only. And the only question on this appeal is as to the sufficiency of such execution to bind the defendant Charles Calvin Johnson.

The facts are fully set out in the judgment of the learned Chief Justice, who has very fully and carefully given his reasons, both upon the law and the facts, for his conclusions. I entirely agree both with the reasoning and the conclusions of the learned Chief Justice, who has dealt with the matter so fully that but little more can usefully be said.

There was a contract in writing sufficient under the Statute of Frauds to bind the defendant William A. Johnson. If he had been the owner, judgment against him would have been as of course, for he has no defence. He was not the owner, but the agent; and the plaintiff's contention is, that he was entitled to prove the agency and so hold the principal on whose behalf the contract was made. That such proof may be given is, as the learned Chief Justice points out, well-established and cannot be and is not disputed. Then the power of attorney, when produced, shews that it is amply sufficient to authorise the agent to sell. That also is not disputed. The contention, therefore, is narrowed to this, that, because the power, in the usual form, says that the sale is to be "for me and in my name," a sale by the agent in his own name is invalid. That contention is one for which I can find no authority; and certainly none which would support it was cited to us by the learned counsel for the defendants. It looks to me very like a somewhat desperate attempt, by sacrificing the spirit to the letter, to construct a defence where there is none—an attempt which now-a-days usually and deservedly fails.

I would dismiss the appeal with costs.

*Appeal dismissed.*

ALTA.

S.C.

1912

April 17.

**TOLLINGTON & CO. (plaintiffs) v. JONES (defendant) and JONES (plaintiff by counterclaim) v. TOLLINGTON & CO. and the ONTARIO WIND ENGINE AND PUMP CO. (defendants by counterclaim).**

*Alberta Supreme Court. Trial before Beck, J. April 17, 1912.*

1. NEGLIGENCE (§ I B 2—30)—LIABILITY OF SELLER AND MANUFACTURER OF GASOLINE ENGINE—DEFECTIVE INSTALLATION.

The seller of a gasoline engine who negligently installs it, and not the manufacturer thereof, is answerable to the purchaser for any damage resulting from its defective installation.

2. GASOLINE (§ I—10)—LIABILITY OF SELLER OF GASOLINE ENGINE—EMISSION OF DANGEROUS FUMES—ABSENCE OF WARNING—ATTACHMENT OF BOOK OF INSTRUCTIONS.

The seller of a gasoline engine is liable for injuries sustained by the purchaser as the result of the emission of dangerous fumes from the exhaust of the engine, which was installed by the former in a small building without conveying the exhaust pipe to the open air, the necessity of which must have been known to the seller, who did not warn the purchaser of the danger therefrom, notwithstanding it was explained in a book of instructions sent with the engine, which, however, the purchaser had not noticed or read.

[*Clarke* v. *Army and Navy Co-operative Society*, [1903] 1 K.B. 155, followed; *O'Neil* v. *James*, 5 Am. & Eng. Ann. Cas. 177, referred to.]

Statement

THE principal action was for the price of a gasoline engine and a "crusher." The defendant counterclaimed against the plaintiff and against the Ontario Wind Engine and Pump Co. added as defendants by counterclaim for personal injuries received while operating the gas engine caused by the escape of gas, there being no extension of the exhaust thereof to the exterior of the building. The plaintiffs had installed the engine in a small shed without the exhaust extension which they claimed would constitute an extra and was not included in the sale of the engine.

The plaintiffs' action was maintained as well as defendant's counterclaim against the plaintiffs with a direction for set-off, but the counterclaim against the added parties the Ontario Wind Engine and Pump Co. was dismissed.

*C. T. Jones*, for plaintiffs.

*P. J. Nolan*, for defendant Jones.

*J. B. Roberts*, for the Ontario Wind Engine and Pump Co. added as parties defendant as to the counterclaim.

Beck, J.

BECK, J.:—At the conclusion of the case, I stated my opinion that the sellers of the engine and crusher to the defendants were the plaintiffs, Tollington & Co., not the Ontario Wind Engine and Pump Company; and that the defendant had become overcome by gas from the engine, and that it was owing to his being in that condition that he had fallen and sprained his ankle. I took time to consider the remaining questions involved.

ALTA.

S. C.
1912

TOLLINGTON & Co. v. JONES.

Beck, J.

I now find that the engine was a dangerous machine, operated in a small building, without having attached to the exhaust an extension to the exterior of the building. In such circumstances, it would endanger the health, and perhaps the life, of those in the building at the time of operation, and probably there would be danger of explosion. It is a common thing for such engines to be operated inside buildings, many of which must be small; and one witness stated that they were often operated in the open air, only because of the lack of a building. That these engines are dangerous when operated in a small building without an extension of the exhaust to the outside, and dangerous to the knowledge of the manufacturers, and I infer to that of the plaintiffs, the sellers, is made clear, not merely by the oral evidence, but by the book of instructions issued by the manufacturers.

On p. 2 is the following: "D. The exhaust pipe should extend to the outside of the building, and be kept at least six inches from any wood work; and, where it is run through floors or partitions, should be provided with ventilated thimbles, at least eight inches in diameter. The exhaust should never discharge into a chimney. The exhaust muffler should be removed from the engine and put into the end of the exhaust pipe outside the building, and at least one foot from any wood work or combustible material."

The defendant was not warned at the time of purchase that the engine was dangerous if used in a small building. A copy of the book of instructions was fastened to the engine; but the defendant did not notice it until long after the accident. It was not brought to his attention. Devons, the man employed by the plaintiffs to set up and start the engine for the defendant, says that, while the engine was running—he and the defendant working it—he said to the defendant that it would be better to have an extension on the exhaust. But this seems to have been made in the way of a merely casual remark, and its necessity for the purpose of avoiding danger was not brought to the defendant's mind.

Under these circumstances, I think the plaintiffs liable in damages to the defendant. I think this case comes within the principle of the case of *Clarke* v. *Army and Navy Co-Operative Society*, [1903] 1 K.B. 155 (C.A.). Collins, M.R., in that case says (p. 164):—

> It seems to me that, independently of any warranty, a relation arises out of the contract of sale between the vendor and the purchaser, which imposes in the former a duty towards the latter; namely, a duty, if there is some dangerous quality in the goods sold, of which he knows, but of which the purchaser cannot be expected to be aware, of taking reasonable precautions in the way of warning the purchaser that special care will be required. . . . It is not

ALTA.

S. C.

1912

TOLLINGTON & Co. v. JONES.

Beck, J.

necessary to go through the authorities to which I referred during the argument, and which appear to me clearly to shew that, independently of contract, there is a duty to a purchaser on the part of a vendor such as I have mentioned; and if the vendor, under such circumstances, knowing that the goods sold are dangerous, delivers them to the purchaser without giving him any warning, he does not discharge that duty, or at any rate there is evidence of negligence on his part for a jury.

The other members of the Court expressed the same view.

Reference may be made also to *O'Neil* v. *James*, 5 Am. & Eng. Cas., at pp. 177 *et seq.*; and to 29 Cyc., tit. "Negligence," p. 479 (notes).

I assess the defendant's damages at $273.25. The plaintiffs will have judgment for $409.40 without costs. The defendant will have judgment for $273.25 against the plaintiffs with costs. The counterclaim is dismissed against the Ontario Wind Engine and Pump Company without costs. There will be a set-off between the plaintiffs and the defendant, and judgment for the balance in the defendant's favour. There will be a stay of the execution for thirty days.

*Judgment for plaintiffs with set-off of counterclaim.*

---

ALTA.

S. C.

1912

June 22.

## REX v. MARTIN.

*Alberta Supreme Court, Scott, Stuart, Beck, Simmons and Walsh, JJ. June 22, 1912.*

1. THEFT (§ I—1)—WHAT SUBJECT OF—RAILWAY FARE—CRIM. CODE 1906, SEC. 355.

A railway conductor who does not account to the railway company for a cash fare he received from a passenger, and who denies the receipt thereof, may, under such facts, be convicted of theft under sec. 355 of the Criminal Code (1906), where he omitted to issue a duplex ticket or to account for the money in the usual course.

2. EVIDENCE (§ XII L—990)—SUFFICIENCY OF PROOF IN THEFT—RAILWAY CONDUCTOR FAILING TO TURN IN CASH FARE.

A *primâ facie* case of theft under sec. 355 of the Criminal Code is established by the facts that a railway conductor failed to account, as his duty required, to a railway company for cash received from a passenger in payment of fare, which he denied receiving.

3. EVIDENCE (§ XII L—990)—THEFT BY CONVERTING FARE—DENIAL OF RECEIVING—ADMISSIBILITY OF DEFENCE THAT HE MIGHT ACCOUNT AT ANOTHER TIME.

The denial by a railway conductor of the receipt of a cash fare from a passenger, for which he did not account to the railway company, indicates a purpose to fraudulently convert it, sufficient to deprive him, on a trial for theft under sec. 355 of the Criminal Code, of the defence that he might have accounted for it at some other time and place than on the occasion when he made returns to the company for the trip on which he received it.

ALTA.

S. C.

1912

REX v. MARTIN.

4. CRIMINAL LAW (§ III—93)—OFFENCE COMMITTED IN ONE PROVINCE—ACCUSED TO ACCOUNT FOR SUBJECT-MATTER OF THEFT IN ANOTHER PROVINCE.

A railway conductor may be prosecuted in Alberta under sec. 355 of the Criminal Code, for the theft of cash paid him therein by a passenger as fare, notwithstanding it was his duty to account for it in British Columbia, where, in Alberta, he denied to the railway company the receipt of the money, since such denial amounted to a refusal to account therefor in the latter province.

Statement

CRIMINAL appeal by the accused, who had been convicted of theft from the Canadian Pacific Railway Company.

The appeal was dismissed.

The appeal was taken under the Criminal Code in respect of certain questions of law upon which an application for a reserved case had been made to the trial Judge (Harvey, C.J.) and had been refused.

The questions were as follows:—

1. Was I right in holding that, "if the fact is established that the money was received and not accounted for, the offence would be established," under the charge as laid against the said Arthur James Martin?

2. Is there the necessary legal evidence to support the conviction upon the charge as laid against the said Arthur James Martin?

3. Should my conviction of the said Arthur James Martin, upon the charge as laid, be quashed, on the ground that I had no jurisdiction?

4. Should my conviction of the said Arthur James Martin, upon the charge as laid, be quashed, on the ground that the facts established by the evidence do not constitute theft under sec. 355 of the Criminal Code.

*A. A. McGillivray*, for the accused.

*W. R. Campbell*, for the Crown.

The judgment of the Court was delivered by

Simmons, J.

SIMMONS, J.:—On the 8th February, 1912, the defendant was employed as a conductor on a Canadian Pacific Railway Company's train running from Macleod, in the Province of Alberta, to Cranbrook, in the Province of British Columbia.

The defendant is charged with the theft of $3.05 from the Canadian Pacific Railway Company, on the said 8th February, 1912, said sum being one single passenger fare paid to the defendant by one Joseph Bedard, a detective, the said sum being the full passenger fare from Macleod to McGillivray on the Crow's Nest branch of the Canadian Pacific Railway.

The detective says that, when the conductor approached him on the train, he said he was going to McGillivray, and the defendant said the fare was $3.05, upon which he paid the defendant $3.05, but received no receipt or ticket from the defendant.

The instructions to conductors require them to issue "duplex tickets to passengers who purchase transportation on the trains;" and at the end of the trip the conductor is required to hand in duplicates of such tickets, together with a statement of all such

ALTA.
S. C.
1912
REX
v.
MARTIN.
Simmons, J.

fares collected, and also the cash collected. The conductor also delivers balance sheet of the fares collected for the week.

No account of the particular fare in question appears in any of these statements, and no duplex certificate was handed in by the conductor for this particular fare. The defendant, in the witness-box, denied having received this sum; and the learned Chief Justice disbelieved him, and found that he had received it and failed to account for it, and convicted him of theft.

It is contended on behalf of the defendant that the prosecution has not proved a failure to account, even if it is admitted that the conductor received the money, in the circumstances of the case. I do not see much force in this. The conductor made a return on a printed form supplied by the railway company, in which he accounted for $15.60, and issued duplex tickets to passengers for the same.

The prosecution proved the receipt of the money, and the omission to account at the particular time when it was his duty to account, and a failure to account at any subsequent time, and have made out a *primâ facie* case. The defendant denies the receipt of the money, and his denial is not given any credence.

It seems to me that the denial of the receipt of the money indicates an intention on his part or a purpose fraudulently to convert, and thus deprives him of the benefit of such a defence as is set up, namely, that he might have accounted at some time and place other than on the occasion when he made his returns at the end of the trip.

The view I have indicated seems to me to dispose of questions 1, 2 and 4.

There remains question 3, which raises an important consideration as to jurisdiction.

It is contended that, since the money was received in the Province of Alberta, and, in the usual course of business and in accordance with the instructions of the principal, the money would be accounted for in Cranbrook, British Columbia, therefore the Alberta Court has no jurisdiction.

Now, the defendant, at the request of Mr. Price, general superintendent at Calgary, came to Calgary and signed a declaration denying the charge referred to in this case.

There was clearly a refusal in Calgary to account, when he denied having received the money. And again at Macleod the defendant acknowledged his signature to his report (exhibit 1), before Paul F. Weisbrod, superintendent from Moose Jaw, and also his signature to the balance sheet for the week beginning the 8th February, 1912, which is exhibit 2. When giving evidence on his own behalf he distinctly alleges that he included in exhibit 1 all the moneys paid him on the 8th February for fares, and in exhibit 2 all the moneys paid him for fares for the week beginning the 8th February.

There was a refusal to account at Macleod, when he acknowledged the identity of these documents, in view of his evidence now, when he says these documents contained an account of all moneys received.

In *Reg.* v. *Rogers*, 14 Cox C.C. 22, it was the prisoner's duty to collect moneys and remit them at once to his employers. On the 18th April he received money in the county of Y., and on the 19th or 20th April he wrote his employers from Y., not mentioning that he had received the money, and on the 21st he wrote them again from Y., intending them to believe that he had not received the money. The letters were received by the employers in the county of M., through the post, and it was held that he might be indicted in county M. Kelly, C.B.: "The letter was received by the employers in Middlesex, and it is the same as if he had said to them in Middlesex that he had not received the money." See, also, *R.* v. *Burdett*, 4 B. & Ald. 95; *R.* v. *Taylor*, 3 B. & P. 576; and *R.* v. *Murdoch*, 5 Cox C.C. 360.

The discussion in these cases indicates clearly that the defendant could be indicted in the county in which he received the money, if there was evidence of an intent to defraud at the time the money was received, or at any time while the defendant remained in that county.

In the case before us the defendant did not issue a duplex ticket when he received the passenger's fare, which is some evidence, though possibly not conclusive, of an intention to retain the money. I do not think it necessary to decide whether he could be prosecuted in this Province or not if the money had been received here and the failure to account had occurred solely in the Province of British Columbia, for the reason that there was clearly a refusal to account in the Province of Alberta.

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

*Appeal dismissed.*

---

## BOYES v. DOMINION EXPRESS CO.

**File No. 4214.226.**



*Board of Railway Commissioners. April 18, 1912.*

1. CARRIERS (§ IV C 4—545)—TARIFF ON C.O.D. SHIPMENTS—UNJUST DISCRIMINATION.

It is an unjust discrimination against a shipper, as well as an excessive charge, for an express company to remit money collected on a C.O.D. shipment to the shipper by an express money order instead of sending him the money therefor, and to exact for such service the regular merchandise C.O.D. rate which was greatly in excess of that chargeable for the money order.

CAN.

Ry. Com. 1912

BOYES v. DOMINION EXPRESS CO.

The Chief Commissioner.

THE application was heard at Ottawa, April 16, 1912.

*W. H. Burr*, for the respondent.

The applicant was not represented.

April 18, 1912. THE CHIEF COMMISSIONER:—Complainant was charged sixty-five cents for return C.O.D. collection from Vancouver to Napanee of $27.00.

It was admitted at the hearing that there had been an excess charge of five cents, which would be refunded; but the case brings up the principle upon which these charges are based, and this matter was not covered by the judgment in the Express Enquiry.

Formerly, express companies, after collecting C.O.D. shipments, made return of the cash to the shipper, and the charge for this service, as appears by the classification, was based upon merchandise rates. For some years, instead of remitting and carrying back the cash the agent at the delivery office issues an express order and posts it direct to the shipper; yet the charge for this is not based upon the scale of charges for express orders, but the old merchandise rates still apply. This cannot be defended; it is a discrimination against the C.O.D. shipper, in that a much greater charge is made against him, or imposed upon the consignee, than is made against another person buying a similar express order for almost similar services. It is true these services are not identical; if they were, it would be the plain duty of the Board to apply the express order charges to C.O.D. return collections. These are facilities supplied by the Express Companies of great convenience to shippers and consignees, and the remuneration to the companies should be upon a liberal basis. The present scale of charges is, however, excessive. The Board has not the necessary information before it to fix what might be regarded as fair and remunerative rates to the companies, and leaves it to them to frame tariffs based upon other than merchandise rates. When these tariffs are prepared and filed, the Board will hear the companies in support of their reasonableness, if necessary. These tariffs should be filed within three months.

The ASSISTANT CHIEF COMMISSIONER and COMMISSIONERS MILLS and MCLEAN concurred.

*Order accordingly.*

## WILLIAMS v. SUN LIFE ASSURANCE CO.

B. C.

C. A.

1912

April 9.

*British Columbia Court of Appeal, Macdonald, C.J.A., and Irving and Galliher, JJ.A. April 9, 1912.*

1. MORTGAGE (§ VI G 2—105)—SALE—CONSENT OF MORTGAGOR TO ABANDONMENT OF FORECLOSURE PROCEEDINGS—SETTING ASIDE AFTER LAPSE OF TIME.

A mortgagor who consents to an abandonment of foreclosure proceedings and a sale of the encumbered property by the mortgagee without an order of Court, cannot, four years later, have the sale set aside as against a purchaser from the mortgagee, where, with full knowledge of all the facts, the mortgagor, without questioning the regularity of the sale, but treating it as regular, remained passive while the purchaser made extensive improvements in the property and treated it as his own.

[*Jones* v. *North Vancouver L. and I. Co.*, [1910] A.C. 317, specially referred to; see also Halsbury's Laws of England, vol. 13, p. 166.]

Statement

APPEAL by plaintiff from the judgment at trial (by Morrison, J.), dismissing his action against the defendant insurance company and against their co-defendant corporation, David Spencer Limited, to set aside a sale of land made in the year 1906, by the insurance company under power of sale in a mortgage and to set aside the conveyance of said lands made in purported completion of such sale by the insurance company to David Spencer Limited, as the purchasers thereof from the mortgagees.

The judgment appealed from was affirmed.

The judgment of Morrison, J., appealed from was as follows:—

Morrison, J.

MORRISON, J.:—There was here an absolute power of sale, which power, in my opinion, was properly exercised and the property sold to the defendants David Spencer Limited—*bonâ fide* purchasers, without notice—at the best available current value: *Haddington Island Quarry Co.* v. *Huson*, [1911] A.C. 722, 81 L.J.P.C. 94.

True, it seems that the purchasers made no inquiry as to the title, but, nevertheless, under the circumstances of this case, they are safe: *Dicker* v *Angerstein*, 3 Ch.D. 600.

I do not think the doctrine of constructive notice is sufficiently elastic to be stretched to reach the defendants David Spencer Limited. See Lord Cranworth's statement of the law in *Ware* v. *Egmont*, 4 DeG. M. & G. 460, as quoted by Mr. Justice Stirling in *Bailey* v. *Barnes*, [1894] 1 Ch. 31, and Lindley, L.J., at pp. 33-4.

A circumstance to be considered in this connection is the fact that the *lis pendens* in question was filed by the co-defendants the Sun Life Assurance Company in the foreclosure action.

Having regard to the lapse of time and the depressed condition of the real estate market, together with the knowledge of the plaintiff of what was transpiring, including the sale to David

B. C.
C. A.
1912
WILLIAMS v. SUN LIFE ASSURANCE CO.
Morrison, J.

Spencer Limited (of which, I find, the plaintiff had knowledge at the time), as well as the conduct of the plaintiff in respect of the whole transaction, I find that he comes within the case of *Jones* v. *North Vancouver Land and Improvement Co.*, 14 B.C.R. 285, affirmed on appeal to the Privy Council, [1910] A.C. 317, and that he agreed to and did in fact abandon his rights, and by his conduct and delay induced the defendants to alter their position on the faith that he had done so: 13 Halsbury's Laws of Eng., pp. 166-7-8, where the cases on acquiescence and laches are assembled. If I am right in thus so finding, then I do not think the exercise of the power of sale should be cut down by any implication such as was urged by the plaintiff's counsel.

The circumstances of the order *nisi* for foreclosure, justifying the inference of abandonment of rights in respect thereof, differentiate the present case from both that of *DeBeck* v. *Canada Permanent Loan and Savings Co.*, 12 B.C.R. 409, and *Stevens* v. *Theatres Limited*, [1903] 1 Ch. 857, upon which it was based. At no time material to the issues here, has the plaintiff been in a position to pay. Even now, I give little or no credence to the allegation of his indirect capacity to do so. It would be futile to proceed with the accounts. The action is dismissed with costs.

The plaintiff appealed.

*L. G. McPhillips*, K.C., and *J. P. Walls*, for the plaintiff.

*G. E. McCrossan* and *A. M. Harper*, for the defendants David Spencer Limited.

*Charles Wilson*, K.C., for the defendants the Sun Life Assurance Company.

The judgment of the Court of Appeal was delivered by

Macdonald, C.J.A.

MACDONALD, C.J.A.:—I think the appeal must be dismissed. There is evidence, as the trial Judge found, that the foreclosure proceedings were settled and allowed to drop by the consent of both parties, and under an arrangement to which both parties agreed. Even if there had been no such settlement, the sale without the leave of the Court was a mere irregularity; and, if the plaintiff stood by and took no objection to what was being done, he, by his conduct, has disentitled himself to the equitable relief which he is now claiming. He was aware of the sale, and not only did he not protest, but he acted as if he recognized the sale as a proper one. He gave the combination of the safe to the Spencers, and on no occasion suggested that it was contrary to his rights. He stood by and saw the purchaser alter the building, and treat it as their own, and use it as part of their store, and during all these years, from 1906 to 1910, he made no complaint. It was only when he found the property becoming of some value over and above the mortgage and interest that he put forward his present claim.

*Appeal dismissed.*

## McCORMICK v. KELLIHER.

B. C.
C. A.
1912
June 4.

*British Columbia Court of Appeal, Macdonald, C.J.A., Irving, and Galliher, JJ.A. June 4, 1912.*

1. APPEAL (§ VIII B—670)—ASSESSMENT OF COMPENSATION BY APPELLATE COURT—B.C. WORKMEN'S COMPENSATION ACT, SEC. 6, SUB-SEC. 4.

The Court of Appeal, upon reversing, because no negligence on the part of the defendant was shewn, a judgment in favour of the plaintiff for negligently causing the death of his son, based on Lord Campbell's Act and the Employers' Liability Act as well, cannot assess compensation under sec. 6, of sub-sec. 4, of the Workmen's Compensation Act (B.C.); the trial Court is the only tribunal with jurisdiction to do so.

[*Greenwood* v. *Greenwood*, 97 L.T.N.S. 771, 24 Times L.R. 24, specially referred to.]

3. DAMAGES (§ III J 3—188)—DEATH OF PLAINTIFF'S SON—POWER OF APPELLATE COURT TO ASSESS DAMAGES.

There is no reason why an application should not be made to the trial Court to assess damages for negligently causing death, under sec. 6 of sub-sec. 4 of the Workmen's Compensation Act (B.C.), after the Court of Appeal has reversed a judgment in favour of the plaintiff based upon Lord Campbell's Act and the Employers' Liability Act as well, on the ground that the negligence of the employer had not been shewn.

[*Cribb* v. *Kynock*, [1908] 2 K.B. 551; and *Edwards* v. *Godfrey*, [1899] 2 Q.B. 333, specially referred to.]

3. TRIAL (§ V E—300)—RIGHT TO REMIT AFTER JUDGMENT PERFECTED—ASSESSMENT OF DAMAGES.

After a judgment of the Court of Appeal has been perfected allowing an appeal and reversing a judgment of the trial Court in favour of the plaintiff, in an action for negligently causing the death of his son, based both upon Lord Campbell's Act and the Employers' Liability Act (B.C.), on the ground that no negligence on the part of the defendant had been shewn, the Court cannot remit it to the trial Court for assessment of compensation under the provisions of the Workmen's Compensation Act, notwithstanding it might have done so had leave been asked before the perfection of such judgment. (*Per* Irving, J.A.)

Statement

THE plaintiffs at the trial before Clement, J., recovered damages for the death of their son, who was killed while in the defendants' employ. On appeal, the Court of Appeal of British Columbia reversed the judgment below and dismissed the action on the ground that no negligence causing the death had been proven against the defendants. Counsel for the plaintiffs afterwards applied to the Court of Appeal to assess compensation under the provisions of sec. 6, sub-sec. 4, of the Workmen's Compensation Act.

The application was dismissed for want of jurisdiction.

*A. E. McPhillips*, K.C., for appellant.

*G. A. Lucas*, for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—We were referred to *Greenwood* v. *Greenwood*, 97 L.T., at p. 771, 24 Times L.R. 24, in which case a similar application was made to a Divisional Court under circumstances identical with the present. In that case the Court

B. C.

C. A.
1912

McCORMICK
v.
KELLIHER.

Macdonald, C.J.A.

thought that the trial Court was the proper tribunal to assess the compensation. I think it is plain on the reading of the statute that the tribunal designated to discharge the duties which are ordinarily discharged by an arbitrator, is the trial Court. Where the plaintiff's action is dismissed at the trial no difficulty arises. If the plaintiff desires to claim the benefit of said section, he may do so, and the trial Judge proceeds to deal with the matter there and then. But where, as here, the plaintiff succeeds at the trial, but fails on the appeal, the question arises as to whether or not this Court can discharge the functions in this behalf of the trial Judge; and if not, can it make any order in the premises? As I have already said, I think this Court cannot assess the compensation, but I see no reason why an application to the trial Court should not be made. I express no opinion as to how that Court should deal with it. It follows that this application must be refused, but as the question has come up for the first time, and is one of general importance, there should be no costs.

Irving, J.A.

IRVING, J.A.:—The action brought under Lord Campbell's Act was for damages at common law, and also under the Employers' Liability Act, and was dealt with under the common law and judgment was given for the plaintiffs.

The judgment was reversed by this Court on the ground that the employer was not liable in that action. Mr. A. E. McPhillips now asks this Court for an order directing the Court in which the action was tried to assess the compensation payable under the Workmen's Compensation Act, 1902, in the same way that the Court in which the action was tried would assess the damages acting under sec. 2(4) of the Workmen's Compensation Act, 1902.

The case of *Greenwood* v. *Greenwood* (1907), 24 Times L.R. 24, was relied upon by counsel for the applicants. There the plaintiff's action was successful in the County Court; but that judgment was reversed by the Divisional Court. Upon an application to the Divisional Court to assess the compensation, the opinion was expressed that the County Court was the proper tribunal to make the assessment, but the Court declined to insert in the order any direction to the County Court. The report in 97 L.T.N.S. 771, agrees with that in 24 Times L.R. 24.

The chief objection taken by Mr. Lucas is that the plaintiffs are not at liberty to proceed at common law, and then when that remedy has failed, to go to the Workmen's Compensation Act. When we turn to the Act itself, we find that to provide a remedy for accidents attributable to the negligence of fellow-workmen, to the man's own carelessness, or to causes beyond his explanation, the legislature thought fit to declare that the employer should regard as one of the costs of production a sum

or sums necessary to compensate the workmen during his disablement—or after his death, his actual dependents.

To the end that this compensation should be obtained in an easy and informal way, it was provided that the tribunal to determine whether compensation was or was not payable, and the amount thereof (if any) should be settled not by the Courts, but by arbitration. But the legislature in granting this new remedy, and providing a suitable tribunal for its administration, had also to deal with those cases where an employee might think that he was entitled to damages in consequence of the injuries sustained by him, being caused by the personal negligence or wilful act of his employer, or of some person for whose act or default the employer was responsible.

In such cases the civil liability of the employer remained by sec. 2 (2*b*) unaffected, but, *nemo bis vexari debet*, the Act provided that it was optional with the workman injured to say whether he would proceed under the new Act or take his chances in an action at law. The employer was not liable to pay compensation, both independently of the Act and also under the Act. That means according to a number of cases decided in England, e.g., *Cribb* v. *Kynoch* (*No.* 2), [1908] 2 K.B. 551, that he was not only not to pay compensation, but he was not to be harrassed with unnecessary litigation; but an exception, in favour of the injured man was made in the event of his suing for damages, if the suit was commenced within six months, in such a contingency it was provided that if it were determined in the action that the injury was one for which the employer was not liable, for damages—but that it was a proper case for compensation, the action should be dismissed, but the Court, instead of putting the plaintiff to the expense of going to arbitration, should, if the plaintiff then and there made a request to that effect, proceed to assess the compensation, just as an arbitrator would, and as if no action had been brought. Subject to this, the Court was to be at liberty to deduct from the compenastion all the costs which in its judgment had been caused by the plaintiff bringing the action, instead of proceeding under the Act, as he ought to have done.

There are authorities, e.g., *Edwards* v. *Godfrey*, [1899] 2 Q.B. 333, at 337, that to entitle the plaintiff to this exceptional privilege, he must make his application "then and there," that is to say before the action is disposed of.

Unless the application is made then and there, the Court can have no power to set off the costs against the compensation.

Now in this case, as the plaintiff succeeded before the trial Judge in obtaining damages, it would have been unreasonable for him in such case to apply then and there for an assessment. But unfortunately for him we have disagreed with the Judge who found in his favour, and the question we have to deal with

B. C.
C. A.
1912
McCORMICK
v.
KELLIHER.
Irving, J.A.

is—Can this Court under these circumstances, by virtue of subsection (*a*) of sec. 8 of the Court of Appeal Act, 1907, (now ch. 51, Rev. Stats. B.C., 1911, sec. 8), par. (*b*) of Rule 868 of the Supreme Court Rules 1906, assess the compensation, or make an order directing the Supreme Court to determine whether the employer is liable, under the circumstances of this case, to pay compensation, and if so, to make the assessment?

In my opinion this Court has not now the power, as by the order of this Court the action has been dismissed, and is now at an end.

Having regard to the fact that this action was brought within the six months, this Court, in my opinion, would have had the power to make the order asked for, *i.e.*, remitting it to the Supreme Court in order that the Court might "determine in the action," whether or not the injury was one for which the employer was liable, had the application been made to this Court before the judgment allowing the appeal and dismissing the action had been perfected.

Galliher, J.A.
Macdonald, C.J.A.

GALLIHER, J.A., concurred with MACDONALD, C.J.A.

*Application dismissed without costs.*

---

B. C.
S. C.
1912
July 17.

## REX v. DURLIN.

*British Columbia Supreme Court, Murphy, J., in Chambers. July 17, 1912.*

1. ARREST (§ II B—9)—SUMMARY TRIAL—ACCUSED ON BAIL PENDING APPEAL—RE-ARREST ON ORIGINAL WARRANT AFTER CONFIRMATION OF CONVICTION.

The release under bail pending an appeal under Cr. Code, sec. 797, from a conviction on summary trial for keeping a disorderly house does not prevent the re-arrest and detention of the defendant under the original warrant of commitment on the conviction being affirmed.

2. APPEAL (§ III B—77)—EFFECT OF APPEAL FROM SUMMARY CONVICTION IN RESPECT TO ORIGINAL WARRANT OF COMMITMENT.

On an appeal taken under sec. 751 of the Criminal Code, 1906, applicable to appeals from summary convictions and to certain appeals from summary trials (Cr. Code 797) the original warrant of commitment on the conviction appealed from is not vacated by the lodging of the appeal and the granting of bail to the accused and the further enforcement of such warrant may be proceeded with without a fresh warrant after the affirmance of the conviction upon such appeal.

Statement

MOTION for a writ of *habeas corpus* to discharge from custody the defendant held under a commitment made by a police magistrate following a conviction for keeping a bawdy house.

An appeal had been taken from the conviction and the defendant had been admitted to bail pending the hearing of the appeal. On the appeal being heard and dismissed, the accused was re-arrested under the original warrant of commitment.

The objection was now raised that a new warrant is necessary because of the order for bail and release thereunder pending the appeal.

B. C.

S. C.
1912

REX
v.
DURLIN.

Murphy, J.

The application was refused.

*M. B. Jackson*, for the defendant.

*C. L. Harrison*, for the Crown, opposed the motion.

MURPHY, J.:—This matter comes before me on a writ of *habeas corpus*. The prisoner was convicted of keeping a bawdy house and sentenced to six months' imprisonment. A warrant was issued under which she was taken into custody and detained for a few hours, when, upon giving notice of appeal, she was admitted to bail.

On the appeal being heard, the conviction was affirmed, and it was adjudged that the appellant be punished according to and pursuant to the said conviction.

No new warrant was issued, but the prisoner is now held under the original warrant drawn up upon conviction before the magistrate. It is contended that, because the prisoner was admitted to bail, this warrant is vacated; and that, no new warrant having been issued, her detention is illegal; and *Regina* v. *Arscott*, 9 O.R. 541, is cited as authority. I do not consider the contention valid.

A careful reading of *Regina* v. *Arscott*, 9 O.R. 541, shews that the real ground of the decision was, that the warrants did not shew a crime (see p. 546). This case went, under guise of an action to recover penalties under the Habeas Corpus Act, to a Divisional Court (*Arscott* v. *Lilley*, 11 O.R. 153), and finally to the Ontario Appeal Court (*Arscott* v. *Lilley*, 14 A.R. 283). Cameron, C.J., at the trial of this civil action, dealt with the very point raised here, stating: "The original warrant of commitment on such appeal is quashed;" and goes on to state that, under the process of the sessions, the person convicted can be placed in custody to undergo the punishment awarded against him by the original conviction and warrant.

By "process of the sessions," I take it, can only be meant the order directing punishment pursuant to the conviction, such as was made by the learned County Court Judge herein, in view of the express statement that the original warrant is not vacated by the appeal. And it is to be remembered that the case being dealt with by him is on all fours with the present one, the prisoner there having likewise been admitted to bail. The leading judgment of the Divisional Court seems to confirm this view, and incidentally to dissent *in toto* from the decision reported in 9 O.R., *ubi supra* [*Regina* v. *Arscott*, 9 O.R. 541.]

There seems no reason in principle, or in the wording of sec. 751 of the Code, for holding that the original warrant is vacated by the lodging of an appeal and the granting of bail.

The application is dismissed.

*Habeas corpus refused.*

ONT.

H. C. J. 1912

July 27.

## REX v. RIDDELL.

*Ontario High Court, Kelly, J., in Chambers. July 27, 1912.*

1. CONSTITUTIONAL LAW (§ II B 4—359)—ONTARIO LEGISLATURE—REGULATION OF SALES OF INTOXICATING LIQUORS—COMPELLING THE DISCLOSURE OF PARTY FROM WHOM LIQUOR WAS PURCHASED.

The Ontario Legislature was acting within its powers in passing sec. 13 of Act 2 Geo V. (Ont.), ch. 55, providing that in a municipality in which a by-law, under sec. 141 of the Liquor License Act, R. S.O. 1897, ch. 245, prohibiting the sale by retail of liquor is in force, a person found upon a street or in any public place in an intoxicated condition owing to the drinking of liquor shall be guilty of an offence against the Liquor License Act aforesaid, and, upon any prosecution for such offence, he shall be compelled to state the name of the person from whom and the place in which he obtained such liquor, and in case of his refusal to do so, he shall be imprisoned for a period not exceeding three months or until he discloses such information.

[*Hodge* v. *The Queen*, 9 App. Cas. 117, followed.]

2. APPEAL (§ I C—27)—RIGHT OF APPEAL—CRIMINAL CASE—WHERE THERE IS EVIDENCE ON WHICH MAGISTRATE MIGHT HAVE CONVICTED.

Where there was evidence before a magistrate trying a prosecution for an offence forbidden by law on which he might have convicted the accused, this conviction will not be disturbed, as the magistrate is the judge of the weight to be attached to the evidence.

[*R.* v. *St. Clair*, 3 Can. Crim. Cas. 551, 27 O.A.R. 308, at p. 310, followed.]

3. INDICTMENT, INFORMATION, AND COMPLAINT (§ II E 2—30)—SUFFICIENCY OF ALLEGATION—FOLLOWING LANGUAGE OF THE STATUTE.

Where the information and the conviction follow the language of the statute under which the conviction was made, that is all that is required, even though the information and the conviction charged two offences and the evidence was not confined to one offence.

[*Rex* v. *Leconte*, 11 Can. Cr. Cas. 41, 11 O.L.R. 408, applied.]

Statement

MOTION by the defendant to quash a conviction made by two Justices of the Peace for the county of Lennox and Addington, under sec. 13 of 2 Geo. V. ch. 55(O.), amending the Liquor License Act.

The conviction was, for that the defendant was found upon a street or in a public place, in a municipality in which a by-law passed under sec. 141 of the Liquor License Act was in force, in an intoxicated condition owing to the drinking of liquor.

The motion was dismissed with costs.

*J. B. Mackenzie*, for the defendant.

*J. R. Cartwright*, K.C., for the Attorney-General.

Kelly, J.

KELLY, J.:—It was argued for the defendant that the Ontario legislature had no power to enact sec. 13 of the Act 2 Geo. V. ch. 55, and "that the offence could not be made to exist in local option territory or there alone."

These objections are answered by *Hodge* v. *The Queen*, 9 App. Cas. 117.

On the further objection that it was not proven that the defendant's condition was owing to the drinking of liquor, and

that there was no valid and sufficient evidence to prove the offence, the defendant must fail. There was evidence on which the convicting magistrate might have convicted; and, as said in *Regina* v. *St. Clair*, 27 O.A.R. 308, 310, 3 Can. Cr. Cas. 551, he was the judge of the weight to be attached to it."

Though in the notice of motion exception was taken that no by-law under sec. 141 was in force in the municipality, counsel for the defendant on the argument stated that he did not then raise any objection to the by-law. It is, therefore, not necessary to consider that objection.

One other exception was taken to the conviction, namely, that the information and the conviction charge two offences, and the evidence was not confined to one offence.

Both the information and the conviction follow the language of the section under which the conviction was made; and that is all that is required: *Rex* v. *Leconte*, 11 O.L.R. 408, 11 Can. Cr. Cas. 41.

As all the objections fail, I dismiss the defendant's application with costs.

*Motion dismissed.*

---

## SUNDY v. DOMINION NATURAL GAS CO.



*Ontario High Court. Trial before Sutherland, J. July 4, 1912.*

1. CONTRACTS (§ IV A—316)—PERFORMANCE—DUTY CREATED BY PARTY—NEGLECT TO PROVIDE AGAINST ACCIDENT.

Where a party by his own contract creates a duty or charge upon himself, he is bound to make it good notwithstanding any accident, by inevitable necessity, because he might have provided against it by his contract.

[*Wallbridge* v. *Gaujot*, 14 O.A.R. 460, affirmed in *Palmer* v. *Wallbridge*, 15 Can. S.C.R. 650; *Ridgeway* v. *Sneyd*, Kay 627; *Clifford* v. *Watts*, L.R. 5 C.P. 577, at p. 586, 40 L.J.C.P. 36; *Gowan* v. *Christie*, L.R. 2 Sc. App. 273, and Leake on Contracts, 6th ed. (Can.), 495, specially referred to.]

2. CONTRACTS (§ II D—157)—CONSTRUCTION—TO FURNISH NATURAL GAS—SALE OF STOCK TO ANOTHER COMPANY.

Where a contract was entered into between a natural gas company and certain holders of stock in another company in the same business absorbed by the contracting company whereby it was agreed on the part of the company as a further consideration for the purchase of such stock, that the holders thereof should be entitled to receive from the company gas free for use in their private dwellings in the district in which the company was carrying on its operations, the effect of such contract is that the company was bound to supply the other parties to the contract gas free for use in their private dwellings so long as they lived in such district and gas was obtainable therein sufficient for that purpose.

3. CONTRACTS (§ IV E—367)—BREACH OF COVENANT TO SUPPLY NATURAL GAS—DAMAGES—CONTINUING BREACH.

Where a contract was entered into between a natural gas company and certain holders of stock in another company in the same business absorbed by the contracting company whereby it was agreed on the

ONT.

H. C. J.
1912

SUNDY
v.
DOMINION
NATURAL
GAS CO.

part of the company as a further consideration for the purchase of such stock, that the holders should be entitled to receive from the company gas free for use in their private dwellings in the district where the company was carrying on its operations and the company continued to supply the other party to the contract with natural gas free of charge for more than six years when it discontinued doing so and took up the pipe line by which the gas was delivered and sold the wells producing it to third persons from whom the other parties to the contract were obliged to secure their supply of gas upon the company refusing to furnish it and to pay therefor and the company claimed that its action was caused by the fact that the wells in the district had run down to a point that made it commercially unfeasible to continue to pipe from them, though after the pipe line was taken up, it was still drawing gas from wells in the same field which it still owned and was piping it by another line to the same place where the old line ended, the company is liable to the other parties to the contract for the breach of the agreement for failing to provide the gas free, without prejudice to their rights in any future action, if the company continue to refuse to supply them with free gas, the covenant to supply the same being still an existing and binding one under the circumstances shewn.

Statement

AN action for an injunction and damages in respect of an alleged breach of an agreement.

*J. A. Murphy*, and *R. S. Colter*, for the plaintiffs.

*J. Harley*, K.C., and *A. M. Harley*, for the defendants.

Sutherland, J.

SUTHERLAND, J.:—In or about the year 1896, natural gas was discovered in the county of Haldimand, at or near Attercliffe station. The plaintiffs, Sundy, Strome, Kenny, and one Harold Eagle, were then residing at or near that station. They or one of them drilled a well; and, some time after, when there was talk of others piping the gas from that field to the city of Brantford, a second well was put down to insure, as far as practicable, to them and those to whom they might see fit to sell gas, a continued supply. The plaintiffs obtained a supply of gas for themselves at their respective dwellings, and also sold some to others.

A company was incorporated by them with a capital stock of $2,000, under the name of the Attercliffe Station Natural Gas Company Limited. Each of the named persons became a shareholder therein, and the company commenced to do business, and was apparently succeeding and paying dividends.

On the 25th March, 1902, a written agreement was entered into between the company and H. Cockshutt and W. J. Aikens, by which a new company was to be formed to take over the holdings of the original company. Under this agreement the named plaintiffs and Eagle were to and did take stock in the new company in the proportions of their holdings in the old company. It was also agreed that they should have, "in addition, gas for their private dwellings free for ordinary purposes." The new company was incorporated under the name of the Imperial Natural Gas Limited. A supplemental agreement, dated the 16th December, 1902, was made between the original company and

the individual shareholders thereof and such new company. This agreement contained a clause referring to the shareholders of the original company, including the said named plaintiffs and Eagle, by which they became "entitled to receive" from the new company "gas for ordinary purposes for use in their private dwellings at and adjacent to Attercliffe station, in accordance with the agreement recited in the premises," which agreement alleged to have been recited in the premises was, no doubt, the agreement of the 25th March, 1902.

The Imperial company proceeded to extend its operations in the Attercliffe gas field, and in doing so drilled nine new wells. It also continued to supply the plaintiffs with free natural gas at their dwellings. There had been a company known as the Dunnville Natural Gas Company, operating near the town of Dunnville, several miles distant from Attercliffe station, and supplying gas for the use of the inhabitants of that town. These two companies, the Imperial and the Dunnville company, were merged into a new company, called 'The People's Natural Gas Company," in which the plaintiffs again took stock in exchange for their stock in the Imperial company; and they say in evidence that they were to continue to have free gas as before. It was apparently understood, at the time of this amalgamation, that gas was to be piped from the Attercliffe field to Dunnville; and a pipe line was thereafter put down for that purpose, and gas was piped there.

In the year 1905, the People's company is said to have been "absorbed" by the defendant company, the Dominion Natural Gas Company Limited; and in connection with this arrangement a written contract was, on the 2nd February, 1905, entered into between the Dominion Natural Gas Company Limited, of the first part, and Eagle, Strome, Sundy, Reily, and Kenny, of the second part, which is in part as follows: "Whereas the parties of the second part hereby agree to sell, assign, convey, and transfer their stock now held in the People's Natural Gas Company for par value of same to be paid forthwith by W. J. Aikens: Now this agreement witnesseth, and it is hereby agreed by and between the parties hereto as follows: The parties of the second part shall be entitled to receive from the parties of the first part gas free for use in their private dwellings at and adjacent to Attercliffe station in accordance with the agreement entered into with the Imperial Natural Gas Company on the 16th day of December, 1902. It is understood that this agreement is to extend to the successsors and assigns of the parties of the first part."

The plaintiff Strome obtained from the company a contract bearing the same date by which the company agreed to supply to him and his heirs a certain amount of free gas along

ONT.
H. C. J.
1912
SUNDY
v.
DOMINION
NATURAL
GAS CO.
Sutherland, J.

any of its pipe lines in case he removed from Attercliffe station. This is not of importance in this action as he is still living at or near Attercliffe station.

Each of said named plaintiffs and Eagle was paid in cash, under the said agreement, the par value of their stock, amounting to $444.

Some time after the last-mentioned agreement, Harold Eagle died, and the plaintiff Rosina Eagle is said to be his heir-at-law. It was agreed by counsel at the trial that she was not properly a party to the action, and her name was struck from the record. The defendant company continued to supply the plaintiffs Sundy, Strome, and Kenny with natural gas, free of charge, down to April, 1911, when they discontinued doing so, and took up the pipe line between Attercliffe station and Dunnville.

There is some disagreement between the parties as to whether, after discontinuing the supply to the plaintiffs in April, 1911, the defendant company did or did not first offer to sell to them certain wells in which there was still some gas available, apparently, for purely local purposes, before selling them to other persons. By that time some of the wells had been abandoned as useless, and the others they then sold for sums representing approximately the cost of the casings therein.

The position of the defendant company in this action is, that, when the plaintiffs sold out to them in February, 1905, it was in the contemplation of all parties that the gas was being or would be piped from the Attercliffe field to Dunnville, where there was a considerable population to be supplied, and that the result would inevitably be to cause the Attercliffe field to be sooner exhausted than it otherwise would. They say that, the pressure in the wells in the Attercliffe field having run down to a point where it was not commercially feasible to continue to pipe from those wells, they were justified in discontinuing operations therein, and in declining further to supply the plaintiffs with gas free at their dwellings.

Since April, 1911, the plaintiffs have been obliged to secure their supply of gas from the purchasers of these wells, and have so obtained it, and apparently it has cost them in the neighbourhood of $50 to $60 a year.

In this action the plaintiffs assert that on the 25th April, 1911, the defendants, in violation of the agreement of the 2nd February, 1905, shut off and refused to supply them further with free gas, and still refuse to supply them therewith. They ask, in consequence, "an order restraining the defendants from the continuance of the said breach," and damages therefor.

It appears that, while the main pipe line from Attercliffe station to Dunnville has been taken up, the defendant company are still drawing gas from wells in the Attercliffe field, which

they still own, and piping it by another line along the Dilks road to Dunnville. The defendants say that these wells are not wells which were owned by the plaintiffs or the Imperial company, but wells put down by the Dunnville company before the merger. These wells are about a mile east of the Attercliffe station, and there was a line from the Dilks road to Attercliffe station formerly, which is said to have been taken up after the main pipe line from Attercliffe station to Dunnville was taken up.

The plaintiffs contend that, as the contract to supply them with free gas is an unconditional one, the defendant company must continue to supply them or else pay damages consequent upon their failure. The defendants, on the other hand, contend that, so long as the company could do so on a commercial basis and without loss to themselves, they had lived up to the contract, and that the moment they could not do so the contract was at an end.

The effect of the contract entered into on the 16th December, 1902, between the plaintiffs and the defendant company, is, I think, as follows: that the company would supply to the plaintiffs gas free for use in their private dwellings so long as they lived at and adjacent to Attercliffe station and gas was obtainable in the Attercliffe station field sufficient for that purpose. It is clear that, when the defendants refused further to supply the plaintiffs, there was still gas in that field, from wells owned by the defendants, sufficient to supply the plaintiffs for use in their private dwellings. It is clear that there is still gas in that field which the defendants are at the present piping to Dunnville by way of the Dilks road. It is said that the pressure in the wells in that field, still owned by the defendants, fluctuates, and at times it might be difficult to pipe any gas from these wells to Attercliffe station. It appears that at other times it would be quite practicable. It is plain, also, that, if the defendant company had not parted with the wells which they owned, they would have been in a position ever since they cut off the supply from the plaintiffs to supply them, as the present owners of those wells are now doing. The defendant company might have qualified their contract with the plaintiffs by the introduction of a clause such as that they were only to continue to supply so long as gas continued to be found in the Attercliffe station field in paying quantities, or so long as they could supply the same without loss to themselves. They did not do so.

It has been laid down that "when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract:" *Clifford* v. *Watts* (1870), L.R. 5 C.P. 577, at p. 586, 40 L.J.C.P. 36; Leake on Contracts, 6th ed. (Can.), p. 495; *Wallbridge* v.

ONT.

H. C. J. 1912

SUNDY v. DOMINION NATURAL GAS CO.

Sutherland, J.

*Gaujot*, 14 A.R. 460 (affirmed, *Palmer* v. *Wallbridge*, 15 Can. S.C.R. 650); *Ridgeway* v. *Sneyd*, Kay 627; *Gowan* v. *Christie*, L.R. 2 Sc. App. 273: "At common law the mere fact of 'unworkability to profit' affords no ground for reducing or throwing up a lease of minerals, which are in their nature subject to many vicissitudes."

The plaintiffs ask, and I think are entitled, to receive from the defendants damages for the breach of the agreement for failing to supply to them gas free. Approximately, it has cost them about $60 since the date when the defendants refused further to supply them with gas. I think each of the three plaintiffs, Sundy, Strome, and Kenny, must, therefore, have judgment for the sum of $60 down to the date of trial. I find that the covenant to supply free gas to the plaintiffs is still an existing and binding one upon the defendants. In case, therefore, they continue to refuse to supply the plaintiffs, the disposition I am making of this case will not in any way prejudice the rights of the plaintiffs in any future action.

I think it is a case in which High Court costs should be granted to the plaintiffs, and I make an order accordingly.

It is, of course, impossible to say exactly how long the Attercliffe station gas field will continue to supply gas for commercial purposes, or even for local purposes. Aikens, a gas expert who testified at the trial on behalf of the plaintiffs, says that the gas under present conditions and consumption would probably last eight or ten years for commercial purposes, and will possibly be completely abandoned for such purposes in twelve years. It may be that the parties would prefer that I fix a lump sum to be payable by the defendants to the plaintiffs for a release of any further liability under the contract in question. If so, the matter may be further mentioned.

*Judgment for plaintiffs.*

---

QUE.

C. R. 1912

Jan. 4.

## COURCHESNE v. TALBOT.

*Quebec Court of Review, Lemieux, A.C.J., Pelletier and Malouin, JJ. January 4, 1912.*

1. LEVY AND SEIZURE (§ III B—45)—RIGHT TO ANNUL—WHEN OPPOSITION LIES.

An opposition to annul only lies after the seizure has been actually effected.

2. LEVY AND SEIZURE (§ III B—45)—OPPOSITION TO WRIT OF EXECUTION PRIOR TO SEIZURE.

An opposition to the writ of execution itself, before any seizure is effected, is premature and will be dismissed.

QUE.

C. R. 1912

COURCHESNE v. TALBOT.

Lemieux, A.C.J.

APPEAL by way of inscription in review from a judgment rendered by the Superior Court, Pouliot, J., on October 14th, 1911. The appeal was dismissed.

*Girouard, Beaudry* and *Girouard*, for the plaintiff.

*Perrault* and *Perrault*, for the opposant.

Quebec, January 4, 1912. LEMIEUX, A.C.J.:—An opposition to annul, made by Talbot to a writ of execution which had not yet been executed was dismissed by the first Court for the ground that this opposition was premature.

The Court of Arthabaska held that an opposition to annul could only be made after the seizure of the movable effects of the debtor had been effected.

The opposant appeals from this judgment.

Our system of procedure contains special provisions in regard to seizure which are not found in the French code. It is simpler, inasmuch as it omits that antiquated proceeding preliminary to the seizure, which is required by the French code, called "*commandement de payer*" (commandment to pay). The commandment is not required: *Lee* v. *Lampson*, 2 L.C.R. 148, *Massue* v. *Crébassa*, 7 L.C.J. 225.

Under our law the seizure is begun by a writ, called a writ of execution, which is issued in the name of the Sovereign and orders the sheriff to levy the amount of the debt, the interest, and the costs both of the suit and of the execution. (Arts. 600, 617 C. P.) Seizure in execution, as the words imply, is the execution of the judgment. It consists in putting beneath the hand of justice all the property of the debtor, to satisfy the judgment obtained against him.

Rolland de Villargues, vo. "*Saisie-execution*":—

> C'est l'action de mettre sous la main de justice des biens et des effets, dans l'intérêt du saisissant ou de la vindicte publique.

Fuzier-Herman, vo. "*Saisie-execution.*"

Pigeau, Procédure, vol. 2, p. 600:—

> La saisie-execution est un acte par lequel les meubles, effets, marchandises, bestiaux et toutes autres choses mobilières corporelles, appartenant au débiteur, sont mis sous la main de justice, à la requête de son créancier, *à l'effet d'y demeurer jusqu'à la vente* que l'on en fera pour payer ce créancier.

The English authors say that "the writ of execution is called the life of the law, and therefore in all cases is to be favoured" (Ency. of the Laws of England, p. 125). The author cited borrows the Latin maxim: *Executio est fructus, finis et effectus legis.*

Our legislators have well understood that the writ of execution was the end and object of the law, and they have not wished to see its effect lessened and paralysed before its execution.

Under our code the seizure must have taken place before the

QUE.
C. R.
1912
COURCHESNE
v.
TALBOT.
Lemieux, A.C.J.

debtor can stop the effect of the writ ordering the sheriff to put the hand of justice upon the property of the debtor.

This follows from the code of procedure (arts. 612 to 644), which after having laid down the method of seizure, indicates the property which may be seized, and then gives the methods of opposing the seizure.

Article 644 says:—

> A seizure of movables in execution may be contested by opposition either by the debtor himself or by third parties.

Article 645:—

> The debtor may demand the nullity of a seizure of movables in execution:
>
> 1. On the ground of irregularities in the seizure, whenever they cause a prejudice.
>
> 2. On the ground of any of the effects being exempt from seizure.
>
> 3. On the ground of the extinction of the debt.
>
> 4. On any other ground of a nature to effect the judgment sought to be executed.

The idea which is apparent from these articles is that an opposition can only be made by the defendant and received when the seizure has been actually effected.

We find no article saying, implying or suggesting that an opposition can be made to the writ or to prevent or hinder the execution of the writ, but, throughout, the law clearly expresses the thought that the opposition can only be received after the execution of the writ, in other words the code does not grant an opposition to annul in order to protect or guard oneself against a threatened or attempted seizure under a writ of execution, but it informs us that it can only be received after the hand of justice has been placed upon the property of the debtor.

The legislator has been careful to make *res judicata*, the judgment, and the right of seizing in the name of the Sovereign, respected, by requiring that he who becomes an opposant should make an affidavit (art. 647 C.P.) to the effect that the opposition is not made with intent to unjustly retard the sale, but that it is made to obtain justice.

The words "oppose the sale" are significant, for they mean that the opposition is not made with intent to retard the sale of the effects seized, because there cannot be a sale if there has not been a seizure.

If, without a text to that effect, we were to decide that an opposition could be made to a writ of execution, what would prevent proceedings to stop, prevent, or hinder the execution of a *capias*, a seizure before judgment or other rigorous proceedings which the legislator has granted in order to prevent and frustrate fraudulent schemes on the part of debtors?

To decide that the debtor was entitled to prevent the seizure by making an opposition to the writ of seizure, would constitute

a deplorable innovation in the administration of justice, which already has such difficulty to overcome the obstacles in its path. In fact, the debtor, after having exhausted all dilatory means, objections and exceptions to delay the recognition of a right by judgment, would set himself to watch and spy for the issuance of a writ of seizure, in order to prevent its execution by an opposition in support of which he would raise irregularities, etc., in the writ itself, all for the purpose of obtaining time to make away with his goods or to prevent its execution.

We are of opinion that the judgment should be confirmed with costs.

Malouin, J.

MALOUIN, J.:—The plaintiff has obtained a judgment against the defendant for the sum of $800 and has caused a *fieri facias de bonis et de terris* to issue in execution of this judgment.

Before the seizure, the defendant produced in the hands of the sheriff, who was the holder of the writ of execution, an opposition to annul. After the receipt of this opposition the sheriff made a return and brought the writ into Court.

The plaintiff has made a motion under art. 651 C.P. asking for the dismissal of the opposition to annul on the ground that it had been made before the seizure was effected.

The Court of first instance granted the motion for this reason and dismissed the opposition to annul.

The plaintiff invokes other grounds in his motion, but the judgment of first instance does not mention them, and I do not think it is necessary to refer to them for the decision of the present appeal.

The opposition to annul is a special proceeding which can only be resorted to in the cases provided by law. This recourse has the effect of suspending the proceeding which has been begun and obliging the officer of justice, who holds the writ, to make a return without delay.

This proceeding is directed against the seizure itself, and in consequence if there be no seizure there cannot be ground for an opposition to annul.

This results from arts. 644 and following, C.P.

Art. 644 says that the seizure in execution may be contested by opposition.

Garsonnet, vol. 4, No. 1332, defines *saisie-execution* as "L'acte par lequel un créancier met sous main de justice les meubles corporels de son débiteur, aux fins de réalizer le gage commun des créanciers."

And art. 645 C.P. adds: "The debtor may demand the nullity of a seizure of movables in execution . . . ," in the cases which this article enumerates.

The French version of art. 645 is no less explicit: "Le saisi peut demander la nullité de la saisie-execution." This article says "*le saisi*," that is to say, the person whose effects are seized.

QUE.
C. R.
1912
COURCHESNE
v.
TALBOT.
Malouin, J.

In order that the debtor may demand the nullity of the seizure, the seizure must necessarily have been effected. How, indeed, could he demand the nullity of a seizure which did not exist.

Art. 722 C.P., which relates to immovables is to the same effect: "*Le saisi,*" says the French version, "peut s'opposer à la saisie ou à la vente de ses immeubles ou rentes dans les cas et en la manière énoncée en l'article 645."

The article says "*Le saisi peut s'opposer.*" But if there is to be a seizure, the seizure must be effected.

The English version of art. 722 reads as follows: "The party whose immovables or rents are seized, may oppose the seizure or the sale thereof, in the cases and in the manner declared by art. 645."

Nothing could be clearer. The recourse by way of opposition to annul is given to him whose property is seized.

Art. 647 C.P. requires that the opposition shall be accompanied by an affidavit that such opposition is made without intent to unjustly retard the sale. The sale of what? Evidently of the goods seized.

Arts. 648 and 649 C.P. establish that oppositions are served upon the sheriff or the bailiff and that the service of the opposition causes a stay of proceedings upon the seizure and the sale.

Why are oppositions served upon the sheriff or the bailiff? Is it because they have effected the seizure and the order to suspend it should be addressed to them.

I find in Pothier (Bugnet ed.), vol. 1, p. 672, No. 104, a definition of opposition to annul which comes from the old French procedure. This definition is all the more appropriate as our code has preserved intact the distinctive character of this proceeding. The definition is as follows:—

> L'opposition du saisi est un acte par lequel le débiteur saisi soutient la nullité de la saisie, soit pour quelque défaut de forme, soit par les moyens de fond, parce qu'il prétend ne rien devoir, ou parce qu'il prétend que la créance pour laquelle le saisissant a saisi, n'est pas exécutoire. Cette opposition donne lieu à une instance sur l'assignation de celle des parties qui prévient l'autre.

See also Pothier (Bugnet), vol. 10, p. 216, No. 469.

It results from the above citations that the opposition to annul is a contestation of the seizure. As indeed its name indicates, its purpose is to annul the seizure in execution.

According to the plan of our code of procedure, one can no more make an opposition to a writ of execution than one can plead to a writ of summons which is not served nor returned into Court.

The appellant has cited Garsonnet as well as Carré and Chauveau who say that an opposition can be made to a "*Com-*

*mandement de payer.*" These authors express this opinion in commenting upon arts. 583 and 584 of the French code of procedure.

Art. 583:—

> Toute saisie-exécution sera précédée d'un commandement de payer a la personne ou au domicile du débiteur, fait au moins un jour avant la saisie, et contenant notification du titre, s'il n'a déjà été notifié.

Article 584:—

> Il contiendra élection de domicile, jusqu'à la fin de la poursuite, dans la commune où doit se faire l'exécution, si le créancier n'y demeure; et le débiteur pourra faire, à ce domicile élu, toutes significations, même d'offres réelles et d'appel.

These two articles do not exist in our code of procedure. Here, it is not necessary to serve the judgment upon the debtor before executing it, unless the judgment itself orders it. Consequently, the preliminary obligation of a "*commandement*" does not exist with us.

When the bailiff, holding the writ of execution, presents himself before the debtor to make a seizure, he asks him verbally for payment of the sum claimed, and upon default to pay he proceeds without delay to seize the goods. There is no commandment in writing, nor delay to pay, nor election of domicile, as in the French law.

It was decided before the code, that a commandment to pay was not necessary in the case of seizure in execution of movable property: *Lee* v. *Lampson*, 2 L.C.R. 148, *Massue* v. *Crébassa*, 7 L.C.J. 225.

Our code of procedure does not anywhere require a commandment to pay before the seizure. Art. 609, indeed, says that an execution can be proceeded with without making a demand of payment, which implies that a creditor ought to make a demand of payment when he proceeds with a first execution, but as I have just said, the code of procedure does not make this an imperative rule.

This was evidently the opinion of all the Judges of the Superior Court, since, when they met to prepare the rules of practice, they adopted rule 60 which declares that demand of payment at the time of a first execution is requisite only when the seizure is made at the domicile of the debtor or in his presence.

This rule limits the demand of payment to the case where the seizure is effected at the domicile of the debtor, or otherwise when he is present, so as to avoid the costs of seizure in case the debtor should pay.

The omission of this formality cannot affect the validity of the seizure, but it might have the effect of making the seizing creditor liable for the costs of the seizure.

QUE.
C. R.
1912
COURCHESNE v. TALBOT.
Malouin, J.

I am therefore of the opinion, that the commandment required by arts. 583 and 584 of the French code of procedure does not exist in our law, and that consequently there can be no question of an opposition to the commandment.

The opposition of which Garsonnet and Carré & Chauveau speak, is not the opposition to annul of the old French law which is also ours. It is a proceeding which does not directly attack the seizure; it does not stop the proceedings upon the seizure and the sale. See Pothier (Bugnet ed.), p. 216, note 7, and p. 217, notes 2 and 3. Upon this subject Bugnet, Pothier's annôtator, says:—

> Le code n'établit aucune procédure particulière pour l'opposition qui serait formée par le saisi. . . . L'opposition formée par le saisi constitue donc une instance ordinaire sur lequel le saisi doit procéder suivant les régles générales par voie d'ajournement, sauf à obtenir abréviation de délai ou à se pourvoir, s'il y a lieu, par provision devant le juge de référé.
>
> Ni l'opposition, ni l'acte d'ajournement ne peut avoir pour effet d'arrêter les poursuites du saisissant qui agit en vertu d'un titre exécutoire.
>
> Si la partie saisie s'est bornée à declarer une simple opposition, ou si elle ne suit pas sur l'ajournement qu'elle a donné, le saisissant n'a aucun intérêt à demander mainlevée de l'opposition qui ne peut arrêter la poursuite.

See also Sirey, Code de Procédure, under article 583, No. 25.

As may be seen, this opposition of which the French authors speak, is not the opposition to annul of our code of procedure: it possesses neither its character nor its effects. It does not suspend the proceedings upon the seizure and does not stop the sale. It is an ordinary proceeding. There can be no objection to allowing it before the seizure. Even after the production of this opposition, the bailiff may proceed with the seizure and the sale.

If an opposition to annul was allowed to be made before the seizure, the creditor would be deprived of his privilege of putting the goods of his debtor beneath the hand of justice, when this is formally recognized by law. This would encourage frauds by certain debtors who would profit by it to secrete or make away with their goods.

It is evidently for this reason that our code only allows an opposition to annul to be made after the seizure.

For these reasons I am of opinion that the judgment of the Court of first instance dismissing the appellant's opposition is well founded.

*Appeal dismissed.*

## CARRINGTON v. RUSSELL.

QUE.

S. C.
1912

May 29.

*Quebec Superior Court, Laurendeau, J. May 29, 1912.*

1. LIBEL AND SLANDER (§ II E 4—77)—PRIVILEGED COMMUNICATIONS—WORDS USED BY WITNESS IN JUDICIAL PROCEEDINGS—ABUSE OF PRIVILEGE—C.C. (QUE.), SEC. 1053.

If a witness abuses his position as such in order to injure the parties to the case or third parties, either by perjuring himself or by making statements which do not relate to the matter in issue or to the questions which are put to him, he commits a fault provided against by art. 1053 of the Quebec Civil Code.

Statement

INSCRIPTION in law on a question arising in a slander action as to whether the plaintiff's pleading disclosed a cause of action.

*Perron, Taschereau, Rinfret & Genest*, for the plaintiff.

*Geo. A. Campbell*, for the defendant.

Laurendeau, J.

LAURENDEAU J. (translated):—The plaintiff sues the defendant for slander and claims the sum of $25,000.

The defendant inscribes in law against allegations 8, 9, 10, 11, 12, 13, and 14 of the declaration. These allegations read as follows:—

8. On the 23rd day of September, 1911, the said defendant was examined *on discovery* on behalf of the defendants in the said cases bearing numbers 2132 and 2175 on the records of this honourable Court, in which cases the said defendant is plaintiff, and the said Allan A. Pinkerton *et al.* are defendants.

9. In the course of this examination said defendant in order to injure said plaintiff and to cause him damages, and without any cause or legal justification whatsoever, swore that the said plaintiff was party to a conspiracy against said defendant in order to have the said defendant incarcerated in a lunatic asylum, and was party to the conspiracy mentioned in paragraph 6 of this declaration.

10. Said plaintiff is unable to set out in this declaration the exact words or terms used by the said Russell with reference to the said plaintiff in connection with the suits above mentioned, but files with these presents a certified copy of the deposition then given by said defendant, and plaintiff hereby refers to said deposition as forming part of the present declaration as plaintiff's exhibit No. 2.

11. On the 28th and 29th of September last past, 1911, and the days following, said defendant was examined on his behalf in the suit bearing number 2132 of the records of this honourable Court, in which the said defendant was plaintiff, and the said A. A. Pinkerton *et al.* were defendants, the said suit then being heard at *enquête* and merits.

12. While the said defendant was so examined he then repeated against said plaintiff all the former statements which he had made against him in his examination *on discovery* as mentioned above, and this with malice, without any cause whatsover and in order simply to injure plaintiff and cause him damages; a certified copy of the deposition so given by the said defendant is filed herewith to form part hereof as plaintiff's exhibit No. 3, and plaintiff hereby specially refers to said deposition as forming part hereof.

QUE.
S. C.
1912
CARRINGTON
v.
RUSSELL.
Laurendeau, J.

13. In said deposition above mentioned said defendant maliciously asserted that plaintiff had tried to commit a crime against him, viz., had conspired against him with several other persons in order to have him incarcerated in a lunatic asylum and had also conspired with several other parties in committing another crime, viz., what he called "a badger game" and used other words to the same effect and purpose.

14. The said statements above mentioned were made by the said defendant before a large number of persons, and every one understood that said defendant was stating under oath that plaintiff had committed a crime against said defendant by conspiring and trying to induce people to play the badger game on said defendant.

The reasons for the inscription in law are as follows:—

1. The said allegations, even if true, (which is denied) do not give rise in law to the conclusions taken by plaintiff in his declaration.

2. As appears from the allegations of the said paragraph the publications therein referred to were relevant answers given by defendant to questions put to him, when being examined as a witness under oath in the course of the said judicial proceedings, to wit, the trial of the said actions No. 2132 and No. 2175, and all the publications and allegations so made by defendant were, and each of them was and is, absolutely privileged, and cannot give rise to any right of action by the present plaintiff against the present defendant.

The allegations which are attacked by the inscription in law are completed by allegation 19 which is as follows:—

19. All the said statements are false and have been made by the said defendant against said plaintiff with the sole view and purpose of injuring him and causing him damages, and said defendant well knew when he was making such statements against plaintiff that they were unfounded and false.

The defendant in support of his inscription in law submits the following propositions:—

(1) The duties, rights, responsibilities and privileges of a person who is heard as a witness under oath before a court of justice are matters which relate to the administration of justice, and as such, are matters of public law.

(2) The public law of the Province of Quebec upon this subject is the English law.

(3) According to English law, the witness enjoys an absolute immunity, and he cannot be sued in damages even if he has acted maliciously, in bad faith, and if what he has said does not relate to the case, nor to the questions put to him; this rule is essential for the proper administration of justice.

These different propositions are only of importance if we are to adopt the English common law, as interpreted by the jurisprudence in England, in deciding upon the responsibility of the witness.

The jurisprudence and the authors who have written on the subject recognize an absolute immunity for the witness. The witness can only be proceeded against in case of perjury, and then only criminally. He does not incur any civil responsibility, except, perhaps, when what he says has no reference whatever to the matter in issue. This rule is based upon the consideration of public interest, which requires that the witness should be perfectly free to speak the whole truth. The fear of being sued might prevent him from speaking the whole truth. There is less inconvenience in the application of this rule than in the application of a different one.

The references given below embody a complete study of the question. There is no doubt that public interest is the reason for the law which forces the witness to appear before a court of justice and to reply to the questions which are put to him. But it does not follow that, because public interest has rendered this law necessary, the relations of the witness towards this law are regulated by public law.

Our laws of procedure contain full provisions regarding the summoning of the witness, his appearance, his conduct before the Courts, his punishment for contempt of Court, etc.; his responsibility and his punishment for refusal to appear are regulated by art. 303 of the code of procedure.

His responsibility for his fault when he gives evidence is regulated by art. 1053, Civil Code, which is our common law in matters of civil responsibility.

Forced to appear and declare under oath the facts which he knows, the witness necessarily enjoys certain privileges. These privileges are not expressly defined by law, but they result from the obligation which the law imposes upon him and from the special position in which he finds himself. He cannot be in fault while he is accomplishing a duty or executing an obligation. But if the witness abuses his position to injure the parties to the case or third persons, either by perjuring himself or by making declarations which do not relate either to the matter in issue or to the questions which are put to him, he commits a fault because he is no longer accomplishing the duty or the obligation which the law imposes on him.

Supposing the facts alleged in the declaration to be true, the defendant has not only maliciously and with the sole purpose of injuring him, made slanderous statements concerning the plaintiff, which relate neither to the matter in issue nor to the questions which were put to him, but he perjured himself in making these statements. He has therefore committed a fault for which he is civilly responsible.

I have not, as has been suggested, got to enquire whether the defendant acted in good faith, with probable cause and without

QUE.
S. C.
1912
CARRINGTON
v.
RUSSELL.
Laurendeau, J.

malice, and whether he honestly believed that the replies he gave were true, or again, that these replies referred to the matter in issue. The Judge who hears the case on the merits will decide this point. Upon the inscription in law I must take the facts alleged and consider them as proved.

The foregoing reasoning seems to me to be in accordance with our jurisprudence. It is only in the case of suits for damages for illegal arrest that we find certain differences of opinion among the Judges of this province.

In the case of *Hétu* v. *Dixville Butter & Cheese Association*, 16 Que. K.B. 333, the Honourable Chief Justice of the Court of Appeal (Taschereau) expressed the opinion that the defendant's responsibility should be regulated by English law, because, in this country, we are governed by English criminal law; but he adds that, according to him, there no difference between English law and French law on this point. The Honourable Mr. Justice Blanchet, who rendered the judgment of the Court, seems to be of a different opinion. He admits, with the Honourable Chief Justice, that the English law and the French law on this question are alike. But he adds that it is a question of civil responsibility, that the action for responsibility for false arrest is a civil one, and in the case of a civil suit the ordinary civil laws in regard to responsibility should be applied. This case was taken to the Supreme Court of Canada. The judgment of the Court of Appeal was confirmed. The Honourable the Chief Justice of the Supreme Court, accepting the opinion of Judge Blanchet, declared that there was no difference between the English law and the French law on this point; but he added, expressing a personal opinion, that the principles applicable in the Province of Quebec are contained in art. 1053 of the Civil Code.

In the case of *Canadian Pacific Railway* v. *Waller*, 1 D.L.R. 47, the Court of Appeal [Quebec King's Bench, Appeal side] held that it is the principles of the French law, as reproduced in art. 1053 C.C., which govern actions in responsibility for false arrest, and not the English law.

The cause of this difference of opinion is that as we are governed by English criminal law, some Judges have thought that the civil responsibility of the complainant should be governed by English law, while others have thought that civil responsibility, from whatever cause it arise, should be determined by our civil law.

But if there was ground for a difference of opinion in the case of civil responsibility due to false arrest, this difference in views cannot be justified when it is a question of the responsibility of a witness in civil matters.

In the case of *Coté* v. *Deneau*, 19 Que. K.B. 272, it appears to have been held that a witness who gives evidence before a

Court of Justice enjoys an absolute immunity with regard to defamatory statements made by him in his deposition, and no action can be maintained against him in regard to the defamatory statements.

In reading the notes of the Honourable Judge Cross, one is easily convinced that the holding at the beginning of the report of the case is not correct. The Honourable Judge, as I understand the report, did not express such a formal opinion. The decision is based on special circumstances. He has cited English and French authorities to shew how far the privilege of a witness might extend in different cases, and the only conclusion at which the Honourable Judge arrives is found at pages 279 and 280. At page 279 the Honourable Judge speaks as follows:—

> I may conclude that in this case the witness did not act with such malice and go so far out of his way to find an insult to cast upon the plaintiff as to have forfeited the immunity which I have described.

At the foot of the page 280 he adds:—

> Upon the whole, our conclusion is that the provocation to which the respondent was subjected was such as should involve the denial of any recourse in damages to the plaintiff. It should be understood that, while we confirm the adjudication made by the Superior Court, we are not to be understood as formally holding that the part of the answer of the witness complained of was a pertinent statement.

The only other cases which are to be found in our jurisprudence concerning the responsibility of the witness are as follows:—

*Marquis* v. *Gaudreau*, 2 Que. S.C. 502, decided by Honourable Judge Jetté. In the judgment of the case there is the following *considérant*:—

> Whereas in principle, when the facts which a witness states are relative to the case in which he is examined and when they are made in good faith and without malice, a recourse in damages will not lie by reason of the words so spoken.

*Prairie* v. *Vineberg*, 2 Que. S.C. 507. In this case the defendant, after having finished his evidence as a witness before the Fire Commissioners, added that:—

> The goods which disappeared during the night while the store was under the charge of the police, were in the store when these latter took charge of the store in question. The Commissioners drew the attention of the defendant to the gravity of his accusation, and that if he persisted in affirming it they would notify the Chief of Police. The defendant persisted in his accusation and consented that the Chief of Police should be told of it. The defendant then declared that he had suffered more damages during the time the police were in charge of the store than he had by the fire; that he had been robbed during the night and that he did not wish to have policemen as guardians any more, but that he wished to have an honest man.

It was under these circumstances that the Court condemned Vineberg.

QUE.
S.C.
1912
CARRINGTON v. RUSSELL.
Laurendeau, J.

*Hibbard* v. *Cullen*, 4 Que. S.C. 369. This judgment was rendered by the Court of Review, composed of Judges Pagnuelo, Lynch and Doherty. In this case it was decided that if a witness should be protected when, in good faith, he swears to facts which are injurious to the character of any person, it does not follow that he should be allowed to slander him deliberately and maliciously.

The Honourable Judge Davidson decided in the Superior Court in this same case: *Hibbard* v. *Cullen*, 3 Que. S.C. 463, that a witness incurs no civil responsibility and that he can only be punished if he perjures himself.

In the cases of *Renaud* v. *Guenette*, 25 Que. S.C. 310, *Larue* v. *Brault*, 9 Que. S.C. 149, and *Labbé* v. *Pidgeon*, 7 Que. S.C. 29, the opinion which I have expressed has been admitted implicitly. The following judgments concerning the privilege of advocates may be read with interest: *Labbé* v. *Pidgeon*, 1 R. de J. 404; *Gauthier* v. *St. Pierre*, 1 M.L.R., S.C. 52; *Paillé* v. *Demers*, 3 R. de J. 434.

The Honourable Mr. Justice Charbonneau has applied the same principle in a case of *Honan* v. *Parsons*, 13 Que. P.R. 363.

Special laws, both civil and criminal, which we do not have here, have in France given rise to a jurisprudence which we cannot accept. (Sirey, 1838-1-740; Sirey, 1839-1-707; Sirey, 1836-1-314; Sirey, 1877-1-90; Sirey, 1885-1-157).

The defendant's inscription in law is dismissed with costs.

The following authorities were cited by the parties:—

Walton, Scope and Interpretation of the Civil Code, pp. 26, 28 and 42; *Corporation of Arthabaska* v. *Pantoine*, 4 Dorion Q.B. 364; *Wilkins* v. *Major*, 22 Q.O.R., S.C. 264; *Campbell* v. *Hall*, 20 State Trials 304; *City of Montreal* v. *Lacroix*, 19 Q.O.R., K.B. 385; *Archambeault* v. *G.N.W. Telegraph Co.*, 18 R.L. 181; *Giguere* v. *Jacob*, 10 Q.O.R., K.B. 501; *Maloney* v. *Chase*, 7 Q.O.R., S.C. 18, Andrews, J. (1894); *Isles* v. *Boas*, 6 Q.O.R., S.C. 312, (C.R.) (1894); *Gowan* v. *Holland*, 11 Q.O.R., S.C. 75, (C.R.) (1896); *Lemire* v. *Duclos*, 13 Q.O.R., S.C. 82, Lemieux, J. (1898); *Lavigne* v. *Lefebvre*, 14 Q.O.R., S.C. 275, Archibald, J., (1898); *Lachance* v. *Cazeau*, 1 Q.O.R., K.B. 179; *Attorney-General* v. *Fournier*, 19 Q.O.R., K.B. 431; Odgers, Libel and Slander, 5th ed. (1912), pp. 227, 229, 230, 232, 233, 238, 241 248*a* and 248*b*; *Seaman* v. *Netherclift*, 1 C.P.D. 540; confirmed in appeal in 2 C.P.D. 53. See remarks of Coleridge, L.J. in 1 C.P.D., at pp. 544, 545 and 546; Folkard, Libel and Slander, 7th ed., pp. 88, 93, 95, 96 and 100; *Bottomley* v. *Brougham*, [1908] 1 K.B. 584; *Scott* v. *Stansfield*, L.R. 3 Exch. 220; *Barratt* v. *Kearns*, [1905] 1 K.B. 505; *Dawkins* v. *Lord Rokeby*, L.R., 7 Eng. & Ir. App. 744; *Astley* v. *Younge*, 2 Burrow's Reports 807, decided by Lord Mansfield in 1759; *Henderson* v.

*Broomhead*, 4 H. & N. 567; *Rochon* v. *Fraser*, 3 L.C.R. 87; *La Cie du Publication du Canada-Revue* v. *Fabre*, 6 Q.O.R., S.C. 543; *Lamarche* v. *Bruchesi*, 7 Q.O.R., S.C. 62, Archibald, J. (1895); *Larue* v. *Brault*, 9 Q.O.R., S.C. 149; *Mercier* v. *Masson*, 12 Q.O.R., S.C. 337; *Carsley* v. *Bradstreet*, M.L.R., 2 S.C. 33; Canadian Criminal Code, secs. 320 and 326; Cyc., vol. 25, vo. "Libel and Slander," pp. 375 *et seq.*, pp. 379, 381 and 383; *Vogel* v. *Gruaz*, 110 U.S. 311; *Garr* v. *Seldon*, 4 N.Y. 1901; *Siskles* v. *Kling*, 6 N.Y. 515; *Youmans* v. *Smith*, 153 N.Y. 214; *Hermius* v. *Nelson*, 138 N.Y. 517; *Burke* v. *Ryan*, 36 L.R.A. 951; *Gardemal* v. *McWilliams*, 43 L.R.A. 454; *Hoar* v. *Wood*, 3 Metcalfe Reports 193; *Suydam* v. *Moffatt*, Stanford's Reports 458; *Law* v. *Llewellyn*, [1906] 1 K.B. 487; *Burr* v. *Smith*, [1909] 2 K.B. 306; Dareau, des Injures, vol. 1, par. 9, p. 130; *Fuzier-Herman*, vo. "Diffamation," Nos. 1592 *et seq.*

The formal judgment of the Court, was recorded as follows:—

"The Court, after having heard the parties by their attorneys upon the defendant's partial inscription in law, having examined the record and deliberated;

"Whereas the plaintiff claims from the defendant damages because the latter in divers depositions made by him under oath as witness in another case, made injurious statements concerning him, without cause and without any justification, but with malice, with the sole purpose of injuring him, and knowing what he said to be false;

"Whereas the defendant, by his inscription in law, contends that the defendant is not civilly responsible by reason of the facts set forth above;

"Considering that when a witness abuses his position in order to injure someone else, he commits a fault for which he is civilly responsible under art. 1053 of the Civil Code; that under the circumstances this fault consists in the fact that the defendant has injured the plaintiff by making false statements, knowing them to be false, and has maliciously and without justification made injurious remarks concerning him which had no relation either to the case or to the questions which were put to him;

"Considering that the inscription in law is ill-founded;

"Doth dismiss the said inscription in law with costs."

*Inscription dismissed.*

ONT.

H. C. J.

1912

May 20.

## BARTRAM v. GRICE.

*Ontario High Court. Trial before Kelly, J. May 20, 1912.*

1. PLEDGE (§ II B—20)—SHARES PLEDGED AS SECURITY—POWER OF SALE—TENDERS—SETTING ASIDE SALE.

A power of sale in an agreement whereby shares of stock were pledged as security, which required upon default in payment, that tenders should be advertised for three times in designated newspapers, with intervals of a week between each insertion, was not properly exercised, and a sale will be set aside, where a full week, excluding the day of publication, did not elapse between each publication.

2. PLEDGE (§ II B—20)—CONDITION PRECEDENT TO SALE—NON-OBSERVANCE—SETTING ASIDE SALE.

A sale of shares of stock held as security is irregular and will be set aside, where the order of priority of their sale as provided in the agreement by which they were pledged, was not observed, and the purchaser had notice thereof.

3. CORPORATIONS AND COMPANIES (§ V C 1—192)—RIGHTS OF TRANSFEREE—IRREGULAR SALE OF STOCK—KNOWLEDGE BY SOLICITOR OF PURCHASER OF IRREGULARITIES.

One who purchases shares of stock under an irregular sale by a pledgee will not be protected as a purchaser for value without notice, where the solicitor who acted for the former was also the solicitor for the pledgee, and had knowledge of such irregularity, as his knowledge was imputable to the purchaser.

4. NOTICE (§ II—16)—IMPUTED NOTICE OF IRREGULAR SALE OF SHARES—CIRCUMSTANCES SHEWING.

Even where a power of sale of property pledged is so framed as to relieve a purchaser from obligation to make inquiries, yet, if the circumstances which put in question the propriety of the sale are brought to his knowledge he thereby becomes charged with notice.

[*Jenkins* v. *Jones*, 2 Giff. 99, referred to.]

5. PLEDGE (§ II B—21)—PURCHASE FOR BENEFIT OF PLEDGEE—INADEQUATE PRICE—SETTING ASIDE SALE.

A sale of pledged shares of stock cannot be upheld where the circumstances shew that the purchaser, who paid an inadequate price, knew practically nothing about the company that issued them, or about its affairs or financial circumstances, and that he consulted with the pledgee in relation to the sale, and, was, to some extent, in his employ, as the conclusion therefrom was that the purchase was made at the suggestion of and for the benefit of the pledgee.

6. PLEDGE (§ II A—11)—DUTY OF PLEDGEE AS TO SALE—PROTECTION OF PROPERTY.

It is the duty of the pledgee of shares of stock in selling them upon default to take reasonable means to prevent a sacrifice thereof, and to act as a provident owner would have done.

[*Latch* v. *Furlong* (1866), 12 Gr. 303, applied.]

7. PLEDGE (§ II B—21)—SALE—PURCHASE FOR BENEFIT OF PLEDGEE—INADEQUACY OF PRICE.

While inadequacy of price is not ordinarily a sufficient reason for setting aside a sale, yet it will have that effect when, taken in connection with other circumstances, it leads to the assumption that the purchase was made for the benefit of the pledgee.

Statement

ACTION to set aside a sale made by the defendant Grice to the defendant Naylor of 500 shares of the capital stock of the General Construction and Dredging Company Limited.

*F. E. Hodgins*, K.C., and *W. R. Wadsworth*, for the plaintiff.

*W. M. Douglas*, K.C., and *J. R. L. Starr*, K.C., for the defendants Grice and Naylor.

*McGregor Young*, K.C., for the defendants the General Construction and Dredging Company.

KELLY, J.:—By an agreement made between the plaintiff and defendant Grice, on the 23rd February, 1910, the plaintiff agreed to transfer to Grice 500 shares of the capital stock of that company as security in respect of another 500 shares which had been purchased and paid for by the defendant Grice. The agreement also provided that the plaintiff should transfer to the defendant Grice a further 100 shares of such capital stock, which Grice was to be entitled to hold for himself absolutely, subject to certain rights of the plaintiff in respect thereto. There is a further provision that, in the event of Grice not having before the 1st April, 1911, received in dividends upon the 500 shares so purchased by him $50,000, he was to be entitled up to, but not after, the 15th April, 1911, to call upon the plaintiff to pay him $50,000 and interest at 6 per cent. from the 1st May, 1909, till the time that such sum should be paid to him, less any dividends received by him prior to such repayment; and on payment of such sums the plaintiff was to have the right to call on the defendant Grice to transfer to him the 500 shares purchased by Grice, the 500 shares transferred to Grice as security, and the other 100 shares above referred to. Further, if the plaintiff failed to pay the sums mentioned within 30 days after being called upon by Grice to do so, Grice was to be entitled to realise on, "first, the 500 shares now held by him in the said company and paid for by him, and secondly, the 50 shares in the company to be transferred by Mr. Bartram to Mr. Grice as security as aforesaid; thirdly, the 100 shares," etc.

The manner in which the shares were to be disposed of was this: "Mr. Grice shall dispose of the shares as follows, that is to say, he shall call for tenders by advertisement to be inserted three times with an interval of a week between each time in the Globe, Toronto, and in some well known London newspaper, and Mr. Grice shall accept the highest tender for cash for the said shares, or shall himself purchase the said shares at the amount of the highest tender, but in no event shall Mr. Bartram be personally liable for the repayment of the $50,000 purchase-money."

There was a still further provision that, "in the event of Mr. Grice not calling on Mr. Bartram for repayment of the $50,000 prior to the 1st April, 1911, and offering to retransfer to Mr. Bartram the full 1,000 shares, then in such event Mr. Grice shall re-transfer to Mr. Bartram the 500 shares held as security, before the 1st May, 1911."

ONT.

H. C. J. 1912

BARTRAM v. GRICE.

Kelly, J.

Grice not having received in dividends the $50,000 and interest, he, by his solicitors, issued a notice dated the 28th March, 1911, to the plaintiff, requiring him to pay $50,000 and interest thereon at 6 per cent. per annum from the 1st May, 1909, to the date of payment, and offering to transfer to the plaintiff, upon such payment, 1,000 shares of the capital stock of the defendant company; and on the 5th April, 1911, a similar notice was issued.

There was some contention between the parties as to whether these notices were properly served on the plaintiff within the time required by the agreement. With this aspect of the case I shall not deal at present; but, even if the notices were duly served, I am of opinion that the sale, for other reasons, cannot be upheld.

The only method of realising on the shares on default in payment, was that given by the power of sale in the agreement.

Advertisements for tenders for the sale of the first 500 shares (that is, the shares which had been purchased by the defendant Grice) were inserted in the Toronto Globe on the 15th, 22nd and 29th July, 1911, and in the London Globe on the 1st, 8th, and 15th August, 1911; and advertisements for tenders for the sale of the other 500 shares were inserted in the Toronto Globe on the 21st and 28th July and the 4th August, 1911, and in the London Globe on the 1st, 8th, and 15th August, 1911.

On the 27th October, 1911, the defendant Naylor made an offer of $100 for the purchase of the second block of 500 shares, namely, the shares held by Grice as security, and his offer was accepted, and the defendant company were called upon to have the transfer to the purchaser entered in their books, but were restrained by injunction from doing so.

I find that the power of sale was not properly exercised. The power required the advertisements for tenders to be inserted "three times with an interval of a week between each time." While this language shews want of care in its preparation, there cannot be any doubt that it means that there was to be an interval of a week between the date of one insertion and the date of the insertion next succeeding it. Inserting the advertisements on the 21st and 28th July and 4th August, and on the 1st, 8th, and 15th August, was not a compliance with the provisions of the agreement, inasmuch as an interval of a week did not elapse between the date of one insertion and the date of the insertion next succeeding it. . . .

In *R.* v. *Justices of Shropshire* (1838), 8 Ad. & E. 173, it was decided that where an act is required to be done so many days at least before a given event the time must be reckoned excluding both the day of the act and that of the event.

An interval of not less than 14 days is equivalent to saying that fourteen days must intervene or elapse between the two dates: *In re Railway Sleepers Supply Company* (1885), 29 C.D. 204.

Chitty, J., in that case says:—

I do not see any distinction between "fourteen days" and "at least fourteen days."

In *Chambers* v. *Smith* (1843), 12 M. & W. 2, it was held that the words "not being less than fifteen days" meant fifteen full days or clear days.

In *Young* v. *Higgon* (1840), 6 M. & W. 49, Baron Alderson said:—

Where there is given to a party a certain space of time to do some act, which space of time is included between two other acts to be done by another person, both the days of doing those acts ought to be excluded, in order to ensure to him the whole of that space of time.

These authorities make it clear that a full week should have elapsed between the dates of any two insertions, that is, that the days of publication must, in the calculation of the week, be excluded.

In another respect also the sale was irregular. The agreement provided that the defendant Grice should first realise on the 500 shares owned and held by him; secondly, on the 500 shares transferred to him as security; and, thirdly, on the 100 shares; but the sale attempted to be made by Grice to Naylor was of the second 500 shares before a sale of the first 500 shares had been effected. Down to the time of action the first 500 shares had not been sold.

It has been contended that the defendant Naylor is a purchaser for value without notice, and is not affected by any irregularities in the manner of exercising the power or conducting the sale.

I think he cannot thus protect himself or uphold the sale. He made his offer of $100 to Grice's solicitor, who, acting for Grice, had issued the advertisements for tenders and who was conducting the sale proceedings. This same solicitor acted for Naylor in the transaction and prepared for him the offer of $100, and Naylor left with him or paid him the $100 offered, which at the time of the trial had not been paid to Grice.

Naylor's solicitor had full knowledge of the requirements of the power of sale, and was familiar with the sale proceedings. The solicitor's knowledge was Naylor's knowledge, and he cannot successfully contend that he was not affected and bound by it.

Even in a case where a power of sale is so framed as to relieve the purchaser from all obligation to make inquiries, yet, if the circumstances which put in question the propriety of the sale are brought to his knowledge, and he purchases with that knowledge, he becomes a party to the transaction which is impeached: *Jenkins* v. *Jones*, 2 Giff. 99, at pp. 108-9.

ONT.

H. C. J.
1912

BARTRAM
v.
GRICE.

Kelly, J.

There are other reasons, too, which lead to the conclusion that the sale cannot be upheld.

Naylor's evidence shews that he knew practically nothing about the defendant company, that he knew nothing about its assets, its contracts or its operations, and he says that the defendant Grice told him that its stock was of little value.

Naylor's occupation was that of a plasterer, working at his trade for other people. He had never before been engaged in a transaction of this nature. His brother-in-law, Lawson, was Grice's representative on the board of directors of the defendant company, and consulted with Grice about the company's affairs, and was to some extent in Grice's service.

Grice's duty was to take reasonable means of preventing the sacrifice of the shares, and to act as a provident owner would have acted: *Latch* v. *Furlong* (1866), 12 Gr. 303. It is not clear to my mind that he discharged that duty. Added to all this is the allegation that the sale was at a gross undervalue. While mere inadequacy in price is not of itself a sufficient reason for setting aside a sale, still, in this instance, taken in conjunction with the other circumstances, the price was so small in proportion to the value of the shares sold as to afford some evidence of the impropriety of the sale, and to lead to the assumption that the purchase by Naylor was made at the suggestion of Grice and for his benefit.

Considering, therefore, the want of regularity in the insertion of the advertisements for tenders, the attempt to sell the 500 shares pledged before selling the 500 shares owned by Grice, as required by the agreement, the relationship of Grice, Lawson, and Naylor toward each other, the fact that both vendor and purchaser were represented by the same solicitor, and the price paid, which was but a nominal one as compared with what the evidence shews was the real value of these shares, I am clearly of opinion that the sale cannot be upheld.

I, therefore, direct judgment to be entered declaring invalid and setting aside the sale of the 500 shares by the defendant Grice to the defendant Naylor, cancelling any transfer of these shares and of certificate number 61 representing them made by Grice to Naylor, restraining the defendant Naylor from transferring or otherwise dealing with these shares and certificate, restraining the defendant Grice from doing any act towards completing such sale and transfer, and restraining the defendant company from transferring or consenting to any transfer of these shares and certificate to the defendant Naylor, and from recording him in the company's books as the owner thereof.

The costs of the plaintiff and of the defendant company will be paid by the defendants Grice and Naylor. The counterclaim of the defendant Grice is dismissed with costs.

*Judgment for plaintiff.*

## REX v. MARCINKO.

ONT.

H. C. J.
1912
July 26.

*Ontario High Court, Kelly, J., in Chambers. July 26, 1912.*

1. DISORDERLY HOUSES (§ I—1)—WHAT ARE—BAD REPUTATION—CONVICTION BY MAGISTRATE.

In a prosecution for keeping a disorderly house where there was no evidence of disorderly conduct except on one single occasion but there was evidence of the bad reputation of the house, there was evidence upon which the magistrate could convict and as he was the judge of the weight to be attached to it, his conviction will not be disturbed. [*R. v. St. Clair*, 3 Can. Crim. Cas. 551, 27 O.A.R. 308, at p. 310, followed.]

2. CERTIORARI (§ II—20)—AMENDMENT OF CONVICTION—RIGHT OF COURT TO MAKE CONVICTION CONFORM TO CODE—CRIM. CODE SEC. 754.

Assuming that a police magistrate, who imposed a penalty in excess of what was authorized by the Criminal Code, 1906, had no power, after service upon him of a notice of motion to set aside the conviction, which called upon him to make a return of the conviction, information, etc., to amend the conviction by substituting a penalty provided by the Code, the Court, to which the conviction was removed by *certiorari*, may amend the conviction so as to conform to the Code, under the authority given by sec. 1124 thereof providing that no conviction made by any justice should be held invalid for any irregularity, etc., therein, if the Court or Judge before which or whom the question is raised is satisfied that an offence of the nature described in the conviction has been committed, over which such justice has jurisdiction, and giving the Judge or Court where so satisfied, even if the punishment imposed is in excess of that which might lawfully have been imposed, like powers in all respects to deal with the case, as are given by sec. 754 of the Code providing that, in every case of appeal from a summary conviction, the Court to which such appeal is made, shall, notwithstanding, among other things, that the punishment imposed may be in excess of that which might lawfully have been imposed, hear and determine the charge on which such conviction was made upon the merits and, among other things, exercise any power which the justice whose decision is appealed from, might have exercised.

Statement

APPLICATION by the defendant to quash a Police Magistrate's conviction, under sec. 228 of the Criminal Code, for keeping a disorderly house.

The application was dismissed without costs.

*D. D. Grierson*, for the defendant.

*J. R. Cartwright*, K.C., for the Attorney-General.

Kelly, J.

KELLY, J.:—On the argument the chief grounds relied upon by the defendant were: (1) that there was no reasonable evidence on which the conviction could be made; and (2) that the Police Magistrate imposed a penalty in excess of what is authorised by the Criminal Code, and that, after service upon him of the notice of motion to set aside the conviction, which called upon him to make a return of the conviction, information, etc., he amended the conviction by substituting a penalty provided by the Code.

In *R. v. St. Clair*, 3 Can. Cr. Cas. 551, 27 O.A.R. 308, 310, a case very much resembling the present one, Mr. Jus-

ONT.

H. C. J. 1912

REX v. MARCINKO.

Kelly, J.

tice Osler, in delivering the judgment of the Court of Appeal, said: "If there was evidence upon which the magistrate might have convicted, he was the judge of the weight to be attached to it." In that case, as in this, there was no evidence of disorderly conduct except on one single occasion; but there was, as there is in the present case, evidence of the bad reputation of the house. The Court was of opinion that, in the face of such facts, it could not be said that there was no evidence to support the charge.

I think that in the present case there was evidence from which the magistrate might draw the conclusion of guilt, and on which he might have convicted. On that ground, the conviction must be sustained.

Then as to the other ground, that of excessive penalty and the magistrate's amendment of the conviction, the amendment was made so as to bring the penalty within what is authorised by the Criminal Code, namely, the payment of $100 (which includes costs), and, in default of payment, imprisonment for six months.

If the magistrate had the power to make the amendment, the defendant's objection is not well taken; but, assuming that he had not that power, the liberal powers of amendment given by the Code enable the Court to amend in cases such as this; and I, therefore (if it be necessary), now amend the conviction of the accused, Georgina Marcinko, made on the 10th April, 1912, by substituting for the words "two hundred dollars besides costs" the words "one hundred dollars." This $100 includes costs.

The conviction being so amended, I dismiss the defendant's application, but without costs.

*Application dismissed.*

---

SASK.

S. C. 1912

Feb. 10.

## HEINTZMAN & CO. Limited v. RUNDLE.

*Saskatchewan Supreme Court. Trial before Wetmore, C.J. February 10, 1912.*

1. SALE (§ I B—11)—CONSTRUCTION OF CONTRACT FOR SALE—TIME OF DELIVERY—OMISSION FROM ORDER.

Where the time for the delivery of a piano was omitted from an order therefor, it is deliverable within a reasonable time after the date of the order.

2. CONTRACTS (§ I D 4—62)—SUFFICIENCY OF ACCEPTANCE—STIPULATION THAT CONTRACT NOT SUBJECT TO COUNTERMAND.

Where it was stipulated in a written offer to purchase a piano, that the order was not subject to countermand or rescission, and the vendee requested that the piano should be held for him until such time as his rooms should be ready to receive it, the offer is sufficiently accepted so as to create a binding contract which was not subject to countermand, where, after the piano had been held about two months,

the vendor acted upon the offer by requesting the vendee to name a time for delivery, whereupon the vendee did not repudiate but asked the vendor to hold the piano a little longer, should deliver it, stated that he wished it to be held for him a little longer.

[*Ellis* v. *Abell*, 10 A.R. 226, and *Ruess* v. *Picksley*, L.R. 1 Ex. 342, specially referred to.]

ACTION for the price of a piano.

Judgment was given for the plaintiffs.

*C. E. Armstrong*, for the plaintiffs.

*W. F. Dunn*, for the defendant.

WETMORE, C.J.:—On the 27th April, 1910, the defendant ordered from the plaintiffs a D Grand piano which was then lying in the plaintiff's ware-room in Moose Jaw; at the time of the purchase he signed an order, the material part of which is as follows:— Wetmore, C.J.

> *Moose Jaw, April 27th*, 1910. Messrs. Heintzman & Co. Limited, Piano Manufacturers, Toronto, Ont. Please supply me with one of your style *D Grand* pianos and deliver it to me by shipping it addressed to me at R. R. station on or about the day of 19 , for which I agree to pay you in *Regina* the sum of $800, with interest at the rate of eight per cent. per annum payable as follows: *Cash* $200 *when delivered and* $150 *every following three months until paid in full.* If payments are not made when due they shall bear interest at 8 per cent. per annum until paid.

The parts of the order above set out were printed except the portions italicised, which were written by indelible pencil; there were some further provisions following the portion above set out, which were all in print, but they are not material to the matters in question herein, except a clause authorizing the plaintiffs, on any default in payment or other breach of the agreement, to declare the whole price payable and to enter suit for the same and to retake "*possession of the piano so sold* to me" (the defendant), and another clause which is as follows: "I further agree that this order shall not be subject to countermand or revocation."

It will be observed that the blanks in the order left to be filled in with the name of the place to which the piano was to be addressed, and the date on or about which it was to be shipped, were not filled in, and, it seems to me very clearly, for a very obvious reason, namely, because the piano was not to be shipped from any one point to any other point, inasmuch as it was in Moose Jaw when the order was signed.

I hold that no time was mentioned in the order for delivery of the piano; and, therefore, according to such order, it was to be delivered in a reasonable time after the date of the order. The question of the time of delivery was, however, verbally discussed between the plaintiffs' agent, and the defendant; the defendant swore in effect that he gave the order merely by way of obliging

SASK.

S. C.
1912

HEINTZMAN & Co. LIMITED v. RUNDLE.

Wetmore, C.J.

the plaintiffs' agent, Craig, to help his month's business, and make a good shewing to the plaintiffs; and if he (the defendant) wanted to take the piano he could do so some time later, but it was not to be sent to him until he gave the plaintiffs notice to send it; or, in other words, that, at the time of signing the order, it was understood that there was no present intention on the part of the defendant to take the piano at all, but that he might later on make up his mind to do so, and, if he did, he was to notify the plaintiffs' agent. I am unable to accept that version of the transaction.

Craig swore that the matter of delivery was discussed; that the defendant represented that the room in which he proposed putting the piano was not completed, and he might not have it completed for two weeks, or probably longer—it might be four or five weeks; and he (Craig) sold the piano subject to be delivered within that certain time mentioned in which the room would be completed, that is, from two to five weeks.

I find that the arrangement respecting the delivery was as so stated by Craig. The arrangement, however, was at variance with the terms of the written document, whereby, as I have stated, the piano was to be delivered within a reasonable time after the date of the order.

I also find that, at the time the order was signed, it was the intention of the defendant to purchase the piano; and that it was left in the plaintiffs' ware-room to suit the convenience of the defendant, until he got his room ready to place it therein.

I am, under all these circumstances, strongly of the opinion that the document signed was not merely an order for the shipping or delivery of the piano, but constituted an absolute sale of it. However, I will not put my judgment on that ground (I merely suggest it). I find that there was an acceptance of the offer (assuming that the document was merely an offer) by the plaintiffs before it was countermanded.

The plaintiffs held the piano at the disposal of the defendant from the date of the order until about the 1st June then next following. The defendant was then asked by the plaintiffs' agent, Coan, when they could expect him to take delivery of it. That was a point of intimation and notice that the plaintiffs accepted the order and were prepared to make delivery. The defendant did not then repudiate the order or countermand it; on the contrary, he stated that he was not then ready for it, and would be glad if the plaintiffs would hold it a little while longer —a distinct recognition that they were holding it for him. Coan again saw him but a week after that, and asked him practically the same question, when he was told that he was not ready for it.

The defendant was approached by the agent twice after that, but he never countermanded or repudiated the order until about

SASK.

S.C.
1912

HEINTZMAN & Co. LIMITED v. RUNDLE.

Wetmore, C.J.

the 24th September, when the plaintiffs were about to deliver the piano at his rooms. I find the facts as above stated, and that there was an acceptance of the order, of which the defendant had notice, and therefore a binding contract long before the defendant countermanded the order, and it was too late when he attempted to do so.

In *Ellis* v. *Abell*, 10 A.R. 226, at p. 251, Burton, J.A., lays down the following: "Where a proposal is made in writing and accepted in terms by the party to whom it is addressed, whether verbally or *by acting upon* it, it is a written contract." This is supported by *Ecuss* v. *Picksley*, L.R. 1 Ex. 342.

No question was raised as to there being a delivery on the 24th September, when the piano was taken to the building where the defendant had his rooms and left in the hall there. It was admitted that that was sufficient delivery if there was an agreement binding the defendant. I do not feel called upon, therefore, to discuss that question, and it was not disputed that, under the acceleration, the plaintiffs would, if there was a binding contract, be entitled to recover the whole amount of the purchase price. Having reached this conclusion, it is not necessary to consider what would have been the effect of the clause providing that the order should not be subject to countermand or revocation, if the offer had not been accepted by the plaintiffs.

There will be judgment for the plaintiffs for $913.93, with costs.

*Judgment for plaintiffs.*

---

**SCHWARTZ (respondent, plaintiff) v. THE HALIFAX AND SOUTH WESTERN RAILWAY (appellant, defendant).**

N.S.

S.C.
1912

May 10.

*Nova Scotia Supreme Court, Graham, E.J., Russell and Drysdale, JJ. May 10, 1912.*

1. RAILWAYS (§ II D 7—75)—LIABILITY OF RAILWAYS TO REMOVE COMBUSTIBLE MATERIAL FROM RIGHT OF WAY—R.S.N.S. 1900, CH. 91.

It is the duty of a railway, under ch. 91 of R.S.N.S., 1900, to clear from off the sides of its roadway, where it passes through woods, all combustible material, such as grass, ferns, bushes, or other material, by careful burning at a safe time, or otherwise, whenever they become combustible.

2. RAILWAYS (§ II D 7—75) — LIABILITY FOR FIRES — FIRE STARTING ON RIGHT OF WAY—BREACH OF STATUTORY DUTY—R.S.N.S. 1900, CH. 91.

Under ch. 91 of R.S.N.S. 1900, which requires a railway to clear from off the sides of its roadway, where it passes through woods, all combustible material, it is answerable for the value of property adjacent to its roadway that was destroyed by fire which was started on the roadway by sparks from engines, in an accumulation of dried grass, ferns, bushes, and turf.

[*Rainville* v. *The Grand Trunk*, 25 Ont. App. 242, affirmed, *sub nom. The Grand Trunk* v. *Rainville*, 29 Can. S.C.R. 201, specially referred to.]

N. S.

S.C.
1912

SCHWARTZ
v.
HALIFAX
AND SOUTH
WESTERN
RAILWAY.

Statement

MOTION on behalf of the defendant company to set aside findings of the jury and for a new trial in an action brought by plaintiff as administratrix of the estate of Frank Schwartz, deceased, to recover damages for the destruction of plaintiff's dwelling house, barn, etc., by fire alleged to have been caused by sparks from defendant's locomotive igniting an accumulation of inflammable material on defendant's right of way.

The motion was dismissed, Drysdale, J., dissenting.

The cause was tried at Halifax before Meagher, J., with a jury.

By R.S.N.S. (1900), ch. 91, "Of the protection of woods against fires," sec. 9, it is enacted that "Where railways pass through woods the railway company shall clear from off the sides of the roadway combustible material by careful burning at a safe time or otherwise."

The jury found that a fire by which plaintiff's house, barn, etc., were destroyed, originated from sparks from defendant's engine, starting upon defendant's right of way, and that inside such right of way there was an accumulation of dried ferns, grass, etc., which were the cause of the fire and its consequent spreading, and a verdict was given against the defendant railway company for damages.

The findings upon which judgment were entered in favour of plaintiff are set out in full in the judgments of the Court.

Argument

March 21, 1912. *H. Mellish*, K.C., for appellant:—There was no negligence and no violation of the statute. The meaning of the statute is that the dry material should be burned off from time to time and there should have been a further finding on this point. There was nothing on the right of way but the natural growth of grass, bushes, etc. The expression "sides of the road" does not mean that the company must clear off the material to the fences, but only to the ends of the sleepers. The engine was equipped with a spark arrester. There is no evidence that the fire started on the right of way.

*W. F. O'Connor*, K.C., and *W. J. O'Hearn*, for respondent:—The ferns, grass and other material on the track were the growth of the summer before, and it was the duty of defendant to have cleared them off: *David* v. *Britannic Coal Co.*, [1909] 2 K.B. 164. Keeping clear the sides of the roadway means keeping the right of way clear: Abbott's Railway Law 408; MacMurchy & Denison's Railway Law 501; Brown & Theobald on Railways 1124. We rely on the statute and also on the common law: *Grand Trunk Rly. Co.* v. *Rainville*, 29 Can. S.C.R. 201; *Smith* v. *London & S.W. Rly. Co.*, L.R. 6 C.P. 14.

*Mellish*, K.C., replied.

Graham, E.J.

GRAHAM, E.J.:—This is an action for damages caused by a fire set by sparks from the defendant's locomotive igniting com-

bustible materials left upon its roadway, such as dried ferns, grass, bushes and turf. The fire in its course burned down some buildings of the plaintiff adjacent to the road.

These are the findings of the jury:—

1. Q. How did the fire originate? A. From sparks from the defendant's engine.

2. Q. Where did it start? A. It started upon the defendant's right of way.

3. Q. Was it upon the right of way or was it outside of the railway fence, and was it by sparks carried from defendant's engine? A. Yes, it was upon defendant's right of way, inside the fence. It was on the right of way and inside the fence, and was caused by sparks carried from the defendant's engine.

4. Q. What was the condition of the right of way at that place? Answer fully and give details as to its condition? A. Inside the right of way was an accumulation of dried ferns, grass, bushes and turf.

5. Q. If there were combustible material upon the right of way at that time, what effect, if any, had its presence there in causing the spread of the fire? A. The presence of the combustible material at this place and time was the cause of the fire and its consequent spread.

6. Q. What damages were occasioned by the loss of the house? A. One thousand three hundred dollars.

7. Q. By the loss of what was in the house belonging to the deceased? A. Two hundred dollars.

8. Q. By the loss of the barn? A. Three hundred dollars.

9. Q. By the loss of the cooperage? A. One hundred dollars.

10. Q. By the loss of its contents?

11. Q. By the loss of the pig and hen house? A. Fifty dollars.

The negligence relied on is common law negligence and, second, the breach of a provision, R.S.N.S. 1900, ch. 91, "Of the protection of woods against fires."

After provisions imposing requirements on a railway company as to locomotive screens, etc., and the duties of the locomotive drivers, the statute provides, sec. 9:—

> Where railways pass through woods the railway company shall clean from off the sides of the roadway the combustible material by careful burning at a safe time or otherwise.

The fire took place the 23rd of May, 1911, and at this point the railway had not been cleared that spring or since the previous summer, when it had been burned over by a fire which escaped the control of the employee of the company. The generally adopted way appears to be cutting it and then burning it on the spot.

N. S.
S. C.
1912
SCHWARTZ
v.
HALIFAX AND SOUTH WESTERN RAILWAY.
Graham, E.J.

In the summing up, which is not complained of by the defendant, the case was submitted only upon the view of there having been a breach of the statute which I have quoted. The learned Judge explained, of course, to the jury the necessity of regarding only the proximate cause.

The defendant contends that the plaintiff is not entitled to judgment upon these findings; that the statute is not absolute.

In my opinion the plaintiff could only rely upon negligence at common law, about which I say nothing, because it was not submitted to the jury, although I think that there was a case for the jury in view of *Rainville* v. *The Grand Trunk*, 25 Ont. App. 242, affirmed, *sub nom. The Grand Trunk* v. *Rainville*, 29 Can. S.C.R. 201, and other cases which are cited for a passage I shall quote presently, or upon a breach of the statutory provision which I have quoted.

And she must fail on that unless it is absolute, for there is no such word as "negligently" or its implication or any half-way measure in its terms. It is either absolute or nugatory.

Of course statutes of this character have expressions like "keep free from" or "keep clear." But I think that that is the proper meaning of this statute, because any other construction in view of the tenor of the Act would lead to an absurdity, and a construction of that character is to be avoided.

When is the company to clean from the roadway which passes through woods combustible material? I answer, whenever it is there. Not when the company first builds its road, nor when a prudent owner would clear, nor yearly, but whenever these growths of ferns, grass bushes or other material become combustible.

I do not think in practice that this is a hardship. The emission of sparks from a locomotive is, as the learned Judge indicated to the jury, practically a normal condition and unavoidable, and the Legislature may require other safeguards to protect the forests. These growths only become combustible at a certain season of the year, or perhaps at other times in a dry season, and I think it is not unreasonable for the Legislature to require its removal or for the Court to adopt the construction I have indicated.

The clearing off is permitted to be done by careful burning if it is a safe time for using fire in that way, but if it is not a safe time it is to be cleared off otherwise.

I think that the very existence of statutes in other places where the words are to "keep the roadway clear" or "keep it free from," shews that the construction is not unreasonable.

And the common law practically requires that. Of course the question has to be submitted to a jury. It is said in 13 Am. & Eng. Enc. 466:—

"A railroad company is required to keep its track and the land of its right of way adjacent thereto free from combustible

and inflammable substances which are likely to be ignited by sparks from passing engines and to communicate fire from adjacent property." (One case cited I have just mentioned.) "It is impossible to operate a railroad and prevent at all times the escape of fire from the locomotive engines. Prudence, therefore, requires railroad companies to have the property under their control reasonably clear from such material as might serve as a medium for the communication of flames. Then it has been held negligence on the part of a railroad company to permit dry grass and weeds in considerable quantities to accumulate on its right of way, rendering the company liable for starting a fire thereon which was directly communicated to plaintiff's property adjoining."

The findings meet the terms of the statute construed in the manner I have indicated.

On the other question I think that the findings are supported by the evidence. In this view the application should be dismissed. Of course if this view is incorrect the Court has power to grant a new trial to enable the plaintiff to submit to a jury the case of negligence apart from the statute.

Russell, J.

RUSSELL, J.:—The probabilities of the case as they appear to me are that the fire originated outside of the right of way and worked inwards to and upon the right of way. If I had been a juryman I think I should have so found. But the jury has found otherwise and that the fire was caused by sparks from the engine falling upon accumulations of combustible material inside the right of way. I cannot say that this is a verdict that no reasonable jury could come to. There was evidence that the sparks blew down from the smoke stack and there was every possibility that they should ignite the rubbish at the side of the road. If the fire happened in this way I think that the company must be held liable. I incline to think that it would be negligence to leave such accumulations on their property, even if there were no statute. But the statute clearly, in my opinion, requires them to keep the sides of the road free from combustible material within a reasonable distance from the rails, and I should think a fair reading would require them to clean the whole right of way. I have not, however, looked at the authorities on the point. It is enough to say that if the findings of the jury can be supported by the evidence, they present a clear case of negligence, and that there is evidence from which a not unreasonable jury could find as this jury has done.

Drysdale, J.

DRYSDALE, J. (dissenting):—Whether there should be a new trial I think rests solely upon the proper construction of sec. 9 of ch. 91, Revised Statutes of Nova Scotia, "Of the protection of woods against fires."

The section reads as follows: "When railways pass through woods, the railway company shall clear from off the sides of the

N. S.

S. C.

1912

SCHWARTZ v. HALIFAX AND SOUTH WESTERN RAILWAY.

Drysdale, J.

roadway the combustible material by careful burning at a safe time or otherwise."

At the time of the fire in question there was combustible material on the company's right of way, and the question whether it was so there by the negligence of the company was not put to the jury. I take it the verdict entered ought to stand if the section quoted creates and imposes on the company an absolute liability to keep their right of way absolutely clear of combustible material, but if the section is only intended to impose such a duty as would be satisfied by the burning over of such material at certain safe times in the year, then the company's liability would depend on negligence, and without a finding of negligent conduct in having or leaving combustible material on the right of way a verdict could not be sustained against them, considering the nature of the country through which most of the railways in this Province pass. I would not have supposed that the Legislature meant to impose the absolute duty on railway companies of clearing from the right of way all combustible material at all times and of keeping the way absolutely free from such material, and if such an onerous duty were intended I think it ought to be found in clear language in the statute.

If careful burning of such material on the right of way at such times as fires may be safely resorted to, is all that the section means, then the statute could not be considered onerous. But I take it, the whole point in the case is to construe what the Legislature meant when they said the company "shall clear from off the sides or the roadway the combustible material by careful burning at a safe time or otherwise." Would careful burning of the combustible material, such as moss, dry soil, shrubs, plants and bushes, at suitable times, say once or twice a year, be considered a compliance with the intention of the Legislature under this section, and I feel obliged to say that in my opinion it would. Had it been intended to impose a further obligation than this, different language would, I think, have been used, and until the Legislature sees fit to clearly impose such an onerous undertaking on the railways of the Province as the absolute duty of at all times keeping the sides of the roadway through the woods and barren stretches of this Province absolutely clear of combustible material, I am of opinion the position of the railways ought to be considered on the basis of negligence only in respect to the condition of their ways.

Holding this view, and finding that the question of negligence of the company in respect to the condition of its right of way was not submitted to or passed upon by the jury, I think there ought to be a new trial herein.

*Motion dismissed.*

## REX ex rel. HOGAN v. JOLLIVETTE.

ALTA.

S. C.
1912
Feb. 22.

*Alberta Supreme Court, Beck, J. February 22, 1912.*

1. OFFICERS (§ I E 1—45)—RESIGNATION OF MUNICIPAL COUNCILLOR AFTER ELECTION AND PRIOR TO TAKING OFFICE—CONSENT OF COUNCIL.

A person elected to the office of municipal councillor after a poll of votes and not by acclamation may, at any time previous to the beginning of his term of office and before his election is complained of disclaim the office under sec. 77 of the Municipal Ordinance C.O. 1898, ch. 70, without the consent of the council, and such disclaimer has the effect of a resignation.

2. MUNICIPAL CORPORATIONS (§ III—285)—POWER OF MUNICIPAL COUNCIL TO ELECT SUCCESSOR TO MEMBER WHO RESIGNED—MUNICIPAL ORDINANCE C.O. 1898, CH. 70, SEC. 106.

Under sec. 106 of the Municipal Ordinance C.O. 1898, ch. 70, there is an implied right given to a member of a municipal council in Alberta to resign, and this right, apart from a statutory disclaimer, may be exercised even before the member elect has taken full possession of the office for which he was a candidate.

3. ELECTIONS (§ II A—16)—FAILURE TO GIVE STATUTORY NOTICE OF SPECIAL ELECTION TO FILL VACANCY—MUNICIPAL ORDINANCE, 1898, CH. 70, SEC. 21.

Failure to give six full days' notice of a special election to fill a vacancy in the office of municipal councillor, as required by sec. 21 of the Municipal Ordinance, 1898, will vitiate the election held thereunder.

4. OFFICERS (§ I E 1—45)—RESIGNATION BY COUNCILLOR AFTER ELECTION —EFFECT OF FILING DISCLAIMER—MUNICIPAL ORDINANCE 1898, CH. 70, SECS. 77 AND 78.

The filing of an alleged disclaimer of office under sec. 77 of the Municipal Ordinance (N.W.T.) 1898, (Alta.), after the person elected has resigned, is ineffective to vest the office in the person who received the next highest number of votes at the election, as provided by sec. 78 of the ordinance, a disclaimer made at a time when the person was neither an officer *de facto* or *de jure* not being within the purview of section 78.

5. OFFICERS (§ I E 1—45)—RESIGNATION OF COUNCILLOR—DISCLAIMER—MUNICIPAL ORDINANCE N.W.T., 1898, CH. 70.

A resignation from the office of municipal councillor does not operate as a disclaimer under secs. 77 and 78 of the Municipal Ordinance, so as to vest the office in the person who received the next highest number of votes at the election.

Statement

THIS is a proceeding by summons in the nature of a *quo warranto* under secs. 56 *et seq.* of the Municipal Ordinance C.O. 1898, ch. 70, to try the validity of the election of the respondent to the office of councillor of the town of St. Albert.

The respondent holds the office *de facto*. He claims to be entitled to hold it *de jure* on two grounds:—

(1) Because he was elected at a special election held in pursuance of sec. 106, one Piquette, elected at the general municipal elections, having resigned; and

(2) Because at the general election he was "the candidate having the next highest number of votes" (sec. 78) to Piquette.

The motion was granted.

*J. T. J. Collisson*, for relator.

*Frank Ford*, K.C., for respondent.

ALTA.

S. C.
1912

HOGAN
v.
JOLLIVETTE.

Beck, J.

BECK, J.:—A number of more or less intricate questions of construction of provisions of the Municipal Ordinance were argued before me, but I find that it is not necessary to deal with all of them.

Piquette was elected a councillor at the general municipal elections, the voting for which took place on the 11th December. He was at the time of the election a councillor whose term of office expired on the 31st December, 1911. He was then elected for the years 1912 and 1913. The respondent, at the general election, was "the candidate who received the next highest number of votes."

At a meeting of the Council, held on the 15th December, Piquette handed in his resignation as councillor for the remainder of the year 1911 and for the years 1912 and 1913 and at the same meeting was appointed secretary-treasurer of the town, and a returning officer was appointed for the election of a councillor in Piquette's stead.

It was urged on the part of the relator that Piquette, though he might resign his office of councillor for the remainder of that year, 1911, could not do so for the years 1912 and 1913—in other words, that an officer elect cannot resign the office to which he has been elected. The Municipal Ordinance, by implication, gives the right to any member of the council to resign: sec. 106. Acceptance by the council is, possibly, necessary to make the resignation effective, but apparently under sec. 77 a member of the council who has been elected, not by nomination only, but as the result of a poll that is a "contested election," may at any time before his election is complained of, that is, before it has become a "contested election," disclaim his right to the office, with the effect of a resignation, to which the consent of the council is not necessary.

There being, as I have said, a right under the Ordinance to resign, I cannot see any reasonable ground for the contention that resignation can be made only after the member-elect has taken full possession of the office in pursuance of his right. He can equally as well, I think, resign his right to the office before the time has arrived at which actual possession is possible. I think, therefore, that Piquette's resignation was effective and that therefore the council rightly proceeded to a new election in pursuance of sec. 106. Objection is taken to this new election because the Ordinance requires (sec. 21) "at least six days'" notice, and the notices were posted on the 16th December for nomination on the 21st December.

It was said that there was authority to the effect that this provision was directory only and not mandatory and that non-compliance with it, unless it were shewn to have affected the result of the election, should be disregarded.

In Ontario there is a provision in the Municipal Act (sec. 204) to the effect that no election shall be declared invalid by reason of any . . . irregularity if it appears . . . that the election was conducted in accordance with the principles laid down in the Act, and that such . . . irregularity did not affect the result of the election. There is no such provision in our Ordinance, and Mr. Biggar, in his Municipal Manual, in his notes to sec. 204, among "examples of irregularities which would probably invalidate an election"—as I understand him, in face of sec. 204—gives sec. 127, providing for "at least six days' notice" of the meeting for nomination. I have considered a large number of cases, with the result that my conclusion is this. Statutory provisions with respect to time are very often merely directory and not mandatory; for instance, a provision that an election shall be held within a certain time where consequently it would be unreasonable that the office should not be filled though the time limited has been allowed to pass. Again, in the case of a general election, where the day of nomination and the day of polling are fixed by statute, irregularities in or in respect of the notices directed by the statute may be somewhat readily disregarded. But in the case of a special or casual election, where the date for nomination at least is necessarily brought to the knowledge of the public only by the public notice directed by the statute, it seems to me that the statutory provision, so far at least as relates to the length of such notice, must be treated as mandatory though irregularities in other respects may be treated as merely directory, first, because that notice is the foundation of the election, and secondly, because in such a case it would be scarcely possible to say that the result might not have been effected by a notice of less duration than that provided by the statute. See 15 Cyc. 320 *et seq.*; Am. & Eng. Ency. of Law, 2nd ed., vol. X, 624 *et seq.* I think, therefore, the special election of the 21st December, whereat the respondent was elected, was invalid.

Then is the respondent entitled to hold the seat in view of secs. 77 and 78? Sec. 77 says: "Where there has been a contested election the person elected may at any time after the election and before his election complained of, deliver to the secretary-treasurer of the municipality a disclaimer signed by him." Sec. 78 says: "Where a disclaimer has been made in accordance with the preceding sections (sec. 75 provides for disclaimer after the election is complained of) it shall operate as a resignation and the candidate having the next highest number of votes shall become the councillor."

The respondent was the candidate who at the general municipal elections had the next highest number of votes. Piquette delivered a disclaimer to the secretary-treasurer on the 2nd

ALTA.
S. C.
1912
HOGAN
v.
JOLLIVETTE.
Beck, J.

February, i.e., some time after the special election, and still longer after he had, as I have held, validly and effectively resigned.

It seems to me that then—that is, at the time when he was neither *de facto* nor *de jure* a member of the council—he could not act under sec. 77, and that therefore his disclaimer was ineffective.

The question remains, did his resignation of the 15th December have the same effect as a disclaimer, that is, was its effect that the respondent, having the next highest number of votes at the general election, became the councillor?

Sec. 78 says that a disclaimer shall operate as a resignation "and" the candidate having the next highest number of votes shall then become the councillor. Is the force of the word "and" here "and therefore" or "and furthermore"? I think it must be taken in the latter sense. In other words, the natural sense and effect of a simple resignation would not be to give the office to the candidate having the next highest number of votes and therefore this further result is—as it is intended—necessarily added; and a disclaimer has the effect of a resignation plus this further result. A resignation, whether or not acceptance is necessary, can undoubtedly be made at any time during the term of office. On the other hand, in my opinion, this is not so with regard to a disclaimer. There are two cases in which it is provided that a disclaimer can be made. First under sec. 77 before the election is complained of. This, I think, contemplates a terminus—a period of time—within which advantage may be taken of the provision. Complaint against the election can be made (sec. 56) only within six weeks after the election or one month after acceptance of office. The lapse of the later of these two periods is, I think, the ultimate period for the operation of sec. 77. Secondly, under sec. 75 after the election is complained of the limit of one week is fixed. It is reasonable that a disclaimer which can be made only within a short time after the election should have the effect of giving the seat to the candidate having the next highest number of votes. It is not reasonable that a resignation which can be made at any time should have this effect.

I therefore must find that the respondent is not entitled to his seat as a councillor and the usual order will go with costs.

*Judgment for relator.*

## Re HOESSAN RAHIM.

B. C.

C. A.

1912

June 4.

*British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin and Galliher, JJ.A. June 4, 1912.*

1. APPEAL (§ II C—54)—JURISDICTION OF B.C. COURT OF APPEAL—CANCELLATION OF ORDER OF DEPORTATION—R.S.B.C. 1911, CH. 51.

Under sec. 6 of the Court of Appeal Act, R.S.B.C. 1911, ch. 51, providing that an appeal shall lie to the Court of Appeal from all judgments, orders, or decrees made by the Supreme Court or a Judge thereof, no appeal lies to the Court of Appeal of British Columbia from the judgment of a Judge of the Supreme Court of British Columbia cancelling an order of deportation made by the chairman of a Board of Inquiry constituted under sec. 13 of the Immigration Act of Canada, 9-10 Edw. VII. ch. 27.

[*Cox* v. *Hakes*, 15 A.C. 506, followed; *Ikezoya* v. *Canadian Pacific R. Co.*, 12 B.C.R. 454, overruled.]

2. COURTS (§ V B—297)—STARE DECISIS—CONCLUSIVENESS OF JUDGMENT.

The Court of Appeal of British Columbia will not follow decisions as to practice in *habeas corpus* appeals of the former full Supreme Court of British Columbia to whose appellate jurisdiction such Court of Appeal succeeded, if to do so would establish in the Province of British Columbia a practice in conflict with the practice in England and would prejudicially affect the liberty of the subject.

Statement.

AN appeal from the judgment of Morrison, J., cancelling the order of deportation made by the Chairman of the Board of Enquiry against Hoessan Rahim.

The appeal was quashed, Irving, J.A., dissenting.

Messrs. *D. G. Macdonell* and *J. H. MacGill*, for appellant.
*G. E. McCrossan*, for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—In so far as the right of appeal is concerned, there is no distinction between this case and that of *Cox* v. *Hakes* (1890), 15 A.C. 536, unless it is to be found in the difference in the wording of sec. 19 of the English Judicature Act, and sec. 6 of the Court of Appeal Act, R.S.B.C. ch. 51.

Said sec. 19 provides that:—

> The Court of Appeal shall have jurisdiction and power to hear and determine appeals from any judgment or order of the High Court or the Judges thereof.

Section 6 of our Act provides:—

> An appeal shall lie to the Court of Appeal from all judgments, orders or decrees made by the Supreme Court or a Judge thereof.

Certain exceptions are made in both Acts. It was said in *Ikezoya* v. *C.P.R. Co.*, 12 B.C.R. 454, that the English section merely confers jurisdiction to hear and determine appeals, and does not confer rights of appeal except in cases inherently appealable: while ours gives the right of appeal as well as the jurisdiction to hear and determine. But the *ratio decidendi* of *Cox* v. *Hakes*, 15 A.C. 506, does not support this distinction, the considerations which induced their Lordships to hold that the Legislature did not intend to give an appeal against an order discharging the

B. C.

C. A.
1912

RE HOESSAN RAHIM.

Macdonald, C.J.A.

person detained, were that where the person had been set at liberty and hence was out of the control of the Court, the reversal of the order would be futile, because no judicial machinery had been provided for effectuating the order of the appellate Court in such a case if the order appealed from were reversed, and further, that so grave a change in the existing law affecting the liberty of the subject ought not to be inferred from general words, though wide enough to include such a change. Lord Bramwell summed up the former consideration in the following language at p. 527:—

> I think that if an order of discharge is a judgment or order, and so within the very words of sec. 19, a limitation must be put on them excluding such appeals to avoid the futility, inconvenience and incongruity which would otherwise result.

And at p. 543, Lord Herschell said:—

> The jurisdiction of the Courts whose functions are transferred to the High Court to discharge under a writ of *habeas corpus* was well known, and if it had been intended that an appeal should lie against such an order, I think that provision would have been made to enable the Court of Appeal to restore to custody the person erroneously discharged. In the absence of such a power the appeal is futile, and this appears to me to be a sufficient reason for holding that the Legislature did not intend the right to hear and determine appeals to extend to such cases.

Practically the same reasons are given by the majority of their Lordships. This indicates very plainly to my mind that the question whether the words of sec. 19 were wide enough to give a right of appeal where none existed before, or were confined to cases where there was an inherent right of appeal, was not the one troubling their Lordships, but whether, as Lord Herschell put it in the language just quoted, "the Legislature did not intend the right to hear and determine appeals to extend to such cases," that is to say, cases where the detained person had been discharged. In other words, he has left no room for the distinction which was drawn in *Ikezoya* v. *C.P.R. Co.*, 12 B.C.R. 454.

Again, in *Overseers of the Poor of Walsal* v. *London & N.W. Rly.*, 4 A.C., p. 30, sec. 19, was held to give a right of appeal where none existed before, that is to say, where there was no inherent right of appeal; and in *Barnardo* v. *Ford*, [1892] A.C. 326, it was held that an appeal in *habeas corpus* was within the section where the appeal was not from an order discharging the person, but from one granting a writ of *habeas corpus*, although there was no inherent right of appeal. *Ikezoya* v. *C.P.R. Co.*, 12 B.C.R. 454, is also opposed to the unmistakeable finding of the House of Lords in *Cox* v. *Hakes*, 15 A.C. 506, on the impossibility of effectuating the order of an Appeal Court in such a case as the present. The other consideration which influenced the decision is stated by Lord Halsbury at p. 522:—

> But your Lordships are here determining a question which goes very far indeed beyond the merits of any particular case. It is the right of personal freedom in this country which is in debate; and I for one should be very slow to believe, except it was done by express legislation, that the policy of centuries has been suddenly reversed and that the right of personal freedom is no longer to be determined summarily and finally, but is to be subject to the delay and uncertainty of ordinary litigation, so that the final determination upon that question may only be arrived at by the last Court of Appeal.

This "policy of centuries" was respected by the Parliament of Canada when it gave an appeal in *habeas corpus* from an order of remand, but none from an order of discharge: R.S.C. ch. 139, sec. 62.

I have come to the conclusion, which to my mind is irresistible, that the distinction drawn by the full Court is non-existent, and as to give full effect to it in this case would establish here a practice in conflict with the practice in England, and which would prejudicially affect the liberty of the subject, I must, with very great reluctance, decline to be bound by the *Ikezoya* v. *C.P.R. Co.*, 12 B.C.R. 454, case. At the same time I wish to make it plain that I fully recognize that judicial comity which leads one Court to follow the decisions of another of co-ordinate jurisdiction. While the rule is a salutary one, I think it must yield in some cases to considerations which are paramount to it in importance.

The appeal should be quashed.

IRVING, J.A. (dissenting):—This is an appeal from Morrison, J., who cancelled the order of deportation made on the 11th August, 1911, by the Chairman of the Board of Enquiry (Wm. C. Hopkinson) against Hoessan Rahim. Irving, J.A.

The order was made after the Board of Enquiry had sat. In my opinion the fact that this enquiry had been held shews that the matter was not the same as that adjudicated upon by Murphy, J. The point determined by Murphy, J., was that under the new Act a determination by a Board of Enquiry was necessary. He also expressed the opinion that under the old Act the applicant had no right to be admitted to Canada as a "tourist." In my opinion the matter now under consideration is not *res judicata*: see the *Duchess of Kingston's Case*, 2 Sm.L.C., 8th ed., 832.

The statutes are the Immigration Act (1910), 9 and 10 Ed. VII, ch. 27, assented to 4th May, 1910, and 1 and 2 Geo. V, ch. 12.

The point we have to determine is this: Does sub-section 10 of sec. 33 of the Act assented to 4th May, 1910, apply to the case of a man who was permitted to land in Canada on the 14th January, 1910?

The old Act was ch. 93 of Rev. Stats. 1906, amended in 1907, ch. 19, and again in 1908, ch. 30. By the Act of 1908 the Gover-

B. C.
C. A.
1912
RE HOESSAN RAHIM.
Irving, J.A.

nor-General in Council was authorised to prohibit the landing of "any immigrants who have come to Canada otherwise than by a continuous journey from the country of which they are natives or citizens, and upon through tickets purchased in that country.

On the 27th May, 1908, an order was passed under this section, and was in force when the respondent landed in Canada. He being a native of India, although for 18 months a resident of Honolulu, and arriving upon a ticket not purchased in India, was prohibited from landing in Canada.

The officer in charge of the immigration agency in Vancouver undertook to allow the respondent, by a device not at that time sanctioned by statute. He arranged that the respondent should be regarded as a tourist, making only a short stay in Canada.

It is in consequence of that arrangement that the respondent is able to say that he was "lawfully landed" in Canada when he first came to the country. In his affidavit of 29th August, 1911, he says:—

> When I first came to Canada I had no intention of remaining in Canada permanently, but have since acquired business and land investments such as demand my personal attention and presence to look after.

In my opinion, the respondent was only "lawfully landed" in the sense deposed to by the immigration agent. In any other sense the respondent was not "lawfully landed." He was allowed to land on the representation made by himself that he was merely passing through Canada as a tourist; and when that trick (if trick it was) is exposed, or the intention to go on (if such intention there was) is abandoned, the tourist becomes liable to the provisions of the Act. He is still "prohibited" and remains so until his case is dealt with by the proper authorities.

Then on the 4th May, 1910, the Immigration Act, ch. 27, was passed, and on the same day another order in council was passed, under sec. 38 of the new Act, covering the same ground as that made under the authority of the Act of 1908.

The new Act recognised the system of temporary permits and repealed the earlier Acts; and it is argued that under the new Act of 1910 there is no way of dealing with the case of a man who was landed under the Acts repealed.

Sec. 19 of the Interpretation Act prevents such confusion of rights and duties. The repeal of the earlier Acts and the revocation of the regulation of 27th May, 1908, did not affect (*b*) the previous operation of the Act; nor (*c*) the obligation or liability of the respondent under the said regulation; nor (*e*) the legal proceeding or remedy in respect of such liability; and the respondent was therefore liable to be dealt with as if the old Act or regulation had never been repealed.

B. C.

C. A. 1912

RE HOESSAN RAHIM.

Irving, J.A.

But by sub-sec. 10 of sec. 33 a new rule was laid down to the effect that a person:—

> who enters Canada as a tourist or traveller or other non-immigrant, but who ceases to be such and remains in Canada, shall forthwith report such facts to the nearest immigration officer and shall present himself before an officer for examination under this Act, and in default of so doing he shall be liable to a fine of not more than one hundred dollars and shall also be liable to deportation by order of a board of inquiry or officer acting as such.

"Such facts" must mean in the present case "change of intention."

Now, if the respondent had wished to avail himself of this privilege (and in my opinion it was his duty to do so if he wished to remain) the statute would be read as having a retrospective effect so as to confer on him and those who had been admitted by the immigration agents prior to the passing of the Act as tourists, an opportunity of being "lawfully landed" in the fullest sense of the words. The extraneous circumstances as well as the words of the Act, shew that sub-sec. 10 applies to the respondent's case. I would allow the appeal.

As to the jurisdiction of this Court to hear an appeal from an order of discharge, I would refer to the reasons for judgment of Hunter, C.J., in *Ikezoya* v. *C.P.R. Co.* (1907), 12 B.C.R. 456, That being a judgment of the old full Court as to its jurisdiction, should, in my opinion, be followed.

MARTIN and GALLIHER, JJ.A., concurred in the judgment of Macdonald, C.J.A.

Martin, J.A.

Galliher, J.A.

*Appeal quashed,* IRVING, J.A., *dissenting.*

---

## FALLIS v. DALTHASER.

ALTA.

S. C. 1912

April 23.

*Alberta Supreme Court, Beck, J. April 23, 1912.*

1. SUNDAY (§ IV—26)—VALIDITY OF CONTRACT EXECUTED ON SUNDAY—LORD'S DAY ACT, R.S.C. 1906, CH. 153, SEC. 16.

A contract executed on the Lord's Day giving an option for the purchase of land, is void under sec. 3 of ch. 91 of C.O. (N.W.T.) 1898, as preserved by the Lord's Day Act, R.S.C. 1906, ch. 153, sec. 16, which declares void all contracts or agreements for the sale or purchase of real or personal property made on that day.

2. CONSTITUTIONAL LAW (§ I G—140)—POWER OF TERRITORY TO PASS ORDINANCE RESTRICTING CONTRACTS ON SUNDAY—N.W.T. CON. ORD. 1898, CH. 91, SEC. 3.

C.O. (N.W.T.) 1898, ch. 91, sec. 3, which declares void all sales and purchases as well as contracts and agreements for the sale or purchase of real or personal property when made on the Lord's Day, was *intra vires* of the legislature of the Northwest Territory, and its adoption in Alberta is *intra vires* of the legislature of Alberta.

ALTA.

S. C.
1912

FALLIS
v.
DALTHASER.

3. LAND TITLES (§ IV—40)—CAVEATS—REGISTRATION IN RESPECT OF A VOID CONTRACT—VACATION OF THE REGISTRATION.

A caveat registered in respect of an option for the purchase of land which was executed on the Lord's Day, contrary to C.O. (N.W.T.) 1898, ch. 91, sec. 3, as preserved by the Lord's Day Act, R.S.C. 1906, ch. 153, sec. 16, may be vacated and set aside.

4. COSTS (§ I—19c)—APPLICATION BY VENDOR TO REMOVE CAVEAT—"MALUM PROHIBITUM"—CONDITION OF GRANTING.

Since a contract executed by the plaintiff giving the defendant an option to purchase land, although void under C.O. (N.W.T.) 1898, ch. 91, sec. 3, as preserved by the Lord's Day Act, R.S.C. 1906, ch. 153, sec. 16, because made on the Lord's Day, is not *malum in se* but is *malum prohibitum* only, a caveat filed thereon by the defendant will be vacated upon the application of the plaintiff upon condition that the latter pay the costs of the application.

Statement

APPLICATION by plaintiff to vacate the registration of a caveat in respect of an option given by plaintiff to defendant for the purchase of certain lands.

The application was granted upon terms of his paying the costs of the motion.

*James Muir*, K.C., for plaintiff.

*J. J. Mahaffy*, for defendant.

Beck, J.

BECK, J.:—The defendant registered a caveat founded upon an instrument whereby the plaintiff gave the defendant the option to purchase certain land, on certain terms. The defendant paid, as is expressed, $50 as consideration for the option. The option is expressed to be open for acceptance till the 15th May next.

The plaintiff alleges in his affidavit on which the summons was granted, and it is admitted to be a fact, that the instrument was made and executed on a Sunday. On this ground, the plaintiff contends that the instrument is void, and the caveat based upon it should be discharged.

C. O. (N.W.T.) 1898 ch. 91, intituled "An Ordinance to prevent the profanation of the Lord's Day," sec. 3, enacts that

> All sales and purchases and all contracts and agreements for sale or purchase of any real or personal property whatsoever, made by any person or persons on the Lord's Day, shall be utterly null and void.

I think this section of the Ordinance was *intra vires* of the legislature of the North-West Territories, and is *intra vires* of the legislature of Alberta, and that its effect is preserved by the Lord's Day Act, R.S.C. 1906, ch. 153, sec. 16, and that, therefore, sec. 5 of that Act does not come up for consideration.

I am of opinion that an option is an unilateral contract, that is, a contract or agreement for sale; and therefore, falls within the terms of the section which I have quoted from the Ordinance. I must, accordingly, hold the option in question void, and as affording no foundation for the caveat.

ALTA.

S. C.
1912

FALLIS
v.
DALTHASER.

Beck, J.

I think I should not act on the suggestion that the Court in such a case should do nothing, leaving the parties in the position into which their illegal act—in which they both concurred—has led them; but that I should discharge the caveat.

I think, however, that the contract, though illegal, not being *malum in se*, but only *malum prohibitum*, and being the contract of the plaintiff only—though the defendant assented to it and seeks to benefit by it—I should visit the plaintiff's repudiation of it by ordering him to pay the costs of this application, and making the payment of them a condition of the discharge of the caveat.

*Caveat vacated on terms.*

---

**SCHULTZ** (plaintiff) v. **FABER & CO. and F. W. FAIRBAIRN** (defendants).

ALTA.

S. C.
1912

April 16.

*Alberta Supreme Court. Trial before Stuart, J. April 16, 1912.*

1. CONTRACTS (§ IV D—362)—CONDITION PRECEDENT TO RECOVERY—INSPECTOR'S CERTIFICATE—GOOD FAITH—FINALITY.

A certificate of an inspector that the plowing and improving of land by the plaintiff had been done to the satisfaction of the former, as was required by the terms of the contract, is a condition precedent to the right of the plaintiff to recover for doing such work, and, where such inspector acts honestly and in good faith, his decision that the work was not performed in accordance with the contract, is final and cannot be questioned in the Courts.

[*McRae* v. *Marshall*, 19 Can. S.C.R. 10, applied.]

2. ESTOPPEL (§ III K—143)—WAIVER OF CONDITION—RECEIVING PAYMENT ON ACCOUNT AS WORK PROGRESSES—CONDITIONAL APPROVAL OF INSPECTOR.

A condition in a contract for the plowing and improving of land that it should be plowed to a certain depth, is not waived by the payment of money on the contract during the performance of the work where the inspector, whose decision, by the terms of the contract, was final, had approved of such payment only upon the understanding that portions of the land should be replowed to the required depth.

3. COSTS (§ I—10)—DISCRETION OF COURT IN GIVING OR REFUSING.

Upon holding that the plaintiff who plowed and improved land under a contract which required it to be plowed to a certain depth, was not entitled to compensation, since the inspector, whose decision was, by the terms of the contract, to be final, refused to approve of the work, the Court may exercise its discretion in refusing to award costs to the successful defendant where it appears that, notwithstanding the defective manner of carrying out the contract, the defendant would be able to raise a fair crop of the class for which the work was done.

Statement

ACTION for work done in breaking up and improving land under a contract made by the defendants Faber & Co. as agents for their co-defendant Fairbairn.

The action was dismissed as against defendants Faber & Co. with costs and as against the defendant Fairbairn without costs.

*E. F. Ryan*, for plaintiff.

*J. B. Roberts*, for defendants.

ALTA.

S.C.
1912

SCHULTZ
v.
FABER & CO.

Stuart, J.

STUART, J.:—The plaintiff, on the 28th June, 1911, entered into a contract with the defendant Fairbairn, through his agents, the defendants Faber & Co., which was in the following terms:—

Land Development Contract.

June 28, 1911.

To Faber & Company, Calgary, Alta., Agents for F. W. Fairbairn.

I hereby offer to plough, pack, disc and drag four hundred and eighty (480) acres situate upon the south half of section 20 and north-east quarter of section 17, all in township 26, range 27, west of the fourth meridian, to an average depth of not less than three (3) inches. My charge for the said work is to be at the rate of $3.50 per acre for ploughing; 50 cents per acre for packing; 50 cents per acre for discing; and 35 cents per acre for dragging. The said work to be fully and satisfactorily completed on or before the 15th day of August, 1911.

Before payment is made for the said work, the said ploughing, packing, discing and dragging shall be passed upon by an inspector, duly authorized by Faber & Co., upon whose certificate of approval, duly signed, payment will be made for all work so completed, on the basis of terms and prices above mentioned.

It is fully understood that Faber & Co., will honour no orders against the said work, or any assignment of payment, therefor, and will not make payment to any party other than the contractor.

This was signed by the plaintiff, and below was written:

The above offer is hereby accepted, and N. C. Hendricks, of Calgary, is hereby named inspector, to whose satisfaction and approval the said work is to be done.

Dated June 28th, 1911. Faber & Company, agents for F. W. Fairbairn, per E. S. Frost.

The plaintiff did not perform any part of the contract himself, but employed a number of other persons to carry it out. These persons he paid the same amount as he was to get himself, except in the case of the dragging, for which he paid 25 cents an acre instead of the 35 cents which he was to get himself. This difference of 10 cents in the dragging constituted the only benefit the plaintiff expected to get from the contract. The men employed by him proceeded to perform the work, and they and the plaintiff apparently thought the work was completed by the time specified. It does not appear that the plaintiff knew when he signed the contract that Faber & Co. were going to appoint Hendricks as inspector. In his evidence he stated that the name of Hendricks had not been filled in the contract when he, the plaintiff, signed it, and he was at that time unaware who would be selected.

Some time about the middle of July, the plaintiff desired to get a payment on account, and the defendants Faber & Co. sent Hendricks out to the land, apparently to see if it would be safe to pay the plaintiff. Hendricks went out and examined the

land, although he didn't speak to the men who were working at it. He states that he examined the depth of the ploughing at the time in three or four different places, and concluded that it was not more than two and a half inches deep. He stated also that he told Faber & Co. never to let a contract for such shallow breaking as that was.

It does not very clearly appear whether Hendricks knew at that time the exact conditions of the contract, although one would imagine that he would ascertain these before proceeding to make any inspection. However, as a result of his visit, Faber & Co. did pay the plaintiff $500 on account of the contract on behalf of the defendant Fairbairn, their principal. Later on, Hendricks made two visits in company with the plaintiff (Schultz) to the land in question, in order to ascertain whether it had been ploughed, packed, diseed, and dragged in accordance with the contract.

Schultz says that on this occasion the weather was very bad; that it was raining very hard. He also says that Hendricks did not make any complaint then as to the depth of the ploughing, but referred to some portions which were omitted around some ditches and at the ends of some of the lands; and also that he objected to some patches which had been apparently skipped by the ploughs. Schultz also says that Hendricks told him to fix these pieces up; and that, if they were finished, he would pass the work. Hendricks's account of this interview does not quite agree with that given by Schultz. He says that he told Schultz that it was not a good job, and that Schultz agreed with him, but stated that it could be fixed up. Hendricks also says that he promised Schultz that, if he, Schultz, could possibly fix it up in some way so that he, Hendricks, could reasonably report favourably on it, he would do so. At any rate Schultz got his men to do some additional work in the places where the ploughing had not been done; but, after a second visit by Hendricks, the latter decided that he could not pass the work, and so reported to the defendant.

There was a great deal of evidence given as to whether the land had really been ploughed to an average depth of three inches, as provided by the contract. If I were free to make a finding of fact on this point myself, I think I should come to the conclusion that it was ploughed to an average depth of three inches, notwithstanding the fact that Hendricks was of a different opinion. I was not very well satisfied with the carefulness of the examination made by Hendricks or any of the witnesses for the defence in order to ascertain the exact depth to which the ploughing had been done.

Upon the whole, I should be disposed to accept the other view, namely, that the ploughing was done to an average depth of three inches, except, of course, in a few spots, not exceeding

ALTA.
S. C.
1912
SCHULTZ
v.
FABER & CO.
Stuart, J.

at the most two acres in all, where the ploughs had been thrown out of the ground by stones. I should also accept the evidence of the workmen that the land had been packed, disced, and dragged. Unfortunately, however, it seems to me that the law is absolutely against the plaintiff in this case.

It is clear from the authorities that the certificate of Hendricks as to the performance of the work in accordance with the contract in a satisfactory manner was a condition precedent to the obligation to pay. It is not suggested in the pleadings and was not suggested at the trial that Hendricks was in collusion with the defendants in any way, that he was in any way interested in the matter, or that he acted otherwise than in perfect good faith in refusing the certificate.

It is quite clear that he honestly and fairly came to the conclusion that the average depth did not reach three inches; and, although I would conclude otherwise from the evidence of all the witnesses, himself included, yet he was the person or inspector to whom the defendants referred the matter for decision; another agreement of the defendant gave them the plain right to do this. In such a case, his decision is final, and I am unable to override it. The authorities against the plaintiff are too numerous to need any specific reference; and, really, the only question which was argued by the plaintiff's counsel was the question of waiver.

It was suggested that the payment of $500 constituted a waiver of the necessity for a certificate by Hendricks. Unfortunately the authorities are against the plaintiff on this ground too. At one time I thought possibly the direction by Hendricks to the plaintiff to complete the work in the places where it had not been done at all would constitute a waiver, but I am unable to see how that action of Hendricks can be taken as a ground of waiver by the plaintiff.

This is just one of those cases in which the words of Chief Justice Cockburn in *Stadhard* v. *Lee*, 3 B. & S. 364, quoted with approval by Chief Justice Ritchie in *McRae* v. *Marshall*, 19 Can. S.C.R. 10, at p. 14, are very applicable:—

> But we are equally clear that where, from the whole tenor of the agreement, it appears that, however unreasonable and oppressive a stipulation or condition may be, the one party intended to insist upon and the other to submit to it, a Court of justice cannot do otherwise than give full effect to the terms which have been agreed upon between the parties. It frequently happens, in the competition which notoriously exists in the various departments of business, that persons anxious to obtain contracts submit to terms which, when they came to be enforced, appear harsh and oppressive. From the stringency of such terms, escape is often sought by endeavouring to read the agreement otherwise than according to its plain meaning. But the duty of a Court, in such cases, is to ascertain and give effect

ALTA.
S. C.
1912
SCHULTZ
v.
FABER & CO.
Stuart, J.

to the intention of both parties as evidenced by the agreement; and though, where the language of the contract will admit of it, it should be presumed that the parties meant only what was reasonable; yet, if the terms are clear and unambiguous, the Court is bound to give effect to them without stopping to consider how far they may be reasonable or not.

These words, I think, should be borne in mind a little oftener than they are. The action will be dismissed; but, in view of the fact that the weight of evidence shews clearly that a fairly good crop of flax can be grown this year, which was indeed admitted by most of the defendants' own witnesses, and which was the purpose for which the land was being prepared, I think there should be no costs, in so far as the defendant Fairbairn is concerned.

There was, of course, no possible ground for a claim against Faber & Co. in any case. The plaintiff clearly knew that they were acting only as agents for Fairbairn, and the contract which he signed states so specifically. Faber & Co. must, therefore, get their costs against the plaintiff.

*Action dismissed.*

---

**FRIEDENBERG et al. v. BAILEY and the BANK OF MONTREAL (mis-en-cause).**

QUE.
S. C.
1912
April 10.

*Quebec Superior Court, Charbonneau, J. April 10, 1912.*

1. ATTACHMENT (§ I A—5)—PROMISSORY NOTES—EXCESSIVE INTEREST—MONEY LENDERS' ACT, R.S.C. 1906, CH. 122.

Promissory notes cannot be seized, by attachment, before maturity and placed in judicial control in order to deduct therefrom interest taken in excess of that provided by the Money Lenders' Act, R.S.C. 1906, ch. 122, where the insolvency of the holder of the notes is not alleged in the affidavit for the writ, nor in the declaration, so as to shew that it will be impossible to reclaim such overcharge from him in an action on the notes.

PETITION to quash an attachment of certain promissory notes. Statement

The petition was granted.

*J. N. Decarie*, for plaintiff; *N. K. Laflamme*, K.C., counsel. *Margolese, Whelan & Tritt*, for defendant.

CHARBONNEAU, J.:—The Court, having heard the parties upon petition to quash the seizure effected in the hands of *mis-en-cause* issued on the demand of plaintiff to put under judicial custody certain notes described in the declaration for the purpose of reducing thereon the amount that may be due to the defendant as holder of said notes, these notes having been discounted by the defendant at a rate of interest exceeding that allowed by the Money Lenders Act:— Charbonneau, J.

QUE.
S. C.
1912
FRIEDENBERG v. BAILEY.
Charbonneau, J.

Considering that it is not alleged either in the affidavit or in the declaration that the defendant is insolvent and that it would be impossible to reclaim from him these overcharges;

Considering that the plaintiff does not shew that he is entitled or needs to have said notes placed under judicial custody in order to assure the exercise of his rights over them;

Considering that according to the Money Lenders Act the only right conferred upon the plaintiff by articles 7 and 8 of ch. 122 Revised Statutes of Canada (1906) is to be relieved from the obligation of paying any sum in excess of 12 per cent. per annum if sued by the money lender who discounted the notes or his *prête-nom*, and the right to reclaim from said money lender any amount unduly paid if sued by a *bonâ fide* holder;

Considering that if a third right of action may be inferred by interpretation from the two above mentioned rights, that is to say the right to have the amount due to the money lender on said notes reduced even before the maturity thereof, there was no necessity of having recourse to the conservatory attachment for that purpose;

Considering that those different rights are only rights of action or exception, and that they constitute a remedy equally convenient, beneficial and effectual as the conservatory attachment unless there would be proof of allegations of the defendant's immediate insolvency;

Considering that the present seizure might prevent the defendant from negotiating or transferring said notes, an absolute right of which he cannot be deprived:—

Grants said petition and quashes the writ of conservatory attachment with costs against plaintiff.

*Attachment quashed.*

---

QUE.
C. R.
1912
Jan. 19.

## ROSENBLOOM v. SUTHERLAND.

*Quebec Court of Review, Sir Melbourne M. Tait, Chief Justice, Tellier and Dunlop, JJ. January 19, 1912.*

1. EASEMENTS (§ III—31)—EXTENT OF RIGHT—PARTITION DEED—RIGHT TO RECEIVE AIR, AND THE RIGHT OF VIEW—C.C. (QUE.) ARTS. 534 AND 535.

The right to use windows in the rear wall of a house, being a servitude over the adjoining property created by a deed of partition, includes the right of view and the right to receive air, and is not limited to the right to receive light. (Arts. 534 and 535 C.C.)

2. EASEMENTS (§ III—30)—RIGHTS AND LIABILITIES OF SERVIENT TENEMENT—ERECTIONS—C.C. (QUE.) ARTS. 536, 537.

The owner of the servient land must not erect any building or structure to interfere, within the distances specified in arts. 536 and 537 C.C., with a right of light, air, and view incident to the right to the use of windows created by a partition deed as a servitude over adjoining property.

THE judgment inscribed for review, and which is confirmed, was rendered by the Superior Court, Guerin, J., on April 28, 1911.

*McAvoy, Handfield & Handfield,* for the plaintiff.
*Bisaillon & Brossard,* for the defendant.

Montreal, January 19, 1912. The opinion of the Court of Review was delivered by

Tellier, J.

TELLIER, J.:—This is a case of a confessory action for a servitude which the plaintiff claims upon the lands of the defendant. The plaintiff, who is owner of cadastral lot 790 of St. Lawrence Ward, Montreal, alleges that under his titles he has the right to make use of and to extend a gallery built behind his house as well as the right of passing through the defendant's yard behind the house and using the windows in the house which look upon the court.

He complains that the defendant, who is the owner of the adjoining property to the east and south, namely, lot 791, which is burdened with the servitudes mentioned above, has built a fence which darkens the plaintiff's property and prevents him from exercising his right of view; that he has also had a door closed by which the plaintiff used to exercise his right of passage and has wrongfully built a fence behind the plaintiff's property (the dominant land), nailing it to the balcony and thus preventing the plaintiff from exercising the right of using the balcony; that he has also built a small shed on the space reserved for the right of passage; that upon the defendant's property there is a waste water pipe which has broken several feet above the ground and which pours the water from the defendant's house upon the wall of the plaintiff's house; that these waters keep the wall damp and penetrate into the house itself and that the plaintiff suffers for this reason damages to the amount of $500 which are also claimed by the action.

The defendant while recognizing the plaintiff's right to use the windows behind the property, has contested all the other allegations.

The judgment condemns the defendant to leave an unobstructed space of six feet clear in the yard along the plaintiff's house and consequently to remove the boards fastened to the fence within six feet; condemns the defendant to leave a free space of two feet in an easterly direction opposite the lower floor of the plaintiff's house and consequently to remove the partition built by him within these two feet; declares that these works must be executed within a delay of fifteen days from service and that in the event of the defendant failing to comply with the judgment within fifteen days the plaintiff will be authorized to have the works done at the defendant's expense

QUE.
C. R.
1912
ROSENBLOOM
v.
SUTHERLAND.
Tellier, J.

and cost reserving to the plaintiff the right to have the cost fixed by this Court if necessary; and condemns the defendant to pay the plaintiff a sum of $20 damages with interest from the date of judgment and the costs of the action as brought.

Upon the inscription in review, we need only concern ourselves with the question of the right of view, since all the other pretensions of the plaintiff were rejected by the judgment. By his plea the defendant recognizes that the plaintiff has the right to use the windows behind his property and this permits a servitude of a direct view for six feet and of an oblique view for two feet.

The defendant pretends that the plaintiff's only right under the circumstances is a right to receive light. And he cites Demolombe to establish that the right which belongs to the plaintiff of maintaining windows behind his house is purely and simply a right to receive light.

I think the defendant is mistaken on this point. In this case we must distinguish simple lights from rights of view. Lights are openings for the single purpose of lighting a building and they are not for the purpose of providing a means of looking out. They allow the light from the sky or daylight to enter but not a view or even the exterior air. Prospect lights are openings or windows made in such a way as to let the outside air enter and to allow a direct view (*regard pénétratif*) upon the property of another, as is said by the Custom of Orleans. This is a very ancient distinction and it results from the very nature of things. It must be admitted that our Code has not stated it very precisely, for sec. 2 of chapter 2 of title 4 of the second book of our Code comprises under the heading "Of view on the property of a neighbour" simple lights and views and articles 534 and 535 seem to use the words "light" and "windows," indifferently, as being synonymous; but at most this is only a confusion of terms which one meets with often enough in practice. At bottom the articles establish very clearly the difference between the two kinds of openings which have always been called by the different names of "light" and "view." Views themselves are divided into two kinds; views from direct windows and views from oblique windows. Those which are made in a wall parallel to the line separating the two properties are called direct views or prospect windows; those in a wall which is perpendicular to this line forming a right-angle or almost a right-angle to it are called oblique or side views. It is according to these different distinctions that our Code regulates the exercise of the right of opening lights or views upon neighbouring properties. In order to understand the provisions of our Code on this point it is necessary to distinguish between three kinds of walls: walls which are placed on the

line separating two properties; secondly, those which without being placed on the separation line are not at a distance required by articles 536 and 537 from the neighbouring property to allow for direct or oblique views; thirdly, walls which are placed at the distance required by these articles.

When a wall is placed on the line separating two properties it is necessary to distinguish whether it is common or whether it belongs exclusively to him who wishes to make openings in it. The case where a wall on the separation line between the property belonging entirely to one of the neighbours is governed by articles 534 and 535 of our Code which provides as follows:—

> 534. The proprietor of a wall which is not common adjoining the land of another may make in such wall lights or windows with iron gratings and fixed glass, that is to say, such windows must be provided with an iron trellis the bars of which are not more than four inches apart, and a window sash fastened with plaster or otherwise in such a way that it must remain closed.
>
> 535. Such windows or lights cannot be placed lower than nine feet above the floor or ground of the room it is intended to light, if it be on the ground floor; nor lower than seven feet from the floor, if in the upper stories.

So much for simple lights. On the one hand it would have been impossible without great inconvenience to absolutely prohibit a person from making any opening in a wall which belonged to him exclusively and deprive him also of the means of obtaining light for illuminating a room or a staircase which is often very useful; on the other hand, it is not right that openings giving directly on the neighbour's property should compromise his safety or tranquillity, allow anybody to enter his property, or to throw dirt or rubbish upon it, or to look upon it with curiosity or indiscretion. It was necessary to make allowance for each of these considerations and to reconcile the interests of the two neighbours in an equitable manner; and this is in fact the end sought by articles 534 and 535 which I have just cited.

The present case relates to a servitude created by deed. All that I have just said refers to rights which a person may exercise over a neighbouring property under the law; but when there is a title it is the title which must be consulted to determine what the rights are. Now, in the present case the plaintiff's rights flow from a deed of partition which took place between William Boyd and Thomas Boyd, two brothers, in 1853. By this partition there fell to Thomas Boyd a brick house of one storey and a half, comprising three dwellings. He is the owner of the wall behind this house which touches the land which fell to William Boyd by the deed of partition of 1853. In this deed of partition it is formally provided that Thomas Boyd who received the three storey brick house in the partition should have

QUE.
C. R.
1912
ROSENBLOOM
v.
SUTHERLAND.
Tellier, J.

the right to keep the windows in the same state as they were, and that he should have the right to maintain his balcony which overhung the land which fell to William Boyd by the deed of partition. He even had the right to extend the balcony to reach the privies which were a little further off.

As this right was granted to him, what is his position?

The defendant says they were only lights. No, they are windows which you must suffer and you must suffer them in such a way that the plaintiff can make use of them and allow them to fulfil their purpose. Now these windows constituted a direct and even an oblique right of view, as regards one part, over the land which remained the property of William Boyd and which now belongs to the defendant in this case, Mr. Sutherland. The question is whether under these circumstances the defendant by building a fence at six feet ten inches from the rear wall of the plaintiff's brick house, has violated the law.

The judgment declares that he was entitled to build this fence; only the fence was built at an unnecessary height, the fence is fifteen feet high and the window in question which the plaintiff wishes to have protected is on the ground floor of the house only a few feet from the ground. The fence which is fifteen feet high is six feet ten inches from the exterior wall of the plaintiff's house and a rack has been added to the fence and on the rack is nailed a sloping board which extends underneath the gallery of the plaintiff's house. So that this board is within the six feet and the judgment condemns the defendant to remove it.

On the other hand, immediately beside the window which the plaintiff has the right to keep under his title, a right which the defendant himself recognizes, the defendant has built quite near the window, but to one side, another fence. This fence the judgment orders him to demolish.

The defendant complains of this judgment as he only considers that the plaintiff is entitled to lights and as the windows are still in exactly the same position, he considers he has not violated the servitude belonging to the plaintiff.

It is not a light, but a window and the plaintiff is entitled to open it to receive air and especially to view and he has the right to view for a distance of six feet from the wall of the house. As the defendant has encroached upon these six feet he was rightly condemned to demolish the additions he made, the addition made to the fence as well as the fence placed at less than two feet from the window.

The defendant says "the plaintiff does not complain of that, the plaintiff complains purely and simply of the board which is

attached to the fence because that prevents him from making full use of his balcony." No, there is a general allegation:—You have erected this fence to injure my light and it darkens my property. That is the allegation. Then we have the other allegation to shew that you, the defendant, have even committed the act of nailing your fence to the balcony itself.

The plaintiff has succeeded and he has succeeded upon the right of view and the Court is of opinion to confirm this judgment with costs.

*Appeal dismissed.*

---

## REX v. JAMES.



*British Columbia Supreme Court. Trial before Hunter, C.J.B.C., at the Vernon Spring Assizes. May 27, 1912.*

1. EVIDENCE (§ VIII—671*b*)—TESTIMONY AT A PRELIMINARY ENQUIRY FOR DIFFERENT OFFENCE—ADMISSIBILITY ON TRIAL.

   A statement made voluntarily by a person upon a preliminary enquiry on an offence with which he was charged, and in which he gave an account of a shooting connected with the charge then being inquired into and admitted firing the shot, will be admitted in evidence upon a charge of murder laid against him after the death of the person injured by the shooting although such death occurred subsequent to the preliminary enquiry upon which the admission was made.

2. EVIDENCE (§ VIII—671*b*)—ADMISSIONS AFTER STATUTORY CAUTION—PRELIMINARY ENQUIRY—ESCAPE FROM CUSTODY—MURDER.

   A statement made by the prisoner after the statutory caution upon a preliminary enquiry being held upon a charge of escape from custody will, if relevant, be admitted in evidence against him upon a subsequent trial for murder.

3. EVIDENCE (§ X C—696)—ADMISSIBILITY OF VOLUNTARY STATEMENTS MADE AGAINST SELF-INTEREST.

   Any statement of the accused made against self-interest is admissible if made voluntarily.

Statement

TRIAL for murder at the Vernon Assizes. The accused had been brought up for preliminary hearing on a charge of escape, and at the hearing, after the usual statutory caution had been given, gave an account of the homicide, in which he admitted firing the shot from the effects of which the injured person had died, after the statement was made.

*R. H. Rogers*, for the prisoner, objected to the admission of the statement.

*Burns*, for the Crown, *contra*.

Hunter C.J.

HUNTER, C.J.:—Any statement made against self-interest, if voluntary, whether written or oral, sworn or unsworn, is admissible. Here there is the additional safeguard that it was made in open Court, after a caution by the magistrate. The statement is admissible.

*Verdict, guilty of murder.*

B. C.

S. C.
1912

Feb. 26.

## LAURSEN v. McKINNON.

*British Columbia Supreme Court. Trial before Gregory, J. February 26, 1912.*

1. TRESPASS (§ I A—5)—WHAT CONSTITUTES—REMOVAL OF TIMBER FROM TIMBER LIMIT—WILFUL AND DELIBERATE.

One who cuts and removes timber from the timber limits of another with knowledge of the latter's rights, is answerable for a wilful and deliberate trespass.

2. TIMBER (§ I—1)—LICENSE TO CUT—APPLICATION FOR—ACCURACY OF DESCRIPTION.

One who makes application for a license to cut timber from a timber limit before it has been surveyed, is not required, in his application, to describe with mathematical accuracy the land he proposes to take up.

3. TRESPASS (§ I B—10)—TIMBER LICENSE—LAND LAID DOWN IN SURVEY PREPARED BY APPLICANT AND ACCEPTED BY CROWN.

The acceptance by the Crown of a survey of land made by an applicant for a timber limit license and the noting on the official map that such land belongs to the applicant, and the issuance to him of such license, creates a right in the land which he may defend against trespassers.

4. DAMAGES (§ III K 2—216)—MEASURE OF COMPENSATION—WILFUL AND DELIBERATE TRESPASS—CUTTING AND REMOVING TIMBER.

The measure of damages for a wilful and deliberate trespass in cutting and removing timber from the timber limits of another, where the evidence does not warrant the application of any other rule, is the value of the timber after it was severed and manufactured while on the plaintiff's land.

[*Union Bank of Canada* v. *Rideau Lumber Co.*, 4 O.L.R. 721, specially referred to.]

Statement

ACTION in trespass in cutting and removing timber from the plaintiff's timber limits.

Judgment was given for the plaintiff.

*E. P. Davis*, K.C., for plaintiff.

*W. B. A. Ritchie*, K.C., for defendant.

Gregory, J.

GREGORY, J.:—The defendant was the only witness called on his behalf. He did not attempt to deny that he had cut upon the land lying to the south of his own claim, lot 111; but he swore positively that no timber had been cut west of his westerly side line or a prolongation of it in a southerly direction; and I cannot accept his statement in the face of the satisfactory evidence of King and Maloney. His evidence was, in fact, very unsatisfactory, and I am unable to place any reliance upon it.

When asked to explain a contradiction in one important particular between his answers given on discovery and his answers given on the witness-stand, he denied having made the statements attributed to him in the discovery. The discovery was such as to leave no room, I think, for misunderstanding.

I find as a matter of fact, that there was a trespass upon the plaintiff's limits plotted on the official map as lot 353 (exhibit No. 9), and also on that portion of his limits lying immediately to the west of lot 111, and which, it is not disputed, belong to

the plaintiff; also on the land lying immediately to the west of the prolongation of the westerly boundary of lot 111. The defendant admits having cut upon that portion of the lands claimed by the plaintiff, bounded by the lines and letters F E C D on exhibit 1; but attempts to justify by saying that the same are not included in the area described in the plaintiff's license—that they were vacant Crown lands, and, if he had not cut them, the timber thereon would have been wasted.

Strangely enough, he never reported his cutting to the Crown lands office. As to a portion of it, he also attempted to justify by shewing that it was necessary to do so in order to get access to the sea from lot 111; but that contention was very weakly put forward—was not proved—and King swore that the little piece of road running through the north-easterly corner of it was not required for the operation of 111—and a glance at the map seems amply to sustain this statement. He also entirely overlooks the fact that this land was reserved, by notice published in the British Columbia Gazette, 26th September, 1907, p. 8,695—a reservation established only a few months after the plaintiff's limits were staked, and which, so far as appears in this case, is still in force. The defendant further says that, upon an accurate plotting of the lands described in the plaintiff's license, the land F E C D will not be included within it, and so the plaintiff cannot maintain this action, because there is no provision in the Land Act permitting the correction of any inaccuracies in the description of timber limits.

If this were so, it would mean that applicants would, at their peril, have to describe with mathematical accuracy any limits they proposed to take up before they are surveyed, which is an impossibility. Owing to previous accepted applications interfering, the plaintiff could not get all the land included in his license; and, in attempting to follow the description set out in the plaintiff's application, there is some difficulty in making the ends meet.

The surveyor swears that the usual practice was adopted of following the same as nearly as possible, and, if the ends do not meet, of bringing them together in the shortest possible way, and in doing so F E C D must be included. The defendant's counsel suggests another way of bringing the ends together; but his plan would have the double disadvantage of dividing the plaintiff's limits into two parcels and of unnecessarily depriving him of an additional portion about equal in area to F E C D.

The surveyor appears to me to have adopted the least inconvenient and the most natural method, if it is permissible to do this at all. The Government, through its land department and Surveyor-General, has accepted the plaintiff's survey and placed it upon the official map as the land belonging to the plaintiff's

B. C.
S. C.
1912
LAURSEN
v.
MCKINNON.
Gregory, J.

limits. Whatever effect this may have, it seems to me that at least it gives the plaintiff some right to it which he can defend against admitted trespassers, such as the defendant, who has not the shadow of right of any kind.

The pre-emption record of William Hughes offered in evidence is not, I think, admissible; but, if it were, I do not think it would help the defendant.

The plaintiff took possession. His representatives warned the defendant's foreman before any, or at least much, timber was cut, and again before any of it was removed; but, notwithstanding this, he cut and removed practically all of the timber, stating that the defendant told him to disregard the lines.

The defendant personally knew of his foreman's acts; and, although the plaintiff was living in Vancouver, he did nothing. If he had searched the land office, he would, in January, 1910, before the timber was removed, have found the field notes of the plaintiff's survey on file there. Instead, he relied upon his own interpretation of the description in the plaintiff's application. I am not convinced that he even made an innocent mistake as to this. In these circumstances, he must be found guilty of wilful and deliberate trespass, for which he will have to pay damages.

There will be judgment for the plaintiff for the trespass as claimed and a reference to the registrar to ascertain the damages; and, in fixing the damages, the registrar will find the value of the timber after it was severed and manufactured, so far as it was manufactured while on the plaintiff's limits. I do not recall any evidence that will justify damages under any other head, but there will be liberty to apply in case I have overlooked any such evidence.

For the rule as to damages, see the case cited by Mr. Davis, *Union Bank of Canada* v. *Rideau Lumber Co.*, 4 O.L.R. 721.

*Judgment for plaintiff.*

# INDEX OF SUBJECT MATTER, VOL., IV. PART V.

(*For Table of Cases Reported see end of this Index.*)

## CASES REPORTED, VOL. IV., PART V.

## YOULDEN v. LONDON GUARANTEE AND ACCIDENT CO.

ONT.

*Ontario High Court. Trial before Middleton, J. March 12, 1912.*

H. C. J. 1912

March 12.

1. INSURANCE (§ III A—16)—RENEWAL RECEIPT—INCORPORATION OF TERMS OF RENEWED POLICY—REFERENCE BY NUMBER—ONTARIO INSURANCE ACT, 1897, CH. 203.

A reference in an insurance renewal receipt to the renewed policy by its number as continued, for a fixed term is sufficient to incorporate the terms of the policy in the new contract of insurance so created to comply with section 144 of the Ontario Insurance Act, R.S.O. 1897, ch. 203, by which no condition or stipulation shall be valid to the prejudice of the assured, or of the beneficiary, unless set out in full upon the face or back of the instrument forming or evidencing the contract.

[*Venner* v. *Sun Life*, 17 Can. S.C.R. 394; *Jordan* v. *Provincial Provident Institution* (1898), 28 Can. S.C.R. 554; *Hay* v. *Employers' Liability Assurance Corporation* (1905), 6 O.W.R. 459, followed.]

2. INSURANCE (§ III D—60)—CONSTRUCTION OF CONTRACT OF INSURANCE—RENEWAL RECEIPT—NEW AGREEMENT.

A contract of insurance supported by a renewal receipt for the premium is to be regarded as a new contract of insurance depending upon a new agreement between the parties.

3. EVIDENCE (§ X H—730)—STATEMENT OF INJURIES IMMEDIATELY FOLLOWING ACCIDENT—ACCIDENT INSURANCE—PHYSICAL CONDITION.

In a suit to enforce an accident insurance policy, evidence for the limited purpose of proving the physical condition of the person making the statement of what the injured said immediately after the alleged accident, is admissible on behalf of the plaintiff.

4. EVIDENCE (§ XII K—979)—WEIGHT OF EVIDENCE IN INSURANCE MATTERS—STATEMENTS OF ASSURED FOLLOWING ACCIDENT—BALANCE OF PROBABILITIES.

An inference of the cause of an injury may be drawn by the Court from statements made by the injured person as to his symptoms immediately after the injury; Courts like individuals habitually act upon a balance of probabilities.

[*Evans and Co.* v. *Astley*, [1911] A.C. 674, followed; *Grand Trunk R. Co.* v. *Griffith* (1911), 45 Can. S.C.R. 380, specially referred to.]

Statement

THE plaintiff sued as beneficiary under a policy issued by the defendants, insuring the late Henry Youlden against accident and death from accident, to recover the sum named in the policy.

The action was dismissed without costs.

*J. L. Whiting*, K.C., for the plaintiff.

*W. N. Tilley* and *C. Swabey*, for the defendants.

Middleton, J.

March 12. MIDDLETON, J.:—The deceased had been insured with the defendants for some years, the policy having been issued on the 7th January, 1902, and the renewal premium paid on the 2nd January, 1909.

On the 23rd June, 1909, shortly after his dinner, the deceased—a member of a firm carrying on a foundry business in Kingston—was at the railway station, superintending and assisting in the loading of a retort upon a railway car. The retort weighed about three and a half tons, and had to be transferred from a dray to the railway car by means of jacks and other

ONT.

H. C. J.
1912

YOULDEN
v.
LONDON
GUARANTEE
AND
ACCIDENT
CO.

Middleton, J.

appliances. For the purpose of making a way for removing the retort, a heavy stick of timber, lying upon the railway premises, was desired to be used. This weighed from five to six hundred pounds. Youlden attempted to carry one end of this, while the other end was carried by two men. His partner Selby went to his assistance; and shortly afterwards Youlden remarked to him that he was afraid he had injured himself. He then sat in the shade at the station for a time, and, feeling faint, he went with Selby to an hotel and took a glass of whisky and soda, and thereafter did no more work, but returned to the shop upon a rig, and sat around doing little or nothing until six o'clock, when he went home. The same evening, without taking any supper, he went to a garden party, where a presentation was to be made in which he was much interested. During the evening he partook sparingly of ice-cream, and went home at a little after ten o'clock. His wife, hearing that he was unwell, followed him home; and shortly thereafter he lay down upon a sofa to rest for the night, in a dressing-gown. During the night he was uncomfortable and restless, could not sleep, and, his wife said, "looked miserable and grey." Nevertheless, he went to the office in the morning, but stayed there only a short time, returning in about half an hour. A doctor was called, and found him weak and in pain. He had then had a violent motion of the bowels, and appeared to be generally collapsed. By the evening his temperature was high and there was further bowel trouble. The case developed into a case of acute enteritis, which would not yield to treatment, and finally caused his death.

The plaintiff alleges that a strain was caused by the exertion of lifting the timber, and that this strain brought about a physical condition which enabled bacteria in the digestive tract to develop to such an extent that death resulted from his inability to resist their attack, by reason of the reduced vitality following the strain in lifting the timber.

At the trial I admitted in evidence, against the protest of the defendants' counsel, the statement made by the deceased to his partner Selby, shortly after he had lifted the timber, that he thought he had hurt himself. It is argued that, apart from this, there is no evidence of the existence of a strain. The medical men stated that there was no physical condition indicating a strain; that the injury, if it existed, was internal only; and that the only knowledge they had of its existence would be from statements made to them by the patient of his symptoms, and the history of the case. The symptoms made it quite plain that the malady was caused by the invasion of the system by pernicious bacteria. This invasion, in the opinion of the doctors, might well be occasioned by any injury to the system which rendered it unable to manifest the normal resistance of a healthy

and uninjured individual; but the result might follow equally from anything which would bring about a marked reduction of vitality, or it might follow from the introduction of pernicious bacteria in the food taken—the latter being the general origin of such a malady. The ice-cream taken the evening before, if impure or tainted, would adequately account for the condition found.

It, therefore, becomes a matter of great importance to examine the propriety of my ruling. In *Garner* v. *Township of Stamford* (1903), 7 O.L.R. 50, the Divisional Court had to consider the admissibilty of the statement made by the deceased when she was discovered a short time after an accident upon a highway. Her statement was made in reply to a question as to the cause of the injury. The statement was tendered as being part of the *res gestæ*, but was rejected; because the rule there invoked only makes statements admissible when they are involuntary exclamations at the time of the accident, and does not warrant the reception of statements or exclamations made after there has been time for reflection.

*Gilbey* v. *Great Western R. Co.* (1910), 102 L.T.R. 202,* is a later decision of the Court of Appeal, perhaps somewhat closer to this case. Compensation was claimed in respect of an accident under the Workmen's Compensation Act. It was alleged that the deceased, while carrying a side of beef, so strained himself as to cause an injury to his lungs. The *post mortem* examination disclosed a tear in the lung and made it plain that this brought about death. The Judge of the County Court admitted in evidence the statements of the workman to his wife, not merely of his sensations and of his feelings, but as to the cause and occasion of the injury from which he was suffering. In the judgment of the Court of Appeal the principle applicable here is pointed out. Cozens-Hardy, M.R., says: "I do not doubt at all that statements made by a workman to his wife of his sensations at the time, about the pain in the side or head, or what not—whether those statements were made by groans or by actions or were verbal statements—would be admissible to prove the existence of those sensations. But to hold that those statements ought to go farther and to be admitted as evidence of the facts deposed to is, I think, open to doubt; such a contention is contrary to all authority."

The Irish Court of Appeal, *Wright* v. *Kerrigan*, [1911] 2 I.R. 301, had before it a claim under the Workmen's Compensation Act, where part of the evidence tendered was a statement of the deceased to a doctor as to how the injury was received. Cherry, L.J., mentions this evidence, saying: "Hearsay evidence is in some cases admissible, and the learned Recorder appears to

*Also reported, 3 Butterworth's W. Comp. Cases, 135.

ONT.

H. C. J.
1912

YOULDEN
v.
LONDON
GUARANTEE
AND
ACCIDENT
CO.

Middleton, J.

me to have acted strictly in accordance with the settled rules of evidence. . . . He ruled out statements as to the circumstances of the accident. He admitted the statements made by the deceased man to his medical attendant . . . as to his symptoms *and their cause*. Such statements are usually held to be admissible upon the ground that there is no other means possible of proving bodily or mental feelings than by the statements of the person who experiences them."

In *Amys* v. *Barton*, [1911] W.N. 205, the accuracy of this statement of the law was canvassed by the Court of Appeal, and Cozens-Hardy, M.R., pointed out that the words "and their cause" in the statement by Cherry, L.J., could not be supported, but appeared to approve of the rule as stated, with this exception.

In the 9th edition (1910) of Powell on Evidence, p. 358, the admissibility of statements for the limited purpose of proving the physical condition of the person making the statement is asserted; and I think for this purpose the evidence was properly admitted, and it is sufficient to establish that, shortly after the deceased had been engaged in lifting the timber, he had, as he said, indications that he had been hurt.

The statement, perhaps, did not go so far as to indicate that the lifting of the timber was the cause of the injury; but I think that this is an inference which may be drawn from the fact of the injury, and falls within the principle indicated in *Richard Evans & Co. Limited* v. *Astley*, [1911] A.C. 674, 678, where it is said: "The applicant must prove his case. This does not mean that he must demonstrate his case. If the more probable cause is that for which he contends, and there is anything pointing to it, then there is evidence for a Court to act upon. Any conclusion short of certainty may be miscalled conjecture or surmise, but Courts, like individuals, habitually act upon a balance of probabilities." See also the decisions of the Supreme Court of Canada in *McKeand* v. *Canadian Pacific R. W. Co.*, not yet reported, and in *Grand Trunk R.W. Co.* v. *Griffith* (1911), 45 Can. S.C.R. 380.

Acting upon this principle, I find that the symptoms indicate that the deceased, at this time, did suffer an injury in lifting the timber in question; and I further find that this injury was the cause of his death. I believe this to be the cause, because, as I understand the medical evidence, it is a possible cause, and it is the only one of the several possible causes which is shewn to have actually existed. There is no evidence that the ice-cream eaten was tainted; and the evidence satisfies me that up to the happening of the accident the deceased appeared to be in perfect health. This brings the case within the decision of the Court of Appeal in *In re Etherington and Lancashire and Yorkshire Accident Insurance Co.*, [1909] 1 K.B. 591.

ONT.

H. C. J. 1912

YOULDEN v. LONDON GUARANTEE AND ACCIDENT CO.

Middleton, J.

It is, therefore, necessary to consider the other matters dealt with upon the argument.

The policy, issued in 1902, contains provisions and stipulations as to notice which, it is admitted, were not complied with, and which are made conditions precedent to the right to recover.

The plaintiff contends that the terms of this policy are not binding upon her, because the renewal receipt, as it is called, constitutes a new contract of insurance; and, by sec. 144 of the Insurance Act, R.S.O. 1897, ch. 203, "the terms and conditions of the contract" not having been "set out by the corporation in full upon the face or back of the instrument forming or evidencing the contract," "no term of, or condition, stipulation, warranty or proviso, modifying or impairing the effect of any such contract made or renewed after the commencement of this Act shall be good and valid, or admissible in evidence to the prejudice of the assured or beneficiary."

Is this a new contract within the meaning of the statute? The original contract, unlike many insurance policies, does not contemplate any renewal. It is an insurance for one year, and one year only; and, upon the principle acted upon by the Court of Appeal in *Carpenter* v. *Canadian Railway Accident Insurance Co.* (1909), 18 O.L.R. 388, the contract evidenced by the renewal receipt is to be regarded as a new insurance, depending entirely upon a new agreement between the parties. I do not think that this is at all in conflict with *Liverpool and London and Globe Insurance Co.* v. *Agricultural Savings and Loan Co.* (1903), 33 Can. S.C.R. 94, where the decision of the Court of Appeal, *Agricultural Savings and Loan Co.* v. *Liverpool and London and Globe Insurance Co.* (1901), 3 O.L.R. 127, is reversed.

This new contract is, according to the terms of the receipt, a contract of insurance for a year "according to the tenor of policy 565996."

Referring in the first place to the statute itself, the intention of the Legislature appears to be plain. The contract to insure is to stand, but it is to be purged of all terms and conditions modifying the primary contract in the interest of the company and to the prejudice of the insured, unless the terms are set out upon the face or back of the instrument evidencing the contract. "Instrument" must be understood, in the light of the Interpretation Act, as meaning "instrument or instruments;" and the contention of the company is, that the reference in the receipt to the original policy constitutes it one of the instruments forming or evidencing the contract, and that its terms are, therefore, binding; and, in the alternative, that the reference to the former policy is a sufficient compliance with the Act.

ONT.

H. C. J. 1912

YOULDEN v. LONDON GUARANTEE AND ACCIDENT CO.

Middleton, J.

The contention of the assured is, that the Legislature intended to render insufficient a mere reference to some other document in which the terms of the insurance are to be found, and to require the whole contract to appear on the face of the single sealed or written instrument which forms or evidences the contract. This argument is much fortified by sub-clauses (*a*) and (*b*), which expressly permit the application and the rules of friendly societies to be embodied in the contract by reference.

The cases I find to be very difficult. In *Venner* v. *Sun Life Insurance Co.* (1890), 17 Can. S.C.R. 394, the statute under consideration was the Dominion Insurance Act, R.S.C. 1886, ch. 124, sec. 27. This provided that "no condition, stipulation or proviso modifying or impairing the effect of any policy . . . shall be good or valid unless such condition, stipulation or proviso is set out in full on the face or back of the policy." There the policy had been issued "upon the representations, agreements and stipulations" contained in the application; and the Supreme Court held that the section in question could not be relied upon as an answer to a claim that the policy was void by reason of misrepresentation contained in the application.

It is difficult to see how it could be thought that the section had anything to do with the question whether the contract had been obtained by fraud. Mr. Justice Taschereau, in the course of his judgment, does not pass upon this point, but says that, if applicable, the stipulation in the application "is in express terms referred to in the body of the policy, so that the appellant cannot invoke against the company section 27." None of the other Judges referred to the point: Mr. Justice Gwynne giving reasons; the other three Judges simply agreeing that the appeal should be dismissed.

In *Jordan* v. *Provincial Provident Institution* (1898), 28 Can. S.C.R. 554, the appeal was from Ontario, and the statute under consideration was the Ontario Act, 55 Vict. ch. 39, sec. 33. This statute modified in some important respects the earlier Ontario Act, 52 Vict. ch. 32, sec. 4 (which was in practically the same words as the Dominion statute) and is identical with the present Ontario Act (sub-sec. (*b*) having been added in 1895 by 58 Vict. ch. 34, sec. 5, sub-sec. 10). The policy was in substantially the same form as that under consideration in the *Venner* case. It was issued in consideration of the statements contained in the application. There was material misstatement. The judgment of the Supreme Court is given by Sedgewick, J., who says: "We consider that the Ontario Insurance Act of 1892, section 33, subsection 1, was complied with in the present case, following, as we do, the decision in the case of *Venner* v. *Sun Life Insurance Co.*" [17 Can. S.C.R. 394.]

This precludes my independent consideration of the question, as I think it is an authoritative statement that, notwithstanding

ONT.
H. C. J.
1912
YOULDEN
v.
LONDON
GUARANTEE
AND
ACCIDENT
Co.
Middleton, J.

the provision of the Act, the section in question is complied with when the document relied upon is referred to and sufficiently identified in the contract. Had the Supreme Court not seen fit to place its judgment upon this ground, I should have thought it apparent from the terms of the statute that the application might be identified by reference, and that this express provision found in clause (*b*) went far to indicate that this was intended to be an exception to the general rule.

The question again rose in *Hay* v. *Employers' Liability Assurance Corporation* (1905), 6 O.W.R. 459, where Mr. Justice Osler says: "Whatever other construction we might have felt ourselves at liberty to place upon sec. 144, sub-sec. (1), of the Ontario Insurance Act, R.S.O. 1897, ch. 203, we are now bound by the decisions of the Supreme Court of Canada . . . to hold that the plaintiffs' proposal and the statements therein contained are, by reference thereto in the policy, sufficiently incorporated therewith and set out in full therein, within the meaning and rquirements of the . . . section." And in *Elgin Loan and Savings Co.* v. *London Guarantee and Accident Co.* (1906), 11 O.L.R. 330, this statement is adhered to.

I cannot see any ground upon which I should be justified in attempting to distinguish the case in hand from what is said in the authorities referred to. These cases, as I have already pointed out, might have been rested upon the fact that the application is, by clause (*b*), excepted from the more general provision of the section; but the Court has deliberately refrained from placing its decisions upon this ground, and has preferred to adopt a construction of the clause which, I fear, has had the effect of nullifying the intention of the Legislature. If I am right in this, it is admitted that the plaintiff's action fails; and it is not necessary to consider the other questions argued.

The action is dismissed without costs.

*Action dismissed.*

---

**McDOUGALL v. OCCIDENTAL SYNDICATE Limited.**

ONT.
C. A.
1912
June 18.

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

1. JUDGMENT (§ IV B—220)—FRAUD IN OBTAINING AS A DEFENCE ON A FOREIGN JUDGMENT—ABSENCE OF PROOF.

Fraud, sufficient to permit a judgment of a Territorial Court to be attacked in an action brought upon it in the Courts of Ontario, is not shewn by the fact that the plaintiff, who was in some doubt as to whether the defendant or another closely related company was his employer, in good faith brought his action against the defendant on a demand that was justly due him.

[*McDougall* v. *Occidental Syndicate* (*sub nom. Johnston* v. *Occidental Syndicate*), 3 O.W.N. 60, affirmed on appeal; *Jacobs* v. *Beaver*, 17 O.L.R. 496, followed.]

ONT.

C. A.
1912

McDOUGALL
v.
OCCIDENTAL
SYNDICATE
LTD.

Falconbridge, C.J.

APPEAL by the defendants from the judgment of Falconbridge, C.J.K.B., *sub nom. Johnston* v. *Occidental Syndicate Limited*, 3 O.W.N. 60, in favour of the plaintiff in an action upon a judgment recovered in the Yukon Territorial Court.

The judgment appealed from is as follows:—

FALCONBRIDGE, C.J.K.B.:—The defendants appeared in the Yukon action. An application for final judgment was made to Mr. Justice Macaulay under sec. 102 of the Judicature Ordinance.

The defendants filed an affidavit of one A. B. Craig, and counsel appeared for them and shewed cause to the motion. The Judge made the order asked for, and judgment was signed in pursuance thereof.

A great deal of evidence was taken in England on commission, and some *viva voce* testimony was given before me.

The case, as thus presented, falls within "the combination of the two rules," as enunciated by Mr. Justice Garrow, in *Jacobs* v. *Beaver* (1908), 17 O.L.R. 496, at p. 506:—

> The fraud relied on must be something collateral or extraneous, and not merely the fraud which is imputed from alleged false statements made at the trial, which were met by counter-statements by the other side, and the whole adjudicated upon by the Court, and so passed on into the limbo of estoppel by the judgment.'

I am not sitting in appeal from or by way of rehearing of the Yukon judgment.

The defence, therefore, fails. The question of amendment of the statement of defence, by specifically pleading fraud in procuring the judgment, is r[illegible]rred to any Court which may sit in appeal from this judgm[illegible].

Judgment for the plaintiff for $4,918, with interest from the 2nd September, 1909, and costs.

*H. W. Mickle*, for the defendants.

*R. C. H. Cassels*, for the plaintiff.

Garrow, J.A.

GARROW, J.A.:—The action was brought upon a judgment recovered by one Frederick Charles Johnston against the defendants, an English joint stock company, in the Territorial Court of the Yukon Territory, which was assigned to the present plaintiff after the action commenced; and by an order of revivor dated the 12th December, 1911, the action was directed to be continued in the name of the present plaintiff.

The judgment in the Yukon Court was recovered in the month of February, 1907. The defendants appeared to the writ of summons, and were represented by counsel before the Court on the motion for judgment. Mr. Archibald Baird Craig, the defendants' managing director, then in Canada, made an affidavit of the facts from the defendants' standpoint, which

ONT.

C. A.

1912

McDougall v. Occidental Syndicate Ltd.

Garrow, J.A.

was read and used upon the motion. The defence suggested in that affidavit is not that the then plaintiff's claim was entirely unfounded, but that, if he had a claim at all, it was not against these defendants, but against another company called "The Klondike Eldorado Company Limited." And upon this affidavit, as well as upon the other materials before him, the learned Judge of that Court found in favour of the plaintiff.

Fraud is not explicitly pleaded upon this record. An application to amend so as to set up a defence of that nature was made at the trial, and was reserved by the learned Chief Justice. The application is now renewed; and, as it must depend for its success upon the evidence already given, I see no objections to formally granting it.

The state of the pleadings, however, is not the defendants' main difficulty, which goes much deeper. And their difficulty is this: they are not by the evidence seeking to set up such a fraud as would avoid the judgment under the principles discussed and approved in *Jacobs* v. *Beaver*, 17 O.L.R. 496, recently before this Court, to which the learned Chief Justice refers in his judgment, but practically to have the question which was before the Yukon Court, and upon which that Court necessarily passed in awarding judgment in favour of the plaintiff, tried over again. What is presented is really not, properly speaking, a case of fraud at all.

The Klondike Eldorado Company, by which Johnston was apparently originally employed, was connected with and largely owned by the defendants, and those interested in the defendants as shareholders, in addition to which the defendants were large creditors for money advanced to the former company. The Klondike Eldorado Company became, on the evidence, practically moribund some years before the action in the Yukon Court was commenced. But that company had owned certain mining claims considered of value, which were in charge of Johnston, who apparently continued in such charge for the benefit of those interested—in other words, for the defendants' benefit, as well as for the benefit of any others in like case who were interested as creditors of or shareholders in the Klondike Eldorado Company. And out of such charge, for the services rendered and advances made, the claim actually sued upon arose. The story is somewhat meagrely told, but it is quite apparent that there were communications from John Craig, a director of the defendants in Canada, to Johnston, by virtue of which he might well believe that he was, if not in the defendants' actual employment, to look to them for payment. The defendants now attempt to repudiate these communications, and also to repudiate Johnston's services, not by saying they were not rendered, but that they were rendered to the moribund Klondike Eldorado Company.

ONT.

C. A.
1912

McDOUGALL
v.
OCCIDENTAL
SYNDICATE
LTD.

Garrow, J.A.

The letters subsequently discovered in a barrel, upon which stress is laid, merely support what cannot be denied, that Johnston was originally employed by the Klondike Eldorado Company. They in no way shew, or tend to shew, that the claim subsequently made upon the defendants was not made in good faith, or even that, had the letters been before the Yukon Court, the result would probably have been different. What that Court had to pass upon, after reading, as it must be assumed was done, the affidavit of A. B. Craig, was, whether, regarding the subsequent correspondence with John Craig and Mr. McKee, the then plaintiff had made out a case upon which to charge the defendants.

The conclusion reached may have been erroneous, or even unjust; with that we have nothing to do. The point is, that it was not, so far as appears, obtained by any fraud practised upon the Court by the plaintiff; for which reason, I agree with the judgment of the learned Chief Justice.

The appeal should be dismissed with costs.

Meredith, J.A.

MEREDITH, J.A.:—If the judgment sued upon were obtained by fraud, the Courts of this Province will not give effect to it: that is now quite settled law of the Province, as well as generally, whatever formally may have been the view of this Court upon the subject.

So the single question for consideration in this case should have been, and is one of fact—whether the judgment in the Yukon Court was obtained by fraud.

From the whole evidence adduced in this case, it appears that the plaintiff had a good cause of action, but that he was in doubt as to his real debtor: one McKee had employed him, but apparently McKee was acting for the company who, the defendants say, are the real debtors, or else for the defendants; and these two companies seem to have been in some way related to one another; the one is said to have been the outcome of the other. The plaintiff first threatened McKee with an action, asserting that in any case he was answerable for the debt; subsequently he sued the defendants for it in the Yukon Court, and there recovered judgment for the amount of it against them, in summary proceedings.

It is quite clear that there was no fraud, in the sense of a pretence of a debt which had no existence in fact; nor can I think it proved that there was fraud in the assertion of a debt on the part of the defendants, knowing that they were not the real debtors, or in asserting that they really were, when in truth he did not know whether they were or not; and, however much the plaintiff may have been mistaken in any respect, if at all, as it does not appear to me to be proved that he was dishonest in any of these respects, fraud in obtaining the judgment has not

ONT.

C. A.
1912

McDougall v. Occidental Syndicate Ltd.

been established; and so the plaintiff was rightly held entitled to succeed.

Whether the judgment in the Yukon Court ought to have been made upon a summary application; and, if so, whether it ought to be opened up now and sent down to a trial in the usual way in view of all the circumstances of the case, especially the subsequently discovered evidence, are questions for the Yukon Courts, where justice between the parties will be done, if they are applied to.

Meredith, J.A.

Magee, J.A., and Latchford and Lennox, JJ., concurred.

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

*Appeal dismissed.*

---

## ADAMS v. GOURLAY.

ONT.

H. C. J.
1912

March 25.

*Ontario High Court. Trial before Boyd, C. March 25, 1912.*

1. Wills (§ III B—80)—Who may take—Legatees under will codicil.

Where a will provided that on a given event the legatees under "this my will" should share a certain fund proportionately, legatees under a codicil to that will do not share with the legatees named by the will in that fund, where the codicil is not, by its terms, made part of the will.

[*Henicood* v. *Overend* (1815), 1 Mer. 23; *Hall* v. *Severne* (1839), 9 Sim. 515, followed.]

2. Wills (§ I F—60)—Codicil—Status of codicil as affecting will.

As a general principle a codicil to a will forms part of the will or testamentary instrument, but not necessarily to all intents and purposes.

[*Fuller* v. *Hooper*, 2 Ves. Sr. 242, followed.]

3. Wills (§ III G 4—136)—Gift upon condition—Impossibility of performing condition—"Contra bonos mores."

Ignorance by the beneficiary of a condition annexed to a gift does not protect the devisee from the consequences of not complying with it, but where compliance with the condition is *contra bonos mores*, the devisee might well be absolved from compulsory compliance with the condition.

[*Brown* v. *Peck* (1758), 1 Eden. 140; and *Astley* v. *Earl of Essex*, L.R. 18 Eq. 290, specially referred to.]

4. Wills (§ III G 4—136*a*)—Conditional gift under will—Substantial performance—Cy-près doctrine.

Where literal compliance with a secret condition attached to a gift becomes impossible from unavoidable circumstances, and without any fault of the party, it is sufficient that it is complied with as nearly as it practically can be, or as it is technically called *cy-près*.

Statement

Action for construction of the will of George Baker; for an accounting by the defendant the executor; to recover from the defendants the Misses Baker the moneys and property of the estate transferred by them to the executor; and for administration.

*R. S. Robertson*, for the plaintiff.

*F. H. Thompson*, K.C., for the defendants.

Boyd, C.

March 25. Boyd, C.:—The testator gives the bulk of his property to his two nieces, who are, with the executor, defendants, upon this condition:—

ONT.

H. C. J.
1912

ADAMS
v.
GOURLAY

Boyd, C.

"Upon their remaining with me as my housekeepers at all times (unless I consent to one or both of them going out) during the remainder of my life and during that time rendering me faithful service and giving me all necessary and proper attention and all proper care and nursing in case of illness or in case I should become feeble and should they fail in those respects or any of them I hereby absolutely revoke the said devise and bequests to them and direct that in lieu thereof my executors shall pay to my said niece Sarah Elizabeth Baker the sum of two hundred dollars only and I direct that their shares be distributed equally among the other legatees named in this my will."

"And I hereby further declare notwithstanding anything hereinbefore contained that it is not my will or intention that it shall be compulsory for both of my said nieces to remain with me at all times but that it will be sufficient if one of them is with me when I am in my usual health and that both of them shall be present when I require the services of both and so notify them."

The will was made in February, 1907; a codicil was added giving the legacy of $100 to the plaintiff under the name of Ellen Hamilton—she not being named or referred to in the will—codicil dated in September, 1908. The testator died on the 27th September, 1910. His wife died in 1906, and he had no children. I am not clear as to his age, but I think it was about eighty. The nieces did not know of the terms of the condition or of anything that was in the will—nor did any one, according to the evidence, but the solicitor who drew it (who was not called as a witness). The nieces, however, lived with him and cared for him, as it turned out, according to the terms of the condition, however strictly construed, from before the date of the will and just upon the death of his wife, until the 19th July, 1909, when a change in his health and habits became very apparent, which had begun about the date the physician was summoned during February, 1909; then, at his instance, more competent assistance was called in, under the supervision of the nieces, and this state of domestic affairs continued until his death.

Then first became known the condition expressed in the will; and, on a review of and with knowledge of all that was detailed before me in evidence, the executor paid over or turned over to the two beneficiaries the property now claimed (in part) by the plaintiff. The plaintiff, as she testified, sues on her own behalf solely, and is not joined by and does not represent any other possible claimants under the will.

I expressed my opinion as the the effect of the evidence at the close of the argument, but reserved judgment generally. I now deal first with the right of the plaintiff to maintain this action.

In *Henwood* v. *Overend* (1815), 1 Mer. 23, the residue was to be divided "amongst the several legatees in proportion to the several sums of money bequeathed to them by this my will."

By a codicil specified "to be added to and taken as part of" the will, other legacies were given to other legatees. Sir William Grant, M.R., held that the legatees under the codicil were excluded from sharing in the residue; and that the words "by this my will" were not less strong than the words "hereby" and "hereinafter," which were so restrictively construed by the Lord Chancellor in *Bonner* v. *Bonner* (1807), 13 Ves. 379.

Sir William Grant's decision was approved and followed by Shadwell, V.-C., in *Hall* v. *Severne* (1839), 9 Sim. 515, where the residue was to be proportionably divided among "the hereinbefore mentioned legatees;" and in a codicil, which he declared to be a part of his will, he gave other legacies to other persons and also additional legacies to those who were legatees in the will. It was held that none of the legatees under the codicil were to share in the residue in respect of their legacies under the will. The Vice-Chancellor declined to follow the case of *Sherer* v. *Bishop* (1792), 4 Bro. C.C. 55, in which Lord Commissioner Eyre said that a codicil was a part of the testamentary disposition, though not part of the instrument, and on this ground that the residue should be divided among legatees (described as "such relations only as are mentioned in this my will") and other legatees, also being relations, named in the codicil; the two other Lords Commissioners, Ashhurst and Wilson, hesitating a good deal at this extension of the word "will" and doubting the construction. Shadwell, V.-C., favoured the opinion of the hesitating and doubting Judges, and characterised that of the Chief Commissioner as "a very extraordinary one." The concurrence of opinion in two such Judges as Grant and Shadwell, both skilled in questions of construction, may well be followed without hesitation. The words used in this will are identical with those used in the case in 1 Mer.

Looking at this will *per se*, I would not think the testator's meaning to be doubtful. He directs that the property intended to be given to his two nieces, which, upon their default in certain conditions, is to be revoked, shall then be distributed "equally among the other legatees named in this my will." The codicil does not in terms say that it is made part of the will, as in the *Severne* case, but it confirms the will and gives other pecuniary legacies to persons not named in the will. The obvious meaning, to my mind, is, that the testator named in the will those who are to share equally in the revoked property, and does not intend that the legatees first named in the codicil shall come in to diminish what is given to those named in the will.

It was said in argument that *Hall* v. *Severne* has been discredited. On the contrary, I find it has not been impeached, but rather upheld. It was followed in *Early* v. *Benbow* (1846), 2 Coll. 342, and both cases were referred to as authorities by Farwell, J., in *Re Sealy* (1901), 85 L.T.R. 451; and was held to be rightly

ONT.
H. C. J.
1912
ADAMS
v.
GOURLAY
Boyd, C.

decided by Sullivan, M.R., in *Donnellan* v. *O'Neill* (1871), Ir. R. 5 Eq. 523, 532, on the ground that the shares of the residue were fixed by the will, and so were the persons to take them, and there was nothing in the codicil to alter this express gift. And, in addition to all this, it was followed as late as 1907 by a Divisional Court in *Re Miles* (1907), 14 O.L.R. 241, a decision binding upon me.

There is no doubt of the general principle that a codicil forms part of the will or testamentary instrument, but not necessarily to all intents and purposes. As said by Lord Hardwicke, C., in *Fuller* v. *Hooper* (1750), 2 Ves. Sr. 242, "the testament . . . . may be made at different times and different circumstances, and therefore there may be a different intention at making one and the other."

I hold, therefore, that the present plaintiff, being a legatee only by virtue of the codicil signed and made on the 9th September, 1908, is not one of the legatees contemplated in the will made on the 7th February, 1907. This being so, and as the evidence is that she sues only for herself and in her own behalf, she has no *locus standi* to question the conduct of the executor in paying over the property devised to the two nieces, who take under the terms of the will.

This lessens the importance of the main question as to whether these nieces are entitled to take the property. My impression at the trial was, that, upon the facts, there had been a sufficient compliance with the conditions requisite to their success. I refer to my comments on the evidence at the close of the trial, as follows:—

I do not propose to dispose finally of this case at present; there are legal questions that arise; but upon the evidence I will just say a few words that strike me now.

There are two parts in this will to be regarded. The benefits to the two Baker nieces are conditional "upon their remaining with me as my housekeepers at all times"—I leave out the parenthesis—"during the remainder of my life and during that time rendering me faithful service and giving me all necessary and proper attention and all proper care and nursing in case of illness or in case I should become feeble." Then there is the clause put in, "upon their remaining with me as my housekeepers at all times (unless I consent to one or both of them going out)." There is a provision there that there may be a remission of the continuous attendance of one of them, or even of both of them—going out from his house, and therefore ceasing to be his housekeepers; and then at the end, which is to be taken as the strongest part of the will, if there is any ambiguity, there is his declaration, "I hereby further declare notwithstanding anything hereinbefore contained that it is not my will or intention that it shall be compulsory for both of my said nieces to remain with me at all times but that it

will be sufficient if one of them is with me when I am in my usual health and that both of them shall be present when I require the services of both and so notify them."

Of course they did not know this. This was entirely in the testator's breast and in the office of his solicitor, locked up in the will; and neither of these women knew anything about this. Only the testator himself knew what was in it. He knew what was in the will; and, whether or not they were requested, they acted on the terms of this will. It was not compulsory for both of his nieces to remain with him at all times. "It will be sufficient if one is with me when I am in my usual health." Now, one or other of them was with him continuously, under the strictest terms of the will, while he was in his usual health. I think his usual health failed, his usual condition failed, at the time the doctor was called in, in February, 1909, and he degenerated more or less from that time until Mrs. Mutton was called in to take possession as housekeeper in July, 1909. They remained with him during his usual health and down to the time, three days after the time in fact, that Mrs. Mutton came in, and then they were superseded by her as housekeepers; but, I think, the evidence amply justifies the conclusion that—whatever his state of mind may have been from a legal point of view, as to his legal capacity and so on—he had certainly lucid intervals, he was able to understand matters; and, although you could not fully intrust to him the disposal of business, he understood what was going on. I cannot fail to reach that conclusion from the whole of the evidence, the evidence given by Mrs. Mutton herself, as well as the evidence of others. Mrs. Mutton had reasons for knowing, and she tells us that on one occasion, when he was making some objection to signing a cheque, they told him it was to pay Mrs. Mutton, and he signed it. That corroborates what the two women themselves say, that he was aware that they were collecting his income, his rents and so on, and that they were transacting his financial business, that they were paying Mrs. Mutton as housekeeper, and that the niece who had been housekeeper under wages had ceased to receive wages some time before, and that Mrs. Mutton was acting in her stead and she so continued. He was aware of that change; and, I think, it would not be at all unfair to treat that transaction, his knowledge of it, and his consent to it, and his agreeing that Mrs. Mutton should be paid, as an outcome of this parenthetical clause, "unless I consent to one or both of them going out." They both did go out. They necessarily went out, I think, because of the condition of the man himself, and he in effect consented to their doing so, and consented to the other housekeeper coming and being appointed in their stead. That is the equitable construction to give to the will, of which I think it is susceptible, and I am inclined to think that the evidence would justify it.

ONT.

H. C. J.
1912

ADAMS
v.
GOURLAY

Boyd, C.

Turning to the evidence, it is quite plain from what the doctor said that it was unsafe for those women to stay there any longer. He advised a change. He did so with scientific knowledge and accuracy and judgment required in dealing with such cases. He did not know anything about the will. He was not actuated one way or the other, but for the best interests of the man himself and of these two women that were there; and he says that it was impossible for those women with any degree of propriety to stay there. It was indelicate and inadvisable; and it was much better in every way that this mature woman, a married woman, should come in; and she proved an admirable success, but they retained the control of affairs; they did not abandon the old man or leave him to the tender mercy of casual strangers, as was said. They were there once or sometimes twice a week. They attended to the operation of shaving him, a confidential performance, and were brought close to him, in touch with him in a most familiar way, so that he was with them all along at intervals, although he knew that they were not there continuously, and in his saner moments he may have appreciated the reason of their not being there; but he was content with the arrangement; he made no objection; he went on and consented to Mrs. Mutton being housekeeper and to their coming in in that way from time to time all through. Now, he knew what the conditions were in his will, and he made no objection to this state of affairs as indicating that they were not carrying out what he intended they should do in order to enjoy this legacy. I rather think, upon the fair construction of the evidence, that there was a sufficient performance within the meaning of the terms of the will, having regard to the flexibility of it and the consent which he might give to both of them being absent. I do not finally pass upon this until I look at the cases, and on the other point as well as this. It may be that the other point is fatal. However that is, I will reserve judgment on the whole case.

True it is that ignorance by the beneficiary of a condition annexed to a gift by will does not protect the devisee from the consequences of not complying therewith: *Astley* v. *Earl of Essex* (1874), L.R. 18 Eq. 290.

There is a good deal to be said in favour of the view presented by the defendants' counsel that the conduct of the testator, his words and acts in regard to his nieces and in their presence, were so fraught with sexual aberration as to render the requirement of residence with him one *contra bonos mores*, within the meaning of *Brown* v. *Peck* (1758), 1 Eden 140. This, of course, does not appear upon the face of the condition, and requires to be established (as it was established) by the evidence. This conduct would absolve them from continuous residence and would justify their having him cared for, as they did, by a married woman and her husband, who were able to control the testator; so that, in equity, the testator himself worked a discharge of the conditions.

ONT.

H. C. J. 1912

ADAMS v. GOURLAY.

Boyd, C.

I still think that there was a substantial performance of the condition by the nieces; and, if so, by the application of the *cy-près* doctrine, the condition has been practically satisfied. In Williams on Executors, assent is given to the law found in Story's Equity Jurisprudence, that "where a literal compliance with the condition becomes impossible from unavoidable circumstances, and without any fault of the party, it is sufficient that it is complied with as nearly as it practically can be, or as it is technically called '*cy-près:*'" Williams, 10th ed., p. 1013, note (*e*).

But, in view of my decision upon the status of the plaintiff, I do not further pursue the inquiry on this branch of the case.

The action should stand dismissed; but I would give no costs against the plaintiff unless she appeals. Costs out of the estate to the defendants in any event.

*Declaration accordingly.*

---

## Re MOUNTAIN.

ONT.

C. A. 1912

April 15.

*Ontario Court of Appeal, Moss, C.J.O., Garrow, Maclaren, Meredith, and Magee, JJ.A. April 15, 1912.*

1. APPEAL (§ VII I—346)—REVIEW OF ORDER FIXING SCALE ON WHICH COSTS WERE ALLOWED.

Where party and party costs are given out of an estate by the trial Judge, an appellate Court will not vary the order or provide for solicitor and client costs to a successful beneficiary, not an executor or trustee.

2. COSTS (§ II—28)—SCALE OF COSTS—SOLICITOR AND CLIENT—LIMITATION.

The common law rule as to solicitor and client costs being payable to a successful party, out of the estate, is limited to the executor or trustee representing the estate and may not be extended to a successful beneficiary. (*Per* Moss, C.J.O.)

3. WILLS (§ III G 9—160)—CONSTRUCTION OF DEVISE—VESTED OR CONTINGENT INTERESTS.

Where there is an immediate gift to charitable uses, delayed as to actual conveyance till the secured debts are paid out of income from the security, the gift vests at the testator's death, and it makes no difference that a twenty-five year period is allowed a specific charity to effectuate the object of the gift, in default of which the gift is to pass *ipso facto* to another charity named in the will.

[*Chamberlayne* v. *Brockett* (1872), L.R. 8 Ch. 206; *Re Swain*, [1905] 1 Ch. 669; *Christ's Hospital* v. *Grainger* (1848-49), 16 Sim. 83, affirmed, 1 Macn. & G. 460, followed; *Re Lord Stratheden and Campbell*, [1894] 3 Ch. 265, distinguished.]

4. WILLS (§ III D—100)—RESTRICTIONS ON A DEVISE TO A CHARITY—RULE AGAINST PERPETUITIES.

The fact that a devise to a charity need not be *pro forma* conveyed to a charity, within the period fixed by the rule against perpetuities, does not operate to void the devise.

Statement

APPEAL from the decision of Boyd, C., upon the construction of a will.

The judgment below was varied.

The executors of the will of the Reverend Jacob Jehoshaphat Salter Mountain, deceased, had moved upon originating notice

ONT.
C. A.
1912
RE MOUNTAIN.
Statement

for an order determining certain questions arising in the administration of the estate of the deceased, involving the construction of his will and codicils.

The testator died on the 1st May, 1910. His will was dated the 25th June, 1902. The material parts of it were as follow:—

1stly. I will and direct that all my just debts and the expenses of my funeral . . . be fully paid and discharged as soon as possible after my decease.

Nevertheless the payment of debts secured by mortgages on real estate, whether in Canada, the Isle of Wight, or elsewhere, or those for which an equivalent portion of my bank stock has been temporarily transferred, shall be postponed until they have been paid off from the income of my estate. And none of my bank stock or other securities are to be sold, but are to be distributed according to their market value at the time of distribution.

My real estate in England or the Isle of Wight is not to be sold till after a tunnel or bridge is made between said Isle and the mainland (if such should be made within the lifetime of my executors or twenty-one years after), after which time it may be sold, if my executors should consider that such sale would benefit my estate.

2ndy. I will devise and bequeath to my executors all my property estate and effects real and personal movable and immovable of whatsoever kind or nature and wheresoever situated or to be found which may belong to me at the time of my decease after payment of my *just* debts and funeral expenses as aforesaid to be held in trust for the following purposes, that is to say:—

1st. Out of the revenue thereof, to pay to my wife Louisa Mira yearly (for as long a time as she may outlive me, except as hereinafter provided) one hundred and fifty pounds, the same as I mentioned in a codicil to my last will which codicil was signed after our marriage at Shanklin, Isle of Wight, and a duplicate of it left with her sister Kate, said sum to include her right of dower, and to be made up partly of what would be a fair rent for my executors to charge on my property now called "Mira Cottage" on the Winthrop Highlands, in the suburbs of Boston, Mass.—or in case of this property being sold, of five per cent. interest on the proceeds. . . .

She is also to have the use, rent free, during the time of her natural life, of this "Pinehurst House," furnished, or of whichever house of mine may be our home at time of my decease. . . .

2nd. To pay four thousand dollars towards the endowment of the "Bishop George Jehoshaphat Mountain Memorial Mission Fund" now in process of formation for the support of Missions within the territory which now forms the Diocese of Quebec—so soon as another four thousand dollars shall have been added to said fund by individual subscribers after my death. . . .

[Then followed a number of small legacies.]

ONT.

C. A.
1912

RE MOUNTAIN.

Statement

9th. To allow the Rev. S. Gower Poole, or the future Rector or Rectors of the Church of the Good Shepherd, to reside in the house now occupied by him, unless Cornwall should become the See of a Diocese or a suffragan bishopric, in which case I desire his present abode to become the episcopal residence, when he (unless he were the chosen bishop) or his successor in office would have to return to his former residence . . .

10th. Two shares of my Montreal bank stock to be transferred to the names of "the Rector and Church Wardens of the Church of the Good Shepherd" and the interest of said shares to be used for repairs to said Church and the houses thereto belonging. This is to be called "the Church and Church Property repair fund."

11th. All the property purchased by me from the executors of the John Purcell estate—also lot No. 2 on Second street, formerly known as "the Cattanach property" but now belonging to me (on which I would recommend the erection of two double semi-detached houses and one single house)—Also my property on "First" and "Amelia" streets bordering on or opposite to the "Central Park"—Also my property No. 2 on Park Avenue Winthrop Highlands near Boston Mass. U.S. (after the death of my dear wife, who meanwhile has the profits)—Also the tract of Prairie land half a mile square more or less, which I hold near Qu'Appelle, N.W.T.—if still unsold, or, if sold, the proceeds of the sale—Also my properties in the Isle of Wight, England, if still unsold, or, if sold, the proceeds of the sale or an equivalent thereto—All these properties I desire to be legally conveyed to the Synod of the Diocese of Ottawa to be held in trust by said Synod for an endowment of the bishopric of Cornwall whenever the Bishop of Cornwall is being appointed, whether as an independent Bishop or as a suffragan to the Bishop of Ottawa. If the yearly income from said properties, together with any other official income from whatever source, be insufficient to produce a salary of two thousand dollars a year for a suffragan Bishop or three thousand dollars yearly for an independent Bishop, then, in such case, the income of my sixty Hudson Bay shares (the certificates of which are now deposited, for safe keeping, with the Parr's Bank Limited in the Consolidated Bank Building, Threadneedle Street, London, E.C., which also receives and places to my credit account the yearly dividends) or such part of the said income of these 60 shares as may be requisite shall be applied towards the same object.

12th. But if it be unnecessary for said purpose so to apply the income of said 60 Hudson Bay shares (which must in time become more and more valuable in proportion as the value of land increases in these territories and which shall not be sold, nor any of my previously mentioned properties in Cornwall, during the lifetime of the Rev. Arthur Jarvis or that of any of his

ONT.
C. A.
1912
RE MOUNTAIN.
Statement

children now living and twenty-one years after), then in this case I hereby bequeath these Hudson Bay shares to the University of Bishop's College, Lennoxville, and constitute said corporation my residuary legatee, so far as said shares are concerned, upon the following trust and conditions that is to say: To found and endow in said college a Mission Fellowship whose Fellow shall be appointed, and his duties assigned as follows . . .

The stipend of the Mission Fellow shall, to the extent of twelve hundred dollars a year, be the first charge on said Hudson Bay shares. The Mission Fellow shall be called "The Jacob Mountain Mission Fellow of Bishop's College Lennoxville."

13th. If and as soon as from the above named and other available sources a larger income than two thousand dollars annually shall arise and be derived, then I will devise and bequeath, in such case and as soon as practicable, that one hundred dollars or whatever portion of it may be in hand be paid yearly toward the stipend of the Rector or Incumbent of the Mountain Family Memorial Church of the "Good Shepherd" East Cornwall. . . .

19th. It is my desire further that as soon as the obligations on my personal and real estate have been discharged, including the payment of five thousand dollars to the University at Windsor, N.S., for which I gave "my note of hand," then all my real estate in Cornwall, Ont., in the Isle of Wight, or, if this should have been already sold, according to the instructions herein contained, the proceeds of such sale, and the property in the Winthrop Highlands near Boston, Mass., U.S., shall be transferred to the Synod of the Diocese of Ottawa to be held in trust for the proposed new Diocese or suffragan Bishop of Cornwall, Ont., subject to the claim of residence, in one or other of my houses, of my dear wife during the time of her natural life.

Also it is my desire that after all existing claims on my estate real and personal as hereinabove described shall have been satisfied then the accumulation of all rents shall be safely invested to form a fund for duly fitting up the house in which Mr. Poole now lives, as a suitable residence for the future Bishop of Cornwall . .

20th. I have made all the above bequests to the suffragan bishopric or independent See of Cornwall (which is to be called "The Mountain Memorial Bishopric of Cornwall") in the hope that its northern boundary will be the Ottawa River including the Island of St. Pierre and all the other islands between the Cascades and the Island of Montreal.

But if the appointment and consecration of such a bishop do not take place within twenty-five years after my death, then and in such case the properties which had been intended for the endowment of the See of Cornwall shall also by transfer become the property of Bishop's College Lennoxville, subject to the annual payment of said one hundred dollars to the rector

or incumbent of said Church of the "Good Shepherd" and other bequests herein made chargeable on said property and the privileges herein conferred and in trust towards the endowment of a Professorship of Natural Science. . . .

[The testator then appointed executors and trustees.]

The first codicil was dated the 6th April, 1903, and contained the following provisions, among others:—

Owing to serious losses and many expenses and disappointments since Bishop Dunn of Quebec proposed the formation and endowment of the Bishop George Jehoshaphat Mountain Memorial Mission Fund—now in process of formation, I am led to reduce, as I hereby do reduce, my bequest to said fund to one thousand five hundred dollars, payable by my executors as soon as fifteen hundred dollars shall have been otherwise contributed towards said fund, and this within five years after my death. In default of which said sum being otherwise contributed within said time said fund shall have no claim on my estate. . . .

I also direct that the five thousand dollars referred to in my . . will . . as set apart for the benefit of the University at Windsor, Nova Scotia, be paid by my executors to the Alumni Association of King's College, to be held by them in trust for said University, on condition, etc.

The second codicil was dated the 7th August, 1905, and was as follows:—

Know all men by these presents that I, Rev. Canon Mountain, D.C.L., D.D., and now of Yarbridge, Brading, Isle of Wight, England—do hereby assign and make over to my dear wife—Louisa Mira the use of my Bungalow here situated, together with that of the adjoining cottage now occupied by Moses Cooper (after the time of his decease) to have and to hold the same after my death, and to receive the rents therefrom during the period of her natural life.

All be it that this codicil, made on the seventh day of August 1905 (nineteen hundred and five) and signed in the presence of two witnesses within said Bungalow, does not affect the terms and conditions of my last will and testament of which a copy was left with my agent R. Smith Esq. the lawyer of Cornwall, Ont. Canada.

The deed of gift contained in this codicil is free from all mortgage claims and legacy duties.

The third codicil was dated the 29th May, 1909, and was unimportant, except as confirming the will and referring to the testator's property in the Isle of Wight as his "temporary residence."

The questions for determination submitted by the executors were the following:—

1. What portion, if any, of the estate of the deceased is undisposed of by the said will and codicils thereto, and is to be distributed according to the Statute of Distributions ?

ONT.

C. A.
1912

RE MOUNTAIN.

Statement

2. What assets or properties of the deceased the said executors are entitled to convert into cash for the payment of the debts of the deceased, and as to the validity and effect of the directions and provisions made in the said will and codicils in restraint of sale of the various properties of the deceased.

3. The fund from which debts secured by mortgages on real estate and by transfer of bank stock are to be paid off.

4. The fund or property from which the executors are to pay off the various general legacies contained in the said will and codicils and the annuities to his widow and others.

5. How the executors are to dispose of the income and capital of the Hudson Bay shares mentioned in the said will.

6. What obligations on personal and real estate are referred to in clause 19 of the said will and what fund the $5,000 bequeathed to the University at Windsor, N.S., is to be paid from.

7. When and upon the fulfillment of what conditions the property devised to the Synod of the Diocese of Ottawa is to be transferred to the said Synod.

8. What claims on real and personal estate are referred to in clause 19 of the will, and how and out of what fund the executors are to satisfy the same, and what is meant by the expression in clause 19 "accumulation of rents," and how the same are to be applied by the executors.

9. What buildings or erections or repairs the executors should undertake pursuant to clauses 11 and 19 of the will and the codicil thereto dated the 6th April, 1903.

10. What houses the widow of the deceased is entitled to occupy or receive the rents for.

11. The general construction of the will and codicils and the advice of the Court as to the proper manner of dealing with and distributing the estate of the deceased.

November 9, 1910. The motion was heard by BOYD, C., in the Weekly Court at Toronto.

*R. Smith*, K.C., for the executors.

*Glyn Osler*, for M. Beatrice Lloyd and Rose McCaskell, two of the next of kin of the testator.

*J. A. Macintosh*, for Salter M. Dickinson and others, also next of kin.

*Travers Lewis*, K.C., for the Synod of the Diocese of Ottawa.

*D. C. Ross*, for Bishop's College, Lennoxville.

Boyd, C.

November 14, 1910. BOYD, C.:—By carefully spelling out this complicated will, it appears that the testator provided for the payment of his obligations by a double process, and for that purpose divided his debts into two classes: (1) what he calls his "just debts;" and (2) debts secured by him on land or personalty.

He first provides for the payment of his "just debts" and funeral expenses as soon as possible after his death, and then makes

the exception that the payment of debts (a) secured on real estate or (b) those for which his bank stock has been transferred, should be postponed till they have been paid off from the income of his estate.

The distinction is again marked when he transfers all his property to his executors; this is so transferred "after payment of his just debts and funeral expenses," to be held by them in trust. He then, in the 11th paragraph, provides for the transfer of lands in trust to the Synod of the Diocese of Ottawa; but this is to be read in connection with the 19th paragraph, by which it is provided that this transfer is to be made as soon as "the obligations of my personal and real estate have been discharged;" and, later in the same paragraph, he says: "After all existing claims on my estate real and personal as hereinabove described shall have been satisfied then the accumulation of all rents shall be safely invested," etc.

All these indicate and direct a gathering in and application of income from the whole estate, vested already in the executors, in order thereout to pay the secured debts, which are, therefore, not to be paid in ordinary course out of all available assets forthwith, but to be paid from time to time as the income permits till all are finally satisfied.

It is uncertain rather in what category the obligation to Windsor University is. By the 19th paragraph of the will, it is classed with "the obligations on his real and personal estate." But the codicil of the 6th April, 1903, would rather go to indicate a payment at one time. No information has been obtained from the University as to the nature of the claim which may exist against the testator, and I can add nothing to what I have said. My judgment is, that the payment of these secured claims is to be made out of accruing income of the estate by the executors—assuming, that is, that the creditors are willing to wait. But, if the claim is enforced by the creditors, I do not see that the next of kin have any equity or status to require the executors to postpone dealing with respect to the other trusts of the estate, for so long as it might have taken to accumulate enough to pay all these secured claims in the manner directed by the testator. The legal rights of the secured creditors would frustrate the delay contemplated by the testator, but *cui bono?* Surely for the advantage of the beneficiaries under the will. The testator's object in accumulating the rents is thereout to have the creditors paid; but the object of accumulation ceases when the creditors enforce payment out of the general assets in the usual course of administration. I think his intention is clear to exonerate the lands and property charged with debts from the payment of the charges by the beneficiaries. The general estate is to pay all debts sooner or later.

As soon as the obligations on the real and personal estate are satisfied, then the trust arises in respect of the lands. It was

ONT.
C. A.
1912
RE MOUNTAIN.
Boyd, C.

agreed during the argument that an accumulation of income would be required for about five years in order to pay all these secured debts thereout. The lands are then to be conveyed to the Synod of the Diocese of Ottawa, to be held in trust for the endowment of a suffragan bishopric of Cornwall. But, the will proceeds, if the accomplishment of the said suffragan bishopric is long delayed . . . if the appointment and consecration of such Bishop do not take place within twenty-five years after my death, then the properties intended for the endowment of the See of Cornwall shall by transfer become the property of Bishop's College, Lennoxville.

The will was made on the 25th June, 1902, and the last codicil confirming his will was made on the 29th May, 1909, and the testator died, in the Isle of Wight, on the 1st May, 1910. The appointment of any Bishop for a Diocese of Cornwall has not yet taken place—though some steps have been taken towards the establishment of a coadjutor bishopric in that locality. But the matter has in no sense reached that point of completion required by the testator. The question is, whether the trust to convey by the executors of the testator is to remain in abeyance for twenty-five years from his death or for such lesser period as may elapse before a coadjutor or suffragan Bishop has been appointed and consecrated for the new See of Cornwall, or is it a void bequest by reason of infringing the rules against remoteness? Even if the conveyance to the Synod was not to be made till the Bishop was appointed, it may be persuasively argued that the testator was aware of the condition of his estate, and contemplated that some five years would elapse from his death before the lands were to be taken out of the hands of the executors—they holding them under the trust to satisfy, first, the secured creditors before the claim of the Synod arose. Thus, in the view of the testator, five years would be occupied in clearing the real estate, and only an interval of twenty years would be the period of suspense as to whether or not a Bishop should be appointed. That length of time would not be objectionable in point of remoteness.

But I prefer that reading of the will which would call for the conveyance of the lands to the Synod forthwith upon the satisfaction of the secured debts—by that body to be held in trust expectant upon the episcopal appointment for the period of twenty-five years from the testator's death—with provision for the transfer of the lands by the Synod to the Lennoxville College, if no Bishop had been duly appointed before the end of the twenty-five years.

The language of the testator permits of this construction, and the Court will be slow to seek to frustrate his general charitable purpose.

All the real and personal estate is vested in the executors to hold in trust . . . for the purpose, as to the lands mentioned,

of being "legally conveyed to the Synod of the Diocese of Ottawa to be held in trust by said Synod for an endowment of the bishopric of Cornwall whenever the Bishop of Cornwall is being appointed" (*sic*).

Again, in paragraph 20, he adverts to this trust conferred by the earlier clause on the Synod of Ottawa, in this way: "If the appointment . . . of such a Bishop do not take place within twenty-five years after my death, then and in such case the properties which had been intended for the endowment of the See of Cornwall shall also by transfer become the property of Bishop's College, Lennoxville." That is, as I read it, the then trustees for the Synod shall, at the end of the twenty-five years (if no Bishop is appointed), transfer what they hold to the trustees of the college "in trust towards the endowment of a Professorship of Natural Science."

In brief, after payment of the secured debts, the real estate held in trust is to be conveyed in fee simple to the Synod, subject to be divested if a Bishop is not appointed in twenty-five years, in favour of the college.

Here is found an immediate gift for charitable uses, delayed as to the actual conveyance till the secured debts are paid, and, therefore, vested at the death and effective in law, though the particular application of the gift may be in suspense for twenty-five years or may never take effect at all—in which contingency there is a valid transfer to another charity at the end of the twenty-five years. *Chamberlayne* v. *Brockett* (1872), L.R. 8 Ch. 206, lays down the general principle, and there is a particular application of it in *In re Swain*, [1905] 1 Ch. 669, which is much in point as to the scheme of this will.

The disposition of the lands to the first charity (the Synod) being valid, the provision for the transfer in certain events to the second charity (the college) is also a valid charitable bequest: *Christ's Hospital* v. *Grainger* (1848-9), 16 Sim. 83, affirmed 1 Macn. & G. 460.

The testator had sixty Hudson Bay shares of considerable value, which are held by the executors in trust for the payment of debts as aforesaid. I have considerable doubt as to their future disposal. They are mentioned specifically in connection with the endowment of the new bishopric and the lands intended therefor. The will reads (paragraph 11): "If the yearly income . . . together with any other official income from whatever source, be insufficient to produce a salary of $2,000 a year for a suffragan Bishop . . . then, in such case, the income of my Hudson Bay shares . . . or such part of the said income . . . as may be requisite shall be applied towards the same object." Paragraph 12: "But if it be unnecessary . . . so to apply the income of said 60 Hudson Bay shares . . . then . . . I hereby bequeath these . . . shares to the University of

ONT.
C. A.
1912
RE MOUNTAIN.
Boyd, C.

Bishop's College . . . and constitute said corporation my residuary legatee, so far as said shares are concerned, upon the following trusts and conditions" (*i.e.*, to found a Mission Fellowship, etc.).

I incline to think that the shares, after debts satisfied, are to be held by the Synod of the Diocese to accumulate the income for the purposes of the expected endowment of the new bishopric; and, if and when that is established, within the twenty-five years, to apply the accumulated as well as the yearly accruing income in payment of the salary named. If there is a surplus, or the bishopric is not created within the period, then that surplus or the shares themselves are to be transferred to Bishop's College. That is to say, the final beneficiary takes in subordination to the prior beneficiary, and only so much as can be called "residue" after the just claims for the endowment are satisfied. This construction is warranted, I think, by the exceptional rule which obtains in favour of charities, *viz.*, that it is preferable to give effect to the general intention of the testator, though the detail be incomplete, than to declare an intestacy. The testator means to allocate all these Hudson Bay shares (income and capital) to one or other of the named charities: *In re White*, [1893] 2 Ch. 41.

The restraint upon the sale of the Isle of Wight land till a tunnel is made between the Isle and the mainland, if such should be made within the lifetime of any of the executors or twenty-one years thereafter, would appear to be an illegal provision under *In re Rosher* (1884), 26 Ch.D. 801, followed and approved of in *Blackburn* v. *McCallum* (1903), 33 S.C.R. 65.

These were all the points before me, and counsel agreed that the disposal of these would sufficiently clear the way for proceeding with the administration of the estate; and I answer them as above indicated.

Costs out of the estate.

Salter M. Dickinson and others, some of the next of kin of the deceased, appealed (by leave) directly to the Court of Appeal from the judgment of BOYD, C.

November 22, 1911. The appeal was heard by MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

Argument

*J. A. Macintosh*, for the appellants. The learned Chancellor should have held that, if the executors were obliged to pay the debts, or any of them, secured on real or personal estate, otherwise than out of income, then to the extent that such debts are paid otherwise than out of income, the amount so paid should be restored to the estate out of accumulation of subsequent income. The devise and bequest to the Synod of the Diocese of Ottawa is made upon a condition or conditions which need not be performed within the limits allowed by the rule against perpetuities, and is therefore void: *Cherry* v. *Mott* (1835), 1 My. & Cr. 123; *Chamber-*

*layne* v. *Brockett*, L.R. 8 Ch. 206, at p. 212; *In re Lord Stratheden and Campbell*, [1894] 3 Ch. 265; *In re Bewick*, [1911] 1 Ch. 116. If the devise and bequest to the Synod of the Diocese of Ottawa is void, the devise and bequest to the University of Bishop's College, Lennoxville, which is dependent on the validity of the devise and bequest to the Synod, is also void, and the property covered by it becomes part of the undisposed of estate: *Robinson* v. *Hardcastle* (1786), 2 Bro. C.C. 22; *Brudenell* v. *Elwes* (1801), 1 East 442; *Beard* v. *Westcott* (1813), 5 Taunt. 393; *Monypenny* v. *Dering* (1852), 2 D.M.&G. 145; *Routledge* v. *Dorril* (1794), 2 Ves. Jr. 356.

*Glyn Osler*, for M. Beatrice Lloyd and Rose McCaskell, next of kin, in the same interest as the appellants. The learned Chancellor's order declares that in case the executors are obliged to pay any portion of the secured debts before receiving sufficient income out of which to pay them, they are to pay them out of the undisposed of corpus of the estate, which is not to be replaced from subsequent income. This declaration is contrary to the express intention of the will, namely, that when the time for distribution of the corpus should arrive the corpus should be intact, the debts and charges having been discharged out of income. The testator's general intention was to postpone payment of the substantial legacies and bequests until the discharge of his debts out of income. If any creditors whose debts are due refuse to wait, the beneficiaries should not thereby become entitled to receive their legacies before the debts have been paid or provided for out of income. In case the executors are required to pay debts of an amount exceeding the income in hand, at the time payment is demanded, their duty is either to raise the necessary fund by charging upon the estate or to replace the corpus temporarily used to discharge the debts. If subsequent income cannot be used to replace moneys provided to meet a deficiency, then, the fund indicated for payment having partly failed, the devisee must take the real estate subject to the unpaid portion of the charges and incumbrances against it: Wills Act, R.S.O. 1897, ch. 128, sec. 37; *Rodhouse* v. *Mold* (1866), 35 L.J. Ch. 67. I adopt the argument of counsel for the appellants that the devises and bequests to the Synod and to Bishop's College are void under the rule against perpetuities under the authorities cited by him.

*Travers Lewis*, K.C., and *J. W. Bain*, K.C., for the Synod of the Diocese of Ottawa. The gift to the Synod is a vested gift, to which the rule against perpetuities cannot be applied: *Chamberlayne* v. *Brockett*, L.R. 8 Ch. 206, at p. 210; *In re Swain*, [1905] 1 Ch. 669. The gift being to a charity, the gift over is also good, as the rule is not applied to such a case: *Christ's Hospital* v. *Grainger*, 16 Sim. 83, 1 Macn. & G. 460; *Wallis* v. *Solicitor-General for New Zealand*, [1903] A.C. 173, at p. 186; Theobald on Wills, 7th ed., p. 367; *Re Gyde* (1898), 79 L.T.R. 261; *Attorney-*

ONT.
C. A.
1912
RE MOUNTAIN.
Argument

*General* v. *Bishop of Chester* (1785), 1 Bro. C.C. 444. In case the executors are obliged to pay any of the secured debts before sufficient income shall be received by them, they are entitled to pay the same out of the undisposed of corpus of the estate, and in such event the portion of the corpus so expended is not to be replaced from subsequent income: *Metcalfe* v. *Hutchinson* (1875), 1 Ch.D. 591, at p. 594; Theobald on Wills, 7th ed., pp. 834 and 836; *Adamson* v. *Armitage* (1815), 19 Ves. 416; *Page* v. *Leapingwell* (1812), 18 Ves. 463; *Haig* v. *Swiney* (1823), 1 Sim. & Stu. 487; *In re L'Herminier*, [1894] 1 Ch. 675; *Wharton* v. *Masterman*, [1895] A.C. 186; *Mannox* v. *Greener* (1872), L.R. 14 Eq. 456, 462; *Morrow* v. *Jenkins* (1884), 6 O.R. 693. The restraint upon the sale of the property in the Isle of Wight and of the properties in Cornwall and the Hudson Bay shares is an illegal restraint: *Blackburn* v. *McCallum*, 33 S.C.R. 65. The widow is not entitled to the use of the testator's house in Cornwall if she accepts the devise to her of the testator's bungalow in the Isle of Wight and the cottage adjoining it. The Synod should be paid their costs as between solicitor and client: *Re Fleming* (1886), 11 P.R. 272, 285, and cases there cited.

*D. C. Ross*, for Bishop's College, Lennoxville. The Hudson Bay shares should be transferred to the college after payment of the debts and charges mentioned in the third paragraph of the judgment, or be held in trust by the trustees of the will and the income paid to the college until such time as the suffragan Bishop of Cornwall is appointed, and it is ascertained that his salary requires to be augmented from the income of these shares. If the devise and bequest to the Synod of the Diocese of Ottawa be held void for remoteness, the same became vested in or was transferred to the college, which is a charity *in esse;* or, there being a general charitable intention, on failure of one mode, the other indicated should take effect in favour of the College. See Taylor's Equity, pp. 176, 177; *Going* v. *Hanlon* (1869), 4 Ir. R.C.L. 144.

*R. Smith*, K.C., for the executors, submitted his clients' rights to the Court.

*Macintosh*, in reply. In the *Christ's Hospital* case, cited by the respondents, the first bequest was a valid one. But I deny that if the devise to the first charity is invalid, and the second offends against perpetuities, it is valid because it follows another. See *In re Bowen*, [1893] 2 Ch. 491; Theobald on Wills, 7th ed., p. 373. On the question of the validity of the gift, see *Worthing Corporation* v. *Heather*, [1906] 2 Ch. 532, at p. 538.

MOSS, C.J.O.

Moss, C.J.O.:—This is an appeal by certain of the next of kin of the testator, the Rev. Jacob Jehoshaphat Salter Mountain, D.D., from the judgment pronounced by the Chancellor of Ontario upon two of several questions raised by the executors and executrix of the will under Con. Rule 938, as enacted by Con. Rule 1269. The questions were: whether, if the executors

were obliged to pay debts or any part of debts secured on the testator's real or personal estate otherwise than out of income, the amount so paid should be restored to the estate out of subsequently accumulated income; and whether or not the devise and bequest contained in the will to the Synod of the Diocese of Ottawa is void as offending the rule against perpetuities.

The learned Chancellor determined both these questions adversely to the contention of the appellants, who are supported in the appeal by others in the same interest. Other questions were discussed by counsel for the Synod of the Diocese of Ottawa during the argument; but, if they are at all proper to be disposed of upon a proceeding of this kind, they seem not to be ripe for determination at present.

The main question is, of course, whether the devises and bequests to the Synod are void under the rule against perpetuities.

The will, which, with three codicils, deals with and purports fully to dispose of the testator's estate, is a very long and intricate instrument, containing many complicated and involved provisions and directions, due to some extent, no doubt, to the testator's evident fondness for and tendency to minute detail and his desire to leave nothing unprovided for in the final disposition of his estate. And it is apparent that he must have felt satisfied that he had effectively disposed of all he possessed, for there is no residuary clause.

His whole estate, real and personal, is said to be of the value of about $99,000. There were debts which he appears to have divided into two classes, and which it was his desire should be treated differently or at least regarded in a different way by his executors in the administration of his estate: (a) ordinary current debts, which he calls his "just debts;" and (b) debts secured by him on lands or personalty, among which he seems to have included a liability of $5,000 to the University at Windsor, Nova Scotia, for which, he says, he gave his "note of hand."

He desired the first class, together with his funeral expenses, to be paid as soon after his death as possible. His intention with regard to the other class was to postpone payment so far as to enable them to be paid off from the income of his estate. He could not, of course, control the action of the creditors, in case they were not willing to wait after their claims became payable. Beyond this, he gives no specific directions to his executors with regard to the payment of these debts, except what is to be gathered by inference from the 19th paragraph of the will, and the direction in the first codicil as to the payment by the executors of the $5,000 to the Alumni Association of King's College, instead of directly to the University of Windsor. This latter direction is quite consistent with the payment of the amount in one sum out of the general estate, instead of out of income. By the 11th paragraph of the will, the testator gives directions for the conveyance of the

ONT.
C. A.
1912
RE MOUNTAIN.
Moss, C.J.O.

properties there mentioned, and the proceeds of any that may have been sold, to the Synod of the Diocese of Ottawa, to be held by it in trust for the endowment of the bishopric of Cornwall, only delayed, if at all, by virtue of what is provided in the 19th paragraph of the will. But I do not think that these provisions were intended to affect or do affect the vesting in the Synod of Ottawa of an immediate estate or interest for the purposes designated in the 11th paragraph. The two paragraphs must be read together, and, so read, they are found to contain, as the learned Chancellor expresses it, "an immediate gift for charitable uses, delayed as to the actual conveyance till the secured debts are paid, and, therefore, vested at his (the testator's) death."

Here the gift to the Synod for the charitable purposes expressed is not conditional upon the payment of the debts out of the income. The gift takes immediate effect, whichever way the debts may be paid. In the recent case of *In re Bewick*, [1911] 1 Ch. 116, much relied upon by the appellants, there was no gift to the children living and the issue of any that might have died nor any vesting in them of any beneficial interest until all the testator's real estate should be clear of all charges thereon—a wholly uncertain event which might operate to postpone the period of vesting beyond that prescribed by the rule against perpetuities. I agree with the construction which the learned Chancellor has placed upon this will as regards this branch of the case.

As to the application of income to the exoneration of the general estate, to the extent, if any, to which it may be called upon to answer the secured debts, I am, with deference, unable to perceive any reason why that should not be the case. It is very apparent that, while the testator was anxious, if possible, to free the incumbered estates by the application of income, he had no intention that they should be freed at the expense of the general estate; and I think the judgment should be varied in this respect.

We were asked by counsel for the Synod to pronounce upon a number of other points. One was with regard to a further declaration as to conditions which he submitted were in restraint of sale of the testator's Cornwall property and Hudson Bay shares This may or may not depend upon circumstances, and could properly arise only in administration proceedings. So with regard to the alleged obligation of the testator's widow to elect between the gifts to her of a life estate in the testator's Cornwall house and one in the Isle of Wight. The facts are not sufficiently developed to enable any proper conclusion to be arrived at on this question. Then, as to the claim that the Synod should be paid its costs as between solicitor and client, the rule does not extend in general beyond the applying trustee or executor, and we could not interfere with the order as it now stands in this respect.

Except as indicated, I would affirm the judgment appealed from, the directions of which appear quite sufficient to enable all

the matters dealt with by the learned Chancellor to be properly worked out.

As to costs, the appellants have failed as to the substantial part of their appeal, and should pay the costs of the respondents who are adverse in interest to them. The executors' costs, as between solicitor and client, may be paid out of the estate.

MEREDITH, J.A.:—This matter seems to me to be within quite a narrow compass; and easy to be determined if approached in the right way. Meredith, J.A.

Our duty is not to endeavour to wreck this will upon the shoals of technicality, or upon any rock of inexorable rule of law, but rather to guide it through such obstacles, and to give effect to the testator's intentions, expressed in it, if, by any lawful means, that can be done, and, for that purpose, to take a comprehensive view of the will, not to search for, and stumble at, minute seeming contradictions or uncertainties; and that duty can, I think, be accomplished without any sort of serious difficulty.

I am unable to perceive any substantial reason why the gift to the Synod may not be considered a vested gift, to which the rule against perpetuities cannot be applied; and once vested the estate may last indefinitely without offending the rule; and, the gift being a gift to a charity, and the gift over to another charity, the gift over is also good, as the rule is not applied to such a case: see *In re Tyler*, [1891] 3 Ch. 252. In this respect this matter comes within the authority of *Chamberlayne* v. *Brockett*, L.R. 8 Ch. 206, and not within that of *In re Lord Stratheden and Campbell*, [1894] 3 Ch. 265, in which the gift was made upon a condition that might never happen; in this case the gift was vested, but to be divested in a certain event. The intention was not to give only in the event of the creation of the new see; that would be to frustrate, rather than to further, the testator's object, an object which was dear to his heart. He knew that that could hardly be accomplished without the means which he was providing, and possibly might not be, even with them; and so the means were given presently, but to be withdrawn if the bishopric were not an accomplished fact within the twenty-five years. The parenthetical restriction, contained in the 12th item of the will, may, I think, be considered an attempt to restrain alienation; whether valid or not is immaterial upon this the main question in the case.

The provision for the payment of debts out of the income does not aid the appellants in this respect, nor would it, if it delayed the beneficiaries having the benefit of the gifts to them, beyond the perpetuities' period; for a trustee in such a case holds in trust for the beneficiary, subject to the payment of the debts: *Bacon* v. *Proctor* (1822), T. & R. 31.

If creditors will not wait, or if the beneficiaries are willing to pay off all charges against their properties, I cannot understand

ONT.

C. A.
1912

RE MOUNTAIN.

Meredith, J.A.

why the simple method adopted in the case of *Bacon* v. *Proctor* should not be followed; or, in any case, why the money to pay off pressing creditors may not be raised upon the estate in such a manner as will put the new creditors in precisely the same position as the old creditors, and so leave this matter, substantially, precisely as the testator left it by his will: and, I think, this should be done. But, whatever course may be adopted, the burden ought to be made to fall, in all respects, just as it would under the will, if possible, and, if not possible in all respects, then as nearly so as possible.

Questions of restraint on alienation do not seem to me to be proper subjects of an application such as this. An expression of opinion upon such an application would be of no useful binding effect; upon proceedings between vendor and purchaser such a question would properly arise and a judicial opinion be effectual. An opinion now expressed would be especially out of place, in my opinion, in regard to the land in the Isle of Wight: I, therefore, refrain from expressing any opinion upon these questions.

The question whether the widow is entitled to Pinehurst House, as well as to the Bungalow, depends entirely upon the question of fact, whether, at the time of the testator's death, Pinehurst House was his and was also the home of his wife and himself. Each gift is for life; there is no restriction upon that of the Bungalow, but in regard to Pinehurst House his will is: "She is also to have the use, rent free, during the time of her natural life, of this 'Pinehurst House,' furnished, or of whichever house of mine may be our home at time of my decease." So that, though the widow certainly takes the Bungalow, she loses Pinehurst House if at the time of the testator's death the Bungalow were "our home," for it was unquestionably a "house of mine." In the codicil of the 29th May, 1909, the last codicil, the testator refers to his property in the Isle of Wight as his "temporary residence."

There is no sufficient ground upon which the disposition of the costs of the application can be disturbed; but the appellants ought to pay the general costs of this appeal, the substantial question being the validity of the gifts to the charities.

Garrow, J.A.
Maclaren, J.A.
Magee, J.A.

GARROW, MACLAREN, and MAGEE, JJ.A., concurred.

*Judgment below varied.*

## THAMER v. JUNDT.

ONT.

D. C.

1912

May 22.

*Ontario Divisional Court, Boyd, C., Teetzel, and Kelly, JJ. May 22, 1912.*

1. WILLS (§ I D—37)—TESTAMENTARY CAPACITY—DELUSIONS.

Whether the general faculties of a person's mind are so affected by insane delusions as to render him incompetent to make a testamentary disposition of his property as a whole or of that part in respect to which a delusion exists, is a question of fact to be determined from all the evidence.

[*Jenkins* v. *Morris* (1880), 14 Ch. D. 674, and *Re Walker*, [1905] 1 Ch. 172, specially referred to.]

2. APPEAL (§ VII L 3—489)—REVIEW OF FACT—FINDING OF SURROGATE COURT—TESTAMENTARY CAPACITY.

A finding of the Surrogate Court that a testator was mentally competent to make a testamentary disposition of his property will not be disturbed on appeal unless so manifestly and clearly wrong as to amount to a miscarriage of justice.

3. WILLS (§ I D—36)—DEGREE OF MENTAL CAPACITY—DISPOSITION OF ALL OF PROPERTY.

A greater scope of general mental capacity is requisite where a testator by will disposes of all his property, than where he deals with a single or separate part thereof.

4. WILLS (§ I D—36)—DEGREE OF MENTAL CAPACITY.

In order that a testamentary disposition of property may be sustained the testator must be of reasonably sound mind, memory and understanding.

Statement

APPEAL by the defendant from the judgment of the Judge of the Surrogate Court of the County of Perth, establishing the will of Henry Thamer, deceased, made on the 3rd February, 1911, and adjudging that it be admitted to probate.

The appeal was dismissed.

*J. C. Makins*, K.C., for the defendant.

*G. G. McPherson*, K.C., for the plaintiffs, the executors.

Boyd, C.

BOYD, C.:—Granted or proved that insane delusions exist in a man's mind, the question is, whether the general faculties of his mind have been so far affected as to render him incompetent to make a testamentary disposition of his property as a whole or of that part in respect of which a delusion exists. That is a practical question depending upon the facts proved; and it is for the tribunal of trial (whether Judge or jury) to come to the proper conclusion upon the evidence. The learned Surrogate Court Judge has in this case found in favour of the testator's capacity—having regard to all the mass of testimony for and against—and the rule is, that, unless he is manifestly and clearly wrong, so much so indeed as to amount to a miscarriage of justice, the appellate Court ought not to interfere. I think all the above positions and propositions are established by the case cited for the respondents of *Jenkins* v. *Morris*,

ONT.
D. C.
1912
THAMER
v.
JUNDT.
Boyd, C.

14 Ch.D. 674 (1880), which represents the modern reading of the law on this difficult subject. See also *In re Walker*, [1905] 1 Ch. 172, 173.

A greater scope of general capacity is needed where the whole of a man's property is being dealt with (as, e.g., by a will) than when he deals with a single and separate piece of it by way of contract (as in the case cited). Where testamentary capacity is being investigated, the testator should be of reasonably sound mind, memory, and understanding, if the disposition he makes is to be sustained. More matters have to be weighed and considered in dealing with the one case of a part than with the other as to the whole of a man's estate. But always the result arrived at by the first tribunal has to be shewn to be decidedly wrong before it will be disturbed.

Having read over carefully all the evidence taken, including the examination of the parties before an examiner—the whole forming a very large mass of testimony—I see no ground upon which to disturb the carefully considered conclusions of the Judge who heard and saw the witnesses. I would myself have come to the same conclusion that he did upon the merits and upon the capacity of the testator. He has accepted as truthful the account given by the grandchild who drew the will, and that of the son who heard the contents of the will afterwards from his father; from these sources it is evident that the testator wished to change his will, and appreciated what he was doing before, at, and after the date of execution. A natural and reasonable account is given of the way in which it came to be made at the hotel kept by one of the witnesses, and a reasonable account is given of why it was not made public at the time. The total value of the estate is said to be about $3,000, which will be considerably diminished by the drain of this litigation—the costs of which are given to both parties out of the estate.

The changes made by this will from the earlier one, made about three years before 1911, are only in minor details, and are referable to the desire of the testator to make these changes, as shewn in various parts of the evidence. Just before this will was made, he had a quarrel with the defendant, and told her that he was not going to keep her husband in his will as executor, and he also told Mr. Weir and spoke to the witness Bardy about wanting to have all Mrs. Weir's children share, as one had been left out in the former will. In the new will this was made right, and a change was made in the executors, leaving out Jundt. The testator also wished to leave out his daughter, the defendant; but, on talking it over with Weir, who drew the will, her name was mentioned as legatee for $100.

ONT.

D. C.
1912

THAMER
v.
JUNDT.

Boyd, C.

In the earlier will, his wife was to get $100 a year for life; but in the new will she was only to get $300 as a lump sum; in both the adopted son is to get $150. In the new will, after the payments of $300 and $150 and $100 to the defendant, the residue is to be divided among the son William, the daughter Annie, and the children of his deceased daughter Elizabeth. The former will provided for payment to the adopted son of $150 and payment to the widow of $100 for life, and after her death division equally among the family (except, as I understand, one son of Mrs. Weir, who had been omitted). So that financially little change was made, and the changes made are explained by the situation. He had not got along well with the Normans, and was going to assert his power by changing his will. His wife had been married before, and had a family and some land and a house in which he lived, and she was by no means in destitute circumstances. The daughters had all been married, and had left home for years; so that the will is in all respects officious.

The learned Surrogate Court Judge has dealt liberally with the defendant in allowing solicitor and client costs out of the estate—but I do not think this should be followed as to the cost of an unsuccessful appeal. The appeal should be dismissed and the defendant left to pay her own costs.

TEETZEL, J., concurred. Teetzel, J

KELLY, J.:—After a careful perusal of the whole evidence, I see no reason why the conclusion arrived at by the learned trial Judge should not be sustained. Kelly, J.

Whatever may be said about the testator's mental condition in the latter part of 1910, and in January, 1911, when he is said to have had delusions, the evidence does not shew that when he made the will of February 3rd, 1911, he was not of sound mind and testamentary capacity.

Stress was laid on the happenings about a week prior to the will, as tending to shew his unfitness to make a disposition of his property, but his conduct at that time can be accounted for, to some extent at least, by his excitement over what he evidently thought was an attempt to oppose his wishes and subject him to control. He was a man of strong will, who had been accustomed to have his own way.

He had so far recovered, however, from the delusions as to be quite capable of understanding and appreciating what he was doing when on February 2nd he expressed his intention of making a new will, and on the following day when he gave instructions therefor and discussed the changes he desired to make and the reasons for these changes. That he did so understand and appreciate his acts is shewn not only by the evidence of

ONT.

D. C.
1912

THAMER
v.
JUNDT.

Weir, who drew the will, and of the witnesses, but by his having on the same day repeated the terms of the will to his son, whom he had appointed one of his executors, and who had no previous knowledge of its contents.

The appeal should be dismissed; costs to be disposed of as directed by the learned Chancellor.

*Appeal dismissed.*

---

QUE.

K. B.
1912

April 29.

## ROLLAND v. FOURNIER.

*Quebec King's Bench (Appeal Side), Archambeault, C.J., Trenholme, Lavergne, Carroll and Gervais, JJ. April 29, 1912.*

1. PATENTS (§ II C—20)—WELL KNOWN MECHANICAL DEVICE—PUT TO NEW USE—PRIOR KNOWLEDGE.

In order that a device be validly patentable it is not sufficient to take a well-known mechanical contrivance and apply it to a subject to which it has not been hitherto applied; the true test being whether an ordinary mechanic could have made it without other suggestion than his knowledge of his art.

[*Dominion Fence* v. *Clinton Wire Cloth Co.*, 39 Can. S.C.R. 535, distinguished; *Harwood* v. *Great Northern R. Co.*, 11 H.L.C. 654, followed; *Wisner* v. *Coulthard*, 22 Can. S.C.R. 178; *Carter* v. *Hamilton*, 23 Can. S.C.R. 172, and *Copeland* v. *Paquette*, 38 Can. S.C.R. 452, specially referred to.]

2. PATENTS (§ III—27)—CLAIMS—OLD DEVICE UNPATENTABLE.

In the manufacture of a sofa-bed the addition of a woven wire mattress to the lower frame when such a device has been used for years in the upper frame is not a new and useful improvement which can be protected by patent.

[*Harwood* v. *Great Northern R. Co.*, 11 H.L.C. 654, 35 L.J.Q.B. 27, applied.]

3. EVIDENCE (§ II B—112)—ONUS OF PROVING DEVICE A PATENTABLE ONE—PATENT GRANTED.

The onus of proving that a device does not display the novelty required for a valid patent under Canadian law lies on the person attacking the patent.

[*Dompierre* v. *Baril*, 18 R.L. (Que.) 597, followed; *Allen* v. *Reid*, 14 Que. L.R. 126, disapproved.]

Statement

APPEAL by the plaintiff from a judgment of the Superior Court, Demers, J., dismissing the plaintiff's action claiming damages for the infringement of a patented improvement in sofa-beds.

The appeal was dismissed with costs.

The facts and authorities are fully set out in the trial Judge's notes of the judgment appealed from, which are as follows.

Demers, J.

DEMERS, J.:—Plaintiff, who is the transferee of Gustave Hugues Lenoir Rolland, sues the defendant for $570 damages resulting from the infringement of a patent. He alleges that the transferor Rolland is the inventor of certain new and useful improvements in the manufacture of sofa-beds and that his rights over such improvements are protected by means of a

patent in proper form granted in his favour on November 2, 1889; that the said invention relates to improvements in the manufacture of sofa-beds whereby the inferior or lower frame is furnished with a metallic wiring instead of an old-time mattress and that the defendant has infringed his patent rights.

The defendant pleads *inter alia* that the improvements described do not constitute new and useful improvements, that they were known to and in use by the public long before the issue of the said patent. Rolland claimed as being of his invention the addition of a metallic wire-woven mattress to the lower frame to which it is attached by means of wands. He should have been content to state the addition of a metallic mattress attached to the lower frame, as he was compelled to admit at the trial that the method of attachment was not new. The only new idea is that of putting a wire web across the lower frame as well as across the upper frame, for the usage of metallic wiring in beds or sofa-beds has been known and in use for a long time.

These questions of patent rights are amongst those which have caused the greatest division of opinion in our Courts. There is but little difference of opinion as to the fundamental principles, but the application thereof is extremely difficult.

In the case of *Muir* v. *Perry*, 2 L.C.R. 305, at p. 308, Mr. Justice Day enumerated the different cases in which a patent is valid:—

> The invention of machinery which may be made the subject matter of letters patent may be classed under three heads: 1st, new inventions of entire machines; 2nd, the addition or subtraction of parts in old machines, whereby greater results are obtained, or the same results with less expense; 3rd, a new combination of old parts, whereby greater results are obtained, or the same results, with less expense.

It is evident that the plaintiff claims he has discovered a new combination. The whole case therefore comes down to this: Has plaintiff really found "a new and useful improvement" as stated in sec. 7 of ch. 69 of the Revised Statutes of Canada.

Plaintiff insists that the improvement is useful and places special reliance on the case of the *Dominion Fence* v. *Clinton Wire Cloth Co.*, 39 Can. S.C.R. 535, wherein it is said:—

> A device resulting in the first useful and successful application of certain known arts and processes in a new combination for manufacturing purposes is not unpatentable for want of novelty merely because some of the elements so combined have been previously used with other manufacturing devices.

But this case dealt with the first useful application of an art and there was a new combination involved therein. This case does not contradict the principle laid down in *Harwood* v. *Great Northern Ry. Co.*, 11 H.L.C. 654: "Nor will it be sufficient to take a well-known mechanical contrivance and apply it to a

QUE.
K. B.
1912
ROLLAND
v.
FOURNIER.
Demers, J.

subject to which it has not been hitherto applied." The same principle is also enunciated in the Am. and Eng. Enc. of Law (vol. 22, p. 288):—

> The mere carrying forward or more extended application of an old idea, although with better results, is not invention.

And again:—

> A mere change in the location and arrangement of parts developing no function or result different from that by the old arrangement of the same devices, does not constitute invention, even though it may add to the utility of the device.

And at p. 281:—

> The true test whether a device is the result of invention or mechanical skill is whether an ordinary mechanic would make it without other suggestion than his knowledge of his art.

This principle seems to have been applied in the cases of *Wisner, Son & Co.* v. *Coulthard, Scott & Co.*, 22 Can. S.C.R. 178; *Carter Co., Ltd.*, v. *Hamilton & Phillips*, 23 Can. S.C.R. 172; *Copeland* v. *Paquette*, 38 Can. S.C.R. 451; *Baril* v. *Masterman*, 4 L.N. 181; *Dompierre* v. *Baril*, 18 R.L. 597; *Allen* v. *Reid*, 14 Q.L.R. 126.

The only case which might incline us to doubt on this score is that of *Dansereau* v. *Bellemare*, 16 Can. S.C.R. 180. But this case cannot influence the Court as the Judges were all divided. Besides, the principles enunciated by Chief Justice Ritchie were not contradicted by the majority of the Court.

In the case of *Dion* v. *Dupuis*, 12 Que. S.C. 465, 474, the Court of Review at Quebec developed this doctrine. Casault, J., dissented and, after citing the House of Lords decision in *Harwood* v. *Great Northern Ry. Co.*, 11 H.L. Cas. 654, 35 L.J. Q.B. 27, 12 L.T. 771, 14 W.R. 1, added, "quand le breveté n'a fait qu'appliquer l'usage d'une chose connue à un autre usage analogue, son brevet est sans valeur." Andrews and Routhier, JJ., who formed the majority of the Court, approved absolutely the principles laid down by Casault, J., and referring to the case cited by him, said: "That case would have applied to the plaintiff's patent if it had been shewn that a box nearly similar to this had been used in trades other than the butter export trade" (p. 474).

Now, in the present case it is proven that wiring had been fixed to beds and to sofa-beds for many years. Plaintiff therefore merely applied to the lower frame the principle recognized and adopted for many years for the upper frame. Plaintiff contended that there was a presumption in favour of the patent.

This had been held by Jetté, J., in *Dompierre* v. *Baril*, 18 R.L. 597.

Andrews, J., in *Allen* v. *Reid*, 14 Q.L.R. 126, had upheld the contrary view following an English precedent.

In France and England it would seem that the law does not oblige the government to have the patents examined by experts who should pass on the merits of the invention. In France the merits of the invention are not even inquired into, the registration being granted as of right. It follows, therefore, that in such countries there is no presumption in favour of patents, but in the United States and Canada the presumption is evidently to the opposite as taught by Mr. Ridout in his treatise on Inventions, pp. 43, 44, 45 and 47.

The onus therefore fell on the defendant and I find that he has succeeded completely. Plaintiff's claim is dismissed with costs.

The plaintiff appealed from the above judgment.

Argument

*Paul St. Germain*, for appellant:—In any event plaintiff's action should not be dismissed unless the patent be declared null. The patent sued on was an improvement on a sofa-bed patented by one Côté. This improvement is most useful as it substitutes a wire spring mattress attached to the lower frame serving as a bed to the old movable mattress which was formerly detachable and placed thereon. Besides, the old method was far more expensive, required pulleys and ropes, and failed to give the absolute security obtained by plaintiff's improvement. Appellant refers to *Electric Fireproofing Co. of Canada* v. *The Electric Fireproofing Co.*, 43 Can. S.C.R. 182, on the question of law.

*R. Delfausse*, K.C., for respondent:—Spring-bed wire mattresses for sofa-beds existed long before appellant's *auteur* obtained his patent. Rolland merely copied Côté. All the small changes introduced by plaintiff brought into play nothing really new, nothing that had not been used by several other persons for years and years. Any ordinary mechanic could have brought about these modifications. The notes of the trial Judge contain the authorities cited by respondent in the Court below.

April 29, 1912. The unanimous judgment of the Court of Appeal was delivered by

Trenholme, J.

TRENHOLME, J.:—This was an action by the plaintiff, as transferee of the rights of one Rolland, brought against defendant-respondent, claiming $570 damages for the violation of certain patent rights belonging to the transferor concerning the manufacture of sofa-beds. The defence was that the improvements described in the patent were known to the public and in use by them long before the patent was obtained.

This case raised a question as to improvements in a sofa-bed —that is to say, in a bed that could be used as a sofa or a sofa that could be used as a bed. The appellant claimed a violation of his patent right and damages for loss suffered. The trial Judge dismissed the action as being founded on an invention which did not disclose a patentable right. This Court is un-

QUE.
K. B.
1912
ROLLAND
v.
FOURNIER.
Trenholme, J.

animous in the opinion that the Judge arrived at a proper conclusion and that there is not in this case a novelty which justifies the issue of a patent. We find that the patent consists in the attachment of wire mattresses to the two frames of the sofa-bed —that is to say, of a wire mattress attached to the top part and of another attached to the lower part, in such a way that when the sofa is opened the wires will be on a level the one with the other. We do not see disclosed in this attachment the inventive faculty that will support a patent.

We think that for the reasons given by the learned Judge in the Court below this action should be dismissed with costs.

*Appeal dismissed.*

---

ONT.
H. C. J.
1912
April 18.

## Re FARRELL.

*Ontario High Court, Teetzel, J. April 18, 1912.*

1. WILLS (§ III—75)—INCONSISTENT GIFTS IN A WILL—INTENTION OF TESTATOR.

Where there are inconsistent gifts in a will, the last gift will ordinarily prevail and will operate as a revocation of the first, but it must be reasonably clear that the testator so intends.

Statement

MOTION by the trustees under the will of Dominick Farrell, deceased, for an order determining certain questions arising in the administration of the trusts as to the proper construction of the will.

*Glyn Osler*, for the trustees.

*I. F. Hellmuth*, K.C., for Catharine Forbes and other legatees and for all the infants.

*D. L. McCarthy*, K.C., for Edward Farrell.

Teetzel, J.

TEETZEL, J.:—The most difficult question for determination is question (a): "Who is entitled to the residuary estate, having regard to clauses 17 and 19 of the will and the codicil dated the 20th March, 1909?"

Clauses 17, 18, and 19 read as follows:—

"17. In further trust after payment of annuities and all other bequests and expenses to divide the income to be derived from my residue estate equally between Eva Farrel, Dorothy Farrell and Cyril Farrell the children of my son Vincent F. Farrell and Minnie Finn and Catharine Forbes the children of my daughter Mary Finn and in the event of the death of any such grandchildren without issue him or her surviving the parent's share of the capital from which such income was derived to be equally divided among his or her brothers and sisters but to those only above named.

"18. Provided also that my executrices and trustees shall after the death of any of the said children as aforesaid and until their said issue becomes entitled hereunder to receive their

said shares pay to the said issue or expend in any way which may be deemed best for their education or support the interest and income from their respective shares in the whole of my estate.

"19. In respect of the said residue of my estate I direct that all or any property and moneys belonging to my estate given or bequeathed to the various parties and objects mentioned herein or not so given which may fall in fail or in any way lapse on account of the death of any person or other cause whether it be in the nature of income or principal shall form part of the said residue and be distributed finally among my said grandchildren or other persons mentioned above upon the principle and according to the provisions hereinbefore set out so as to prevent the possibility of any intestacy as to any part of my estate."

And the codicil of the 20th March, 1909, reads as follows:—

"This is a codicil to the last will and testament of me Dominick Farrell formerly of Halifax, Nova Scotia, but at present residing in Worthing, Sussex, England, Esquire, which will bears date on or about the 13th day of July, 1907.

"Whatever balance may remain to the credit of my estate whenever the final settlement of the same is made by my trustees the National Trust Company of Ontario at Toronto, I direct and it is my will that the same shall be invested to the best advantage by them and paid over to my grandson Doctor Edward Farrell after the death of his mother and in the case of his death divided equally between his issue and if no issue to go to my residuary estate. . . ."

The will was dated the 13th July, 1907, and within the next three years the testator executed eleven codicils, the above-recited codicil being the seventh.

Substantially, the answer to question (a) turns upon whether the said codicil revokes the gifts in clauses 17, 18, and 19 of the will, by reason of its inconsistency with those provisions.

In paragraph 3 of his will the testator gives all the rest and residue of his personal estate to his executors and trustees upon certain trusts, which are set out in several paragraphs of the will prior to paragraph 17, and which consist chiefly in making provision for payment out of the income of a number of annuities and also pecuniary and specific legacies.

The provisions in the will subsequent to paragraph 19 chiefly consist of directions to his trustees.

It is quite plain, on perusing the will and the codicils, that the testator had constantly before his mind the creation and disposition of a residuary estate, the first reference thereto being in paragraph 4, in which he makes provision that, should the

ONT.
H. C. J.
1912
RE FARRELL.
Teetzel, J.

legatee therein die without issue, the amount given should go "back to my estate to become part of the residue."

In clause 6, he makes similar provision, stating that the amount given "shall revert to my estate and become part of the residue thereof."

In clause 8 he uses the words, "and if no issue back to my estate to form part of the residue thereof."

Then it will be observed that in clause 17 he uses the words "residue estate," and in clause 19 "said residue of my estate."

In clause 25 he makes provision that, if any legatee shall make any claim against his estate which is not presented in his lifetime, or shall institute any legal proceedings against his estate, etc., he shall be deprived of all participation in the estate, and the share or shares to which he would have been entitled "shall form part of my residuary estate and be divided pro rata among the other legatees." This is the first instance in which he uses the words "residuary estate," but thereafter, in the third codicil, he makes provision that certain legacies therein shall "fall into and form part of my residuary estate," and he uses the same words in the fourth and fifth codicils; and in the above-recited codicil he makes provision that, in default of issue, the legacies shall "go to my residuary estate."

Having, therefore, clearly made provision for residuary estate and a disposition of it under clauses 17 to 19 of his will, the difficulty arises to determine what the testator meant by using the words "whatever balance may remain to the credit of my estate whenever the final settlement of the same is made" in the above-recited codicil.

It may be that, being anxious to avoid an intestacy as to any part of his estate, as expressed in the 19th clause, and having made so many alterations and substitutions in the preceding six codicils, the testator may have, for greater caution, and to avoid intestacy should there be any balance of his estate undisposed of, made the above provision. On the other hand, if he meant thereby to give his residuary estate to Dr. Edward Farrell, that gift would be quite inconsistent with the gift of the residue contained in his will; and, under the well-settled rule that where there are inconsistent gifts the last must ordinarily prevail and operate as a revocation of the first, this codicil would probably have that effect.

I am unable, however, upon consideration of all the provisions of the will, to conclude that the testator meant by the codicil to revoke the bequest of the residue in his will.

In the first place, it seems to me that the use of the words "balance," etc., in the first part of the gift, and providing in the latter part that, if there is no issue to take that balance, the same is to go to his residuary estate, is quite inconsistent with the view that the testator could have contemplated that the balance referred to was the same as the whole body of the resi-

duary estate disposed of in his will, which, I understand, represented by far the greater portion of his total estate. The codicil treats "residuary estate" as an existing fund and the "balance" as problematical.

Then, if the effect of the codicil is to revoke the former gift of the residuary estate, and if there should be no issue of Dr. Edward Farrell, there would happen an intestacy; because, outside of the provisions in clauses 17 and 19 of his will and this codicil, there is no one named to take the residuary estate, and the contingency of an intestacy was one that from the language of clause 19 the testator was anxious to avert.

Clauses 17 and 19 are clearly so worded as to leave no chance of any balance remaining, although, as I have said, by reason of the testator having in his codicils made other gifts, he may have conceived the idea that there was a possibility of a balance; but, if it is a fact that under the provisions of the will there is no chance of a balance remaining to the credit of his estate, then this provision is void, not for uncertainty, but because there is no fund upon which it can attach. It would seem to me to be unduly extending the rule as to revocation by an inconsistent subsequent bequest to hold that the words "balance," etc., necessarily or reasonably mean the residuary estate; for it is also a rule that to cut down or revoke a previous gift by a subsequent one it must be reasonably clear that the testator intended to revoke or cut down the previous gift. It furthermore seems to me that, if the testator had intended to revoke the residuary gift, he would have made his intention more manifest than it can be argued he did from this clause, because, in other codicils, when the testator desired to revoke a provision in the will, he effected the revocation by clear and appropriate language.

The answer to this question will therefore be, that the gifts provided for in the 17th, 18th, and 19th clauses of the will are not affected by the codicil of the 20th March, 1909.

To question (b) the answer is, Yes.

Question (c): By arrangement, this question and question (e) were reserved for subsequent application, should events hereafter arise making it necessary.

Question (d): The trustees shall set aside a sum at the present time, the income on which, in their opinion, will be sufficient to meet the annuities.

Question (f): The income during the period of obstruction to be temporarily suspended only, and not absolutely lost.

Question (g): The expense should be confined to the expenses of obtaining probate.

Question (h): Mary Finn is entitled under the codicil of the 3rd March, 1910, to the twenty-five shares of stock absolutely.

Costs of all parties out of the estate; those of the trustees as between solicitor and client.

*Order made accordingly.*

ONT.

H. C. J.
1912

May 7.

## Re MATTHEW GUY CARRIAGE AND AUTOMOBILE CO.

(Decision No. 2.)

*Ontario High Court, Middleton, J. May 7, 1912.*

1. CORPORATIONS AND COMPANIES (§ IV G 3—120)—COMPENSATION OF DIRECTORS—PERFORMANCE OF MANUAL LABOUR—ONTARIO COMPANIES ACT, 7 EDW. VII. CH. 34, SEC. 88.

Directors who perform mere manual labour as servants or clerks of a company are entitled to remuneration therefor at the ordinary market price, without such payments being first authorized by a by-law adopted at a general meeting as required by sec. 88 of 7 Edw. VII., ch. 34, (The Ontario Companies Act), in the case of compensation of officers whose appointment must be by by-law.

[*Burland* v. *Earle*, [1902] A.C. 83, followed; *Re Queen City Plate Glass Co., Eastmure's Case* (1910), 1 O.W.N. 863; *Re Morlock and Cline Limited, Sarvis and Canning's Claims* (1911), 23 O.L.R. 165; and *Benor* v. *Canadian Mail Order Co.* (1907), 10 O.W.R. 1091, distinguished.]

Statement

AN appeal by the directors of the company, in liquidation, from an order of the Master in Ordinary, dated the 1st April, 1912, upon the return of a misfeasance summons, whereby he directed the directors severally to repay certain sums received by them from the company in remuneration for services rendered.

The appeal was allowed.

*F. S. Mearns*, for certain directors.
*W. S. McBrayne*, for other directors.
*G. H. Kilmer*, K.C., for the liquidator.

Middleton, J.

May 7. MIDDLETON, J.:—After most careful consideration, I am unable to agree with the learned Master. I adhere to the views expressed in *Re Queen City Plate Glass Co., Eastmure's Case* (1910), 1 O.W.N. 863, as to the wide effect to be given to sec. 88 of the Ontario Companies Act, 7 Edw. VII. ch. 34; but I think this case entirely different from any of the reported decisions, and falls quite outside the section.

The company was incorporated for the purpose, *inter alia*, of manufacturing automobiles. F. M. Guy was a practical mechanic, and worked at manual labour in the company's shop, receiving a weekly wage of $15. Daniels also worked, first in the factory and afterwards as a stenographer in the office, receiving the ordinary wage paid to those in like employment. Walter was employed as a painter and varnisher in the factory. Armstrong was the company's bookkeeper. All of these men had been employed by Matthew Guy, the original owner of the business, before it was taken over by the incorporated company; and a formidable contention is made on behalf of these directors that it was part of the original understanding, upon the transfer of the business, that the company should assume the existing

contracts with employees; but I prefer not to base my judgment upon this aspect of the case.

The section of the statute provides: "No by-law for the payment of the president or any director shall be valid or acted upon until the same has been confirmed at a general meeting." There is much to be said in favour of the contention put forward by the appellants, that this section relates to the payment of the president or director for his services rendered in his official capacity, and that it was not intended to deal with payments made to him for services rendered in any other capacity. This seems to have been the view entertained by Mr. Justice Meredith in *Mackenzie* v. *Maple Mountain Mining Co.* (1910), 20 O.L.R. 615, where he says (p. 621): "The purpose of the enactment is that those who govern the company shall not have it in their power to pay themselves for their services in such government without the shareholders' sanction."

But I think that the Courts have adopted a wider view of the statute, and that it must be taken to apply to all cases in which a by-law is necessary for the payment, and to cover the remuneration of all officers of the company whose appointment should properly be made by by-law.

*Birney* v. *Toronto Milk Co.* (1902), 5 O.L.R. 1, is now recognised as conclusive authority for this position. The claim there was upon an executory contract by which the plaintiff was employed as the manager of the company. The holding is, that the plaintiff could not recover because no by-law for his payment had been passed and no contract was made under the corporate seal. It was pointed out that the appointment of a manager was an entirely different thing from the appointment of mere servants or casual or temporary hiring; the latter contracts not necessitating either a by-law or a contract under seal. It is with reference to such an appointment that Mr. Justice Street used the words relied upon by the liquidator (p. 6): "In my opinion we should hold the section as requiring the sanction of the shareholders as a condition precedent to the validity of every payment voted by directors to any one or more of themselves, whether under the guise of fees for attendance at board meetings or for the performance of any other services for the company. It is not conceivable that the Legislature intended to forbid the directors from voting small sums to themselves for their attendance at board meetings, without obtaining the consent of the shareholders, and at the same time to allow them to vote large sums to themselves for doing other work, without reference at all to the shareholders. The interpretation contended for by the plaintiff would in fact render the section nugatory, for nothing would be easier than to evade it. I think the section should be given a broad and wholesome interpretation, and

ONT.

H. C. J.
1912

RE MATTHEW GUY CARRIAGE AND AUTOMOBILE CO.

Middleton, J.

that it should be held wide enough to prevent a president and board of directors from voting to themselves or to any one or more of themselves any remuneration whatever for any services rendered to the company without the authority of a general meeting of the shareholders."

I have neither the right nor the inclination to narrow this statement of the law, when rightly understood; but, bearing in mind that it was spoken of an employment for which a by-law is necessary, and that the section itself does not prohibit the remuneration of a director, but merely renders invalid any by-law, I do not think that there is any warrant for extending the principle to cases in which the director has acted as a mere workman or clerk and has been remunerated at a rate not exceeding the real value of the services rendered, at the ordinary market-price.

I think that the principle applicable is analogous to that applied to *ultra vires* contracts, where the company has received the benefit. It cannot retain the benefit without paying a fair price. If the effect of the statute is somewhat larger than I have indicated, and renders invalid the contract of hiring, then the directors have, as servants of the company, in the discharge of the manual and clerical services which they have respectively rendered to the company, a right to receive a *quantum meruit* for those services. It is not suggested that they have received more than this. Therefore, they have not been guilty of misfeasance.

I do not find anything in the decided cases opposed to this view. In *Re Queen City Plate Glass Co., Eastmure's Case, supra,* repayment was ordered of salary received by Eastmure as president; and I refused to recognise any claim based upon a *quantum meruit,* because, when services have been rendered by a director and accepted, no promise to pay can be inferred; his services, in the absence of the by-law, being deemed to be gratuitous. But here the whole circumstances shew that the wages were paid as remuneration for labour in the factory and office, and indicate that it was not intended that the labour should be gratuitously rendered.

In *Burland* v. *Earle,* [1902] A.C. 83, at p. 101, this view appears to receive the sanction of the Privy Council. J. H. Burland had been secretary. When he became a director, and was appointed vice-president, he continued to do the same class of work that he had done as secretary. "He was allowed by the directors to continue to draw his former salary without any observation until the present action; and their Lordships think that the inference may fairly be drawn, from all the circumstances of the case, that he was intended to retain his salary, although there was a shifting of the offices."

ONT.

H. C. J. 1912

RE MATTHEW GUY CARRIAGE AND AUTOMOBILE CO.

Middleton, J.

So here, I think the true intendment was, that, upon the taking over of these carriage works by the incorporated company, the former employees were intended to continue to render similar services and to draw the same remuneration as they had theretofore received. I do not put this as being part of the bargain, but as being the result of their continuation in the employment.

*Re Morlock and Cline Limited, Sarvis and Canning's Claims* (1911), 23 O.L.R. 165, is very close to this case; and, as I had some doubt whether it might not be regarded as determining the point in a way opposed to my present view, I availed myself of the privilege of discussing it, and *Benor* v. *Canadian Mail Order Co.* (1907), 10 O.W.R. 1091, with my brother Riddell; and he tells me that, in his view, these cases are not opposed to the opinion which I have formed. In the *Benor* case, a by-law was clearly necessary; and in the *Morlock* case, the distinction between cases in which a by-law is necessary and cases of the employment of a mere servant was not suggested.

For these reasons, I think the appeal succeeds, and should be allowed, with costs here and below.

*Appeal allowed.*

---

## DANIEL v. BIRKBECK LOAN CO.

ONT.

C. A. 1912

May 15.

*Ontario Court of Appeal, Moss, C.J.O., Garrow, Maclaren, Meredith, and Magee, JJ.A. May 15, 1912.*

1. NEW TRIAL (§ II—5)—ERROR OF COURT—OBJECTION NOT PLEADED.

A new trial will be granted where, before any evidence was heard, an action was dismissed on an objection, that was not pleaded, by the defendant, that the shares of stock on which the plaintiff based his action, had been assigned by him.

2. PARTIES (§ I A 3—40)—EFFECT OF ASSIGNMENT OF SHARES—ASSENT OF ASSIGNEE TO SUE.

If shewn on a trial that shares of stock on which an action was based had been assigned, the case should be directed to stand over in order to permit the plaintiff to obtain the assent of the assignee to become a co-plaintiff, or, if not obtainable, to make him a defendant, where the plaintiff desires to prove that the assignment was as security only and that he still retained a beneficial interest in the shares.

Statement

APPEAL by the plaintiff from the judgment of LATCHFORD, J., at the trial, without a jury, at London, dismissing the action, which was brought to recover moneys alleged to have been paid by the plaintiff to the defendants on shares of the defendants' capital stock.

The appeal was allowed.

The plaintiff appeared in person.

No one appeared for the defendants.

MOSS, C.J.O.

MOSS, C.J.O.:—No evidence was adduced, and no investigation of the merits, if any, of the plaintiff's claim was entered

ONT.

H. C. J. 1912

DANIEL v. BIRKBECK LOAN CO.

MOSS, C.J.O.

upon, but effect was given to a preliminary objection made by the defendants that the plaintiff had made assignments or an assignment of the shares on which the action was brought.

The defence was not set up in the pleadings, and apparently the learned Judge's attention was not directed to that fact, as doubtless it would have been if the plaintiff had been represented by counsel, and had not undertaken the conduct of her own cause.

The statement of claim, though discursive and not conforming to the ordinary rules of pleading, seems to disclose a case which, if established in evidence, would entitle the plaintiff to some measure of relief; but whether any, and if so to what extent, relief should be granted, can only be determined after the testimony on both sides has been adduced.

The defendants, besides disputing the plaintiff's claims and putting her to strict proof, set up that an order was made in liquidation proceedings pending against the defendants the Birkbeck Loan Company that no action should be commenced against the company or their liquidators, the defendants the London and Western Trust Company, without the permission of the Court, and that no consent had been given to the bringing of this action.

At the opening of the proceedings at the trial, the defendants' counsel raised the objection that no consent had been obtained. This was contested by the plaintiff, who stated that, if time was given, she could produce the order granting permission to bring the action; and, after some discussion, the learned Judge was prepared to grant an adjournment to enable that to be done. The defendants' counsel then raised the objection as to the assignments, and considerable discussion ensued, and it is said that, in the course of it, the plaintiff admitted the fact of an assignment. But this is scarcely correct. She stated that a paper had been executed to her brother, but never delivered, and that any other assignment was not absolute, but merely as security. In truth, there was no proof, by admission or otherwise, of the execution of any assignment.

So far as appeared also, any assignment was subsequent in date to the commencement of the action.

In any case, the utmost effect that should have been given to the assignments, supposing them to have been proved, would have been to direct the case to stand over to enable the plaintiff to procure the consent of the assignees to become co-plaintiffs, or, failing their consent, to make them defendants.

The plaintiff was placed at a disadvantage in meeting this objection, which, as already stated, was not set up in pleading; and, no doubt, if that fact had been pointed out to the learned Judge, he would not have given effect to the objection

ONT.

C. A.
1912

DANIEL
v.
BIRKBECK
LOAN CO.

MOSS, C.J.O.

without first giving the plaintiff an opportunity of meeting it in any manner which she might be advised was proper.

As it was, a mistake was made, for which, no doubt, the plaintiff was to some extent responsible, but the defendants were not wholly blameless. The result was, that the case was summarily disposed of without trial.

In view of all the circumstances, the judgment should not stand. But all that can be done is to direct a new trial. This will not stand in the way of the plaintiff taking such steps as she may be advised to make the record complete by the addition of proper parties in case it appears that any such proceeding is necessary.

There should be no costs of the appeal, but the costs of the former trial should be costs in the action.

GARROW, J.A.
MACLAREN, J.A.
MAGEE, J.A.
MEREDITH, J.A.

GARROW, MACLAREN, and MAGEE, JJ.A., concurred.

MEREDITH, J.A.:—The entanglements in which the appellant now finds herself in this case have arisen mainly from her lack of knowledge of the practice of the law

If the case had been wisely conducted it seems to me that it might very well have been finally disposed of, upon its merits, long ago, at much less cost than already has been incurred in it, with the merits of the case yet wholly untouched by judicial consideration; and as she has chiefly herself to blame for the embarrassments she is now involved in. Her claim seems to me to be a simple one, and one which might, and ought to, have been stated in a few words. It is that she has acquired the shares of the Birkbeck Loan Company, which this Court in former litigation considered were not covered legally by the company's mortgage in which they were comprised; and she seeks an accounting by the defendants in respect of them.

Her allegations respecting the mortgage of lands to secure payment to the company in respect of such shares and of the sale of the lands by a prior mortgage and payment into Court of the surplus moneys arising from such sale as well as of payments and overpayments on the stock, are but things incidental to an accounting in respect of such shares; and the whole matter, one which a competent referee ought to be able to fathom and dispose of, according to the very truth of the matters in controversy, speedily and easily.

The defendants assert that the claim is frivolous and imaginary, important only that it has long delayed and is still delaying the winding-up of the company, and delaying it to the great prejudice of all who have real and substantial claims against it. But if that be so do not these things call rather for a final disposition of the claim upon its merits, than obstructing it; even though the obstruction be upon valid and proper legal grounds? As far as I can see, there has never been any

ONT.

C. A.
1912

DANIEL
v.
BIRKBECK
LOAN CO.

Meredith, J.A.

adjudication, in any tribunal, upon the merits of the plaintiff's claim.

The proceedings in the winding-up matter never went so far as that; there was never anything like a judgment against which either party might appeal. Then, after many vicissitudes, the case came for trial in May, 1911, and when the defendants first objected to a trial, of the merits, on two more or less technical grounds, namely: (1) because of the winding-up proceedings which stayed all actions against the company without leave, and it was asserted that no leave had been obtained, and (2) because of a Chambers' order staying all proceedings in this action until the costs of another action had been paid; and it was asserted that such costs had not then been paid.

The appellant then, conducting her own case, as she had throughout—very unwisely because of her incompetence as a lawyer—answered that the leave had been given and the costs paid, as she could prove, but not then; and asked for a postponement of the trial until she could do so; and that was about to be done when the defendants, firmly objecting, interposed another point and insisted upon the dismissal of the action.

This point was that the appellant had assigned absolutely all her claims in this action to a foreign corporation; and they produced that which purported to be a copy of such an assignment. The appellant did not deny that she had made an assignment, but asserted that it was not absolute, but only as security for money which she had borrowed to enable her to prosecute this action. She also seems to have admitted making another assignment, but asserted that as to it the assignees were bare trustees for her.

The learned trial Judge thereupon dismissed the action with costs, on the ground that the appellant had absolutely assigned all her rights in the subject-matter of this action. In that I think he erred; it is now firmly settled that a party cannot, against his will, be nonsuited upon his opening of the case merely; that may be insufficient to shew a good cause of action; but the evidence may supply all that is needed; and this case seems to me to have been especially one for adducing the facts upon oath; the appellant being very plainly incompetent as counsel not only because of want of legal knowledge, but because taken possession of so engrossedly by it that she seems to be able to discern nothing else than that which seems to her to be its unspeakable righteousness.

I repeat that the case is especially one in which a trial Judge should do all in his power to elicit the actual facts concerning it. There was really no evidence of any assignment by the appellant; and the admission was of assignments which still left in her the most substantial interest in this action.

It did not appear when the assignments were made; but, possibly, after the commencement of the action; but even if before I cannot think it was right to dismiss the action under the circumstances; it would, no doubt, be right to require the appellant to make the assignees parties to the action, within a reasonable time, so that one action should determine all things concerning the appellant's claims; and, as to the other objections the course which the trial Judge had determined to take was a reasonable one, as it did not appear that any notice had been given to the appellant that she would be met with these preliminary objections when she came down to a trial on the merits.

The postponement should have provided that in the meantime the appellant should take such steps as would make any judgment pronounced binding on all outstanding interests in the subject matter of this litigation. The appellant is, I think, strictly entitled to a new trial, upon the terms I have mentioned as to outstanding interests.

But I venture to suggest to the appellant that she has had enough experience of her lack of knowledge of the law and practice of the Courts to call for the employment of a competent trustworthy solicitor—such as the Official Guardian—to conduct her case in the future and to bring it as soon and as cheaply as possible to a final disposition on its merits; and, to both parties, that, that being done, there be the usual reference, in cases such as this, to one of the several competent Referees of the Court, either here or in London, to hear and determine all the matters in controversy upon the merits in the usual manner.

I have inquired of the learned County Court Judge before whom the winding-up proceedings were taken and are now pending, who has informed me: (1) that although the appellant's claims were under investigation before him, no adjudication from which there might be an appeal was made upon them; that they were too indefinite and intangible for anyone among several who represented the appellant as well as herself, to present anything that might be so adjudicated upon; (2) that he gave leave to bring an action on the condition that the costs of a former action were paid within 30 days; and (3) that such costs were not paid within that time, but have since been. He also informed me that some question as to his power to grant leave to sue did arise, owing to some changes in the winding-up enactment.

The taxable cost of this appeal should, I think, be costs in the action to the appellant in any event; but there should be a set-off of costs now if any are now payable by the appellant to the respondents.

*Order for a new trial.*

QUE.

C. R.
1912

Jan. 4.

## BOHL v. CARON.

*Quebec Court of Review, Lemieux, A.C.J., Pelletier and Cannon, JJ.*
*January 4, 1912.*

1. APPEAL (§ I B—15)—RIGHT OF APPEAL—BOUNDARY ACTION—SURVEYOR'S REPORT—C.P. QUEBEC, 8 EDW. VII. CH. 74, SEC. 6.

A judgment in an action for boundary which dismisses a plea of prescription, sets aside the report of a surveyor, previously appointed, based on a prescriptive title, and appoints a new surveyor to make a fresh report, is an interlocutory and not a final judgment, and an appeal therefrom to the Court of Review can only be taken in accordance with the provisions of arts. 1202*a* and following (C.P. Que. 8 Edw. VII. ch. 74, sec. 6).

[*Mercier* v. *Barrette*, 25 Can. S.C.R. 94, specially referred to.]

Statement

APPEAL in an action of boundary.

*Crepeau, Coté & Jodoin*, for the plaintiff.

*Perrault & Perrault*, for the defendant.

Quebec, January 4, 1912. The opinion of the Court was rendered by

Lemieux, A.C.J.

LEMIEUX, A.C.J. (translated):—This is an action for boundary. The defendant by his plea declared that he was ready to settle the boundaries, but this according to his title deeds and his possession, and he pleaded that the lands of the plaintiff and the defendant had been for upwards of thirty years delimited by an old fence, which had been recognized by the parties as being the division line between their properties. By the same plea the defendant pretended to be the owner both by his title deeds and by prescription acquired through possession for thirty years.

Upon the demand of the parties, a surveyor was appointed as expert by the Court. He, without having received special instructions made an enquiry in regard to the possession which the defendant invoked, and also in regard to the establishment of the line which he invoked. Witnesses for one side and the other were heard before the surveyor and their evidence was taken by writing, the parties being represented by their attorneys. This consent by the parties to hear witnesses was valid, although the surveyor had received no instructions to make the enquiry.

Castonguay, the expert surveyor, made a report in writing, which was well reasoned and supported by a plan of the locality, and in his report he concludes that the defendant Caron has established public and uninterrupted possession for thirty years and he suggests fixing the boundary in the division line established by the old fence.

The report being made, the case was inscribed for proof and hearing on the merits, and the parties proceeded to hear evidence anew before the Court, on the question of possession and prescription.

QUE.
C. R.
1912
BOHL
v.
CARON.
Lemieux, A.C.J.

In the course of the hearing before the Judge, Castonguay testified that the proof of possession and prescription appeared to him so evident that he had suggested to fix the boundaries as mentioned, that is to say, in the line established by the old fence, but he adds that if the possession or the prescription ought not to prevail or be admitted, his indication of the place where the boundary marks should be placed, according to the parties' title-deeds was insufficient, as he had not performed all the necessary operations to enable him to say clearly when the boundary should be placed under the parties' titles. His reason for having acted as he did was his conviction that the boundary should be fixed in accordance with the old fence.

The Court, by its judgment, set aside and dismissed the plea of prescription of the defendant Caron, with costs, on a ground of law of which Castonguay was unaware, and upon which, moreover, he was not qualified to pronounce, namely that prescription could not have been acquired against the plaintiffs who were minors during a portion of the time for which Caron had possessed.

The Court based itself on art. 2232, Civ. Code, which declares that prescription does not run, even in favour of subsequent purchasers against those who are not born or against minors.

The Court also held that Castonguay's report was consequently illegal, condemned the parties to pay the costs incurred before the surveyor in equal shares, ordered the nomination of a new expert surveyor to indicate the place where the boundary between the properties of the parties should be fixed according to their title-deeds, and ordered the surveyor to make a report of his proceedings in order that the same might subsequently be adjudicated upon.

Caron, the defendant, appealed from this judgment *de plano*, treating it as a final judgment.

If it is a final judgment the Court of Review has the right to enquire whether it is well or ill founded, in fact or in law. On the other hand, if the judgment is only an interlocutory judgment the Court of Review is without power and jurisdiction to enquire whether the judgment is valid or ill founded. In other words, the question which arises is whether the judgment is a definitive judgment or an interlocutory judgment.

An interlocutory judgment according to the provisions of law which regulate the Court of Review, is, under 8 Edw. VII. ch. 74, sec. 4 (Que.), (art. 52*a* C.P.), one which decides in part the suit, or which orders the doing of anything which cannot be remedied by the final judgment, or which has the effect of unnecessarily delaying the trial of the suit.

Has the Court of Arthabaska, which dismissed the defendant's plea of prescription with costs, and ordered the surveyor

QUE.
C. R.
1912
BOHL
v.
CARON.
Lemieux, A.C.J.

to measure the lands of the parties in order to determine the division line between the lands without taking the defendant's possession into account and which reserved the question of adjudicating subsequently upon the surveyor's report as the rights might appear, rendered a definitive or an interlocutory judgment?

A judgment is said to be interlocutory which orders the taking of evidence on a preliminary enquiry in order to arrive at a final judgment but which precedes the adjudication on the grounds of the action or the final solution: art. 452, French Code of Procedure. The final judgment is that which passes upon the grounds of the action.

It goes without saying that the judgment rejecting the plea of prescription has decided in part the suit. But can this judgment be remedied by the final judgment?

In the case of *Archer* v. *Lortie*, 3 Que. L.R. 159, Chief Justice Meredith, speaking in the name of the Court of Review, composed of Judges Meredith, Casault and Caron, said:—

> Besides, as to the mere question of power, the Judge who renders the final judgment, can reverse all interlocutory judgments.

This power of the Court has always been recognized and has never been questioned, especially since the judgment in *Budden* v. *Rochon*, 13 Que. S.C. 322, rendered by the Court of Review, Caron, Casault and Pelletier, JJ. In this case Judge Pelletier gave a concise and learned dissertation in which he shewed how interlocutory differed from final judgments.

In the present case, can the judgment *a quo* be remedied by the final judgment. In other words can the Court which dismissed the plea of prescription on the ground of suspension of prescriptive possession because of the minority of the plaintiffs, retract this judgment at the hearing on the merits and maintain the plea? We think we can reply in the affirmative, under the authority of the *Budden* v. *Rochon* decision.

At the hearing on the merits the Court will have two distinct surveyor's reports before it; that of Castonguay recommending specially and with the support of arguments the fixing of the boundaries in accordance with Caron's possession, and the report of the new surveyor shewing the place where the boundary marks should be placed according to the title-deeds of the parties. The Court being more fully informed upon the subject will certainly be able, if it sees fit, to optate between one or the other of the reports, and the establishment of one or the other of the lines, and it can then easily maintain the plea of prescription if the circumstances or if new evidence permit it.

From this first ground we conclude that the judgment under appeal is an interlocutory judgment.

QUE.
C. R.
1912
BOHL
v.
CARON.
LEMIEUX, A.C.J.

The question of which judgment is final in matters of boundary has often been discussed and settled.

The Court of Review in *Sangster* v. *Lacroix*, 14 Que. S.C. 89, Casault, Caron and Andrews, JJ., decided that the final judgment in matters of boundary was that by which the Court, according to the evidence or a surveyor's report, ordered the placing or establishment of boundary marks at a determined spot. The proceedings subsequent to the homologation of the surveyor's report establishing these boundaries are only proceedings in execution of the judgment. Judge Andrews in his elaborate judgment refers to several decisions in the same sense.

The Supreme Court of Canada in the case of *Mercier* v. *Barette*, 25 Can. S.C.R. 94, has also decided that the final judgment is that which orders the placing of the boundary marks.

Applying these rules which appear to us clear and indisputable we easily conclude that the judgment *a quo* is not final, because it does not order the placing or establishment of boundaries but only the measurement of the properties by the surveyor, who is to make a report upon which the Court will adjudicate at a subsequent date, by deciding to place the boundary marks according to the report.

If the judgment under appeal is an interlocutory judgment we have no power or jurisdiction to maintain or reverse it, because the law says imperatively that an appeal to the Court of Review from an interlocutory judgment, must be taken within a fixed delay and with a Judge's permission, which permission was not obtained in the present case. (1202*a* C.P., 8 Edw. VII. ch. 74, sec. 6.)

The respondent did not raise the question of jurisdiction. We decide, therefore, as the Supreme Court has done in several cases where, as in the present case, it raised the question of jurisdiction itself, *ex proprio motu*, that the appeal should be dismissed each party paying its own costs: 1 Cassels' Supreme Court Digest, *verbo* "Costs," No. 38.

*Appeal dismissed.*

QUE.
S. C.
1912

March 8.

**SCHOOL MUNICIPALITY** of the City of St. Cunegonde of Montreal (plaintiff) v. The **MONTREAL WATER AND POWER CO.** (defendant).

*Quebec Superior Court, Laurendeau, J. March 8, 1912.*

1. SCHOOLS (§ IV—74)—RIGHT OF SCHOOL CORPORATIONS TO TAX—MUNICIPAL ASSESSMENT ROLL ON BASIS—R.S.Q. 1909, ARTS. 2521, AND 2836.

The law relating to public instruction (arts. 2521 and following, R.S.Q. 1909), in declaring that the valuation of property made by the municipal authorities shall serve as the basis of the assessments to be imposed by school corporations (art. 2836) does not thereby authorize school corporations to tax all property valued in the municipal roll.

2. SCHOOLS (§ IV—74)—WHAT PROPERTY LIABLE FOR SCHOOL TAXES—REAL ESTATE—R.S.Q. 1909, ART. 2521, SUB-SECS. 15 AND 16.

School corporations cannot tax all property valued in the municipal roll but only so much of such property as they may tax under the law of public instruction, *i.e.*, that which constitutes "real estate" under that law (art. 2521, pars. 15 and 16).

3. TAXES (§ I E 1—52)—WHAT TAXABLE—PIPES OF A WATERWORKS COMPANY.

Pipes of a water company laid in the public streets are not "real estate" within the meaning of the law of public instruction, and are not liable to school taxes.

[*Bell Telephone Co.* v. *Corporation of Ascot*, 16 Que. S.C. 436, disapproved.]

Statement

ACTION by a school municipality to recover school taxes from defendant water company which raised a defence of exemption. The action was dismissed.

*Cordeau & Bissonnet*, for the plaintiff.

*White & Buchanan*, for the defendant.

Laurendeau, J.

LAURENDEAU, J. (translated):—The defendant is the owner of a large water system situated in the city of Montreal and the neighbouring municipalities. The former water system of the town of St. Cunegonde was leased by the defendant under an emphyteutic lease and now forms part of their system. For the purposes of the present case the defendant must be considered the owner of the leased system. The school municipality, plaintiff, comprises rather more than the territory of the former town of St. Cunegonde, and only contains within its limits water pipes laid in the public streets and forming part of the water system.

Upon the valuation roll prepared and homologated by the city of Montreal, these water pipes are described as such ("water mains") and are valued as buildings at a sum of $367,000.

The plaintiff claims the sum of $4,190.13 for school taxes which it has imposed upon these pipes for the years 1908, 1909 and 1910. In imposing these taxes it made use of the city of Montreal's roll.

QUE.

S. C.
1912

School Municipality v. Montreal Water & Power Co.

Laurendeau, J.

The defendant pretends that these pipes are exempt from taxes for a period of twenty years under the contract of lease which it entered into with the town of St. Cunegonde on September 4, 1891; that moreover these pipes are not taxable property because school taxes can only be imposed on land and these pipes are placed under ground in public streets belonging to the municipal corporation and which are by law exempt from taxes.

The questions to be decided are as follows:—

(1) Are the pipes exempt from taxes under the contract of September 4, 1891?

(2) Does the law in obliging school corporations to make use of the municipal valuation roll as the basis for the imposition of school taxes authorize them to impose taxes on all the property which is valued in the roll?

(3) Are the pipes in question taxable property under the circumstances?

The contract of September 4, 1891, only grants the defendant exemption from municipal taxes. There can be no question of school taxes because the plaintiff was not a party to the contract. This pretension of the defendant is therefore ill founded. It should be remarked that the parties to the contract, namely, the defendant and the town of St. Cunegonde, did not, when they stipulated for the exemption of taxes in favour of the defendant, recognize that, under municipal law generally, water pipes are not taxable property; but this clause of exemption was only inserted in the contract because the charter of the city of St. Cunegonde which was then in force (53 Vict. (Que.) ch. 70, sec. 502), granted to the latter the power to impose and levy a tax "upon all gas pipes or others and their accessories whether placed over or under the soil."

The plaintiff is governed by the law of public instruction (62 Vict. (Que.) ch. 28, now articles 2521 to 3051 R.S.Q. 1909). It can, therefore, only impose and levy taxes which this law authorizes. Article 2836 R.S.Q. 1909, it is true, declares that the valuation of property which has been made by the order of the municipal authorities shall serve as the basis of the assessments to be imposed by school corporations; but this is no reason for saying that school corporations have the power to impose taxes on all property which is valued by the municipal authorities, since the various municipal laws differ among themselves and often differ from the school law as regards the power to tax.

In virtue of section 361 of the charter of the city of Montreal all immovable property situated within the limits of the city is subject to taxation, with certain exceptions. Under the school law there is only real estate which is subject to taxation,

QUE.
S. C.
1912
SCHOOL MUNICIPALITY v. MONTREAL WATER & POWER CO.
Laurendeau, J.

(article 2521, paragraph 16). We shall have occasion to define the sense of the words "real estate" in answering the third question.

The same section 361 of the charter of the city of Montreal says, that "Immovable property comprises lands, buildings erected thereon, machinery or other property so fixed or related to any building or land, as to form a part of the realty and also all pipes, poles, wires, rails, tunnels and other constructions and apparatus of every nature used in connection with the generation or distribution of power, light, heat, water, electricity or for traction purposes whether any of the same be constructed or placed upon, over or under property, streets, highways or elsewhere within the limits of the city."

It is under this provision of the charter that the defendants' water pipes have been included in the roll and valued at the sum of $376,000.

If no valuation has been made by the order of the municipal authorities, or if the valuation roll cannot be obtained, the school commissioners are to cause a valuation of the *real estate* (in the French version) of the municipality to be made (article 2840, R.S.Q. 1909). And article 2854 adds that the roll prepared by the commissioners shall serve as a basis for the collection roll for the school taxes until the municipal or school authorities have made another according to law.

School corporations can therefore only tax real estate. If the municipal roll contains other property which may be immovable but which is not real estate it must be left aside.

Strange to say there is no article in the law of public instruction which says expressly upon what property school corporations may impose taxes.

Article 2836 says that the valuation of property which has been made by order of the municipal authorities shall serve as the basis of the assessments to be imposed by school corporations.

But there is no definition anywhere of the word "*property*" contained in this article.

Article 2840 declares, however, that if the municipal corporation has not made a roll or if it cannot be obtained by the school corporation, the latter shall itself make a valuation roll of the *real estate* (French version) of the municipality; and article 2854 adds that this roll serves as the basis for the collection for the school taxes.

We must conclude, therefore, that taxes can only be imposed on real estate situated in the municipality and the word "property" in article 2836 means real estate.

What do the words "real estate" mean? Paragraph 15 of article 2521 defines them as follows: "The words 'real estate' 'land,' or 'immovable' mean all *lands* possessed or occupied by

one person or by several persons jointly and include the buildings and improvements thereon."

Paragraph 16 of the same article declares that the words "taxable property" mean the real estate liable for school taxes.

We now require a definition of the word "lands" (*propriété foncière*) which the law does not give. In the definition given by paragraph 15 the word "land" (*terrain*) has a larger and more extended sense than its natural sense while the word "immovable" has a more restricted sense. In defining the words "real estate" by the word "lands" nothing new is said.

In speaking of property exempt from taxation in article 2733 the words "*property* belonging to His Majesty," "*property* belonging to the government," etc., are used.

In article 2734 the words "real estate" are used; in article 2736 the words "land" and "parcel of land" are used to designate the same thing; in article 2890 the word "properties"; in articles 2891 and 2892 the words "immovable property" and "real estate"; in article 2893 the words "immovable property"; in article 2897 and 2898 the word "property"; in article 2888 the word "immovables"; in articles 2885 and 2887 the word "lands"; in article 2731 the words "taxable property" are used to express the same thing.

In order to define the qualifications of an elector, article 2642 says that the elector must be the proprietor of "*real estate*" or of a *building* constructed upon land belonging to another and must be entered as such upon the valuation roll. By article 2639 the same qualification is required for school commissioner or trustee. In article 2856 for the qualification of valuator the words "immovable property" are used.

This nomenclature shews that the legislator has not been particular in the use of words. But we must give the same meaning to these different expressions and return to the interpretation of the words "real estate" (*bien-fonds*) or land (*propriété foncière*) which the law does not give.

The English version of paragraph 15 of article 2521 reads as follows:—(The learned Judge then quotes the English text given above).

The French text reads as follows:—

> "Les mots 'biens-fonds,' 'terrain' ou 'immeuble,' designent toute propriété foncière possédée ou occupée par une seule personne, ou par plusieurs personnes conjointement, et comprennent les constructions et améliorations qui s'y trouvent."

The English translation is not a happy one and throws no light on the subject. Nothing in the law indicates how the valuation roll prepared by the school corporation should be made in so far as concerns the entry upon the roll and valuation of real estate. Are they to value the land and buildings separately?

QUE.
S. C.
1912
SCHOOL MUNICIPALITY v. MONTREAL WATER & POWER CO.
Laurendeau, J.

The only articles which can guide us on this point are articles 2642 and 2639 where it is said that an elector and school commissioner to be qualified as such must be proprietors of real estate or must be the proprietors *of a building* upon land belonging to another and *must be entered as such upon the valuation roll.* For the interpretation of these two articles it is therefore necessary that the buildings should be valued on the roll separately from the land.

Are buildings or houses real estate or land, and consequently taxable property? If we reply in the negative the proprietor of a building, etc., built upon the land of another would pay no taxes while he who was the proprietor of the land and building would pay taxes on both in this sense that the land which is built upon would be valued at a higher sum than if it was not built upon. The elector and school commissioner or trustee who are only owners of buildings will also not pay taxes.

We must therefore conclude that buildings, houses, etc., must be entered on the valuation roll and valued separately from the land upon which they stand and must be considered as taxable property. I think, moreover, that buildings, etc., are real estate within the meaning of the definition of these words in paragraph 15 of article 2521. This section says that the words "real estate" "land" or "immovable" mean all lands and include buildings and improvements thereon. In the sense which I give to it this paragraph should read as follows: "The words 'real estate,' 'land' or 'immovable' mean all lands and mean also the buildings and improvements thereon."

By "real estate" or "lands" we must understand the land itself or the buildings, houses or improvements erected upon the land.

Are the defendant's water pipes real estate or lands within the meaning of the school law? These pipes are placed in the ground beneath the highways in the city of Montreal. The defendant is not proprietor of the streets where these pipes are placed. It only has the privilege of keeping these pipes where they are, of replacing them, or of laying them in new streets in order to furnish water to persons living in a certain territory. It only has the use of the streets for this purpose. It has not even acquired the ownership of the soil upon which the pipes lie. It has furthermore no interest in the soil. Nor can these pipes be considered as forming part of the soil. If they were they would then form part of land which was not taxable.

The nature of the rights which the defendant possesses is very difficult to define. Are they real rights, immovable rights, immovables? It is possible; but this is not sufficient. These immovables must be real estate according to the school law. As these pipes are not lands they must be considered as buildings

or improvements according to paragraph 15 of article 2521 if we wish to recognize them as taxable property.

I do not think that the legislature wished to comprise water pipes or gas pipes laid under public streets in the words "buildings and improvements." There is not a word in the school law which enables us to give such a broad interpretation to these words. Laws relating to taxes must be strictly interpreted and the power to tax must be clearly expressed in the law.

The defendant's pipes are not, therefore, under the circumstances taxable property and I dismiss the action.

I consider I should review briefly the authorities which were cited before me and others which I have consulted myself. Although we should not reason by analogy in such a case it is not without interest to compare different municipal laws.

The old Towns Corporations Act (articles 4178 and following of R.S.Q., 1888) contains no enumeration of taxable property because under this law (article 4538) a town corporation can only impose those taxes which are specially provided by its special charter.

The Cities and Towns Act (Que.), 1903 (articles 5730 and following, R.S.Q., 1909) allows taxes to be imposed on every immovable situate in the town, but it gives no definition of the word immovable.

But it must be noticed that in most of the special charters which have been granted to a large number of towns for which these acts form the common law, there is a special clause allowing the taxation of pipes, poles, etc., of telephone, telegraph or water companies or the taxation of the company itself at a rate of so much a pole or according to its business.

The Municipal Code presents the closest analogy with the school law. Article 709 says that all lands or real estate situated in a local municipality are taxable property. Article 719 adds that the actual value of taxable real estate includes the value of all buildings, factories or machine shops erected thereon and of any improvements which have been made thereto.

Then section 17 of article 19 says the term "taxable property" means the real property subject to taxation; and section 24 of the same article declares that the words "real estate" or "land" mean all land or parcels of land in a municipality possessed or occupied by one person or several persons conjointly and include the buildings and improvements thereon.

There is practically no difference between the municipal law and the school law.

The exemption from taxes which article 615 of the Municipal Code (Que.) allows municipal corporations to grant to water companies cannot make us conclude that water pipes are taxable property. It may happen, as is nearly always the case,

QUE.

S. C.
1912

SCHOOL MUNICIPALITY v. MONTREAL WATER & POWER CO.

Laurendeau, J.

that such companies own lands or buildings situated within the limits of the municipality and which would certainly be taxable. There is also a commercial or business tax to which these companies might be subject.

The Honourable Mr. Justice White has decided, however, in a case of the *Bell Telephone Company* v. *The Corporation of Ascot*, 16 Que. S.C. 436, that poles and wires, etc., of the telephone company placed in streets are immovable by nature and are taxable property in the meaning of article 709 of the Municipal Code.

At page 442 of the report the Honourable Judge speaks as follows:—

> Undoubtedly movable things, which have become immovable by reason of their having become attached to real estate, would become taxable as real estate, as a part of the real estate to which they are attached. . . . . .
>
> We hold therefore, that these poles and wires, erected as they have been, to be real estate by reason of their being erections or improvements upon the parcels of land, which the appellants have obtained the right to possess and occupy; and as such, taxable within the limits of the local municipality in which they have been erected, *i.e.*, they are real estate by their nature, in the same way as other improvements erected upon land or real estate.

I cannot accept this reasoning for the reasons which I have given above. That Honourable Judge bases his opinion chiefly on some American decisions which he cites. But these American decisions, which I have verified, are based upon special statutes which clearly enough grant to municipal corporations the right to impose taxes on water pipes or poles and telephone wires, etc.

The Honourable Judge also bases his opinion on the decision in the case of *The City of Hamilton* v. *Bell Telephone Co.*, 25 O.A.R. 361. That decision does not apply in the present case. In that case it was simply a question of deciding whether the pipes and poles of a telephone company situated within the limits of a territory could be valued separately and independently from the buildings, machines and other apparatus of the company situated outside the territory. In that judgment there is an affirmation that these pipes and poles, etc., are immovable ("real property and estate"), but it must be noticed that the law of Ontario differs considerably from ours.

In the case of *Sherbrooke Gas & Water Co.* v. *Town of Sherbrooke*, 15 L.N. 22, the Honourable Mr. Justice Tait decided that the pipes of a water company are immovable and subject to taxation. Under the charter of the city of Sherbrooke (39 Viet. ch. 50, sec. 30), the city has the power to impose taxes on lands, city lots, and parts of city lots, whether buildings exist on them or not, with all buildings and constructions erected thereon. In that case the defendant was owner of lands and

buildings and in addition of pipes laid in the streets across the town. The Court decided that the lands, buildings and pipes placed beneath the streets formed one whole and that this whole was taxable property.

Although that case is very different from the present one it may still be doubtful whether the Court of Appeal in view of the decision which it has rendered in the case of *The Town of Westmount* v. *The Montreal Light, Heat & Power Co.*, 20 Que. K.B. 244, would confirm that judgment, at least in so far as it relates to pipes. In this latter case the Court of King's Bench decided that the town of Westmount had not, under the provisions of its charter which allowed it to impose taxes on lands, town lots or parts of lots with all buildings and constructions thereon erected, the power to impose a tax upon the posts, pipes, etc., placed in the streets of the town by the Montreal Light, Heat & Power Company. Nevertheless, in this case, the Montreal Light, Heat & Power Company was in possession of the ground upon which the poles, pipes, etc., were placed as was the case in the case decided by Judge White and Judge Tait. The Supreme Court confirmed this judgment of the Court of Appeal: *Town of Westmount* v. *Montreal Light, Heat & Power Co.* (1911), 44 Can. S.C.R. 364.

The case of *Consumers Gas Co.* v. *City of Toronto*, 27 Can. S.C.R. 453, has also been cited to me. The plaintiff in that case had laid gas pipes in and under the streets of the city of Toronto and the Court decided that these pipes, etc., were immovable property subject to taxation. But it is well known that the law of Ontario is very different from ours. Under that law all property movable and immovable is taxable unless there is an exception in the law.

In the case of the *Metropolitan Railway Co.* v. *Fowler*, [1893] A.C. 416, it was decided that a tunnel built by a railway company under public streets could be taxed. But in that case the company which was authorized to construct the tunnel had the power to acquire and make use of the subsoil of the streets as well as to acquire from private parties parts of the subsoil if necessary for the construction of the railway. The Court considered that as the company had the right to acquire and make use of the subsoil of the streets as well as to acquire from private parties certain portions of land it had something more than a privilege of constructing a tunnel and that it had an interest in the land upon which the tunnel was built. And in that case Lord Herschell expressly declared that the company's tunnel could not be taxed if the company had not an interest in the land under which the tunnel was built, but only had the privilege of building the tunnel.

QUE.

S. C.
1912

SCHOOL MUNICIPALITY v. MONTREAL WATER & POWER CO.

Laurendeau, J.

In the case of *Chelsea Water Works* v. *Bowley*, 17 Q.B. 358, the English Court of Appeal decided that a water company which had power to lay pipes in streets was not subject to the tax imposed on lands because the right given to the company was to lay pipes on the lands of another and that the simple right of laying pipes in the ground could not be considered as land.

In the case of *The Queen* v. *East London Water Works*, 18 Q.B. 705, it was decided that a water company, whose pipes and other apparatus were laid under the street, should pay the tax as occupant of the land; but this decision is based upon a special statute which allows a tax to be imposed "upon all persons who shall inhabit, hold, occupy, possess or enjoy any land, house, shop, warehouse, cellar, vault, or other tenements or hereditaments within any of the streets, squares, etc., of the district."

*Action dismissed.*

---

ALTA.

S. C.
1912

June 22.

## Re CANADIAN ANTHRACITE COAL CO. and McNEILL.

*Alberta Supreme Court, Harvey, C.J., and Scott, Beck, Stuart and Simmons, JJ. June 22, 1912.*

1. LANDLORD AND TENANT (§ III A—44*a*)—RIGHTS OF PARTIES ON TERMINATION AS TO IMPROVEMENTS—CONSTRUCTION OF LEASE—RENEWAL.

Where a lease of a coal mining property provides that, at the expiration of the term, the value of the improvements added to the property by the lessee, in the way of plant, machinery, mining appliances and other betterments, shall be appraised with reference to the amount and character of the work which they were intended to perform and will be able to perform when and after the appraisement is made, and, upon the expiration of the term, a new lease is made, whereby that appraisement is waived, and it is provided that, upon the expiration of the term granted by the new lease, the lessor shall pay to the lessee, on appraisement, the value of the improvements added to the property by the lessee, in the way of plant, machinery, mining appliances, and other betterments, etc., during the period of the former lease as well as of the new lease, but that no stope, shaft, tunnel, gangway, breast, manway, airway, support, work, or fixed apparatus, constructed, made or used underground, shall be considered improvements or betterments so as to be subject to valuation and payment as aforesaid, except such as shall be of actual value to the lessor in the future operation of any such stope, etc., at the expiration of this lease, the word "operation" must be taken to mean the operation of the mine by the use of such stope, etc., so that all stopes, etc., which are of use for the future operation of the mine, are to be considered as improvements and to be appraised at their value as improvements added to the property, which means the property as leased, and not as returned to the lessor, so that those stopes, etc., which are simply the result of taking out coal, will probably have added nothing to the value of the property, but will rather have depreciated it, by reason of the removal of coal of greater value than the cost of their construction; and for the purpose of the appraisement the two terms of the tenancy may be treated as one continuous term, and the property to be considered as being affected by improvements may be taken as it existed at the commencement of the first lease.

STATED case submitted by arbitrators in respect of the appraisal of the value of improvements made by the lessee of a mining property payable by the lessors at the termination of the lease.

*R. B. Bennett*, K.C., for the H. W. McNeill Company, lessee.

*A. H. Clarke*, K.C., for the Canadian Anthracite Coal Company, lessors.

The judgment of the Court was delivered by HARVEY, C.J.:—The H. W. McNeill Company was lessee from the Canadian Anthracite Coal Company of certain coal lands, for the period of nearly 20 years, from 1892 to 1911, under two successive leases. Under the first lease it was provided that, at the expiration of the term, "the value of the improvements added to the property by the lessee in the way of plant, machinery, mining appliances, and other betterments," should be appraised "with reference to the amount and character of the work which they were intended to perform and will be able to perform when and after the appraisement is made."

When the new lease was made, at the expiration of the first term, the appraisement became then unnecessary, and the following provision was made:—

> It is further understood and agreed between the lessor and lessee that, upon the expiration of the term hereby demised, the lessor shall pay to the lessee, on appraisement, the value of the improvements added to the property by the lessee, in the way of plant, machinery, mining appliances, and other betterments, etc., during the period covered by that certain lease between the parties hereto of the property hereinbefore described, dated the 13th December, 1892, as well as during the continuance of this lease; both parties hereto waiving the appraisal of improvements to be made under and at the determination of said lease of the 13th December, 1892, the value of the said improvements to be appraised with reference to their value at the time such appraisement is made.

On the appraisement by the arbitrator appointed under the provisions of the lease, the lessee contended that it was entitled to receive "the actual value to the lessor of any stope, shaft, tunnel, gangway, breast, manway, airway, support, work, or fixed apparatus, in the future operation of any such stope, shaft, tunnel, gangway, breast, manway, airway, support, or fixed apparatus;" while the lessor contended that it is not required to pay for anything underground except such fixed apparatus as shall be of actual value to the lessor in the future operation of any stope, shaft, etc."

The arbitrators, being in doubt, have, under the provisions of the Arbitration Act, stated a case for the opinion of the Court, as to which contention is correct; also as to whether, if compensation is to be made as contended by the lessee, it is to be extended to any stope, shaft, etc., constructed during the term

ALTA.

S. C.
1912

RE CANADIAN ANTHRACITE COAL CO. AND MCNEILL.

Harvey, C.J.

of the first lease; and also, in so far as, if at all, it is a question of law, what is the basis upon which the value should be appraised?

It is urged on behalf of the lessor that the expression "improvements added to the property" includes only such things as are brought on the property from outside, and cannot include passageways, in other words, holes, which are simply the result of something being taken away, and that this view is supported by the class of things specified, "plant, machinery, etc.," as well as by the use of the word "improvements" in other parts of the lease, and in the first lease in this connection.

There would seem to be much force in this contention, were it not for the fact that the second lease contains a clause in effect declaring that stopes, shafts, etc., on conditions specified, are to be considered as included in the term "improvements." The clause follows the one I have quoted as to appraisement and is as follows:—

> Provided, however, that no stope, shaft, tunnel, gangway, breast, manway, airway, support, work, or fixed apparatus, constructed, made, or used underground, shall be considered improvements or betterments so as to be subject to valuation and payment as aforesaid, but the same shall be considered as the property of the owners of the land, except such as shall be of actual value to the lessor in the future operation of any such stope, shaft, tunnel, gangway, breast, manway, airway, support, work, or fixed apparatus, at the expiration of this lease, in which case they shall be appraised as herein agreed.

It seems clear from this proviso that "stopes, shafts, etc.," are, under certain conditions, to be treated as included within the term "improvements" and to be appraised and paid for; but what the conditions are is not so clear. It is a little difficult to understand what is meant by the "operation of any such stope, shaft, etc." It is admitted that "stopes, shafts, gangways, breasts, and manways" are passageways made by the removal of coal, and they might be said to be "operated" if coal were being removed from them, but a "tunnel," it is said, is a passageway from one seam of coal to another through some other substance.

An "airway," as the name indicates, is for the passage of air, and might not be through coal; and "operation," in the sense suggested, could clearly not apply to a "support, work, or fixed apparatus." Some other meaning must, therefore, have been in the intention of the parties, and the only interpretation which seems justifiable so as to give any effect to the clause is, that the word "operation" is used loosely and in reality refers to the operation of the mine by the use of "such stope, shaft, etc." With this interpretation, it would follow that all "stopes, shafts, etc.," which are of use for future operation of the mine, are to be considered as improvements and to be appraised as such. It is contended by counsel for the lessee that they are

to be appraised at their actual value to the lessor for future operations.

Counsel for the lessor objects that the lease does not call for an appraisement on any such basis; that they are not to be appraised at all, unless they are of actual value for future operations, but that it does not follow that they are to be appraised at such actual value. It is quite conceivable that the coal that stills remains in the mine can be mined only through and by means of the "stopes, shafts, etc.," now in existence, and that it is of such value as to justify an expenditure equal to the lessee's cost of making the "stopes, shafts, etc.," to obtain access to it.

How, then, could their actual value for future operations be determined? Would it be by what it would have cost the lessor to construct them? If so, is it to be assumed that the passageways are to be constructed through soil, coal, or rock? Because the cost would greatly differ. It may be said that it is not necessary to assume anything, but the conditions should be taken as they actually existed. In that case the lessor, in making the excavations, would take out the coal, which, from the fact that the lessee has taken it out and paid a considerable royalty for the privilege of so doing, was quite clearly of greater value than sufficient to pay the cost of all the work, which leads the lessor to argue that the value of the coal taken out of any "stope, shaft, etc.," should be deducted from its cost in fixing its value for the appraisement. The result of that would probable be that the passageways, which are the result of taking out coal, would have no appraisable value, though the passages which are not the result, but are for the purpose, of taking out coal, might and probably would have some appraisable value.

The lessor's counsel points out that to pay the actual value for future operations might compel the lessor, after having allowed the lessee to sell the coal, to pay the lessee all the cost of having mined it, which it has already received from the price of the coal sold. Such a result could surely not have been intended; and it appears to me that the terms of the lease furnish the basis of valuation; and, adopting that basis, no such result as last-mentioned could follow. While the stopes, shafts, etc., are to be appraised, such appraisement is to be at their value as "improvements added to the property;" and I can see no ground, in view of the clear terms of the second lease, for any distinction between those made under the first lease and those made under the second.

The definition, applicable to the present use of the word "improvement," given by Murray's New English Dictionary, is:

> An act of making or becoming better; a process, change, or addition by which the value or excellence of a thing is increased; that in which such addition consists, or by which anything is made better.

ALTA.

S. C.
1912

RE CANADIAN ANTHRACITE COAL CO. AND MCNEILL.

Harvey, C.J.

In so far as these "stopes, shafts, etc.," increase the value of the property, they are improvements, and their value as such improvements is the amount of such increase; but—and this appears to be where the whole importance is—"the property" which is referred to in the lease is not the property which is now returned to the lessor, of which the stopes, shafts, etc., form a part, but is the property which was leased, and it is the improvements added to that property which are to be appraised, and the value of which is to be paid by the lessor to the lessee.

In an ordinary lease the property leased remains constant, and is returned in the same condition as received, but the present lease, while such in name and in effect, sells as much of the property stated to be leased as the lessee can remove during the term. It may quite be that the value of the stopes, shafts, etc., to the lessor, is very considerable, for the purpose of obtaining the remaining coal, or, in other words, for future operations; but it does not thereby follow that they have increased the value of the property leased so as to have any value as "improvements added to the property."

In fact, it is quite probable, and, as far as anything occurs to me, would seem to be the fact, that those which are simply the result of taking out coal have added nothing to the value, and that in fact the property has been depreciated in value by their creation, by reason of the removal of coal of greater value than the cost of their construction. There may be other things specified, such as tunnels, supports, fixed apparatus, etc., as well as stopes, shafts, etc., made in development work in advance of the mining operations, as required by the terms of the lease, the creation or construction of which have enhanced and not depreciated the value of the property. If so, they are to be appraised at their value as improvements, that is to say, at the amount by which they have increased the value of the property as it existed before they came into existence, and to which, accordingly, they have been added.

I have said that no distinction is to be made between the works created under the first lease and those created under the second. I mean by that, that they are to be included and appraised in the same way, though, of course, the property which was leased by the second lease was not the same as that leased by the first lease, and in fact included the "stopes, shafts, etc.," then in existence. But, for the purpose of the appraisement, the two terms may be treated as one continuous term, and the property to be considered as being affected by improvements may be taken as it existed at the commencement of the first lease.

By the terms of the lease above-quoted, the improvements are to be appraised with reference to their value at the time such appraisement is made; and, though they might have had a

value as improvements when made, if they have ceased to have such value at the time of appraisement, they will be disregarded. They should not, however, be taken as a whole, but should be treated as divisible; and any stope, shaft, etc., which increases the value of the property leased, should be paid for at the value of such increase, and of any that do not so increase the value should be disregarded.

*Declaration accordingly.*

---

## STONE v. CANADIAN PACIFIC R. CO.



*Ontario Court of Appeal, Moss, C.J.O., Garrow, Maclaren, Meredith, and Magee, JJ.A. April 4, 1912.*

1. MASTER AND SERVANT (§ II C 2—199)—LIABILITY OF RAILWAY COMPANY —CONTRIBUTORY NEGLIGENCE OF SERVANT—COUPLING CARS.

It is contributory negligence for a brakesman, while standing with one foot on a loose step on the side of a box car 6½ inches below the bottom thereof, and with one hand holding a rung of a ladder on the side of the car 14 inches above the bottom of the car, to attempt to open the coupling device by working the lever that operated it, the end of which was about 15 or 16 inches from the side of the car.

2. TRIAL (§ II C 8—146)—NEGLIGENCE OF RAILWAY—QUESTIONS FOR JURY.

Where the jury omitted to answer a direct question submitted to them on the trial of a railway employee's action against the railway for damages for negligence causing personal injury as to whether there was negligence on the part of the plaintiff or of the defendant company or of both, their negative answer to another question as to whether the car was reasonably safe for the employees, which latter question was not directly pointed at the alleged defects leading to the injury, is not alone a finding of negligence and is insufficient to support a verdict for plaintiff.

3. CARRIERS (§ IV A—518*b*)—GOVERNMENTAL CONTROL—EQUIPMENT OF FREIGHT CARS—FOREIGN CARS INTERCHANGED—RAILWAY ACT, R.S.C. 1906, CH. 37, SEC. 264.

Sub-sec. 5 of sec. 264 of the Railway Act which requires "all box freight cars of [a railway] company" to be equipped with outside ladders on the ends and sides thereof, applies only to cars owned by the defendant company and not to those of a railway company operating in the United States, that were received by the defendant in interchange of traffic under sec. 317 of the Railway Act.

4. MASTER AND SERVANT (§ II C 2—199)—CONTRIBUTORY NEGLIGENCE—ABSENCE OF LADDER FROM END OF FOREIGN RAILWAY CAR—STATUTORY CONDITION.

A verdict for the defendant should be directed where the evidence shews that the plaintiff, a brakesman in the former's employ, received an injury as the result of his own carelessness while attempting to couple cars, and not as the result of the absence of a ladder from the end of a car that, in the interchange of traffic, under sec. 317 of the Railway Act was received by the defendant from and was owned by a railway company operating in the United States, which was not shewn to be under any obligation, statutory or otherwise, to maintain ladders on the ends as well as the sides of its box freight cars.

ONT.

C. A.

1912

STONE v. CANADIAN PACIFIC R. CO.

5. CARRIERS (§ III J—486)—EQUIPMENT OF FOREIGN FREIGHT CARS—RAILWAY ACT, R.S.C. 1906, CH. 37, SEC. 261.

Notwithstanding that sec. 261 (1) of the Railway Act requires every railway company to provide cars with couplers coupling by impact, that can be uncoupled without the necessity of men going between the ends of cars, the fact that a car, which in the interchange of traffic, under sec. 317 of the Railway Act was received from and was owned by a railway company operating in the United States, had an operating lever on its coupling device which was shorter than those on cars owned by the defendant, is not a defect so as to render the defendant liable for injuries sustained by a brakesman while attempting to couple it, since cars with short levers were constantly being received and passed in the ordinary course of inspection.

6. MASTER AND SERVANT (§ II C 2—199)—CONTRIBUTORY NEGLIGENCE—COUPLING CARS.

The fact that a box freight car was not equipped with ladders at the ends as required by sub-sec. 5 of sec. 264 of the Railway Act, will not render a railway company liable for injuries sustained by a servant while attempting to couple cars, where the absence of such ladder was not the contributing cause of such injury.

7. NEGLIGENCE (§ I A—1)—BASIS OF ACTION—ABSENCE OF NEGLIGENCE ON PART OF DEFENDANT.

A verdict for the plaintiff for injuries received while in the employ of a railway company cannot be sustained where neither the evidence nor the answers of the jury to questions submitted them disclose, on the part of the defendant, negligence that contributed to the plaintiff's injury.

Statement

THIS is an appeal by the defendants from a judgment entered by the Chancellor of Ontario, upon the answers of the jury at the trial, awarding the plaintiff $6,000 damages for injuries received while in the defendants' employment as a brakesman. The plaintiff was endeavouring to effect a coupling between two box freight cars, at or near Bolton Junction, a station on one of the defendants' lines of railway, and, while doing so, was either shaken off or fell from a ladder affixed to the side and close to the end of the car upon which he was riding, and one of the wheels passed over his right arm, necessitating amputation. The box freight car in question was not the property of the defendants, but had been received and was being hauled over their lines under the interchange of traffic provisions of the Railway Act. It had been received by the defendants at Detroit from the Wabash Railroad Company on the 14th March, 1911, loaded with merchandise for various points on the defendants' lines of railway, and on the 18th March it was in course of return to Detroit, *viâ* Toronto Junction, as part of one of the defendants' regular way-freight trains, when the accident happened.

The plaintiff attributed the accident to three causes: (a) the la'der being defective because the lowest step, or the step which was placed below the bottom of the car, was not joined to the rest of the ladder, but was separate and attached to the bottom timbers of the car, and was loose and insecure; (b) there was no ladder on the end of the car close to where the side ladder was; and (c) the coupling-rod used for controlling the action of auto-

ONT.

C. A.

1912

STONE v. CANADIAN PACIFIC R. Co.

Statement

matic couplers, when about to effect a coupling of cars, did not extend outward from the couplers to the side of the car, or within a short distance from it, but was so short as to necessitate the going in between the cars, or at all events to render it necessary to reach very far beyond the side of the car in order to get hold of it.

The defendants denied all liability, and witnesses were examined on both sides. At the conclusion of the plaintiff's case, counsel for the defendants moved for judgment on the ground that no case of negligence had been shewn, but the learned Chancellor declined to withdraw the case from the jury. The motion was renewed at the conclusion of the whole case and again denied.

The learned Chancellor submitted to the jury a number of questions which with the answers returned are subjoined, *viz.*:—

1. Was the car in question owned by the C.P.R. or by another company? A. Owned by another company.

2. Was the car and its fittings reasonably safe for the employees of the C.P.R., in the usual operations of the road? A. We think not.

3. Was the plaintiff, having regard to all the circumstances, in his method of arranging the gear for coupling the cars, acting according to good and proper practice? A. Not having received circular No. 4, we think he acted to the best of his knowledge.

4. If not, wherein did he err?

5. Was the plaintiff injured in consequence of any defect in the make-up of the car? A. Yes, in our opinion we think he was.

6. If he was so injured, state everything which you find to be wrong. A. The car in question lacked the ladder on end of car and long lever equipment used by C.P.R., in which company he was employed.

7. Could the plaintiff, by the exercise of reasonable care, have provided for the coupling of the cars with safety to himself? A. In our opinion, not under the circumstances.

8. Do you find negligence as to the matters in dispute?

(a) In the C.P.R.?

(b) In the plaintiff?

(c) Or, in both of them?

9. If so, state briefly what was the negligence in each case.

10. If the plaintiff is entitled to damages, state how much. The jury have agreed on $6,000 for damages for plaintiff.

Upon the answers judgment was entered for the plaintiff for $6,000.

The defendants now appeal, contending that the plaintiff is not entitled to recover damages against the defendants; that, if entitled to any judgment, the damages should be limited to the amount recoverable under the Workmen's Compensation for Injuries Act; and that, in any event, the damages awarded are excessive.

ONT.

C. A.
1912

STONE
v.
CANADIAN
PACIFIC
R. CO.

Argument

*I. F. Hellmuth*, K.C., and *Angus MacMurchy*, K.C., for the defendants. The learned trial Judge should have given effect to the motion for nonsuit at the close of the plaintiff's case, or at least upon the whole case he should have told the jury that no liability had been made out. There was no breach of any statute by the defendants. Unless the provisions of sec. 264 of the Railway Act, R.S.C., 1906, ch. 37, apply, there appears to be no rule against the transport of foreign box freight cars. The car in question was not in contravention of that section. It was received in the ordinary course of the obligation to interchange traffic, imposed by sec. 317 of the Railway Act, and was properly inspected. The evidence shewed that the accident was caused, not by the negligence of the defendants, but by that of the plaintiff, and that he was the author of his own injury. His position on the ladder was not a proper one, and was an unauthorised and a dangerous one. He should have signalled the engine-driver to stop, and then got down and made the coupling from the ground. At any rate, the jury by their answers have not directly found the defendants guilty of negligence, though they have found that the Wabash car was defective. There was no evidence on which a jury could reasonably find that the alleged defects pointed to in the answers to questions 5 and 6 were the proximate cause of the accident. There was no evidence to justify the answer to question 7. There was neither statutory nor common law liability. In any event the damages are excessive.

*A. E. H. Creswicke*, K.C., and *Christopher C. Robinson*, for the plaintiff. The judgment below should be affirmed. The findings of the jury which bear upon the questions of negligence and contributory negligence are amply supported by the evidence, and should not be disturbed. The evidence and findings of the jury shew clearly that the defendants were guilty of a breach of their statutory duty under the Railway Act, and that such breach was the cause of the accident. See sec. 264 (*c*), and sub-sec. 5; *Durant* v. *Canadian Pacific R.W. Co.* (1909), 13 O.W.R. 316; *Scott* v. *Canadian Pacific R.W. Co.* (1909), 19 Man. L.R. 165. In everything but the ladders, the Act deals with the train, the ladders being dealt with in reference to "cars." Therefore, the statute applies to the coupler, whether the cars are foreign or not. In reference to sec. 256 of the Railway Act, see *Atcheson* v. *Grand Trunk R. W. Co.* (1901), 1 O.L.R. 168, and MacMurchy and Denison's Railway Law of Canada, 2nd ed., p. 410. As to secs. 284 and 317, no company is bound to accept cars unless properly equipped: *Richardson* v. *Great Eastern R.W. Co.* (1876), 1 C.P.D. 342. On the question of contributory negligence, we submit that on a plea of "not guilty by statute" that question is not open. *Doan* v. *Michigan Central R.W. Co.* (1890), 17 A.R. 481, is not conclusive. The jury have found against contributory negligence: *Canadian Northern R.W. Co.* v. *Anderson* (1911), 45 S.C.R. 355.

ONT.

C. A.
1912

STONE
v.
CANADIAN
PACIFIC
R. CO.

MOSS, C.J.O.

*Hellmuth*, in reply. We are not obliged to plead contributory negligence.

April 4, 1912. MOSS, C.J.O. (after setting out the facts as above):—Upon all the facts disclosed in evidence, and having regard to the circumstances under which the plaintiff met with the injury, I think that, if I had tried the case without a jury, I should have had no hesitation in holding that the plaintiff had not succeeded in fastening liability upon the defendants. But, the case having been submitted to the jury, and their answers to the questions being now before us, there arise for consideration the questions: (a) whether there was evidence proper to submit to the jury upon the questions of negligence on the part of the defendants; and, if so, (b) whether, upon the answers, judgment should not have been entered for the defendants.

The plaintiff, a young man twenty-two or twenty-three years of age, who had been for over five years in the employment of the Canadian Express Company, but in what capacity does not appear, though it may be inferred that it was work in connection with railways, and was subsequently employed by the Grand Trunk Railway Company as a brakesman for six months, entered the defendants' employment as a spare brakesman on the 20th August, 1910, and continued in that capacity, though not engaged all the time in actual work, until the date of the accident, on the 18th March, 1911. On that day he was engaged as brakesman on a freight train with the box freight car in question as one of the cars. At Bolton Junction it was necessary to detach a car which was to be left there, and it was cut out by means of a running shunt. After performing that and some other operations, the next step was to unite the remainder of the cars, which were to go on to Toronto Junction. The car in question—called the Wabash car—was to couple with a car some distance from it on the line. The plaintiff, as his duty required, went upon the roof to signal the engineer to back down to the other car. When the engine was moving the Wabash car down towards the other car, the plaintiff, according to his testimony, observed that the coupler on it was closed—that is, that the knuckle was not in a position to effect a coupling with the Wabash car unless the knuckle or its coupler, which was also closed, was opened.

In order to open this knuckle, the plaintiff went down the ladder on the side of the Wabash car, near the end which was approaching the other car, with the intention of getting hold of the lever or coupler-rod by which the knuckle was opened or closed, and by lifting it thereby open the knuckle so as to receive the coupler of the other car. He went to the bottom step, and, with his left foot resting on it, and holding on to the lowest rung of the ladder with his left hand, and with his right foot hanging down and swinging in the air, he endeavoured to reach around the end of the car to the lever or coupler-rod. This lever was connected with

ONT.

C. A.
1912

STONE
v.
CANADIAN
PACIFIC
R. CO.

MOSS, C.J.O.

the top of the coupler, with the rod projecting towards the side of the car on which the plaintiff was. While he was in this position, the car, moving at the rate of about seven miles an hour, passed over a crossing of two tracks, and the jar caused his foot to slip from the bottom step, and he fell with his arm under the wheels. In his evidence he said that the lever-rod projected only some fifteen or sixteen inches from the coupler, which was about four feet from the side of the car, so that the end was about thirty-two or thirty-three inches from the side of the car where he was. He further said that the bottom step was about eleven inches in width, and was loosely and insecurely fastened to the bottom timber of the car, besides not being under the ladder but to one side of it, and that the side which was the furthest from the end of the car. In all these respects the testimony adduced by the defendants amply and satisfactorily displaced the plaintiff's contentions. But, as the case stood at the end of the plaintiff's case, the learned Chancellor could not have withdrawn it from the jury if the defendants' negligence rested upon proof of these facts. It was admitted that the Wabash car had not ladders on the ends, as required by sec. 264 (5) of the Railway Act.* The plaintiff, in examination in chief, stated that, had there been a ladder at the end of the car, he would have gone down it, and endeavoured to make the coupling. But on cross-examination he admitted that it was not good railway practice to go down between the ends of two cars to make a coupling when the car was in motion—but, he said, "you see it done every day." It is manifest that such a practice is not only dangerous but is directly opposed to the policy of the law as declared by sec. 264 (c) of the Act. He also suggested that, if the ladder had been at the end, he might have saved himself from falling, by catching it; but it is difficult to suppose that he could have seriously believed that that was one of the purposes for which a ladder is required on each end of a car. It was not, however, proved or admitted during the plaintiff's case that the car was not the property of the defendants. And, assuming it to have been the defendants' property, there were the questions whether it

* Sub-sec. 5 of sec. 264 of the Railway Act, R.S.C. 1906, ch. 37, is as follows:—

"All box freight cars of the company shall, for the security of railway employees, be equipped with—

(a) Outside ladders, on two of the diagonally opposite ends and sides of each car, projecting below the frame of the car, with one step or rung of each ladder below the frame, the ladders being placed close to the ends and sides to which they are attached; and,

(b) Hand grips placed anglewise over the ladders of each box car and so arranged as to assist persons in climbing on the roof by means of the ladders:—

Provided that, if there is at any time any other improved side attachment which, in the opinion of the Board, is better calculated to promote the safety of the train hands, the Board may require any of such cars not already fitted with the side attachments by this section required, to be fitted with the said improved attachment."

was fitted with couplers and ladders as required by sec. 264, and whether the failure to provide them was the cause of the accident, or whether it was due to the plaintiff's own want of care or failure to observe the usual and proper modes of making the coupling. The plaintiff admitted that the proper course would have been to signal the engine-driver to stop, and then get down and make the coupling from the ground, which he could have done. He excused himself by saying that he was on the fireman's side of the car, and that the engine-driver was not looking, and so he (the plaintiff) could not give any signal.

Upon the whole, although scanty, there was enough at the close of the plaintiff's case to justify the refusal to enter judgment for the defendants. But at the close of the whole case, when it had been proved, and indeed admitted, that the car was not the defendants' property, but was owned by the Wabash or some other company, other questions arose as to the liability of the defendants for the failure of this car to comply with all the requirements of sec. 264, applicable to couplers and ladders on box freight cars. The car had been received in the ordinary course of the obligation to interchange, traffic, imposed by sec. 317 of the Railway Act.* It had been inspected in due course and passed in accordance with the ordinary practice, by inspectors whose competency was not questioned. Many hundreds of box freight cars without ladders on each end are received and passed daily, entering Canada from the United States. It is shewn that there is no rule, statutory or otherwise, requiring that there shall be ladders on the ends as

Section 317 of the Railway Act, R.S.C. 1906, ch. 37, is as follows:—

"All companies shall, according to their respective powers, afford to all persons and companies all reasonable and proper facilities for the receiving, forwarding and delivering of traffic upon and from their several railways, for the interchange of traffic between their respective railways, and for the return of rolling stock.

2. Such facilities to be so afforded shall include the due and reasonable receiving, forwarding and delivering by the company, at the request of any other company, of through traffic, and, in the case of goods shipped by car load, of the car with the goods shipped therein, to and from the railway of such other company, at a through rate; and also the due and reasonable receiving, forwarding and delivering by the company at the request of any person interested in through traffic, of such traffic at through rates.

3. No company shall—

(*a*) Make or give any undue or unreasonable preference or advantage to, or in favour of any particular person or company, or any particular description of traffic, in any respect whatsoever;

(*b*) By any unreasonable delay or otherwise howsoever, make any difference in treatment in the receiving, loading, forwarding, unloading, or delivery of the goods of a similar character in favour of or against any particular person, or company;

(*c*) Subject any particular person, or company, or any particular description of traffic, to any undue, or unreasonable prejudice or disadvantage, in any respect whatsoever; or,

(*d*) So distribute or allot its freight cars as to discriminate unjustly against any locality or industry, or against any traffic which may originate on its railway destined to a point on another railway in Canada with which it connects.

ONT.

C. A.
1912

STONE
v.
CANADIAN PACIFIC R. CO.

MOSS, C.J.O.

well as on the sides of box freight cars used on railways operated in the United States. The car was provided with automatic couplers, but the complaint is as to the length of the lever, or coupling-rod. There is no express provision in the Railway Act prescribing the length of the lever, but the testimony for the defendants shewed that the end of the lever on the car extended to within fifteen or sixteen inches of the side, instead of thirty-two of thirty-three inches, as the plaintiff stated. The modern Canadian lever is made to extend out to the side, or to within at least eight inches; but cars from the United States, with the end of the lever fifteen or sixteen inches from the side, are admitted and passed in the usual and ordinary course of inspection. Unless the provisions of sec. 264 apply, there appears to be no statutory or other rule against the transport of foreign box freight cars, although they do not comply in every respect with the Railway Act.

Section 264 (1) enacts that:—

> Every company shall provide and cause to be used on all trains modern efficient apparatus, appliances and means, . . . (*c*) to securely couple and connect the cars composing the train, and to attach the engine to such train, with couplers which couple automatically by impact, and which can be uncoupled without the necessity of men going in between the ends of the cars.

Assuming the expression "and cause to be used" to comprehend foreign cars in transport over the defendants' lines, the car in question was not open to objection for any defect in the above-mentioned respects.

4. Every company which has or works a railway forming part of a continuous line of railway with or which intersects any other railway, or which has any terminus, station or wharf near to any terminus, station or wharf of any other railway, shall afford all due and reasonable facilities for delivering to such other railway, or for receiving from and forwarding by its railway, all the traffic arriving by such other railway without any unreasonable delay, and without any such preference or advantage, or prejudice or disadvantage as aforesaid, and so that no obstruction is offered to the public desirous of using such railways as a continuous line of communication, and so that all reasonable accommodation, by means of the railways of the several companies, is, at all times, afforded to the public in that behalf.

5. The reasonable facilities which every railway company is required to afford under this section, shall include reasonable facilities for the junction of private sidings or private branch railways with any railway belonging to or worked by any such company, and reasonable facilities for receiving, forwarding and delivering traffic upon and from those sidings or private branch railways.

6. Every company which grants any facilities for the carriage of goods by express to any incorporated express company or person, shall grant equal facilities, on equal terms and conditions, to any other incorporated express company which demands the same.

7. Any agreement made between any two or more companies contrary to this section shall be unlawful and null and void: 3 Edw. VII. ch. 58, secs. 253, 271, and 278; 6 Edw. VII. ch. 42, sec. 23.

ONT.

C. A.
1912

STONE
v.
CANADIAN
PACIFIC
R. CO.

MOSS, C.J.O.

Sub-section (5) enacts that—

> All box freight cars of the company shall, for the security of railway employees, be equipped with—(*a*) outside ladders, on two of the diagonally opposite ends and sides of each car, projecting below the frame of the car, with one step or rung of each ladder below the frame, the ladders being placed close to the ends and sides to which they are attached.

The car in question had not ladders on the ends, but it was not a car "of the company." There is a distinction drawn between the couplers to be used on all trains, and the equipment of box freight cars with ladders. The obligation with regard to the latter is confined to cars of the company. The car was, therefore, not in contravention of the sub-section. Even if the contrary were the case, it is clear that their absence in no way contributed to the accident which befell the plaintiff. I think that, upon the whole case, the jury should have been told that no case appeared upon which they could reasonably find that the defendants were negligent, and that no case of liability had been made out; and that the action should have been dismissed.

Assuming, however, that it was proper to submit the case to the jury, is the plaintiff entitled to judgment upon the answers returned to the questions? It is to be observed, in the first place, that the jury failed to return answers to the very pointed and material question on the head of negligence contained in No. 8. But they answer the very general question No. 2, "Was the car and its fittings reasonably safe for the employees of the C.P.R. in the usual operations of the road?" which is not directly pointed at the alleged defects leading to the injury, and a negative answer to which is not a finding of negligence on the part of the defendants.

The answers to questions 4 and 5 bear more directly on the question. They attribute the plaintiff's injury to the fact that the car in question lacked the ladder on the end of the car and the long lever attachment used by the defendants in their cars. But there is no evidence upon which a jury could reasonably find that these alleged defects were the proximate cause of the accident. The plaintiff was endeavouring by using the side ladder not as a means of descending the ladder to the ground and there effecting the coupling, as he admits was the proper course, but for the purpose of enabling him, by using the lowest step as a foothold and crouching with his body in a strained and awkward position, to effect the coupling, without stopping the car or getting down to the ground. The position was admittedly an improper, and certainly a very dangerous, one, not authorised to be taken. The method adopted by the plaintiff to endeavour to effect the coupling was the very one most calculated to expose him to danger and risk of injury. And there is no evidence to justify the answer of the jury to the 7th question, an answer which, in its terms, is

ONT.

C. A.
1912

STONE
v.
CANADIAN PACIFIC R. CO.

Moss, C.J.O.

inconclusive and unsatisfactory. There were no "circumstances" to prevent the plaintiff from adopting the perfectly safe course which he admits he might have done.

Having regard to the evidence in the case, I do not think the answers sufficient to support the judgment entered for the plaintiff; and I think that, notwithstanding them, judgment should have been entered dismissing the action.

The appeal should be allowed, and the action dismissed, with costs if exacted.

Garrow, J.A.
Maclaren, J.A.

GARROW and MACLAREN, JJ.A., concurred.

Meredith, J.A.

MEREDITH, J.A.:—A good deal that has been said and done in this case seems to me to have quite missed the mark which should have been arrived at; for instance, all of that branch of it which deals with the requirements of the statute-law regarding ladders at the ends of "box freight cars." It can make no difference whether there was any such requirement in respect of the "Wabash" car, from which the plaintiff fell, or, if so, whether that obligation was imposed upon the company that owned the car, or upon the company who were using it in the carriage of their freight, or upon the defendant company, who had received, and were forwarding it as interchanged freight only, if as I think, it is incontrovertible that the ladder was not required to be provided for the work in which the plaintiff was engaged when he fell and was hurt; but, on the contrary, that, if he had made use of any such ladder for such a purpose, he would have misused it, contrary to the provisions of the enactment in question, against the wishes and interests of his masters, against his own interests, and against the first instincts of all animals—self-preservation. If he had fallen from such a ladder as he did from the one in question, his life, not only one hand, would have paid the penalty.

It is quite obvious to any one who has not had, as the plaintiff had, six years' experience in railway matters as a brakesman and otherwise, that it is dangerous to go between cars of any train, and extremely so if they are in motion; and it is equally obvious that that risk should not be taken in any case in which it can reasonably be avoided; quite obvious that it is against the interests of him who does it, of his relatives and friends, and of his employers, as well as against the public interests, that risk of life or limb should be undertaken when there is no occasion for it.

As to his experience, he tells of it in these words:—

> Q. You have had no experience in railway matters before you went into the employ of the C.P.R.? A. Yes, sir.
>
> Q. To what extent? What was your experience? A. I had been with the Canadian Express Company for about five or six years, and I was with the Grand Trunk as brakesman.

ONT.

C. A.
1912

STONE
v.
CANADIAN
PACIFIC
R. CO.

Meredith, J.A.

Q. Passenger brakesman or freight? A. Passenger and freight both.
Q. Then your experience up to the time you quit their employ would be about five or six years, would it? A. Yes, about six years.

In the same section of the Railway Act in which the requirement as to the ladders is contained, it is expressly and plainly required, in the interests and for the safety of just such men as the plaintiff, that automatic couplers, "which can be uncoupled without the necessity of men going in between the ends of the cars," shall be provided, and used, upon cars such as that in question. So that, if such couplers are provided, what possible excuse can there be for going between the cars to uncouple them, not to speak of going between them and doing the work on a perpendicular box car ladder, without any sort of reason for not doing that work from without the cars?

It seems to have been thought necessary, by a learned Judge, to say that you cannot have damages for injury to a finger in the closing of a passenger carriage door, merely because the headlight of the engine, which was drawing the train, was not burning when it should have been; and so it seems to me to be necessary to repeat somewhat frequently the observation that one cannot have damages for any negligence which is not the proximate cause of the injury.

So that really this case depends entirely upon the two questions: (1) whether the defendants were guilty of any negligence in respect of the kind of brake which the plaintiff was attempting to uncouple only; and, if so, (2) whether that negligence was, or whether the plaintiff's want of care in whole or in part was, the cause of his injury.

The jury have not found any negligence in the defendants; it would be very hard to see how they could. The question was pointedly put to them. The substance of their findings, in so far as they affect this case, is, that the "Wabash" car was "defective" in not having "the ladder on the end of the car and long lever equipment," such as the defendants have upon their own cars; and that, in consequence of such defects, the plaintiff was injured.

The findings are not very consistent, for, if the ladder which was not provided had been provided, and if the plaintiff had used it, he would have had no need of a long lever uncoupling rod. His testimony is, that, if there had been a ladder at the end of the car, he would have used it in uncoupling. A longer rod might have made the task of uncoupling from the side ladder somewhat easier; but possibly less so from an end ladder; the lengthened rod is to enable doing the work without going between the cars.

But there is no evidence that the uncoupling rod did not fully comply with the requirements of the statute, and no finding that it did not; how then can the judgment be sustained? And, as I have before mentioned, there is no finding of negligence on the part of the defendants; and, if there had been, there is no evidence

ONT.

C. A.
1912

STONE
v.
CANADIAN PACIFIC R. CO.

Meredith, J.A.

whatever to support such a finding; the plaintiff's case seems to me to be hopeless in this respect; indeed, it may be that the requirements of the enactment, in this respect, are all that the law can require from any company subject to its provisions, whichever company may be the one to which it applies, if it does not apply to more than one of the companies concerned in the making and the movement of the car in question.

In addition to all this, it seems to me to be impossible for any reasonable man to say, conscientiously, that the plaintiff's injury was not caused altogether by his own negligence; and considerably less than that would deprive him of any right to recover.

The statute-law, passed for the especial benefit of persons engaged in car coupling and uncoupling, as a brakesman especially is, shews the impropriety of uncoupling in any manner making it necessary to go between the cars for that purpose. If the plaintiff were a novice complaining of being put at dangerous work without proper instructions, the case might be different; but he was a man of six years' experience "in railway matters;" and is without any sort of excuse for adopting the extraordinary method which he was employing when injured. I cannot but think it likely to bring legal methods into conflict with the commonest of common sense if it can be lawfully determined that the plaintiff was acting properly in endeavouring to uncouple cars in motion, from a ladder on the side of the car, too far, according to his testimony, from the end of it, and, according to the same testimony, with a foot-hold too shallow and not wide enough to get both his feet into, and shaky at that, with a coupler rod too short to be operated without danger; and while supported by one foot only upon the loose step, and one hand only upon the rung of the ladder next above that in which his foot was, and only about twenty inches apart, and then making an unduly long reach around the end of the car with his right hand to uncouple; when there was absolutely no need of attempting it, and when so doing was in the teeth of the interest of every one, as before-mentioned, as well as of the enactment already referred to.

It was suggested that the plaintiff should have our sympathy, however unwisely he may have acted, because, it was said, he was taking the risk in his masters' interests and for their benefit; the first part of the proposition I assent to, provided however that such sympathy does not warp the judgment; the latter part is obviously erroneous; there is no kind of evidence of over-zeal on the plaintiff's part in his masters' service; as I have intimated, he did that which was, and he must have known was, against the interests of every one because of the danger of it; he knew that every one's interest required that the uncoupling should be done from the ground without going between the cars and when they were not in motion, and that there was no sort of reason why that course should not be taken; but familiarity with danger

breeds contempt of it, and he is not the only man who would not hesitate to take the risk rather than take the additional trouble to stop the train and get down and uncouple and get up again; for, after all, the risk might be undertaken a good many times without a fall, and a good many falls might happen without getting any part of one's body under the wheels; and he is not the only man who is willing to make the trip's work as short as possible and to be home again as soon as possible.

Meredith, J.A.

The jury have hedged themselves in, with a shifty answer, from the untrue finding that the plaintiff could not, by the exercise of reasonable care, have uncoupled the cars in safety: "In our opinion, not under the circumstances;" and they quite dodged the question whether that which the plaintiff was trying to do when he fell was "according to good and proper practice," meaning, I suppose, was it a proper method of uncoupling the cars? The jury should have been asked what they meant by "under the circumstances;" if under the circumstances of standing on the ladder as he was and attempting to do the work in that way—if they assume that that was proper—there might be some justification for the answer; but that would be entirely begging the question.

I would allow the appeal and dismiss the action.

Magee, J.A.

MAGEE, J.A.:—The plaintiff was brakesman on top of a freight car, at the rear of a train which was being pushed back to be coupled to another car which was stationary. Both cars had automatic couplers—but in order to couple it is necessary that the knuckle of one or other shall be open. He noticed that both were closed. The knuckle, according to the defendants' witness Hawkes, can be opened by the operating lever of a moving car. To reach the operating lever the plaintiff descended the only ladder at that portion of the car. That was a ladder on the side of the car, which appears from the evidence to have been reasonably close to the corner or end.

It is, I think, clear from the evidence that it was customary for brakesmen to operate the levers from the ladders while the cars were moving. It had been done only a few moments before by the other brakesman opening the coupler of the adjoining car to make a flying shunt. The conductor says it was quite customary, and he would not think of reporting a brakesman for doing it, and had never told any one not to do it. The general yard-master, called for the defendants, states that the lever can be operated from the side-ladder.

It is sought to draw a distinction between operating the lever on a moving car in order to uncouple, and doing so in order to couple. But the plaintiff states, and he is not contradicted but indeed borne out by other evidence, that he had plenty of time to do what he was going to do and get around to the side out of the way before the cars would couple. Really all he proposed doing

ONT.

C. A.
1912

STONE
v.
CANADIAN
PACIFIC
R. CO.

Magee, J.A.

was operating the lever on a moving car. Nowhere do I find that to be forbidden. It was argued that this was contrary to the defendants' circular No. 4 of the 15th February, 1911, which, however, the jury find the plaintiff not to have had notice of. That circular forbids "all acts familiarly known as taking chances," and it calls attention to accidents which had occurred "solely by carelessness on the part of some employee, such as," *inter alia*, "adjusting coupler . . . when cars are in motion." But Mr. Hawkes, the defendants' yard-master, expressly states, as one might expect, that opening the knuckle by the operating lever is not "adjusting the coupler." That circular naturally enough puts "adjusting coupler" in the same category with "turning angle-cock or uncoupling hosebags"—all which would have to be done by going between the cars on the ground. But the circular is luminous in respect of several operations. Thus it refers to "accidents from holding on side of car," but only "when passing platform, building, or other obstruction known to be close to track;" "kicking cars into sidings," but only where other cars are standing; and "detaching moving cars" without first seeing to the brakes being in order. This last instance impliedly recognises the practice of detaching moving cars if only the brakes are in order. The plaintiff was injured in an operation not a whit more dangerous than those which are here impliedly recognised, and not at all one which involved the danger of going between cars.

But it seems to me that the plaintiff was not warranted in trying to work the lever from the position which he took, that is, holding with one hand the very lowest rung of the ladder only fourteen inches above the edge of the car, with one foot on the step, only six and a half inches below the edge. He does not shew that there would have been any difficulty in reaching the lever while grasping a rung higher up. Mr. Hawkes considers it quite feasible to have done so, even from the upper rung, which I would doubt, though it is not contradicted. The plaintiff would seem to have been in fact inviting disaster by attempting to reach the lever while in that attitude. There was no compulsion of any sort upon him to do so, either from fear of injury to his employers' property or otherwise. It is simply a case of unnecessary overbalancing, so far as appears—and, however much one may feel sorry for his injury, it cannot, I think, be said to be caused by the defendants' negligence or breach of statutory duty, if there was such duty as to this car of another company.

*Appeal allowed.*

## Re IRWIN.

ONT.

H. C. J.
1912

March 30.

*Ontario High Court, Middleton, J. March 30, 1912.*

1. WILLS (§ III G 7—150)—CONSTRUCTION — ANNUITIES CHARGED UPON INCOME—EFFECT ON CORPUS.

Where from a will the testator's intention appears to be that annuities thereby created should be a charge only upon the income of his estate, the corpus cannot be charged therewith.

[*Carmichael* v. *Gee*, 5 App. Cas. 588, distinguished; *Baker* v. *Baker*, 6 H.L.C. 615; *Re Boden*, [1907] 1 Ch. 132; *Re Howarth*, [1909] 2 Ch. 19 and *Re Watkins*, [1911] 1 Ch. 1, specially referred to.]

2. EVIDENCE (§ II K—322)—DIRECTION TO EXECUTORS—PRESUMPTION AS TO GIFT—ANNUITY CHARGED ON INCOME.

Express directions to executors to hold and invest all of the testator's property of all kinds until the time fixed for distribution thereof, precludes the inference of an intention to enlarge the gift of an annuity, which was expressly charged upon the income of his estate, so as to render it a charge upon the corpus thereof.

3. ANNUITIES (§ I—7)—EXPRESS CHARGE ON INCOME.

A gift of an annuity as an express charge upon the income of an estate is not enlarged so as to create a charge upon the corpus thereof by loose expressions in a will to the effect that it shall be a charge upon the estate or its investments.

4. ANNUITIES (§ I—7)—ARREARAGES—INSUFFICIENCY OF INCOME—PERMANENT CHARGE.

Where arrearages in the payment of annuities are due to the income upon which they are expressly charged not being sufficient to pay them in the order of priority established by will, they do not remain a charge upon the income of the estate after the time fixed for distribution until they can be paid in full.

5. WILLS (§ III L—193)—ANNUITIES CHARGED ON INCOME—DEFICIENCY—MODE OF ABATEMENT.

Where a will declares that annuities thereby created shall be paid, some as a first charge, others as a second charge, etc., on the income of an estate, any abatement incident to a deficiency of income must be borne in the order of priority stated in the will and not *pro rata* as between the various annuitants.

6. WILLS (§ III L—193)—ANNUITIES CHARGED ON INCOME—VARIATION IN AMOUNT—ARREARS.

Where the income of an estate varies from year to year, each year is to be considered separately; and annuities will be paid therefore in the order of priority established by will; and an annuitant who does not in any one year receive the full amount of his annuity cannot charge the arrearage upon the income of subsequent years in priority to those annuities payable in that year.

7. ANNUITIES (§ I—4)—PAYING PREVIOUS DEFICIENCIES FROM SURPLUS.

The surplus income of an estate for any one year, after the payment of all annuities for that year chargeable thereon is available for the payment of arrearages of annuities for previous years.

8. WILLS (§ III E—111)—SURPLUS INCOME—RESIDUARY ESTATE.

The surplus income of an estate which is not required for the payment of annuities or arrearages thereof charged thereon will fall into the residue of the estate for distribution.

ONT.

H. C. J.
1912

RE IRWIN.

9. EXECUTORS AND ADMINISTRATORS (§ II A—21)—DUTY OF TRUSTEES AS TO INVESTMENTS—UNPRODUCTIVE SECURITIES—DELAY IN CONVERTING SAME—LIFE TENANT.

Where trustees who are vested with absolute discretion as to the conversion of non-productive securities of an estate, delay the conversion thereof, the proceeds when realized enure to the benefit of life tenants so as to give them the same benefit as if the conversion had taken place within a reasonable time from the death.

[*Yates* v. *Yates*, 28 Beav. 637; and *Re Cameron*, 2 O.L.R. 756, specially referred to; see also *Leadlay* v. *Leadlay*, 3 D.L.R. 487, 3 O.W.N. 1218, 22 O.W.R. 14.]

10. DEEDS (§ II B—27)—SETTLEMENT ON MEMBERS OF "FAMILY"—CONSTRUCTION.

The word "family" as used in a deed of settlement to the effect that upon the death of the beneficiary the principal should go to such persons, who might be members of the settlor's family, as he should by will appoint, *primâ facie* means "children."

[*Pigg* v. *Clarke*, 3 Ch. D. 672, referred to.]

11. DEFINITION (§ I—7)—MEANING OF WORD "FAMILY" IN DEED OF SETTLEMENT.

The word "family" as used in a deed of settlement to the effect that upon the death of the beneficiary the principal should go to such persons who might be members of the settlor's family, as he should by will appoint, is elastic enough and the context broad enough to include grandchildren who, at the death of the beneficiary, resided with and were a part of the settlor's recognized family.

12. ANNUITIES (§ I—3)—CHARGED ON INCOME—DIVERSION OF PART TO GENERAL INCOME.

Where a settlement terminated with the death of the settlor, and by the terms of his will the income from the principal thereof was payable to annuitants therein named, such income cannot be diverted to the payment of annuities which the testator charged generally upon the income of his estate.

13. ANNUITIES (§ I—7)—PAYABLE FROM DESIGNATED FUND—RIGHT TO RESORT TO INCOME FROM GENERAL ESTATE.

Where by will an annuity is payable primarily from a designated fund the securities belonging thereto will be marshalled and the annuity paid from the income thereof before resort will be permitted to the income of the testator's general estate.

14. WILLS (§ III E—113)—BEQUEST OF INCOME FROM LIFE INSURANCE—CORPUS TO THEIR CHILDREN.

A bequest of an income from a portion of the insurance upon the life of a testator to his daughters for their lives, and at their deaths of the corpus to their children, constitutes a good declaration under the Insurance Act.

15. WILLS (§ III E—113)—BEQUEST OF PORTION OF LIFE INSURANCE—PRESENT GIFT.

A present gift is created by a bequest to a grandson of a portion of the insurance upon the life of a testator.

16. WILLS (§ III L—198*m*)—DIVISION OF RESIDUE—SPECIFIC LEGACY EXCEEDING RESIDUARY SHARE.

Under a will which provides that three-quarters of the amount a legatee received by specific bequests should be deducted from the amount to which he was entitled as a residuary legatee, and that the difference should be divided among a designated class of legatees, where the amount of such specific bequests exceeded the former's residuary share of the estate the latter share will be divided among such designated class of legatees.

17. WILLS (§ III E—111)—BEQUEST OF PART OF LIFE INSURANCE—DEATH OF LEGATEE—R.S.O. 1897, CH. 203, SEC. 159, SUB-SEC. 8.

Where a legatee to whom is bequeathed a portion of the insurance upon a testator's life dies before the latter, such bequest will be divided, under R.S.O. 1897, ch. 203, sec. 159, sub-sec. 8, equally among such designated class of legatees.

ONT.

H. C. J.

1912

RE IRWIN.

Statement

ORIGINATING notice to determine questions arising upon certain trusts of the will of James M. Irwin, who died on the 8th October, 1908.

On the 26th November, 1891, a separation agreement was come to between the testator and his wife, Annie Irwin, by which he agreed to make certain payments to her while she should live separate from him.

On the 29th February, 1896, the testator executed a deed poll in favour of A. H. Marsh, assigning certain securities to him as trustee for the purpose of securing the payments to Annie Irwin, and, subject to these payments, for the benefit of his children as he might appoint by will.

A further agreement was made between the testator, his wife, and Marsh on the 5th July, 1898, modifying the separation agreement and supplementing the trust fund.

After the death of the testator, a question was raised as to Annie Irwin's right under these instruments; and an order was made by BOYD, C., on the 22nd March, 1910, declaring that the trust created by these instruments ceased on the death of the testator.

In the meantime, the testator had obtained a divorce (the validity of which was not in question) from Annie Irwin, and had married Sherife MacDonald.

By his will the testator gave all his property, save his household effects, etc., to his executors, with power to convert into money at such times as they in their unlimited discretion should think fit, and to invest the proceeds, holding the fund upon the following trusts: (1) Out of the income, "as a first charge" to pay to his present wife, Sherife Irwin, $800 a year so long as she should live and remain unmarried. (2) As a second charge in order of priority to pay out of the income $500 a year to his daughter Lillian for her maintenance; and, if she should die leaving children before the time for final distribution of the estate, this annuity to be paid to her children. (3) To pay out of the income a sufficient sum which, together with the income arising from the property which may be transferred to a trustee for that purpose, would make up $600 per annum to Annie Irwin, so long as she should remain unmarried; this to be taken in lieu of dower and in satisfaction of all claims under the separation agreement, and to form "a third charge in order of priority upon my estate." (4) To pay out of the income $500 a year to his daughter Caroline Bird, and after her death to her sons or the survivor until the period of distri-

ONT.

H. C. J. 1912

RE IRWIN.

Statement

bution. (5) To pay out of the income $500 a year to the children of his deceased son James, which "annuity shall form a fifth charge in order of priority upon my estate." Upon the annuity to Sherife Irwin ceasing to be a charge, the trustees were to pay $5,000 to the testator's son Mossom; and upon the annuity to Annie Irwin so ceasing, a further principal sum of $2,000 to Mossom. The final period of distribution was to be when the youngest of the two sons of James or the youngest of the now living sons of Caroline should attain the age of twenty-one, or when the provisions in favour of Annie Irwin and Sherife Irwin should have ceased to be a charge upon the estate, whichever should be latest. Then the remainder of the estate was to be divided into four equal shares, and the income from one was to be paid to Caroline during her lifetime, and after her death the corpus to her two sons now living or the survivor (Caroline and her two sons being called class 1). Another fourth was to be paid to the two sons of James or the survivor (class 2). The income derived from the third of the four shares was to be paid to Lillian during her lifetime, and upon her death the corpus to be paid to her children then living; if no children, then to be divided as set forth in detail (class 3). From the remaining fourth was to be deducted three-fourths of the amount to which Mossom was entitled under the other provisions of the will, and the balance was to be paid to Mossom, who, with his children, if he should die before the date of distribution leaving children, was to be regarded as class 4; and the three-quarters so deducted was to be divided among the three other classes.

*A. G. F. Lawrence*, for the executors.

*T. P. Galt*, K.C., for Annie Irwin.

*E. D. Armour*, K.C., for Caroline Bird, Lillian Irwin, and Mossom Irwin.

*H. T. Beck*, for Sherife Irwin.

*J. R. Meredith*, for the infant children of James Irwin and of Caroline Bird.

Middleton, J.

MIDDLETON, J.:—A separation agreement was come to on the 26th November, 1891, between the testator and his wife Annie Irwin, by which, among other things, the husband agreed to make certain payments to his wife while she should live separate from him.

On the 29th February, 1896, the testator executed a deed poll, by which he assigned to the late A. H. Marsh, Q.C., certain debentures therein mentioned, amounting in all to approximately $6,000, for the purpose of securing the payments due and to accrue due to his wife, and, subject to these payments, "For the benefit of and among my children and their issue or some one, two or more of them, in such shares and proportions as shall be appointed by my last will and testament and

in default of such appointment then to divide the said moneys between my three daughters, Caroline, Bessie and Lillian, or the survivor or survivors of them.

A further agreement was made between Irwin and his wife, and Mr. Marsh, as trustee, on the 5th July, 1898, reciting the separation agreement and a desire to modify it in some respects, and the intention of Irwin to sell certain property and a request by him to his wife to join in the conveyance for the purpose of barring her dower, and that it had been arranged among other things to supplement the trust fund already held by Mr. Marsh, by placing in his hands a further sum of $4,500, to be held for the purpose of paying the separation allowance, and "subject to such appointment hereof by the said party of the first part (the husband) to or among such one or more persons who at the time of appointment shall be members of the family of the said party of the first part as he the party of the first part shall by deed or will appoint," and in default of appointment to divide between the three daughters or their survivors. On the 5th July, 1898, Mr. Marsh executed a document acknowledging receipt of this sum, to be held upon the trusts declared.

After the death of Irwin some question was raised as to whether the wife's right to receive the payments under the trust deed came to an end; and on the 22nd March, 1910, the Honourable the Chancellor declared that the trust created by the above mentioned instruments ceased and determined on the death of Irwin. In the meantime Irwin had, in reliance upon a divorce the validity of which is not now in question, contracted marriage with Sherife MacDonald, and she was treated by him as his wife.

By his will the testator gave all his property, save his household effects, etc., to his executors, with power to convert into money at such times as they in their unlimited discretion should think fit, and to invest the proceeds, holding the fund upon the following trust:—

First, out of the income, "as a first charge" to pay to his present wife, Sherife Irwin, an annuity of $800 per year so long as she lives and remains unmarried.

And, as a second charge in order of priority to pay out of the income an annuity of $500 per annum in equal quarterly payments to his daughter Lillian for her maintenance, and if she should die leaving children before the time arrives for the final distribution of his estate this annuity is to be paid to her children.

Thirdly, to pay out of the income a sufficient sum which, together with the income arising from the property which may be transferred to a trustee for that purpose, would make up $600 per annum, in quarterly instalments to his former wife

ONT.

H. C. J.
1912

RE IRWIN.

Middleton, J.

Annie Irwin, so long as she shall remain unmarried, this to be taken in lieu of dower, and in satisfaction of all claims under the separation agreement, and to form "a third charge in order of priority upon my estate."

Fourthly, to pay out of the income an annuity of $500 per annum in quarterly instalments to his daughter Caroline Bird, and after her death to her sons or the survivor until the period of distribution.

Fifthly, to pay out of the income an annuity of $500 in quarterly instalments to the children of his deceased son James, which "annuity shall form a fifth charge in order of priority upon my estate."

Upon the annuity to the testator's wife Sherife ceasing to be a charge, the trustees are to pay to his son Mossom $5,000 and upon the annuity to Annie Irwin ceasing to be a charge they are to pay to Mossom a further principal sum of $2,000.

The final period of distribution is to be when the youngest of the two sons of James or the youngest of the now living sons of Caroline shall have attained the age of 21 years, or when the provisions in favour of the first and second wives shall have ceased to be a charge upon his estate, whichever shall be the latest. Then the remainder of his estate is to be divided into four equal shares, and the income from one of such shares is to be paid to Caroline during her lifetime, and after her death the corpus is to be paid to her two sons now living, or the survivor; Caroline and her sons being called class 1.

Another of these four shares is to be paid to the two sons of James, or the survivor, they being called class 2.

The income derived from the third of the four shares is to be paid to Lillian during her lifetime, and upon her death the corpus to be paid to her children then living; if she has none, then to be divided as set forth in detail. This is called class 3.

From the remaining share is to be deducted three-fourths of the amount which Mossom is entitled to under the other provisions of the will, and the balance is to be paid to Mossom who, with his children if he shall die before the date of distribution, leaving children, is to be regarded as class 4; and the said three-quarters so deducted is to be divided between the three other classes.

Upon these clauses of the will several questions arise. The income of the estate is not sufficient to meet the annuities. The two wives claim that the annuities are charged not only upon the income after the period fixed for distribution, until any arrears are fully satisfied; this being equivalent to a charge upon the corpus.

The cases upon the subject are very numerous, and not at all easy to reconcile with any clearly defined principle. Where

the gift is of an annuity, and the disposition of the estate is subject thereto, there is no doubt that the charge is upon the corpus. *Carmichael* v. *Gee*, L.R. 5 A.C. 588, is an illustration of cases of this type. On the other hand, if the gift is of an annuity payable out of income only, the corpus is not charged. *Baker* v. *Baker*, 6 H.L.C. 615 is a case of this type. Between these two extremes there are many intermediate cases.

Sir John Rolt, L.J., in *Birch* v. *Sherratt*, L.R. 2 Ch. 644, thus contrasts the two classes:—

> If an annuity is given out of rents and profits, or dividends and interest, and the capital or corpus is given intact from and after the annuitant's death, to another, the case is equivalent to the case of a life interest with remainder over. But if the capital is given over, not from and after the annuitant's death but from and after satisfaction of the annuity and subject to the annuity, then I think the case is equivalent to the case of a legacy and a residuary bequest, especially if the gift of the annuity itself admits of a construction charging it upon the capital of the estate or of the trust fund.

Lord Cranworth, in *Baker* v. *Baker*, 6 H.L.C. 615, says:—

> In all these cases arising upon a construction of will the real question is whether that which is given is given as an annuity or is given as the interest of a fund; and when that question is to be considered what you must look to is this: whether the language of the testator imports that a sum at all events is annually to be paid out of his general estate or only the interest or portion of the interest or capital sum which is to be set apart. Now, in deciding that question, it is obvious that all we have to look to is the language of the particular will, and to ascertain what is the true interpretation of the language there employed.

In the same case, Lord Chancellor Chelmsford, after pointing out that the testator did not contemplate a deficiency, states that under these circumstances, not present to the testator's mind, the Court has—

> to impose as it were a new intention upon the testator, because, as he clearly contemplated that there would be a sufficient fund to pay this annual sum out of the interest and dividends and that the corpus of the fund was not to be touched for the purpose of assisting in its payment, you are now called upon to suppose that he had the intention of appropriating a portion of the corpus of the fund in case the dividends and interest out of which he declared the annual sum should be payable are proving to be deficient.

Lord Chelmsford then points out, as being a very strong controlling consideration, the impossibility of supposing that the testator might have contemplated that by—

> appropriating annually a portion of the corpus of the property it would be utterly annihilated and the beneficiaries would be left without any provision at all.

ONT.

H. C. J. 1912

RE IRWIN.

Middleton, J.

an intention which could not have existed in the mind of the testator.

In many of the cases the Court has found, in the expression used in connection with the devise of the property upon which the annuity is charged, an intention sufficiently expressed to charge not merely the income but also the corpus.

The cases cited for the "widows" fall under this head. In *Re Howarth*, [1909] 2 Ch. 19, the gift of the annuity was out of the income; but when the testator came to deal with the corpus the gift was "subject to the aforesaid annuities" which, as stated by Buckley, L.J., means—

> not subject to the payment of the annuities out of income as aforesaid, but subject to the payment and satisfaction of certain annual sums.

To the same effect is *Re Watkins*, [1911] 1 Ch. 1, where the corpus was given after the direction to pay an annuity out of the income to the widow "subject thereto" as a matter of interpretation the Court held that this meant not subject to payment out of the income but subject to the payment of the whole annuity; the effect of the terms by which the corpus was dealt with being regarded in each case as sufficient to charge it with the payment of the annuity; but there is nothing in the cases at all in conflict with what is said by Fletcher Moulton, L.J., in *Re Boden*, [1907] 1 Ch. 132, at p. 153—

> that when the testator has directed that the payment should be out of income he did not intend the capital of his residuary trust fund to be disturbed in order to make the annual payments.

Turning then to the will, I think I find conclusive indications that the testator did not intend the corpus of the estate to be encroached upon. The provisions for the different annuities are not identical. In each case the gift of the annuity is out of income arising from the investments made by the executors; and in the case of Sherife there is an express direction that the principal money from which the annuity is derived shall upon her death or marriage fall into his estate and become subject to the provisions of the will. This provision is not repeated in the case of the other annuities, but the intention is plain.

What the executors are to hold and invest is "all the rest residue and remainder of my real and personal property of every nature and kind;" and upon the arrival of the period of distribution, the testator's desire is, "that then all the rest residue and remainder of my estate of every nature and kind shall be divided." This, I think, indicates clearly that the same fund which the executors received is to be held until the arrival of the period of distribution, and to be then distributed. There is nothing in the gift over indicating any enlarge-

ment of the gift to the annuitants; and the gift to the annuitants is in each case a gift out of income, and income alone. The same reasoning shews that the annuities are charged upon the income prior to the period of distribution, and that there is no intention to create a continuing charge.

The only foundation for an argument to the contrary arises in the clauses dealing with the priority of the annuities. The expressions are loose, and vary in the different clauses. The annuities are declared to be "a first charge," "a second charge upon the investments," "a third charge upon my estate," etc. I do not think that these expressions can be taken to enlarge the gift.

Then the question was raised as to whether these annuities should abate rateably or whether priority is given between the annuities. As I intimated upon the argument, I am unable to conceive any clearer expression of intention intimating that the annuities shall rank in priority than those used in this will. Sherife's annuity is made a first charge on the income from the investments; Lillian's is made a second charge in order of priority; Annie Irwin's a third charge in order of priority; Caroline's a fourth charge in order of priority; and that for the children of James a fifth charge in the order of priority.

The question was then raised as to how these annuities should be dealt with, having regard to the fact that the annual income will vary from time to time and will increase as unproductive property is realised. I think that the annuities are to be dealt with annually, and that at the end of each year from the testator's death the executors should ascertain the amount of income available, and should then determine the amount to which each annuitant is entitled—having regard to the priorities declared—and that no annuitant who fails to receive the full amount has any charge against the income for the next or any succeeding year in priority over the annuities payable in that year. Each year will thus be standing upon its own footing. If in any year, before the final period of distribution, the income derived from the estate is more than sufficient to pay all the instalments of annuity falling due in that year, such surplus will, I think, be available to meet any arrears that may be due to the annuitant in respect of instalments of annuity which fell due during lean years. This is, of course, to be confined to the income prior to the date fixed for distribution. All the income prior to that date stands charged with the annuity. If there is any surplus not required to meet the annuities and arrears of annuities, it will then fall into the residue to be distributed among the classes.

The next question presented was the right and duty of the trustees to apportion the proceeds of non-productive securities

ONT.
H. C. J.
1912
RE IRWIN.
Middleton, J.

when realised. The governing principle is found in *Yates* v. *Yates*, 28 Beav. 637, 639, where Sir John Romilly says:—

> Where a testator gives property to trustees with an absolute trust for conversion and with a discretion as to the time at which the conversion shall take place, if from any causes whatever arising from the exercise of the discretion and judgment of the trustees the conversion is delayed, then the tenant for life is not prejudiced by that delay, but is to have the same benefit as if the conversion had taken place within a reasonable time from the death of the testator; which is usually fixed at twelve months from that period.

This principle is applied in *Re Cameron*, 2 O.L.R. 756, where the mode of computation is pointed out.

The next difficulty arises in connection with the fund held under the two declarations of trust called by counsel the "Marsh settlements."

Under the "Marsh settlements" and the separation deed, the widow's right ceased upon the death of the testator, as already determined. Under the first of these settlements, the principal is to go to the testator's children and their issue as the testator may appoint by his will. Under the second, it is to go to such one or more persons, who at the time of appointment shall be members of the testator's family, as he shall by his will appoint. The testator by his will has referred to these two declarations, and directed that these trust funds shall form part of his estate dealt with by his will.

The word "family," used in the second settlement, primâ facie means "children:" *Pigg* v. *Clarke*, 3 Ch.D. 672. The words, however, are elastic, and the context here would be sufficiently wide to cover the grandchildren—the children of the deceased son James—if at the time of the testator's death these resided with and formed part of the recognized "family," in a more colloquial sense, of the testator. The facts as to this are not sufficiently clear upon the material, but it may be supplemented before the order issues.

I do not think that either Sherife Irwin or Annie Irwin is entitled to share in the income derived from these securities: they do not fall within the scope of the power. The income from these securities will, therefore, be primarily answerable for the annuities payable to the children and possibly the grandchildren; but Annie Irwin will be entitled to have the securities marshalled and to compel Lillian to resort to the income of this trust fund in priority to the income from the general estate.

This question has not been argued before me. If there is any question upon which counsel cannot agree, it may be mentioned later.

The next question is with respect to the insurance money.

The testator was insured for a considerable sum, originally declared in favour of his wife and children. By his will he directed that the money should be applied and paid, $500 to his son William, $500 to his daughter Bessie, $3,000 to his son Mossom, and the balance to be invested by his trustees: the income derived from one-fourth of such balance to be paid to Annie Irwin so long as she should be entitled to receive the annuity under his will, and the remaining three-fourths and the reversion of the one-fourth "shall be divided into three equal parts, and one of the said parts shall be taken as supplementing the provision hereinbefore made for class 1, and one of the said parts shall be taken as supplementing the provision hereinbefore made for class 2, and one of the said parts shall be taken to supplement the provision hereinbefore made for class 3." The only provision made for these classes by the earlier part of the will is a provision becoming operative at the period fixed for final distribution.

Class 1, as already indicated, consists of the testator's daughter during her life, and after her death of her surviving sons. I think this is a good declaration, under the Insurance Act, in favour of this class.

Class 2 is the two sons of the deceased son James. I think this is a good declaration in favour of these two sons and that it constitutes a present gift to them.

In the same way I think the provision for class 3 is a good declaration, under the Insurance Act, in favour of Lillian during her life, and upon her death as provided by the will.

Class 4 is, I think, a good present appointment in favour of Mossom, but it is subject to the deduction of $7,000, which will far more than exceed Mossom's share. The amount of this share will, therefore, fall to be distributed between the other three classes as indicated by the will.

The testator's daughter Bessie, to whom $500 insurance money is given by this apportionment, is said to be dead. The date of her death is not given. I assume that she pre-deceased the testator. If so, under the Insurance Act her share is distributed among the survivors of the preferred beneficiaries in equal shares. R.S.O. ch. 203, sec. 159, sub-sec. 8.

I think that covers all the questions submitted. If any point has been overlooked, or if this decision gives rise to any new difficulties, counsel are at liberty to speak to the matter before the order issues.

Costs of all parties may be paid out of the estate.

*Declaration accordingly.*

MAN.

K. B.
1912
July 9.

## COLONIAL ASSURANCE CO. v. SMITH.

*Manitoba King's Bench. Trial before Mathers, C.J.K.B. July 9, 1912.*

1. CORPORATIONS AND COMPANIES (§ V G 2—295)—RIGHT OF SHAREHOLDER TO VOTE—NON-PAYMENT OF NOTE GIVEN FOR A CALL—52 VICT. (MAN.) CH. 53, SEC. 12.

A shareholder whose note given for a call is overdue, cannot, under the provisions of sec. 12 of ch. 53 of 52 Viet. (Manitoba), vote at an election of company directors.

2. CORPORATIONS AND COMPANIES (§ V G 2—295)—WHO ENTITLED TO VOTE —WRONGFULLY VOTING AT PRIOR ELECTION.

The fact that a shareholder who was in arrears for calls and therefor not entitled, under sec. 12, ch. 53, 52 Viet. (Manitoba), to vote at elections of directors, had been permitted to vote at previous elections, will not justify his voting at a subsequent election.

3. TENDER (§ I—6)—CHEQUE FOR ARREARS IN PAYMENT OF CALL ON SHARES —EFFECT OF ON QUALIFICATION TO VOTE ON ELECTION OF DIRECTORS—52 VICT. (MAN.) CH. 53, SEC. 12.

The tender, at an election of company directors, of a cheque for arrears in payment of a call, does not remove the disqualification imposed by section 12, ch. 53, 52 Viet. (Manitoba), on a shareholder, so as to permit him to vote at such election.

4. CORPORATIONS AND COMPANIES (§ V G 2—293)—RIGHT OF NON-MEMBER TO VOTE AS PROXY.

Unless the incorporating statute or a by-law of the company provides otherwise, the proxy appointed to represent a shareholder at a shareholders' general meeting at which the election of directors is to be held, need not himself be a shareholder.

[Lindley on Companies, 6th ed. 429; and *Ernest* v. *Loma*, [1897] 1 Ch. 1, specially referred to.]

5. CORPORATIONS AND COMPANIES (§ V G 2—293)—POWER OF COMPANY AS TO APPOINTMENT OF NON-MEMBER AS PROXY.

The right of a shareholder to appoint a non-member as proxy to vote at an election of company directors, may be taken away by by-law.

6. CORPORATIONS AND COMPANIES (§ IV G 2—117)—POWERS OF DIRECTORS AND SHAREHOLDERS AS TO BY-LAWS RELATIVE TO VOTING SHARES BY PROXY—52 VICT. (MAN.) CH. 53, SEC. 15.

The power to adopt by-laws relative to the voting of shares by proxy at elections of company directors is, by section 15 of ch. 53, of 52 Viet. (Manitoba), vested in the directors only, and not in the shareholders of the company.

[*Kelly* v. *Electrical Construction Co.*, 16 O.L.R. 232, applied.]

7. CORPORATIONS AND COMPANIES (§ V G 2—293)—RIGHT OF MEMBER IN DEFAULT TO VOTE BY PROXY.

A proxy may be voted at an election of company directors by a shareholder who is, by reason of non-payment of calls, under section 12 of ch. 53 of 52 Viet. (Manitoba), precluded from voting his own shares.

8. CORPORATIONS AND COMPANIES (§ V G 2—294*a*)—MODE OF VOTING FOR DIRECTORS—52 VICT. (MAN.) CH. 53, SEC. 12.

Under sec. 12 of ch. 53 of 52 Viet. (Manitoba), company directors cannot be elected in any manner except by ballot.

9. CORPORATIONS AND COMPANIES (§ I D—19)—RIGHT OF MAJORITY OF SHAREHOLDERS TO USE NAME OF COMPANY IN PROCEEDING TO EXPEL DIRECTORS.

The name of a company may be used in behalf of a majority of the shareholders in a proceeding to expel directors who were illegally elected.

MAN.

K. B.
1912

COLONIAL ASSURANCE CO. v. SMITH.

Statement

THIS is an action brought in the name of the Colonial Assurance Company and A. H. Correlli, R. M. Simpson and Jasper Halpenny, on behalf of themselves and all other shareholders of the company, to set aside the election of the defendants as directors of the company at the annual meeting held on the 14th February last, on the ground that such election was illegal and void, and for other incidental relief.

Judgment was given for the plaintiff.

*G. A. Elliott* and *W. L. McLaws*, for plaintiffs.

*T. H. Johnson*, for defendants.

Mathers, C.J.

MATHERS, C.J.K.B.:—At the meeting in question the shareholders were divided into two factions. Those favourable to the present defendants were:—

F. Crossley, holding 60 shares; Wm. Smith, 210 shares; Mrs. Wm. Smith, 50 shares; J. M. Dick, 50 shares; James Hooper, 50 shares; J. L. Nelson, 100 shares; Geo. Leslie, 40 shares; Wm. Manahan, 50 shares. Total, 610 shares.

In addition to above there were present in person or by proxy the following shareholders:—

L. W. Hill, per proxy to W. B. Thompson, 200 shares; W. P. Davidson, per proxy to Jas. Fisher, 200 shares; A. H. Correlli, in person, 100 shares; Geo. Glines, per proxy to A. H. Correlli, 100 shares; Thos. Wilson, per proxy to A. H. Correlli, 100 shares; R. M. Simpson, in person, 100 shares; J. Halpenny, per proxy to R. M. Simpson, 100 shares; Nellie Halpenny, per proxy to B. C. McMillan, 5 shares; B. C. McMillan, per proxy to A. H. Correlli, 20 shares; J. J. Foot, per proxy to A. H. Correlli, 20 shares; Jerry Robinson, per proxy to A. H. Correlli, 50 shares; W. J. Hammond, per proxy to A. H. Correlli, 100 shares. Total, 1,095 shares.

At a meeting of the shareholders of the company held the 16th day of February, 1905, what purports to be the general by-laws were passed. Of these by-laws clauses six and thirteen are as follows:—

Sec. 6. The election of directors and all other matters brought before the annual or special meetings of the company shall be decided by a majority of the shareholders present in person or as represented by proxy. A poll may be demanded by any of the shareholders present, in which event each share represented in person or by proxy shall be entitled to one vote.

Sec. 13. No person not being a shareholder, or any shareholder not having paid the calls upon his shares, can take part at any meeting of the company and no person shall be deemed a shareholder unless his name appears as such upon the books of the company.

Before the election of directors was taken up the question of those entitled to take part in the meeting under the above quoted by-laws was discussed. Neither W. B. Thompson nor James Fisher, who were present as proxies, for L. W. Hill and W. P. Davidson, respectively, were shareholders, and the defendant

MAN.

K. B.
1912

COLONIAL ASSURANCE CO. v. SMITH.

Mathers, C.J.

Smith, who was chairman of the meeting ruled that they could not, for that reason, represent the shareholders named. The chairman also ruled that the plaintiffs Simpson and Halpenny could not take part, because they were in default for calls upon their shares. They had each given the company their promissory note to cover the call which notes were accepted by the company. I gather that Halpenny's note was still current and therefore I think he was not in default and had a right to vote. The plaintiff Simpson's note at the time of the meeting was overdue and unpaid. At the meeting he tendered his cheque in payment, but the chairman refused to accept it on the ground that it was not legal tender, and ruled that he could not take part in the meeting or vote his shares. There was a good deal of excitement and angry discussion because of these rulings of the chairman and the plaintiff Correlli protested vigorously. When the business of electing directors was reached, the chairman called for nominations. The five defendants were then nominated; Correlli protested against the proceedings, but no other names were put in nomination and without taking a ballot or calling for a vote, the chairman declared the defendants duly elected.

It is admitted that if Hill, Davidson and Simpson had been permitted to vote they would have voted against the defendants. As Hill, Davidson and Simpson held 500 shares and Correlli represented 490 shares, which would also have gone against the defendants, it is quite evident that in that event the defendants would not have been elected.

The company was incorporated by private Act of the Legislature of Manitoba, 52 Vict. ch. 53, as "The Manitoba Assurance Association." The name was subsequently changed to that which it at present bears.

Sec. 12 provides that the directors shall be elected by ballot and shall hold office until their successors shall be appointed; that every shareholder shall be entitled to one vote for every share held by him for not less than 15 days prior to the time of voting on which all calls have been paid; that such votes may be given by proxy if the voter be not present; and that all questions proposed for the consideration of the meeting shall be determined by the majority of votes, the chairman having the casting vote in case of an equality.

Sec. 15 enacts *inter alia* that the directors shall have full power in all things to administer the affairs of the company and may from time to time make by-laws regulating the allotment of stock, the making of calls thereon, the payment thereof, the issue and registration of stock certificates, the transfer of stock, the declaring and payment of dividends, vacancies among the directors, the number of directors within the limits provided by the Act, the quorum both at meetings of shareholders and directors,

the right and manner of voting by proxy and the conduct and management in all other particulars of the affairs of the company, etc., but every such by-law, unless in the meantime confirmed at a general meeting of the company duly called for the purpose, shall only remain in force until the next annual meeting of the company, and in default of confirmation thereat shall from that time cease to have effect.

Simpson's right to vote did not depend upon the validity of the by-laws. His note was overdue and therefore he was in arrear for a call. The fact that he had been allowed to vote at previous meetings, and that his cheque for the amount of his arrears was tendered to the president at the meeting and refused, does not alter the question. By section 12 of the Act of incorporation only those whose calls are paid are entitled to vote. Simpson's call was not paid and he therefore had no right to vote. The chairman's refusal to allow Simpson to vote may, under the circumstances, be regarded as a piece of sharp practice, but I cannot say that he was not within his strict legal right.

The Act gives a right to vote by proxy and does not limit the choice of proxy to another shareholder. But by-laws may be passed regulating "the right and manner of voting by proxy" and in my opinion a valid by-law might be passed depriving shareholders of the right to appoint as proxy any person not a shareholder. The wording of the by-law in this case is that no person not being a shareholder can take part at any meeting of the company. That is sufficient, I think, to prevent a non-shareholder from representing a shareholder as proxy.

In the absence of any by-law a non-member would have a right to represent a member as proxy. In Lindley on Companies 429, it is said: "A person present who is not a member, but is the holder of a proxy, is entitled to vote." See also *Ernest* v. *Loama*, [1897] L.R. 1 Ch. 1. The right of Hill and Davidson to have voted by their respective proxies depends therefore upon the validity of the by-laws. The objection is that the power to pass by-laws is, by sec. 15, conferred upon the directors, and that by-laws passed by the shareholders are so much waste paper. The exact point was decided by Chief Justice Mulock, in *Kelly* v. *Electrical Construction Co.*, 16 O.L.R. 232, 10 O.W.R. 704. The reasoning by which he arrived at the conclusion that, where the power to pass by-laws regulating voting by proxy was conferred upon the directors, it could not be exercised by the shareholders, appeals to me as being correct. I hold, therefore, that the alleged by-laws are void and that Hill and Davidson should have been permitted to vote by their respective proxies, Thompson and Fisher. Halpenny was not present, but Simpson held his proxy. Although Simpson was in arrear for a call and could not vote

MAN.

K. B.
1912

COLONIAL ASSURANCE CO. v. SMITH.

Mathers, C.J.

in respect of his own shares, he had a right to represent Halpenny as his proxy. The evidence is conclusive that, with the exception of 610 votes, the shareholders present in person or by proxy representing 995 votes were opposed to the election of the defendants.

It is argued, however, that the election of the defendants was unanimous. It is a sufficient answer to say that sec. 12 of the Act requires the election of directors to be by ballot. The chairman ignored this provision and declared the defendants elected without ballot. This he had no power to do. A majority of the shareholders present might have voted against the defendants, although there were not more than the requisite number nominated.

It is also objected that the plaintiffs have no authority to use the name of the company. The action is in effect to have it declared that the defendants are usurpers who have assumed the office of directors without having been elected thereto. In such a case the majority of the shareholders have a right to use the name of the company for the purpose of expelling them. Such an action would only be stayed if it appeared that a majority of the shares was opposed to it: Lindley on Companies 6th ed. 772.

There will be judgment setting aside the election of the defendants as directors of the company and declaring such election void; that a meeting be held at the office of the company in the city of Winnipeg on Monday, the 29th day of July, 1912, at the hour of four o'clock in the afternoon for the purpose of electing directors in the place of those whose election is hereby set aside; that notice of such meeting shall be advertised for one week prior to the day of such meeting in one of the daily newspapers of Winnipeg, and notice thereof shall also be mailed in a registered packet postage prepaid to each person whose name appears in the books of the company as a shareholder, such notice being addressed to such shareholders at their last known post office address, and shall be posted at least seven days before the day of meeting; that such notice shall be approved by the prothonotary and be published and mailed by the secretary of the company; that such of the defendants who were not directors prior to said election be, and they are hereby, restrained from acting as such or interfering in the business of the company; a declaration that the board of directors who were in office immediately prior to such election are the directors of the company and shall continue in office until their successors are appointed as herein provided.

The plaintiffs are entitled to the costs of this action.

*Judgment accordingly.*

## GRONDIN v. TISI & TURNER.

QUE.

C. R.
1912

April 30.

*Quebec Court of Review, Lemieux, A.C.J., Malouin and McCorkill, JJ.*
*April 30, 1912.*

1. APPEAL (§ III D—85)—REGULATIONS AS TO SIGNING INSCRIPTION IN REVIEW—ATTORNEY'S NAME STAMPED.

The signature of an attorney to a document of procedure (*e.g.*, an inscription in review) which is affixed by means of a stamp instead of being written by hand, is valid, where no prejudice is caused by the adoption of this method.

[*Neil* v. *Champoux*, 7 Que. L.R. 210, *Cantin* v. *Bel'eau*, 15 Que. S.C. 7, and *Buzzell* v. *Harvey*, 1 Que. P.R. 214, specially referred to.]

Statement

MOTION to reject an inscription in review for alleged irregularity in the signature thereof by the attorney.

*Bouffard & Godbout*, for the plaintiff.

*Taschereau, Roy, Cannon, Parent & Fitzpatrick*, for the opposant.

QUEBEC, April 30, 1912.

Lemieux, A.C.J.

LEMIEUX, A.C.J.:—The question which arises is whether a document of procedure is valid which is certified or signed by an attorney by means of a stamp and not by hand.

In the present case the signature of the attorneys, Bouffard & Godbout, is a fac-simile and a faithful and correct reproduction of their signature.

The question as to whether a document is null because it has not been signed by the attorney himself, with his own hand, has in the past given rise to two very distinct currents of opinion. The old Superior Court at Quebec, which consisted of four Judges, was equally divided on this point, some of the Judges, Casault and Andrews, who were partizans of the French doctrine and of the old law, holding that the signature of an attorney to a document must be written by hand, and that a seal, a wafer, a stamp or even a fac-simile signature, could not take the place of the writing. The other two Judges, Judges Routhier and Caron, decided that the signature of an attorney, which was affixed by a third person, with his authorization, was valid.

This conflict of opinion was the ground for two contrary decisions in the Court of Review, rendered by these same Judges, who formed, however, a different Court.

Thus in 1898, in *Cantin* v. *Belleau*, 15 Que. S.C. 7, the Court of Review, by Routhier and Caron, JJ., Andrews, J., dissenting, held that an inscription in review which was signed by a third party in the name of the attorney, and with the authorization of the latter, was valid, since the opposite party could suffer no prejudice therefrom.

In 1901, in *Drouin* v. *Rosenstein*, 3 Que. P.R. 563, the Court of Review, Casault and Andrews, and Routhier dissenting, de-

QUE.
C. R.
1912
GRONDIN
v.
TISI &
TURNER.
Lemieux, A.C.J.

cided that a document signed by any person other than the attorney was null.

In 1894, Judge Cimon in *Thompson* v. *Riou*, 5 Que. S.C. 217, decided that the attorney must sign every judicial proceeding so as to certify it, and that in order to sign effectively the attorney must himself with his own hand write his name at the foot of the document.

In 1892, Judge Mathieu in *Demers* v. *Piché*, 1 Que. S.C. 435, upheld the same principle.

In 1893, in *Prince* v. *Stevenson*, 2 Que. Q.B. 158, Judge Davidson decided that the signature of an attorney affixed to a document by a person who was duly authorized was valid. "Considering," says the learned Judge, "that it is in proof that the signature 'Carter & Goldstein,' appearing on the declaration and copy thereof are in the hand-writing of a person duly authorized on that behalf, that said signatures are ratified and recognized by the plaintiff's attorneys and that the defendant discloses no *grief* [prejudice] in connection therewith: doth dismiss said '*exception à la forme*' with costs."

An appeal was taken by the defendant from this judgment and was unanimously dismissed by the Court of Appeal composed of Lacoste, Bossé, Blanchet, Hall and Wurtële, because the Court declared that the appellant had suffered no prejudice (*grief*).

In *Buzzell* v. *Harvey*, 1 Que. P.R. 214, in 1897, Judge Lynch, in a case in which our colleague Judge McCorkill was concerned, held that in a case of *capias*, a document signed in the name of the attorney and under his direction by a person employed in his office, is regular.

In 1893, in a case in the Circuit Court, under No. 2648, *Beaulieu* v. *Bélinge*, Judge Routhier dismissed with costs an exception to the form based upon the fact that my signature, as attorney for the plaintiff, had been affixed by a third party.

As may be seen, the majority of Judges (nine against four) have considered that the signature of an attorney on a document, affixed by a third person with his permission, was not void in law. On the contrary, the principle that such a signature can only be declared null if it caused a prejudice either to the opposite party or to the party represented by the attorney whose signature was contested, has been held and affirmed.

The question which is submitted to us presents itself under another aspect and with different consequences.

It is a question whether an inscription in review bearing the signature of an attorney which has been affixed by a stamp and not by hand is valid or void in law. And consequently does it render the inscription void? The ground for the pretended nullity of the signature is the possibility of disavowal of the pro-

ceeding by the party or denial of the signature by the attorney. Is this fear serious under the circumstances? Can it be feared that the appellant, in case his appeal were unsuccessful, would refuse, for instance, to pay the respondent his costs upon the pretext that the appeal was not authorized or that the inscription was void, inasmuch as it had not been signed by the attorney with his own hand and usual signature, but had been signed by means of a stamp? It seems to us that this reasoning is too harsh and is incompatible with the text and system of our Code of Procedure which has done away with many formalities which, by sacrificing the form to the substance have, in the past, helped to cause so many just and legitimate rights to be lost.

The old maxims "*la forme emporte le fond*," "*qui cadit a syllaba cadit in toto*," are no longer in fashion.

How could the party appellant disavow the proceeding or the attorney deny his signature? In this case a deposit is made in review by the appellant to guarantee the opposite party's costs of review. This deposit is presumed to have been made by or on behalf of the party appellant, and in our opinion, bears witness in a peremptory manner to his desire and to the manifestation of his wish to appeal. If the appellant wished to appeal and had in fact appealed by making this deposit, it makes very little difference how the inscription was signed, because disavowal would be impossible. Under these conditions the appellant would be in a bad position who came before the Court and said, after the decision in appeal: "I disavow this appeal, because I did not authorize it or because the inscription was improperly signed by my attorney."

We think that the party who would put forward such a rash pretension would promptly be sent about his business by the Courts. The accomplishment of the formality of the deposit in review by the appellant dissipates and does away with any fears that could be entertained as to the possibility of a future disavowal or an objection to the attorney's signature on the ground that it was illegal or unauthorized.

In the case before us the appellant's attorney affirmed at the hearing, and the fact has not been contradicted, that as soon as the motion to reject the inscription was received he had a declaration served upon the respondent's attorneys to the effect that he intended and wished that the signature of "Bouffard & Godbout" upon the inscription should be considered as the signature of the attorneys to all legal intents. Moreover, one of the attorneys, Mr. Bouffard, came before the Court in support of the signature as affixed and declared that he considered it as his signature. Are not these manifestations and expressions of the will and intention of the attorneys that the signature should be valid and that this signature was intended and had been made with their consent?

QUE.
C. R.
1912
GRONDIN
v.
TISI &
TURNER.
Lemieux, A.C.J.

What would be the logical result of dismissing the inscription in review? It would be to condemn the appellant to pay the respondent his costs upon the very deposit in review which was made by the appellant for the sole purpose of obtaining a review of the judgment. That would be an anomaly which we could not sanction; otherwise we might as well say to the appellant: "You wished to appeal, but we dismiss your appeal because possibly at a later date you may wish to disavow it."

By declaring that the signature is valid we follow the somewhat analogous rule established by the majority of the Judges who have held that the signature of an attorney upon a document, by an authorized person, was valid, or at least could not be contested unless prejudice was caused. Our decision is in conformity with equity and the ends of justice for no prejudice has been invoked by the respondent and no idea of prejudice arises from the proceeding which is attacked. We are in presence of two parties, one of whom suffers no harm and is exposed to no danger or harm, and the other of whom would be deprived of his right to appeal and to have the judgment revised, in case we should decide that the signature is not valid.

In such a case we prefer to follow the rule adopted by Chief Justice Meredith in *Neil* v. *Champoux*, 7 Que. L.R. 210, which related to an informality. "It is possible," said the learned Judge, "although by no means probable that the system we adopt may, in some cases, lead to inconvenience, but if we must choose between the two, I prefer the possibility of inconvenience to the certainty of injustice."

But it has been objected that the Rules of Practice of 1897 impose upon the attorney the obligation of signing documents of procedure. And Rule 29 (Quebec Practice Rules, 1897) is cited, which says, in effect, that every document of procedure whatever must be signed by the attorney. Rules of practice are made for the easier understanding and application of the rules of procedure and not for their complication and embarrassment.

We find no article of the Code which requires the signature of the attorney upon every document, upon pain of nullity. On the contrary numerous provisions have been adopted which allow any pleading to be amended at any stage of the case and any irregularity in the form which does not cause prejudice. (Articles 518, 519, 520 C.P.). Rules of Practice 29 requires the signature of the attorney not so much for the signature itself as to let the opposite party know the name of the attorney to whom he can make tender or payment and upon whom he can serve any document.

There is perhaps a reason to dismiss the respondent's motion *in limine*, because it is not accompanied by an affidavit establishing prejudice. Moreover, if the signature of the attorney

is an authentic signature he should have proceeded by means of improbation.

We must say, however, that this method of signing documents is by no means to be recommended, and may, in certain cases, give rise to serious consequences.

MALOUIN, J., dissented.

McCORKILL, J.:—This case is before the Court on a motion to dismiss the inscription in review, on the ground that it is null, because it is not authenticated by, and does not bear the signature of, either the plaintiff-appellant, or of his attorneys; that the name of the plaintiff's attorneys instead of being written by hand, was stamped thereon. The motion is unaccompanied by affidavit, and no proof thereof was made.

At the argument of the motion, it was admitted by the plaintiff's counsel, Messrs. Bouffard & Godbout, that the signature was made with a stamp, as was customary by that firm, and that immediately on being served with a copy of the motion, the plaintiff's attorneys served the attorneys of the opposant-respondent with a notice that the signature to the inscription was the usual signature of the attorneys and that they acknowledged the same.

The admission by the plaintiff's attorneys should, in my opinion, be accepted as a whole. Without it, there is no proof that the signature to the inscription was not written, if not by a pen, by some other instrument. I am of opinion that the Court should not rely upon its own individual knowledge and experience in such matters, as a substitute for the proof which should have been made by the moving party. I do not consider that the fact alleged in support of the motion is self-evident.

In the absence of the admission by the plaintiff's counsel at the argument, which was not denied by the opposant's counsel, the motion should be dismissed as irregular, being unsupported by evidence and unproved.

I think it is in the interest of both parties that we should not dispose of the motion in that manner, but that the admission should be accepted as a whole, and that we should decide the question on its merits, as it presents itself. The opposant's counsel at the argument cited a number of French authorities and some judgments of the Courts of the province in support of his motion. I do not know that it can be clearly and satisfactorily said that the jurisprudence on this question has been definitely established.

The question has come before our Courts at various times—the Superior Court, the Court of Review and the Court of Appeals. The late Chief Justice Casault, Judges Andrews, Cimon and Mathieu were decidedly of the opinion that all legal

QUE.
C. R.
1912
GRONDIN
v.
TIST &
TURNER.
McCorkill, J.

documents, in which the parties are represented by counsel, should be signed by hand with the signature of the counsel. The authorities upon which they relied for that opinion are to be found in a judgment by Mr. Justice Cimon in the case of *Thompson, pro Regina* v. *Rion*, 5 Que. S.C. 217, rendered on the 3rd of January, 1894. It is to be observed that this judgment was rendered prior to the promulgation of the present Code of Procedure. But the opposant also relies upon the 29th rule of practice, which says:—

> Every document whatever of the procedure must be signed by the attorney or by the notary, where he is authorized to represent a party, or by the party himself, if he be not represented by an attorney or by a notary.

The authorities relied upon by Judge Cimon, in the judgment above referred to, relate principally to the definition of the word "signature," and to the manner in which a signature should be affixed to a document. Dalloz says:—

> C'est le seing, le nom d'une personne écrit de sa main à la fin d'une lettre, d'un acte, pour le certifier, le confirmer, le rendre valable.

All the authorities from Dalloz exact that the signature shall be traced and written by the hand of the party. Under the word "avoué," No. 101, Dalloz declares:—

> Les avoués doivent signer tout acte de leur ministère afin de le certifier et qu'il porte avec lui la preuve de son origine lorsqu'on voudra s'en prévaloir. La partie adverse, pour l'opposer, a besoin que la copie qui lui est signifiée, soit revêtue de cette formalité. Toullier, No. 8, says: La signature doit être celle du nom de famille qui est le véritable nom. Nous avons examiné, tome 5, No. 373, si un testament signé d'une autre manière, pourrait être déclaré nul. Mais dans les actes autres que ceux de dernières volontés, il nous paraît qu'il suffit que les parties signent de la manière dont elles ont l'habitude de signer.

At one time in the history of the jurisprudence in this province, the practice was to exact from litigants and their counsel that they should strictly conform to the rules of procedure and practice laid down in our code of procedure and rules of practice. Exceptions to the form were then nightmares to the young practitioner—they were so common.

Since the promulgation of the present code, exceptions to the form have really become the exceptional plea to an action or to a proceeding, because article 174 contains a very important modification of the old law. Now, a party can only invoke a ground of exception to the form when it causes him a prejudice. (Competence *ratione materiæ* excepted.) Informalities and irregularities now, however apparent, which cause no prejudice, will not be entertained for a moment.

Our rules of procedure are based principally upon the French Code of Procedure. We have not, however, limited our source of supply to that code. Our code contains several important modifications which have been influenced by rules of procedure of the English law, of the Ontario law, and of the codes of other countries. If we consult the definition of the word "signature," as given under other laws, we will find a much more liberal interpretation given to it than that mentioned by Dalloz. Standard 20th Century dictionary defines "signature," "the name of a person or something representing his name, written, stamped or inscribed, by himself or by some one properly deputized, as a sign of agreement or acknowledgment."

Bouvier, Law Dictionary, says:—

> By signature is understood the act of putting down a man's name at the end of an instrument, to attest its validity. The name thus written is called a signature. It is not necessary that a party should write his name himself, to constitute a signature: . . .
> The signature of the grantor affixed to a deed by another, in the presence and at the request of the grantor, is as binding as if he had personally affixed his signature. . . .

Stroud's English judicial dictionary:—

> Signature—Speaking generally, a signature is the writing, or otherwise affixing, a person's name, or a mark to represent his name, by himself or by his authority: *Regina* v. *Keat Ins.*, 42 L.J.M.C. 112, L.R. 8 Q.B. 305, with the intention of authenticating a document as being that of, or as binding on, the person whose name or mark is so written or affixed.

In *Morton* v. *Copeland*, 16 C.B. 517, at p. 535, Maule, J., said:

> Signature does not, necessarily, mean writing a person's Christian and surname, but any mark which identifies it as the act of the party, but the reporter adds in a note: provided it be proved or admitted to be genuine, and be the accustomed mode of signature of the party. The minute requisite of a signature will vary *according to the nature of the document*, to which it is affixed in every case where a statute requires a particular document to be signed by a particular person, it must be a pure question, on the construction of the statute, whether the signature by an agent is sufficient.

Section 4 of the Bills of Exchange Act provides:—

> Where by this Act, any instrument or writing is required to be signed by any person, it is not necessary that he should sign it with his own hand, but it is sufficient if his signature is written thereon by some other person by or under his authority.

Falconbridge, on "Banking and Bills of Exchange," at page 349, says:—

> A signature may be defined as the writing of a person's name on a bill in order to authenticate and give effect to some contract thereon. A pencil signature and also a lithographed or stamped signature is sufficient, etc.

QUE.

C. R.
1912

GRONDIN
v.
TISI &
TURNER.

McCorkill, J.

I am of opinion, after reading all the Quebec authorities as well as several English authorities on the subject, that it is not necessary that the attorney, or that a member of a firm of attorneys, who are acting in a case, must actually sign legal documents with his own hand, but that the names may be signed or stamped in their behalf, by a duly authorized person. I base my opinion more particularly upon the following authorities: *Cantin* v. *Belleau*, 15 Que. S.C. 7; *Buzzell* v. *Harvey*, 1 Que. P.R. 214; *Prince* v. *Stevenson*, 2 Que. K.B. 258. In the last cited case, which was an appeal from a judgment of Mr. Justice Davidson, dismissing an exception to the form, on the ground that there was no prejudice, the Court of King's Bench dismissed the appeal on the same ground.

The following cases shew that, in England, the signature of an attorney of record may be made by his clerk, or even may be stamped: *Regina* v. *Kent*, L.R. 8 Q.B. 305; *Blades* v. *Lawrence*, 43 L.J.Q.B. 133; *France* v. *Dutton*, [1891] 2 Q.B. 208.

I can understand that in actions in which the Crown is interested, and in public suits generally, a more restrictive interpretation should be placed upon this rule because of the "public interest." But in all private actions in which private interests alone are involved, I can see no reason why the opposite party can have any reason to complain. We find this so, particularly in the case that is now before us.

The inscribing party deposited with the inscription complained of, the deposit required by law, as a guarantee of his good faith. He is satisfied with the signature of his attorneys; why should his opponent have a right to complain, especially when he has failed to shew that he is in any way prejudiced by the proceedings.

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

*Motion dismissed.*

## HAMILTON v. VINEBERG.

(Decision No. 2.)

ONT.

D. C.

1912

May 31.

*Ontario Divisional Court, Falconbridge, C.J.K.B., Britton and Riddell, JJ. May 31, 1912.*

1. CONTRACTS (§ IV D—363)—BUILDING CONTRACT—CONCLUSIVENESS OF ARCHITECT'S CERTIFICATE—ABSENCE OF COLLUSION.

An architect's decision as to the value of work performed or of materials furnished for a building erected under a contract declaring that his decision should be final, is not open to attack if he acts fairly and honestly and no collusion between him and the contractor is shewn.

[*Hamilton* v. *Vineberg*, 2 D.L.R. 921, 3 O.W.N. 605, affirmed on appeal.]

2. EVIDENCE (§ XII C—934)—WHAT AMOUNTS TO COLLUSION BETWEEN ARCHITECT AND CONTRACTOR—FINAL DECISION—ABSENCE OF ACTUAL MEASUREMENTS.

Collusion between an architect and a contractor sufficient to invalidate the former's decision, which by contract was final as to the value of work performed or materials furnished for the defendant, is not shewn by the fact that the architect did not make any measurements, nor obtain any account of quantities, and that he acquiesced in the amount the plaintiff claimed therefor.

3. SET-OFF AND COUNTERCLAIM (§ I C—15)—RIGHT OF THIRD PARTY BROUGHT IN BY DEFENDANT'S COUNTERCLAIM TO COUNTERCLAIM AGAINST DEFENDANT.

A third person brought into an action by the defendant's counterclaim against the plaintiff, cannot himself set up a counterclaim against the defendant. (*Per* Riddell, J.)

[*Street* v. *Gover*, 2 Q.B.D. 498; *Alcoy and Gandia R. and Harbour Co.* v. *Greenhill*, [1896] 1 Ch. 19; *General Electric Co.* v. *Victoria Electric Light Co. of Lindsay*, 16 P.R. 476, 529; *Green* v. *Thornton*, 9 C.L.T. Occ. N. 139, specially referred to.]

4. SET-OFF AND COUNTERCLAIM (§ I A—5)—CLAIM FOR WAGES—DEFENCE TO ACTION FOR TORT.

A claim for wages can neither be made the subject of a set-off, nor used as a defence to an action for tort. (*Per* Riddell, J.)

5. PLEADING (§ I G—52)—WAIVER OF IRREGULARITIES—JOINDER OF ISSUE AND NOTICE OF TRIAL WITHOUT OBJECTION.

Joining issue and going to trial without an objection that a counterclaim for wages could not be interposed in an action for tort, is a waiver of the irregularity. (*Per* Riddell, J.)

[*Hyatt* v. *Allen*, 3 O.W.N. 370, applied.]

6. DAMAGES (§ III A 7—97)—LIQUIDATED DAMAGES—DELAY IN COMPLETING CONTRACT—EXTRAS.

A stipulation in a construction contract for liquidated damages for delay beyond a certain day, is not applicable where the delay was caused by the performance of extra work ordered by the owner of the building.

[*Dodd* v. *Churton*, [1897] 1 Q.B. 562, followed. *Westwood* v. *Secretary of State*, 7 L.T.N.S. 736, 11 W.R. 261, 262; *Roberts* v. *Bury Commissioners*, L.R. 4 C.P. 755, L.R. 5 C.P. 310; *Jones* v. *St. John's College*, L.R. 6 Q.B. 115; *Grey* v. *Stephens*, 16 Man. L.R. 189; *Holme* v. *Guppy*, 3 M. & W. 387, specially referred to.]

7. CONTRACTS (§ II D 4—188)—LIABILITY OF OWNER OF BUILDING TO CONTRACTOR FOR EXTRAS ORDERED AND APPROVED.

The owner of a building erected by a contractor at a fixed price, is answerable for material and labour for extras ordered by or approved of by him.

ONT.

D. C.

1912

HAMILTON v. VINEBERG.

8. CONTRACTS (§ II D 4—188)—BUILDING CONTRACTS—EXTRAS—FAILURE OF CONTRACTOR TO KEEP ACCOUNT OF MATERIALS AND WORK—LIABILITY OF OWNER.

The failure of a contractor to keep an account of materials used and time devoted to extra work on a building he agreed to erect for a stated consideration, does not prevent his recovery of the value thereof, where he was not required by the terms of his contract to keep such account, but it was a requirement imposed by an architect for his own convenience in fixing the value thereof. (*Per* Riddell, J.)

Statement

APPEAL by the defendant from the judgment of Sutherland, J., 2 D.L.R. 921, 3 O.W.N. 605.

The appeal was dismissed.

*H. Cassels*, K.C., for the defendant.

*E. C. Cattanach*, for the plaintiffs and one Burnham, defendant by counterclaim.

Falconbridge, C.J.

FALCONBRIDGE, C.J.:—I do not think that, in view of the finding (which is not attacked) that the architect was not guilty of fraud or collusion with the plaintiffs, this appeal can succeed on any of the grounds put forward. As to the extras, the architect certainly took a great deal for granted in favour of the plaintiffs. The evidence of the plaintiffs, leaving out the architect's extraordinary acquiescence in the plaintiffs' demands, and his apparent indifference to his client's interests, was, I think, so vague, sketchy, and unsatisfactory, that I should have been better satisfied if we could have seen our way to direct this branch of the case to be retried.

But, as the architect was the defendant's own agent, and the evidence satisfied the trial Judge, and as my learned brothers agree in thinking that on principle the course above suggested ought not to be adopted, I have not a sufficiently strong opinion to justify me in recording a dissent.

Britton, J.

BRITTON, J.:—As to many of the grounds taken by the defendant in his notice of appeal, he must fail. The learned Judge was quite right in finding that there was no collusion between the plaintiffs and the architect. Upon the evidence the architect appears to have acted honestly, and he intended to be fair, but his mode of dealing with the contractor was simple, confiding and unbusiness-like. He was, however, the agent for the defendant, and if the plaintiffs were willing to have their accounts treated in the way the architect states, so long as there was no fraud or deceit or collusion the defendant cannot successfully complain.

The trial Judge has found in effect that all the extras were ordered by the defendant, that the defendant knew and apparently approved of what was going on. That being the finding and upon evidence, it is difficult to interfere much as my inclination would prompt, owing to the amount of the extras saddled

ONT.

D. C.
1912

HAMILTON
v.
VINEBERG.

Britton, J.

upon the defendant, an amount which seems unreasonable, and excessive.

The contract provides that as to the value of the work added, or omitted, the architect is to decide and his decision is to be final. The architect was of defendant's choosing. He was easy-going and unbusiness-like, but he was honest, and as the plaintiffs have not been guilty of any fraud, it should not be assumed that they have wilfully made false or excessive charges.

The statements made by the architect on his examination for discovery, and which were put in at the trial as against him, were most damaging. He admitted that in passing plaintiff's accounts, he did not make any measurements, get any accounts or statements of quantities, etc., etc. Even in the face of all that it may be that the defendant was not overcharged, but there is the feeling that perhaps the defendant is being asked to pay too much. I cannot say that it was the duty of plaintiffs to furnish invoices and statements of quantities and time, and wages, when not asked, but it is manifest that to a contractor, not honest, who found the owner's architect so easy a mark as Burnham was, there would be a temptation to overcharge. The contractor's accounts were taxed by having a lump sum knocked off, on the general principle that a contractor's account might be excessive.

As to the defendant's claim of $25 per week for the time, after time mentioned for completion of contract—until house ready—the defence is that plaintiffs were delayed by the extras ordered. That is a question of fact and the trial Judge has found against defendant.

The case of *Dodd* v. *Churton*, [1897] 1 Q.B. 562, is an authority against the defendant on this point. The headnote of that case is:—

"Where in a contract for the execution of specified works it is provided that the works shall be completed by a certain date and in default of such completion the contractor shall be liable to pay liquidated damages, and there is also a provision that other work may be ordered by the way of addition to the contract, and additional work is ordered, which necessarily delays the completion of the works, the contractor is exonerated from liability to pay the liquidated damages unless by the terms of the contract he has agreed that whatever additional work may be ordered, he will nevertheless, complete the works within the time originally limited."

In my opinion the appeal must be dismissed, and with costs, as indicated by my brother Riddell.

Riddell J.

RIDDELL, J.:—Hamilton and Walker are a contracting firm; they entered into a written building contract with Vineberg to build according to the plans of Burnham an architect; after

ONT.
D. C.
1912
HAMILTON
v.
VINEBERG.
Riddell, J.

they had finished their work, as they assert, they assigned all moneys due under the contract to Gray, and, with Gray as a co-plaintiff, sued Vineberg. Vineberg defended, and added a counterclaim, himself being therein plaintiff, and Hamilton and Walker, Gray, and the architect, Burnham, being the defendants, claiming that the work, etc., was done badly by Hamilton and Walker, with the "connivance" of Burnham, and so the amount paid was more than enough. He claims also against Hamilton and Walker and Burnham for breach of contract—and against Hamilton and Walker for $250 liquidated damages for delay; further, that Burnham acted with such gross carelessness and negligence and so ignorantly, as well as collusively, with Hamilton and Walker, that the certificates given by him should be set aside and cancelled.

Burnham (by the same solicitor as Hamilton and Walker) sets up a counterclaim against this counterclaim for $60 on account of contract, $48.72 being 3 per cent. of extras, in all $108.72, and interest thereon. Upon this Vineberg joins issue.

The action came on for trial before my brother Sutherland at the non-jury sittings at Toronto; and he gave judgment for the plaintiffs for $1,544.04, being $1,453.49 and interest, with costs, and for Burnham, defendant by counterclaim, upon his counterclaim to the counterclaim of Vineberg for $60 and costs, dismissing the counterclaim to the original action with costs. Vineberg now appeals.

It is well established that a third party brought in, as Burnham was, by counterclaim, cannot himself set up a counterclaim against the plaintiff by counterclaim: *Street* v. *Gover*, 2 Q.B.D. 498; *Alcoy and Gandia R.W. and Harbour Co.* v. *Greenhill*, [1896] 1 Ch. 19; *General Electric Co.* v. *Victoria Electric Light Co. of Lindsay*, 16 P.R. 476, 529; unless what is called a counterclaim is in reality but a set-off or a defence: *Green* v. *Thornton*, 9 C.L.T. Occ. N. 139; *General Electric Co.* v. *Victoria Electric Light Co. of Lindsay*, 16 P.R. 476, at pp. 481, 534. That a claim for wages can be neither set-off nor defence to an action founded upon tort such as this, requires no authority.

But the plaintiff by counterclaim has joined issue on the counterclaim by Burnham, and gone on to trial without objection; and I think he cannot now complain of the irregularity. In *Hyatt* v. *Allen*, 3 O.W.N. 370, the Divisional Court thought that an irregularity not unlike the present might be waived. Here Burnham might have brought his action against Vineberg; and possibly that action, while not consolidated with the present, might have been ordered to be tried at the same time. If the claim be considered well founded, we might say something as to the scale of costs, as the learned trial Judge has not passed upon that matter.

The first claim set up by Vineberg is that for $250 claimed for delay, and he appeals to clause 6 of the contract, which reads: "The contractors shall complete the whole of the work comprehended under this agreement to the satisfaction of the said architect by the 1st day of March, 1910, when the said house shall be complete and ready for occupation; and, failing to do so, they shall pay the owner the sum of $25 for each week, or part of a week, elapsing thereafter, until the said house is ready for occupation, such sum not to be a penalty but as liquidated damages for non-completion by the date specified, which damages may be deducted by the owner out of any balance payable to the contractors herein."

It seems to be settled that language such as appears in this clause does not bind the contractor to complete, not only the work set out in the contract, but also the "extras" which may be ordered, within the time set.

In *Dodd* v. *Churton*, [1897] 1 Q.B. 562, the contract provided that the work should be completed within a certain time and default liquidated damages, also a provision that other work might be ordered, and if ordered, must be done by the contractor. Certain additional work was ordered to complete which necessarily delayed the work beyond the time set. It was held that the contractor in such a case is exonerated from the liability to pay liquidated damages unless by the terms of the contract he has agreed that—whatever additional work may be ordered—he will, nevertheless, complete the works within the time originally limited. And this is so even if the contract contain a clause giving the architect power to extend the time for completion in case of extras being ordered, "if by reason thereof he shall consider it necessary to extend the time for the completion of the tug-vessels, such extension of time shall be given in writing . . . otherwise the time of completion shall be deemed to be not extended . . ."

In *Westwood* v. *Secretary of State* (1863), 7 L.T.N.S. 736, in a contract containing this clause (see p. 737) the engineer did not extend the time, but the Court (Wightman, Crompton, and Mellor, JJ.), held nevertheless, that the defendant having by his own act rendered it impossible to perform the work in time, the builder was relieved.

In the report in 11 W.R. 261, it is said, p. 262:—

> The Court . . . expressed so strong an opinion that the set-off for penalties could not be supported that the argument on the head was not pressed.

A not dissimilar case is *Roberts* v. *Bury Commissioners, etc.* (1869), L.R. 4 C.P. 755, (1870), L.R. 5 C.P. 310, in which Kelly, C.B., giving the judgment of himself and Blackburn and Mellor, JJ., says (L.R. 5 C.P., pp. 326, 327):—

ONT.

D. C.
1912

HAMILTON
v.
VINEBERG.

Riddell, J.

> Where the effect of giving such a construction to the contract would apparently be to put one party completely at the mercy of the other, we ought not to give that construction to the contract unless the intention is pretty clearly expressed.

*Jones* v. *S. John's College* (1870), L.R. 6 Q.B. 115, is a different kind of case. There, as is pointed out by Mellor, J., at p. 123:—

> There is an express provision made in the contract for an extension of time in case the clerk of the works shall consider it necessary, but the contractors contract positively and absolutely to do the work and the alterations within the given time, unless an extension be made under that particular stipulation.

and in the face of that stipulation, the Court held that they could not imply a condition at variance with it. *Expressum facit cessare tacitum.*

In *Grey* v. *Stephens* (1906), 16 Man. L.R. 189, there was a provision for time allowance in case the plaintiff was delayed in the prosecution or completion of the work, but that

> no such allowance shall be made unless a claim therefor is presented in writing to the architect within 36 hours of the occurrence of such delay.

The plaintiff without his default and within the meaning of the clause was prevented from beginning his work, and after beginning from completing it—he did not present any claim to the architect, and the Manitoba Court held that he had no right to an allowance. But there, nothing done by the owner or his architect made it impossible for the contractor to make a claim, and the case is not at all in point so far as I have quoted it. But the remainder of the decision is in point—the owner was to be paid $20 a week in case of delay beyond the time fixed. The time fixed for completion was September 15th, 1903, but the owner ordered some extra work done, which was commenced only January 14th, 1904. The Court held that the allowance of $20 was payable only up to January 14th, because the defendants, having ordered the work to be done which only began January 14th, was estopped from claiming damages for delay beyond that date, following and applying *Holme* v. *Guppy*, 3 M. & W. 387, and cases cited in this judgment. The delay allowed must give time to do the whole of the work including the extras, which the owner is responsible for the ordering of.

The learned trial Judge, upon evidence which wholly justifies such a finding—as he says that he believes the evidence of Hamilton and Burnham—finds that Vineberg gave a verbal assent to an order for the alterations; and the architect gave a written order.

The defendant Vineberg now complains that the direction in this order, "all work done as an extra where owner and con-

ONT.

D. C.
1912

HAMILTON v. VINEBERG.

Riddell, J.

tractor has not agreed on price before commencing said work the contractors must keep an account of all materials and time spent on said work, so that price of said work may be given by the architect as per agreement," was not followed by the builder. But this is not either in the contract or in the order a prerequisite either to doing the work or to being paid for it—it is a direction given by the architect (who is in this particular matter the agent of Vineberg) in order that he may the more easily and accurately fix and ascertain the price to be paid. The omission to keep track does not disentitle the contractor to be paid—although it would justify the architect in allowing as little as he could.

From a perusal of all the evidence, I can see nothing to indicate that the architect acted otherwise than honourably, nor is there any indication of collusion between architect and contractor. Under these circumstances, the certificate of the architect must be final.

Moreover, the finding of the trial Judge that the delay was caused by the owner himself, I think is wholly justified—as are the other findings made by him.

I think the appeal should be dismissed with costs—but with a direction that the costs to be allowed Burnham in his judgment against Vineberg are to be costs on the Division Court scale without a set-off—the costs of the appeal to be on the scale of an appeal to the High Court from a Division Court judgment. In other words, Burnham is to be put in the same position as though he had brought his action in the Division Court; but Vineberg should pay on the appeal costs as though he had unsuccessfully appealed to the Divisional Court from a Division Court judgment.

*Appeal dismissed.*

---

## LEMAY v. LEFEBVRE et al.

QUE.

C. R.
1912

May 17.

*Quebec Court of Review, Tellier, DeLorimier and Martineau, JJ. May 17, 1912.*

1. PLEADING (§ II H—223)—ACTION FOR THE PRICE OF GOODS SOLD—WRITTEN CONTRACT.

In an action for the price of goods sold exceeding the value of $50, where there has been no acceptance or receipt of the goods and nothing given in earnest, the vendor who relies upon a written contract must allege it in his action or by subsequent amendment, and otherwise he cannot produce it or make evidence of it at the trial.

2. TRIAL (§ III E 3—241)—LEAVE BY TRIAL JUDGE TO PRODUCE IN EVIDENCE A WRITTEN CONTRACT NOT PLEADED—IRREGULARITY.

Leave granted to the plaintiff by the trial Judge to produce a written contract for sale of goods not set up in the pleading and, therefore, inadmissible without an amendment of the pleading, is irregular, notwithstanding that such leave is given subject to the defendant's right to amend his plea.

QUE.
C. R.
1912
LEMAY
v.
LEFEBVRE.
Statement

APPEAL by defendants by way of inscription in review.

The judgment which is inscribed for review, and which is reversed, was rendered by the Superior Court on May 10th, 1911, by Globensky, J., in the following terms:—

"Whereas the plaintiff claims from the defendants, jointly and severally, the sum of $400, for the price and value of 16,000 feet of wood sold to them at the times and for the price mentioned in the account attached to the declaration, and asks for judgment for the aforesaid sum;

"Whereas the defendants have pleaded to this action by a general denial of the facts alleged by the plaintiff;

"Considering that it is established by exhibit A, produced by the plaintiff at the trial, that the sale of the wood, the price of which he claims, took place on the 30th August, 1910, instead of the 27th October, 1910, which is the date given in the account attached to the declaration;

"That the defendants opposed the production of the said exhibit as illegal because the defendants were sued upon an account and not upon a contract, because notice should have been given to the defendants of the production of this document, which should have been produced with the action, and because it was sought to take the defendants by surprise;

"That this objection was dismissed, but the Court in dismissing it offered to allow the defendants to amend their plea or to produce a new one, if they thought they were taken by surprise;

"That the defendants refused this offer;

"That they did not make a motion, before pleading, to force the plaintiff to declare if the sale alleged in the declaration was a verbal sale or one by writing;

"That they can suffer no prejudice by the production of the said contract, exhibit A;

"That those who plead should be in good faith, and if the defendants had a serious defence resulting from the production of the said contract which has been produced, they should have put it forward;

"That the plaintiff has proved that the defendants are indebted to him in the sum claimed;

"That the plaintiff has proved the essential allegations of his declaration;

"For these reasons doth condemn the defendants to pay, jointly and severally to the plaintiff the sum of $400, with interest from the date of service of the action and costs."

*Lawrence, Morris* and *McIver*, for the plaintiff.

*E. Rioux*, for the defendants; *E. Fabre Surveyer*, K.C., counsel.

QUE.
C. R.
1912
LEMAY
v.
LEFEBVRE.
Tellier, J.

MONTREAL, May 17, 1912. The judgment in review was delivered by

TELLIER, J. (translated):—The plaintiff claims from the defendants, jointly and severally, the sum of $400, for the price and value of 16,000 feet of wood sold to them at the times and for the price mentioned in the account attached to the declaration, and dated October 27th, 1910, and he asks for judgment for this sum with interest and costs.

By their defence to the action the defendants deny all the allegations of the plaintiffs' declaration, and in consequence they ask for the dismissal of the action with costs.

In commercial matters in which the sum of money or value in question exceeds fifty dollars no action can be maintained against any party or his representatives unless there is a writing signed by the former, upon any contract for the sale of goods unless the buyer has accepted or received part of the goods or given something in earnest (article 1235, C.C.). In the present case the plaintiff has not invoked in support of his demand nor filed in the office of the Court with the return of service, a writing signed by the defendants; and, furthermore, he has not alleged that he has delivered to the defendants the wood sold by him, nor that the latter accepted a part of it or gave earnest. Under these circumstances the plaintiff could not establish the sale of the wood by testimony nor produce at the trial a contract of sale or proof of facts which he had not alleged in his demand.

The defendants rightly opposed verbal evidence under the circumstances, and the production by the plaintiff himself, during his evidence, of the contract of August 30th, 1910, to establish the pretended sale of wood on October 27th, 1910; but the Court of first instance overruled and dismissed these objections, allowed the production of a contract of sale and the proof of facts which were not alleged in the case and forbade the defendants the right of questioning the quality of the wood furnished, without first changing or amending their plea. The facts, which were not alleged by the plaintiff, and were thus allowed in evidence by the Court, were of a nature to take the defendants by surprise and to render other pleadings necessary, and the plaintiff should have amended his declaration so as to agree with the facts proved and the defendants should have pleaded *de novo*, all of which was not done.

Under the terms of the contract of August 30th, 1910, the wood therein mentioned was to be delivered on board the cars at Lake Megantic, but the price was only payable after the wood had been unloaded and measured net; from whence it follows that the price of the wood which the plaintiff claims,

QUE.
C. R.
1912
LEMAY
v.
LEFEBVRE.
Tellier, J.

was not even due under the contract at the time of the service of this action. The wood was never unloaded nor measured in the presence of the parties; and the defendants refused to receive the car of wood after having taken one load which they at once brought back and put back in the car.

For these reasons the judgment is reversed and the plaintiff's action dismissed with costs.

*Appeal allowed.*

---

N.B.
S. C.
1912
Jan. 19.

## JACK v. KEARNEY.

*Supreme Court of New Brunswick (Chancery Division). Hearing before McLeod, J. January 19, 1912.*

1. EVIDENCE (§ II E 7—191)—PRESUMPTION AS TO FRAUDULENT INTENT—VOLUNTARY CONVEYANCE.

A fraudulent intent will be inferred from a voluntary conveyance of his property by a debtor, the effect of which is to defeat, hinder, or delay his creditors.

[*Freeman* v. *Pope*, L.R. 5 Ch. App. 538; *Crossley* v. *Elworthy*, L.R. 12 Eq. 158, and *Mackay* v. *Douglas*, L.R. 14 Eq. 106, followed.]

2. FRAUDULENT CONVEYANCES (§ VI—30)—TRANSACTION BETWEEN PARENT AND CHILD—VOID AS AGAINST CREDITORS—ABSENCE OF FRAUD.

Where a parent, who, upon the purchase by his son of a heavily encumbered farm, assisted him in making a small payment thereon, and subsequently, in consideration of the son transferring it to another brother, conveyed to the former all of the land he owned, upon such son's conveying a half interest therein to a younger brother, to become effective upon the latfer attaining his majority in the event that he should continue to remain at home until then, such conveyance is void as to the creditors of the parent, although made without actual intent to defraud, delay, or hinder them.

3. FRAUDULENT CONVEYANCES (§ II—8)—VOLUNTARY CONVEYANCE—AGREEMENT TO SUPPORT GRANTOR—INSUFFICIENCY OF CONSIDERATION.

An agreement to support a grantor and his wife during their lives will not constitute as against the grantor's creditors, a consideration sufficient to uphold a conveyance of land.

4. FRAUDULENT CONVEYANCES (§ VI—30)—VOLUNTARY CONVEYANCE BY PARENT TO CHILD—SERVICE RENDERED BY CHILD DURING MINORITY—CONSIDERATION.

Services rendered by a child during minority do not constitute a consideration sufficient to support a voluntary conveyance of land by parent to the child as against the creditors of the former.

[*Re Maddever*, L.R. 27 Ch. Div. 523, specially referred to.]

5. MORTGAGE (§ II B—44)—EFFECT OF PROCEEDINGS TO SET ASIDE VOLUNTARY CONVEYANCE—SUBSTITUTION OF NEW MORTGAGE BY GRANTEE.

Where one to whom a voluntary conveyance of land was made, which was void as to the creditors of the grantor, upon retiring an existing mortgage thereon, gave a new one to the mortgagee for a larger amount, such mortgage is not affected by a subsequent proceeding to set aside such conveyance, to which the mortgagee was not a party.

Statement

THE action is brought to set aside a deed given by the defendant Robert H. Kearney, to the defendant Frederick A. Kearney and also a deed from Frederick A. Kearney to the de-

fendant Roy Kearney on the ground that they are both void as against the plaintiff.

The facts of the case were not in dispute, the defendant Robert H. Kearney being the principal witness on the part of the plaintiff.

The defendant Robert H. Kearney is a farmer and in 1909 owned a farm a short distance from Woodstock in Carleton County, worth about four or five thousand dollars, which at that time was subject to a mortgage to the Canada Permanent Loan Company for $2,300 and some odd dollars. He had three sons living with him, Frederick A. and Roy, two of the defendants, and James. Frederick A. was the eldest and was then about 24 years old, James the next was about 22 years old and Roy about 15. The boys all lived at home and worked on the farm. The two older ones had for some years during the winter months worked out pressing hay and part of their earnings was turned into their father and part they spent for themselves.

In 1907, Frederick A., then being about 22 years old, wished to leave home and work for himself. His father did not wish that and after some talk between them he agreed to buy another farm and did buy a farm adjoining his own from a Mr. Hamilton. The price paid was $3,100 which included about $300 of personal property. This farm was subject to two mortgages given by Mr. Hamilton, amounting to $1,550, and these remained as a charge on it. $500 was paid by Robert H. Kearney and Frederick A. Kearney in cash within a few months after the purchase. The farm was conveyed to Frederick A. Kearney and he gave Mr. Hamilton a mortgage for the difference between $1,550 and $2,600, so that the farm was in Frederick A. Kearney's name, subject to three mortgages amounting in all to $2,600. Frederick continued to live at home and the two farms were managed by Robert H. Kearney and worked together by him and his sons.

In the early part of 1909, James Kearney, the second son, then being about 22 years of age, began urging his father to give him $1,000 and a pair of horses as he wished to marry and settle by himself. Robert H. Kearney was entirely unable to do that, but it was eventually agreed between him and the two older boys that the defendant Frederick A. Kearney should convey the Hamilton farm to James Kearney and the defendant Robert H. Kearney should convey the homestead to Frederick A. Kearney. This was accordingly done, the consideration mentioned in the deed to Frederick A. Kearney being five dollars. These deeds were given about the 21st of June, 1909, but were not then registered. The deed of the homestead was registered in April, 1910.

N.B.
S.C.
1912
JACK
v.
KEARNEY.
Statement

It was also agreed that Frederick was to give half the homestead to the defendant Roy Kearney who was then about fifteen years of age, provided he remained and worked on the place until he was 21 years of age, and the deed of the one half was made to him by Frederick A. Kearney and handed to his mother to be given to him when he was 21 provided he remained and worked on the place. If he did not remain and work on the place until he was 21 the whole farm was to belong to Frederick A. Kearney.

The defendants also say that it was understood and agreed that Robert H. Kearney and his wife were to have their living and support on the farm during their lives, but there was no written agreement to that effect, and at best, from the evidence, there was no more than an understanding to that effect.

This conveyance of the farm took practically all the property Robert H. Kearney, the defendant, had. He had the furniture in the house, which I gather from the evidence was not of much value, and one-fifteenth share in a breeding horse which was not quite all paid for, which was of no practical value for creditors. He owed at this time between $1,500 and $2,000.

The crop had all been put in. It consisted principally of potatoes and it was agreed that he was to have the crop of that year to pay his debts. The boys were to assist in gathering it and he was to leave enough for seed for the following spring. The crop, however, especially the potatoes, was a failure, and there was practically nothing to pay the creditors.

The plaintiff does business in Halifax, Nova Scotia, under the name of the Nova Scotia Fertiliser Company. In January or February, 1909, the defendant Robert H. Kearney purchased from the plaintiff fertiliser to the amount of about $600 which was to be paid for on the 1st of January, 1910. It was delivered in the spring and was used on defendant's homestead farm. On July 1st, 1909, he gave a note for the amount, due six months after date. The note was not paid and the plaintiff after pressing for payment brought an action and on the 18th of February, 1911, recovered judgment for $625.25 principal and interest, and $36.90 for costs and an execution was issued on the judgment but the sheriff was unable to find any property on which to levy and returned the writ endorsed "*nulla bona.*"

The plaintiff claims that the deed to Frederick A. Kearney is void under the Statute of Elizabeth.

Argument

*M. G. Teed,* K.C., for the plaintiff:—The plaintiff submits that the deeds in question are void under the statute 13 Eliz. ch. 5, there is no value or consideration sufficient to save them from the operation of the statute; being voluntary conveyances within the meaning of the Act, the circumstances are such that a Court should find they were accepted with intent to delay and

defraud creditors; the circumstances are such that it is not necessary to shew actual intent to defraud, but the effect of the conveyance might be expected to, and in fact has been such as to defeat, delay or defraud creditors, and the Court must attribute a fraudulent intent to the persons executing and receiving deeds; that the assets of Robert Kearney that remained, and the expectations entertained of future crops were not such as to warrant the settlement or deeds; in any event we submit that the undivided one half that is held for Roy cannot be so held and the deeds to that extent must be set aside. In regard to questions of value or consideration see *Three Towns Banking Co.* v. *Meddever*, 27 Ch. D. 523; *Cornish* v. *Clark*, L.R. 14 Eq. 184; *Penhall* v. *Elwin*, 1 Sm. & G. 258. In regard to circumstances implying fraud see May on Fraudulent Conveyances, pp. 40, 41; *Smith* v. *Cherrill*, L.R. 4 Eq. 390; *Freeman* v. *Pope*, L.R. 5 Ch. 538; *In re Sinclair, ex parte Chaplin*, 26 Ch.D. 319. As to reliance being placed on probable value of the crop, see *Crossley* v. *Elworthy*, L.R. 12 Eq. 158; *Mackay* v. *Douglas*, L.R. 14 Eq. 106; *Ex parte Russell*, 19 Ch. D. 588; *Spencer* v. *Slater*, 4 Q.B.D. 13; *The Sun Life Assurance Company of Canada* v. *Elliott*, 31 Can. S.C.R. 91.

*W. P. Jones*, K.C., for the defendants:—There was a valuable and adequate consideration given by Fred. A. Kearney for the deed. He has worked for three years in the interests of the farm and for the last two years under an express agreement. He has rights as well as creditors. His work in 1907, 1908, and 1909, was a direct consideration for the deed sought to be set aside. He also agrees to support his father and mother for the rest of their lives. The sum of five hundred and ten dollars was paid on the Hamilton place, and the Hamilton place was part of the consideration. This is not a voluntary conveyance at all. When a consideration is shewn in family matters, Courts have not been very particular about the adequacy of it. See May on Fraudulent Conveyances at star, page 276, and authorities cited there. In regard to Roy's deed, Roy was to work for five years before he could get the deed. This is simply a rider and part of the family agreement. Without proof of actual fraud on the part of Fred. A. Kearney this Court ought not to take away the property and have his work go for nothing: *In re Johnson, Golden* v. *Gillam*, L.R. 20 Ch. D. 389; *Gale* v. *Williamson*, 8 M. & W. 405; *Whelpley* v. *Riley*, 7 N.B.R. 275. Good faith is shewn by the belief that ample provision was made for the payment of creditors and also by the fact that he had paid some creditors since the deed was given. Where there is valuable consideration (actual consideration) the burden is on the plaintiff to shew actual fraud.

*Teed*, K.C., in reply:—A voluntary transfer is a transfer where there is no consideration going to grantor, and this is a

N.B.
S. C.
1912
JACK
v.
KEARNEY.
Argument

voluntary conveyance unless the grantor's assets are simply changed and instead of land the creditors have other assets to look to for their claims. Fred. was paid for his work by the Hamilton place and by other consideration. See *Three Towns Banking Co.* v. *Maddever*, 27 Ch. D. 523. The decree the plaintiff asks would not necessarily result in the loss of the property to Fred. A. Kearney; it would simply mean that property would be liable to the plaintiff's claim. There is no valuable consideration in this case, because the consideration must pass to grantor himself, where creditors are involved. Now as to Roy's deed. It certainly ought to be set aside. The consideration was Roy's work and this went to Fred. and not to the father, not to the grantor.

McLeod, J.

MCLEOD, J.:—The facts of the case are really not in dispute, the defendant Robert H. Kearney being the principal witness on the part of the plaintiff.

The first question is whether the deed is a voluntary one or not. If it is a voluntary deed and the necessary effect is to defeat, hinder or delay creditors then the law infers an intent to defeat, hinder, and delay creditors and the deed will be set aside, without proving actual and express intent, but if it is founded on valuable consideration then it is necessary to prove actual and express intent.

In *Freeman* v. *Pope*, L.R. 5 Ch. App. 538, which is a leading case, Lord Hatherley, L.C., at page 541, in referring to the *Spirett* v. *Willows* case, reported in 3 DeG. J. & S., page 293, says as follows:—

> In that case there was clear and plain evidence of an actual intention to defeat creditors. But it is established by the authorities that in the absence of any such direct proof of intention, if a person owing debts makes a settlement which subtracts from the property which is the proper fund for the payment of these debts, an amount without which the debts cannot be paid, then, since it is the necessary consequence of the settlement (supposing it effectual) that some creditors must remain unpaid, it would be the duty of the Judge to direct the jury that they must infer the intent of the settler to have been to defeat, or delay his creditors, and that the case is within the statute.

And in the same case, Sir G. M. Gifford, L.J., at page 544, says:—

> There is one class of cases, no doubt, in which an actual and express intent is necessary to be proved—that is in such cases as *Holmes* v. *Penney*, 3 K. & J. 90, and *Lloyd* v. *Attwood*, 3 DeG. & J. 614, where the instruments sought to be set aside were founded on valuable consideration; but where the settlement is voluntary, then the intent may be inferred in a variety of ways. For instance, if after deducting the property which is the subject of the voluntary settlement, sufficient

> available assets are not left for the payment of the settler's debts, then the law infers intent, and it will be the duty of the Judge, in leaving the case to a jury, to tell the jury that they must presume that that was the intent.

And *Crossley* v. *Elworthy*, L.R. 12 Eq. 158, decided by Sir P. Malins, V.-C., is practically to the same effect, and in *Mackay* v. *Douglas*, L.R. 14 Eq. 106, the same learned Judge says, at page 120, as follows:—

> It is not at all necessary to shew that a man had any fraudulent intent in making the settlement as the law is now settled. It is very true that some of the old authorities cited by Mr. Fischer, particularly *Stileman* v. *Ashdown*, 2 Atk. 477, and many of the decisions long after that, proceeded upon the assumption that the settlement could not be set aside unless there was an intention to defraud, because the words of the statute are, "With intent to defraud, defeat or delay creditors." But that has been long got rid of and it is not necessary now to shew that. The statute speaks of cases where the creditors "are, shall or might be in any wise disturbed, hindered, delayed, or defrauded" and it is not necessary to shew an intention to do that, because if the settlement must have that effect the Court presumes the intention and will attribute it to the settler.
>
> That is distinctly laid down by the present Lord Chancellor on appeal from V.-C. James, in *Freeman* v. *Pope*, L.R. 5 Ch. App. 538. I acted upon that principle in *Crossley* v. *Elworthy*, L.R. 12 Eq. 158, where I expressly gave Mr. Elworthy the benefit of my opinion that he did not intend to commit fraud, but as the settlement had the effect of defeating or delaying his creditors I attributed the fraudulent intention to him within the meaning of the statute, and set the settlement aside.

See also *In re Maddever*, 27 Ch. Div. 523, and Fry, L.J., in *Ex parte Chaplin*, 26 Ch. Div. 319, at p. 336; *Taylor* v. *Coenen*, L.R. 1 Ch. Div. 636; *Edmunds* v. *Edmunds*, [1904] P. 362, at p. 375; *Sun Life Assurance Company* v. *Elliott*, 31 Can. S.C.R. 91. Numerous other cases may be cited to the same effect.

In the present case I do not think that it has been proved that there was an actual intent to defeat and delay the creditors but the effect of the deed was to do that very thing, and the Court will therefore presume an intent to defeat and delay the creditors. At the time the deed was made the defendant Robert H. Kearney being indebted to an amount between $1,500 and $2,000 denuded himself of practically all his property. According to his own statement he only had his household furniture, which was of little value, and one-fifteenth share in a horse kept for breeding purposes and which was not all paid for and was really of no value to his creditors. All he had was the hope that the crop would turn out in the fall to be sufficient to pay his creditors, but that crop failed. He himself received no consideration for the conveyance.

N.B.
S. C.
1912
JACK
v.
KEARNEY.
McLeod, J.

It is true that he said that he and his wife were to have a home and living on the place during their lives. This agreement was, however, not in writing and even if it was in such a condition that it could be enforced it is not, in my opinion, a consideration sufficient to support the deed against the plaintiff. A man indebted cannot convey his property simply for the purpose of supporting himself and his wife if need be and thus defeat his creditors.

The circumstances of this case are simply that in 1907 the defendant Frederick A. Kearney then being about twenty-two years of age desired to go away and work for himself but Robert H. Kearney did not wish him to go, and in order to make some arrangement for him, agreed to buy and did buy the farm called in this suit the Hamilton farm which adjoined his own farm and it was conveyed to Frederick A. $500 was paid on it and the balance remained on mortgage. To that no objection can be taken. In 1909, his son James being then about 22 years old and wishing to be married, pressed to have some provision made for him and then it was arranged between Robert H. Kearney and his son Frederick A. that Frederick A. should convey the Hamilton place to James (the equity of redemption in that place being according to the price paid for it worth about $500), and that Robert H. Kearney should convey the homestead to his son Frederick A. (the equity of redemption in this place being according to the value put upon it worth about $2,000), Frederick A. on his part agreeing to convey one half of this homestead to his brother Roy who was then about 15 years of age, on the conditions I have already stated.

The farming utensils were divided between Frederick A. and James, so that when this conveyance was made Robert H. Kearney was left without anything to pay the plaintiff and other creditors he at that time owed, save and except his hope that the crop would turn out sufficient to pay his debts. His son Frederick A. certainly knew that he owed some debts, although he says that he did not know that he owed the plaintiffs, but the very fact that he and his father agreed that the crop of that year should go towards paying the debts of the father shews that he knew his father had debts and he also knew that the conveyance made to him took all the property that his father had.

The defendants relied strongly on *In re Johnson*, 20 Ch. Div. 389, but that case differs very materially from the present case. In that case, Fry, J., before whom the case was tried, says that it is clear that the consideration for the deed of the 12th of June, 1878, was in part meritorious and in part valuable.

The facts were that one Judith Johnson, a widow, conveyed the property she had to her daughters Alice and Amy, and they covenanted that they would "pay all the just debts incurred by

the said Judith Johnson up to the date of the said indenture in connection with the working and management of the farm," which was the property conveyed and also would maintain the said Judith Johnson during her life. There was one debt for which Judith Johnson was liable but which was not incurred by the said Judith Johnson in connection with the working and management of the farm and that creditor brought an action to set aside the deed on the ground that it was void under the Statute of Elizabeth, but Fry, J., held that he could not succeed because the deed was in part, at all events, made for a valuable consideration, which consideration was the covenant that the daughters should pay the debts of Judith Johnson.

In this case I think there was no valuable consideration; there undoubtedly was the desire on the part of Robert H. Kearney to provide for his sons, but as was said by Lord Hatherlay, L.J., in *Freeman* v. *Pope*, 5 Ch. App. 538, p. 540: "Persons must be just before they are generous and debts must be paid before gifts can be made."

I do not think there was any legal obligation on the part of Robert H. Kearney to make a conveyance of his property to his sons. No doubt it would be reasonable for him to make provision to settle his sons in life if he could do so without prejudice to his creditors but he had no right to do it so as necessarily to interfere with their claims. See *In re Maddever*, L.R. 27 Ch. Div. 523, at p. 531.

I cannot think that what has been put forward by the defence, that the sons worked at home, was any consideration for this deed and therefore I think it is voluntary. The father Robert H. Kearney would naturally support his sons during their minority if need be and would be entitled to their services during that time. Roy Kearney, who was only fifteen years old when the deed to him was given, gave no consideration whatever for the one half of the homestead that has been transferred to him. In my opinion the deed of Robert H. Kearney to Frederick A. Kearney must be set aside and also the deed of Frederick A. Kearney to Roy Kearney.

Frederick A. Kearney after the transfer to him gave a mortgage on the property for $2,600, retiring the mortgage of $2,300 that was on it at the time the deed was made to him. As the mortgagee is not a party to this suit he would not be affected by this decision. The order will therefore be that the deed from Robert H. Kearney to Frederick A. Kearney and the deed from Frederick A. Kearney to Roy Kearney be set aside as against the plaintiff. The mortgagee will not be affected by this order. The defendants will pay the costs of this suit.

*Judgment for plaintiff.*

ONT.

C. A.
1912

June 18.

## STOKES v. GRIFFIN CURLED HAIR CO.

*Ontario Court of Appeal, Moss, C.J.O., Garrow, Maclaren, Meredith, and Magee, JJ.A. June 18, 1912.*

1. MASTER AND SERVANT (§ II A 3—58)—LIABILITY OF MASTER TO MINOR—TEMPORARY WORK—FAILURE OF MASTER TO WARN.

It is negligence for a master to direct a minor servant, who was not employed for such position, to work temporarily at a dangerous machine, without warning or instructing him as to the danger, sufficient to render the master liable for an injury sustained by the servant, where, in attempting to unclog such machine, his hand was caught by spikes in a cylinder thereof, which he had never seen.

[*Smith* v. *Royal Canadian Yacht Club*, 3 O.W.N. 19, distinguished.]

2. APPEAL (§ VII J 3—408)—QUESTIONS NOT RAISED BELOW—DELEGATION OF THE CONDUCT OF BUSINESS BY MASTER TO COMPETENT MANAGER.

The question whether a master has, by delegating the conduct of his business to a competent manager and foreman, absolved himself from liability for injuries sustained by a minor servant who was directed to temporarily work at a dangerous machine without first being warned as to the dangerous nature thereof, cannot be raised for the first time in the Court of Appeal.

[*Young* v. *Hoffman*, [1907] 2 K.B. 646, and *Cribb* v. *Kynoch, Ltd.*, [1907] 2 K.B. 548, distinguished.]

Statement

APPEAL by the defendants from the judgment of Sutherland, J., upon the finding of a jury, in favour of the plaintiff, an infant (suing by his next friend), in an action for damages for injuries sustained while working at a machine in the defendants' factory.

The appeal was dismissed.

*D. C. Ross*, for the defendants.

*J. E. Jones*, for the plaintiff.

Garrow, J.A.

GARROW, J.A.:—The action was brought by the plaintiff, an employee of the defendants, to recover damages caused to him by an injury to his hand while in such employment, in the operation of a machine called a "picker," in use in the defendants' factory, at the city of Toronto.

The case came on for trial before Sutherland, J., and a jury, when, upon the findings of the jury, there was judgment in favour of the plaintiff for $1,200.

The jury, in answer to questions, said, among other findings of no present importance, that the plaintiff was injured by reason of the negligence of the defendants, which consisted in not having been properly instructed and warned of the danger; and that there was no contributory negligence.

There was, in my opinion, reasonable evidence to warrant these conclusions. By consent, a view of the machine in action was had by the jury during the trial. There were thereby placed in a position, in which we are not, to consider the evi-

dence and to see whether or not the machine was a dangerous one and liable to clog, as the plaintiff alleged.

The plaintiff had not been hired to operate the machine in question. From the beginning of his employment on the 17th July until the accident on the 5th September, he had only actually operated it occasionally for very short periods at a time, apparently as a sort of stop-gap. On the day of the accident, his evidence is, Mr. Collins, the foreman, came to him where he was engaged on other work and said, "You had better go on this machine while Harvey goes down and cleans the office." He had never seen the inside of the machine, and did not know that at the back, where the injury occurred, there were rapidly revolving spikes. And he says that he was never instructed in the use of the machine or warned of the danger of doing what he did. These spikes, it appears, could be separately distinguished only when the machine was at a standstill. When rapidly revolving, as it did when in use, their individuality was lost, and the whole resembled a solid revolving metal cylinder. It is, under the circumstances, a reasonable assumption that the machine was a dangerous machine to an operator ignorant of its construction; and that proper instructions as to its use and management were necessary for the reasonable safety of the plaintiff. The duty to intruct is really not denied. No objections to the charge of the learned Judge dealing with that portion of the subject were made. But the defendants, among other things, contended that the plaintiff had been properly instructed, relying apparently upon the evidence of the manager, Mr. Griffin. But even Mr. Griffin does not pretend that he gave any particular instructions about the use of the machine to the plaintiff. What he says is more by way of general instructions, that no man or boy would be allowed to feed the machine who did not have some acquaintance with it, and, speaking of the plaintiff particularly, "he had his instructions for to not have anything to do with machinery until he became properly acquainted with it." The plaintiff had been ordered by the foreman to take charge of the machine while another boy, who had been in charge, was sent to clean the office. There is no pretence that Mr. Collins gave any instructions or had been directed by the defendants to do so. So that the only issue presented at the trial as to instruction was that between the plaintiff's evidence, on the one hand, and the evidence of Mr. Griffin, on the other. And the jury, quite properly I think, accepted the plaintiff's version.

Before us a new issue was presented by counsel, namely, that, as the defendants' operations are carried on by and through their manager and foreman, they cannot be liable for a failure to instruct, if these gentlemen were competent. And

ONT.
C. A.
1912
STOKES
v.
GRIFFIN
CURLED
HAIR CO.
Garrow, J.A.

reference was made to the recent case of *Young* v. *Hoffman*, [1907] 2 K.B. 646, where most of the modern cases are discussed. At the trial in that case it was proposed by counsel for the defendant to raise the issue now for the first time raised in this Court, but the trial Judge refused. His refusal was reversed by the Court of Appeal, and a new trial directed. And it was declared to be the law that the duty of the master to instruct may be delegated to a proper and competent person occupying the position of superintendent or foreman, as had been held in the earlier case in the same volume of *Cribb* v. *Kynoch Limited*, [1907] 2 K.B. 548. What would have been the result in this case if the point now presented had been raised at the trial, we do not know; but that it was not intended to be raised is very clear, I think.

Upon the whole, I do not think that we should now interfere, which we could only do by granting the doubtful indulgence of a new trial. The plaintiff received a very severe injury, practically destroying his hand. And he has been awarded a very moderate sum indeed for such a serious injury. The case bears no resemblance, in my opinion, to the case of *Smith* v. *Royal Canadian Yacht Club*, 3 O.W.N. 19, so much relied upon by the learned counsel for the defendants. The plaintiff there had been guilty of inexcusable negligence, not through ignorance, for he knew what he was about. Here the plaintiff, ignorant of the danger, was trying to unclog the machine in order to proceed with his employers' work. Of the danger of doing so while the machine was in motion he had never been warned, and was wholly ignorant, as all the circumstances shew.

I would dismiss the appeal with costs.

Meredith, J.A.

MEREDITH, J.A., gave reasons in writing for the same conclusion.

Moss, C.J.O.
Maclaren, J.A.
Magee, J.A.

MOSS, C.J.O., MACLAREN and MAGEE, JJ.A., also concurred.

*Appeal dismissed.*

## Re WEST NISSOURI CONTINUATION SCHOOL.

ONT.

*Ontario High Court, Middleton, J. July 23, 1912.*

H. C. J.
1912
July 23.

1. MANDAMUS (§ I G—55)—WHEN IT MAY ISSUE—TO SCHOOL OFFICERS—ESTABLISHMENT OF CONTINUATION SCHOOL.

An order for mandamus will be granted at the suit of ratepayers of a township directing the continuation school board of such township and the several members thereof, forthwith to take such proceedings as may be necessary in order that the school may be established and made available to such persons as may desire and be entitled to attend the same and further directing the school board to make a demand upon the council of the township for such money as the school board may, in its discretion, deem necessary in order to open and maintain the school, where it appears that it has already been determined by the proper Court that the continuation school district had been validly established; that a mandatory order had been granted at the instance of the school board directing the payment by the township corporation to the board of a certain sum for maintenance purposes; that a motion for a mandamus to compel the payment of a sum by the council for the purpose of erecting a school building failed solely because of the insufficiency of the demand made by the school board; and that all resolutions offered thereafter in the school board looking to the establishment of the school, were blocked by one-half of the members thereof voting against them because they were determined not to permit the continuation school to be established.

[*Re West Nissouri Continuation School*, 1 D.L.R. 252, 25 O.L.R. 550, specially referred to.]

Statement

MOTION by W. B. Harding and John Macfarlane, ratepayers, for an order directing the West Nissouri Continuation Board and the several members thereof forthwith to take such proceedings as may be necessary in order that the school may be established and made available to such persons as shall desire and be entitled to attend the same, and further directing the school board (within the time limited by the statute) to make request or demand upon the council of the township of West Nissouri for such money as the school board may in its discretion deem necessary in order to open and maintain the school.

The motion was allowed with costs to be paid by the opposing members of the Board.

*W. R. Meredith*, for the applicants.

*G. S. Gibbons*, for Simon Blight, John Salmon, and Ernest McCutcheon, three of the members of the Board of Trustees.

Middleton, J.

MIDDLETON, J.:—This motion is a continuation of the litigation which has been pending in the Courts for some considerable time. (See 1 D.L.R. 252; 25 O.L.R. 550; 3 O.W.N. 478.) It has already been determined that the continuation school district has been validly established; and a mandatory order has been granted, at the instance of the school board, directing the payment by the township corporation to the school board of the sum of $1,000 for maintenance purposes. A motion for a mandamus to compel the payment of $7,000 (and the issue of

ONT.

H. C. J.
1912

RE WEST NISSOURI CONTINUATION SCHOOL.

Middleton, J.

debentures for the raising of that sum) for the purpose of erecting a school building, failed, solely upon the ground of the insufficiency of the demand made by the school board.

Since that motion was launched, there has been a change in the constitution of the board; and it is impossible to read the material, or hear the argument of counsel representing one section of the trustees, without being quite convinced that it is the intention of some members of the board to prevent the establishment of the continuation school. These gentlemen, no doubt actuated by reasons which appear to them to be good and sufficient, think the establishment of the continuation school undesirable; and, although they have accepted office upon the the school board, are actively seeking to prevent the establishment of any school.

Following the decision of the Divisional Court (*Re West Nissouri Continuation School*, 1 D.L.R. 252, 3 O.W.N. 478, 25 O.L.R. 550) rendering necessary the making of a further demand to obtain the $7,000, for which a by-law has already been passed by the township council, a resolution was introduced at the meeting of the school board on the 27th March last, authorising the making of the necessary formal demand. This resolution was defeated, upon an equal division of the board: the three trustees represented by Mr. Gibbons voting against it, the other trustees voting in its favour.

A resolution was at the same meeting moved to demand from the township $2,770 for the maintenance of the school, in order that the school might be carried on at once. This was lost upon the same division.

A third resolution, directing an advertisement for teachers, was also moved, and lost upon the same division.

A fourth resolution, directing instruction to be given to the architects to draw specifications and to advertise for tenders for the construction of a school building, was also moved, and lost upon the same division.

A newspaper account of the proceedings of this meeting is put in and verified; the attitude taken by those opposed to the resolutions being that the school should not be established because the ratepayers of the township are opposed to it. No amendment was moved to any of the resolutions; and, so far as appears, the sole issue raised was, "School or no school?"

Another meeting was held on the 16th April, 1912, when a resolution was moved: "That the West Nissouri Continuation School Board do provide adequate accommodation for all purposes according to the regulations." This resolution was defeated; one at least of the trustees opposed stating that "they would never have a school."

A resolution was moved at this meeting by those opposed to the school: "That a committee, consisting of Trustees Salmon, McCutcheon, and Fitzgerald, be a committee to look into the question of the location of the continuation school and to advise as to the desirability of renting suitable premises or building, and to report to the trustees at their next meeting." This resolution was defeated by those in favour of the school being established, as the committee named were the three members opposed.

Upon the hearing of this motion, counsel opposing the granting of the order took the position that his clients are not opposed to the establishment of the school, and that the resolution last-quoted was intended to be a step towards its establishment. These three trustees, examined as witnesses upon the motion, also took that position.

Upon the argument, I intimated that, in my view, the trustees were called upon to discharge the duties imposed upon them by the statute; that is, to take all proper steps for the establishment of the school; but that how this was to be done, whether by renting temporary premises or by building, was a matter that was entirely and absolutely in the control of the trustees, and that the Court ought not in any way to interfere with the free and untrammelled exercise of this discretion by the responsible body.

The difficulty arises from the inference which counsel for the applicants suggests as irresistible, that there is no bona fide intention to adopt either one course or the other, but simply an intention to drag the matter on until the 15th August, the time limited for making requisitions upon the township council. This fear, was, no doubt, somewhat augmented by the position taken by the respondents' counsel, that no mandatory order could be made until after the time for municipal action had expired; and it was suggested by counsel for the applicants that then the same argument would be adduced as on the former motion for a mandamus, that no order could be granted because the time had gone by.

To meet this situation, I directed the matter to stand until after the 15th July, and that in the meantime a meeting of the board might be held; and I gave leave to supplement the present material by placing before me the proceedings at that meeting, stating that this would give the trustees represented by Mr. Gibbons an opportunity of shewing that Mr. Meredith was quite wrong in stating that there was no intention to establish a school in any way. I offered to accept the undertaking of Mr. Gibbons, on behalf of these three gentlemen, that they would act upon the intention stated in their examination, and take steps to establish a school in rented premises. Mr. Gibbons declined to give this undertaking, stating that his clients might not now be of the

ONT.

H. C. J. 1912

RE WEST NISSOURI CONTINUATION SCHOOL.

Middleton, J.

same mind, and that circumstances have changed—referring to the view that in December the county council may be induced to attempt to repeal the by-law establishing the school.

Since then, copies of the notices calling the meeting and of the correspondence have been put in, and these confirm the view that the three trustees in question have no intention of discharging the duties of their office in any way. This being so, the mandamus will go in the form indicated above, and Mr. Gibbons's clients will be directed to pay the costs of the motion.

I do not direct a stay, as the demand must be made by the 15th August, and Mr. Gibbons's main argument was based upon the statement that his clients would make the demand for such sum as might be necessary, in their view, to establish the school in rented premises, and their opponents have now abandoned the plan of at once erecting a suitable building.

*Motion granted.*

---

ONT.

C. A. 1912

April 29.

## REX v. SCOTT.

*Ontario Court of Appeal, Moss, C.J.O., Garrow, Maclaren, Meredith, and Magee, JJ.A. April 29, 1912.*

1. ABORTION (§ I—2)—SUPPLYING YELLOW JASMINE—CRIM. CODE SEC. 305.

Yellow jasmine or gelsemium is a drug or noxious thing, the supplying of which for illegal purposes may constitute an offence under Cr. Code sec. 305.

2. ABORTION (§ I—2)—SUPPLYING DRUG OR NOXIOUS THING—CRIM. CODE SEC. 305.

The requirements of section 305 of the Criminal Code, prohibiting the unlawful supplying or procuring of any drug or other noxious thing with knowledge that it is intended to be unlawfully used or employed with intent to procure a miscarriage, are satisfied if the substance supplied be a drug, even though the quantity supplied be so small as to be incapable of doing harm; if not a drug, the substance must be proved to be a noxious thing, and noxious in the quantity supplied. (*Per* Meredith, J.A.)

[*Reg.* v. *Cramp*, 5 Q.B.D. 307, referred to.]

Statement

MOTION by the defendant by way of appeal from the refusal of the Chairman of the Wentworth Sessions to state a case for the consideration of the Court, for leave to appeal from the conviction, and for a direction to the Chairman to state a case.

The conviction was under sec. 305 of the Criminal Code, which provides that "every one is guilty of an indictable offence and liable to two years' imprisonment who unlawfully supplies or procures any drug or other noxious thing, or any instrument or thing whatsoever, knowing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, whether she is or is not with child."

The question which the defendant desired to have stated was, whether there was any reasonable evidence that the sub-

ONT.

C. A.
1912

REX
v.
SCOTT.

stance supplied by the defendant was a "drug or other noxious thing."

The motion was refused.

*J. L. Counsell*, for the defendant.
*E. Bayly*, K.C., for the Crown.

Moss, C.J.O.

MOSS, C.J.O.:—Upon this application the law under the Criminal Code and the Imperial Act was discussed and the English decisions referred to at some length by Mr. Counsell. We have since had an opportunity of reading the transcript of evidence and the Chairman's charge and of considering the cases cited and others. Our conclusion is, that no useful purpose would be served by directing that a case be stated upon the point raised. Having regard to the evidence and the charge of the learned Chairman, we see no reason for thinking that the conviction was wrong or that there are sufficient grounds for putting the matter in train for further discussion.

The application must be refused.

Meredith, J.A.

MEREDITH, J.A.:—In the Imperial enactment the words are "any poison or other noxious thing:" under the enactment in force here—see the Criminal Code, sec. 305, and also sec. 303—the words now are, "any drug or other noxious thing," though originally they were as in the Imperial enactment, "any poison or other noxious thing"; and the change from the word "poison" to the word "drug" was not made for the purpose of narrowing the effect of the enactment: it may have been for the purpose of enlarging it, in consequence of the cases in England upon which this appeal, against the refusal of the chairman of the Wentworth General Sessions, to state a case for the opinion of this Court, is based.

Those cases decided that, when the thing administered or supplied was not noxious in small quantities, in order to make a case against the accused it was necessary to prove that it was administered, or supplied to be taken, in quantities enough to make it noxious. So, too, it had been held under the enactment in force here before the change I have mentioned: see *Regina* v. *Stitt*, 30 U.C.C.P. 30. In no case, of which I am aware, has any such ruling been applied to a substance which in itself is a poison, even though some of the most deadly poisons are commonly administered, in infinitesimal doses, for the healing of disease, or otherwise benefiting those in ill-health. To the contrary is the opinion expressed by Field, J., in the case of *The Queen* v. *Cramp*, 5 Q.B.D. 307, in these words: "If the thing administered is a recognised poison, the offence may be committed though the quantity given is so small as to be incapable of doing harm;" and this agrees with the views of that eminent lawyer Dr. Graves, which will be found expressed in a foot-note at p. 131 of Russell on Crimes, 1st Can. ed.

ONT.

C. A.
1912

REX
v.
SCOTT.

Meredith, J.A.

In my opinion, the requirements of the enactment in question are satisfied if the substance administered or supplied be a drug: if not a drug, it must, of course, be proved to be a noxious thing, and, in my opinion, noxious in the quantity administered or to be taken.

In this case there was reasonable evidence that the substance in question was not only a drug—a drug commonly called yellow jasmine, technically gelsemium—but also a poison: in its alkaloid—which was found in the analysis—a very powerful poison, and a recognised poison prescribed in several diseases, one of which is dysmenorrhœa; and also that it was a noxious substance: and so this motion for leave to appeal fails, being based entirely upon the contention that there was no reasonable evidence that the substance, as supplied, was a "drug or other noxious thing."

Garrow, J.A.
Maclaren, J.A.
Magee, J.A.

GARROW, MACLAREN, and MAGEE, JJ.A., agreed that the motion should be refused.

*Motion refused.*

---

YUKON.

Y. T. C.
1912

June 8.

**J. E. LILLY and Company v. ROBERT B. ROBERTSON.**

*Territorial Court of the Yukon Territory. Trial before Macaulay, J. June 8, 1912.*

1. EVIDENCE (§ II E 7—198) — INNEGOTIABLE INSTRUMENTS — RETURN BY PAYEE OF NOTES TO MAKERS—PRESUMPTION OF FRAUD.

In an action on a promissory note given pursuant to an agreement under which several persons advanced money to enable the payee to go on a prospecting trip for minerals for the benefit of all of them, fraud and collusion between the payee and makers of other notes that were given under such agreement will not be assumed from the unexplained fact that the payee returned their notes to them.

2. BILLS AND NOTES (§ V A—112*a*)—RIGHTS AND LIABILITIES OF TRANSFEREE WITHOUT INDORSEMENT—INDORSEMENT AFTER MATURITY—EQUITIES AS BETWEEN PAYEE AND MAKER.

One who, before maturity, took a promissory note as security for a loan made the payee, is not a holder in due course for value without notice, where, at the request of the latter, the note was not indorsed to him until after maturity; the effect of the transaction was that such note was in the hands of such holder, subject to all equities between the maker and the payee.

3. EVIDENCE (§ II K—318)—ONUS OF PROVING FAILURE OF CONSIDERATION FOR A PROMISSORY NOTE.

The onus of proving the failure of the consideration for which a promissory note was given rests upon the maker thereof.

Statement

TRIAL of an action by the plaintiffs as holders of a promissory note for $250, dated February 1st, 1910, made by defendant payable six months after date at the Bank of British North America at Dawson to the order of one Aaron A. Knorr and endorsed by the said Knorr by his attorney H. B. M. Brown to the plaintiffs.

*J. L. Bell*, for plaintiffs.
*F. T. Congdon*, K.C., for defendant.

Dawson, Y.T., June 8, 1912. MACAULAY, J.:—The defendant in his statement of defence sets up that he did not make the said note; that he satisfied and discharged the said note by payment before action; that the said note was not endorsed and delivered for value by the said Aaron A. Knorr to the plaintiffs, and that if he did make the said note, which he does not admit but denies, the same was procured by the said Aaron A. Knorr fraudulently and without consideration, and that the plaintiffs had knowledge of the circumstances and conditions under which the said note, if any, was given. The evidence of the plaintiff shews that he advanced or loaned to the said Knorr during the early part of the year 1910, $2,750 and that the said Knorr deposited with the plaintiffs the note in question, together with other promissory notes as collateral security to the said loan; that the plaintiffs have since retained possession of the said note and it was duly endorsed to them by one H. B. M. Brown, the attorney of the defendant, about the month of October, 1910, but after maturity of the note. The power of attorney from Knorr to Brown was executed in due form, and was put in by the plaintiffs' counsel as exhibit B at the trial. The plaintiffs further say that the said Knorr is still indebted to them in the sum of $1,200 on account of the aforesaid loan. The note in question was put in as exhibit A. The plaintiffs' counsel further put in as exhibit C an agreement made between the said Knorr, of the one part, and the defendant and several other signatories, of the other part, to shew the consideration upon which the note was given. The agreement reads as follows:—

> This agreement made this fourth day of December, A.D. 1909, between: Aaron Alexander Knorr, of Dominion Creek, in the Yukon Territory, miner, of the first part, and, All the parties whose names and signatures are attached hereto, of the second part.
>
> Whereas the said Aaron Alexander Knorr has proposed to the said parties of the second part a certain prospecting and mining venture in a country lately visited by him in the vicinity of the Mackenzie River District, provided that each of such parties shall put up and advance the sum of five hundred dollars ($500.00) each, to be used and applied in the necessary expenses of said trip, tools, grub, mining outfit, travelling expenses and generally such necessary expenses as a trip of the nature contemplated and explained, shall include and involve, including payment of guides and workmen, and stakers, and his own time and labour without any accounting.
>
> And whereas the said Aaron Alexander Knorr has indicated generally but not particularly the locality in which he proposes to operate and prospect for mineral in place and lodes;
>
> Now this agreement witnesseth: that in consideration of the foregoing and the said advance so to be made the said Aaron Alexander

YUKON.

Y. T. C.
1912

LILLY
v.
ROBERTSON.

Macaulay, J.

Knorr agrees with the signatory parties hereto and the said parties agree each with the other and with all the others and with the said Aaron Alexander Knorr, as follows:—

1. The said Aaron Alexander Knorr shall forthwith, as soon as arrangements are completed, proceed to the locality indicated with such help as he may select and diligently search and prospect for precious metals in place and lodes, and when found, the said Aaron Alexander Knorr shall properly and legally locate the same and as many claims as he may legally, under the provisions of the quartz mining regulations in force in the Yukon Territory, locate as aforesaid, but the number of claims so to be located shall not be less than the number of parties of the second part who have either separately or jointly put up $500.00 each, the meaning of this clause being, that one person may put up $500.00 (five hundred dollars) or two or more may put up $500.00, but that the $500.00 shall represent one claim only, but one person may put up more than $500.00 and for that person there shall be staked one claim for every $500.00 put up, and in the final allotment of the shares of the parties they shall share *pro rata* according to the amount advanced and receive undivided interests proportionate to the amount advanced;

2. That the said Aaron Alexander Knorr will not locate or prospect for any other person or persons or company for a period of one year from the date hereof, except with the consent of the parties hereto, nor will he give information respecting the proposed venture, location or trip to any one or aid any one in search of minerals;

3. That all such discoveries and locations shall be held as follows: One undivided one-half interest to the said Aaron Alexander Knorr and the remaining one undivided one-half to be held by the parties hereto jointly for undivided shares of the whole as hereinbefore provided;

4. That all discoveries and locations of value made and staked or discovered shall be so shared by the said Aaron Alexander Knorr and the parties hereto all holding jointly in undivided interests as above, the said Aaron Alexander Knorr's interest being one-half of the whole and the other parties jointly the other half, it being of the true intent of these presents that the benefits of such trip be shared only by the said Aaron Alexander Knorr and the said parties hereto;

5. That on the return of the said Aaron Alexander Knorr from said trip further papers and legal assurances shall be given and deeds signed to effectuate this agreement;

6. The parties hereto of the second part agree to advance the respective sums named, five hundred dollars ($500.00) each, or any greater amount, the heretofore arranged five hundred dollars ($500.00) to be the unit of value per claim, to be applied to the purposes aforesaid and to promote the said mining venture and carry out the real intent of these presents and the agreement and representations made;

7. Provided always and it is hereby expressly understood and agreed by and between the parties hereto that the money hereinbefore agreed to be paid shall be paid over absolutely to the said Aaron Alexander Knorr, or his order, and that the said Aaron Alexander Knorr shall not be called upon to account for the sums in any way, the agreement being that he shall receive said sums in full and that for the same he

shall meet all expenses as aforesaid and in return only assign in the proportions hereinbefore provided the mineral claims staked as hereinbefore agreed.

In witness whereof the parties hereto set their hands and seals.

The defendant was called as a witness on behalf of the plaintiffs and admitted the making of the note and also admitted the signing of the said agreement. Upon cross-examination he stated that previously to the signing by him of the said agreement and note he had an interview with Knorr and was complaining to him that there was trouble and that there might be another party go out and that that party might stake all the prospective claims, and Knorr said he had located another ledge and had traced it for nine miles so that there would be no doubt about getting claims. He further says: "My objection was on account of other parties going out and he said this was in a different district and he was to be back over the snow." In answer to the question: "Was anything said as to the time within which there was to be location of the claims?" the defendant said: "He was going to be back here on the snow; that would be that winter of 1910." Asked further: "Are you aware whether he has located any claims and registered them?" he answered: "I have not heard a word." Defendant further stated that some of the notes were given back to the makers. He further stated that he received no consideration for the note. He further states that one John Rourke, one of the signatories, was allowed to take his note back, and understood that McDiarmid took his note back and a Miss Cook also got one back. She paid $100.00. He gives no explanation, however, to shew why these notes were given back, and I do not think I have the right to assume without further evidence that there was a fraudulent arrangement entered into between these parties and Knorr. Rourke, McDiarmid and Miss Cook might have been called as witnesses and it then could have been clearly shewn if they had received their notes back and under what circumstances the notes were returned. This was not done and on this point the evidence is not sufficient, in my opinion, to warrant me in coming to the conclusion that fraud was committed between these parties and Knorr as against the other parties to the agreement.

Although the plaintiffs had the note in question in their possession as collateral security for the loan made to Knorr it was not endorsed by Knorr, or his attorney Brown, until long after maturity, and the plaintiffs admit that it was not so endorsed because Knorr thought it would injure his credit if it was known that he was borrowing money. Being the holders of

YUKON.

Y. T. C.
1912

LILLY
v.
ROBERTSON.

Macaulay, J.

the note under the circumstances above mentioned the plaintiffs are not in the position of a holder in due course for value before maturity and without notice and therefore stand in the same position as Knorr, the payee, would stand if he were plaintiff in this action and subject to any equities that the defendant might have as against Knorr. The consideration for the note is set out in the agreement above recited, and the defendant says, among other things, in his defence that it was procured fraudulently and without consideration. In his evidence the defendant admits the making of the note but he says he received no consideration for the same. Now, according to the agreement in writing the said Knorr, in consideration of the money advanced to him by the different signatories, was to proceed to a certain locality with such help as he might select and diligently search and prospect for precious metals in place and in lodes and when found properly and legally locate the same and do such further things as are provided in the said hereinbefore recited agreement. The only manner in which the agreement varies from the testimony of the defendant is that the defendant says Knorr told him that he had located another ledge and had traced it for nine miles so that there would be no doubt about getting claims and he said this was in a different district and he was to be back over the snow. The agreement does not state when Knorr was to return to Dawson, but it does state that Knorr has proposed to the signatories a certain prospecting and mining venture in a country lately visited by him in the vicinity of the Mackenzie River. There is nothing in the evidence to shew that this is not the very property discussed by Knorr and the defendant. There is nothing to shew that Knorr has failed to perform his part of the agreement except that he has not returned to Dawson over the snow, as the defendant in his evidence says would mean the winter of 1910. The agreement itself is silent as to the date at which he would return, and it seems to me only reasonable that such would be the case when a man was starting out on such a venture as that contemplated in the agreement. In my opinion, there is no evidence offered to support the contention of the defendant that the agreement was fraudulent or that the consideration mentioned therein has failed. There is nothing to shew that Knorr is not now fulfilling the obligations undertaken by him in the agreement and that he may not return to Dawson at any time, having completely fulfilled said obligations. The onus is on the defendant to prove that the consideration has failed and he has not discharged that onus. The agreement contemplated a prospecting and speculative trip, and the note in question was given in consideration of the moneys that were to be paid to Knorr in advance by the defendant under the terms

of the agreement entered into which would be a further consideration for the giving of the said note.

I am, therefore, of the opinion that the plaintiffs are entitled to recover judgment for the amount sued upon, together with interest at the rate of five per cent. per annum from the due date of the note until judgment.

Judgment will, therefore, be entered accordingly, together with the costs of the action.

*Judgment for plaintiffs.*

---

## MAGNUSSEN v. L'ABBÉ.



*Ontario High Court. Trial before Clute, J. March 15, 1912.*

1 MASTER AND SERVANT (§ II A 4—65)—LIABILITY OF MASTER—TRENCH-DIGGING—FAILURE TO SHORE UP SIDES.

Where a contractor is digging a trench, and previous blasting has rendered the sides of the trench liable to cave in, so that workmen in the trench are exposed to danger unless the sides are shored up, of which the contractor ought to have known, he is guilty of negligence if he fail to shore up the sides, and a workman is injured in consequence.

2. MASTER AND SERVANT (§ II B 6—171)—NEGLIGENCE OF SUPERINTENDENT—FURTHERANCE OF COMMON OBJECT—DIFFERENT DEPARTMENTS—WORKMEN'S COMPENSATION FOR INJURIES ACT, R.S.O. 1897, CH. 160.

In order to establish a case under the Workmen's Compensation for Injuries Act (R.S.O. 1897, ch. 160), of liability for the negligence of a superintendent, it is not necessary that such superintendence should be exercised directly over the workman injured, or that the workman should be acting under the immediate orders of such superintendent; it is enough if the superintendent and the workman are both employed in the furtherance of the common object of the employer, though each may be occupied in distinct departments of that common object. (*Per* Clute, J.).

[*Kearney* v. *Nicholls*, 76 L.T. Newsp. 63, followed.]

3. MASTER AND SERVANT (§ II E 6—275)—FOR WHAT ACTS OF SUPERINTENDENT MASTER IS LIABLE—WORKMEN'S COMPENSATION FOR INJURIES ACT, R.S.O. 1897, CH. 160.

Where a contractor is digging a trench, and it is the duty of the man in charge of the blasting to place logs over the drill-holes to prevent the scattering of debris by the blast, and he negligently rolls a log upon and injures a man working in the trench, the contractor is liable under the Workmen's Compensation for Injuries Act (R.S.O. 1897, ch. 160), for his negligence, even though the injured workman be not in the blasting department.

4. DAMAGES (§ III J 4—192)—MEASURE OF COMPENSATION—PERMANENT INJURY TO EYES—INSTANCE OF AMOUNT.

Where a young man, 27 years old, in good health, and capable of earning $3.50 a day, is so injured that the hearing in one ear is seriously affected, and his eyesight is injured so as to cause him to see double, and it seems probable that the injury will be permanent, and his occupation requires the use of his natural sight, so that his earning power is seriously depreciated and probably will remain so during his life, $1,100 is a reasonable sum to be awarded to him as damages.

ONT.

H. C. J. 1912

MAGNUSSEN v. L'ABBÉ.

Statement

THIS action was tried at Port Arthur on the 28th June, 1911, before BOYD, C., and a jury. No questions were submitted, but the jury found as follows: "We believe the plaintiff was injured by accident through no fault of his own or the defendants. The man Polson evidently started the log moving, whether accidently or not we are not prepared to say." Upon this finding BOYD, C., dismissed the action. A new trial was ordered by a Divisional Court, 3 O.W.N. 301. The action was accordingly tried before CLUTE, J., without a jury, at Port Arthur, on the 7th March, 1912.

The parties agreed that the evidence taken at the former trial should be read, with such further evidence as either party might be advised to produce.

A number of witnesses were examined on the re-trial, including Alfred Polson, referred to in the jury's finding.

*A. E. Cole*, for the plaintiff.

*A. J. McComber*, for the defendants.

Clute, J.

CLUTE, J.:—To understand the effect of the evidence of Polson, it will be convenient here to state the nature of the action and the evidence at the former trial.

The defendants were contractors. The plaintiff was in their employ. A trench was being dug for the city corporation, from which there led a cross-trench. The plaintiff was working in the cross-trench. At the point of intersection there was a man-hole some 12 or 15 feet deep. The cross-trench was from 10 to 12 feet deep at the man-hole, and of a lesser depth as it extended from the man-hole. The sides of the upper portion of the trench were earth, sand, small stones, and hard-pan. There was further blasting to be done in the trench at a distance of some 20 feet from the man-hole. A number of blasts had already been put in. The plaintiff was in the cross-trench, about 8 feet from the man-hole, throwing out earth, broken rock and stone. Polson was in charge of the blasting. He had several men with him, assisting. It was a part of his duty, before the shots were fired, to cover the holes with logs to prevent the escape of rock and other débris thrown out by the blast. The defendant Bengsten had general charge and supervision of the work. He had authorised Polson to call to his assistance the men digging in the trench for any purpose for which he might require them in connection with his blasting, and particularly in removing the logs to be placed over the drill-holes. After a previous blast, the logs had been placed on the edge of the trench. The nearest log, I find from the evidence, was placed at from 2 to 2½ feet from the edge of the trench. The evidence differs as to the size of this log. It is spoken of as a telegraph pole. It was large at one end and smaller at the other. The largest end was near the man-hole. Polson was standing near that end. The men assisting him were

near-by ready to give a hand. He held a cant-hook in his hand. He required further help to move the log, and called the plaintiff, who was working beneath in the trench, to his assistance. As the plaintiff looked in answer to him calling, he saw the earth and timber falling, and received a blow from the falling log which caused the injuries complained of. There was a dispute at the former trial as to what had taken place causing the log to fall in.

Polson was not present at the former trial, not living in the district at that time. The plaintiff's witnesses, being the men who were assisting Polson, swore that the bank caved in, causing the pole to roll in at one end where the bank gave way. The defendant Bengsten swore that he was about 100 feet away, but could see what took place, and declared that Polson with the cant-hook started the log rolling, that the bank did not cave in, but that Polson rolled the log in.

The new trial was granted mainly to get this further evidence. I may say here that the Chancellor, in his charge to the jury, gave credit to the plaintiff and his witnesses. He says: "These men impressed me favourably. They just stated simply what they knew. What they did not know they did not try to tell. They tried to tell you the truth of what they remembered."

In reading the evidence one is impressed with this same view, and that is the opinion I formed of Polson. In his evidence before me, he stated that he called to the plaintiff; and, while he was waiting for him to come out of the trench, the earth caved in, and that he, Polson, went with it and went down feet first. He swears positively that he did nothing with the cant-hook. I am satisfied from the evidence of Polson and the plaintiff's other witnesses that this is the manner in which the accident occurred, and that the defendant is mistaken in his statement of how it occurred.

The cave-in, as described by some of the witnesses, extended back some 2½ feet, sufficient to start the log moving, and extended down the sides 4 or 5 feet. This corresponds exactly with what had occurred with a previous cave-in at the man-hole, of which the defendant Bengsten was aware prior to the accident in question.

There was also evidence that the effect of the blasting was to loosen the soil about the trench and render it liable to fall in, and that the trench was dangerous without being shored up or protected. The defendant Bengsten had knowledge of all that occurred, that is, of the condition of the trench, of the previous cave-in, of the position of the log on the edge of the trench, and ought to have known, I think, of the danger men incurred in working in the trench.

ONT.

H. C. J. 1912

MAGNUSSEN v. L'ABBÉ.

Clute, J.

I find the defendants guilty of negligence in not taking proper precautions in shoring up the sides of the trench or adopting other means to prevent the cave-in.

I am further of opinion that, if the defendant Bengsten's evidence of the cause of the falling in of the log be accepted, that is, that it was owing to Polson rolling it over with the cant-hook, the defendants are still liable.

It was admitted by the defendant Bengsten before me that Polson had charge of the blasting and charge over the men whose duty it was to place the logs and prevent the discharged blast from flying out through the trench. He was, therefore, a man having superintendence, and, while in the act of such superintendence, he negligently and carelessly rolled the log into the trench, knowing that the plaintiff was there. The plaintiff, at that moment, was under his control, and was just in the act of obeying his command, but that would not make any difference. If he, as superintendent, under sec. 3, sub-sec. 2 [The Workmen's Compensation for Injuries Act, R.S.O. 1897, ch. 160] was guilty of negligence which caused injury to a man, even in another department, the defendants would still be liable.

In *Kearney* v. *Nicholls*, 76 L.T. Newsp. 63, it was held, "that it is not necessary that such superintendence should be exercised directly over the workman injured, or that the workman should be acting under the immediate orders of such superintendent; it is enough if the superintendent and the workman are both employed in furtherance of the common object of the employer, though each may be occupied in distinct departments of that common object."

Section 2, sub-sec. 1, does not limit the scope of sec. 3, sub-sec. 2 [The Workmen's Compensation for Injuries Act, R.S.O. 1897, ch. 160], but enlarges the scope of the application of the Act as limited by sec. 8 of the English Act. This is apparent on comparing the two Acts.

I place, however, my decision upon the first ground.

The amount of damages that ought to be given is difficult to ascertain. The injuries suffered were: (1) the drum of the ear was broken, which seriously affects the hearing through that ear; (2) the injury to the eye causes the plaintiff to see double. The specialist states that it is impossible to say whether this injury is permanent or not, but he is strongly of the view that it is a permanent injury. It is not one that can be corrected by glasses.

The plaintiff is a young man, twenty-seven years of age, otherwise in good health, and was capable of earning $3.50 a day. He was a driller, and requires, therefore, his natural sight to see the drill. In attempting subsequently to drill, he had to cover the one eye, otherwise he would make a mis-stroke. He tried the

ONT.

H. C. J.
1912

MAGNUSSEN
v.
L'ABBÉ.

Clute, J.

method of wearing a handkerchief over one eye, and not with very satisfactory results. He is still far from well, suffering severe pains in his head; not capable of hard and continuous work. There can be no doubt that his earning power has been seriously depreciated and probably will be during his life. The evidence is uncertain as to the extent of the loss. After taking all the circumstances into consideration, I think $1,100 is a reasonable sum to assess as damages, and I assess such sum accordingly.

The plaintiff is entitled to the costs of the action, including the former trial, the appeal to the Divisional Court, and the second trial.

*Judgment for plaintiff.*

---

ALTA.

S. C.
1912

April 13.

## ARNOT v. PETERSON.

*Alberta Supreme Court. Trial before Beck, J. April 13, 1912.*

1. LAND TITLES (§ III—31)—EFFECT OF A TRANSFER UNDER ALBERTA LAND TITLES ACT—6 EDW. VII. (ALBERTA) CH. 24.

A transfer under the Alberta Land Titles Act, 6 Edw. VII. ch. 24, is not a deed of grant. It does not pass the title, and its practical effect is little or nothing more than a mere order to the registrar by the holder of the registered title to transfer the title to somebody else.

2. LAND TITLES (§ III—31)—TORRENS SYSTEM—TRANSFER EXECUTED IN BLANK—ALBERTA LAND TITLES ACT, 6 EDW. VII. CH. 24.

There is no reason in law why a transfer under the Alberta Land Titles Act, 6 Edw. VII. ch. 24, should not be executed in blank, with authority to the person to whom it is handed, or to anyone else, to fill in, under certain instructions, the name of the so-called transferee, who, in reality, is the person to whom the registrar is to be requested to issue a new certificate of title.

3. LAND TITLES (§ III—31)—RIGHTS OF TRANSFEREE ON RECEIVING NOTICE OF SALE OF PROPERTY AFTER EXECUTION AND DELIVERY TO HIM OF TRANSFER.

Where one has advanced money on the security of an agreement to give a transfer of land registered under the Alberta Land Titles Act, 6 Edw. VII. ch. 24, and the transfer is executed and delivered, and the transferee then receives notice of an agreement of sale made by the transferor after the execution and delivery of the transfer, he is nevertheless entitled to register his transfer, and obtains thereby a good title as against the holder of the agreement of sale.

4. LAND TITLES (§ III—31)—TORRENS SYSTEM—EFFECT OF NOTICE OR ABSENCE OF NOTICE OF ANY OUTSTANDING INTEREST—6 EDW. VII. (ALBERTA) CH. 24, SEC. 135.

The effect of section 135 of the Alberta Land Titles Act, 6 Edw. VII. ch. 24, is that a person dealing with a registered owner is not affected by any outstanding interest of which he has no notice, nor of any interest of which he has notice, unless, with such notice, he does something which constitutes fraud.

5. LAND TITLES (§ IV—41)—TORRENS SYSTEM—CAVEATS—EFFECT OF REGISTRATION—6 EDW. VII. (ALBERTA) CH. 24, SEC. 97.

Section 97 of the Alberta Land Titles Act, 6 Edw. VII. ch. 24, dealing with registration by way of caveat, applies only as between persons claiming under the same root of title, and, for this purpose, each fresh certificate of title constitutes a new root of title.

ALTA.

S. C.
1912

ARNOT
v.
PETERSON.

Statement

ACTION for specific performance brought by Arnot and Smith, the purchasers, against three defendants, Peterson, Brooks, and Clark, Brooks being joined as a purchaser from the defendant Clark.

Judgment was given for the plaintiffs.

*James Muir*, K.C., for the plaintiffs.
*W. T. D. Lathwell*, for the defendant Peterson.
*I. W. McArdle*, for the defendant Brooks.
*J. J. McDonald*, for the defendant Clark.

Beck, J.

BECK, J.:—I propose to give my opinion now, and to give a stay of thirty days, so that anybody dissatisfied with the decision will have an opportunity of appealing and taking such steps by way of execution as he sees fit. The first matter I have to deal with is the transaction of the 21st April, 1910. That is the arrangement between Clark and Peterson. Now, the facts about that are, as I find them, that Clark was entitled to a transfer from Thibault, on the payment of a certain sum of money; that the transfer was in the hands of the bank, and there was an arrangement made between Clark and Peterson that Peterson should raise for Clark a sufficient sum of money to take up the transfer and get possession of it for Clark; and, in addition to that, Peterson agreed to pay Clark $40 in connection with some past transaction, and $100 by way of bonus and interest; and there is a question whether that $100 was not also to cover the removal by Peterson of the Cruikshank caveat; but whether he agreed on this last point, I do not think it is important for me to decide.

Peterson, in fact, got the caveat removed, and, in fact, paid the costs; so that, although the question is not in issue here, I express the opinion that Peterson has no legal ground upon which he can claim payment from Clark of the costs which he paid in that connection. Now, I find that the arrangement was, that, as security for that sum to be advanced, Clark agreed to give a transfer of the property, and that he actually executed a transfer.

There has been some question raised about the validity of the transfer, because there is said to be an alteration in it. I do not think that the law which has been referred to here, with regard to alterations in deeds of grant and other documents under seal by which title passes, has any application to an instrument of that kind.

In the first place, a transfer made under the Land Titles Act is not a deed of grant. It does not pass the title, and its practical effect is nothing more, or at all events little more, than a mere order to the registrar by the holder of the registered title to transfer the title to somebody else.

Now, there is no reason in law why an instrument of that sort should not be executed in blank, with authority given to the person to whom it is handed or to anybody else, to fill in, under certain instructions, the name of the so-called transferee, who, in reality, is the person to whom the registrar is to be requested to issue a new certificate of title. And I find it is a fact that the transaction at that stage was a *bonâ fide* transaction, an honest transaction; and that Peterson had the authority of Clark to fill in Mrs. Peterson's name. I do not say that he had expressly the authority: I mean to say—although it is not necessary for me to find whether he had or had not the authority to fill in the name of Mrs. Peterson—that he had the authority—and that is as far as it is necessary for me to go—to fill in a name.

I think I may as well say that I am satisfied that he had authority to fill in Mrs. Peterson's name. I find that transaction a satisfactory transaction, complete and not open to objection from any point of view. Now, that being Mrs. Peterson's position in regard to the land, the transfer to Mrs. Peterson was ultimately registered on the 5th November, 1910, and she thereby became the registered owner of the land. Between these two dates, comes the agreement of sale from Clark to Brooks.

That agreement is dated the 15th October, 1910; and the question is raised, as a matter of fact, whether Peterson or Mrs. Peterson had notice before the 5th November (the date on which the transfer to Mrs. Peterson was registered) of this agreement of sale by Clark to Brooks. In the view I take of the law upon the question, it is not necessary for me to find what the fact is about that. That raises a question whether I ought to believe the story of Clark and Mrs. Clark, on the one hand, or of Peterson, on the other. During the course of the case, I made a remark which was perhaps a little wider—it was in fact a little wider—than I intended, that I thought Clark was honest. I made that remark in reference to a particular matter under examination at that particular moment. I do not say that I now mean that I think him in any way dishonest; I am not expressing an opinion about it, nor about which of the two men, Peterson or Clark, I am prepared to believe. But it is an obvious remark to say that, with regard to some of Clark's evidence, it is not to be entirely depended upon, on account of what he says himself—his accident, and the fact that, from his accident, his brain had been affected, and that on some occasions, as he admits and admits quite honestly, he was under the influence of liquor. But, as I say, it is not necessary now, in the view I take of the case, to decide which of the two men, Peterson, on the one hand, or Clark, on the other, has given

ALTA.

S. C.
1912

ARNOT
v.
PETERSON.

Beck, J.

a correct account of what took place at Clark's house, on the occasion of the conversation which took place between them.

The Clarks say that they told Peterson on that occasion of the sale to Brooks, and Peterson says they didn't. I do not know which to believe. Mrs. Peterson became the registered owner of this property on the 5th November, 1910.

I think, as a matter of law, that, whether she had notice of the sale to Brooks at that time or not, she had the legal right to register the transfer, that is, she had a legal right to obtain title. The money which she had advanced had been advanced on the security of the land, and she was entitled in all honesty, as a matter of law, to put her security in the form of a certificate of title. Mrs. Peterson, having the title, makes an agreement for the sale to the plaintiffs of the land, and they, it is admitted, had not notice of any adverse claim.

Now, I think, that the plaintiffs are protected by virtue of sec. 135 of the Act. That section expressly refers not merely to a purchaser from the registered owner who gets a transfer and registers it, but to a person "contracting or dealing with, or taking or proposing to take a transfer . . . from the owner of any land for which certificate of title has been granted." And it says that

> Any such person shall not be bound or concerned to inquire into or ascertain the circumstances in or the consideration for which the owner . . . was registered . . . nor shall be affected by notice direct, implied, or constructive, of any trust or unregistered interest in the land. . . .

So that the section clearly contemplates that a person dealing with a registered owner is not affected by any outstanding interest of which he has no notice, nor of any interest of which he has notice, unless, with that knowledge, he goes one step further, and does something which will constitute fraud. Now, a difficulty is suggested with regard to this interpretation by reason of sec. 97, which says that "registration by way of caveat . . . . shall have the same effect as to priority as the registration of any instrument under this Act."

It is contended that Brooks, having registered a caveat with respect to his agreement of sale, which he did on the 13th March, takes priority over the plaintiffs, who registered a caveat in respect of their agreement of sale on the 24th June, 1911.

But I interpret sec. 97 to apply as between claimants claiming under the same root of title, so that, had there been two purchasers from Clark, Brooks and somebody else, as between those two persons claiming under the same root of title, that is, claiming from Clark—claiming under his title—I would say that the section applied so as to give to the one of the two who filed his caveat first priority over the other. But I think that

the section has not the effect of giving Brooks priority over the plaintiffs, because the root of title of Brooks's claim is a different root of title from that of the plaintiffs. If Brooks's root of title is to be looked upon as the earlier certificate to Clark, that root or title was destroyed by the certificate of title granted to Mrs. Peterson, granted, as I say, properly and legally; so that the plaintiffs stand on the basis of a title which has priority over the basis of title upon which Brooks claims.

There is another view, perhaps, or another aspect of the same view, that Clark had a merely equitable interest—a beneficial interest—and that, in dealing with that beneficial interest, he places Brooks in no better position than himself. That is, Mrs. Peterson, as the registered owner, held the legal title, and was bound to account to Clark. Clark sold that beneficial interest. That is all he could sell, and Brooks stood in his place. Clark had contemplated the creation of an unregistered beneficial interest, and the caveat filed by Brooks must be taken as dealing only with that beneficial interest. Taking this view of the case, there is no other conclusion than that the plaintiffs are entitled to specific performance.

I think that, in that connection, the order should provide that they pay the balance of their purchase-price into Court, according to the terms of their agreement, and that, upon the full amount being paid in, they will be entitled to a vesting order clear of incumbrances, existing at the date of their agreement.

As to Brooks, he, of course, will be entitled to repayment of the amount he paid down. That was received by Clark, I understand, and there will be an order that Clark should pay that amount to Brooks with interest.

Now, out of the money paid into Court, Mrs. Peterson is entitled to be repaid the amount of her advance. She has already received something. She is entitled to be repaid the balance of the amount, $638.75, with interest at 5 per cent., after the 21st October, 1910.

The plaintiffs are entitled to their costs, and I think that I should order that Brooks should pay those costs. The contest here was substantially between the plaintiffs and Brooks, and the action has been forced to trial by Brooks, because he was advised that, on this state of facts and the law, he was entitled to hold the land. I have found that he is not, and I think the plaintiffs, therefore, are entitled to the costs against him. As far as I see, there is no reason why these costs which I am ordering Brooks to pay the plaintiffs, or Brooks's costs of defence, should be paid by Clark. There may be some reasons suggested to me why Clark should pay these costs, but at the present

ALTA.
S. C.
1912
ARNOT v. PETERSON.
Beck, J.

moment I think Brooks must pay his own costs and the plaintiffs' without any recourse over.

As to Peterson's costs, I feel a little uncertain as to what I should do about that, and I will take a little time to consider. That is my judgment with that exception; and, as I said at the beginning, I will give a thirty days' stay of proceedings in order that any party who is dissatisfied with the decision may conveniently appeal, because there are some important questions of law involved, and I anticipate that there will be an appeal. The costs payable by Brooks may be taken out of the moneys in Court to the extent to which Clark is indebted to Brooks—Mrs. Peterson's balance being first paid. I will settle the minutes of judgment, and the time for appealing will date from the settlement of the minutes.

*Judgment for specific performance.*

---

B.C.
S. C.
1912
April 29.

## SCALZO v. THE COLUMBIA MACARONI FACTORY.

*British Columbia Supreme Court, Murphy, J. April 29, 1912.*

1. APPEAL (§ VII L 4—510)—FINDINGS OF ARBITRATOR—EVIDENCE TO SUPPORT—B.C. WORKMEN'S COMPENSATION ACT.

Where there is evidence to support a finding of an arbitrator under the provisions of the B.C. Workmen's Compensation Act, who upon conflicting testimony found that the workman was not justified in leaving his place in the factory, and for purposes of his own, going behind a certain machine, where he was injured and that, in so doing, he was not acting in the course of his employment, such findings are findings of fact and not of law and will not be disturbed by the Supreme Court of British Columbia upon a stated case on questions of law.

[*Low* v. *General Steam Fishing Co. Ltd.*, [1909] A.C. 523, at p. 534, specially referred to.]

2. MASTER AND SERVANT (§ II A 2—49)—LIABILITY OF MASTER—INJURIES SUSTAINED WHILE NOT PERFORMING DUTY AND NOT IN MASTER'S INTEREST—B.C. WORKMEN'S COMPENSATION ACT.

A workman is not entitled to the benefit of the British Columbia Workmen's Compensation Act, for injuries received while in a place in his master's factory where his duty did not call him, and where he went to procure something for his own convenience and not in his employer's interest.

[*Smith* v. *Lancashire, etc., R. Co.*, [1899] 1 Q.B. 141, and *Reed* v. *Great Western R. Co.*, [1909] A.C. 31, specially referred to.]

Statement

CASE stated by an arbitrator under the Workmen's Compensation Act (B.C.), upon questions of law as follows:—

1. Was I right in holding that the accident did not arise out of and in the course of the employment?

2. Was I right in holding that the applicant was disentitled to the benefits of the Workmen's Compensation Act?

The findings of the arbitrator were as follows:—

I find as a fact that the accident occurred when Scalzo had gone to get the pail to spit in. He had gone across the room, got the pail,

Statement

and had placed it behind his machine and when pointing to it for the benefit of a fellow-workman, in some unaccountable way, not noticing what he was doing, he got caught in the machine and was injured. The pail was used to place the waste in when cleaning the machine and the machine would not be cleaned until the day's work was done, so that, undoubtedly, the pail was procured for the purpose of spitting in and not for the master's business of being used as a receptacle for waste.

Now the whole evidence between the parties turned on that point, that is, was the applicant placing the pail for his own purposes when the accident happened or was he behind the machine for the purpose of picking up dough, and I can see no reason why I should not follow the weight of evidence which to me seems absolutely clear.

The whole question then is, did the accident arise out of and in the course of the applicant's employment? The accident occurred during working hours, while the man was on duty, but while he for a minute or two had stepped across the room to get a pail for his own purposes, namely, to spit in.

I cannot distinguish the case from that of *Smith* v. *Lancashire and Yorkshire R. Co.*, 1. Minton-Senhouse, Workmen's Compensation Cas. 1. The accident was unfortunate, but the man for that minute or so was not about his master's business, and was not doing something which, though not his duty, was for his master's benefit.

*M. A. Macdonald*, for the applicant.

*C. W. Craig*, for the respondents the Columbia Macaroni Factory.

MURPHY, J.:—The learned arbitrator has found that the accident happened when the applicant was placing the pail for his own purposes at a point behind the machine. He has also found that the accident was not one arising out of and in the course of the employment. "This finding may, dependent on circumstances, be regarded as one of law or of fact. If there is no evidence to support the finding, a question of law arises. If there was conflicting evidence bearing upon the issue raised, the question must be one of fact": *Low* v. *General Steam Fishing Co. Limited*, [1909] A.C. 523, at p. 534. Here there is evidence that the applicant's duty was to stand on a platform, and that he had no business behind the machine. (See evidence of Liberato and Marinero.) This is disputed by the applicant, but the arbitrator by his finding has determined this issue against the applicant.

Murphy, J.

The applicant, therefore, had no business to be where he was; and the risk of the accident cannot, on the arbitrator's finding, be held to be one which may reasonably be looked upon as incidental to the employment: *Smith* v. *Lancashire, etc., R. Co.*, [1899] 1 Q.B. 141; *Reed* v. *Great Western R. Co.*, [1909] A.C. 31.

The questions are answered in the affirmative.

*Judgment for respondents.*

ALTA.

S. C.
1912
Jan. 17.

## IREDALE v. DREWEY.

*Alberta Supreme Court, Scott, J. January 17, 1912.*

1. CONTRACTS (§ IV A—321)—BUILDING CONTRACT—RECOVERY FOR EXTRA WORK.

A contractor who built the foundation and walls for a stone building, may recover for extra work caused by the property owner enlarging the dimensions of the building from those specified in his contract.

2. DAMAGES (§ III E—140)—MEASURE OF COMPENSATION—NEGLIGENCE IN PLACING A WINDOW.

A contractor who negligently misplaces a window in the building of a house is liable in damages therefor.

3. CONTRACTS (§ II D 4—188)—CONSTRUCTION OF BUILDING CONTRACT—FOUNDATION AND WALLS.

One who contracts merely to build the foundation and walls for a building will not be held liable to do the beam filling thereon where such was not specifically mentioned in the contract or specifications nor was any evidence given to shew that such work was impliedly included in such trade contracts.

Statement

THE plaintiff claimed $1,500, the price agreed upon for building a house for the defendant, $325 for extras due to enlargement of the building, $300 for cut stone therefor, and $24.50 for erecting chimneys therein.

Judgment was given for the plaintiff.

*C. Macleod*, for plaintiff.
*E. P. McNeill*, for defendant.

Scott, J.

SCOTT, J.:—The contract between the parties was a verbal one and the evidence shews that it was not one for building a house but one for building merely the foundation and walls of a house. No proper plans or specifications for the work to be done were ever prepared and it appears to me that this litigation is due solely to their not having been provided.

The plaintiff claims that when he entered into the contract the outside dimensions of the building were to be 32 x 54 feet and that defendant afterwards changed the plan by making the inside dimensions that size. The defendant claims that the latter were the dimensions upon which the contract was based. The evidence upon the question is conflicting, the evidence of the plaintiff and another witness supporting his claim, while that of the defendant and another witness (Thompson) is to the contrary. It appears, however, that when the defendant first approached the plaintiff to tender for the work, he sketched a ground plan shewing the dimensions to be as claimed by the plaintiff. He subsequently prepared another sketch shewing those to be the interior dimensions but I

am led to the conclusion that the latter sketch was not presented to the plaintiff, until after the contract was entered into. I therefore hold that the plaintiff is entitled to recover for the extra work caused by the increase in the dimensions of the building. Such increase should be based upon the price per running foot of the walls contracted for and the amount he is entitled to I compute at $174.70. I allow the plaintiff $120 for the cut stone sills, being at the rate of 50c. per running foot.

I hold that the building of the chimneys was not part of the work to be done under the original contract and that the plaintiff is entitled to recover therefor in addition to the contract price. I allow him $18.50 for same, as it was shewn that one of the chimneys was not completed by him but was afterwards completed by the defendant. The plaintiff admits that defendant is entitled to credit for $26.09 for lumber and other materials furnished by him.

The defendant counterclaims for damages for the misplacing by the plaintiff of a window in one of the walls. I hold that the window was misplaced by reason of the negligence of the plaintiff and I allow the defendant $50 damages for same. The defendant also counterclaims for damages for non-completion of the building within the time he claims it was to be completed. I have already stated that the plaintiff's contract was not one to complete the building and I hold that it was not a term of the contract that he was to complete his work at any specified time, and I therefore disallow the claim.

The defendant also charges that plaintiff under his contract was required to do certain beam filling which he has not done and claims a reduction from the contract price by reason thereof.

During the negotiations leading up to the contract, the beam filling was not referred to and it therefore becomes a question whether a person contracting to erect merely the foundations and walls of a stonehouse is required to beam fill as part of his contract. There is no evidence that he is so required, though there is contradictory evidence as to whether a person contracting to build a house would be bound to do so. In the absence of evidence upon the point, I hold that the defendant has not shewn that the plaintiff was bound to do the beam filling, and I therefore disallow the claim.

The defendant in his statement of defence alleges the payment of certain sums amounting to $1,000 on account of the plaintiff's claim. There is nothing in my notes to shew that any such payment was made.

I hold the plaintiff is entitled to judgment for $1,970.11 together with his costs of suit, the amount I award being made up as follows:—

ALTA.

S.C.
1912

IREDALE
v.
DREWLY.

Scott, J.

| | |
|---|---|
| Contract price | $1,500.00 |
| Extra work | 174.70 |
| Cut stone sills | 120.00 |
| Chimneys | 18.50 |
| | $1,813.20 |
| Less lumber and materials supplied by defendant | 26.09 |
| | $1,787.11 |
| Interest from 1st January, 1910 | 183.00 |
| | $1,970.11 |

The amount so awarded is to be subject to reduction upon entry of judgment by any sums heretofore paid by the defendant on account of plaintiff's claim and by a corresponding reduction of interest. If the parties cannot agree upon the reduction there will be a reference to the clerk to ascertain the amount, if any, to which defendant is entitled.

I give judgment for the defendant upon his counterclaim for $50 with costs.

*Judgment accordingly.*

---

ONT.

C. A.
1912

April 29.

## Re WEST LORNE SCRUTINY.

*Ontario Court of Appeal, Moss, C.J.O., Garrow, Maclaren, Meredith, and Magee, JJ.A. April 29, 1912.*

1. ELECTIONS (§ II C—70)—SCRUTINY BY COUNTY COURT JUDGE—INQUIRY INTO—NAME ON VOTERS' LIST.

The right of a person whose name was on the certified voters' list, to vote upon a local option by-law, may be inquired into by a County Court Judge upon a scrutiny of the ballots cast, under the provisions of secs. 369, 371 of the Ontario Consolidated Municipal Act, 3 Edw. VII. ch. 19, since the Court's power in such proceeding is not limited to a mere recount or examination of the paper ballots themselves.

[*In Re Local Option By-law of Township of Saltfleet* (1908), 16 O.L.R. 293, specially referred to; *Re West Lorne Scrutiny*, 25 O.L.R. 267, 277, reversed on appeal.]

2. ELECTIONS (§ II C—70)—SCRUTINY—NON-RESIDENT VOTING ON LOCAL OPTION BY-LAW.

Upon a scrutiny under secs. 369, 371 of the Ontario Consolidated Municipal Act, 3 Edw. VII. ch. 19, a ballot cast at a local option by-law election by a tenant whose name appeared upon the certified voters' list, may, under sec. 24 of the Ontario Voters' Lists Act, 7 Edw. VII. ch. 19, sec. 24, be declared void by the County Judge if it appears that such tenant was not a resident of the municipality when his name was placed on the list, or that he had subsequently ceased to be one.

[*Re Orangeville Local Option By-law* (1910), 20 O.L.R. 476, distinguished.]

3. ELECTIONS (§ II C—70)—SCRUTINY—LOCAL OPTION BY-LAW—DISCLOSURE OF VOTE.

A person who, without right, votes at a local option by-law election cannot be required upon a scrutiny of the vote under secs. 369 and 371 of the Ontario Consolidated Municipal Act, 3 Edw. VII. ch. 19, to disclose how he voted, since sec. 200 of such prohibits such disclosure.

[*Re West Lorne Scrutiny*, 23 O.L.R. 598, 25 O.L.R. 267, 277, and 20 O.W.R. 738, specially considered.]

4. ELECTION (§ II C—70)—SCRUTINY—LOCAL OPTION BY-LAW—DEDUCTION OF ILLEGAL VOTES.

Votes illegally cast at an election on a local option by-law, upon a scrutiny thereof under secs. 369 and 371 of the Ontario Consolidated Municipal Act, 3 Edw. VII. ch. 19, will be deducted from the total vote cast in favour of the by-law, where the official declaration that the by-law had carried is under attack, since there is no way of ascertaining legally in which way they were actually cast.

5. ELECTIONS (§ II C—70)—SCRUTINY—APPLICATION OF ONTARIO VOTERS' LISTS ACT, 7 EDW. VII. CH. 4.

Section 24 of the Ontario Voters' Lists Act, 7 Edw. VII. ch. 4, applies to a scrutiny of a municipal election held under the Ontario Consolidated Municipal Act, as well as to one held under the Ontario Election Act. (*Per* Moss, C.J.O.)



Statement

APPEAL by D. H. Mehring, the applicant for a scrutiny, from the order of a Divisional Court, *Re West Lorne Scrutiny*, 25 O.L.R. 267, 277, 3 O.W.N. 25, 20 O.W.R. 738, varying the order of MIDDLETON, J., *Re West Lorne Scrutiny*, 23 O.L.R. 598, 2 O.W.N. 1038, 19 O.W.R. 231.

The appeal was allowed, MACLAREN and MEREDITH, JJ.A. dissenting.

Argument

*C. St. Clair Leitch* and *J. M. Ferguson*, for the appellant, argued that the case turned on the interpretation of sec. 24 (2) of the Voters' Lists Act, and on the decision in *In re Local Option By-law of the Township of Saltfleet* (1908), 16 O.L.R. 293, and that, on the evidence material and the law applicable to the case, an order should not be made prohibiting the County Court Judge from certifying that the by-law in question had not been approved by the requisite three-fifths majority.

*W. E. Raney*, K.C., and *J. Hales*, for Dugald McPherson, respondent, argued that the decision of the Divisional Court on the first branch of the case, the question as to the jurisdiction of the County Court Judge to go behind the voters' list, was right and should be affirmed. The following cases were referred to: *Re Weston Local Option By-law* (1907), 9 O.W.R. 250; the *Saltfleet* case, *supra*; *Re Orangeville Local Option By-law* (1910), 20 O.L.R. 476; *Re Ellis and Town of Renfrew* (1911), 23 O.L.R. 427; *In re McGrath and Town of Durham* (1908), 17 O.L.R. 514. As to the second branch of the case, the right of the County Court Judge to inquire how the persons whose votes were disallowed, did vote, it was submitted that the judgment of MIDDLETON, J., was right, and that the Courts had gone too far in their requirements as to absolute secrecy.

*Leitch*, in reply, referred to *Re Sinclair and Town of Owen Sound* (1906), 13 O.L.R. 447; *Haldimand Dominion Election Case* (1888), 1 Ont. Elec. Cas. 529; *Re Lincoln Election Petition* (1878), 4 A.R. 206; *Rex ex rel. Ivison* v. *Irwin* (1902), 4 O.L.R. 192.

MOSS, C.J.O.

April 29. MOSS, C.J.O.:—Appeal from a judgment of a Divisional Court, reported 25 O.L.R. 267, allowing an appeal

ONT.
C. A.
1912
RE WEST LORNE SCRUTINY.
MOSS, C.J.O.

from a judgment of Middleton, J., reported 23 O.L.R. 598. The facts are fully stated in the report.

This case furnishes another example of the difficulty and confusion which so often arise from the adoption by the Legislature of the device of incorporating by reference some of the provisions of one statute into the body of another statute which is being enacted. The disadvantages of this mode of legislation have been remarked upon in England and this country, and it has been truly said that this procedure makes the interpretation of modern Acts of Parliament a very difficult and sometimes doubtful matter. See *Knill* v. *Towse* (1889), 24 Q.B.D. 186, 196, where the question was not unlike in some respects the question involved in this case. And a legislative committee in England is reported to have described legislation by reference as making an Act so ambiguous, so obscure, and so difficult that the Judges themselves can hardly assign a meaning to it, and the ordinary citizen cannot understand it without legal advice: Craies' edition of Hardcastle on Statutory Law (1907), p. 26.

It is scarcely to be wondered at, therefore, that unanimity of opinion is not to be found expressed in many of the decisions in which the questions arising on this appeal or some of them have been discussed.

The first question raised in the appeal has been much debated and has given rise to much divergence of opinion among the Judges who have had it under consideration in other cases. As stated by Teetzel, J., in his opinion delivered while sitting as a member of the Divisional Court whose judgment is now in appeal, the question is: whether, upon a scrutiny under the Municipal Act, the County Court Judge may declare void and deduct from the result the vote of a tenant whose name was upon the certified voters' list, but who was not in fact a resident of the municipality when the list was certified, and who never afterwards became a resident therein.

This question affects 4 votes polled; and, if answered in the negative, as it was by the Divisional Court, practically ends any necessity for discussion as to the fate of the one other vote polled, which is in question here.

In holding that the 4 votes in question were not open to attack upon the scrutiny, the Divisional Court considered itself bound so to hold by the decision of another Divisional Court in *In re Local Option By-law of the Township of Saltfleet*, 16 O.L.R. 293, though it had been subjected to adverse comment in some other cases.

In *Re Orangeville Local Option By-law*, 20 O.L.R. 476, Meredith, C.J., considered the question of the jurisdiction of the Judge to enter upon an inquiry as to the right to vote of any one who has deposited his ballot paper, and declared his own

opinion to be against the exercise of such jurisdiction. He expressed the opinion that the inquiry is limited to a scrutiny of the ballot papers, and differs only from a recount in that the Judge is not limited to dealing with the ballot papers *ex facie*, but may take evidence in the same way as may be done upon a trial of the validity of an election of a member of a municipal council for the purpose of determining whether any ballot paper ought or ought not to be counted.

With deference, I am unable to follow the distinction drawn between a scrutiny of ballot papers and a scrutiny of votes, bearing in mind the object with which the scrutiny is entered upon. The Judge is to determine and certify whether the majority of votes given is for or against the by-law. He is not merely, as in the case of a recount under sec. 189 of the Consolidated Municipal Act, 1903, to count up the votes given upon the ballot papers not rejected, and make up a written statement of the number of votes given for each candidate and of the number of ballot papers rejected and not counted by him, and certify the result to the returning officer. In all this he is acting in a ministerial capacity. In a scrutiny he is acting in a judicial inquiry, with the purpose of ascertaining which way, in truth and in fact, the majority of the votes is given. Light is thrown upon this view by the language of sec. 24 of the Ontario Voters' Lists Act, 7 Edw. VII. ch. 4,* which expressly refers to a scrutiny under the Municipal Act, as well as to one under the Ontario Election Act. That section declares that "the certified list shall, upon a scrutiny, under" either of these Acts, "be final and conclusive . . . except." The exception applies to one scrutiny as much as the other. Then what is the extent of the exception under sub-sec. 2, which is the one with which we are immediately concerned? It applies to persons who, subsequently to the list being certified, are not or have not been resident either within the municipality to which the list relates, or within the electoral district for which the election is held, and

*Section 24, ch. 4, of the Ontario Voters' Lists Act, 7 Edw. VII. (Ont.), is as follows:—

24. The certified list shall, upon a scrutiny, under the Ontario Election Act, or the Municipal Act, be final and conclusive evidence that all persons named therein, and no others, were qualified to vote at any election at which such list was, or was the proper list to be used; except—

1. Persons guilty of corrupt practices at or in respect of the election in question on such scrutiny, or since the list was certified by the Judge;

2. Persons who, subsequently to the list being certified, are not or have not been resident either within the municipality to which the list relates, or within the electoral district for which the election is held, and who by reason thereof are, under the provisions of the Ontario Election Act, disentitled to vote;

3. Persons who, under sections 4 to 7 of the Ontario Election Act are disqualified and incompetent to vote.

ONT.

C. A.
1912

RE WEST LORNE SCRUTINY.

MOSS, C.J.O.

who by reason thereof are, under the provisions of the Ontario Election Act, disentitled to vote.

If this sub-section applies to municipal elections, it also applies to voting on by-laws, by the express terms of the preceding part, which speaks of a scrutiny under the Municipal Act.

So that, when conducting a scrutiny under the Municipal Act, reference must be made to the provisions of sec. 24 of the Ontario Voters' Lists Act in order to ascertain the extent to which the inquiry can proceed. I agree with those who think that a scrutiny under sec. 371 of the Consolidated Municipal Act, 1903,* is something more comprehensive than a simple recount; and that, when proceeding with a scrutiny under that section, the County Court Judge has authority to inquire into the question whether any persons who have cast their ballots come within the excepted class mentioned in sub-sec. 2 of sec. 24 of the Ontario Voters' Lists Act.

I am also of opinion that it is competent for the County Court Judge to declare void the vote of a person who has cast a ballot, when it appears that, although his name was on the certified list, he was not, when it was placed thereon, resident and has not since become resident within the municipality to which the list relates. Within the very terms of the sub-section, as it appears to me, he is not and has not been resident within the municipality subsequently to the list being certified. I am unable to see why any distinction should be drawn between his case and that of a person who was resident within the municipality when the list was certified, but ceased to be resident subsequently to the list being certified.

The one remaining vote held void by the County Court Judge was admittedly within the exception of sub-sec. 2. The result should, in my opinion, be that the County Court Judge's ruling was correct, and that his certificate should stand.

The remaining question dealt with by the Divisional Court is, whether, if the County Court Judge, upon a scrutiny conducted by him, finds that a person whose name was upon the list, but who had no right to vote, did vote, such person may be compelled to disclose before the County Court Judge how he did vote. While the decision of the Divisional Court on the other branches of the case rendered it unnecessary to consider

*Section 371, ch. 19, of the Consolidated Municipal Act, 3 Edw. VII. (Ont.), is as follows:—

371. On the day and at the hour appointed, the clerk shall attend before the Judge with the ballot papers in his custody and the Judge upon inspecting the ballot papers, and hearing such evidence as he may deem necessary, and on hearing the parties, or such of them as may attend, or their counsel, shall, in a summary manner, determine whether the majority of the votes given is for or against the by-law, and shall forthwith certify the result to the council.

this question so far as the result was concerned, it deemed it of sufficient importance to justify a determination upon it.

Without entering upon any extended discussion, I think it quite sufficient for me to say that I entirely agree with the conclusion of the Divisional Court upon the question, as expressed in the opinion of Teetzel, J.

The result upon the whole is, that the order of the Divisional Court should be set aside, and that the County Court Judge should be left at liberty to certify the result of the scrutiny to the council.

But, in view of the varying and conflicting opinions and the apparent difficulty in solving the questions at issue, there should be no costs of any of the proceedings.

MOSS, C.J.O.

GARROW, J.A.:—This is an appeal from the judgment of a Divisional Court reversing an order of Middleton, J., made in the matter of a vote taken in the village of West Lorne upon a local option by-law.

GARROW, J.A.

After the vote had been taken, one Dameon H. Mehring applied to the Judge of the County Court of the County of Elgin for a scrutiny of the ballot papers. The scrutiny was granted, and was proceeding when one Dugald McPherson applied to Middleton, J., for an order prohibiting the County Court Judge from entering upon an inquiry as to the right to vote of 5 persons whose names appeared upon the voters' list and who had voted, but who, it was alleged, were disqualified, or, in the alternative, for a mandatory direction to the County Court Judge to ascertain how these persons had voted.

Middleton, J., agreeing with the County Court Judge, held that these persons were not entitled to vote, and directed him to inquire and ascertain how they had voted in order to determine whether the majority of the lawful votes given was for or against the by-law.

An appeal from this order was taken and was heard first before the King's Bench Division (see 25 O.L.R. 267); and, in consequence of the difference of opinion there expressed, reargued before the Exchequer Division (see 25 O.L.R. 277), when the appeal was allowed.

The judgment of Middleton, J., is reported in 23 O.L.R. 598.

The polling took place on the 2nd January, 1911. The voters' list was finally revised and certified on the 28th October, 1910. The 5 persons whose votes are in question were all upon the list as tenants. Four of them had ceased to reside in the municipality before the voters' list was certified. One of them became non-resident afterwards, namely, on the 5th December, 1910. The total number of votes polled, including those of the before-mentioned 5 persons, was 234. The votes for the by-law

ONT.
C. A.
1912
RE WEST LORNE SCRUTINY.
Garrow, J.A.

were 142, and against 92. The learned County Court Judge proposed to deduct these 5 votes from the total, leaving as the actual total 229. And he also proposed to deduct the whole of the 5 votes from the votes cast in favour of the by-law, which would have left 137, or less than the required three-fifths of the proper total, and would have so certified but for the prohibition granted by Middleton, J.

The Divisional Court was of the opinion, following the *Saltfleet* case, [*Re Local Option By-law of the township of Saltfleet*, 16 O.L.R. 293] that the County Court Judge had no legal authority to disallow the 4 votes given by the tenants who had ceased to reside in the municipality before the voters' list was certified, and that in that case it was unnecessary to deal with the fifth, who had ceased to so reside thereafter, because the disallowance of that vote would not affect the result. The Court further held that the inquiry directed by Middleton, J., into how a person had voted, would be contrary to the provisions of sec. 200 of the Consolidated Municipal Act, 1903.

The questions involved are, therefore, three, namely: (1) were the 5 tenants, or any of them, disqualified because they had ceased to reside in the municipality before the voting; (2) had the County Court Judge power, on a scrutiny held under sec. 369 of the Consolidated Municipal Act, 1903,* to disallow such votes, or any of them; and (3), if they were properly disallowed, what should follow—should they be deducted, as the County Court Judge proposes to do, from the affirmative vote, without inquiry, or should there be an inquiry, as Middleton, J., seemed to think, and the deduction made as the result of such inquiry?

By sec. 141 (1) of the Liquor License Act, a local option by-law must, before being finally passed, be approved by the "electors of the municipality". And who are such "electors" is determined by sec. 86 of the Consolidated Municipal Act, 1903. We are concerned here only with tenants, and their right to vote, or in other words, to be "electors" of the municipality. These are provided for by clause "secondly" of sec. 86, which says: "All *residents* of the municipality who have resided

*Section 369, ch. 19, of the Consolidated Municipal Act, 3 Edw. VII. (Ont.), is as follows:—

369. If within two weeks after the clerk of the council which proposed the by-law has declared the result of the voting, any elector who was entitled to vote upon the by-law applies, upon petition, to the county Judge, after giving such notice of the application, and to such persons as the Judge directs, and shews by affidavit to the Judge reasonable grounds for entering into a scrutiny of the ballot papers, and if the petitioner enters into a recognizance before the Judge in the sum of $100, with two sureties (to be allowed as sufficient by the Judge upon affidavit of justification) in the sum of $50 each, conditioned to prosecute the petition with effect, and to pay the party against whom the same is brought any costs which may be adjudged to him against the petitioner the Judge may appoint a day and place, within the municipality, for entering into the scrutiny.

therein for one month *next before* the election, and who are, or whose wives are, at *the date of the election*, tenants in the municipality." They must, of course, in addition, be upon the voters' list used at the election.

Residence alone is not sufficient, nor is being upon the voters' list, without residence, sufficient. Both must exist to qualify the tenant voter. And, that being so, it is perfectly clear that none of the 5 was qualified or entitled to vote on the by-law in question. The Ontario Voters' Lists Act, 7 Edw. VII. ch. 4, sec. 24, was relied on as the foundation for a contrary view. The one statute, however, is of as much force and virtue as the other, unless the later one was intended to repeal the earlier, of which there is not the very slightest indication. And both must, therefore, be read together, as, in my opinion, they can be with perfect harmony, as expressing the law upon the subject. No one disputes the finality of the voters' list as expressed in sec. 24 of the Voters' Lists Act. However disentitled to be upon the list, if a person is upon it, and conforms to sec. 86 of the Municipal Act as to residence, such a person's vote cannot, I think, be questioned. It was said in the *Orangeville* case, 20 O.L.R. 476, at p. 479, by Meredith, C.J., that the only paragraph of sec. 24 of the Voters' Lists Act which is applicable to a municipal election, or a vote on a by-law, is the first, and that paragraph 2 is applicable only to elections under the Ontario Election Act. I am, with deference, unable to agree with the latter statement. There is nothing in the Election Act requiring a voter to reside in any particular municipality after the voters' list is made up and certified, but he must continue to reside in the electoral district to entitle him to vote at an election to the Assembly. The words "within the municipality," followed by "or within the electoral district," would, therefore, make the former words meaningless and unnecessary, unless they are held to apply, as, in my opinion, they do, to municipal elections and to the disqualification by reason of non-residence for which the Municipal Act provides.

Clause 2 of sec. 24 should, perhaps, have contained a reference to the Municipal Act, as well as to the Ontario Election Act. As it is, its proper construction is, I think, to regard the later words, "and who by reason thereof are, under the provisions of the Ontario Election Act, disentitled to vote," as referring only to the words, "or within the electoral district for which the election is held," which immediately precede them. It is unreasonable to suppose that the Legislature, while carefully preserving the provisions as to residence contained in the Election Act, intended, in such an indirect manner, to repeal the very similar provisions as to residence contained in the Municipal Act, affecting as they do every class of voter except a freeholder.

ONT.
C. A.
1912
RE WEST LORNE SCRUTINY.
GARROW, J.A.

The question, however, in the view I take, is not vital, for the real disqualification arises, in my opinion, not under the Voters' Lists Act so much as under the plain language of sec. 86 of the Municipal Act, which, while fully accepting the finality of the voters' list, cannot be ignored as to events subsequently occurring or existing.

The next question is as to the power and authority of a County Court Judge, upon a scrutiny, to deduct such votes—a question which has been frequently discussed and upon which divergent views have been from time to time expressed.

The decision of the Divisional Court in the *Saltfleet* case, 16 O.L.R. 293, seems to mark an epoch. Teetzel, J., before whom the matter first came, was of the opinion that the County Court Judge had no power to question the right of any voter to vote, or to disallow any vote, and that his power was confined to compelling the production before him of the voters' lists and all material used at the election, and hearing evidence, as he might consider necessary, with reference to the ballots, so that he might ascertain exactly the number of ballots cast for and against respectively, and that he might determine, upon something more than the mere ballot itself, if necessary, as to its validity or invalidity as a ballot. The appeal to the Divisional Court was, upon the facts, dismissed with costs. But, in the judgments of the learned Chancellor and Magee, J., a larger view was taken of the County Court Judge's powers, which view has since, though frequently anathematised—see *per* Anglin, J., in *In re McGrath and Town of Durham* (1908), 17 O.L.R. 514; *per* Meredith, C.J., in the *Orangeville* case, 20 O.L.R. 476; and *per* Riddell, J., in *Re Ellis and Town of Renfrew*, 21 O.L.R. 74—been followed.

The view of the learned Chancellor is set out on p. 302 of 16 O.L.R. As will be seen, he regarded the scrutiny in such a case as something more than a simple recount, the extent of it to be measured "by what can be done on inspection of the ballot papers, and the ascertainment of what votes are void *ex facie*, and the scope of investigation contemplated by the exceptions to the finality of the voters' list." Earlier on the same page, he had said that a subsequent change of residence, which would disqualify, might be investigated under sub-clause 2 of sec. 24 of the Voters' Lists Act, but not a subsequent change of status.

With a subsequent change of status we have nothing to do here. We are dealing only with the case of non-resident tenants whose names are upon the voters' list; and, with deference, it seems to me to be a matter of perfect indifference when such non-residence began, whether before or after the voters' list was certified, if in fact it continued to exist down to within one month of the election or vote, as the case may be. The inquiry

in both cases is wholly as to a state of facts existing subsequent to the perfection of the voters' list, and is in no respect in derogation of its finality, the point at which the inquiry in both cases must begin.

I, therefore, agree with the decision in the *Saltfleet* case, as far as it goes, with respect to the power of the County Court Judge to disallow the vote of a tenant because of non-residence arising after the list was certified; but I go further and say that, in my opinion, no valid distinction can be drawn between that case and the case of the non-resident tenant who was actually non-resident when the list was certified, and afterwards so continued.

I quite agree that a scrutiny is something more than a recount. That it was intended to be something more is clearly made manifest by the circumstance that the ordinary recount, provided for in the case of municipal elections by sec. 189 of the Consolidated Municipal Act, is also applicable to the case of a vote upon a by-law, that section being one of those introduced by sec. 351—a circumstance, it seems to me, which has not always been kept clearly in mind in dealing with the subject. And that section (189) seems to make short work of another matter upon which those who hold the narrower view have occasionally built, namely, that the scrutiny is to be of the ballot papers, which, they say, is not the equivalent of a scrutiny of the votes. But throughout that section "ballot paper" and "vote" are used indiscriminately as representing and meaning the same thing—in my opinion, the only sensible view.

Then as to the third point, what is to be done with the disallowed votes? And as to that, the only question is, should they all be deducted, as the learned County Judge thought, from the affirmative votes? Middleton, J., was of the opinion, evidently, in referring the matter back to the learned County Court Judge, that the voters whose votes were disallowed could be made to disclose in what way they had voted, upon the ground that they were not voters, and therefore not entitled to the protection of sec. 200 of the Consolidated Municipal Act. But I am, with deference, unable to accept that view.

In the *Orangeville* case, 20 O.L.R. Meredith, C.J., at p. 483, suggested, without determining, that in such a case the County Court Judge should not make the deduction, but simply certify the facts to the council. That view also seems to me, with deference, to be unsound. Under sec. 371, the only person who can "determine whether the majority of the votes given is for or against the by-law" is the County Court Judge. The council could only act on his certificate determining the result one way or the other.

ONT.

C. A.

1912

RE WEST LORNE SCRUTINY.

GARROW, J.A.

The subject is one of much difficulty. In the absence of the ballots themselves, it is impossible to arrive at a perfectly satisfactory result, nor, in my opinion, would the result be much more satisfactory if it was possible to examine under oath the voter, who, if dishonest, knowing that he could not be found out, could easily inflict further injury upon the side against which he actually voted by pretending that he voted upon that side. In some cases, perhaps, evidence, more or less reliable, might be got as to the habits and associations of the voter which might raise a presumption as to which way he had probably voted. A hotel-keeper, a bar-tender, or other liquor-seller, it might fairly be presumed, would probably vote against such a by-law, while a member of a temperance organisation, or one who, without being a member, was an abstainer in practice, would probably vote the other way. And yet such evidence could not go very far, for one object of the secret ballot is to protect the voter in the expression of his honest convictions, even where his associations and the company he keeps, and such convictions, do not, as must sometimes happen, agree.

Upon the whole, after much consideration, I am not prepared to say that the learned County Court Judge was wrong in proposing to deduct the disallowed votes from the total of those cast in favour of the by-law. That seems to have been for so long the practice that, if a change is desired, it should come through legislation.

The result is, that, making such deduction, the by-law has not received the requisite majority, and the County Court Judge should certify accordingly.

The appeal should, therefore, to the extent I have indicated, be allowed; but, under the circumstances, there should, I think, be no costs, either here or below.

MAGEE, J.A.

MAGEE, J.A.:—Upon the scrutiny, under sec. 369 of the Consolidated Municipal Act, 1903, the County Court Judge has found 142 ballots marked in favour of the by-law and 92 against it, and has rejected 6 ballots as improperly or insufficiently marked. But he has gone beyond mere inspection of the ballot papers, and on inquiry has found that 5 persons deposited ballots whose names were on the voters' list as tenants, but who had for more than a month before the polling been and then were non-residents of the municipality, and 4 of them in fact were non-resident at the time of the certification of the list and continuously thereafter. He considered the 5 not entitled to vote; and, having no evidence as to how they marked their ballot papers, he could not certify that the 142 votes nor more than 137 were cast for the by-law. The Divisional Court has prohibited him from certifying that the by-law was not carried, and this appeal is from that order.

Four questions arise. First, has the County Court Judge the right, upon the scrutiny, under sec. 369, to go beyond an inquiry how the ballot papers actually received and deposited were marked (involving, if necessary, an inquiry as to lost and spurious ballots), and to inquire into the right of persons to vote whose names are upon the voters' list and who have received and deposited their ballot papers? Second, if so, can he reject the votes of persons entered on the voters' list as tenants who were not in fact residents of the municipality at the time of the final revision of the voters' list, and who have continued to be non-resident until after the polling day, and who in fact had not any other right than as tenants? Third, can a person who, at the time of polling, had no right to vote, but whose name was on the voters' list, and who received and deposited a ballot paper, be required to state how or whether he marked it? And fourth, what is the result if it be found that some of those who voted had no legal right to vote, and there is no evidence as to how they voted?

The appellant, D. H. Mehring, who petitioned for the scrutiny, contends for an affirmative answer to the first and second questions, and for the negative to the third, and on the fourth that the number of illegal voters must be deemed to be possible supporters of the by-law. The respondent, Dugald McPherson, a supporter of the by-law, who applied for the prohibition order appealed from, contends for the opposite. The anomalous spectacle is presented of friends of the by-law trying to uphold votes which they believe to have been cast against it; while the opponents wish to have these votes rejected without inquiry on which side they were.

The first question was decided in the affirmative in 1908, by a Divisional Court in *In re Local Option By-law of the Township of Saltfleet*, 16 O.L.R. 293; and, despite the objections which have been made thereto, I cannot say that I have any doubt as to the conclusion there arrived at. As then pointed out, the history of the legislation, the reasons for it, the procedure adopted, the language copied from other enactments, the manifestly designed analogy between the proceedings for by-laws and municipal and provincial elections, and the absence of any other provision for contesting the result where the clerk declares a by-law to have been defeated, all point to the intention in 1876 to use the word "scrutiny" in the sense in which it is ordinarily and in other enactments used, and clearly to distinguish it from a mere recount on examination of the ballot papers themselves. The provision for this scrutiny was made in 1876, and has remained unchanged and it should be interpreted as then. It was then called "scrutiny of the ballot papers," as it is still; and in 1880, in 43 Vict. ch. 27, sec. 16, it was manifestly this scrutiny which

ONT.
C. A.
1912
RE WEST LORNE SCRUTINY.
Magee, J.A.

was referred to as "scrutiny of the votes," as it yet is in the corresponding present section, 366, and in sec. 366*a*, on a similar subject. Indeed, only in secs. 366, 366*a*, and 369, do I find the word "scrutiny" used, though a scrutiny is manifestly intended and necessary in other proceedings. As pointed out in the *Saltfleet* case, votes and ballot papers were evidently considered interchangeable expressions.

The scrutiny, then, in my opinion, involves the inquiry as to the right to vote, and is not a mere recount which, with the right to take evidence necessary for a recount (sec. 189, 7 Edw. VII. ch. 40, sec. 4), is elsewhere provided for. But, in the inquiry as to the right to vote, regard must be had to the enactment as to the finality of voters' lists.

That brings us to the second question, as to whether the non-resident tenants could properly vote. In *Re Ellis and Town of Renfrew*, 23 O.L.R. 427, it was pointed out that the provisions in the Voters' Lists Act, 1907, 7 Edw. VII. ch. 4, sec. 24, as to the list when finally revised being final and conclusive evidence upon a scrutiny, was intended only for provincial and municipal elections, and not for voting on by-laws—and that the list itself was not the one to be used for the latter purpose, but, it being the list of all and only those entitled to vote at elections, the clerk had to make from it the list to be used for the by-law. In no other sense is it made final for by-law purposes. But the effect for the present case is practically the same. Section 24, in clause 2, expressly excepts from the finality of the list "persons who, subsequently to the list being certified, are not or have not been resident either within the municipality to which the list relates, or within the electoral district for which the election is held, and who by reason thereof are, under the provisions of the Ontario Election Act, disentitled to vote." In the *Orangeville* case, 20 O.L.R. 476, the learned Chief Justice of the Common Pleas considered that these last words, referring to the latter Act, controlled the whole of clause 2, and that, therefore, it does not refer to municipal elections. But, with much deference, I think he has not given due weight to the fact that the Election Act does not require residence, after the list, in the municipality, but only in the electoral district (8 Edw. VII. ch. 3, secs. 19 and 95, and forms 17, 18, 19); whereas the Municipal Act (in secs. 86 and 112) does require residence in the municipality; and the reference in clause 2 to the latter would be meaningless if the clause is inapplicable to municipal elections. I am, therefore, of opinion that clause 2, as far as the word "relates," must in this case be applied.

Even assuming that to be so, the Divisional Court considered that the votes of the 4 tenants referred to could not be struck off, as they had not changed their status, and the list was con-

clusive that they were resident tenants. It has not been contended that the fifth should not be struck off if the list is not final. The result would be that he who was longer a resident would be in a worse position than those who had severed their connection with the municipality long before, and who in fact were wrongfully on the list, while he was rightfully on it. I find nothing in the statute to force us to such a conclusion. The words are, plainly, "Persons who subsequently to the list being certified are not or have not been resident." It does not say, "persons who subsequently have become not resident or persons who have subsequently ceased to be resident," but "persons who subsequently are not resident." I confess, with much deference to the opinions expressed, that I cannot see any warrant for adopting any other than the ordinary interpretation, or striving for a result so opposed to the policy of the Act against non-residents having a voice in the municipality's affairs. Reference has been made in some of the cases to the judgment of the learned Chancellor in the *Saltfleet* case as if he had expressed an opinion that a continued non-residence would not disqualify; but I do not read it as saying more than that subsequently occurring non-residence would disqualify, which is evidently all that he meant to deal with. In my opinion, the learned County Court Judge rightly held all these 5 votes to be invalid.

It is not suggested that there is any means of proving on which side they or any of them were cast unless by calling the voters themselves to disclose it. If any one or more of them had intentionally displayed his ballot after marking it, though he might be punished for doing so, I do not see why any one who saw it and who was not sworn to secrecy should not be admitted to prove, if he could, how it was marked.

In the absence of evidence of that sort, we come to the third question. Section 200 of the Consolidated Municipal Act, 1903, declares that no person who has voted at an election shall, in any legal proceeding to question the election or return, be required to state for whom he has voted. Section 351 makes that section apply also to voting on by-laws. The provision in sec. 200 goes back to 1874 (38 Vict. ch. 28, sec. 34). Like provision was made in 1874, as to provincial elections, by 37 Vict. ch. 5, sec. 32 (now 8 Edw. VII. ch. 3, sec. 166), and as to Dominion elections by 37 Vict. ch. 9, sec. 77. Section 200 should be construed in the same way as those enactments. Up till 1906, the provincial election law was such that if, upon a scrutiny, it was found that a person not entitled to vote had deposited a ballot paper, it could be traced and inspected by the Court and rejected. There was and is no lawful way of doing so in municipal or Dominion elections, nor since 1906 in provincial elections.

ONT.
C. A.
1912
RE WEST LORNE SCRUTINY.
Magee, J.A.

Thus it was the declared policy of the Legislature that, in case of necessity, upon a scrutiny there should be no secrecy for an invalid vote. Yet, side by side with that policy, there was this broad provision that "no person" who voted should be "required to state how he voted." It is not even limited by saying "no voter." To some extent, it might be said that the very provision for unearthing the ballot would indicate that the voter could not be asked what it would shew. In rendering the ballot now untraceable legally in provincial elections, a scrutiny has not been done away with (see sec. 24, already referred to); and the necessity for evidence of some other sort as to the marking of the ballot is greater; but the wording of the section protecting the voter remains the same, and must still have the same interpretation. Indeed the change has emphasised the policy of secrecy. But the fact that, when the provincial Act 37 Vict. ch. 5, sec. 32, was enacted, entitling the voter to keep silent, the law made other provision for obtaining the evidence, is, I think, a reason for giving the Ontario law even a more liberal and not a less liberal interpretation in favour of the voter than the Dominion law which had the same wording.

The Ontario municipal provision (now sec. 200) should have the same interpretation as that in the Ontario Election Act. Until the case of the *Orangeville* by-law, 20 O.L.R. 476, the precise question here does not seem to have arisen. There have been several cases in which lawful voters were not allowed to be asked or to state on oath how they had marked their ballots. In the *Lincoln Election Case*, 4 A.R. 206, it is pointed out that the protection of the statute is around the voter until his vote is proved invalid—but it was not absolutely decided that, if invalid, the protection would be removed. I fully agree with the view of Mr. Justice Britton in the present case (25 O.L.R. at p. 296), that, as a vote may have been given in perfect good faith, although it turns out that the right to it did not exist, it is important that, unless the law clearly provides otherwise, the person honestly casting it should have the benefit of secrecy. The opinions given upon the Dominion Act, although referring to rated votes, are wide enough in their terms to include those turning out to be invalid; and, if voters willing to tell how they voted are excluded from doing so by the policy of the law, much more should those who, as probably in this case, would be unwilling to do so. I am of opinion that they cannot be asked. There is much, however, to be said in favour of the contrary view. In the United States the result of decisions is thus stated in 15 Cyc. 424, under "Elections:" "And it would seem that the same considerations of public policy which relieve the voter himself from being compelled to testify for whom he voted should prevent other proof of that fact. But this protection is

extended to legal voters only. When it has been established that a voter was not a legal elector, any person having requisite knowledge may testify as to the person for whom he voted, and he may be compelled himself to disclose for whom he voted, unless he claims the other and different privilege of refusing to criminate himself. . . . According to the weight of authority the exemption from obligation to disclose the character of his vote can be claimed only by the voter himself. But on the other hand it has been held that in an election contest voters cannot testify at all as to how they voted. Where it does not appear from direct testimony for what candidate an unqualified voter voted, the fact may be shewn by circumstantial evidence."

The fourth question is one which might arise upon any Dominion, provincial, or municipal election, as well as upon any by-law. It is not certain and cannot be made certain how any of the 5 illegal votes were cast. They may have been in favour of the by-law. If so, it would only have 137 supporters, and therefore not the requisite three-fifths. If any one of the 5 voted against it, then it would certainly have 138 against a possible 91, which would be sufficient. On the affidavits there is every probability that at least two, who were well known opponents, voted against it, but probability is not enough. The question turns upon the issue involved.

In the *Lincoln* case, 4 A.R. 206, at p. 212, the Court said: "The solution of this question seems to follow from a consideration of the issue raised. The respondent has been returned as duly elected. The petitioner, in claiming the seat for Mr. Neelon" (the unsuccessful candidate), "undertakes to prove that he received the majority of legal votes. That proposition he is bound to establish affirmatively. Where it is sought to diminish the majority of the respondent" (Mr. Rykert, who had been returned as elected) "by a vote, two things must be proved: firstly, that the voter had no vote; and secondly, that he assumed to vote for the respondent. In the case put, the second is incapable of proof, and the petitioner therefore fails to prove that the vote was cast for Rykert and not for Neelon." Similarly in the United States the result of the authorities is thus stated in 15 Cyc. 416: "In a statutory contest at the suit of a defeated candidate, the certificate of the board of canvassers is *primâ facie* evidence of the result, and the contestant, whatever may be his ground of complaint, has the burden of establishing it. Where the validity of the returns is not attacked on the ground of fraud, it is not enough to shew that illegal votes were cast; it must be shewn that a sufficient number of such votes were cast for the successful candidate to change the result."

If the scrutiny could be looked upon as an appeal from the clerk's certificate that the by-law was carried, and as an affirma-

ONT.
C. A.
1912
RE WEST LORNE SCRUTINY.
Magee, J.A.

tive assertion that more than two-fifths voted against it, then this case would be governed by the principle of the decision in the *Lincoln* case, and the onus would be upon the opponents of the by-law to shew that the clerk's return was wrong; and, failing affirmative proof of it by shewing that all 5 persons voted for the by-law, the clerk's return of 141 against 92 would stand, except as amended by the Judge by the addition of the one improperly rejected ballot.

But the scrutiny cannot, I think, be so looked upon. The question is not the same as the question between two candidates, where each asserts that he has been elected, and not merely that the other has not been elected. The scrutiny may be asked for by any elector, and he need not even have voted. He has only to shew to the Judge reasonable grounds for a scrutiny, and does not need to assert that a different result should be arrived at. He simply asks a more certain result. It might be that mistakes in one polling subdivision would be offset by those in another, the ultimate result being the same. He might be a supporter of the by-law who believed that a greater majority should be declared. In such a case, he should not be deemed to be asserting that the bad votes were cast against the by-law, and, because he failed in proving it, meet the result that they should be assumed not to have been against it. The petitioner for a scrutiny does not, I think, raise any issue other than the original one—whether or not three-fifths of the legal voters have decided for the by-law—although he does render himself liable to costs.

Such a petitioner is not in the same position as one making an application to quash a by-law. It might well be that the onus would be upon the latter to shew that the by-law was defeated; and, if he failed in affirmative proof, the by-law would stand. Whatever the result would be upon such an application to quash, upon a scrutiny under sec. 369 the whole question is open, and the Judge is not to inquire merely as to the allegations made in the petition to justify the scrutiny; but, having been satisfied that there was reasonable ground for one, he is, under sec. 371, to determine, not the truth of those allegations, nor the truth of the clerk's return, but "whether the majority of the votes given is for or against the by-law"—that is, the necessary majority of legal votes—and he is to certify the result to the council. The Judge can arrive at the result only upon the evidence before him, which is here that five persons voted who should not have done so, and they may or may not all have voted for the by-law; and, therefore, he cannot say that it has been carried.

In my opinion, therefore, the prohibition should not have been granted, and the appeal should be allowed without costs.

ONT.

C. A.
1912

RE WEST LORNE SCRUTINY.

Magee, J.A.

I regret to have to come to this conclusion in this case, because there is every reason to believe that the by-law was lawfully carried; but it rests with the Legislature to say whether it will permit evidence as to the way in which illegal voters marked their ballots. The result of the present condition of the law is, that a man who has no vote may first have his vote added to those opposing a by-law, and then deducted from the number of those supporting it, and thus count twice as much as that of the lawful voter.

Meredith, J.A.

MEREDITH, J.A. (dissenting):—This case involves the question whether a scrutiny, under sec. 369 of the Consolidated Municipal Act, 1903, is a scrutiny of votes polled, and consequently a controverted election trial; or is, as it purports to be, a scrutiny of "the ballot papers" only.

The question arose in the case of *In re Local Option By-law of the Township of Saltfleet*, 16 O.L.R. 293, in which a Judge had held that the enactment meant no more than it, in plain words, said—"a scrutiny of the ballot papers:" but, upon an appeal to a Divisional Court, that ruling appears to have been differed from to some extent, but to just what extent is not made very plain. Boyd, C., dealt with the question in an *addendum* only to his judgment, in which he intimated that the case had not been very fully argued. Mabee, J., agreed with him, without giving any reasons: but Magee, J., dealt with this question at considerable length, and went the full length of holding the scrutiny to be an unlimited scrutiny of the votes polled.

For several reasons, I am quite unable to agree with him in that conclusion.

In the first place, it is in the teeth of the plain and simple words of the legislation, "a scrutiny of the ballot *papers:*" and I decline to attribute to the Legislative Assembly a lack of knowledge of the meaning of such words, under any circumstances; but the more so, because, when a scrutiny of votes polled has been so meant, that representative body has found no difficulty in providing for it in quite appropriate words: see sec. 76 of the Ontario Controverted Elections Act, R.S.O. 1897, ch. 11: the words there employed being, "a scrutiny of the votes polled at the election." It will be found safer, in all cases, to attribute to the Legislature as complete a knowledge of plain English as that which most of us possess.

In the next place, if this be not a scrutiny of the "*papers*" only, but, in truth, a controverted election trial, then a special tribunal is constituted for the trial of such a case, and, according to the general rule, the finding of such a tribunal is not subject to review elsewhere, unless some provision for appeal or review is made in the legislation, and there is, in this legisla-

ONT.
C. A.
1912
RE WEST LORNE SCRUTINY.
Meredith, J.A.

tion, no such provision in any shape or form. I cannot think that any one will seriously contend that the Legislature meant that the judgment of a single County Court Judge, upon such a proceeding, should be final and conclusive as to the validity of any by-law—money or local option—which may be the subject of the voting, the ballot papers of which are to be so scrutinised. On the other hand, if such general rule is not to apply—and generally the cases seem to have been dealt with as if it did not—then we should have the farce of a costly scrutiny to no binding purpose; a costly scrutiny to be gone over anew in any attack which might be made upon the by-law in the usual way. So that, whichever way it is looked at, it seems hardly possible that reasonable men could have desired such an effect. Whilst, if the scrutiny be restricted to the ballot papers—in the nature of a recount—it would be quite reasonable, and quite in accord with the provisions for a speedy recount, which, by legislation, is now commonly given after all elections.

Again, the proceedings must be commenced within the usual time for beginning recount proceedings, fourteen days after the declaration of the result of the poll; whilst the time-limit for motions to quash is, generally speaking, not less than a year. Preparing for a scrutiny of the votes would ordinarily require more time than preparing for attacking the by-law on other grounds; and, beside this, no provision is made for notice of objections to voters; nor is there anything to indicate, in any manner whatever, that the qualifications of voters, specially to be objected to, or the qualification of every voter who voted, is to be, or may be, inquired into in this hurried fashion: on the contrary, the Judge is to proceed upon an "*inspection of the ballot papers,*" not an inquiry into the qualification of voters, and upon such evidence as he may deem necessary—evidence as to ballot papers, not as to qualification of voters, which, upon a scrutiny of votes polled, would not be in the mere discretion of the Judge, but would be such admissible evidence as the parties saw fit to adduce.

And again, the ruling in the *Saltfleet* case, [*Re Local Option By-law of Saltfleet township*, 16 O.L.R. 293] has been frequently questioned, so that hitherto the weight of judicial opinion greatly preponderates against the view that a scrutiny of ballot papers is a scrutiny of the votes polled, involving an inquiry into the qualifications of the voters.

And lastly, even if the words be considered of doubtful import, is a Court of such extensive jurisdiction, and one of such extraordinary power—whether wholly conclusive or wholly inconclusive, as I have before mentioned—to be created on doubtful language?

And, if this is not enough, look at the result: the by-law is to be judicially declared to have been defeated at the poll—

with all the binding consequences of such a defeat of a local option by-law at the polls—though in truth it may have been, and in all probability was, carried: an injustice arising wholly from a disregard of the plain words of the legislation; an unfortunate attempt to improve upon well-considered legislation. Let the scrutiny be, as the Legislature has plainly said, of the ballot papers, and you have certainty, finality, and justice: certainty and finality in the County Court Judge's scrutiny of the ballot papers, and justice from the ordinary courts, with the usual rights of appeal, in making the scrutiny of the qualifications of voters, and in, in such a case as this, setting aside the by-law because of the inconclusive character of the poll; leaving it to the contestants to try it over again if they choose to; which is the only just consequence of an indecisive election poll or any race.

Against all these, and other, reasons for treating the Legislature as if its members knew the meaning of plain words, these things have been urged:—

In the first place, it is said that the provision, contained in sec. 372* giving to the Judge, upon the scrutiny, the like power and authority as those which he has upon the trial of the validity of an election, shews that each is really an election trial. But there is no warrant for any such contention: the power and authority is expressly limited to matters properly "arising upon the scrutiny." It was necessary to confer power and authority to enable the Judge to prosecute the inquiry, and, "upon inspecting the ballot papers," to determine, in a summary manner, "whether the majority of the votes given is for or against the by-law", and what shorter or better method could be adopted than in saying that, so far as they are applicable to a scrutiny of ballot papers, the procedure upon an election trial shall be applicable, as this section in effect provides?

Then it is said that the Legislature could not have meant a mere recount, because it had, in an earlier section of the Act, provided for a recount in municipal elections (sec. 189): and had, by another section (sec. 351), made this section applicable to voting on money and local option by-laws. But, in truth, that is not so; nor, if it were, would such a consequence necessarily follow. Under section 351, secs. 138 to 206, except sec. 179, are incorporated with the provisions respecting the poll in

*Section 372, ch. 19, of the Consolidated Municipal Act, 3 Edw. VII. (Ont.), is as follows:—

372. The Judge shall, on the scrutiny, possess the like powers and authority, as to all matters arising upon the scrutiny, as are possessed by him upon a trial of the validity of the election of a member of a municipal council; and in all cases costs shall be in the discretion of the Judge, as in the case of applications to quash a by-law, or he may apportion the costs as to him seems just.

ONT.
C. A.
1912
RE WEST LORNE SCRUTINY.
Meredith, J.A.

regard to money by-laws; and local option by-laws are, under the local option enactments, put in the same category as money by-laws; but those sections are so incorporated only in "so far as they are applicable;" and the rule is, that, where a special enactment provides for a certain case, the provisions of a general enactment covering it also are inapplicable: so that, here, it seems to me to be plain that, the provision of sec. 369 specially applying to such a by-law, sec. 189 is inapplicable, and so expressly excluded under the plain words of sec. 351. And there is abundant reason for that, for money by-laws are by-laws of the most important character, and the provisions of sec. 369 are of a wider and more protective character than those of sec. 189; the one is a scrutiny of the ballot papers, the other a recount of the votes only. Upon a scrutiny of the ballot papers the question of the validity of each ballot may be inquired into; a thing of no small importance when the corrupt dealing with ballot papers, even by sworn election officers, which has been only too frequently proved in election cases some time ago, is borne in mind.

And, lastly, it is said that the Legislature has used, elsewhere, the words "ballot papers" and "votes" indiscriminately, and so may be taken to have meant a scrutiny of the votes polled, and a scrutiny of the widest character respecting such votes, when it has said only that it shall be a scrutiny of ballot papers. Again I challenge both the accuracy of the statement and the logic of the conclusion if the statement were true. Section 189 is again appealed to; but, instead of that section proving indiscrimination, from the beginning to the end of it it shews a clear discrimination, knowledge, and expression of the obvious difference between votes polled and ballot papers. The Judge is to examine the ballot papers and recount the votes recorded upon them; and this discrimination is shewn throughout the section, with one possible exception, which appears in sub-section (6), where the words "recount all the votes or ballot papers" are used; but even these words shew a discrimination, and would be very exact if the word "or" were "and," because not only is it necessary to count the votes but also to count the ballot papers, unused and rejected, as well as used and become evidence of a vote. If the Legislature knew not the difference between a vote and a ballot paper, why use both expressions? The error in asserting that the words "ballot paper," as used in sec. 369, mean vote, ought surely to be evident when it is borne in mind that there are *unused* ballot papers which must be scrutinised and counted, as well as, also, used and spoiled ballot papers, to be so dealt with; as well as any corruptly substituted or corruptly marked or re-marked ballot papers; for the whole subject of ballot papers comes within the scrutiny under sec. 369, though not within the recount under sec. 189.

I can, therefore, find no excuse for attributing to the Legislature want of knowledge of the meaning of the plain and simple words "ballot papers;" and I venture to assert that no existing enactment gives any sort of excuse for doing so.

If this be so, then the County Court Judge had no power to enter upon a scrutiny of the votes in regard to the qualification of the voters, and was rightly prohibited from doing so; and it is quite immaterial that the grounds upon which the order was made were erroneous.

The next question considered by the Divisional Court was, whether the voters in question were qualified to vote; but I am at a loss to understand what power there was to deal with such a question in prohibition proceedings: if the County Court Judge had jurisdiction to enter upon such an inquiry, whether he reached a right or a wrong conclusion is surely not a question that can be dealt with in prohibition; prohibition is directed against an usurpation of jurisdiction only: we must not assume the power which would rest only in a court having appellate jurisdiction over such proceedings; and, as I have before intimated, no appeal is given from the County Court Judge.

But, as a majority of the members of this Court considers that there is power here to consider the question, I am bound to accept that view and to express my opinion upon it; and my opinion is, that upon this question also the order of the Divisional Court was right; but I would support it also on different grounds.

Whether these voters were qualified or not depends upon sec. 24 of the Ontario Voters' Lists Act, 7 Edw. VII. ch. 4.

The names of all of them appeared as duly qualified voters in the certified list of voters referred to in that section, which provides that such list shall, upon a scrutiny such as that in question, be final and conclusive as to such qualification to vote. There can be no doubt, nor is there any dispute, as to that; but it is contended that, under sub-sec. 2 of that section, such persons as these voters are taken out of its provisions. The subsection is in these words: "2. *Persons who*, subsequently to the list being certified, are not or have not been resident either within the municipality to which the list relates, or within the electoral district for which the election is held, *and who* by reason thereof are, *under the provisions of the Ontario Election Act*, disentitled to vote:" and, under the section itself, such persons are excepted out of its provisions.

But, how is it possible to bring these voters, *at a municipal poll*, within its provisions? As plain as any words in the English language can make it, this exception applies only to voters at a provincial election; those who, by reason of such non-residence, under the provisions of the Ontario Election Act, are disentitled to vote.

ONT.

C. A.
1912

RE
WEST
LORNE
SCRUTINY.

Meredith, J.A.

It is said that non-residence in a municipality does not disentitle under the provisions of the Ontario Election Act, that it is enough under it that the residence be within the electoral division: but what has that to do with the question? To say that, because this provision cannot be made wholly applicable to that which alone the Legislature has said it shall apply, any Judge may apply it to something else, to which he may think it ought to have been made applicable, but obviously has not, is surely legislation, not adjudication. We ought not to forget that we are not now legislators, nor even here acting as statute-revisers.

Can any one, in reason, say that the sub-section is not limited to those who are disentitled under the Ontario Election Act: and can any one in reason say that any of these persons are so disentitled? Surely not.

Nor is the sub-section inapplicable to those to whom it is so limited. It plainly excepts all those who are disentitled under the provisions of the Ontario Election Act; and it is quite immaterial whether the disjunctive words "within the municipality" are or are not superfluous or otherwise useless.

It may, or may not be, that the Legislature intended to make the sub-section applicable to municipal elections and other municipal polls; but that is quite immaterial here, because it is unquestionably certain that, whatever was intended, that was not done.

The provisions of sec. 86 of the Consolidated Municipal Act of 1903, regarding a tenant's residence, are not repugnant in any way to those of sec. 24 of the Voters' Lists Act; if they were, they would be equally repugnant in respect of other wants of qualification, such, for instance, as to the voter being a British subject: the two enactments must be read together, and, so read, sec. 24 makes the voters' lists conclusive evidence, upon a scrutiny, of qualification in all these respects. The qualifications are all necessary, but the inquiry under the Voters' Lists Act is a conclusive consideration of the question of their existence or absence.

The cases upon this subject have, I think, all been rightly decided; it is for the Legislature, not the Courts, to cure the want of expression including municipal electors in sub-sec. 2, if it see fit.

For a like reason, I am obliged to express my opinion upon the last question dealt with in the Divisional Court, a question which I should hardly have thought arguable: to give effect to the order of Middleton, J., in it, would be to refuse to be guided by the plain words of legislative enactment, and to fly in the face of the whole trend of legislation regarding the secrecy of the ballot, without any sort of authority for it.

I find it impossible to understand how it can truly be said that a person who has voted, and whose vote has been counted, is not a person who has voted, merely because he may not have been a qualified voter. Effect ought to be given to the plain meaning of plain language.

The numbered ballot was in force for years in provincial elections, not for the purpose of ascertaining how good votes were cast, but for finding out how votes proved to have been invalid were cast, so that they might be deducted from the proper side; but even that was considered such a menace to the secrecy of the ballot that it was wiped out of the statute-law entirely.

But, if there were not these things against the order made in this respect, in the first instance, the cure would seem to me to be worse than the disease: one who, having no vote, voted, and probably swore "his vote in," would not be unlikely, when obliged to say how he voted, to tell an untruth about it; and so the double wrong would most likely be done; the bad vote would remain on the side for which it was cast, and a good one be taken from the opposite side. It would be absolutely impossible to trace the ballot, and highly impossible that any one but the voter would be able to give any testimony as to the way in which he actually voted.

Beside all this, shewing how one man, or several men, voted, may, in some cases, shew how others voted, and absolute secrecy seems to be needful to give the required feeling of absolute security; and nothing should be done to throw doubt upon the absolute secrecy of the ballot, where voting by ballot is in force. To compel any one to disclose his vote, or rather to answer upon oath any question as to how he voted, would in another way lead to the disclosure sometimes of the votes of qualified voters, for Judges are not infallible; qualified voters may erroneously be held to be unqualified; and doubt would, in any case, be thrown upon that essential of the ballot system, a feeling of absolute security in absolute secrecy.

I would dismiss the appeal.

Maclaren, J.A.

MACLAREN, J.A., also dissented, agreeing with the opinion of MEREDITH, J.A.

*Appeal allowed;* MACLAREN and MEREDITH, J.A., *dissenting.*

QUE.

K. B.
1912

June 15.

## BAILLARGEON v. ST. GEORGE'S.

*Quebec Court of King's Bench (Appeal Side), Archambeault, C.J., Trenholme, Lavergne, Cross and Carroll, JJ. June 15, 1912.*

1. APPEAL (§ VII M 3—541)—MISTAKE OF JUDGE WARRANTING REVERSAL.
A judgment of a trial Judge will be reversed on a question of fact only when it is evident that he made a mistake, and where the evidence, as a whole, does not sustain his decision.

2. NEGLIGENCE (§ I D—70)—DUTY OF DRIVER ON HIGHWAY—PEDESTRIANS.
It is the duty of a driver of a vehicle on a public street to exercise prudence and care in order to avoid injuring pedestrians.

3. MASTER AND SERVANT (§ II A 2—291)—RECKLESS DRIVING OF EMPLOYEE —LIABILITY OF EMPLOYER.
A master is answerable in damages for the act of a driver in his employ who, while driving a waggon on car tracks just ahead of a street car, turned out for it at a street intersection, where many people were standing in the roadway waiting to board the car, shouted for them to get out of his way, and drove through the crowd in such a reckless manner as to strike the plaintiff, a person attempting to board the car, which was then opposite the waggon, and knock him down, so that the car ran over and crushed his foot.

Statement

APPEAL on inscription in review by the defendant from the judgment at trial in favour of plaintiff in an action for damages for negligent driving.

*N. A. Millette*, for appellant.

*A. Theberge*, for respondent.

The judgment of the Court was delivered by

Archambeault, C.J.

ARCHAMBEAULT, C.J.:—In this case the respondent was awarded by the Superior Court the sum of $2,500 for damages suffered under the following circumstances:—

On September 18th, 1910, a Saturday, at about a quarter to one in the afternoon, the respondent was about to board a car at the corner of St. Denis and St. Catherine streets, when he fell under the car and had his right foot crushed; as a result he was obliged to get his foot amputated.

The respondent contends that the accident was due to the fault of one of the appellant's employees, hence the action.

The question to be decided is exclusively one of facts. I am of opinion that we should reverse a judgment on a question of fact only when it is evident that the trial Judge has made a mistake, and when the evidence taken as a whole cannot sustain such a decision. In the present case I cannot arrive at such a conclusion.

The evidence is, no doubt, contradictory as to certain details. But the evidence reviewed as a whole establishes quite sufficiently that the accident met with by respondent was due

to the fault of one of the appellant's employees whilst in the discharge of his duties.

This employee, a carter by the name of Achille Forget, was driving an express of the appellant. He was going up St. Denis street on the car tracks, just a few feet ahead of a car. As he neared St. Catherine street, wishing to leave the tracks clear, he pulled towards the right, next to the stopping place of the cars.

There was a large crowd waiting there to get on the car. The witnesses do not agree as to the number of persons who were there at the time. Some say fifteen, some twenty, others fifty, and one witness said seventy-five. To those who know this locality this last witness is probably nearest to the truth. For it was a Saturday, as I have said, about a quarter to one, and we know what large crowds are to be found at the corner of St. Denis and St. Catherine, at meal hours, to take the cars going up St. Denis. In any event this point is of little importance. It is absolutely certain that many persons were stationed near Laval University at the time of the accident.

Forget, then, wishing to leave the tracks clear for the car coming behind following him, pulled to the right towards the people who were waiting for the car.

Instead of stopping and waiting until the people had boarded the car, he shouted at them to get out of the way, and continued on his way, thus compelling the crowd to push precipitately to the sidewalk on pain of being run over. By this time the car had come up to him, and between the car and the sidewalk there was a distance of only nine and a half feet.

At the same moment the respondent had got off a St. Catherine street car going east and went towards the St. Denis car to board it. The appellant's vehicle continued going up St. Denis street between the car and the waiting throng. The respondent tried to get in the car and the hind wheel of the appellant's vehicle struck him, or struck another pedestrian between the waggon and him, and pushed the former against him, the respondent. Anyway, this made the respondent fall and his right foot was crushed by one of the car wheels.

The witnesses contradict one another as to whether the horse was being driven rapidly or whether it was going slowly. This fact is of no importance. It might determine perhaps the degree of the driver's fault; but in both cases the fault is there.

I really for the life of me do not know where cabmen and carters, and I might add automobile drivers, find the rule of law which makes of them the absolute masters of our streets.

They seem to think that they can drive along without any prudence, without taking the least precaution, and that pedestrians have the right to make use of the sidewalk only.

QUE.

K. B.

1912

BAILLARGEON v. ST. GEORGE'S.

Archambeault, C.J.

I hope that the judgment in this case will be a lesson and a warning to them.

A carter, a cabman, an automobile driver, a cyclist, is, like every other person, responsible for the damage caused by his act, his imprudence, his neglect or his want of skill. They have no right to run over people in the streets or to damage other people's property.

Not only are they responsible at civil law, but criminal proceedings may also lie against him. Art. 285 of the Criminal Code declares that every one is guilty of an indictable offence and liable to two years' imprisonment who, having the charge of any carriage or 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.

It has too often happened that serious injuries, and even loss of life, have resulted from such recklessness or imprudence. And the guilty ones, or those who are civilly responsible for their wrongdoing, come with bad grace to complain before us of the judgments condemning them to indemnify their victims of the damages suffered.

At any rate, I am very glad of the opportunity to express my opinion on this question and to assure the victims of such criminal conduct that they may rely on being afforded ample protection by the Courts.

*Judgment confirmed.*

# INDEX.

CORPORATIONS AND COMPANIES—*continued.*

WORDS AND PHRASES—*continued.*

WORDS AND PHRASES—*continued.*