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ANNOTATED

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ANNOTATION

GUARANTEES AND THE STATUTE OF FRAUDS

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I. The Classification of the Cases.

The object of this article is to consider, in the light of recent English decisions, the application of the Statute of Frauds to the contract of guarantee or suretyship, and to suggest some principles for a classification of the cases.

The statute,[1] so far as is material to the present subject, is as follows:

> 4. No action shall be brought . . . whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriages of another person . . . unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised.

A guarantee is defined by de Colyar,[2] as "a collateral engagement to answer for the debt, default or miscarriage of another person." The definition is obviously borrowed, almost *verbatim*, from the Statute of Frauds—the word "collateral" being substituted in the definition for the word "special" in the statute. There is some advantage in borrowing the language of the statute, because the cases with regard to the application of the statute involve an analysis of the nature of the contract itself, and it simplifies the terminology of the subject if, as far as possible, a guarantee is so defined as to coincide with the promise mentioned in the statute.

It is not, of course, intended to suggest that every contract of guarantee falls within the statute. There have been many cases in which the contrary has been held. On the other hand, in many other cases it has been sought without success to make the statute applicable to contracts which are not guarantees. The cases fall into two main classes. There are, firstly, certain promises which either are or include true contracts of guarantee, that is, promises which give rise to collateral liability on the promisor's part for the debt, default or miscarriage of another

[1] 29 Car. II., ch. 3.
[2] Law of Guarantees and of Principal and Surety, 3rd ed., p. 1.

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person, but which have been held on special grounds not to be within the statute. Cases of this class form an exception to the general rule that *primâ facie* the statute applies to contracts of guarantee. There are, secondly, certain promises which in some respects resemble contracts of guarantee, but which really give rise to original or principal liability on the promisor's part, and are essentially not contracts of guarantee at all. Cases of this class include the contract commonly called a contract of indemnity,[3] as well as other contracts which do not comply with the essential requirements of a guarantee. The failure to observe the fundamental distinction between these two main classes of cases has sometimes resulted in confusing language in the reports.

The five rules stated in Halsbury's Laws of England,[4] embodying in slightly revised form the rules stated in de Colyar's earlier work,[5] may conveniently be taken as the basis of discussion.

These rules are as follows:

1. To bring a case within s. 4 of the Statute of Frauds, the primary liability of another person to the promisee for the debt, default or miscarriages to which the promise of guarantee relates must exist or be contemplated, otherwise the statute does not apply and the promise is then valid, and can be sued on, though not in writing.[6]

2. The statute does not apply to any promise to be answerable for another, unless such promise is made to the creditor, that is to say, to the person to whom another is already, or is thereafter to become, liable, and who can enforce such liability by action.[7]

3. The statute does not apply to any case, unless there is an absence of all liability on the part of the promisor (the surety), or of his property, except such as arises from his own express promise.[8]

4. The main or immediate object of the agreement between the parties must, to bring a case witnin the statute, be to secure the payment of a deot, or the fulfilment of a duty by a third party.[9]

5. Whenever the transaction between the promisor and the creditor, to whom the promise is made, amounts to a sale or surrender by the latter, to or for the benefit of the former, of a security for the debt of another or of the debt itself, the statute does not apply.[10]

II. The Main or Immediate Object of the Agreement.

Of the five rules, I propose for the moment to pass over the first two and to confine my discussion to the last three. Rules 3, 4 and 5 relate to one phase of the subject and may be considered together.

In order to emphasize the relation between these three rules I suggest the following restatement of them:

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[3] Cf. *Harburg India Rubber Comb Co.* v. *Martin*, [1902] 1 K.B. 778 at 784, 792.

[4] Vol. 15, pp. 458 *et seq.*

[5] *Op. cit.*, pp. 65, 66.

[6] 15 Halsbury, para 889; De Colyar, *op cit.*, p. 65, rule 1.

[7] 15 Halsbury, para. 892; De Colyar, *op. cit.*, p. 66, rule 2.

[8] 15 Halsbury, para. 892; De Colyar, *op. cit.*, p.66, rule 3, omits "or of his property," and inserts "or interest" after the word "liability."

[9] 15 Halsbury, para. 893; De Colyar, *op. cit.*, p. 66, rule 4.

[10] 15 Halsbury, para. 894; De Colyar, *op. cit.*, p. 66, rule 5.

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A promise to answer for the debt, default or miscarriage of another person is *primâ facie* within the Statute of Frauds, but by way of exception the statute does not apply to an agreement between the surety and the creditor if the promise by the former to the latter to answer for the debt, default or miscarriage of another person is merely one incident of the agreement, which has some other main or immediate object;

And in particular, the statute does not apply

(1) if, when the promise is made, there already exists any liability on the part of the promisor (the surety) or of his property except such as arises from his own express promise, or

(2) if the transaction between the promisor (the surety) and the promisee (the creditor) amounts to a sale or surrender by the latter to or for the benefit of the former of a security for the debt of another or of the debt itself.

This restatement is intended to shew on its face that the general rule is that which requires, in the case of a promise falling within the statute, that the main or the immediate object of the agreement between the parties shall be the answering for another. It is also intended to suggest that the subsidiary rules are merely particular examples of the general rule—examples which may to some extent serve as a guide in determining the scope of the general rule.

An instructive modern case on the question when a contract of guarantee is not within the Statute of Frauds is that of *Harburg India Rubber Comb Co.* v. *Martin.*[11]

The plaintiff had recovered judgment in an action against the Crowdus Accumulator Syndicate and had placed a writ of *fieri facias* in the sheriff's hands, upon which, however, he had failed to realize, the syndicate's place of business being closed and the works being stopped. After this the defendant Martin orally promised the plaintiff's agent to endorse two bills of exchange, each for one-half the judgment debt, payable at three and six months after date respectively, and on the faith of this promise the plaintiff withdrew the writ. The present action was brought for breach of the defendant's promise.

The defendant was the largest shareholder in the syndicate, and was therefore in a popular sense interested in its property, but he had nothing in the way of a charge,[12] upon the property and in a legal sense had no interest in the goods which were about to be seized under the plaintiff's execution, when the promise was made. The plaintiff's counsel argued "forcibly and ably" that although the defendant had no legal right to or interest in the goods he had an interest in them in a business sense, but the Court held that the "interest" required to take the case out of the statute must be an interest which the law recognizes.

It was also argued that the object of the defendant's promise was really to secure a benefit for himself and not to secure for-

[11] [1902] 1 K.B. 778.

[12] As to the effect if the defendant had had a charge, see *Davys* v. *Buswell*, 1913] 2 K.B. 47, discussed *infra*, at p. 9.

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bearance for the syndicate, but the Court would not agree with this argument. "It seems to me," says Cozens-Hardy, M.R. in [1902] 1 K.B. at p. 792, "to involve a confusion between object and motive. I cannot doubt that the object of the promise which was made by the defendant was to secure the forbearance of the plaintiffs for 3 months and 6 months, in enforcing the debt due from the syndicate." In order to see what is the object of a contract in a legal sense, we must look at the contract itself and see what is its subject matter, and not at the defendant's motive for entering into the contract.

An Ontario case, somewhat similar to *Harburg* v. *Martin* is that of *Young* v. *Milne*.[13] The plaintiff had issued execution against the Lentz Lumber Co. Before anything was done under the writ, the defendant (according to the evidence of the plaintiff's solicitor) offered to pay $250 on account and to pay the balance in four weeks provided the execution was withdrawn. The sum of $250 was paid by the cheque of the company and the plaintiff withdrew the execution. The defendant denied having made any promise that he himself would pay. The action was dismissed. Boyd, C., at p. 368 said:

> The confusion of evidence and of recollection exemplifies the value of the rule of law which requires that the promise to pay the debt of another should be manifested in writing. The sole question is, does this promise, even giving credit to the solicitor's version, fall within the Statute of Frauds, which is pleaded. The authorities are, according to the latest exposition, in favour of the defendant. When the plaintiff, in consideration of the promise to pay, has relinquished an execution under which some advantage or security exists or is likely to be realised, and when the effect of the relinquishment is that such interest or advantage accrues to the defendant who has made the promise, then no writing is required, for the transaction is substantially one for the purchase of the execution. But if the promise is given in consideration of a promise of forbearance for a time, and the execution is, as here, withdrawn, yet, as no direct benefit therefrom has arisen to or was contemplated by the promisor, it is simply a promise to pay the debt of another, which is valid enough as far as the consideration is concerned, but is not enforceable because not put into writing . . . The execution against the Lentz Company is still outstanding and enforceable and that company is liable for this judgment debt.

Modern judicial commendation of the Statute of Frauds is not common, and undoubtedly the statute helps to mar the uniformity of the English law of contract, which in most cases enforces the formless agreement. The judgment last quoted from is therefore noteworthy in the suggestion it gives of a justification for the particular statutory provision now in question. Street[14] has indeed pointed out that the collateral promise of guarantee—like the promise of an executor personally to pay the debts of the estate of which he is executor—may well be subjected to restrictions in the way of proof. In the case of a promise

[13] (1910), 20 O.L.R. 366.
[14] Foundations of Legal Liability, 1906, vol. 2, pp. 183, 188-9.

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under the second clause of the fourth section of the Statute of Frauds, as well as in the case of a promise under the first clause, the defendant is asked to pay something which is not in itself chargeable to him, but the same cannot be said of the other clauses of the statute. In the ordinary simple contract where the promisor is bound by a good consideration and himself gets the benefit of the contract, there is no reason for requiring written evidence—especially since the parties may now give evidence on their own behalf. The thing delivered or the act done or the counterpromise given is generally capable of easy proof, and the claim is not more likely to be bolstered up by perjury, than any other cause of action. In suretyship (as in the case of the executor), on the other hand, the liability of the defendant is founded wholly upon the alleged promise, and he cannot usually protect himself against a misrepresentation of language by an appeal to the facts out of which the main liability grew. The surety may be held merely upon proof that the sale was made at his instance and on his credit or that he promised to pay if the purchaser should not. When the guarantee is given after the sale a new consideration is indeed necessary, but it may consist of a real or pretended forbearance on the part of the vendor. It is therefore not unreasonable that writing should be required in the ordinary case of a guarantee, but the reason ceases to exist when it is proved that the guarantee is merely subsidiary to a larger contract or is merely incidental to another object which itself is the real subject matter of the defendant's promise.

The reason underlying the statute is clearly stated, in language which need not be quoted here, by the Supreme Court of the United States in *Davis* v. *Patrick*,[15] in which it is pointed out that the reason for the statute fails in a case in which

> the promisor has a personal, immediate, and pecuniary interest in the transaction, and is therefore himself a party to be benefited by the performance of the promise.

As was said by the same Court in the earlier case of *Emerson* v. *Slater*,[16]

> Whenever the main purpose and object of the promisor is not to answer for another, but to subserve some pecuniary or business purpose of his own, involving either a benefit to himself or damage to the other contracting party, his promise is not within the statute, although it may be in form a promise to pay the debt of another, and although the performance of it may incidentally have the effect of extinguishing that liability.

It is only with the greatest diffidence that a Canadian lawyer should question the correctness of dicta of members of the Supreme Court of the United States, and I should hesitate to do so at all if I could not appeal for support to judges and writers.

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[15] (1891), 141 U.S. 479, Ames' Cases on Suretyship, 89. See further observations as to this case, *infra*, p. 9.

[16] (1859), 22 How. 28, at p. 43.

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The two passages above quoted are, however, open to criticism in view of what seems to be the better view of the scope and meaning of the Statute of Frauds. The passage quoted from *Emerson* v. *Slater* in particular has, as is well known, been made the basis of many subsequent judgments in State Courts, and as so applied has, it is respectfully submitted, had the effect of taking out of the statute many a case which should have been held to be within the statute.

Even if it is admitted that the State Courts have given a wider meaning to the passage in question than was intended by the Supreme Court, it would seem that the language of the Supreme Court lends itself to misinterpretation when read apart from the limitations stated in the decided cases upon which it is based.[17] The statement that a promise is not within the statute,

> if the main purpose and object of the promisor is not to answer for another, but to subserve some pecuniary or business purpose of his own, involving either a benefit to himself or damage to the other contracting party,

seems too vague in its reference to the "pecuniary or business purpose" of the promisor to be subserved by the making of the promise, and tends to encourage that confusion between object and motive which was condemned in the judgment in *Harburg* v. *Martin*, *supra*. The form of the reference to the benefit to the promisor or the detriment to the promisee is also open to criticism because it suggests, without actually authorizing, the doctrine that the statute does not apply if there is a new consideration, distinct from the debt, moving between the creditor and the surety.[18]

There are of course judgments in the reports in favour of the last mentioned doctrine,[19] which, as Browne says, by its too free and unqualified assertion, has done much to darken and complicate the law upon this branch of the statute.[20] Some of the judgments in which the doctrine has been stated can, it is true

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[17] It is not quite clear that the Supreme Court itself bore these limitations sufficiently in mind.

[18] My excuse for referring at all to the last mentioned doctrine is that in its effect it is hardly to be distinguished from the doctrine that a case is taken out of the statute by the fact that the promisor's object is to benefit himself. If one doctrine is erroneous, the other is equally erroneous unless it is subjected to some fairly definite limitations.

[19] See, *e. g.*, the English cases referred to in de Colyar, *op. cit.*, p. 132. Some of the heretical American judgments, especially in the state of New York, are based upon a dictum of Kent, C.J., (afterwards Chancellor) in *Leonard* v. *Vredenburgh* (1811), 8 Johns. 29, which was not necessary to the decision of the case. Cf. Brandt, Suretyship and Guaranty, 3rd ed., sec. 80. As to the subsequent development of the doctrine in New York, see also 20 Cyc. 188 ff.; *Mallory* v. *Gillett* (1860), 21 N.Y. 412, Ames' Cases on Suretyship, 76; *Prime* v. *Koehler* (1879), 77 N.Y. 91, Ames' Cases on Suretyship, 87; *White* v. *Rentoul* (1888), 108 N.Y. 222.

[20] A Treatise on the Construction of the Statute of Frauds, 5th ed., sec. 168, page 214. In secs. 207 ff. the author discusses the doctrine very fully.

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be supported on other grounds, but the doctrine itself has the effect of making a dead letter of the statute in many cases of promises to pay the pre-existing debt of a third party.[21] It has been vigorously condemned in various cases, and it seems clear that in order to take a case out of the statute there must be some element other than a new consideration moving between the creditor and the surety.[22]

It is a still more obviously insufficient ground for excluding the operation of the statute that there is a new consideration moving between the debtor and the promisor,[23] but the case of the debtor transferring property to the promisor to be applied by the latter in payment of the creditor is of course in a different category.[24]

III. Sub-Classification of the Exceptions.

It is therefore important to ascertain the real scope of the exceptions from the operation of the statute indicated by the three rules with which we are immediately concerned,[25] and for this purpose it is instructive to consider the specific classes of cases in which a promise which involves the answering for another has been held to be outside the statute.

These cases have been conveniently sub-divided into the "property cases," the "document cases" and the "*del credere* cases."[26]

(a) *The Property Cases.*

The leading case is *Fitzgerald* v. *Dressler*.[27] A sold goods to B, A retaining possession by virtue of his vendor's lien. B afterwards sold the same goods to C. C was under terms to pay B for the goods before the time fixed for payment by B to A. In order to induce A to hand over the goods before the time fixed for payment by B, C orally promised A that B should pay on the day named. A accordingly gave up possession of the goods. It was held that the promise was not within the statute.

At the time the promise was made (says Williams, J., at p. 394), the defendant was substantially the owner of the linseed in question, which was subject to the lien of the original vendors for the contract price. The effect of the promise was neither more nor less than this, to get rid of the incumbrance,

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[21] Browne, *op. cit.*, sec. 207, page 266.

[22] See, *e. g.*, *Fullam* v. *Adams* (1864), 37 Vt. 391; *Maule* v. *Buckrell* (1865), 50 Pa. St. 39; *Ames* v. *Foster* (1871), 106 Mass. 400, Ames' Cases on Suretyship, 85; *Bailey* v. *Gillies* (1902), 4 O.L.R. 182, at 190.

[23] *Furbish* v. *Goodnow* (1867), 98 Mass. 296, Ames' Cases on Suretyship, 33.

[24] See *Williams* v. *Leper* (1766), 3 Burr. 1886, 97 E.R. 1152, Ames' Cases on Suretyship, 72, discussed below.

[25] That is, de Colyar's third, fourth and fifth rules which I endeavoured to restate towards the beginning of this paper.

[26] Cf. Cozens-Hardy, M.R., in *Harburg, etc.* v. *Martin*, [1902] 1 K.B. 778, at pp. 792-3.

[27] (1859), 7 C.B. (N.S.) 374, 141 E.R. 861.

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or, in other words, to buy off the plaintiff's lien. That being so, it seems to me that the authorities clearly establish that such a case is not within the statute.

Cockburn, C.J., in the same case[28] quotes with approval from Williams' notes to *Forth* v. *Stanton*[29] as follows:

> There is considerable difficulty in the subject, occasioned perhaps by unregarded expressions in the reports of the different cases; but the fair result seems to be, that the question, whether each particular case comes within this clause of the statute (sec. 4) or not, depends, not on the considerations for the promise, but on the fact of the original party remaining liable, coupled with the absence of any liability on the part of the defendant or his property, except such as arises from his express promise.

Cockburn, C.J.'s approval of the passage just quoted was expressed to be conditional upon the concluding words being considered an integral part of the proposition, that is to say, that in order to take the case out of the statute the property which is the subject of the defendant's undertaking must be in point of fact his own or must be property in which he has some interest.

Emphasis was laid upon the same point, and perhaps a disposition to restrict this exception from the operation of the statute was shewn, in the more recent case of *Davys* v. *Buswell*.[30] The defendant counterclaimed upon a promise by the plaintiff to be answerable for the price of goods supplied by the defendant to a limited company. The defendant had been supplying goods to the company, but there being a balance owing he had refused to supply any more goods until this balance was paid. The plaintiff then made an oral promise, the effect of which, according to the finding of the jury, was that the plaintiff agreed to pay if the company made default. The jury also found that the plaintiff was induced to enter into this agreement by the fact (*inter alia*) that he had a debenture charge upon the assets of the company.[31]

It had been pointed out by Stirling, C.J., in *Harburg, etc.* v. *Martin*[32] that the defendant in that case had nothing in the way of a charge on the property of the syndicate and therefore no "interest" in the legal sense in the goods which were about to be seized under the plaintiff's execution. Apparently with special regard to the implication to be drawn from Stirling, C.J.'s judgment that if the promisor had a legal charge upon the property of the company the promise would be enforceable although there was no writing, Lord Coleridge, J., in *Davys* v. *Buswell, supra*, held that the case was taken out of the statute by the promisor's interest in the company's property. This

[28] 7 C.B. (N.S.) 374, at p. 392, 141 E.R. 861.
[29] (1668), 1 Wms. Saund. 211 e., 85 E.R. 217.
[30] [1913] 2 K.B. 47.
[31] This charge was of the kind known as a "floating" charge, but nothing turned on the fact that the charge was an equitable, not a legal, charge.
[32] [1902] 1 K.B. 778, at 791.

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decision was reversed by the Court of Appeal, virtually on the ground that this case, like *Harburg, etc.* v. *Martin*, was not analogous to the "property cases," in which a person who has purchased or has an interest in certain goods which are subject to a lien obtains a discharge of the lien by undertaking to be responsible for payment of the debt in respect of which the lien exists. The motive of Davys in making the promise was doubtless to improve his own position, because if more goods were supplied to the company the value of the property covered by his charge in the event of the winding up of the company would be greater, but the object of the promise was simply to guarantee the company's debt.

Fitzgerald v. *Dressler*, already mentioned, was a clear case of a promise the object and effect of which was to free specific goods, the property of the promisor, from a lien, and which was therefore not primarily a promise to answer for another. The Courts in England have, however, refused to extend the exception from the application of the statute to a case in which the promisor had merely an interest in a business sense as chief shareholder of the principal debtor (*Harburg, etc.* v. *Martin*), or even to a case in which the promisor had a general debenture charge upon the assets of the principal debtor (*Davys* v. *Buswell*). Strictly in accordance with the doctrine of the English cases it was held in Massachusetts that the statute applied in a case in which the owners of a ship were indebted to the plaintiffs for wood and coal supplied, and when the plaintiffs threatened to attach the ship, the defendant, a mortgagee of a three-fourths share in the ship, promised to pay the bill if the plaintiff would not attach the ship.[33]

It is interesting to compare these cases, especially that of *Davys* v. *Buswell*, with the case of *Davis* v. *Patrick*,[34] already mentioned, decided by the Supreme Court of the United States. A comparison of the cases seems to indicate a divergence between the view of that Court and the most recently expressed views of the English Court of Appeal. The latter Court seems to be inclined to draw the line more strictly in excepting cases from the operation of the statute. In *Davis* v. *Patrick* the promisor had bought from the principal debtor and had paid for a large quantity of ore. The object of his promise was in part at least to secure the transportation and delivery to him of this ore, his own property. So far as the judgment against him was based on this ground it is unexceptionable—the case falling clearly within the "property cases." In the judgment, however, much

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[33] *Ames* v. *Foster* (1871), 106 Mass. 400; Ames' Cases on Suretyship, 85.
[34] (1891), 141 U.S. 479, Ames' Cases on Suretyship, 89.

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stress is laid also on the circumstance that the promisor was a creditor of the principal debtor with some measure of control over the mine operated by the principal debtor, and it is said that the object and effect of the promise was to help the principal debtor to pay its debt to the promisor, because the payment of the debt depended upon the continued and successful working of the mine. In other words the dicta referred to seem to recognise as valid the argument which was condemned in *Harburg* v. *Martin*, and *Davys* v. *Buswell*, namely, that it is sufficient, in order to take a case out of the statute, that the promisor should have an interest in a merely business sense in the property of the principal debtor.

The Pennsylvania case of *Goodling* v. *Simon*,[35] seems to be inconsistent with the English cases. The plaintiffs were holders of a note made by a company, of which the defendants were shareholders and creditors, as well as being respectively president and treasurer. The plaintiffs having threatened suit on the note, the defendants promised to pay the plaintiff's claim upon condition that the plaintiffs would not proceed further against the company. It was held that the promise was not within the statute, on the ground that the main object of the promise was not to answer for the debt of another but to further and protect the defendant's own interests, by enabling them to dispose of their individual interests in the company, which to the knowledge of all the parties to the suit was insolvent.

In the earlier Pennsylvania cases cited in the judgment in *Goodling* v. *Simon*, there is manifest the same inclination to except from the operation of the statute any promise made for the purpose of subserving the promisor's own interests without imposing any such strict limitation upon the exception as has been imposed by the English cases.

In the interval between the decision in *Harburg, etc.* v. *Martin* and that in *Davys* v. *Buswell*, the Ontario case of *Adams* v. *Craig*[36] was decided. The defendant Craig made a sale of goods with a view of reducing his overdraft with the defendant bank. Included in these goods were certain goods contracted to be purchased by him from the plaintiff, and in order to obtain the plaintiff's acquiescence in the sale, an oral promise was made on behalf of the bank that upon the sale being completed and the purchase money being placed to the credit of Craig, the bank would pay the amount of a cheque drawn by Craig upon the bank in the plaintiff's favour. It was held that the circumstances brought the promise within the "property cases" and that the bank was

[35] (1913), 54 Pa. Superior Ct. 125.
[36] (1911), 24 O.L.R. 490.

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liable upon the oral promise to pay the cheque. It seems, however, doubtful whether the decision is consistent with the strict view of the "property cases" adopted in *Davys* v. *Buswell*, unless indeed the transaction may be regarded as being a purchase of the goods by the bank from the plaintiff in order that they might be sold by Craig together with his own goods.

(b) *The Document Cases.*

The clearest direct authority on this class of cases is *Castling* v. *Aubert*.[37] The plaintiff, a broker, had effected certain policies of insurance for his principal, and had a lien thereon in respect of bills of exchange accepted by the plaintiff for the accommodation of the principal. A loss occurred under the policies, and the defendant, in order that he might collect on behalf of the principal the amount due from the underwriters, promised the plaintiff to provide for the payment of the acceptances as they became due, upon the plaintiff giving up to him the policies. The plaintiff sustained damages by the breach of the defendant's promise. The defendant having collected on the policies a larger amount than the plaintiff's claim, it was held that the plaintiff was entitled to recover on the count for money had and received, but it was also held that the defendant's promise was not within the statute, the transaction rather being a purchase by the defendant of the securities which the plaintiff held in his hands. This, as Lord Ellenborough, C.J., observed,[38] was

> quite beside the mischief provided against by the statute; which was that persons should not by their own unvouched undertaking without writing charge themselves for the debt, default or miscarriage of another.

Lawrence, J., says,[39]

> This is to be considered as a purchase by the defendant of the plaintiff's interest in the policies. It is not a bare promise to the creditor to pay the debt of another due to him, but a promise by the defendant to pay what the plaintiff would be liable to pay [*i. e.*, the acceptances], if the plaintiff would furnish him with the means of doing so.

The "document cases" are discussed by Cozens-Hardy, M.R., in *Harburg, etc.* v. *Martin*[40] as being entirely distinct from the "property cases," but Vaughan Williams, L. J.'s definition of the latter, already noted, clearly include the former, and the advantage of making two classes is doubtful. The defendant's promise is either a contract for the release of property which is his own or in which he has an interest or a contract for the purchase of property.

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[37] (1802), 2 East 325, 102 E.R. 393.
[38] Cf. 2 East at p. 331.
[39] Cf. 2 East at p. 332, 102 E.R. 393.
[40] [1902] 1 K.B. 778, at p. 793.

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(c) *The Del Credere Cases.*

A contract for the employment of a *del credere* agent need not be in writing, although it incidentally involves the answering for the debt, default or miscarriage of another person.

The leading case in England is that of *Couturier* v. *Hastie*.[41] Parke, B., delivering the judgment of the Court of Exchequer, said,[42]

> The other and only remaining point is, whether the defendants are responsible by reason of their charging a *del credere* commission, though they have not guaranteed by writing signed by themselves. We think they are. Doubtless, if they had for a percentage guaranteed the debt owing, or performance of the contract by the vendee, being totally unconnected with the sale, they would not be liable without a note in writing signed by them; but being the agents to negotiate the sale, the commission is paid in respect of that employment; a higher reward is paid in consideration of their taking greater care in sales to their customers, and precluding all question whether the loss arose from negligence or not, and also for assuming a greater share of responsibility than ordinary agents, namely, responsibility for the solvency and performance of their contracts by their vendees. This is the main object of the reward being given to them; and though it may terminate in a liability to pay the debt of another, that is not the immediate object for which the consideration is given, and the case resembles in this respect those of *Williams* v. *Leper*,[43] and *Castling* v. *Aubert*.[44] We entirely adopt the reasoning of an American Judge (Mr. Justice Cowen) in a very able judgment on this very point in *Wolff* v. *Koppel*.[45]

The principle of *Couturier* v. *Hastie* was applied and possibly extended in the case of *Sutton & Co.* v. *Grey*.[46] The plaintiffs, who were stockbrokers, entered into an oral agreement with the defendant, who was not a member of the stock exchange, that he should introduce clients to them, and that the plaintiffs should transact business on the exchange for the clients thus introduced, upon the terms that, as between the plaintiffs and the defendant, the defendant should receive one-half of the commission earned by the plaintiffs in respect of any transactions for such clients, and that the defendant should pay to the plaintiffs one-half of any loss which might be incurred by them in respect of such transactions. The plaintiffs sued the defendant for one-half of the loss incurred in transactions entered into on behalf of one of the clients introduced by the defendant. It was held that the Statute of Frauds did not apply because the defendant had an equal interest in the transaction with the plaintiffs, or, alternatively, because the main object of the agreement was not to guarantee payment of the debt of another, but to regulate the terms of the defendant's employment by the plaintiffs. It was not strictly the case of

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[41] (1852), 8 Exch. 40, 155 E.R. 1250, reversed on other grounds (1853) 9 Exch. 102, 156 E.R. 43, and affirmed (1856), 5 H.L. Cas. 673, 10 E.R. 1065.
[42] 8 Exch. 40, at pp. 55, 56.
[43] (1766), 3 Burr. 1886; Ames' Cases on Suretyship, 72.
[44] (1802), 2 East 325.
[45] (1843), 5 Hill, (N.Y.) 458, Ames' Cases on Suretyship, 67.
[46] [1894] 1 Q.B. 285, Ames' Cases on Suretyship, 70.

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the employment of a *del credere* agent nor was it strictly a partnership, but it was held that the principle of the *del credere* cases applied.

It will be observed that when the *del credere* cases were in *Couturier* v. *Hastie* first decided not to be within the statute, the ground given for the decision was the broadest principle applicable to the circumstances—a principle amply broad enough to cover the somewhat different circumstances of *Sutton & Co.* v. *Grey*—broad enough also to cover the very different circumstance of the other cases previously discussed. As pointed out by Vaughan Williams, L.J., in *Harburg* v. *Martin*,[47] the property cases (including the document cases) and the *del credere* cases are cases of different species, but all members of one genus. In each of these cases there is a main contract—a larger contract—and the obligation to pay the debt of another is merely an incident of the larger contract. It is not a question of motive—it is a question of object. The question in each case is, what is the subject matter of the contract? If the subject matter is the purchase of property, the getting rid of an encumbrance, the securing of greater diligence in the performance of the duty of a factor, or the introduction of business into a stock-broker's office—in all these cases there is a larger matter which is the object of the contract. The mere fact that as an incident to that contract—not as the immediate object, but indirectly—the debt of another person will be paid, does not bring the case within the statute. The form of the promise is not conclusive. Whether the promisor in terms engages to answer for the debt of another or not, it is the substance, not the form which is to be regarded. The statute applies only to a special promise to answer for the debt, default or miscarriage of another person, that is, a promise specially directed to this end.[48] It does not apply to a promise made with some other main or immediate object.

The case of *Williams* v. *Leper*,[49] cited in the judgment of Parke, B., in *Couturier* v. *Hastie*, is a good illustration of the broad principle. One Taylor, a tenant of the plaintiff, being in arrear for rent and insolvent, conveyed all his effects for the benefit of his creditors. They employed the defendant to sell the effects and accordingly he advertised the sale. On the morning advertised for the sale, the plaintiff came to distrain the goods in the house. The defendant having notice of the plaintiff's intention to distrain,

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[47] [1902] 1 K.B. 778, at pp. 784, 786.

[48] "Special promise" meant, for the lawyers of the Restoration, special (as opposed to *indebitatus*) *assumpsit*. Pollock on Contract, 8th ed., 1911, p. 164, note (i); C. D. Hening in 57 (N.S.) Univ. Penn. L.R. 611 (June, 1909); Ames' Cases on Suretyship, pp. 1 ff; cf. Street, Foundations of Legal Liability, vol. 2, pp. 172-3.

[49] (1766), 3 Burr. 1886, 97 E.R. 1152, Ames' Cases on Suretyship, 72.

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promised to pay the arrears of rent if he would desist from distraining, and the plaintiff did thereupon desist. It was held that the promise was not within the Statute of Frauds.

Wilmot, J., considered the distress as being actually made, and said that the defendant made the promise to discharge the goods. That is only another way of saying that the object of the promise was not to answer for the debt of another, but to protect the goods of the creditors for whom the defendant was trustee, and this seems to be the simplest and broadest ground upon which the decision can be based.[50]

It is only a particular application of the broader principle to say that the defendant was liable on his promise because he was virtually a purchaser of the goods[51] or because he had an interest in the goods apart from his promise[52] or because his liability did not arise wholly out of his express promise.[53] But if there is no actual right of distress at the time the promise is made, as for instance where the promise is made in respect of future rent,[54] the case is within the statute—not being within the exception based on the general principle as broadly stated, or any of its particular applications.

Lord Mansfield in *Williams* v. *Leper* based his decision on the ground that the defendant was trustee for all the creditors and therefore obliged to pay the landlord who had the prior lien. This is not a promise to pay the debt of another. Wilmot, J., said that the defendant was in the nature of a bailiff for the landlord, and, if the defendant had sold the goods and received money for them, an action for money had and received for the plaintiff's use would have lain. In this connection it is to be noted that Aston, J., thought that if the goods had not sold for so much as the plaintiff's rent, the defendant would be liable for no more than they sold for.

De Colyar[55] cites *Williams* v. *Leper* as one of the class of cases which may be considered referable to the principle that the statute applies only where there is a principal debtor, and in particular as an illustration of the principle that a promise made to a third person's creditors to pay the debt of that third person out of the proceeds of a sale of that third person's goods is not within the statute.[56] Such a promise is not a promise to answer for the debt

[50] Cf. Mathew, J., in *Harburg, etc.* v. *Martin*, [1902] 1 K.B. 778, at p. 779.
[51] De Colyar, Law of Guarantees, 3rd ed., 160.
[52] De Colyar, *op. cit.*, 138.
[53] See Stirling, L.J., in *Harburg* v. *Martin*, [1902] 1 K.B. at p. 790, treating *Williams* v. *Leper* as a type of one of the classes of cases falling within the general principle that if the promisor or his property is already liable to the promisee, the promise is not within the statute.
[54] *Thomas* v. *Williams* (1830), 10 B. & C. 664, Lord Tenterden, C.J., at p. 670, 109 E.R. 597.
[55] *Op. cit.*, pp. 78–81.
[56] Cf. *Dock* v. *Boyd & Co.* (1880), 93 Pa. 40, Ames' Cases on Suretyship, 40.

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of another person, but a promise to answer for the sufficiency of a certain fund, or for the due application of the fund, as the case may be. In such a case you undertake or promise *not* for *another*, but for *yourself*. You undertake, not that *another* shall pay out of the proceeds of the sale, but that you yourself will do so. Consequently, there is no one liable, or to become liable, in the first instance, to do that which you promise or undertake to do, and therefore the operation of the statute is excluded. This belongs, however, to the second main class of cases, which I propose next to discuss.

IV. Guarantee Distinguished from Original Liability.

I proceed now to consider some of the cases which relate to de Colyar's first and second rules.

The cases already discussed afford examples of contracts which either are or include true contracts of guarantee, but which have been held, on special grounds, not to be within the statute. The cases now to be discussed afford examples of promises which in some respects bear a misleading resemblance to contracts of guarantee but which are not within the statute because they give rise to original or principal, not collateral, liability on the promisor's part.

The rules in question are as follows:

1. To bring a case within sec. 4 of the Statute of Frauds, the primary liability of another person to the promisee for the debt, default, or miscarriages to which the promise of guarantee relates must exist or be contemplated, otherwise the statute does not apply, and the promise is then valid and can be sued on, though not in writing.[58]

2. The statute does not apply to any promise to be answerable for another, unless such promise is made to the creditor, that is to say, to the person to whom another is already, or is thereafter to become liable, and who can enforce such liability by action.[59]

It is elementary that in a contract of guarantee there must always be three parties in contemplation: a principal debtor (whose liability may be actual or prospective), a creditor, and a third party who in consideration of some act or promise or forbearance on the part of the creditor promises to discharge the debtor's liability if the debtor fails to do so.

The leading case as to the necessity for the liability of a third party, i.e., the existence of a principal debtor, is *Birkmyr* v. *Darnell*,[60] reported as follows in Salkeld:

Declaration, That in consideration the plaintiff would deliver his gelding to A, the defendant promised that A should re-deliver him safe; and evidence was, that the defendant undertook that A should re-deliver him safe; and this was held a collateral undertaking for another: for where the undertaker comes in aid only to procure a credit to the party, in that case there is a

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[58] 15 Halsbury, para. 889; De Colyar, Law of Guarantees, 3rd ed., p. 65, rule 1.

[59] 15 Halsbury, para. 891; De Colyar, *op. cit.*, p. 66, rule 2.

[60] (1704), 1 Salk. 27, 91 E.R. 27.

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remedy against both, and both are answerable according to their distinct engagements; but where the whole credit is given to the undertaker, so that the other party is but as his servant, and there is no remedy against him, this is not a collateral undertaking; but it is otherwise in the principal case, for the plaintiff may maintain *detinue* upon the bailment, against the original hirer, as well as *assumpsit* upon the promise against this defendant.

It appears from the fuller report of the case in Lord Raymond's Reports[61] that upon the argument, Holt, C.J., with Powell and Gould, JJ., seemed to be of the opinion, against Powys, J., that the case was not within the statute, because English (to whom the horse was delivered upon the defendant's promise that it should be re-delivered) was not liable on the contract, for if any action could be maintained against English, it must be for a subsequent wrong in detaining the horse or actually converting it to his own use, and Powell, J., said:

That that rule, of what things shall be within the statute, is not confined to those cases only, where there is no remedy at all against the other, but where there is not any remedy against him on the same contract.

The last day of the term the Chief Justice delivered the opinion of the Court. He said, that the question had been proposed at a meeting of Judges, and that there had been great variety of opinions between them, because the horse was lent wholly upon the credit of the defendant; but that the Judges of this Court were all of opinion, that the case was within the statute. The objection that was made was, that if English did not re-deliver the horse, he was not chargeable in an action upon the promise, but in *trover* or *detinue*, which are founded upon the tort, and are for a matter subsequent to the agreement. But I answered, that English may be charged on the bailment in *detinue* on the original delivery, and a *detinue* is the adequate remedy, and upon the delivery English is liable in *detinue*, and consequently this promise by the defendant is collateral, and is within the reason, and the very words of the statute; and is as much so, as if, where a man was indebted, J. S., in consideration that the debtee would forbear the man, should promise to pay him the debt, such a promise is void[62] unless it be in writing.

V. Promise to Answer for Tort of Another.

De Colyar[63] properly refers to the case of *Birkmyr* v. *Darnell* as raising a doubt as to the applicability of the statute to a promise to be responsible for the future wrongful act or tort of a third person,[64], but it is not easy to follow the reasoning of his statement that "Any doubt that may have been caused by these observations of Justice Powell, or by the decision in *Read* v. *Nash*,[65] was certainly entirely removed by the case of *Kirkham* v. *Marter*."[66] In neither of the two last mentioned cases was a promise given in respect of the future liability in tort of a third person.

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[61] 2 Lord Raym. 1085, 92 E.R. 219, Ames' Cases on Suretyship, 12, *sub nom. Buckmyr* v. *Darnall*.

[62] Strictly speaking, "void" should be "unenforceable." The mistake is not uncommon in the older cases.

[63] *Op. cit.*, pp. 62, 63.

[64] Because the Court was at such pains to find a liability in contract.

[65] (1751), 1 Wils. K.B. 305, 95 E.R. 632, Ames' Cases on Suretyship, 25.

[66] (1819), 2 B. & Ald. 613, 106 E.R. 490, Ames' Cases on Suretyship, 23.

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In *Kirkham* v. *Marter* the defendant's son without leave or license, had ridden the plaintiff's horse, thereby causing the horse's death. In consideration of the plaintiff's refraining from suing the defendant's son for damages for the wrongful act, the defendant promised to pay certain sums to the plaintiff. It was held that the defendant's undertaking was a promise to answer for the debt, default or miscarriage of another within the statute, and was therefore unenforceable because it was not in writing.

In the earlier case of *Read* v. *Nash* it appeared that the defendant Nash had promised one Tuack to pay £50 and the costs of an action brought by Tuack against one Johnson for assault and battery, in consideration that Tuack should not proceed to trial but should withdraw his record. Tuack withdrew the record, and his executor Read brought action against Nash upon his promise. Lee, C.J., delivered the judgment of the Court as follows (at p. 306):—

> The single question is, whether this promise, which is confessed by the demurrer not to have been in writing, is within the Statute of Frauds and Perjuries; that is to say, whether it be a promise for the debt, default, or miscarriage of another person; and we are all of opinion that it is not, but that it is an original promise sufficient to found an assumpsit upon against Nash, and is a lien upon Nash, and upon him only. Johnson was not a debtor, the cause was not tried, he did not appear to be guilty of any default or miscarriage, there might have been a verdict for him if the cause had been tried for anything we can tell; he never was liable to the particular debt, damages, or costs. The true difference is between an *original* promise and a *collateral* promise; the *first* is out of the statute, the *latter* is not when it is to pay the debt of another which was already contracted.

De Colyar[67] submits that the distinction between the two cases is perfectly clear.

> In *Read* v. *Nash* the promise simply was, *forbear to proceed with the action you have commenced against A. and I will pay you £50.* In *Kirkham* v. *Marter* it was, *do not make A. pay for his default, and I will do so myself.*

The distinction between an original undertaking and a collateral undertaking is of course fundamental, and it is true that *Read* v. *Nash* was distinguished in *Kirkham* v. *Marter* on the ground that in the former case the undertaking was an original one, while in the latter it was collateral. The difficulty is to find any such distinction in either the form or the substance of the promises in the two cases in question. The only substantial difference[68] in the facts is that in *Kirkham* v. *Marter* the liability of the third party was admitted, whereas in *Read* v. *Nash* it was not admitted. There is however no reason for assuming in the latter case that the action against the third party was groundless, in view of the fact that Nash promised to pay £50 and the costs in order to prevent it from being brought to trial.

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[67] *Op. cit.*, p. 87.

[68] Subject to the question whether in *Read* v. *Nash* the liability of Johnson was extinguished. See the case of *Bird* v. *Gammon*, *infra* 19.

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In *Fish* v. *Hutchinson*[69] it appeared that an action had been commenced by the plaintiff against one A, and the defendant, in consideration that the plaintiff would stay his action, promised to pay the money owing by A. It was held that the promise was within the statute. *Read* v. *Nash* was distinguished on the ground that in that case it was doubtful whether there was the existing liability of a third party, whereas in *Fish* v. *Hutchinson* there was the debt of another still existing and a promise to pay it.

De Colyar[70] says:

> It is quite possible to distinguish *Read* v. *Nash* from *Fish* v. *Hutchinson*. For in *Read* v. *Nash* the promise of the defendant was to pay £50 and costs. On the other hand in *Kirkham* v. *Marter* and *Fish* v. *Hutchinson*, the defendants promised not to pay the plaintiff a fixed sum of money, but something that a third person was liable to pay.

It is respectfully submitted that the above mentioned efforts to distinguish *Read* v. *Nash* from the later cases are not productive of any tangible or profitable result. The distinction between an admittedly valid claim against a third party and a claim which, though not admitted, is asserted by action or otherwise seriously maintained, seems to be unreasonable and unsatisfactory as a test of the applicability of the statute to the promise made by the defendant. If the claim against the third party is admittedly invalid, *cadit quaestio*, because there is no principal debt to which the defendant's promise can be collateral. But it seems unreasonable to assume the invalidity of the claim against the third party for the purpose of making liable, as on an original promise, a person whose promise is made with respect to that claim.

As regards the sufficiency of the consideration for a guarantee it has been held that if A believes in good faith that he has a fair chance of success, a reasonable ground for suing B, and forbears to sue B on the faith of C's promise to pay, C will be bound if his promise is evidenced as required by the statute.[71] It would seem reasonable that in such a case B's promise to pay either the amount of A's claim against B, or a definite sum of money, in consideration of A's forbearance, should *prima facie* be considered a collateral promise—a promise to answer for the debt, default or miscarriage of another person.[72] Whether the claim against B would have been held valid in an action by A against B or not, it is at least a claim which C considers to be a sufficient foundation for his promise. In such a case it seems unsatisfactory to make

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[69] (1759), 2 Wils. K.B. 94, 95 E.R. 704.

[70] *Op. cit.*, p. 88.

[71] See, *e.g.*, *Callischer* v. *Bischoffsheim* (1870), L.R. 5 Q.B. 449; *Miles* v. *New Zealand Alford Estate Co.* (1886), 32 Ch. D. 266; *Drewry* v. *Percival* (1909), 19 O.L.R. 463.

[72] Always assuming that the claim against B is not extinguished as a result of the transaction between A and C.

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the enforceability of C's promise depend upon the validity of the claim against B, because the result would be to impose upon the court which has to pass upon the enforceability of A's claim against the defendant C the necessity of passing also upon the validity of a disputed claim by A against B, although B may not be a party to the action and the Court may not have before it adequate material for deciding the question of B's liability.

It may be noted that in the Massachusetts case of *Dexter* v. *Blanchard*[73] the Court repudiated the doctrine that an oral agreement to answer for the debt of another would be enforceable if it could be shown that the original contracting party could have established a good defence to the debt in an action against him.

It seems better to say that *Read* v. *Nash* was in effect overruled by *Kirkham* v. *Marter*,[74] or in other words that the decision in *Read* v. *Nash* that the promise there in question was an original, not a collateral, promise was wrong on the facts, and that the case is indistinguishable from *Kirkham* v. *Marter*, in which the promise was clearly collateral. This conclusion is, however, to be read subject to the construction put upon *Read* v. *Nash* in the case of *Bird* v. *Gammon*[75] in which the earlier case was expressly followed. One Lloyd, being an execution debtor of the plaintiff, conveyed all his property to the defendant, the defendant undertaking to pay Lloyd's creditors. The plaintiff then, with the consent of Lloyd and the defendant, withdrew his execution. It was held that the defendant's undertaking was not a promise to pay the debt of a third person, but an agreement that if the plaintiff would forego his claim on Lloyd, the defendant would pay the amount of the debt on his own account. It was objected that the plaintiff, if he failed in this action, might still sue Lloyd or issue execution; but it was answered by Tindal, C. J.,

if he were to do so, Lloyd might shew, on plea or *audita querela*, that on good consideration the plaintiff gave up his remedy against Lloyd, and took the defendant's liability instead; which though not properly accord and satisfaction, would be a complete defense on the general issue; *Good* v. *Cheeseman*[76] and the cases there cited.

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[73] 11 Allen (93 Mass.) 365 (1865), Ames' Cases on Suretyship, 26. This was said, however, in a case in which the principal debtor was an infant and the debt was not for necessaries. There are cases both in England and the United States in which it has been held that in such a case the promise is an original one and outside the statute by reason of the absence of any principal debt. *Harris* v. *Huntbach* (1757), 1 Burr. 373, 97 E.R. 355; *Chapin* v. *Lapham*, 20 Pick. (37 Mass.) 467 (1838); *Downey* v. *Hinchman*, 25 Ind. 453 (1865). Probably a distinction must be made between the contract of an infant which is merely voidable and one upon which it is legally impossible for him to incur personal liability. Halsbury, Laws of England, vol. 15, p. 459.

[74] See note to *Forth* v. *Stanton*, 1 Wms. Saunders 210, 85 E.R. 217.

[75] (1837), 3 Bing. (N.C.) 883, 132 E.R. 650, Ames' Cases on Suretyship, 29.

[76] (1831), 2 B. & Ad. 328, 109 E.R. 1165.

Annotation.

The case was therefore decided on the ground that there had been novation and an extinguishment of the original debtor's liability.

Of course if the effect of the promise is to extinguish the liability in respect of which the promise is made, the promise must be an original promise. It cannot be a collateral promise if there is no continuing liability of another to which it is collateral. But it is to be observed that in *Bird* v. *Gammon* the Court has virtually invented a new ground of justification for *Read* v. *Nash*. If the effect of Nash's promise and the withdrawal of the record in the action against Johnson was to extinguish Johnson's liability to be sued, then clearly Nash's promise was an original promise for which no writing was required. But this view of *Read* v. *Nash* puts it in a different class of cases. Looked at in this way, it is no longer a decision that the defendant's promise was original because Johnson's liability to the plaintiff was uncertain, as put in the case itself, and it is no longer difficult to distinguish it from *Kirkham* v. *Marter* and *Fish* v. *Hutchinson*. In each of the latter cases we must assume that the liability in respect of which the promise was made was not extinguished by the transaction between the plaintiff and the defendant, otherwise the decision would be clearly wrong as the decision in *Read* v. *Nash* would be clearly right.

In *Goodman* v. *Chase*[77] the plaintiffs having recovered judgment and sued out a *ca. sa.* under which the defendant's son was arrested, the defendant promised to pay the damages and costs. It was held that the promise was an original promise in consideration of the discharge of the debt as between the plaintiffs and the defendant's son. It will be observed that this case was a simple one in this respect, that there was no question but that the debt was discharged as a result of the transaction between the plaintiffs and the defendant, because the discharge of the defendant's son from custody with the plaintiff's consent operated in law as a discharge of the debt. The defendant alone was liable and his promise was necessarily original, not collateral. It was therefore unnecessary to consider whether the memorandum signed by the defendant was sufficient under the statute.[78]

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[77] (1818), 1 B. & Ald. 297, 106 E.R. 110, Ames' Cases on Suretyship, 27; cf. *Eden* v. *Chaffee*, 160 Mass. 225 (1843); *Bailey* v. *Gillies*, 4 O.L.R. 182, at p. 190.

[78] The sufficiency of the memorandum was disputed on the authority of *Wain* v. *Warlters* (1804), 5 East 10, 102 E.R. 972, which was long regarded as of doubtful authority, but was at last confirmed by *Saunders* v. *Wakefield* (1821), 4 B. & Ald. 505, 106 E.R. 1054; DeColyar, *op. cit.*, pp. 163-4. By statute in England (19 & 20 Vict. ch. 97, sec. 3) and in Ontario (R.S.O. 1914, ch. 102, sec. 6) the consideration for a guarantee need not now appear in the memorandum.

Annotation.

The cases already mentioned leave open the question whether a promise to answer for the future liability in tort of another person is within the statute. In *Kirkham* v. *Marter* the liability was purely tortious, but the wrongful act had been already committed when the defendant's promise was made. In *Birkmyr* v. *Darnell* the liability which was the subject of the promise was merely contemplated when the promise was made, but the Court found it possible to regard it as a liability arising out of contract.

It is interesting to note, however, in connection with *Birkmyr* v. *Darnell*, that whether or not the action of detinue is technically an action founded on contract, it has been held in modern times that where a person is sued in detinue for holding goods to which another person is entitled, the real cause of action in fact is a wrongful act, and not a breach of contract, because it may arise when there is no contract, and the remedy sought is not a remedy which arises upon a breach of contract.[79]

It is probable in any case that the words of the statute are wide enough to cover a promise to answer for the future wrongful act of a third person not arising out of a contract,[80] but in practice a promise to answer for the future default or miscarriage of another person usually refers to some contractual liability of that other person.

VI. Cases in which the Guarantee precedes the Principal Liability.

The cases in which the guarantee precedes the liability of the principal debtor, that is, in which the guarantee is given in order to obtain credit for another person, raise some questions which require special consideration.

As Street points out, [81] it seems strange that it did not occur to the Courts, when the interpretation of the statute was yet open, that the words "to answer for the debt, default, or miscarriage of another" contemplated only claims already in existence at the time the collateral promise is made.

It will be noticed that all personal engagements by the representatives of a deceased person must necessarily be collateral to existing claims. Strong reasons may be advanced for believing that the succeeding clause contemplated the same situation. The reason of the statute certainly does not apply with

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[79] *Bryant* v. *Herbert* (1878), 3 C.P.D. 389, C.A., reversing 3 C.P.D. 189. The question what was the nature of the action of detinue had been an open question for several centuries. See Pollock & Maitland, Hist. Eng. Law, 2nd ed., vol. 2, p. 180. Anson (Contract, 14th ed., 1917, p. 62, 3rd Am. ed., 1919, p. 74) adds: "Detinue is in fact founded in bailment, but the contract of bailment imposes general common law duties the breach of which may be treated, and should be treated, as a wrong. The judgment of Collins, L.J., in *Turner* v. *Stallibrass*, [1898] 1 Q.B. 56 at 59, states this clearly."

[80] As to the different meanings suggested for the words "debt," "default" and "miscarriage" see 15 Halsbury, p. 455, para. 884, note (s).

[81] Foundations of Legal Liability (1906), vol. 2, p. 188; cf. De Colyar, *op. cit.*, pp. 108-109.

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as much force where the guaranty is given before the principal obligation is incurred as where the collateral promise is made afterwards; for the guaranty almost invariably draws the consideration, *e.g.*, the credit from the promisee.

Recognition of the distinction just stated would have made the clause in question vastly less radical than it actually proved to be. Lord Mansfield had the acumen to perceive that the statute did not apply to any case where the promise sued on induced the creation of the principal obligation.[82] Upon further consideration, however, this distinguished Judge found that the law was already settled differently and that the rule was too firmly fixed to be shaken.[83] At a later day, Buller, J., had occasion to lament that the question was no longer open for consideration.[84]

In *Jones* v. *Cooper*[85] Lord Mansfield, at the close of the argument, said, "The general distinction is a clear one, and upon that distinction the case which has been cited (*Mawbrey* v. *Cunningham*) was determined. Where the undertaking is before delivery, and there is a direction to deliver the goods, and 'I will see them paid for,' it is not within the Statute of Frauds. But there may be a nicety where the undertaking is before delivery, and yet conditional as this is. It turns simply upon the undertaking being in case the other did not pay. We will look into it." On the following day he delivered the unanimous opinion of the Court that the promise by the defendant to pay, if Smith did not, was a collateral undertaking within the statute.

In *Peckham* v. *Faria*[86] the promise—"You may not only ship that parcel, but one, two, or three thousand more, and I will pay you if he does not"—was in form indistinguishable from that in *Jones* v. *Cooper*, and the same result was reached. Lord Mansfield said:

Before the case of *Jones* v. *Cooper* I thought there was a solid distinction between an undertaking after credit given and an original undertaking to pay; and that, in the latter case, the surety, being the object of the confidence, was not within the statute; but in *Jones* v. *Cooper*, the Court was of opinion that wherever a man is to be called upon only in the second instance, he is within the statute; otherwise, where he is to be called upon in the first instance.

In *Matson* v. *Wharam*[87] the defendant asked Matson, one of the plaintiffs, if he was willing to serve one Robert Coulthard of Pontefract with groceries; he answered that they dealt with nobody in that part of the country and did not know Coulthard; to which the defendant replied, "If you do not know him you know me, *and I will see you paid.*" Matson then said he would serve Coulthard; and the defendant answered, "He is a good chap, *but I will see you paid.*" A letter was afterwards received by the plaintiffs from Coulthard containing an order for goods,

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[82] *Mawbrey* v. *Cunningham* (1773), cited in *Jones* v. *Cooper* (next note).

[83] *Jones* v. *Cooper* (1774), 1 Cowp. 227, 98 E.R. 1058, Ames' Cases on Suretyship, 2.

[84] *Matson* v. *Wharam* (1787), 2 Term Rep. 80, 100 E.R. 44. See language of Parker, C.J., in *Perley* v. *Spring*, 12 Mass. 297 (1815), afterwards disapproved in *Cahill* v. *Bigelow*, 18 Pick. (35 Mass.) 369 (1836).

[85] *Ubi supra.*

[86] (1781) 3 Doug. 13, 99 E.R. 514.

[87] (1787) 2 Term Rep. 80, 100 E.R. 44.

Annotation.

and the goods were sent to Coulthard accordingly. The goods were charged to Coulthard in the plaintiff's books. They wrote to Coulthard for payment, and getting no answer they applied to the defendant, who refused to pay. In form, it will be observed, the promise was indistinguishable from that in *Mawbrey* v. *Cunningham*, and therefore it was not open to the Court to distinguish the cases upon the ground put forward by Lord Mansfield in *Jones* v. *Cooper*. It was necessary either to follow or to overrule *Mawbrey* v. *Cunningham*, and the Court chose the latter alternative. Buller, J., said:

> If this were a new question, the leaning of my mind would be the other way; for Lord Mansfield's reasoning in the case of *Mawbrey* and *Cunningham* struck me very forcibly. But the authorities are not now to be shaken; and the general line now taken is, that if the person for whose use the goods are furnished be liable at all, any other promise by a third person to pay that debt must be in writing, otherwise it is void by the Statute of Frauds, 29 Car. 2, ch. 3.

In the same sense in *Birkmyr* v. *Darnell*[88] it had been already pointed out that "where the whole credit is given to the undertaker, so that the other party is but as his servant, *and there is no remedy against him*, this is not a collateral undertaking," and the report in Salkeld closes with the following illustration:

> *Et per cur.* If two come to a shop, and one buys, and the other, to gain him credit, promises the seller, *If he does not pay you, I will*, this is a collateral undertaking, and void without writing, by the Statute of Frauds. But if he says, let him have the goods, *I will be your paymaster*, or *I will see you paid*, this is an undertaking as for himself, and he shall be intended to be the very buyer, and the other to act but as his servant.

From a comparison of the last illustration given in *Birkmyr* v. *Darnell* with the words of the undertaking in *Matson* v. *Wharam*, it results that the form of words used is only *prima facie* a test of the nature of the promise. As expressed by Brewer, J., in delivering the judgment of the Supreme Court of the United States in *Davis* v. *Patrick*,[89] "the real character of the promise does not depend altogether upon the form of expression, but largely on the situation of the parties."

On the one hand, the promise may be absolute in form, *primâ facie* implying original liability, as "I will see you paid" or "I will be your paymaster." It may nevertheless be shewn that credit is in fact given by the promisee to a third party, who becomes personally liable, and that the promisor's liability is really collateral. In *Keate* v. *Temple*,[90] for instance, the defendant, a first lieutenant in the Navy, serving on the ship Boyne, promised to see the plaintiff paid for clothing to be supplied to the crew. A verdict in favour of the plaintiff was held to be against the weight of evidence, the Court considering that credit was given to the crew in the first instance.

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[88] (1704), 1 Salk. 27, 91 E.R. 27.
[89] (1891), 141 U.S. 479.
[90] (1797), 1 B. & P. 158, 126 E.R. 834.

Annotation.

On the other hand, the promisor may use language *primâ facie* implying that some one else is bound, as "I will pay if A does not pay." The implication that the promise is collateral may nevertheless be rebutted by proof that credit was given solely to the promisor or that there was in fact no principal liability to which the promisor's liability could be collateral, as, for instance, where goods are furnished to a third person on the credit of the promise but the third person gives no order or does not become liable at all. In *Mease* v. *Wagner*[91] the defendant promised to pay for certain articles for the funeral of Mrs. Bradley, saying, "Charge them to the estate of Dr. Bradley, and as soon as his nephew comes to town he will pay for them, or I will." As neither the estate of Dr. Bradley nor his nephew was liable, the defendant's promise was held to be an original undertaking and therefore not within the statute.

If the promise sued on embodies the only liability arising out of the transaction in respect of which the promise is made, the promisor's liability is necessarily original, and the statute does not apply. Street[92] refers to the illustrations given in *Birkmyr* v. *Darnell*, and adds,

> This rule has been reduced to greater certainty, though possibly not without some violence to principle, by holding that the credit must be extended solely to the promisor in order to keep the statute from applying. Therefore, if any credit at all is given to the purchaser, the promise must be in writing.[93] In cases of this kind, where one party is said to come in aid to procure credit for another, it is possible for the tradesman to give credit to them bota jointly. If this be done, both are liable as debtors and no writing is necessary.[94]

The leading modern English case is *Lakeman* v. *Mountstephen*.[95] The plaintiff Mountstephen, a contractor and builder, had completed for the board of health of the town of Brixham a main sewer in the town, and the board, under statutory authority, had given notice to the owners of certain houses directing them to connect their drains with the main sewer and stating that if they failed to make the connections the board would do so at their expense. The householders did not obey the order, and the surveyor of the board asked the plaintiff to procure the material and do the work. The plaintiff declined to do either unless the board would be responsible for the payment. An order of the board was given as to the material and the plaintiff procured

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[91] (1821), 1 McCord (S.C.) 395, Ames' Cases on Suretyship, 20.

[92] Foundations of Legal Liability (1906), vol. 2, pp. 185-6.

[93] *Matson* v. *Wharam*, *supra*.

[94] *Swift* v. *Pierce*, 13 Allen (95 Mass.) 136 (1866); *Gibbs* v. *Blanchard*, 15 Mich 292 (1867); Ames' Cases on Suretyship, 4; *Wainwright* v. *Straw*, 15 Vt. 215 (1843).

[95] (1874), L.R. 7 H.L. 17, Ames' Cases on Suretyship 14, affirming the decision of the Court of Exchequer Chamber (1871), L.R. 7 Q.B. 196, which had reversed the judgment of the Court of Queen's Bench (1870), L.R. 5 Q.B. 613 (*Mountstephen* v. *Lakeman*).

Annotation.

the necessary piping, but still declined to do the work. Some days afterwards a conversation took place between the plaintiff and the defendant Lakeman, the chairman of the board.[96] Lakeman said, "What objections have you to make these connections?" The plaintiff answered, "I have no objection to do the work if you or the local board will give me the order." Lakeman replied, "Mountstephen, you go on and do the work, and I will see you paid." The plaintiff thereupon did the work and charged the account to the board, and upon its refusal to pay brought action against the defendant. It was held that Lakeman had undertaken to pay personally, the liability being an original liability to which the statute did not apply.

Lord Cairns considered that the natural meaning of the plaintiff's words was that he would do the work either if he had a formal order from the board or if he had a personal order from Lakeman, and that Lakeman gave him a personal order. Lakeman thus rendered himself personally liable in the first instance, and neglected afterwards to protect himself by obtaining from the board a formal order and acting and paying under that order.[97]

Lord Selbourne, in the course of his concurring opinion, said,

> There are some observations in the opinions of the learned Judges of the Queen's Bench which certainly do look at first sight as if some of those learned Judges thought that there might be a valid contract of suretyship,—although there might be in truth no principal debtor. If that was the view of the learned Judges, with all respect to them, I must confess myself unable to follow it. There can be no suretyship unless there be a principal debtor, who of course may be constituted in the course of the transaction by matters *ex post facto*, and need not be so at the time, but until there is a principal debtor there can be no suretyship. Nor can a man guarantee anybody else's debt unless there is a debt or some other person to be guaranteed.[98]

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[96] The words of this conversation are taken from the judgment of Lord Cairns, L.C. The plaintiff's version alone is material, because the jury found a verdict for the plaintiff, and the only question in the Appellate Courts was whether there was sufficient evidence for the jury of an enforceable promise. The Queen's Bench directed a nonsuit to be entered on the ground that the defendant's words under the circumstances amounted only to a promise to pay if the board did not. On appeal the Exchequer Chamber reversed this decision.

[97] In other words no credit was given to the board. In this sense the case was followed in Ontario in *Petrie* v. *Hunter* (1884), 10 A.R. (Ont.) 127, and *Simpson* v. *Dolan* (1908), 16 O.L.R. 459. The last mentioned case was distinguished on the facts in *McWilliam* v. *Sovereign Bank* (1909), 14 O.W.R. 561. In *Gillies* v. *Brown* (1916), 31 D.L.R. 101, 53 Can. S.C.R. 557, affirming *Brown* v. *Coleman Development Co.* (1915), 26 D.L.R. 438, 35 O.L.R. 219, it was held on the facts that the promise made by the defendant Gillies to repay to the plaintiff money advanced by the latter for the benefit of the defendant company was not within the statute.

[98] *Lakeman* v. *Mountstephen* was distinguished in Ontario in *Bond* v. *Treahey* (1875), 37 U.C.R. 360, and *James* v. *Balfour* (1882), 7 A.R. (Ont.) 461, the promises being similar in terms but there being a continuing liability of a third person.

Annotation.

The foregoing cases illustrate the first rule,[99] that a promise is not within the statute unless there is an existing or contemplated liability of a third person to which the promise is collateral. On the same principle, a promise to procure the signature of a third person to a guarantee is not within the statute, this not being a promise to answer for another,[100] though a promise to give a guarantee in the future is within the statute.[101]

VII. The Promise must be made to the Creditor.

The second rule[102] requires that a promise, to be within the statute, shall be made to the creditor of the third person. Thus a promise made to a debtor to pay what he owes or is liable for is not within the statute.[103]

It has also been held that a promise to a firm of which the promisor is a member to pay what a third person owes to the firm, if the third person fails to pay, is not within the statute. Such a promise is not a promise to the creditors, or at least not one which the creditors could enforce at law, but is a promise by one partner to his co-partners to make good to the firm the loss if a debtor of the firm fails to pay what he owes to the firm.[104]

There remains one difficult class of cases which illustrate the rule that the promise must be made to the creditor. The so-called indemnity cases oblige us further to define the rule by saying that the promise must be made to the creditor in his capacity as creditor. The promise under the statute "must be distinguished from a contract of indemnity, or promise to save another harmless from the result of a transaction into which he enters at the instance of the promisor."[105]

The leading case as to a contract of indemnity is *Thomas* v. *Cook*[106] A and B dissolved partnership, it being agreed that A should take upon himself the payment of certain debts and that a bond should be executed by A and two other persons to save B harmless from the payment of the debts. Thereafter the plaintiff, at the request of the defendant, executed a bond

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[99] That is, De Colyar's first rule, stated at the beginning of this paper.

[100] *Bushell* v. *Beaven* (1834), 1 Bing. (N.C.) 103, 131 E.R. 1056, Ames' Cases on Suretyship, 21.

[101] *Mallet* v. *Bateman* (1865), L.R. 1 C.P. 163, Ames' Cases on Suretyship, 56.

[102] De Colyar's second rule, stated at the beginning of this paper.

[103] *Eastwood* v. *Kenyon* (1840), 11 Ad. & E. 438, 113 E.R. 482, Ames' Cases on Suretyship, 32; *Barker* v. *Bucklin*, 2 Den. (N.Y.) 45 (1846). So, if the promise is made to one who is neither creditor nor debtor. *Reader* v. *Kingham* (1862), 13 C.B. (N.S.) 344, 143 E.R. 137.

[104] *In re Hoyle, Hoyle* v. *Hoyle*, [1893] 1 Ch. 84.

[105] Anson on Contract, 14th ed. (1917), p. 80, 3rd Am. ed. 1919, p. 95.

[106] (1828), 8 B. & C. 728, 108 E.R. 1213, Ames' Cases on Suretyship, 48; cf. *Harrison* v. *Sawtel*, 10 Johns. (N.Y.) 242 (1813), Ames' Cases on Suretyship, 54.

Annotation.

together with the defendant and A, the defendant orally promising the plaintiff to save him harmless from any payments which he might have to make under the bond. The plaintiff was afterwards compelled to pay under the bond and sued the defendant. It was held that the defendant's promise to indemnify the plaintiff was not within the statute.

A different conclusion was reached in *Green* v. *Cresswell*[107], but the last mentioned case was disapproved in *Wildes* v. *Dudlow*,[108] and other cases, and finally *Thomas* v. *Cook* and *Wildes* v. *Dudlow* were approved and followed in the important case of *Guild* v. *Conrad*.[109]

The case of *Guild* v. *Conrad* is particularly instructive, because it affords an illustration of both an indemnity and a guarantee, and it is admittedly very near the line. The plaintiff (William Binney) carried on business under the name of Guild & Co. in London. He was in correspondence with a Demerara firm of Conrad, Wakefield & Co., one of the partners in which was a son of the defendant Julius Conrad. By a letter of June, 1888, the defendant agreed to guarantee payment up to £5,000, of drafts made by the Demerara firm upon the plaintiff and accepted by him if funds should not be provided at maturity by the drawers. There is no question but that that was a guarantee in the proper sense of the term, that is, an undertaking to be responsible up to £5,000 if the Demerara firm should make default. That undertaking was in writing; but in March, 1891, the defendant orally agreed to increase the guarantee to £6,000 in consideration of the plaintiff's agreeing to increase the credit of the Demerara firm to £10,000. The plaintiff claimed the increased amount under this oral guarantee, but the trial Judge (Mathew, J.) held this part of the action not maintainable because of the Statute of Frauds, and no appeal was taken from this part of his judgment. The plaintiff also claimed upon an oral promise of the defendant made in December, 1891, and another made in January, 1892, when some bills drawn by the Demerara firm were coming due which the plaintiff was unwilling to accept in view of the overdrawn state of the firm's account. The evidence was conflicting as to what was said at the interviews which took place between the plaintiff and the defendant on these two occasions, but the trial Judge found that the defendant promised the plaintiff that if the plaintiff accepted the bills drawn by the defendant's son's firm, the defendant would provide funds to enable the plaintiff to meet the bills at maturity, and held that the defendant's

[107] (1839), 10 Ad. & E. 453, 113 E.R. 172, Ames' Cases on Suretyship, 49.
[108] (1874), L.R. 19 Eq. 198, Ames' Cases on Suretyship, 52; cf. *Tighe* v. *Morrison*, 116 N.Y. 263 (1889).
[109] [1894] 2 Q.B. 885.

Annotation.

promise was not a contract to pay if the firm did not pay, because there was no expectation that the firm would be able to pay. On the faith of that promise the plaintiff accepted the bills. The Court of Appeal, affirming the trial Judge, held that the defendant was liable, following the case of *Thomas* v. *Cook*, and some later cases.

Street[110] says,

> This class of cases has given a great deal of trouble, for it often happens that two antagonistic elements are found in the transaction, one of which would seem to shew that the undertaking is independent and therefore not within the statute, while the other would as clearly indicate that the statute applies. Thus, the giving by C to A of a promise to indemnify him for some act of his own may occur in a case where there is an implied obligation on the part of B also to indemnify him for the same act. As we have already seen, a promise to satisfy an obligation which is already valid as against another is almost necessarily within the statute. These two antagonistic factors have led to confusion and conflict.

Guild v. *Conrad*, though not cited by the author of the passage just quoted, is a striking example of a case in which antagonistic elements are found. The fact that as a result of the defendant's promise a further credit was in effect to be given by the plaintiff to a third person, who would thereby become subject to a further liability, might have been considered by the Court as a ground for regarding the defendant's promise as collateral, but the Court found in the transaction other elements indicating that the promise was original. On the other hand, if the liability of the third party is existing, not merely in contemplation, at the time of the defendant's promise, it would appear to be impossible to regard the transaction as a contract of indemnity.

On the point last mentioned it will be sufficient, in conclusion, to refer to the English case of *Harburg, etc.* v. *Martin*,[111] and the earlier Ontario case of *Beattie* v. *Dinnick*,[112] which were similar in their circumstances, and in each of which it was unsuccessfully argued that the transaction amounted to a contract of indemnity. The facts of *Harburg* v. *Martin* have already been mentioned.[113] In *Beattie* v. *Dinnick* the plaintiff was the holder of a promissory note made by a limited company payable three months after date, which note was a renewal of a former note. The action against the defendant Dinnick was based upon an oral promise made by the defendant to the plaintiff at or about the maturity of the earlier note to the effect that if the plaintiff would forbear to sue the company upon the note and would renew it, the defendant

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[110] Street, Foundations of Legal Liability (1906), vol. 2, pp. 186-187. The author then refers to *Thomas* v. *Cook*, *Green* v. *Cresswell*, and some of the decisions overruling *Green* v. *Cresswell*.

[111] [1902] 1 K.B. 778.

[112] (1896), 27 O.R. 285.

[113] *Supra*, p. 3.

would see that the plaintiff got his money. A Divisional Court held, reversing the judgment at the trial, that the promise was within the statute. Street, J., delivering the judgment of the Court, said,[114] Annotation.

> The distinction between a promise to pay a debt already due a creditor, or one to be created upon the faith of the promise on the one hand; and a promise that if the promisee will incur a liability the promisor will indemnify him against it on the other hand, is not at all a shadowy one, and when the terms of the statute and the interpretation placed upon it by undisputed cases are considered, the reasons for holding the latter class of promises to be unaffected by it, while holding the former class to be within it, seem to be unanswerable. It has been well settled that the statute applies only to promises made to the person who is or is because of the promise made to him, to become creditor, and does not apply to promises made to the debtor or any one else.[115]
>
> The promise intended by the statute is therefore a promise made to a creditor or intending creditor in that capacity. But where the promise is made to one who is not a creditor, that if he will incur a liability to some third person, the promisor will indemnify him against it, it is not made to him as a creditor at all, but rather in the character which he is asked to assume of debtor to the third person.

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[114] *Beattie* v. *Dinnick*, 27 O.R. 285, at p. 293.
[115] *Eastwood* v. *Kenyon*, (1840), 11 Ad. & E. 438, 113 E.R 482; *Wildes* v. *Dudlow*, L.R. 19 Eq. 198.

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Ontario Superior Court, Orde, J. September 2, 1920.

SUMMARY CONVICTION (§ VII—80)— PRESUMPTION OF GUILT — REBUTTED BY EVIDENCE—DECISION OF MAGISTRATE—WHEN OPEN TO REVIEW —RULES AS TO EVIDENCE—AMENDMENT TO ONTARIO TEMPERANCE ACT, 8 GEO. V. 1918, CH. 40, SEC. 19.

In a summary conviction under the Ontario Temperance Act, where the presumption of guilt is met by evidence of the accused, tending to rebut this presumption, the magistrate's decision is not open to review on motion to quash, and no conviction shall be quashed or set aside on the ground that evidence was improperly admitted or rejected unless some substantial wrong was thereby occasioned.

[*Rex* v. *Le Clair* (1917), 28 Can. Cr. Cas. 216, 39 O.L.R. 436, followed; *Rex* v. *Melvin* (1916), 34 D.L.R. 382, 27 Can. Cr. Cas. 350, 38 O.L.R. 231, distinguished.]

MOTION for an order quashing the conviction of the defendant, by the Police Magistrate for the City of Hamilton, for unlawfully keeping intoxicating liquor for sale, contrary to the Ontario Temperance Act, 6 Geo. V. ch. 50, sec. 40. Statement.

M. J. O'Reilly, K.C., for the defendant.

Edward Bayly, K.C., for the magistrate.

ORDE, J.:—The notice of motion sets forth several grounds upon which this conviction is attacked, but upon the argument Orde, J.

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they resolved themselves substantially into two, namely: (1) that there was no evidence to justify the conviction; and (2) that the Police Magistrate improperly admitted irrelevant evidence which affected his judgment, to the prejudice of the accused.

The accused was convicted by the Police Magistrate for the City of Hamilton of unlawfully keeping liquor for the purpose of sale, barter, or other disposal, at No. 23 Case street, Hamilton, in contravention of the Ontario Temperance Act. There was ample evidence that the accused had strong beer upon his premises. He admits that he had several bottles, but claimed that they were for his own private use. There was, therefore, evidence constituting *primâ facie* proof of guilt upon a charge of keeping for sale, under sec. 88.

It was contended that possession of liquor could not be treated as *primâ facie* proof of guilt unless the liquor was found upon a search made under a search-warrant issued under sec. 67. If sec. 67 were the only one which created the presumption of guilt upon proof of possession, this argument might have some force. The concluding words of sec. 67 and the provisions of sec. 88 overlap, but to give effect to the argument now advanced would be to nullify the effect of sec. 88 completely.

Mr. O'Reilly urged that where the presumption of guilt was met by evidence of the accused or otherwise tending to rebut this presumption, the magistrate's decision was open to review upon a motion to quash. And in support of this argument he referred to two Alberta cases, *Rex* v. *Covert* (1916), 34 D.L.R. 662, 28 Can. Cr. Cas. 25, 10 Alta. L.R. 349, and *Rex* v. *Barb* (1917), 35 D.L.R. 102, 28 Can. Cr. Cas. 93. Those decisions are in direct conflict with the line of cases in Ontario of which *Rex* v. *Le Clair* (1917), 28 Can. Cr. Cas. 216, 39 O.L.R. 436, is an example. The law on this point is too well settled in this Province to leave room for any question except in some higher Court.

I must hold that there was sufficient *primâ facie* evidence of possession on which the magistrate could convict; and, unless the conviction ought to be quashed upon the other ground, it must stand.

In all cases of summary conviction, wherever it is clear that the accused has not had a fair trial, or the magistrate's judgment has proceeded upon grounds which are improper or unfair to the

accused, the conviction is open to review. *Rex* v. *Melvin* (1916), 34 D.L.R. 382, 38 O.L.R. 231, 27 Can. Cr. Cas. 350, is cited in support of the contention that the fact that drunken men had been seen coming from the place where the liquor was found was not relevant to the issue, and, having been admitted, might have affected the judgment of the magistrate. It is pointed out by Mr. Bayly that, after the decision in that case, sec. 102*a*. was added to the Act by 8 Geo. V. ch. 40, sec. 19. By that section, "no conviction shall be quashed or set aside on the ground that some evidence was improperly admitted or rejected, or some irregularity occurred at the hearing, unless, in the opinion of the Court or Judge, some substantial wrong was thereby occasioned."

If *Rex* v. *Melvin* is to be regarded as an authority that the mere admission of irrelevant evidence, which may have affected the magistrate's mind, is sufficient ground for quashing the conviction, then it seems to be clear that sec. 102*a*. declares that to be no longer law, and that now it must appear that some substantial wrong to the accused was really occasioned thereby.

In the present case there was evidence not only of the finding of the liquor in the house, but also that, on the occasion when the police entered, a man who was not the accused was having a meal at which he was drinking beer; that there were a large number of empty gin-bottles and beer-bottles in the place; drunken men had been seen going into and coming out of the house on several different occasions; and men had been seen drinking at the dining-room table with glasses and bottles on the table, though there was no evidence that they were drinking intoxicating liquor. There was direct and properly admissible evidence of the foregoing facts, but there was also a good deal of hearsay evidence, which the magistrate ought not to have admitted, such as statements made to the police constable by the man who was eating a meal in the house, statements made by the wife of the accused, and conversations overheard in the house without any evidence that the accused was present at the time. All this last mentioned evidence was clearly inadmissible.

Mr. O'Reilly contends that the evidence as to drunken men entering or coming from the house, and as to the presence of empty bottles, and as to the strange man drinking at his meal, is all irrelevant and ought not to have been admitted. I cannot agree

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with this view. The accused is charged with keeping liquor for sale. Having liquor in his private dwelling house is quite lawful, if not kept for sale, but under sec. 88 the magistrate may convict of keeping for sale unless the accused can displace the presumption against him. Surely the character of the house, the frequent presence of other men and their entering or leaving the house intoxicated, the number of empty bottles, and the drinking of liquor by a strange man at a meal, are all factors in assisting the magistrate to come to a conclusion. Far from being irrelevant, I should consider all such evidence most proper and desirable in determining the *bona fides* of the defence, for that is really the point. The accused is *primâ facie* guilty. All such evidence, whether adduced in support of the charge or by way of reply, is directed towards meeting or answering the defendant's denial of his guilt.

Then as to the admission of the hearsay evidence, I am unable to see how it in any way prejudiced the accused. The magistrate finds as a fact that the accused had been selling liquor. While the magistrate also states that the accused had been selling liquor under the guise of refreshments, and had been carrying on a restaurant business without a license—statements justified only by the hearsay evidence—I do not gather from the magistrate's judgment that he bases upon the hearsay evidence his finding of fact upon which he adjudges the defendant guilty. And, as there is ample admissible evidence coupled with the *primâ facie* proof of guilt to justify the conviction, I am of the opinion that no substantial wrong has been done by the improper admission of evidence, and that the conviction must be affirmed.

The motion to quash is accordingly dismissed with costs.

I was also asked to reduce the sentence of three months in gaol, imposed by the magistrate. Some good ground should be shewn to justify the exercise of any such power. None was shewn in this case, and I must decline to interfere.

Judgment accordingly.

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Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Ives, JJ. October 19, 1920.

DIVORCE AND SEPARATION (§ III E—38)—ACTION FOR JUDICIAL SEPARATION AND ALIMONY—EVIDENCE OF ATTEMPT TO COMMIT ADULTERY MANY YEARS BEFORE ACTION—ADMISSIBILITY OF.

In an action for judicial separation and alimony on the ground of adultery, evidence of an attempt to commit adultery with another woman several years before the action was begun is inadmissible.

HARVEY, C.J., held that the evidence was admissible and that the appeal should be dismissed. Stuart, Beck and Ives, JJ., held that the evidence was inadmissible. Stuart and Beck, JJ., would allow the appeal because of the admission of the evidence.

IVES, J., would dismiss the appeal because although the evidence objected to was inadmissible it was unnecessary and without it the trial Judge would have come to the same conclusion.

[See also annotation to *Walker* v. *Walker* (1919), 48 D.L.R. 1.]

Statement.

APPEAL from a judgment of Walsh, J., for judicial separation and alimony in favour of the plaintiff wife, on the ground of adultery.

A. A. McGillivray, K.C., for appellant.

S. W. Field, for respondent.

Harvey, C.J.

HARVEY, C.J.:—While I feel by no means sure that I would have come to the conclusion of the trial Judge that adultery on the part of the defendant was established I can feel no certainty, not having the opportunity of seeing and hearing the witnesses that I would not, and therefore I am not able to question the correctness of his finding.

Objection was taken at the trial to the admission of evidence of an attempt to commit adultery with another woman several years before the action was begun and that objection is pressed before us. In my opinion the evidence was admissible. There is no direct evidence of adultery in this case and it is only by inference from the found facts that it is established. It seems to me clear that not merely the opportunity to commit the act but the disposition of the defendant so to do must appear before the inference can be drawn. It is possible that the disposition might be inferred without direct proof but if direct proof can be given since the fact must be established it is it appears to me clearly proper.

It is stated in Best on Evidence, 11th ed., at 278, that

> Where the very nature of the proceedings is such as to put in issue the character of any of the parties to them, . . . it is not only competent to

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give general evidence of the character of the party with reference to the issue raised, but even to inquire into particular facts tending to establish it,

and cases of keeping a common bawdy house, seduction and rape are cited as instances.

Harvey, C.J.

In my opinion the principle there enunciated is here applicable and declares this evidence admissible.

It is also objected on the argument before us for the first time that this action should have been begun by a petition, that there were other defects. In my opinion this is only a question of procedure which is for the purpose of bringing the merits before the Court and it is now too late to object.

The only other objection is as to the *quantum* of alimony which the trial Judge fixed at $100 a month. Having regard to the evidence as to the value of the defendant's property and its character and of his business and the age of the parties who have been married for 27 years and the manner of acquisition of the property the amount is in my opinion in no way excessive.

I would therefore dismiss the appeal with costs.

Stuart, J.

STUART, J.:—I agree with Harvey, C.J., upon the point of procedure, viz., that the objection even if it could have been properly taken at the beginning, ought not, at this late stage, to be entertained. But I agree also with Ives, J., that the procedure was correct in any case. I think it was only the substantive law of divorce that was introduced by the North West Territories Act and not the mere procedure for enforcing that law in the Provincial Court. This I take to be the principle of the decision in *Board* v. *Board*, 48 D.L.R. 13, [1919] A.C. 956.

But I agree with Beck, J., that the evidence of the witness McSorley was improperly admitted. We have, in the last year or two, been obliged to begin the administration of a new field of law, one which we had before never felt it necessary to examine, viz:—the law of divorce and judicial separation. We have now to consider, far more frequently than ever before, the question of evidence of adultery. I think it would be a very grave step, indeed, to lay it down as a general rule for the future, that a plaintiff, in one of these actions, could in his or her pleadings allege adultery only with a named paramour and then, when it came to trial, should be at liberty, in order to prove the adultery

alleged, to introduce, quite without warning, evidence of an attempt, or desire, evinced years ago (seven or eight years in this case I think), to commit adultery with an altogether different person. That is, in my opinion, too great a violation of the principle of fairness and natural justice. The defendant, of course, must be prepared to contest all proof of facts which tend to shew adultery with the person named. But if it is proposed, in order to prove that, to shew that at one time and another during his or her past life and years ago, he or she made improper approaches to this person and that, it does seem to me that natural fairness will require that these alleged facts be pleaded beforehand at least. And I do not mean to say that even if pleaded such facts could be admitted properly to proof.

I cannot, moreover, agree to the view that there is any logical relevancy. This, of course, depends not upon law but upon what view one takes of what is a proper basis for an inference of fact. But I do not think it at all follows that, because a man may conceive a passionate desire for sexual intercourse with one woman, therefore, you may infer that he had a desire to have—and did in fact have—sexual intercourse with any other woman one may please to name. This would be leaving no room for differences in the attractive qualities of women; and would mean nothing more than the mere assertion that the man had natural passions which, on one occasion, he failed to restrain. Of course, if it were thought necessary to prove that human beings have really natural passions the fact might be relevant.

Therefore, but chiefly on the first ground, I think the evidence was inadmissible.

Next as to the consequence of the improper admission of this evidence. I think it means that the Court of Appeal must reject it; but may either make up its own mind, there having been no jury, as to the facts from a perusal of the evidence properly admitted, or may, in its discretion and in a proper case, order a new trial. In such a case, the finding of the trial Judge is not to be regarded, I think, at all because it was based upon different evidence. I do not know that I should have much hesitation in finding from the evidence that there had been adultery, but, I think, in view of the facts that the plaintiff, last October or November, directly accused the two of the offence in the presence of each other, which they

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did not deny; and that she continued to cohabit with the defendant thereafter until she left, that she must be held to have condoned the offence. She had apparently plenty of places to go to and often did go away to her daughter's on visits. I do not think she was in such hard case that she was forced to stay with her husband.

Her final departure was not due to the fact of adultery newly discovered and was not indeed intended at the moment as a departure at all but only a visit. The trial Judge thought that the adultery continued thereafter right up to the trial. If I were hearing a mere appeal upon the facts I do not think I would venture to disturb this finding. But, in the circumstances, I have to make up my own mind on the admissible evidence as I read it and I am bound to say that I do not feel prepared to find as a fact, upon the evidence as I find it in the book, that there was adultery after the plaintiff's departure.

Yet the evidence is so strong respecting the prior adultery that, I think the only satisfactory course, in view of the admission of the improper evidence, is to allow the appeal and order a new trial. The admission of the evidence referred to and its consideration by the trial Judge, was, I think, a "substantial wrong" to the defendant, within the meaning of R. 329 (Rules of Court, C.O.N.W.T. 1915). I am, myself, not quite sure how much weight the reading of it has had upon my own mind in respect of the question of the existence or non-existence of the adultery charged and that even though I think it was logically irrelevant. One may mistake a prejudice upon moral grounds for a safe basis of reasoning about facts.

Beck, J.

BECK, J.:—This is an appeal from the judgment of Walsh, J., at the trial in an action for judicial separation in which he gave judgment for the plaintiff, the wife. Subject to how I would have been affected by the appearance and demeanour of the witnesses, I am inclined to believe that, in view of the character of the evidence on the plaintiff's behalf—evidence leading only to inference of adultery—and the denial of the misconduct by the husband and the woman with whom misconduct is alleged; the relationship between all the parties concerned and their near relatives for many years and the corroboration of the defendant's evidence in some particulars, I would not as a trial Judge have found in

favour of the plaintiff. Certainly if the case had been one for divorce I feel sure I would have dismissed the action.

As to the nature of the evidence in such cases as this, see Bishop on Marriage, Divorce and Separation, vol. 2, p. 517, secs. 1349 *et seq.* and *Ginger* v. *Ginger* (1865), L.R. 1 P. & D. 37. Were there nothing more in the case I should, however, have felt inclined, with hesitancy, to leave the trial Judge's finding undisturbed; but there is a question of the inadmissibility of evidence.

A woman was called as a witness on behalf of the plaintiff who stated that in the year 1912, the defendant made improper proposals to her which she resisted. This evidence was objected to.

I think it was inadmissible. The only cases bearing upon the question, that I have been able to find, are those noted in Phipson on Evidence, 5th ed., p. 150, *tit* "adultery." Those noted in the first column were all cases of acts of adultery, or acts from which adultery might well be inferred, with the respondent—acts other than those upon which the petition was based—that is, *similar* acts with the *same* party. In these cases the evidence was admitted. In the second column is the following note (p. 150):

> A. petitions for divorce from B., her husband, on the ground *inter alia* of his adultery with C. Evidence that B. had committed adultery with D. and was a man of immoral habits, held inadmissible, *Pollard* v. *P.*, 1904, Times, Mar. 26, *per* Jeune P. *Contra Joyce* v. *J.*, 1909, Times, April 9, where attempts by B. to enter the women servants' bedrooms were proved; and such evidence might subject to the protection of 32-33 Vict. ch. 68, sec. 3, be relevant as affecting credit.

The English statutory provision above referred to is the same as sec. 8 of the Alberta Evidence Act, 1 Geo. V. 1910 (2nd sess.), ch. 3. This would not make the evidence objected to admissible if, at all, in the circumstance of this case, for the defendant had not yet given evidence.

I think the evidence objected to was not admissible. I think it could not have failed to make an impression upon the mind of the trial Judge, as it in fact appears to have done upon the plaintiff as corroborative of the allegation of the defendant's adultery, and furthermore, as diminishing the credibility of the defendant as a witness on his own behalf. Furthermore, there was an attempt made by defendant's counsel to rehabilitate the defendant's credibility but evidence for this purpose was rejected.

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On the ground then, of the improper admission of evidence, I would allow the appeal.

As to the costs, it seems that they must all fall upon the defendant.

IVES J.:—This is an appeal from the judgment of Walsh, J., in an action, brought by a wife, for a judicial separation and for alimony on the ground of the husband's adultery.

The first ground of appeal is, that the circumstances disclosed by the evidence do not support the finding of adultery.

I agree that the evidence of the witness McSorley, of defendant's attempt upon her, was inadmissible; but in view of the rest of the evidence, it was unnecessary and without it, I am satisfied, the trial Judge would have come to the same conclusion.

I think the rather exhaustive examination of the evidence during the argument leaves no room to doubt that the finding is supported.

Next, it was argued that there had been condonation by the wife of the husband's conduct. It seems idle to discuss whether or not the evidence amounts to a condonation up to January or February of 1920, when the wife was called away by the illness of her daughter in Saskatchewan. She never returned and the trial Judge finds that the husband's adulterous conduct continued up to the time of trial. Manifestly then, there could be no condonation of his conduct during that period. If condonation had been proved however, advantage of that defence must be given even though not pleaded.

But the submission of the counsel for the appellant most strongly argued was that the Court was without jurisdiction having regard to the pleadings and proceedings.

It is urged that an action for the remedy claimed here must be brought by a petition, verified by plaintiff's affidavit and negativing collusion because so prescribed by the statute giving the remedy, viz.: Divorce and Matrimonial Causes Act, 1857, 20-21 Vict. (Imp.), ch. 85. That statute is in force here by virtue of Dominion legislation and it is urged that this Court has jurisdiction to entertain the action only if the statutory procedure is adopted. I think that is true only in the absence of established rules of procedure applicable here. The administration of justice in the Province including the constitution of the Courts and the

procedure in civil matters in those Courts is exclusively within the provincial authority under the B.N.A. Act.

If the Court in this Province, administering the Act of 1857, were not a Provincial Court, then the procedure prescribed by the statute would require to be followed in order to confer jurisdiction. For example, the recent Dominion Act relating to Bankruptcy, prescribed the procedure to be followed in the administration of that legislation and such procedure becomes obligatory because the Court dealing with that subject is a Dominion Court and not provincial.

By our Rules of Court provision is made to enable every claim to be adjudicated. Rule 119 says: "Except as otherwise provided, every action shall be commenced by the issue of a statement of claim by the clerk of any judicial district of the Court."

It follows that, in the absence of special provision for a particular kind of action, then the action shall be commenced by a statement of claim and that is the position here. We have no rule specially dealing with actions for judicial separation, but the administration of the Act granting the remedy, being within the jurisdiction of this Court, R. 119 (see C.O.N.W.T. 1915, Rules of Court), in effect, requires the action to be commenced by statement of claim. The case of *Gray* v. *Balkwill* (1907), 6 Terr. L.R. 283, was decided when sec. 21 of the Judicature Ordinance was in force. That section was repealed in 1918.

The appeal should be dismissed with costs.

Judgment accordingly.

GRAHAM & STRANG v. DOMINION EXPRESS Co.

Ontario Supreme Court, Masten, J. June 25, 1920.

1. INTOXICATING LIQUORS (§ II A—41)—ONTARIO TEMPERANCE ACT—BOARD OF LICENSE COMMISSIONERS—POWER TO INTERFERE WITH EXPORT OF LIQUOR FROM PROVINCE.

The Ontario Temperance Act, 6 Geo. V. 1916, ch. 50., does not give power to the Board of License Commissioners for Ontario to interfere with the export of liquor from Ontario. Secs. 41 and 46 of the Act were not intended to form a basis for interfering with the export of intoxicating liquor and if they do, they are beyond the powers of the Provincial Legislature.

2. CARRIERS (§ III B—382)—OF LIQUOR—PROFESSED BUSINESS—DUTY TO RECEIVE CONSIGNMENT FOR DELIVERY IN ANOTHER PROVINCE—REFUSAL—LIABILITY.

A common carrier, part of whose professed business is the carrying of liquor cannot at its own option refuse to carry, for a firm of dealers in intoxicating liquors, a consignment of liquor for delivery in another Province, even though such firm is designated by the Board of License Commissioners as one whose goods they should not carry.

[*Gold Seal* v. *Dominion Express Co.* (1917), 37 D.L.R. 769, followed.]

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Statement.

AN action brought by a firm of dealers in intoxicating liquors to compel the defendants, who were carriers, to receive and transport shipments of liquors from the plaintiffs' warehouse in the town of Kenora, in the Province of Ontario, to persons in other Provinces or in foreign countries. The plaintiffs, as soon as the action was commenced, applied for an interim mandatory order and injunction. The motion came on for hearing before MASTEN, J., in the Weekly Court, Toronto, and was turned into a motion for judgment, and heard, subject to preliminary objections.

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

Angus MacMurchy, K.C., and *A. D. Armour*, for the defendants.

Edward Bayly, K.C., for the Provincial Board of License Commissioners (intervenants).

The Attorney-General for Ontario was duly notified, but did not desire to be heard.

Masten, J.

June 18. MASTEN, J.:—Motion by the plaintiffs for an interim mandatory order requiring the defendants, until the trial of this action, to receive from the plaintiffs and transport shipments of liquor from the warehouse of the plaintiffs in the town of Kenora, in the Province of Ontario, to persons in other Provinces or foreign countries permitting such traffic, in *bonâ fide* transactions, or, in the alternative, for an injunction to restrain the defendants from refusing so to receive and transport such shipments of liquor, and for such further and other order as may seem just.

The facts not being in dispute and adequately appearing on the material filed, I suggested in the course of the argument that the motion be turned into a motion for final judgment, and, no reason to the contrary being suggested by counsel, I directed that course, and the argument proceeded on that footing.

The defendants raise two preliminary objections:—

First, that mandamus does not lie under the form of proceeding here adopted, because, in the circumstances shewn, the order, if made, must be in the nature of the prerogative writ of mandamus, and because such prerogative writ can be issued only on summary application upon originating notice, and cannot be granted in an action.

Second, that the defendants are primarily subject to the exclusive control and direction of the Dominion Railway Board, and the jurisdiction of the Court is thereby ousted, or, if not, its jurisdiction is so doubtful that, as a mandamus ought only to be granted in the clearest cases, the jurisdiction ought not to be exercised.

I deal with these objections in their order:—

I think that what is here sought is the mandatory order grantable in an action, and not the high prerogative writ of mandamus. The plaintiffs seek to enforce a personal right against a private corporation: a right, moreover, arising not from statutory enactment, but by force of the common law rule requiring common carriers to receive and transport goods properly tendered for transportation, provided such goods are of the class customarily carried by them. Further, I am of opinion that the jurisdiction depends on the construction of sec. 17 of the Ontario Judicature Act, and not on the historical argument which was so ably urged by Mr. Armour. The words of sec. 17 of the Ontario Judicature Act R.S.O. 1914 ch. 56, are as follows:—

"17. A mandamus or an injunction may be granted or a receiver appointed by an interlocutory order of the Court, in all cases in which it appears to the Court to be just or convenient that such order should be made; and any such order may be made either unconditionally, or upon such terms and conditions as the Court shall deem just; . . ."

Those words appear to me to confer a jurisdiction which the Court is bound to exercise if, in its opinion, it is "just or convenient" that a mandatory order be granted.

But, in order that no technicality may interfere with the disposition on the merits of the substantial and important question raised on this motion, I grant leave to the plaintiffs, if so advised, to serve *nunc pro tunc* an originating notice claiming the relief sought, I shorten the time for such notice to one day, consolidate the two motions, and direct that any order that may be granted issue in both proceedings.

With respect to the second preliminary objection: the provisions of the Railway Act of Canada, 1919, 9-10 Geo. V. ch. 68, touching express companies, are to be found in secs. 362 to 366. Sections 362, 363, and 364 were more especially referred to. They are as follows:—

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"362. No company shall carry or transport any goods by express, unless and until the tariff of express tolls therefor or in connection therewith has been submitted to and filed with the Board in the manner hereinbefore provided; or, in the case of competitive tariffs, unless such tariffs are filed in accordance with the rules and regulations of the Board made in relation thereto; or in any case where such express toll in any tariff has been disallowed or suspended by the Board.

"363. No express toll shall be charged in respect of which there is default in such filing, or which is disallowed or suspended by the Board.

"364. The Board may by regulation, or in any particular case, prescribe what is carriage or transportation of goods by express, or whether goods are carried or transported by express within the meaning of this Act, and may order that all such goods as the Board may think proper shall be carried by express."

A consideration of this group of sections appears to me to indicate that the jurisdiction of the Railway Board over express companies is confined to the question of tolls and tariffs, with accompanying provisions for making the same effective; and it is also to be observed that, while sec. 364 provides that the Board "may order that all such goods as the Board may think proper shall be carried by express," there is no corresponding provision under which the Board may interdict the express company from carrying any particular class of goods.

This view receives support from the decision of the Board of Railway Commissioners in the case of *Canadian and Dominion Express Cos.* v. *Commercial Acetylene Co.* (1909), 9 Can. Ry. Cas. 172.

The particular merchandise which is here in question is one gallon of whisky.

The existing express tariff sanctioned by the Board of Railway Commissioners, at p. 16, art. 33, expressly deals with the transportation of liquor and prescribes the rates to be charged for the transportation of whisky. At the present time the Board has not assumed to prohibit or in any way to interfere with the transportation of whisky by the defendant company; on the contrary, the implication from item 33 of the tariff above mentioned is that the defendant company are carriers of liquor.

Very clear and express words are necessary to oust the jurisdiction of the Court. Here I find nothing to oust the jurisdiction at the present time; and, in my opinion, I am bound to exercise it.

Section 362, however, provides that "no company shall carry or transport any goods by express . . . in any case where such express toll in any tariff has been disallowed or suspended by the Board." I express no opinion in regard to the situation that might arise if the Railway Board disallowed or suspended that item of the tariff relating to the transportation of liquor.

The result is, that I find myself unable to give effect to either of the preliminary objections.

On the merits, I have, after careful consideration, reached the conclusion that the plaintiffs are entitled to the relief sought, and, the circumstances shewing urgency (the plaintiffs' business being at a standstill), I announce my conclusion without delaying to formulate my reasons, which will be given in a few days. The judgment will declare that the defendant company are bound to receive from the plaintiffs and transport shipments of liquor sold from the warehouse of the plaintiffs in the town of Kenora, in the Province of Ontario, to persons in other Provinces or foreign countries permitting such traffic, in *bonâ fide* transactions; and ordering the defendant company to receive and transport liquor accordingly.

Costs will follow the event.

June 25. MASTEN, J.:—On the 18th instant I dealt with the case by disallowing the preliminary objections and announcing the conclusion at which I had arrived, and I now proceed to state my reasons.

The facts set up by the plaintiffs are that, prior to the 5th May, 1920, they carried on an export business in liquor from their warehouse in Kenora, and shipments were from time to time offered to the Dominion Express Company at Kenora and received by them for transportation to points in other Provinces of the Dominion of Canada, and the said shipments were delivered by the said Dominion Express Company to consignees residing outside the Province of Ontario.

By a mail order form, dated the 1st May, 1920, one J. A. Gowler, residing at 214 Ethelber street, Winnipeg, Manitoba, ordered from the plaintiffs a gallon of whisky, at the price of $12,

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which sum was received by the plaintiffs with the order. Thereupon the plaintiffs caused to be carried to the office of the defendant company at Kenora the said one gallon of rye whisky, and requested the express agent of the defendant company at Kenora to ship the same to J. A. Gowler, 214 Ethelber street, Winnipeg, Manitoba. All the requirements of the defendant company in respect to the said shipment were complied with by the consignors, and they were willing and ready to perform such other things, if any, as might lawfully be required by the defendant company for the purpose of making the said shipment to the said Gowler. The agent for the defendant company refused to accept the said shipment, purporting to act upon instructions from his head office. The said agent stated that his instructions were that no such shipments of liquor could be received for transportation by the defendant company. By reason of the refusal of the defendant company to accept and transport such shipment, the plaintiffs are prevented from delivering the said goods to the said Gowler, and in consequence thereof suffer loss and damage. The plaintiffs have received other orders for the export sale of liquor from their warehouse in Kenora, and, owing to the refusal of the defendant company as hereinbefore mentioned, are prevented from exporting liquor, and in consequence thereof are unable to carry on their business as exporters. They further allege that their liquor warehouse at Kenora is suitable for the business of export sale of liquor and complies with all the proper requirements, and has heretobefore been approved by the Board of License Commissioners and licensed as a customs and bonded warehouse, and no other goods than liquor for export from Ontario are kept and no other business than keeping and selling liquor for export from Ontario is carried on therein; and that the plaintiffs are prevented by reason of the refusal of the Dominion Express Company as aforesaid from selling liquor from such warehouse to persons in other Provinces than Ontario, or in foreign countries. They further allege that, by reason of the refusal of the defendant company so to receive and transport the shipment above mentioned, the legal rights of persons in other Provinces than Ontario are wrongfully affected and interfered with . . . that their business consists solely in *bonâ fide* transactions in liquor between themselves, in the Province of Ontario, and persons in other

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Provinces or foreign countries; and that, in the event of the continued refusal of the defendant company to accept shipments of liquor for export sale as aforesaid, they, the plaintiffs, will be compelled to abandon their business; that, unless an order of the Court is made without delay commanding the Dominion Express Company to receive and transport such shipments, they cannot continue to carry on their business; also that their business must necessarily be carried on by express, and the only means of transportation available is the Dominion Express Company; and that they will suffer loss and damage for which they cannot subsequently be compensated, because, pending such refusal, the business of the plaintiffs cannot be carried on, and now continues to be embarrassed and prejudiced and at an actual standstill, with no remedy available other than an order of this Court commanding the defendant company forthwith to receive and transport.

In answer, the defendants have filed an affidavit of Walter Hudson Burr, traffic manager of the defendant company, producing a copy of a letter dated the 25th March, 1920, purporting to be signed by J. D. Flavelle, Chairman of the Board of License Commissioners for Ontario, as follows:—

"The Superintendent

"Dominion Express Co., Toronto.

"Dear Sir:

"On the 31st of this month certificates granted to certain individuals and companies enabling them to legally ship intoxicating liquor to points outside the Province of Ontario will lapse at midnight of that day, and the Board would ask you to instruct your agents in these districts not to permit any further shipments of liquor after that date until they are notified in writing by the Board. The names of the individuals and companies at present holding these certificates with their places of business, are as follows:—

"The Hudson's Bay Co., Kenora; John Stormont jr., Kenora; Kenora Wine & Spirit Co., Kenora; James P. Gordon, Dryden; Rat Portage Liquor Co., Kenora; Liquor Imports Ltd., Kenora; D. O. Roblin, Toronto; Hatch & McGuinness, Toronto; Graham & Strang, Kenora; Kenora Exporting House, Kenora; Western

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Shippers, Kenora; Rainy River Export Co. (E. J. Callaghan, Pres.), Rainy River; Leo. George, Ottawa; Herman Holbeck, Fort Frances.

"Will you kindly notify at once your agents at these points to the above effect?

"Yours truly,
"J. D. Flavelle, Chairman."

Also a further letter dated the 3rd April, 1920, to W. H. Burr from J. D. Flavelle, as follows:—

"W. H. Burr, Esq.,
"Traffic Manager, Dominion Express,
"Toronto, Ont.

"Dear Sir:—

"We confirm telegrams sent out yesterday advising the different transport companies to permit shipments of liquor to continue until April 30th from the export warehouses in Kenora, Dryden, Toronto, and Ottawa. We have extended the time permitting shipments of same until April 30th.

"Yours truly,
"J. D. Flavelle."

The defendants further allege that on the 28th April, 1920, the said W. H. Burr, as such traffic manager, received from J. D. Flavelle a further letter dated the 27th April as follows:—

"Dear Sir:—

"Discontinue shipments of liquor after midnight Friday April 30th, from export warehouses, unless under special written instructions from the Board of License Commissioners for Ontario.

"Yours truly,
"J. D. Flavelle.

"*Warehouses:* D. O. Roblin, Toronto; Hatch & McGuinness, Toronto; Hudson's Bay Co., Kenora; Kenora Wine & Spirit Co., Kenora; Rat Portage Liquor Co., Kenora; Liquor Imports Limited, Kenora; Graham & Strang, Kenora; Kenora Exporting House, Kenora; Western Shippers, Kenora; James P. Gordon, Dryden; Leo George, Ottawa.

"W. H. Burr, Esq.,
"Traffic Manager, Dominion Express Co.,
"King & Simcoe Streets, Toronto."

The affidavit of Burr then continues as follows:—

"4. No special written instructions and no instructions of any kind were given by the said Board or its chairman to me or to the defendant company after the letter of the 27th April permitting the said company to accept shipments of liquor from the plaintiffs.

"5. Since the passing of the Ontario Temperance Act the defendant company has not knowingly received or carried or held itself out as prepared to receive or carry shipments of liquor from points within to points outside of Ontario, except as authorised by the said Act and permitted by the Board of License Commissioners for Ontario.

"6. Any shipments received and carried for the plaintiffs, as alleged in paragraph 2 of the affidavit of Walter Ewing Strang sworn herein, were so received and carried under the authority of the said Board, evidenced by the export warehouse certificate issued to the plaintiffs by the Board and extended to the 30th April last, which authority had expired prior to the happening of the events in question herein.

"7. The said company, in ceasing to receive or carry shipments of liquor except as specially authorised or required by the said Board, has endeavoured thereby to comply with the law and with the authority appointed to administer the Ontario Temperance Act."

The defendant also files the affidavit of Henry Parsons Sharpe, general agent of the defendant company, producing and identifying as exhibits A. and B., copies of "Express Classification for Canada No. 4, effective 1st February, 1920," which, taken together, constitute the classification in use by the defendant company during the month of May, 1920.

The contentions of the defendants are:—

1. That they are not common carriers.

2. That, if they are common carriers, their powers, rights, and limitations are derived exclusively from the provisions of the Railway Act, and that they are not thereby placed under obligation to carry for every person.

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3. That, even if they are common carriers of liquor, they do not profess to carry any liquor except in accordance with the license of the Board of License Commissioners of Ontario.

4. That, having regard to the provisions of the Ontario Temperance Act, liquor can only be exported from the Province of Ontario from a duly licensed export warehouse; that the plaintiffs' warehouse has ceased to be a duly licensed export warehouse; that the liquor now contained in it is illegally in the Province of Ontario; and that the License Commissioners of Ontario are by the Ontario Temperance Act empowered to prohibit and have prohibited the transportation out of the Province of such liquor.

Opposing this principal contention, the plaintiffs submit broadly that the action of the License Commissioners and the refusal of the defendants to transport liquor from Ontario to Manitoba amount, in the circumstances, to a prohibition of inter-provincial trade; and, whether done directly or indirectly, is in its essence an interference with trade and commerce, *ultra vires* of the Provincial Legislature; and hence that the Ontario Temperance Act, if and in so far as it supports the action of the Board of License Commissioners, is *ultra vires*.

On a narrower ground the plaintiffs further submit that the liquor warehouse of the plaintiffs and the business now carried on therein does comply with all the requirements of the Ontario Temperance Act; that such warehouse has heretofore been approved by the Board; that such approval is final, unless alterations or variations in the construction of the warehouse are shewn to have taken place, or unless it is shewn that the business is not being carried on as a genuine export business; that no such variation or alteration in conditions has arisen; and, consequently, that the action of the Board of License Commissioners in prohibiting the exportation of the plaintiffs' liquor is not supported by the provisions of the Ontario Temperance Act. The plaintiffs, therefore, contend that the defendants are bound, as common carriers, notwithstanding the directions of the License Board, to receive from the plaintiffs and convey to Winnipeg the whisky in question.

The first question is, whether the defendant company are common carriers. The incorporation of the company was by special Act of the Dominion of Canada, 1873, 36 Vict., ch. 113. Section 4 of that Act declares:—

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"It shall and may be lawful for the said company—

"(1) To contract with railway companies, steamboat companies or owners, stage or waggon proprietors and others, for the carriage and transport of any goods, chattels, merchandise, money, packages or parcels that may be entrusted to them for conveyance from one place to another within the Dominion of Canada:

"(2) To contract with British and foreign express companies, and other parties, for co-operating with and transacting such business as aforesaid in connection with the said Company:

"(3) To acquire, construct, charter and maintain boats, vessels, vehicles, and other conveyances for the carriage and transport of any goods or chattels whatsoever by the Company."

In the case of *Johnson* v. *Dominion Express Co.* (1896), 28 O.R. 203, Rose, J., says, at p. 205: "The defendant company is a common carrier;" and in *F. T. James Co.* v. *Dominion Express Co.* (1907), 13 O.L.R. 211, 218, the late Chancellor, Boyd, said of these same defendants: "The defendants are common carriers, and are liable as such for acts of negligence."

It may well be that their rights, liabilities, and obligations are modified and affected by the provisions of the Railway Act, and by the orders of the Railway Board, but no alteration or modification of their obligations, affecting the question which is submitted in this case, has been shewn. I therefore hold that the defendants are fundamentally common carriers, with their obligations modified as to tariff rates by the Railway Act of Canada; and the tariff of rates filed by the defendants and approved by the Railway Board of Canada establishes that liquor, including whisky, is one of the classes of goods which the defendants profess to carry.

It is, however, a well-recognised principle of the law of carriers that a common carrier is under obligation to receive and transport only such goods as it professes to carry; and the second point urged by the defendants and by the License Board is, that, since the passing of the Ontario Temperance Act, the company, even though held to be common carriers of liquor, have professed to carry it only when such carriage was authorised or licensed by the Board of License Commissioners of Ontario; and that, the transportation of the liquor in question having been interdicted by

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that Board, this gallon of whisky is not goods of the description which the defendants profess to carry. This argument, at first blush, seems plausible; but, on further consideration, I am of opinion that it is not sound.

"At common law no person is bound as a common carrier to carry any goods of a kind which he does not profess to carry:" *Dickson* v. *Great Northern R.W. Co.* (1886), 18 Q.B.D. 176, *per* Lindley, L.J., at p. 183.

He may profess to carry only from one place to another place, in which case he is not a common carrier to intermediate places, or to any other place: *Johnson* v. *Midland R.W. Co.* (1849), 4 Exch. 367, 154 E.R. 1254.

I have not been referred to any case determining or suggesting that, while professing to carry goods of a particular kind, the carrier may discriminate against individuals, and refuse to carry for a certain class of persons. Such a holding would be at variance with the oldest principles of the law of carriers, for "a common carrier is as much bound to carry goods as an *innkeeper* is to lodge a guest:" *Boson* v. *Sandford* (1687), 1 Show. 101, *per* Holt, C.J., at 104, 89 E.R. 477. It seems plain that the carrier may discriminate in the description of goods carried, or in the places to which he carries, but not at his own option in the persons for whom he carries.

If the defendants are common carriers of liquor, it follows that they cannot at their own option refuse to carry liquor for any single individual or for a class of persons selected by themselves. On the same principle, they may not of their own motion refuse to carry for a class of persons selected for them by some one else, for example, by the Ontario License Board, nor do they cease to be common carriers for such a class because they have for a period of time declined to carry for them. If the Ontario License Board can legally segregate a class of persons so as to make the transportation of shipments for that class illegal, that is another matter entirely.

I am, at the moment, dealing only with the argument of the defendants that they are not common carriers of the goods in question, because goods tendered for shipment by the particular class of shippers to which the plaintiffs belong are not goods which they profess to carry, and with the argument that, because the

defendants have of their own motion, ever since the passing of the Ontario Temperance Act, refused to accept shipments unless licensed by the Ontario License Board, they are no longer common carriers of such goods.

I am of opinion that, assuming that the defendants are common carriers of liquor, and that all necessary preliminary conditions have been fulfilled by the plaintiffs, the refusal to carry liquor for a particular class, however ascertained, is as unwarrantable as the refusal to carry for an individual.

But a common carrier is bound to carry goods tendered only if he have no lawful excuse; and, if the carriage of such goods is illegal, that is manifestly a lawful excuse. This brings me then to the consideration of the fourth and main question, as I have set it out above.

The broad general claim of the plaintiffs is that, if the prohibition of the Board of License Commissioners is not warranted by the Ontario Temperance Act, it is beyond the powers of the Commissioners and nugatory. If, on the other hand, their prohibition is supported by the provisions of the Ontario Temperance Act, then the Act itself is in that respect unconstitutional.

It has been determined that the powers of a Province to legislate respecting intoxicating liquor are derived from the words of sec. 92, sub-sec. 16, of the British North America Act, "generally all matters of a merely local or private nature in the Province:" *Attorney-General for Ontario* v. *Attorney-General for the Dominion*, [1896] A.C. 348; *Attorney-General of Manitoba* v. *Manitoba Licence Holders' Association*, [1902] A.C. 73; *Hudson Bay Co.* v. *Heffernan*, (1917), 39 D.L.R. 124, 29 Can. Cr. Cas. 38, 10 S.L.R. 322. Is then the action of the Board of License Commissioners a matter local to Ontario?

The manifest purpose and effect of their action seems to me to be not anything local to Ontario, but rather to prevent the export of intoxicating liquor into Manitoba and the other Western Provinces, thus interfering with trade and commerce, a matter not within the jurisdiction of the Legislature of Ontario, and therefore not within the competence of its agent, the Board of License Commissioners for Ontario.

The extent of the jurisdiction of the Legislature was clearly understood at the date of the passing of the Ontario Temperance Act, and is fully recognised by sec. 139 of that Act, which says:—

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"While this Act is intended to prohibit and shall prohibit transactions in liquor which take place wholly within the Province of Ontario, except under license or as otherwise specially provided by this Act, and to restrict the consumption of liquor within the limits of the Province of Ontario, it shall not affect and is not intended to affect *bonâ fide* transactions in liquor between a person in the Province of Ontario and a person in another Province or in a foreign country, and the provisions of this Act shall be construed accordingly."

That section must, in my view, be construed as an overriding section, to which other provisions of the Act must be interpreted as subsidiary, if they appear in any way to conflict with it.

For that reason, I think that secs. 41 and 46 of the Ontario Temperance Act* were not intended to interfere by an indirect method with trade and commerce, but rather to afford means for insuring that export warehouses did not operate so as to defeat or evade the provisions against local traffic and use within the Province.

In other words, I think that secs. 41 and 46 were not intended to afford a basis for interfering with the export of intoxicating liquors from this Province, and, if they do that, they are beyond the powers of the Provincial Legislature. This view is supported by the decisions to which I have already referred, and by the reasoning of Mr. Justice Ives in the case of *Gold Seal Limited* v. *Dominion Express Co.*, (1917), 37 D.L.R. 769.

*Section 41 of the Ontario Temperance Act, 6 Geo. V. 1916, ch. 50, prohibits any person having intoxicating liquor, except as therein provided, and "except as provided by this Act."

Section 46 is as follows:—

46.—(1) Nothing herein contained shall prevent any person from having liquor for export sale in his liquor warehouse, provided such liquor warehouse and the business carried on therein complies with the requirements in subsection 2 hereof mentioned, or from selling from such liquor warehouse to persons in other Provinces or in foreign countries.

(2) The liquor warehouse in this section mentioned shall be suitable for the said business and shall be subject to the approval of the Board, and shall be so constructed and equipped as not to facilitate any violation of this Act, and not connected by any internal way or communication with any other building or any other portion of the same building and shall be a warehouse or building wherein no other commodity or goods than liquor for export from Ontario are kept and wherein no other business than keeping or selling liquor as aforesaid is carried on.

By sec. 2 (*a*), "Board" means the Board of License Commissioners appointed under the Act.

The conclusions at which I have thus arrived may be summarised as follows:—

(1) The defendants are common carriers.

(2) Carrying liquor is a part of their professed business.

(3) They cannot, at their own option, refuse to carry for a particular class, though that class is designated by the Board of License Commissioners for Ontario.

(4) The Ontario Temperance Act does not give power to the Board of License Commissioners for Ontario to interfere, in the manner here attempted, with the export of liquor from Ontario.

(5) If it did, the Act would be *ultra vires* the Provincial Legislature.

BREAKEY v. CORPORATION OF METGERMETTE-NORD.

Supreme Court of Canada, Idington, Duff, Anglin, Brodeur and Mignault, JJ. April 6, 1920.

APPEAL (§ II A—35)—TITLE TO LAND—FUTURE RIGHTS—TIMBER LIMITS—VALUATION ROLL—JURISDICTION OF COURT.

When it is alleged that, of a number of properties entered on the assessment roll, and subject to municipal and school taxes, in certain cases the appellants only have the right to cut timber, and do not own the soil, the question is raised as to the title of these properties; and the Supreme Court of Canada has jurisdiction to entertain an appeal under the Supreme Court Act, R.S.C., 1906, ch. 139, sec. 46 (b).

Statement.

MOTION to quash an appeal from the judgment of the Court of King's Bench, appeal side, (1919), 29 Que. K.B. 309, reversing the judgment of the Superior Court and dismissing the appellant's action to set aside a valuation roll of the corporation respondent.

The material facts of the case are fully stated in the reasons for judgment of the Registrar of this Court on a motion to affirm jurisdiction, which motion was granted.

THE REGISTRAR:—This is a motion to affirm jurisdiction; the facts shortly are as follows:—

An action was brought by Andrew H. D. Breakey *et al.* against the Corporation of Metgermette-Nord in which the plaintiffs alleged:

(1) Plaintiffs are taxpayers of the defendant corporation, entered on the valuation roll as owners of taxable property, for a considerable amount, and are the largest land-owners of defendant corporation without taking into account the property above mentioned, and they are especially interested in the municipal affairs of defendant, most particularly in the valuation roll

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in force. (2) Defendant corporation has now a valuation roll on which it relies in making its distributions for municipal and school taxes. (3) In the month of July last, the appraisers of the defendant corporation prepared a list which was similar to that of the following September, and which will be produced, in pursuance of which list the defendant corporation has both taxed and levied and has made the following lots which it has mentioned on the said roll as belonging to the plaintiffs, subject to taxation, *viz.*: Range 2, lots 17 and 18; range 2, lot 25; range 2, lot 33; range 2, lot 34; range 2, lot 35; range 3, lot 16; range 3, lot 58; range 5, lot 1; range 5 lot 2; range 5, lots 8 and 9; range 6, lot 5; range 6, lot 6; range 6, lot 7; range 6, lot 8; range 6, lot 9; range 6, lot 10; range 7, lot 9; range 7, lot 29; range 7, lot 23. (4) Plaintiffs have nothing to do with lots 17 and 18 of range 2, since they are owners neither of the soil nor of the cutting rights. (5) Plaintiffs are not owners of lots 33 and 34 of range 2, having neither the soil nor cutting rights. (6) Plaintiffs are not owners of lot 25, range 2; having only the right of floating the wood. (7) Plaintiffs possess as owners only ½ acre on the north-east part of lot 35, range 2, with the right of cutting on the balance. (8) Plaintiffs have nothing to do with lot 33 of range 7, having neither the cutting rights nor the soil. (9) Respecting the other lots above designated, plaintiffs are proprietors of the cutting rights only. (10) Plaintiffs have no right of possession nor of occupation on these lots apart from the grounds above mentioned. (11) Defendant claims that the plaintiffs are owners of the cutting rights which exist on these lots and it has mentioned the lots in the valuation roll claiming to have the right of estimating the cutting rights, separately from the ground rights, of considering the said lots immovables from the municipal point of view, so that they might tax plaintiffs as owners of the cutting rights. (12) In calling the plaintiffs "owners" of the lots on the valuation roll, being aware that plaintiffs were not owners, but being of opinion that it had the right of taxation and valuation of the cutting rights, defendant has acted illegally and has certainly exceeded its powers.

To this the defendant pleaded:

(1) Ignorance of para. 1, defendant declaring that it relied on the valuation roll. (2) Admits para. 2. (3) Denies para. 3, except the existence and the legality of the roll. (4) Ignores the schedules mentioned in the last part of para. 3 and also paras. 4, 5, 6, 7, 8, 9, 10. (5) Denies paras. 11 and 12 of the plea. (6) No complaint was lodged by the plaintiffs at the time of the confirmation of the roll; plaintiffs are absentees who have elected no one in the defendant municipality, and neither the appraisers nor the defendant may seek information from them in the preparation of the roll.

The motion was argued before me on the basis that the question to be decided was whether or not a right to cut wood upon lands in the Province of Quebec had the effect of making the person having the privilege the owner of an immovable and therefore liable to be placed on the valuation roll as such owner; it would seem to me, however, that as to certain lots the plaintiffs distinctly allege that they have been placed upon the roll where they have not even a right to cut timber (see paras. 4, 5, 6), and as the plea

neither admits nor denies these allegations, it would appear to me that we have here a distinct issue raised as to the title to these lots and the Court has jurisdiction by virtue of sec. 46 (b) of the Supreme Court Act, R.S.C. 1906, ch. 139.

But dealing with the matter on the basis of the arguments of counsel, the question for determination then is: Does the issue involve any title to lands or tenements, annual rents or other matters or things where rights in future might be bound?

A determination of this requires that certain articles of the Codes should be construed. Article 16, sub-article 27, of the Municipal Code reads as follows: "The words 'land' or 'immovable' or 'immovable property' mean all lands or parcels of land in a municipality, owned or occupied by one person or by several persons jointly, and include the buildings and improvements thereon."

Article 649, title XXII and following, of the Municipal Code, provide for the duties of the assessors in preparing their valuation rolls and amongst other things they are told that all immovable property is taxable property with some exceptions not of moment here. They are also told they must draw up the valuation roll setting out the particulars required by title XXII of the Municipal Code.

By article 654 of title XXII the assessors are directed to enter on the valuation roll in separate columns, amongst other things, the real value of every taxable immovable or part of an immovable and 6th, the name and surname of the owner of every immovable or part of immovable, if known. It is further provided in the same title that after the roll is prepared, it is to be deposited in the office of the corporation, certain notices must be given, and after complaints have been adjusted, the roll becomes homologated.

Title XXIII of the Municipal Code provides for the imposition of taxes based upon the taxable property as set out in the valuation roll. The Municipal Code also contains provisions for appeal, but the law is well established that where the complaint is that the municipal authority has exceeded its powers and its act is therefore *ultra vires*, a person complaining on this ground is not precluded from taking proceedings in the Superior Court to obtain redress.

The defendants rely upon the interpretation of immovables as defined in art. 381 of the Civil Code as amended by 2 Geo. V. 1912, ch. 45, which reads as follows:—

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381. Rights of emphyteusis, of usufruct of immoveable things of use and habitation, the right to cut timber perpetually or for a limited time, servitudes and rights or actions which tend to obtain possession of an immoveable, are immoveable by reason of the objects to which they are attached.

It may well be that the interpretation they place upon immovable is correct and includes the right to cut timber in the present instance, but that is a question of the merits of the appeal. What I have to determine is: Is there jurisdiction in the Supreme Court to hear the appeal? Or in other words: Does the matter in controversy in the appeal involve matters or things *ejusdem generis* with titles to lands where rights in future may be bound?

I am of the opinion that it does. *Gilbert* v. *Gilman* (1889), 16 Can. S.C.R. 189; *Foster* v. *St. Joseph* (1917), Cameron's Practice and Rules, 1919 ed., vol. 2, 183. Counsel for the defendants claims that the action is premature and that the valuation roll has no such finality as would warrant an action to have it annulled, but it appears to me clear from the terms of the Municipal Code that the preparation of the valuation roll is a necessary part of the machinery by which the rates are imposed upon the owners of immovable property and I do not see why it cannot be attacked after homologation, which the declaration alleges to have taken place, as readily as later on when all proceedings have been completed and the municipal council proceeds to fix the rate to be imposed upon the property included in the valuation roll.

The plaintiff relies upon the jurisprudence of the Court particularly *Stevenson* v. *City of Montreal* (1897), 27 Can. S.C.R. 187. The facts of that case are not on all fours with the present but the difference I do not think is material. The fact that in the *Stevenson* case a by-law was passed for the widening of a street and the valuation roll was based upon the by-law, does not, I think, give the valuation roll any higher standing than the roll which has to be prepared under the provisions of the Municipal Code.

I am of the opinion therefore, as I have said, that the Supreme Court of Canada has jurisdiction to hear the appeal. If I am wrong in my conclusions, the defendant is not precluded by my order from moving later on to quash the appeal for want of jurisdiction as nothing I do can have the effect of conferring jurisdiction upon the Court if otherwise it has none. The application is granted, costs in the cause. See *C.P.R. Co.* v. *Rat Portage Lumber*

Co. (1905), 10 O.L.R. 273; *Glenwood Lumber Co.* v. *Phillips*, [1904] A.C. 405; *McPherson* v. *Temiskaming Lumber Co.*, 9 D.L.R. 726, [1913] A.C. 145.

E. R. CAMERON,
Registrar.

Romeo Langlais, K.C., for the motion to quash.

Louis St. Laurent, K.C., contra.

IDINGTON, J. (dissenting):—The basis of assessment in Quebec distinguish between real and personal property. The Court of King's Bench (1919), 29 Que. K.B. 309, has decided that appellants' title, which is admitted and, as such, is no way in dispute, gives him a property of which the quality is such that it must be classified as real property and hence liable to be assessed as such.

Idington, J.

The resultant tax, it is admitted, cannot by any possibility reach the sum of $2,000. Hence that basis for an appeal here fails.

Nor can the provision of sub-sec. (b) of sec. 46 of the Supreme Court Act, R.S.C. 1906, ch. 139, which reads as follows:—

(b) relates to any fee of office, duty, rent, revenue, or any sum of money payable to His Majesty, or to any title to lands or tenements, annual rents and other matters or things where rights in future might be bound.

So long as the title, as such, is beyond dispute, the question of the quality of property which is held thereby does not, in my opinion, fall within the meaning of this sub-section.

I, therefore, think the motion to quash should be allowed with costs.

DUFF, J., concurs in dismissing the motion with costs.

Duff, J.

ANGLIN and BRODEUR, JJ., concur with MIGNAULT, J.

Anglin, J.
Brodeur J.

MIGNAULT, J.:—The appellants seek to have a valuation roll of the respondent set aside as to a large number of properties which are entered in the roll as belonging to the appellants and subject to being assessed against them for municipal and school taxes, and allege that as to some of these properties they own neither the soil, nor the right to cut timber, and as to others they own merely the right to cut timber. They further complain that the respondents have undertaken to value the right to cut timber separately from the soil and to assess the appellants as owners of such right.

Mignault, J.

The appellant's action was maintained by the Superior Court but dismissed by the Court of King's Bench, and the appellants

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Mignault, J.

appeal to this Court. They succeeded in having the jurisdiction of this Court affirmed by the Registrar and the respondent now moves to have the appeal quashed for want of jurisdiction.

I am of opinion that we have jurisdiction. As to some of the properties mentioned in the declaration, the issue is whether the appellants own either the soil or the right to cut timber thereon, and this raises a question as to the title of these properties. As to the others, the issue is whether the appellants can be assessed in respect of the right to cut timber independently of the right of ownership in the soil. The right to cut timber perpetually or for a limited time is an immovable right (art. 381 C.C.). Future rights of the appellants in respect of this immovable right and its being subject to assessment are therefore involved.

The motion to quash should be dismissed with costs.

Motion dismissed.

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ROUTLEY v. GORMAN AND CORAN.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, and Ferguson, JJ.A. April 26, 1920.

PRINCIPAL AND SURETY (§ 1 A—8)—COLLATERAL NOTES HELD BY CREDITOR—EMPLOYMENT OF PRINCIPAL DEBTOR TO COLLECT SAME—PROCEEDS NOT TURNED IN—KNOWLEDGE OF SURETY AS TO EMPLOYMENT—ACQUIESCENCE—NEGLIGENCE.

The creditor, who holds all the collaterals for all parties interested, is bound to use ordinary diligence in the care of them, but is not negligent in employing the principal debtor to undertake the collection of such collateral notes, if the same is done with the knowledge, and acquiescence of the surety.

Statement.

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

This is an appeal by the defendant Coran from a judgment of MCKAY, Judge of the District Court of the District of Thunder Bay, dated the 22nd October, 1919, whereby he directed that the plaintiff recover against the defendants the sum of $1,004.31 and costs.

The action was brought on two promissory notes, made by the defendant Gorman, in favour of the plaintiff, and endorsed by Gorman and Coran. There was also endorsed on both notes a waiver and guaranty, signed by both defendants, reading: "We hereby waive presentment and notice of protest, and guarantee payment of the within note."

The facts and circumstances are set forth in the following extracts taken from the reasons of the learned trial Judge:—

"The defendants Cecil Coran and G. W. Gorman agreed to canvass for life insurance certain non-English speaking citizens in the western portion of the city of Fort William, for the Imperial Life Assurance Company of Canada.

"The company allowed them a commission of about 65 per cent. on the first premium, of which their city agent in Fort William, G. W. Gorman, received about 35 or 40 per cent. and his sub-agent, Cecil Coran, 25 per cent.

"The said defendants had secured promissory notes in respect of premiums amounting to about $1,889.60, and it was desirable to pay the premiums due to the said insurance company, as apparently several of the said premium-notes had to be sued in order to secure payment, and apparently both defendants desired to secure the prompt payment of their respective commissions without waiting until the premium-notes were actually paid by the respective policy-holders.

"For several reasons, I place no reliance on the evidence of the defendant Cecil Coran where it disagrees with the evidence of the plaintiff or of the defendant G.W. Gorman. The promissory notes were signed and endorsed by the said defendants Gorman and Coran respectively, and handed to the plaintiff, one note for $655.85 about the 21st June, 1918, and the other for $710.95 on the 15th June, 1918, being the respective sums advanced by the plaintiff to the defendant G. W. Gorman. Various premium-notes, endorsed apparently by both defendants, aggregating the respective amounts, were deposited with the plaintiff as collateral security.

"From time to time the defendant G. W. Gorman secured many of these collateral notes from the plaintiff as his agent to collect the same and pay the proceeds of such collections to the said plaintiff to be applied on the said notes.

"Notes were sued in the name of G. W. Gorman, to the knowledge of the defendant Cecil Coran, as he gave evidence on behalf of the defendant G. W. Gorman.

"It is quite probable that the defendant G. W. Gorman could collect these various notes more efficiently and at less cost than if handed to a solicitor to have the same collected, and both

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defendants were interested that such results should be accomplished, as I held that the defendant Cecil Coran was entitled only to 25 per cent. of the premium actually paid, less costs of collection. Exhibit 13 and the subsequent dealings with these two defendants would support that construction of their agreement.

"The defendant G. W. Gorman accounted to the plaintiff from time to time, leaving the balance of $966.55 owing when the writ of summons was issued herein on the 23rd day of May, 1919.

"The defendant G. W. Gorman, in addition to these sums, has collected $800 which he has failed to pay to the plaintiff.

"On the 21st day of December, 1918, the defendant G. W. Gorman signed the two promissory notes sued on herein, for $403.60 and $675.45 respectively. Both the defendants endorsed the said notes, and also signed a memorandum endorsed on the back of each note as follows: 'We hereby waive presentment and notice of protest and guarantee payment of the within note.'

"Both defendants were liable on these notes: Maclaren on Bill and Notes, pp. 331-336; Falconbridge on Banking, p. 695.

"There is no evidence of negligence on the part of the plaintiff in the course pursued in endeavouring to collect the collateral notes. There will be judgment for the plaintiff against the defendant Cecil Coran for $1,004.31 and costs to be taxed.

"The defendant Cecil Coran is entitled to judgment over against the defendant G. W. Gorman for $1,013.65, with interest from the 5th day of June, 1919, $14.84, with costs fixed at $25."

The defendant Coran appeals, on the ground that he should have been credited with all the moneys found to have been collected by Gorman, contending that as surety he was entitled to the benefit of all securities held by the creditor, and that he was relieved from liability to the extent that these securities were lost, by reason of the plaintiff placing them in Gorman's hands for collection.

W. A. Dowler, K.C., for appellant; *W. Laur*, for respondent.

The judgment of the Court was delivered by

Ferguson, J.A.

FERGUSON, J.A.:—The law appears to be settled that in such a case as this the creditor holds the collaterals for all the parties interested, and is bound to use ordinary diligence in the

care of them, and upon payment by the surety to assign them to the surety; and, if the creditor has, without the knowledge or consent of the surety, negligently suffered the securities to be diverted from the purpose of the pledge, to the prejudice of the surety's right to be subrogated, the surety will be discharged to the extent of the actual loss: DeColyar on Guarantees, 3rd ed., p. 321; Taylor's Equity, para. 250; 32 Cyc., p. 217. A creditor is a trustee of the securities: *Mayhew* v. *Crickett* (1818), 2 Swan. 185, 190; *City Bank* v. *Young* (1862), 43 N.H. 457; *Crim* v. *Fleming* (1884), 101 Ind. 154.

The questions for decision in this case seem to me to be:—

(1) Was it negligence on the part of the plaintiff to employ Gorman, the principal debtor, as his agent to collect the premium-notes deposited as collateral security?

(2) Did the defendant Coran assent to such a course? If he did, he cannot complain: DeColyar, p. 335; Colebrooke on Collateral Securities, 2nd ed., p. 395.

The right to appoint, and the duty of a trustee who employs an agent, are stated by Kekewich, J., in *In re Weall* (1889), 42 Ch.D. 674, at pp. 677, 678, as follows:—

"He certainly has the right to appoint them, if and so far as the work of the trust *reasonably requires*. . . . The limit of the power of employment is . . . reasonableness . . . A trustee is bound to exercise discretion in the choice of his agents, but so long as he selects persons properly qualified he cannot be made responsible for their intelligence or their honesty."

Of the many authorities I have read, the one giving the greatest support to the appellant's contention is *Crim* v. *Fleming*, *supra*. There the debtor assigned, as security, fees coming to him as Clerk, of the Circuit Court, and the creditor permitted the debtor, without the consent of the surety, to collect the fees, and the Court held that the surety was released to the extent that the fees were so collected and not paid over, on the ground that the creditor had, in the circumstances, been guilty of negligence.

It seems to me that what is reasonable or negligent depends on the circumstances adduced in evidence in the particular case under consideration. The circumstances of the case at bar are peculiar. The collateral security consisted of 25 premium-notes, for amounts ranging from $16 to $145, all made by foreigners unable to speak

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English, and all obtained by Gorman or his sub-agent Coran. It is not suggested that Routley had any reason to suspect the honesty of Gorman. The nature of the transaction, the character of the notes and the makers thereof, indicate that something out of the ordinary would be required to insure the collection of the notes, as they matured, and that it would be advisable, if not necessary, to make use of both Gorman and Coran in effecting collections.

It is not asserted that any such arrangement was made by Gorman at the time he pledged the notes. There is evidence going to shew that before Coran endorsed the last renewal and the waiver and guaranty, he knew that Gorman was collecting the notes or some of them. In his affidavit, made part of the record, he deposes that he was induced to sign the note on the representation of the plaintiff and Gorman "that no risk or liability would attach to me by so doing, as the notes taken for the insurance would be collected *by them*."

In his statement of defence, filed by leave, he pleads that the representation was that the premium-notes would be collected by the plaintiff. At the trial, he swore that he put his name on the notes only as witness to the signature of Gorman. He admits appearing as a witness in one or more Division Court actions, brought by Gorman on notes deposited as collateral, also that he himself endeavoured to make collections, and sued upon one of the notes which he obtained from Gorman.

The learned trial Judge has found that the plaintiff was not negligent; and, after a careful perusal of the evidence and consideration of all the circumstances, I am not prepared to say that he was wrong. I am also of the opinion that the proper conclusion is that the defendant Coran knew of and acquiesced in the employment of his co-defendant Gorman for the purpose of making the collections.

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

Appeal dismissed.

ALLEN v. SMITH.

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C. A.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. October 11, 1920.

SALE (§ II A—28)—BY PUBLIC AUCTION—STATEMENT BY AUCTIONEER—SILENCE OF OWNER HEARING STATEMENT—WARRANTY—LIABILITY OF OWNER FOR BREACH.

A vendor who stands by, while an auctioneer is selling his goods, and takes no steps to correct or contradict an incorrect statement or affirmation made by such auctioneer is bound by such statement. The purchaser is entitled to rely on the warranty so given and is entitled to damages occasioned by breach of such warranty.

[See Annotation, 43 D.L.R. 165]

APPEAL by defendant from the trial judgment in an action to recover the balance of the purchase price of a mare sold at auction. Reversed. Statement.

P. H. Gordon, for appellant; *L. McK. Robinson*, for respondent.

The judgment of the Court was delivered by

LAMONT, J.A.:—The defendant paid $10 down, and gave the note sued on for the balance. The defendant resists payment on the ground that the mare was warranted to be only 9 years' old, whereas in fact she was much older and was of no value. On the note sued on there was endorsed the following words:— Lamont, J.A.

"Given for one bay mare nine years old."

The notes of evidence are of the most meagre kind. The trial Judge's reasons for judgment, as contained in his notes, are:

> The auctioneer made the statement that horse was 9 years old or about 9 years old. (I cannot conclude defendant relied on this statement.)
>
> The defendant must have known she was old as his witness says she had that appearance in 1915.
>
> Judgment for plaintiff for $57.31 and costs and counterclaim dismissed with costs.

Was the statement made by the auctioneer and repeated in the note binding on the plaintiff? An auctioneer has no authority, unless so instructed by the vendor, to give a warranty at the auction, and an unauthorised warranty will not bind the vendor, although it may make the auctioneer liable to the purchaser for breach of warranty if false. *Payne* v. *Lord Leconfield* (1882), 51 L.J. (Q.B.) 642.

In this case, however, the plaintiff in his evidence testified that the auctioneer said, "Here is a horse about 9 years' old." This can only mean that the plaintiff was present and heard the auctioneer make the statement. As he took no steps to correct or contra-

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dict it, the defendant, in my opinion, was justified in concluding that the auctioneer was authorised to make it, and the plaintiff is bound thereby.

The next question is: Does the statement constitute a warranty? It does, if it was so intended. The rule has long been followed that an affirmation at the time of the sale is a warranty provided it appears on the evidence to have been so intended. The intention of the vendor is to be drawn from the totality of the evidence. See *Heilbut, Symons & Co.* v. *Buckleton*, [1913] A.C. 30.

The reasonable inference to my mind to be drawn from the evidence, and the trial Judge's reasons as above set out, are (1) that the plaintiff intended to warrant the mare to be only 9 years' old, (2) that the mare was much older than that, and there was, therefore, a breach of the warranty. The conclusion of the Judge that the defendant could not have relied upon the statement made as to the mare's age, because in 1915 she had the appearance even then of being old, is, I think, answered by the fact that the plaintiff and his son believed that she was about 9 years' old at the time of the sale, according to their testimony. Her appearance at that time evidently did not indicate old age to such an extent as to lead the plaintiff and his son to think she was over 9 years' old. The defendant was entitled to rely upon the warranty given, and there is no evidence that he did not do so. He is therefore entitled to damages for breach of warranty. Such damages are, *primâ facie*, the difference between the value of the mare at the time of the sale and the value she would have had if she had answered the warranty. Sale of Goods Act, R.S.S. 1909, ch. 147, sec. 51, sub-sec. 3.

Had she answered the warranty, she would have been worth, at the time of the sale, $60. The only evidence as to her real value, is the statement made by the defendant that in 1919 he came to the conclusion she was worth nothing at all. He, however, had used her in 1918 on the drill, and in 1919 also he says she did a little work. She must therefore have been worth something to him, but her real value at the time of the sale is not shewn by the notes of evidence in the appeal book, if it was given at the trial.

In my opinon the appeal should be allowed, and the matter referred back to the trial Judge to assess the damages suffered

by the defendant for breach of warranty. This amount the defendant is entitled to set up against the plaintiff in diminution or extinction of the price. It should therefore be deducted from the amount due the plaintiff on the note, and judgment given in favour of the plaintiff for the difference. Sale of Goods Act, sec. 51, subsec. 1. *Appeal allowed.*

REX v. JOHNSON.

Ontario Supreme Court, Orde, J. September 4, 1920.

CRIMINAL LAW (§ II B—43)—CHARGE LAID AND WITHDRAWN—NEW CHARGE—IRREGULARITY OF SERVICE OF SUMMONS—APPEARANCE OF COUNSEL FOR ACCUSED—WAIVER OF IRREGULARITY OF SERVICE.

A charge against an accused person, being withdrawn and a further charge laid to come up at a future date, the appearance of counsel on such date and his participation in the trial on behalf of the accused, he being authorised to do so, waives any irregularity in the service of the summons, and the conviction must be upheld.

[*Regina* v. *Doherty* (1899), 3 Can. Cr. Cas. 505, referred to.]

MOTION for an order quashing the conviction of the defendant, by two Justices of the Peace, for unlawfully having intoxicating liquor in a place other than his private dwelling house, contrary to the Ontario Temperance Act, 6 Geo. V. 1916, ch. 50, sec. 41. Statement.

C. A. Payne, for the defendant.

Edward Bayly, K.C., for the magistrates.

ORDE, J.:—The notice of motion attacks this conviction upon several grounds, but upon the argument only one was urged, namely, that by reason of the service of the summons upon the wife of the accused, instead of upon him personally, and his non-attendance at the trial, there had not been a proper or fair trial. Orde, J.

The circumstances surrounding the trial are somewhat unusual. On the 8th July, 1920, Johnson appeared, with his counsel, Mr. E. J. Butler, of Belleville, before two Justices at Madoc, to answer a charge under sec. 41 of the Ontario Temperance Act. This charge had been laid as for a first offence. Upon the application of the County Crown Attorney, the Justices permitted the charge to be withdrawn, apparently in order that a new charge might be laid as for a second offence. When the charge was withdrawn, the accused left the court, and it was subsequently arranged

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between Mr. Butler and the County Crown Attorney that, if a new charge was laid, Mr. Butler "would try and arrange to take the matter up on the 15th July." A new information was laid on the 10th July, and a summons issued to Johnson, returnable on the 15th July, at Madoc. This was given on the 10th to a constable to serve, and on the 13th the constable served the summons by leaving it with Johnson's wife at his residence at Madoc, Johnson himself being then absent.

There is no evidence to shew that the constable made any effort to find Johnson or to learn whether or not the summons he was serving upon the wife would come to Johnson's notice in time for the 15th. The County Crown Attorney communicated with Mr. Butler by telephone, and they went to Madoc on the 15th. When the case was called, Johnson did not appear, but Mr. Butler did not ask for an adjournment on that ground, believing that Johnson would appear before the proceedings were over. The constable was called and testified as to the service of the summons upon the wife of the accused, whereupon Mr. Butler objected that the service had not been legal. Notwithstanding this objection, the Justices proceeded with the trial, and Mr. Butler remained and cross-examined two of the Crown's witnesses. The record of his cross-examination of the first witness cross-examined is preceded by the words, "Subject to objection, to Mr. Butler," which I understand to mean that Mr. Butler himself objected to being obliged to proceed, and did proceed subject to that objection. At the close of the proceedings, the Justices formally "adjourned for adjudication" until the 19th July, and on the 19th July adjourned again until the 22nd July, on which date they found the accused guilty; and, proof of a conviction for a previous offence being given, the accused was found guilty of a second offence, and was sentenced to six months' imprisonment.

The accused in an affidavit says that he left Madoc on the 13th July, before the summons was served, and did not return prior to his arrest in Belleville upon a warrant issued after his conviction, and that until his arrest he had received no notice of the summons. He refers to Mr. Butler as his counsel on the return of the first summons on the 8th July, but does not repudiate Mr. Butler's authority to act for him on the 15th. Mr. Butler

in referring to the proceedings at Madoc on the 15th, says: "I had received no specific instructions from the said George A. Johnson to attend at Madoc on the said 15th day of July."

It was virtually admitted by Mr. Bayly that, if the regularity of the conviction depended upon the proof of service alone, it would be difficult to support it. Section 658 of the Criminal Code, which is applicable to the procedure when serving a summons, provides for service upon some person other than the accused at his usual place of abode, if the accused cannot conveniently be met with. There is no evidence here that the constable made any effort to find Johnson or that he could not "conveniently be met with."

But it is contended on behalf of the Crown that the appearance by Mr. Butler as counsel for the accused, at the hearing on the 15th July, was a waiver of any irregularity in the service of the summons, and *Regina* v. *Doherty* (1899), 3 Can. Cr. Cas. 505, a judgment of the Supreme Court of Nova Scotia, is cited. I think I must give effect to this contention. Had Mr. Butler appeared without any authority whatever, the accused could not be bound; but, on the material before me, I must hold that he had ample authority and instructions. The accused does not repudiate Mr. Butler's authority to appear, and Mr. Butler merely states that he had no "specific" instructions to attend on the 15th. But it is clear that he had been retained on the 8th to defend the accused, and I am satisfied that this retainer covered and was intended to cover the subsequent charge for the same offence if and when laid. Had Mr. Butler refrained from appearing at all on the 15th, then the conviction might be open to attack; but Mr. Butler, acting under his retainer, appears for the accused, and, although objecting to the sufficiency of the service, takes part in the trial and cross-examines the witnesses for the prosecution.

It is rather significant that the matter was adjourned to the 19th, and again to the 22nd July, before the Justices found the accused guilty. Had Mr. Butler felt that the accused had suffered any material injustice by his failure to appear, it is difficult to believe that he would not have made some effort to have the accused appear on either of the later dates for the purpose of giving his evidence, if he saw fit, or to get a further enlargement

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to enable this to be done. And, while it is not really incumbent upon the accused to disprove his guilt if the proceedings are irregular, yet it is not without significance that in his affidavit not one word is said as to the merits of the defence which presumably he hoped to make had he been present. There is absolutely nothing to shew that Johnson was in any way prejudiced by his absence or that his defence (if any) was not as fully made out by his counsel as if he had been there in person, and I cannot see that, if there was any irregularity at the hearing, any substantial wrong was occasioned thereby.

For these reasons, I dismiss the motion with costs.

Motion dismissed.

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SMITH v. CHRISTIE.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Ives, JJ. October 19, 1920.

1. OFFICERS (§ I A—8)—PUBLIC—WHAT ARE—DISCHARGE OF PUBLIC DUTY—COMPENSATION.

Everyone appointed to discharge a public duty and receive a compensation in whatever shape whether from the Crown or otherwise is constituted a public officer. A Dominion Government Veterinary Inspector residing at Calgary, the Chief Dominion Government Veterinary Inspector for Alberta, and the Minister of Agriculture for the Dominion of Canada held to be public officers.

2. LIMITATION OF ACTIONS (§ III F—130)—SUPREME COURT ACT (ALTA.)—RULES OF COURT—VALIDITY—PUBLIC OFFICER—ACTION AGAINST—LIMITATION OF TIME FOR COMMENCING.

If the Lieutenant-Governor-in-Council had power under sec. 24 of the Supreme Court Act, 7 Ed. VII. 1907 (Alta.), ch. 3, to pass Rule 711 it is effective and valid law, if he had not, then old Rule 536, never having been authoritatively interfered with, is still in force under sec. 36 of the Act, in either case the result is that all actions and prosecutions against any person for anything purporting to be done in pursuance of his duty as a public officer must be commenced within six months after the act was committed.

[Review of authorities.]

R. B. Bennett, K.C., and *W. C. Fisher*, for plaintiff.

James J. Muir, K.C., for defendants Christie and Hargreave.

A. A. McGillivray, K.C., for defendant Tolmie.

Harvey, C.J.
Ives, J.
Stuart, J.

HARVEY, C.J., and IVES, J., concur with STUART, J.

STUART, J.:—The plaintiff is a cattle rancher with a ranch some distance west of Calgary. The defendant Christie is a

Dominion Government Veterinary Inspector residing at Calgary. The defendant Hargreave is the Chief Dominion Government Veterinary Inspector for Alberta and the defendant Tolmie is the Minister of Agriculture for the Dominion of Canada.

The plaintiff sues the defendants for damages alleged to have resulted as a consequence of certain alleged wrongful and illegal acts of the defendants in placing and continuing his cattle under quarantine for mange in the spring of 1919.

The defendants severed in their defences but Christie and Hargreave defended through one solicitor and the defendant Tolmie through another.

The action was begun on May 6, 1920.

Each of the defendants in his defence pleaded that he was a "public officer" within the meaning of Rule 711 of the Rules of Court and that the action had not been begun within the period of 6 months after the acts complained of as provided by that rule.

The plaintiff applied to the Master in Chambers for an order for directions and on the hearing of this the Master refused to grant the application made on behalf of the defendants that there should be separate trials for each of the defendants and that the points of law in regard to Rule 711 that were raised by the pleadings should be set down for argument before the trial.

The defendants appealed from this refusal to a Judge in Chambers. Walsh, J., dismissed the appeal in respect of the application for separate trials but allowed the appeal in respect of the argument of the points of law and directed that these latter should be set down for argument before the Appellate Division in the first instance.

When the argument on the points of law came on for hearing it was arranged by consent that an appeal which the defendants intended to take from the Judge's order dismissing the appeal from the Master in regard to the separate trials should also be heard forthwith and at the same time as the argument on the points of law.

Rule 711 (C.O.N.W.T. 1915, Rules of Court) reads as follows:—

All actions and prosecutions to be commenced against any person for anything purporting to be done in pursuance of his duty as a public officer (unless otherwise ordered by a judge) shall be commenced and tried in the district wherein the act was committed and must be commenced within 6 months after the act was committed and not otherwise.

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This is the form in which the rule stood, from 1903 until 1914, as Rule 536 of the old Rules of the Supreme Court of the North West Territories which, with some later exceptions, were part of the Judicature Ordinance and were admittedly of statutory force as having been enacted by the Legislative Assembly of the Territories. During that period it would have been therefore idle to enquire whether Rule 536 was substantive law or mere procedure. Even if substantive law it had been enacted by competent authority.

It was tacitly assumed on the argument that the power reserved to a Judge by the rule applies only to the place of trial and not to the time of beginning the action which would appear to be the correct view. The subsequent general rule as to extending time was not apparently resorted to and the question of its effect is really not before us although it might possibly seem to indicate that the Legislature never really intended to enact a strict law of limitation at all.

It was contended on behalf of the plaintiff that the real nature of the enactment is that it is substantive law and that, inasmuch as Rule 711 as we now have it was promulgated only by the Lieutenant-Governor-in-Council under the powers given by sec. 24 of the Supreme Court Act, 7 Edw. VII. 1907 (Alta.), ch. 3, and inasmuch as the power there given was merely to "make and authorize the promulgation of Rules of Court governing the practice and procedure in the Court, etc.", the Lieutenant-Governor had no authority to make or promulgate the rule and that it was therefore *ultra vires* and of no effect.

I am bound to say that, notwithstanding the passages quoted by counsel for the defendants from various precedents which refer to statutes of limitations as being merely enactments of procedure, I am not convinced that such an enactment as we have here can properly be held to come within the meaning of the words "rules of court governing the practice and procedure in the court" as used in sec. 24, 7 Edw. VII. 1907, ch. 3. Indeed I have very little doubt at all that the Legislature never intended to delegate to a subordinate authority, viz, the Lieutenant-Governor-in-Council the power to impose a limitation of time within which an individual may bring a particular complaint into Court and to destroy in effect his legal right entirely if he fails to seek enforcement within that time. A legal right which cannot be enforced in a Court of

law approaches very closely, if not entirely, to a contradiction in terms. The enactment in practical substance says that any legal right which may accrue to any person in consequence of the alleged wrongful act of a public officer, purporting to be done in the execution of his duty as such, shall cease and disappear at the expiration of 6 months after the commitment of the act unless by that time an action is brought to enforce it.

But it is not necessary, I think, to express any final opinion on this point because, owing to the course which legislation took—an unnecessarily involved and tortuous course—the enactment now stands in either of the two possible views, as of statutory effect and not as a rule merely made and promulgated by the Lieutenant-Governor-in-Council under sec. 24.

If the latter authority had no power to make such an enactment as a rule of practice and procedure then old Rule 536 was not authoritatively interfered with or repealed by the Rules of 1914 in themselves. Sec. 36 of the Supreme Court Act of 1907, Alta. Stats. (ch. 3), enacts that:—

> the provisions of the Judicature Ordinance and all amendments thereto [which includes old Rule 536] shall, save where provision is made in this Act to the contrary or in substitution therefor, apply *mutatis mutandis* to the court and to officers thereof, as well with regard to the rules of law according to which law and equity are to be administered in the Court as to other matters therein contained.

This undoubtedly kept old Rule 536 alive unless the Rules of September, 1914, including Rule 711 had the effect of validly changing it, or, rather, taking its place.

On the other hand if the Rules of 1914 either were originally or subsequently became valid in their entirety and throughout, including 711, then the position is the same. As I have indicated I think that sec. 24 of the Supreme Court Act only authorised rules of practice and procedure strictly so called and that the provisions of Rule 711 in question here is almost certainly outside that category. If there had been no subsequent legislation I think the situation would be that old Rule 536 had never been authoritatively interfered with. But now we have to consider secs. 20, 21, and 22 of the old Judicature Ordinance and sec. 22 (a) added by the Alberta Legislature. These sections are as follows. (See the Judicature Ordinance, C.O.N.W.T. 1915, ch. 21):—

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20. The practice and procedure in the Supreme Court of the Territories shall be regulated by this Ordinance and the rules of court; but the Judges of the Supreme Court (*i.e.*, of the Territories) or a majority of them shall have power to frame and promulgate such additional rules of court not inconsistent with this Ordinance as they may from time to time deem necessary or expedient.

21. Subject to the provisions of this Ordinance and the Rules of Court the practice and procedure existing in the Supreme Court of Judicature in England shall as nearly as possible be followed in all causes, matters and proceedings. (Amendment of 1910.)

22. The Rules of Court already made and promulgated by the Judges of the Supreme Court (*i.e.*, of the Territories) are hereby continued in force until repealed, altered or amended by them.

It is not very apparent what circumstances caused the enactment of sec. 22 but it is to be carefully observed that it refers to certain well known rules which had been passed and promulgated by the Judges of the Supreme Court of the North West Territories under the authority of sec. 20 and which were therefore in a slightly different position from the regular statutory rules until sec. 22 placed them in the same position.

Now in 1918, 8 Geo. V. (Alta.) ch. 4, sec. 5, sub-sec. 2, the Legislature repealed sec. 21 above quoted and by sec. 3 it was enacted that the Judicature Ordinance was amended "by adding after sec. 22 the following sec. 22 (a)":—

22 (a) The provisions of the Rules of Court continued in force by the preceding section hereof as altered and amended are repealed as of the 1st day of September, 1914, and The Consolidated Rules of the Supreme Court authorised and promulgated by order of the Lieutenant-Governor-in-Council dated the 12th day of August, 1914, and which came into force on the 1st day of September, 1914, as altered and amended and the provisions thereof are substituted and declared to have been in force on and since the said 1st day of September, 1914.

There appears plainly to have been an unfortunate slip made by the draftsman and the Legislature in this enactment. If it were possible one would feel tempted to make the section mean what was obviously intended by interpreting the words "the preceding section hereof" as referring, not to sec. 22 but to sec. 20, which, aside from sec. 22, had by reason of the repeal of 21 become "the preceding section." This would be treating sec. 22 (a) as merely a sub-section of sec. 22. But this is impossible because of the words "continued in force." Those are the very words of sec. 22 and there is no such wording or enactment in sec. 20. So that the result is that the repealing effect of the new section,

22 (a), can only be applied to the few rules made and promulgated by the Judges of the Supreme Court of the North West Territories under the authority of sec. 20 and "continued in force" by sec. 22. There appears to be no manner of doubt that the draftsman of 22 (a) thought he was drafting a repeal of the whole body of Rules of Court contained in the Judicature Ordinance because the clause as it reads "substitutes" the whole body of the new rules of September, 1914, and it is inconceivable and indeed unintelligible, that it ever was intended to substitute that whole body of new rules merely for the few additional rules which had been made by the Judges. Yet that is exactly what the words of the section do say. The consequence is that unless the old statutory rules have been wiped out in some way or other (and they certainly are not wiped out by 22 (a)) we have two sets of rules in existence at the same time.

I confess that the puzzle baffles me and goes beyond my powers of reconciliation and interpretation, struggle with it as I may.

Yet so far as the point involved in the present case is concerned a solution does fairly clearly emerge. Either the Lieutenant-Governor-in-Council had power under sec. 24 to pass Rule 711 or he had not. If he had, then it is effective and valid law (which alternative I really reject). If he had not then old Rule 536 continues because there is nothing in the new section, 22 (a) of 8 Geo. V. 1918, ch. 4, sec. 5, above quoted which touches it at all in the way of repeal.

On the other hand if one felt at liberty to give a broad and liberal interpretation to sec. 22 (a) and treat it really as working a repeal of all the old rules, statutory as well as judge-made, then one would have to be equally liberal and say that there was a *statutory* substitution of Rule 711 for Rule 536 and a statutory confirmation of it. One cannot help thinking that there was really another slip made in 22 (a) by the omission of some intended verb such as "hereby validated and confirmed" after the words "as altered and amended" in the third line from the end.

When the Legislature declares a rule "to have been in force" from a certain date it seems to me to be rather too refined a treatment of language to suggest that it was only intended that it should be in force *qua* rule, and if it could validly have been originally enacted by the rule-making authority.

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For these reasons the contention that there is no such valid law in force as that contained in Rule 711 seems to me to fail. Either as Rule 711 or as old Rule 536 the law has I think statutory authority.

It was also contended that none of the defendants was a "public officer" within the meaning of the rule. With respect to Christie and Hargreave it is admitted, I assume, that they were properly appointed as inspectors under the Animal Contagious Diseases Act, R.S.C. 1906, ch. 75, secs. 10-14, and that what they are alleged to have done purported to be done in the exercise of their duties under that Act. In *Henly* v. *The Mayor of Lyme* (1828), 5 Bing. 91 at 107 (130 E.R. 995), Best, C.J., said: "Then, what constitutes a public officer? In my opinion everyone who is appointed to discharge a public duty and receives a compensation in whatever shape, whether from the Crown or otherwise, is constituted a public officer." I have no doubt these inspectors were receiving remuneration from the Crown. They are clearly in my opinion "public officers" within the meaning of the rule. The distinction sometimes made between an officer and an employee of a corporation throws, I think, no light on the matter because that distinction was drawn in another connection altogether. In fact, there are few, if any, cases in which it appears to have been disputed that such persons as these are public officers within the meaning of the protecting statute. Most of the English cases seem to deal with the point whether certain bodies or corporations were executing a "public duty or authority" within the meaning of the English statute.

With respect to the defendant Tolmie he, of course, is at any rate a different kind of "officer." He is a Minister of the Crown appointed by commission under the Great Seal (The Department of Agriculture Act, R.S.C. (1906), ch. 67, sec. 2). He is not called an officer in the Act but by sec. 3 the Governor-in-Council "may appoint an officer who shall be called the Deputy Minister of Agriculture." But I do not think this necessarily leads to the conclusion that the head of a Government Department who is a Minister of the Crown is not within the meaning of the rule. In *Raleigh* v. *Lord Goschen*, [1898] 1 Ch. 73, Romer, J., had to discuss the question of the liability of a Minister of the Crown and a head of a Government Department and to be sued for trespass.

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The case perhaps throws only a side-light upon the matter really before us here but it seems clear from the judgment that the head of a Government Department, even though a Minister of the Crown may be sued in his individual capacity for a trespass if in substance it is his individual act though done through an agent or subordinate, and this not because of, but in spite of the fact, that he is an *officer* of state. I observe that the Interpretation Act, R.S.C. 1906, ch. 1., sec. 31 (L) and (M) after referring to a Minister of the Crown goes on to refer to "any other public officer," thus impliedly calling a Minister of the Crown a "public officer." Of course this Interpretation Act does not apply to our rule, but in interpreting the expression in our rule it occurs to me that we can legitimately enquire how the words are generally used and what meaning is generally attached to them. Certainly if a subordinate appointee of the Minister of Agriculture is a public officer it would be strange if the Minister himself should not be called one. And if his appointee and subordinate is entitled to the benefit and protection of the rule surely from the reason of the thing he himself ought also to be so protected.

The result will be that it is only for acts committed within 6 months before the beginning of the action that the defendants can be held liable although there may be some question as to how in the actual circumstances this ought to be interpreted.

With regard to the appeal in the matter of separate trials, I think it should be dismissed with costs and I see no advantage or necessity for adding anything to what was said by Walsh, J., in whose reasons I fully concur.

The costs of the argument on the points of law should be costs in the cause.

Beck, J.

BECK, J.:—By the Judicature Act, C.O.N.W.T. 1898, ch. 21, certain Rules of Court were enacted as part of the Act. The Judges of the Court had no power to repeal or amend these statutory rules but might make additional rules not inconsistent therewith (sec. 20).

The Supreme Court Act, 7 Edw. VII. 1907, ch. 3, authorised (sec. 24) the Lieutenant-Governor-in-Council to make "Rules of Court governing the practice and procedure in the Court, etc.," and to "alter and annul any Rules of Court . . for the time being in force whether the same be included in the Judicature

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Ordinance or any amendments thereto or etc." and provided that "until such rules are so made and promulgated . . . the rules, practice and procedure . . . of the Supreme Court of the North West Territories shall be the rules, practice and procedure in the said (Supreme) Court (of Alberta)".

So far as the Statutory Rules of Court are concerned there can be of course no question as to their validity on the ground that some of the rules related to something other than matters of practice and precedure. In my opinion Rule 711—in the same words as Statutory Rule 536—deals with something other than "practice and procedure," even if the subject matter over which the Lieutenant-Governor-in-Council was given jurisdiction was not made still more distinct by the addition of the words "in the Court."

It assumes to be, so far as that portion of it is concerned, which is in question here, a limitation on a right of action, with an effect corresponding to the ordinary statutes of limitation. Such statutes are undoubtedly considered matters of procedure in Private International Law, but not matters of practice and procedure of or in the Court, which can be dealt with by rule made by a delegated authority. The legislation of 1918 does not, it seems to me, affect the question of the validity of Rule 711. I think its intention was to deal with rules in their quality as rules and not to validate or bring into effect as rules provisions properly the subject matter of legislative enactment. The new Consolidated Rules of 1914 therefore in my opinion could not affect any provisions of the Statutory Rules which dealt with matters which do not come under the subject matter of practice and procedure in the Court with the result that any such provisions in the Statutory Rules still remain in force; and in force in the sense and with exactly the same force and effect as they originally had. Hence if the rule in question Statutory Rule 536, was as a Statutory Rule subject to Statutory Rule 556 (empowering a Judge to enlarge or abridge time) it is still so subject.

I think all the defendants are public officers within the meaning of the rule. As to whether any of them are relieved from responsibility by reason of their representing the Crown in relation to the matters complained of that is another question depending on

what those matters are and the provisions of the statute under which they purported to be acting, things which I have not considered.

I come as I understand it, to the same result as my brother Stuart, on the point which I have dealt with and agree with him in other respects. *Judgment accordingly.*

REX v. CHAPPUS.

Ontario Supreme Court, Orde, J. August 24, 1920.

INTOXICATING LIQUORS (§ III G—87)—SALE OF—CONTRACT—PROPERTY IN GOODS NOT TO PASS UNTIL DELIVERY—GOODS SEIZED ON TRUCK ON WAY TO HOUSE OF ACCUSED—INTENTION OF PARTIES—SALE OF GOODS ACT.

There is no legal reason why a person may not minimise the risk of purchasing liquor under the Ontario Temperance Act by stipulating that no property in the liquor shall pass to him until delivery, and when this is the intention of the parties a conviction for the offence of unlawfully having liquor in a place other than the private dwelling house of the accused will be quashed where the liquor was seized while on a truck being conveyed to the house of the accused, there being nothing to indicate that the accused owned or had control of the liquor at that time.

Statement.

Motion to quash a magistrate's conviction. Conviction quashed.

J. W. Curry, K.C., for the defendant.

Edward Bayly, K.C., for the Crown and the magistrate.

Orde, J.

ORDE, J.:—The prisoner was convicted under the Ontario Temperance Act, sec. 41, by the Police Magistrate at Windsor, of unlawfully having, on the 19th July, 1920, liquor in a place other than the private dwelling house in which he resided, as a second offence, and was sentenced to 6 months' imprisonment with hard labour in the Ontario Reformatory.

The liquor, which comprised about 65 or 66 cases of Scotch and rye whisky, was seized by the License Inspector about 2.30 a.m. on the 20th July, 1920, while loaded upon a truck which was being driven on the public highway by one Vigneaux. The accused was driving behind the truck in a touring car. Apart from the fact that Chappus was in a car behind the truck, there was nothing at that time to indicate that Chappus owned the liquor or had it in his possession or charge or control. Vigneaux was called for the prosecution and swore that Chappus had come to his place at 12.45 that night, woke him up and told him that one Drouillard wanted him at his (Drouillard's) house with his

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truck, as he had a load for him. Vigneaux went to Drouillard's house and found Chappus there. The 66 cases were loaded on to the truck, by Vigneaux and Drouillard, Chappus assisting by handing the cases from the cellar to Drouillard, who in turn passed them to Vigneaux. Drouillard was to pay Vigneaux. Vigneaux left with the load and Chappus followed in his car. About half way to Chappus's house, the liquor was seized by the Inspector. Drouillard, called for the prosecution, denied having sold the liquor to Chappus, but said that he was to sell it to Chappus at the latter's house; that he was to deliver it at Chappus's house and was to get no money until it was delivered there; and that it was part of the bargain that Chappus was to take no chance on delivering it, but that he (Drouillard) was to take that chance for him.

It is clear that, if the effect of the bargain between Drouillard and Chappus was to pass the property in the liquor to Chappus, as soon as it was appropriated to the contract, then Chappus must be guilty; but it is contended on his behalf that there is no evidence which justified the magistrate in coming to the conclusion that the liquor was owned by, or was in the possession, or charge, or control of, Chappus, and that the conviction should be quashed.

That in entering into a bargain with Drouillard which, if completed, would result in a sale, Chappus was assisting Drouillard to commit an offence against the Act, is clear. For an offence under sec. 40 in connection with this transaction, Drouillard was convicted. That fact has no bearing upon the question to be determined here. Nor must the fact that one can have little sympathy for Chappus be allowed to have any weight in determining whether or not he was rightly convicted upon the evidence adduced before the magistrate. No degree of moral turpitude can be allowed to turn the scale if the accused is not technically guilty, nor can a man be found guilty of an offence merely because of a possible intent to commit one.

The sole question to be considered here is whether or not, upon the evidence, the property in the liquor had passed to Chappus. The law with regard to the time when the property in goods sold passes from the vendor is quite clear. It is now embodied in secs. 18, 19, and 20 of the Sale of Goods Act, 1920 (10-11 Geo. V. ch. 40), which came into force on the 1st July last, and which codifies the existing law governing the sale of goods.

By sec. 19, the question, when the property in specific or ascertained goods, which are the subject of a contract of sale, is transferred, is one of intention, having regard to the terms of the contract, the conduct of the parties, and the circumstances of the case. Section 20 then sets forth certain rules for ascertaining the intention of the parties in cases where no different intention appears. Rule 1 provides that where there is an unconditional contract for the sale of specific goods in a deliverable state the property in the goods passes when the contract is made, notwithstanding that the time of payment, or of delivery, or of both, is postponed. This is, of course, all simply declaratory of the law as it stood prior to the Act. See *Wilson* v. *Shaver* (1901), 3 O.L.R. 110. And in the present case the mere fact that payment was not to be made until delivery at Chappus's house would probably not be sufficient to prevent the title in the goods from passing to him as soon as the contract was made and the goods set apart for delivery to Chappus. But the only evidence here as to the terms of the contract is that of Drouillard himself, to the effect that no sale was to take place until the liquor was delivered at Chappus's house. Now, however much one may feel inclined to the belief that this was all a subterfuge, yet that is the only evidence which fastens upon Chappus any interest in the liquor. It is true there is the evidence of Vigneaux as to the visit from Chappus; and there is, of course, abundant evidence that Chappus assisted Drouillard in getting the liquor out of his cellar to load upon the truck, and that he followed the truck on the way to his house. But, if the liquor was not then the property of Chappus, there is no evidence that he was in charge or control of it. Let it be admitted that he was following it to see that it was safely delivered at his house, there is no evidence that Vigneaux was in any way subject to his orders or under his control.

There is here no *primâ facie* proof of possession by the accused which would of itself, in spite of any other evidence, support the conviction upon a motion to quash. If the magistrate came to the conclusion that Chappus was in possession, or charge, or control of the liquor while on its way from Drouillard's house, apart from any question of ownership, then, in my judgment, there was no evidence upon which to support it. But, if the property had passed to Chappus, then the conviction must be sustained. It

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was urged on behalf of the Crown that the magistrate was justified in finding as a fact, upon the evidence and all the circumstances, that there was no intention that the property should not pass until delivery at Chappus's house. If there were any facts upon which to base such a finding, then the magistrate's decision could not be disturbed; but I do not see how the magistrate's decision can be supported in the present case. The only evidence as to the terms of the bargain is that of Drouillard. He was called by the prosecution. To say that the magistrate can accept so much of that evidence as is sufficient to establish a sale and so convict the prisoner, and reject whatever terms of the bargain are in the prisoner's favour, would be to introduce a most dangerous practice. The only evidence of the contract establishes, in my opinion, that no property was to pass until the liquor was safely delivered at Chappus's house, and there was no evidence to justify any other conclusion.

I come to this decision with great reluctance because there was an obvious intention to evade the provisions of the Act, but I really see no legal reason to prevent a man who is attempting to evade the Act from minimising the risks by stipulating that no property in the liquor shall pass to him until delivery.

For these reasons, the conviction must be quashed, with the usual order for the protection of the magistrate.

Conviction quashed.

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EX. C.

BAUER CHEMICAL Co., Inc. v. SANATOGEN Co. OF CANADA Ltd. AND BARRY.

Exchequer Court of Canada, Audette, J. November 6, 1920.

TRADEMARKS (§ III—10)—REGISTERED IN CANADA—ASSIGNMENT TO ALIEN COMPANY IN UNITED STATES—CONFISCATION AND SALE UNDER TRADING WITH THE ENEMY ACT—RIGHTS OF PURCHASER.

The Canadian rights to a trademark registered in Canada which had been transferred to an alien firm carrying on business in the United States of America before that country entered the war are transferred to a purchaser who bought the stock and assets of the business from the American Alien Property Custodian who confiscated the business during the war under the provisions of the Act of Congress known as the Trading with the Enemy Act.

Statement.

ACTION to restrain the defendants from infringing certain trademarks and labels and from selling or offering for sale, in Canada, chemical pharmaceutical preparations under the trade-

marks "Sanatogen" and "Formamint," or having thereon certain labels described in the trademark of 1912, hereinafter referred to.

Russel S. Smart and *J. L. McDougall*, for plaintiff.

Louis Coté and *J. A. C. Bumbray*, for defendant.

AUDETTE, J.:—The defendants, by their statement in defence, deny that the plaintiff company has any ownership in the said trademarks, and they themselves make claim to the same in the manner hereinafter set forth.

On April 6, 1904, Bauer & Co., a co-partnership of Berlin, Germany, registered in Canada, a general trademark consisting of the word "Sanatogen."

On March 1, 1905, Luthe & Buhtz, of Berlin, Germany, registered in Canada, a specific trademark consisting of the word "Formamint," and on October 27, 1905, assigned the same to the said Bauer & Co., of Berlin, Germany.

Then on January 25, 1912, the latter, styling itself "Bauer & Cie.," manufacturers and chemists, of 231 Friedrichstrasse, Berlin, Germany, trading also as The Sanatogen Co. (A. Wulfing & Co.), of 12 Chenies Street, London, England, *registered in Canada in the name Bauer & Cie.*, trading as above mentioned, the specific trademark "Formamint," with label and device of a triangle containing the initials "A. W. & Co." and the *facsimile* signature "A. Wulfing & Co."

On the same day, January 25, 1912, the same party likewise registered in Canada, *in the name of "Bauer & Cie."* trading as above mentioned, the specific trademark of "Sanatogen" with label bearing the signature "A. Wulfing & Co." and the device of a shield provided with rays bearing the initials "S. Co."

Then the war between Germany and Great Britain broke out on August 4, 1914.

The German firm of Bauer & Cie., or Bauer & Co., according to witness Hehmeyer, is composed of John A. von Wulfing and Ernest Moeller, Wulfing being the senior partner and "the one with more money."

Hehmeyer, on behalf of the German firm, opened in the United States a regular branch office of the business, and later on a manufacturing plant. The manufacturing plant for "Formamint" was opened in 1913 and the "Sanatogen" manufacturing plant was decided to be erected in 1914, shortly after the outbreak of the war.

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In 1914, owing to war conditions, Hehmeyer, the German agent in America, says he was given a new power of attorney superseding any other power of attorney limited in its powers, the new one being more comprehensive and broader, and it was understood whatever Hehmeyer would do and say would have the sanction of his principal, the German firm.

Hehmeyer registered, under a partnership name in the United States, as agent for Bauer & Co., carrying on business under the name of Bauer Chemical Co.

Then in June, 1916, Hehmeyer received a wireless from Bauer & Co., telling him to incorporate and pass the interest of Bauer & Co., to an incorporated company so that they would be the owners of the stock as that was the ultimate outcome, the German citizens remaining the owners, as shareholders in this new company. The principal reasons assigned for this incorporation was the alleged improvement in export facilities, as at that time the British blacklist threatened to hamper their exports to other countries. The English branch of the German company having on May 11, 1916, under the Trading with the Enemy Amendment Act, 1916, been taken over by the English controller.

The new company was incorporated on July 26, 1916, and then on July 31, 1916, Hehmeyer made to the company an offer in writing, purporting to be on behalf of Bauer & Co., to transfer to the company all their American rights in North and South America to the products of "Formamint" and "Sanatogen." Hehmeyer testifies he had no specific instructions from Bauer & Co., to transfer the Canadian rights, but took it upon himself to do it under his general power of attorney (Ex. No. 10), thinking it was the best thing to do under the circumstances, in the interests of Bauer & Co. His idea, it is clear, was to save as much as he could for his German principal, knowing moreover that the Custodian of Alien Enemy Property in England had taken over the English business of A. Wulfing & Co. and was controlling it, and knew it when he incorporated his American company. (See Ex. "A".)

The United States entered into the war on April 6, 1917.

Then, in June, 1918, the American business of this German company, carrying on business under the name of the company incorporated in July, 1916, was, under the provisions of the Act

of Congress known as The Trading with the Enemy Act, taken over by the American Alien Property Custodian, and an order for sale of the same was made on January 23, 1919. (Ex. "B".)

As a result of such proceedings, both the stock of the Bauer Chemical Co., Inc., and all the assets of the company were sold, by the Alien Property Custodian to three American citizens, Henry Pfeiffer, C. A. Pfeiffer and Garfred D. Merner, who now constitute—with changes in the list of shareholders—the Bauer Chemical Co., Inc., under which name they carry on their purchased business, and who claim the Canadian trademarks which were transferred by Hehmeyer, agent of Bauer & Co., of Berlin, in 1916, and which they claim formed part of what they bought from the American Alien Property Custodian.

The war between Germany and England was declared on August 4, 1914, and was brought to a termination on January 10, 1920, as will be seen by the Proclamation published in the Canada Gazette on March 29, 1920.

Therefore, it appears that, in England, the Official Controller seized the business of the branch established by the Berlin firm of Bauer & Cie., avoided their trademarks, forfeited and sold their business. In the United States, after entering in the war, the American branch of this Berlin firm, incorporated into a company, was also forfeited and sold and the present plaintiffs—American citizens and an American company—became the owners of the trademarks held in the company's assets at the time they were sold and which were purchased by them from the American Controller. *Continental Tyre & Rubber Co.* v. *Daimler*, [1915] 1 K.B. 893.

In Canada, Parliament enacted the War Measures Act, 5 Geo. V. 1914 (2nd Sess.) ch. 2, and further enacted thereunder a number of Orders in Council, the most important among them being that of May 2, 1916, respecting Trading with the Enemy (7-8 Geo. V. 1917 (See under Canadian Orders in Council, p. liii.), (3 Sup. Proclamations O.C., relating to European War, 1558), and that of April 14, 1920, Canada Gazette, May 1, 1920, respecting the Treaty of Peace at Versailles.

Under this Canadian legislation, or otherwise—after much labour—I have been unable to find any enactment depriving the plaintiffs of the ownership of the trademarks in question. There is no text of law dealing with a matter of this kind.

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The sale by the American Custodian has purged any taint of German ownership, and the present plaintiffs—an American company—are entitled to the trademarks in question. The action is based upon a sale, or title derived from the Government of a friendly nation allied with Canada in the war and the Canadian legislation and Orders in Council respecting Trading with the Enemy do not affect such a transaction.

In the case of *Porter* v. *Freudenberg*. *In re Merten's Patents*, [1915] 1 K.B. 857, Lord Reading, C.J., said at 869:—

> In ascertaining the rights of aliens the first point for consideration is whether they are alien friends or alien enemies. *Alien friends have long since been, and are at the present day, treated in reference to civil rights as if they were British subjects*, and are entitled to the enjoyment of all personal rights of a citizen, including the right to sue in the King's Courts.

Coming to the consideration of the defendants' right to the trademarks in question and in respect of which they are sued for infringement, it will be sufficient, without going into the details of the several transactions in that respect, to state again that Bauer & Co., of Berlin, had also a branch of their business in England. When the war broke out, their trademarks were avoided and their business seized and sold by the English Official Custodian. And while the conditions of sale did not provide for the sale of the good will, it was inserted in the deed of sale and the defendants claim that the Canadian trademarks passed with such good will.

Hehmeyer testified that all trademarks in question were the property of the Berlin partnership. However, with respect to the defendants' claim to the ownership of the trademarks, it will be sufficient to say, whether or not such sale by the English Custodian dealt with or included the Canadian trademarks, that they have absolutely failed to prove any title or proprietary rights thereto. Moreover, they cannot invoke *jus tertii*, the rights which could be derived from the sale by the Custodian in England. There is no privity between the defendants and those who purchased from the English Custodian, in London, England. All the defendant Barry did was to take the law in his own hands, and to assume and convert to himself the said trademarks and assign them to a company formed by him and which, according to his own evidence, was himself.

The defendants' claim to the trademarks in question has not been proven.

Plaintiffs' counsel at Bar, taking sec. 84 of the Order in Council of April 14, 1920 (Canada Gazette, May 1, 1920), into consideration, declared he would be satisfied to limit the recovery of damages resulting from the infringement to the period after the termination of the war, and effect is hereby given thereto.

Under the circumstances, there will be judgment in favour of the plaintiffs, and they are at liberty and entitled to issue the injunction prayed for, the damages or the account of profits to be ascertained only from the date of the termination of the war. The whole with costs in favour of the plaintiffs.

Judgment accordingly.

ANNOTATION

Annotation.

TRADEMARKS.

Rights of purchaser buying from the American Alien Property Custodian.

BY

RUSSEL S. SMART, B.A., M.E., OF THE OTTAWA BAR.

Sec. 4 of the Consolidated Orders Respecting Trading with the Enemy (P.C. 1023), of May 2nd, 1916, reads (see 7-8 Geo. V. 1917 (Can.), Canadian Orders in Council, p. lv.):

"4. (1) No person shall by virtue of any assignment of any debt or other chose in action, or delivery of any coupon or other security transferable by delivery, or transfer of any other obligation, made or to be made in his favour by or on behalf of an enemy, whether for valuable consideration or otherwise, have any rights or remedies against the person liable to pay, discharge or satisfy the debt, chose in action, security or obligation, unless he proves that the assignment, delivery or transfer was made by leave of the Secretary of State or was made before the commencement of the present war, and any person who knowingly pays, discharges or satisfies any debt, or chose in action, to which this sub-section applies, shall be deemed guilty of the offence of trading with the enemy. Provided that this sub-section shall not apply where a license has been duly granted exempting the particular transaction from the provisions of this order, or where the person to whom the assignment, delivery or transfer was made, or some person deriving title under him, proves that the transfer, delivery or assignment or some subsequent transfer, delivery or assignment, was made in good faith and for valuable consideration before the publication in the *Canada Gazette* of these orders and regulations, nor shall this sub-section apply to any bill of exchange or promissory note. (Br. Cap. 12-14, sec. 6, Br. Cap. 79-15, sec. 3 and Interp. 'Enemy.')

"(2) No person shall by virtue of any transfer of a bill of exchange or promissory note made or to be made in his favour by or on behalf of an enemy, whether for valuable consideration or otherwise, have any rights or remedies against any party to the instrument, unless he proves that the transfer was made before the commencement of the present war, and any party to the instrument who knowingly discharges the instrument shall be deemed to be guilty of the offence of trading with the enemy. Provided that this sub-section shall not apply where a license has been duly granted exempting the

Annotation.

particular transaction from the provisions of this sub-section, or where the transferee, or some subsequent holder of the instrument, proves that the transfer, or some subsequent transfer, of the instrument was made in good faith and for valuable consideration, before the publication in the *Canada Gazette* of these orders and regulations. (Br. Cap. 12–14, sec. 6, Br. Cap. 79–15, sec. 3.)

"(3) Nothing in this order shall be construed as validating any assignment, delivery or transfer which would be invalid apart from this order or as applying to securities within the meaning of order 6 of these orders and regulations."

The Treaty of Peace between Germany and the Allies, signed at Versailles on June 20, 1919, was ratified in Canada by the Treaties of Peace Act, 1919, and was placed in effect by The Treaty of Peace (Germany), Order 1920, P.C. 755, dated April 14, 1920. By this Order in Council, issued under authority of the Treaties of Peace Act, 1919, all property, rights and interests of German nationals in Canada were vested in the Custodian, sec. 33 of the Order reading (see 10 Geo. V. 1920 (Can.), Canadian Orders in Council, p. xxxvii. at p. xlii.):

"33. All property, rights and interests in Canada belonging on the tenth day of January, 1920, to enemies, or theretofore belonging to enemies and in the possession or control of the Custodian at the date of this Order shall belong to Canada and are hereby vested in the Custodian.

"(2) Notwithstanding anything in any order heretofore made vesting in the Custodian any property, right or interest formerly belonging to an enemy such property, right or interest shall belong to Canada and the Custodian shall hold the same on the same terms and with the same powers and duties in respect thereof as the property, rights and interests vested in him by this Order."

By a sub-section, however, industrial property (which includes patents, trademarks and copyright) was especially exempted, and the rights of German nationals to such property was re-established or restored from January 10, 1920, sec. 76 (Part IV) of the Order reading (10 Geo. V. 1920, p. li.):

"76. Subject to the provisions of this Order, rights of industrial, literary and artistic property, as such property is defined by the International Convention of Paris of March 20, 1883, for the protection of industrial property, revised at Washington on June 2, 1911, and the International Convention of Berne, of September 9, 1886, for the protection of literary and artistic works, revised at Berlin on November 13, 1908, and completed by the additional Protocol signed at Berne on March 20, 1914, shall be re-established or restored, as from the tenth day of January, 1920, in Canada in favour of the persons entitled to the benefit of them immediately before the war, or their legal representatives. Equally, rights which, except for the war, would have been acquired during the war in consequence of an application made for the protection of industrial property, or the publication of a literary or artistic work, shall be recognized and established in favour of those persons who would have been entitled thereto from the tenth day of January, 1920.

"(2) Nevertheless, all acts done by virtue of the special measures taken during the war under legislative, executive or administrative authority in Canada in regard to the rights of German nationals in industrial, literary or artistic property shall remain in force and shall continue to maintain their full effect."

Annotation.

There have been a few cases in Canada dealing with the disposition of enemy property during and following the war. In *Lampel* v. *Berger* (1917), 38 D.L.R. 47, 40 O.L.R. 165, a contract involving the sale of land made by an Austro-Hungarian residing in the United States was in question. The Court held that the contract was valid but the circumstances were such as to disentitle the defendant to payment during the war. An examination of the grounds on which a contract of this kind might be determined invalid was made by MULOCK, C.J.Ex., in the case referred to in the following terms (38 D.L.R. at 49-50):

"At this date no authority is needed in support of the general proposition of law that upon the declaration of war it became unlawful for any resident of Canada to trade with 'the enemy.' Is the defendant, who is by nationality a Hungarian, but who, at the time of the making of the contract, and ever since, has resided and carried on business in the United States of America, an enemy in the sense that he was incapable of entering into a binding contract with a resident of Canada? I think not.

"With reference to civil rights, 'enemy' does not mean a person who is by nationality a subject of a nation with which His Majesty is at war, but a person, of whatever nationality, who resides or carries on business in enemy territory. Thus, a resident of Canada may trade with a person who is by birth a subject of Germany, if the latter resides in Canada or in some neutral territory, but not if he resides or carries on business in enemy territory. Thus it would be unlawful to trade with a British subject who resides or carries on business in Germany or in any other country with which His Majesty is at war. This prohibition of commercial intercourse is based on public policy, which aims at preventing trade or intercourse that by possibility may be to the advantage of the enemy or the disadvantage of His Majesty's Empire.

"In *Janson* v. *Driefontein Consolidated Mines Ltd.*, [1902] A.C. 484, Lord Lindley says, at pp. 505, 506: 'But when considering questions arising with an alien enemy, it is not the nationality of a person, but his place of business during the war, that is important. An Englishman carrying on business in an enemy's country is treated as an alien enemy in considering the validity or invalidity of his commercial contracts: *M'Connell* v. *Hector* (1802), 3 Bos. & P. 113, 127 E.R. 61. Again the subject of a State at War with this country, but who is carrying on business here or in a foreign neutral country, is not treated as an alien enemy; the validity of his contracts does not depend on his nationality, nor even on what is his real domicile, but on the place or places in which he carries on his business or businesses.'

"In *Porter* v. *Freudenberg*, [1915] 1 K.B. 857, at p. 868, Lord Reading, C.J., quotes with approval this view of Lord Lindley, and states that the law prohibiting commercial intercourse with inhabitants of the enemy country is 'grounded upon public policy, which forbids the doing of acts that will be or may be to the advantage of the enemy State by increasing its capacity for prolonging hostilities in adding to the credit, money or goods, or other resources available to individuals in the enemy State. Trading with a British subject or the subject of a neutral State carrying on business in the hostile territory is as much assistance to the

Annotation.

alien enemy as if it were with a subject of enemy nationality carrying on business in the enemy state, and, therefore, for the purpose of the enforcement of civil rights, they are equally treated as alien enemies. It is clear law that the test for this purpose is not nationality but the place of carrying on the business. . . . When considering the enforcement of civil rights a person may be treated as the subject of an enemy State, notwithstanding that he is in fact a subject of the British Crown or of a neutral State. Conversely a person may be treated as a subject of the Crown notwithstanding that he is in fact the subject of an enemy State.'

"In *Daimler Co., Ltd.* v. *Continental Tyre and Rubber Co.* (Great Britain), *Ltd.*, [1916] 2 A.C. 307, at p. 319, Lord Atkinson says: 'It is well established that trading with the most loyal British subject, if he be resident in Germany, would, during the present war, amount to trading with the enemy, and be a misdemeanour if carried on without the consent of the Crown; the reason being that the fruits of his action result to a hostile country and so furnish resources against his own country.'"

In a more recent case, *Re Walker* (1919), 49 D.L.R. 415, 46 O.L.R. 80, a motion was made by the Secretary of State for a vesting order under the Consolidated Orders respecting trading with the enemy. The will of Hiram Walker of Detroit left certain property to his widow, and certain property to a daughter who had married an alien enemy. The daughter made an agreement to give the widow the Canadian property and retain the United States property herself. Sutherland, J., found that such an agreement was not permissible and held, 49 D.L.R. at 437-8, "there was at least in her a beneficial interest . . . which came under the scope and operation of said orders, and which has not been dealt with and transferred by what has been done elsewhere so as to escape therefrom. . . . No theory of the comity of nations, which implies usually a favourable consideration and adoption by foreign Courts of judgments or orders made in the Courts of domicile, can or should be carried so far as to require [this Court] to decline to make the order asked under the circumstances [of this case]. Any such theory is subject to the essential modification or restriction that, if it runs counter to high public policy, it cannot be given effect to. (Westlake's Private International Law, 5th ed. (1912), pp. 55 and 308.)"

The view of the British Courts with regard to the status of alien enemies during war is indicated by the following authorities:

"A declaration of war by this country against a foreign power imports a prohibition of commercial intercourse with the subjects of that power: *Barrick* v. *Buba* (1857), 2 C.B. (N.S.) 563, 140 E.R. 536.

"The national character of a trader is to be decided, for the purposes of the trade, by the national character of the place in which it is carried on. If a war breaks out, a foreign merchant carrying on trade in a belligerent country has a reasonable time allowed him for transferring himself and his property to another country. If he does not avail himself of the opportunity, he is to be treated, for the purposes of trade, as a subject of the power under whose dominion he carries it on, and as an enemy of those with whom that power is at war: *Cremidi* v. *Powell, The 'Gerasimo'* (1857), 11 Moo. P.C.C. 88, 14 E.R. 628.

Annotation.

An action can be maintained by a person of enemy nationality who is neither residing nor carrying on business in an enemy country, but is residing either in an allied or a neutral country and is carrying on business through his partners in that allied country: *Re Mary Duchess of Sutherland* v. *Bubna* (1915), 31 T.L.R. 248.

Although a bill drawn by a prisoner of war in France . . . upon a person resident in England in favour of an alien enemy could not have been originally enforced, the drawer is liable on a subsequent promise in time of peace to pay principal and interest: *Duhammel* v. *Pickering* (1817), 2 Stark. 90.

An alien, to whom a bill of exchange drawn on England by a British subject detained prisoner in France during war [with England], payable to another British subject also detained there, is endorsed by the latter, may sue on it in this country after the return of peace: *Antoine* v. *Morshead* (1815), 6 Taunt. 237, 128 E.R. 1025.

In the case of *The "Johanna Emilie"* (1854), Spinks' Prize Cases 12, referring to sale by a belligerent to a neutral of a ship in a neutral port, the British Prize Court held that the British Prize Courts recognize such a sale as a valid transaction of commerce, if it be *bonâ fide*, and the enemy's interest has been entirely divested. The Court held (at p. 16) that if the *bonâ fides* of the sale be assumed, "it is not to be denied that it is competent to neutrals to purchase the property of enemies to another country, whether consisting of ships or anything else; they have a perfect right to do so, and no belligerent right can override it."

In some instances the question of domicile is important. Sir William Scott in *The Jonge Klassina* (1804), 5 Ch. Rob. 297 at 302, held: "A man may have mercantile concerns in two countries, and if he acts as a merchant in both he must be liable to be considered as a subject of both with regard to the transactions originating, respectively, in those countries. That he has no fixed compting house in the enemy's country will not be decisive." (See also *The Portland* (1800), 3 Ch. Rob. 41; under proper circumstances a change of domicile may be made but only after there is a complete abandonment in fact of the country where the one is domiciled; *In the Goods of Raffenel* (1863), 32 L.J. (P. & M.) 203, and Dicey, Conflict of Laws, 2nd ed. 744.)

A subject of an enemy State cannot, however, acquire a neutral character by having only a place of business in a neutral State; for in this case residence in the neutral State is an essential condition to the acquisition of such character. (*The "Hypatia,"* [1917] P. 36.)

A supplementary incorporation in this country will not effect a change of character (*Orenstein & Koppel* v. *Egyptian Phosphate Co.*, [1915] S.C. 55, see also *Nigel Gold Mining Co* v *Hoade*, [1901] 2 K.B. 849).

Authorities in the United States have, in the main, followed the English cases, above referred to. In *Schulz Co.* v. *Raimes & Co.* (1917), 100 Misc. R. (N.Y.) 697, it was held that a corporation organised under the laws of the State of New Jersey but owned principally in Germany is not precluded from access to the United States Courts during the war.

In *Robinson* v. *International Life Assce. Soc.* (1870), 42 N.Y. 54, affirming judgment in (1868), 52 Barber 450, it was pointed out that war does not make illegal a contract by agents (who reside in one belligerent) of a neutral foreign corporation, with a member of the other belligerent.

Annotation.

Ludlow v *Bowne* (1806), 1 Johns. 1; *De Wolf* v *New York Firemen's Ins. Co.* (1822), 20 Johns. 214. A neutral may carry on commerce with a belligerent in the same manner and extent as in peace except in articles contraband of war or to blockaded ports. The neutral may lawfully contract and deliver property to a citizen of one of the belligerent nations in his country, and the property cannot, therefore, be lawfully captured in a neutral vessel on the way.

Buchanan v. *Curry* (1821), 19 Johns. 137. Where a contract is made between a citizen and an alien, in good fait' and in the usual course of business, before a war, it is not unlawful for the citizen to perform it during the war, if the performance be made to the agent of such alien within this country. A citizen, residing in this State, and his partner a British subject, residing in Canada, entered into a contract with another British subject, also residing in Canada, for the sale and delivery of timber, part of which was delivered prior to the declaration of war of 1812; and the residue was delivered afterwards and during the war. This transaction completed the contract which was held to be lawful.

Executed contracts, although existing prior to the war, are not annulled or extinguished, but the remedy is only suspended. See *Hanger* v. *Abbott* (1867), 6 Wall. 532 at 536.

A non-resident alien may trade with both belligerents or with either. His acts are lawful in the sense that they are not prohibited and so long as he confines his trade to property not hostile or contraband, and violates no blockade, he is secure both in his person and his property. See *Young* v. *United States* (1877), 97 U.S. 39 at 63. If he breaks a blockade or engages in contraband trade, he subjects himself to the chances of the capture and confiscation of his offending property.

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S. C.

Re EMPIRE TIMBER LUMBER AND TIE Co. Ltd.

Ontario Supreme Court, Orde, J. August 26, 1920.

COMPANIES (§ VI A—313)—WINDING-UP—VOLUNTARY—PROVINCIAL COMPANY—PETITION BY CREDITOR UNDER DOMINION ACT—INSOLVENCY NOT PROVED—DISCRETIONARY POWER TO MAKE ORDER OR OTHERWISE.

The fact that a provincial company is in the process of voluntary winding-up does not itself make the company insolvent within the meaning of the Dominion Act; and insolvency not being proved, it is proper to refuse an order under the Dominion Act at the instance of a creditor for less than $600, when creditors to the extent of more than $14,000 are opposed to a compulsory winding-up.

[*Re Cramp Steel Co. Ltd.* (1908), 16 O.L.R. 230, followed; *Re Colonial Investment Co. of Winnipeg* (*No. 2*) (1913), 15 D.L.R. 634, 23 Man. L.R. 871, referred to.]

Statement.

PETITION by Hall Brothers Limited, creditors, for an order for the winding-up of the above-named company, under the Dominion Winding-up Act.

G. H. Sedgewick, for the petitioners.

H. H. Dewart, K.C., for the company.

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RE EMPIRE TIMBER LUMBER AND TIE CO.

Orde, J.

ORDE, J.:—The Empire Timber Lumber and Tie Company Limited is incorporated under the Ontario Companies Act and is now in process of winding-up voluntarily under the provisions of the Act, in pursuance of a resolution of the shareholders passed on the 3rd July, 1920. The resolution also appointed Mr. John S. Stewart liquidator. The company has a nominal capital of $85,000. The evidence as to the nature and extent of the company's assets and liabilities is a little vague, but it appears to have certain saw-mills and equities in or options upon timber lands and some lumber on hand, all valued at approximately $35,000, with liabilities, secured and unsecured, of about $30,000. The petitioners, Hall Brothers Limited, are creditors upon an overdue promissory note for $591.70 and interest. No judgment has been recovered upon this note, nor has there been default for 60 days after demand made, under sec. 4 of the Dominion Winding-up Act.

The petitioners make no allegation of insolvency, but rely solely upon the fact that they are creditors, and that the company has passed a resolution to wind up voluntarily, and ask that it be declared that the company is a corporation to which the provisions of the Winding-up Act are applicable and that the company ought to be wound up under that Act.

That the Court may make a winding-up order under the Dominion Act against a provincial corporation which it is proved has become insolvent is well-established. But the petitioners claim that, without establishing insolvency, they are entitled to have the company wound up under the Dominion Winding-up Act, R.S.C. 1906, ch. 144, para. (*b*) of sec. 6 and paras. (*b*) and (*e*) of sec. 11. Section 6 declares that the Act shall apply to "all incorporated trading companies doing business in Canada wheresoever incorporated . . . (*a*) which are insolvent; or (*b*) which are in liquidation or in process of being wound up," etc. By sec. 11: "The Court may make a winding-up order . . . . (*b*) where the company at a special meeting of shareholders called for the purpose has passed a resolution requiring the company to be wound up; . . . or, (*e*) when the Court is of opinion that for any other reason it is just and equitable that the company should be wound up."

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Orde, J.

There is no doubt that, if the question depended upon the mere construction of these sections, the Court would have power to bring a provincial corporation within the Dominion Act on grounds other than insolvency. But the question whether or not the Dominion Parliament can legislate so as to force a provincial corporation into a compulsory winding-up on any ground other than bankruptcy or insolvency is, in my judgment, not yet clearly settled.

In *Re Cramp Steel Co. Limited* (1908), 16 O.L.R. 230, 231, Mabee, J., held that "the only clauses of the Dominion Act that can be made to apply to an Ontario corporation are those dealing with insolvency." That decision has not yet been overruled in this Province, although in *Re Hamilton Ideal Manufacturing Co. Limited* (1915), 34 O.L.R. 66, 23 D.L.R. 640, Kelly, J., made an order, under paras. (*d*) and (*e*) of sec. 11 of the Dominion Act, to wind up a provincial company; there the question of *ultra vires* does not seem to have been discussed, the only point involved, so far as would appear from the judgment, being whether or not it was a proper case for the exercise of the learned Judge's discretion to make a compulsory winding-up order. As an authority upon the question of jurisdiction I cannot regard that case as in conflict with the *Cramp* case.

I am, however, referred to a decision of the Court of Appeal in Manitoba, *Re Colonial Investment Co. of Winnipeg* (No. 2) (1913), 15 D.L.R. 634, 23 Man. L.R. 871, in which it was held that, as the Dominion Parliament has power under sec. 91 (21) of the British North America Act to declare what constitutes insolvency, it may enact that a company, if in process of voluntary liquidation pursuant to a resolution of its shareholders, may be brought under the provisions of the Dominion Winding-up Act, on the petition of a shareholder, although not actually insolvent, since such voluntary proceeding is to be regarded as a species of insolvency.

In considering whether or not the *Cramp* case is binding upon me, I think I am at liberty to disregard sec. 32, sub-sec. 2, of the Ontario Judicature Act, which provides that "it shall not be competent for any Judge of the High Court Division in any case before him to disregard or depart from a prior known decision of any other Judge of co-ordinate authority on any question of law or practice without his concurrence." I do not

think this provision could be intended to apply to a case involving the exercise of powers conferred or alleged to be conferred by a Dominion Act; and especially when the Act itself provides, by sec. 125, that the Courts of the various Provinces and the Judges thereof shall be auxiliary to one another for the purposes of the Act. While this section does not amalgamate all the provincial Courts into one federal Court, it indicates an intention that they shall work together, and I am of the opinion that it is desirable that, as far as possible, in the judicial interpretation of the provisions of a federal Act, there should be uniformity throughout Canada. For this reason, if the decision of the Manitoba Court of Appeal in the *Colonial Investment* case was upon a question of procedure or involved the mere interpretation of some section of the Act, I should probably feel it my duty to follow it, but the decision deals with the question of the power of a provincial Judge to interfere with the constitution of a provincial company. For this reason, I deem it my duty to consider whether or not I should follow that decision here.

Now, assuming for the sake of argument that, in the exercise of its power to legislate upon the subject of "Bankruptcy and Insolvency," under sec. 91 (21) of the British North America Act, the Dominion Parliament can declare that the passage of a resolution to wind up voluntarily *ipso facto* makes the company insolvent, I am unable to see how or where in the Winding-up Act it has so declared. Among all the different conditions which the Act, by sec. 3, declares shall be deemed to be insolvency, the voluntary winding-up of the company is not mentioned. On the contrary, sec. 6 makes the Act applicable in two classes of cases: (*a*) when the company is insolvent; and (*b*) when it is in liquidation or in process of being wound up—shewing that there may be cases of liquidation or winding-up which do not necessarily conconstitute insolvency. With all due respect to the decision in the Manitoba case, I am utterly unable to follow the reasoning which leads to the conclusion that, because the Dominion Parliament has power to declare what shall constitute insolvency, the Winding-up Act has in effect declared that a voluntary liquidation or winding-up is "a species of insolvency." In my judgment, the Dominion Act has done no such thing. If it has declared anything at all in this respect, it is that a voluntary liquidation

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RE EMPIRE TIMBER LUMBER AND TIE CO. LTD.

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or winding-up may not involve insolvency at all. If the Manitoba decision is to be accepted as sound, then it means that a provincial corporation, however solvent it may be, cannot voluntarily wind up and distribute its assets under the law of its constitution without running the risk of being harassed by a small creditor, or by one shareholder, who wishes to see the company compulsorily wound up under the Dominion Act. With all due respect for the judgment of those Judges who were in the majority in the Manitoba case, I find myself unable to agree with their decision. In my judgment, the mere fact that a provincial company is in process of voluntary winding-up does not of itself make the company insolvent under the Dominion Act.

It was argued on behalf of the petitioners that the Dominion Act gives power to wind up a provincial company on grounds other than insolvency. But all the authorities are agreed, I think, that the only basis for federal interference with the constitution of a provincial corporation is its bankruptcy or insolvency. The decision in the Manitoba case does not purport to justify itself upon any other ground than that the voluntary winding-up constituted a "species of insolvency."

It may be that, before coming to a decision upon the scope of the Dominion Winding-up Act, I should direct notice to be given to the Attorney-General for Canada and the Attorney-General for Ontario, under sec. 33 of the Ontario Judicature Act, and if the parties desire it I shall direct such notice to be given. But, as I am also of opinion, even assuming that I have power to make an order, that, in the exercise of my discretion, the order ought not to be made, it would serve no useful purpose to have a re-argument before me. If any appeal is taken from my order, then notice under sec. 33 may be necessary.

The petitioners object to the liquidator entering into a contract for the cutting and sale of a quantity of lumber, the details of which it is hardly necessary to go into here. Creditors to the extent of over $14,000 appear to be willing that the liquidator should be given an opportunity of trying to realise the assets to the best advantage, and are opposed to a compulsory winding-up. Under these circumstances, I do not think I ought, at the instance of a creditor for less than $600, to make an order to wind up the company under the authority of the Court. It is, of course,

obvious that default in payment of the petitioners' claim, within the time fixed by the Winding-up Act, may make the company technically insolvent, or the company may commit an act of bankruptcy under the Bankruptcy Act.* In either of these events, the petitioners' position will be different, but at present I do not consider it just or equitable that the company should be wound up under the Dominion Act.

The application is, therefore, dismissed with costs.

Application dismissed.

CURTIS'S AND HARVEY, Ltd. v. NORTH BRITISH AND MERCANTILE INS. Co. Ltd.

CURTIS'S AND HARVEY, Ltd. v. GUARDIAN ASS'CE Co. Ltd.

Judicial Committee of the Privy Council, Viscount Haldane, Viscount Cave, Lord Dunedin, Lord Atkinson, and Duff, J. October 19, 1920.

INSURANCE (§ III D—65a)—STATUTORY CONDITION AS TO EXPLOSION—INTERPRETATION—WARRANTY BY COMPANY—AUTHENTICATION—NOT WITHIN STATUTE—CONSTRUCTION.

Statutory condition No. 11 of art. 7034, R.S.Q. 1909, provides that "The (insurance) company shall make good loss caused by the explosion of gas in a building not forming part of a gasworks, and all other loss caused by any explosion causing a fire and all loss caused by lightning even if it does not set fire." *Held*, that this condition only deals with the case of an explosion originating a fire and not with an explosion incidental to a fire, and where loss is caused partly by fire and partly by explosion a policy expressed to be against fire, and containing the following clause, "Warranted free of claim for loss or damages caused by explosion of any of the material used on the premises," the clause being properly authenticated as required by article 7036 of the statutes, should be given effect to, and an enquiry directed to enquire into the question of what damages are due respectively to fire and explosion.

[*Hobbs, etc. v. Northern Ass'ce Co.* (1886), 12 Can. S.C.R. 631; *Stanley v. Western Ins. Co.* (1868), L.R. 3 Exch. 71; *Hooley Hill Rubber Co. v. Royal Ins. Co.*, [1920] 1 K.B. 257, 272, referred to; *Guardian Ass'ce Co. v. Curtis and Harvey Ltd.* (1919), 29 Que. K.B. 254, affirmed.]

Statement.

APPEAL by plaintiff from the judgment of the Court of King's Bench, Quebec (appeal side) (1919), 29 Que. K.B. 254, in an action to recover the full amount of policy insuring their premises against fire. Affirmed.

The judgment of the Board was delivered by

Lord Dunedin.

LORD DUNEDIN:—Though this is an important case, both in respect of the amount which is at stake and from the fact that it has given rise to a difference of judicial opinion, yet the facts out of which the question arises are capable of being set forth with great succinctness.

*See Annotation on the Bankruptcy Act 53 D.L.R. 135.

IMP.

P. C.

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The appellants in the first of these appeals are manufacturers of explosives and are the owners of works in which such explosives are made, and in particular, they were engaged in the manufacture of tri-nitro-toluol. They wished to insure their works against fire, and through their brokers they sent to the respondents, the North British and Mercantile Insurance Co., a slip on which was typewritten their requirements for insurance. These consisted of a specification of the various buildings wished to be insured, with the addition of terms on which they wished the insurance to be granted. Upon this the respondents issued a policy. The policy consisted of a printed form giving the general words of insurance against fire, leaving a blank for a specification of the premium, and leaving a large blank for the specification of the subject insured. This latter blank was filled up by pasting in a slip, or, as it is locally termed, an "allonge," which was a typewritten paper exactly echoing the proposal made by the broker. On the back of the form are the printed statutory conditions which, according to the law of Quebec, must be printed on every policy, and to which fuller reference will be presently made.

A fire took place in one of the buildings insured in which there was a nitrator, which is a machine employed in one of the stages of the manufacture of T.N.T. From this building the fire extended to the adjoining building, in which there was some T.N.T. Ten minutes after the inception of the fire, an explosion occurred of the T.N.T. That building was wrecked and burning material blown about. Further fires ensued, and then from time to time further explosions. In the end practically the whole of the insured buildings were, whether by explosions or by fire, totally destroyed.

The appellants sue upon the policy for the whole amount, subject to the adjustment which is necessary in respect of there being other insurance in other policies on the same subject. The respondents admit their liability for damage by fire, but contend that they are not liable for damage attributable to explosion, and aver that the greater part of the damage was in fact so caused. Proof was led in which the facts, which have been summarised, were elicited.

It is now necessary to set forth the clauses of the policy on which the question of law depends. The insurance is expressed to be

against fire. In the slip or allonge there is the following clause:—"Warranty free of claim for loss or damage caused by explosion of any of the material used on the premises."

No. 11 of the statutory conditions, R.S.Q. 1909, art. 7034, is as follows:—

(11) The company shall make good loss caused by the explosion of gas in a building not forming part of the gasworks, and all other loss caused by any explosion causing a fire and all loss caused by lightning, even if it does not set fire.

The R.S.Q. 1909, enact, arts. 7034, 7035 and 7036:—

Art. 7034. The conditions set forth in this article shall, as against the insurer, be deemed to be part of every contract of fire insurance entered into or renewed on or after the tenth day of February, 1909, in the Province, with respect to any property therein, or in transit therefrom or thereto, and shall be printed on every such policy with the heading, "Conditions of the Policy," and no stipulation to the contrary, or providing for any variation, addition or omission, shall be binding on the assured unless evidenced in the manner prescribed by arts. 7035 and 7036.

Art. 7035. If the insurer desires to vary the said conditions, or to omit any of them, or to add new conditions, there shall be added to the contract containing the printed statutory conditions, words to the following effect, printed in conspicuous type and in ink of a different colour: "VARIATIONS IN CONDITIONS." This policy is issued on the above conditions, with the following variations and additions. [Set forth the conditions.]

"These variations are made by virtue of the Quebec Insurance Act, and shall have effect in so far as, by the Court or Judge before whom a question is tried relating thereto, they shall be held to be just and reasonable requirements on the part of the company."

Art. 7036. No such variation, addition or omission shall, unless the same is distinctly indicated as set forth in art. 7035, be legal and binding on the insured.

The above quoted warranty contained in the allonge is not printed in red ink. There is, however, inserted in red ink the following variation of condition 11:—

. . . Add the following clause as explanatory of the company's actual liability under clause 11: "This company is not liable for loss caused by explosions of any kind, unless fire ensues, and then for loss or damage by fire only"; nor for loss or damage to any electrical machinery, appliances or equipment, unless fire ensues, and then to include the loss or damage caused by fire only.

The respondents contended that in respect of the clause of warranty above quoted they are not bound to pay for any damage caused by explosion. The trial Judge found for the appellants, and held that the warranty clause was bad, first because it was a variation of the statutory conditions not properly authenticated,

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and second, because in itself it was unreasonable. The Appeal Court reversed that judgment (1919), 29 Que. K.B. 254, and ordered enquiry as to how much damage was caused by explosion and how much by fire, the evidence as led not having been directed so as to clear up this point. Appeal has now been taken to this Board.

There are two questions accordingly which fall to be decided. The first is what is the proper construction of the clause of warranty, the second is if on a proper construction of the clause the respondents are not bound to pay any loss caused by explosion, then is the clause binding on the appellants in respect either (*a*) that it is not properly authenticated or (*b*) that it is in itself unreasonable?

It may be well here to set out what is the state of the decisions on questions which nearly touch the point. In the case of *Hobbs, Osborn and Hobbs* v. *The Northern Ass'ce Co.* (1886), 12 Can. S.C.R. 631, the Supreme Court of Canada decided that a policy which insured against fire covered all loss caused by explosion which was an incident of the fire, *i.e.*, when a fire began without an explosion and an explosion took place during its course and was caused by it. Scrutton, L.J., in the case of *Hooley Hill Rubber and Chemical Co.* v. *Royal Ins. Co.*, [1920] 1 K.B. 257 at 272, expressed an opinion to the same effect. Their Lordships agree with the reasoning of the Judges in *Hobbs's* case. That is an authority on what an insurance against fire covers. The case of *Stanley* v. *Western Ins. Co.* (1868), L.R. 3 Exch. 71, was a case which explained an exception. In that policy, which was against fire, the insurer, in terms of the policy, was not to be liable for loss or damage by explosion. This expression was held to cover all loss by explosion, whether the explosion succeeded to or was caused by a fire, or was prior to and caused a fire. The *Stanley* case was followed by the English Court of Appeal in the *Hooley Hill Rubber Co.'s* case already cited. These cases are not actually binding on their Lordships, but they agree with them. *Stanley's* case was decided by a very strong Court, and has stood as the law of England for many years.

Now were the policy here simply a policy against fire, with the warranty added, the case would be ruled in terms of the decision in *Stanley's* case. The only distinction that can be drawn is that here the policy is not simply against fire, but that there is

adjected the statutory condition No. 11. The primary object of the statutory conditions is to prevent the insurer by means of exceptions skilfully worded and not particularly brought to the notice of the assured, avoiding liability which it is only just and reasonable he should undertake in a fire policy. Their Lordships agree with the arguments of the appellants' counsel that these conditions, if there is doubt, should be held rather as amplifying than as cutting down the insurer's liability. Statutory condition No. 11 may, therefore, be taken to fill up the lacuna left by *Hobb's* case; that is, to make it clear that when the original cause of fire is explosion the damage must be made good by the insurer. The question, therefore, resolves itself into this. When the assured said he would be content that the insurer should not be liable for all loss caused by explosion of the material used on the premises, was he contracting to that effect in view of the sum total of the liabilities under the policy, or was he merely contracting as to the additional liability imposed by clause 11?

It must be remembered that these were T.N.T. works. It is true that T.N.T. may be consumed without being exploded; it may simply burn without its occasioning an explosion in either the popular or scientific sense. As to what is the true meaning of the word "explosion," the parties have been content to leave the Court without any means of judging this from the scientific point of view. Their Lordships do not think they are entitled to read in any knowledge which they may as individuals possess on the subject, but are bound to take it that the parties are agreed to take the word in the popular sense, in which sense it has been used in the résumé of the facts given above. But while T.N.T. might burn it might also explode, and it seems to their Lordships impossible to come to any conclusion but that the parties must have contemplated the possibility of an explosion either as an incident or as an originator of fire. It is obvious that if the assurer was content to have this possible risk barred, he would secure an insurance on better terms. When, therefore, he used in his proposal and the insurer accepted in the policy, words which are absolutely general, and in no way limited, their Lordships think that the more natural construction is to apply the words of exception to the whole risks in which explosion takes a part rather than to confine them to the one special case provided for by statutory condition 11, to which no reference is made.

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The next question to be decided is whether the construction of the warranty, being as above, it is itself struck at by the provisions of art. 7036. The Judges in the Court below, 29 Que. K.B. 254, have held that in respect that art. 7035 specified the insurer as the person who may be desirous to vary the condition, the clause does not apply in cases where, as here, the insured proposed the variation, which was accepted by the insurer. Their Lordships are unable to agree with this view of the statute. Art. 7036 is quite peremptory in its terms. Their Lordships think that it is the policy of the statute to make a hard and fast rule that every fire policy shall have attached to it these statutory conditions, and that they cannot be varied so as to be binding on the insured, unless the variations are authenticated in the prescribed manner. The result will be that, if not varied, they remain in full force, but any other stipulation and covenant which may define or limit the risk can also receive effect in so far as it does not contradict the statutory conditions which are paramount. Applying this view to the question in hand, the insurers are warranted free from explosions of every sort, except such explosion as is provided for by statutory condition 11. Now statutory condition 11, as already stated, only deals with an explosion originating a fire, and does not deal with the case of an explosion incidental to a fire. It follows that the present case is not touched by statutory condition 11, and the warranty free from explosion can have effect. This leads, though by a different line of reasoning, to the same result as reached by the Judges of the Court of Appeal, 29 Que. K.B. 254. Their Lordships need only add that they agree with the Court of Appeal, differing from the trial Judge that the condition is not in itself unreasonable.

Two minor matters forming the material of interlocutory judgments must be mentioned, as they enter into the judgment of the Court of Appeal, though they were not made a matter of argument before their Lordships. Their Lordships consider that the trial Judge was right in striking out a paragraph which proposed to adduce evidence as to the intentions of parties antecedent to the issue of the policy. The matter of the other interlocutory judgment is somewhat obscure. If, as Maclennan, J., thought, it was only a renewal in another form of the motion already dealt with, no more need be said. If, on the other hand, it was a plea

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which would destroy the contract on the ground of its being *ultra vires* of the company, there is, in the view of their Lordships' decision on the merits, no necessity to discuss it. Their Lordships, therefore, think that the judgment of the King's Bench should be varied by striking out from the operative final paragraph such part as deals with the interlocutory judgments, but so far as it directs enquiry into the question of damages due respectively to fire and explosion, should be affirmed, and that the respondents should have the costs of this appeal.

In the second appeal the facts are the same, except that there is no variation whatever of statutory condition 11. The same arguments accordingly apply, and the result must be the same as in the former case.

The respondents on June 11, 1920, obtained special leave to cross-appeal in each action, on the ground that the judgments of the Court of King's Bench, 29 Que. K.B. 254, should have directed judgment to be entered for them. It follows from this judgment that these cross-appeals ought to be dismissed and the appellants are entitled to their costs in respect of them. These costs should be set off against the costs which the appellants are directed to pay to the respondents in the main appeals.

Their Lordships will humbly advise His Majesty to the foregoing effect. *Judgment accordingly.*

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Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont, and Elwood, JJ.A. November 1, 1920.

SALE (§ IV—91)—AGREEMENT FOR DELIVERY OF HORSES—RETURN OF PROMISSORY NOTE—CONSIDERATION COMPLETELY EXECUTED—APPLICATION OF SALE OF GOODS ACT, R.S.S. 1909, CH. 147, SEC. 6.

The plaintiff and defendant entered into an agreement that the defendant would give the plaintiff an order for the delivery of certain horses which he owned in North Dakota, and in consideration of that order the plaintiff would send from Moose Jaw while on his way to the United States a promissory note given to him by the defendant. The defendant gave the order; the Court held that the consideration for the return of the note being completely executed, the Sale of Goods Act, R.S.S. 1909, ch. 147, sec. 6, had no application.

[See Annotation on The Statute of Frauds by John D. Falconbridge, 55 D.L.R., page 1.]

Statement.

APPEAL by defendant from the trial judgment in an action on a promissory note. Reversed.

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Newlands, J.A.

C. E. Gregory, K.C., for appellant; *F. L. Bastedo*, for respondent.

HAULTAIN, C.J.S., and ELWOOD, J.A., concur with LAMONT, J.A.

NEWLANDS, J.A.:—This is an action on a promissory note given by defendant to plaintiff. The defence is that settlement in full was made on October 30, 1919, at the residence of the defendant at Merryflat, Sask., when the plaintiff received and accepted from the defendant payment in full of the said note and promised to mail said note to the defendant at Merryflat as soon as he would return to Moose Jaw and obtain the same.

The evidence on the part of the defendant was, that he had two horses in the United States which plaintiff agreed to accept in full payment of the note. Defendant then gave plaintiff a written order for the horses, and plaintiff agreed to mail the note sued on to him as soon as he returned to Moose Jaw.

The trial Judge, in giving judgment for plaintiff on the note, said: "In order that you may succeed in your defence that you satisfied the claim by the sale of the horses you must shew that you complied with the Sale of Goods Act, R.S.S. 1909, ch. 147."

No other finding was made on the defence, but, from the language used by the trial Judge, I draw the conclusion that he was satisfied that the parties had made the contract set up by the defence, but it not being in writing, nor an actual delivery of the consideration, there was no legal evidence to prove the same.

In so holding, I think the trial Judge was wrong.

In *Lavery* v. *Turley* (1860), 6 H. & N. 239, 158 E.R. 98, the action was for goods sold. The defence was,

> That after the accruing of the causes of action the defendant was in possession of a public house and stock in trade, and thereupon it was agreed that in consideration that the defendant, at the request of the plaintiff, would quit the said public house and premises, and deliver up possession of the same and the stock in trade to the plaintiff, the plaintiff would pay to the defendant the sum of £100 and give up and discharge and exonerate the defendant from all debts and claims and causes of action in respect of the causes of action in the declaration mentioned. That the plaintiff in pursuance of the agreement paid the £100, and the defendant then quitted the house and gave up possession of the stock.

Upon the jury finding a verdict for defendant, leave was reserved to the plaintiff to move to enter a verdict for him if the agreement relied upon by the defendant ought to have been in writing. The Court held that it need not be in writing to be used as a defence. Pollock, C.B., said, at p. 240:—

We are all of opinion that there ought to be no rule. The objection is that the agreement is one which, by the Statute of Frauds, is required to be in writing; and that would be so if it were sought to enforce it as an agreement. But it is pleaded as a fact that the defendant performed the agreement, and the plaintiff accepted such performance in satisfaction. The objection that the agreement was not in writing is got rid of. The 4th section of the Statute of Frauds does not exclude unwritten proof in the case of executed contracts. A familiar instance is that of letting land for a period longer than 3 years, where, if the premises have been occupied, evidence may be given of the terms of the holding. Newlands, J.A.

There should, therefore, be judgment for defendant, and the appeal allowed with costs.

LAMONT, J.A.:—The plaintiff sues on a promissory note dated February 3, 1914, and payable October 1, 1919. The defence is that the plaintiff's claim was settled on November 22, 1919, and that the plaintiff then agreed to mail the note sued on to the defendant as soon as he returned to Moose Jaw, where the note was. The defendant, his daughter, Annie, and his son, Fred, testified that on November 22 the plaintiff came to the defendant's place and a discussion took place as to the payment of the note. They say it was agreed between the plaintiff and defendant that the defendant should give the plaintiff two horses which he had at a certain place in North Dakota, and that the plaintiff, who was going to the United States, would go by way of Moose Jaw and would send the note to the defendant from there. The plaintiff denies this, and says that the horses were to be taken in settlement of an account for feeding cattle which the plaintiff had against the defendant. The plaintiff received from the defendant an order for the horses, but he did not send the note to the defendant. He went to North Dakota, but after seeing the horses refused to take them. Lamont, J.A.

The judgment of the trial Judge is as follows:

I consider that the plaintiff is entitled to judgment on his claim because in order that you may succeed in your defence that you satisfied the claim by the sale of two horses you must shew that you complied with the Sale of Goods Act. That is if you are going to sell your two horses for consideration you must comply with the Act. That is there must either be a delivery of the consideration or there must be something given in earnest to bind the bargain or the agreement must be in writing and none of the conditions in this case are complied with.

These observations on the part of the Judge to my mind are consistent only with the conclusion that an agreement had been arrived at, as testified by the defendant and his witnesses, that

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the plaintiff would take the horses in satisfaction of the note and return it to the defendant. Had the Judge not been satisfied that such was the case, there would have been no object in giving the above reasons.

The trial Judge, however, in my opinion erred in holding that the Sale of Goods Act, R.S.S. 1909, ch. 147, applied to this case. The evidence of the plaintiff's son and daughter establishes that the plaintiff said he would send the note back when he got to Moose Jaw on his way to North Dakota. The return of the note, therefore, was not dependent upon the plaintiff's accepting the horses when he saw them. The real agreement was that the defendant would give the plaintiff an order for the horses on the man in North Dakota in whose possession they were, and in consideration of that order the plaintiff would send the note from Moose Jaw while on his way to the United States. The defendant gave the order. The consideration for the return of the note was therefore completely executed, and the statute has no application. The plaintiff having received the consideration for his promise to return the note, must fulfil that promise.

The appeal should, therefore, be allowed with costs and the action dismissed with costs. *Appeal allowed.*

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Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin, Brodeur and Mignault, JJ. November 2, 1920.

BRIBERY (§ I—4)—TO INDUCE OFFICER NOT TO PROCEED FOR VIOLATION OF TEMPERANCE ACT—INTERFERENCE WITH ADMINISTRATION OF JUSTICE—INDICTABLE OFFENCE—CRIMINAL CODE, SEC. 157.

A bribe given to an officer in order to induce him not to proceed against the accused for violation of the Saskatchewan Temperance Act is given with intent to interfere with the administration of justice and is an indictable offence punishable under sec. 157 of the Criminal Code.

[*Rex* v. *Kalick* (1920), 53 D.L.R. 586, affirmed.]

Statement.

APPEAL by defendant from the Court of Appeal of Saskatchewan affirming a conviction for bribery in order to induce an officer not to proceed against the defendant for violation of the Saskatchewan Temperance Act. Affirmed.

F. H. Chrysler, K.C., for appellant; *Harold Fisher*, for respondent.

Davies, C.J.

DAVIES, C.J.:—I concur with Anglin, J.

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IDINGTON, J. (dissenting):—The appellant was indicted in the King's Bench Judicial District of Swift Current, in Saskatchewan, as follows:—

. . . For that he, the said Jacob Kalick, on the 20th of December, A.D. 1919, with intent to interfere corruptly with the due administration of justice did corruptly give to one Abraham Weder, a police officer, a bribe, to wit: the sum of one thousand dollars ($1,000.00) in order to induce the said Abraham Weder not to proceed against the said Jacob Kalick for violation of the Saskatchewan Temperance Act.

On this he was found guilty by the jury and thereupon the trial Judge reserved for the Court of Appeal the following question:—

Was a bribe given in order to induce a police officer not to proceed against the accused for violation of the Saskatchewan Temperance Act (7 Geo. V. 1917, ch. 23), given with intent to interfere with the administration of justice under sec. 157 of the Criminal Code?

The evidence and charge to the jury is annexed hereto.

The majority of the Saskatchewan Court of Appeal answered in the affirmative (1920), 53 D.L.R. 586.

The dissenting opinion of Newlands, J., which gives us, by virtue of sec. 1024 of the Crim. Code, the jurisdiction to hear an appeal therefrom, held that the offence disclosed by the evidence did not fall within said sec. 157 of the Crim. Code inasmuch as it was not specifically defined by the said Code as a crime, and was specifically provided for by sec. 39 of the Saskatchewan Temperance Act, 7 Geo. V. 1917, ch. 23, under and by virtue whereof the officer in question was acting when alleged to have been bribed.

The section 39 of said Act reads as follows:—

39 (1) No police officer, policeman or constable shall, directly or indirectly, receive, take or have any money for reporting or not reporting any matter or thing connected with the administration of this Act, or for performing or omitting to perform his duty in that behalf, except the remuneration and allowance assigned him in virtue of his office by the Government of the Province. (2) Any police officer, policeman or constable receiving, or any person offering money contrary to the provisions of this section shall be guilty of an offence and liable to a penalty of $100 and, in default of immediate payment, to imprisonment for 3 months.

He held that, inasmuch as Parliament has the exclusive jurisdiction of declaring what is, or may constitute a crime, and had only declared offences against provincial legislation to be crimes when and so far as falling within sec. 164 of the Crim. Code, which he held could not be so operative or effective as the circum-

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stances in question herein required in order to maintain said conviction. That section reads as follows:—

164. Everyone is guilty of an indictable offence and liable to one year's imprisonment who, without lawful excuse, disobeys any Act of the Parliament of Canada or of any Legislature in Canada by wilfully doing any act which it forbids, or omitting to do any act which it requires to be done, unless some penalty or other mode of punishment is expressly provided by law.

That which is simply a re-enactment of the Crim. Code of 1892 seems, not only an express declaration of what (when merely resting upon disobedience of an Act of Parliament or of a Legislature) is to constitute an indictable offence, but also to limit or restrict the indictable quality of the offence to something which is not within the reservation expressed by the term "unless some penalty of other mode of punishment is expressly provided by law."

That enactment of the Crim. Code of 1892 was in substitution of 31 Vict. 1868, ch. 71, sec. 3, which was the earliest enactment of the Dominion Parliament giving the added strength of its enactments by virtue of the exclusive jurisdiction it had over criminal law, to help the enforcement of provincial legislation.

As I have always understood, the policy pursued in this regard has been to help the provincial legislation but to carefully abstain from trenching upon the provincial legislative powers, or wishes of the provincial legislators, as expressed by themselves relative to the sanctions to be imposed by provincial legislation.

Such being the case when we find any provincial legislative enactment containing an express sanction to secure its enforcement, its terms ought to be respected and be the limit in that regard.

It seems idle to take as our guide the vulgar idea of what may constitute a crime, when we have a much better guide in the history of the legislation emanating from Parliament as above outlined.

Then turning to the details of what has to be considered in light thereof, we have, in sec. 2 of the Crim. Code, the definition and interpretation of the words "Peace Officer" and "Public Officer" which are used in the said sec. 157, now in question.

Why should we go beyond these for the purposes of this case?

There certainly is nothing in the Saskatchewan Temperance Act that seems to justify any departure from these respective definitions, nor in the Code to render it imperative to expand either definition in relation to the particular officer in question herein.

What were his duties? What office did he fill under the Saskatchewan Temperance Act which would render it fitting he should be looked upon as either a peace officer or a public officer within the meaning of sec. 157 of the Crim. Code, now in question?

He may have been in fact a peace officer, or worn the uniform of such, but the actual duty in question which he had to discharge was under the Liquor Department created under said Act to inspect the books which appellant, as a druggist, was bound by said law to keep as a vendor of liquor, and compare the incoming supply of liquors with the outgoings served from said supply, and the prescriptions authorising sales, and report the result of such inspection and audit, to his superior officer.

Any man or woman sent by the Liquor Department to discharge such simple duty could have made just as good a report. It was not in any legal sense necessary to have sent a constable, or peace officer, or public officer, as defined by the Code, to perform such a duty.

And sending one apparently so decorated surely did not help to bring him within the meaning of sec. 157.

The evidence of Weder, the officer in question, tells the story as follows:—

Q. What was the first conversation you had with him? A. When I came into the drug store I asked for the records and Mr. Kalick gave them to me and I went back into the dispensary to do the work there. I sat down at the little table in the dispensary, Mr. Kalick came in and says "listen here, I will give you $100 and you leave the books alone." I said I would not do that. I then went to work and started to check up the books and just before I was through Kalick came up again and asked me how I was getting along. I replied that I was of the opinion that he had to account for some shortage. He said "I will give you $500 and you leave the books alone," or rather "Fix up the books so that they will be alright." I said I did not know whether he would be short or not yet, that I was not through. After I was through checking up the books I found a shortage of liquor and I asked Mr. Kalick if he could account for the shortage and he did not say anything to that. So then he offered me $1,000 to call the matter square, that is the way he put it.

This illuminates the story relative to the nature of the duties that were being discharged and the offence of the appellant.

Unless we are to hold that the administration of the Saskatchewan Temperance Act and "the administration of justice" are synonymous terms, I fail to see how we can bring this offence, which the foregoing quotation and the remainder of the story unfold, assuming the strict interpretation of it as against the

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appellant; within the meaning of the indictment assumed to be founded upon sec. 157 in question.

I have no doubt upon the facts interpreted as contended for against the appellant, and in the absence of legislation relevant thereto, that he might have been held to have offended at common law as suggested in the Court below, or against sec. 39 of the Saskatchewan Temperance Act.

I cannot see, even if the conviction herein stands, how the appellant could plead that, if prosecuted at common law or under said sec. 39 of said Act, 7 Geo. V. 1917, ch. 23, in bar of such prosecution.

That seems to me not only the fair test, but the one which the law imperatively requires to maintain this conviction as founded on sec. 157.

In short I agree with Newlands, J., 53 D.L.R. 586, that the offence now in question disclosed by the evidence was, if interpreted against the appellant, clearly one against the above quoted sec. 39, sub-sec. (2), and hence impliedly excluded by sec. 164 of the Crim. Code from falling within sec. 157, now in question.

Moreover, assuming there might, in the absence of special or specific legislation bearing on the question, have been found something offensive against the common law, it is not that we have to deal with but sec. 157. And I submit we must read that and sec. 164 together, and apply the law that fits the crime.

I, therefore, am of the opinion that the appeal should be allowed.

Duff, J.

DUFF, J.:—The stated case is in these words:—(See judgment of Idington, J., *ante* p. 105).

The question submitted for the opinion of the Court is: (See judgment of Idington, J., *ante* p. 105).

It seems clear that giving a bribe to prevent prosecution for an offence is *primâ facie* an interference with the administration of justice. Mr. Chrysler argues that it is not within those words in the context in which they appear in sec. 157 on two grounds:

1. That the offence is specifically dealt with in those parts of the same section as well as in sec. 164 of the Code and that the normal scope of the phrase must receive some restriction in consequence. I cannot perceive the application of sec. 164 and as to the other parts of sec. 157 they do not touch the case of

accepting or giving a bribe for affording protection against a prosecution for an offence and that the facts proved established a case of giving a bribe for such a purpose is assumed in the question submitted.

2. He argues that the application of the section is limited to offenders or persons supposed to be suspected of being or fearing that they are offending against the criminal law strictly so called, that is to say, against the criminal law as falling within the exclusive jurisdiction of the Parliament of Canada. While the word "crime" in the Crim. Code generally speaking applies only to crimes strictly so called and probably has that restricted meaning in this section, I think there is nothing requiring us to limit the meaning of the words "administration of justice" in the way suggested.

The appeal should be dismissed.

Anglin, J.

ANGLIN, J.:—The reserved case assumes that the defendant endeavoured to stifle a prosecution for a violation of the Saskatchewan Temperance Act by bribing a police officer. Was the bribe "given with intent to interfere with the administration of justice under sec. 157 of the Crim. Code" is the question propounded. In my opinion it was.

It is quite immaterial whether the police officer actually intended or contemplated instituting a prosecution. It suffices that the appellant gave the bribe with intent to head off such a proceeding. The due administration of justice is interfered with quite as much by improperly preventing the institution of a prosecution as by corruptly burking one already begun.

Two contentions were pressed by Mr. Chrysler—(a) that interference with a prosecution for a contravention of a provincial penal statute is not within the purview of sec. 157 of the Code; and (b) that if any offence against that section was committed it was that of bribing a police officer "to protect (the appellant) from detection or punishment," and not that of "interfering corruptly with the due administration of justice."

(a) The obvious purpose of sec. 157 is to declare criminal and to render indictable the corruption or attempted corruption of officers engaged in the prosecution, detection or punishment of offenders. "Offenders" is a very wide term (*Moore* v. *Illinois* (1852), 55 U.S. (14 How.) 13), and the use of it affords a strong

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indication that the appellation of sec. 157 should not be restricted, as counsel for the appellant argued, to cases in which the bribe is offered or given to prevent the prosecution, detection or punishment of a person who is, or apprehends that he may be, charged with a crime indictable under the Crim. Code or at common law. The contravention of a valid provincial penal statute is an offence and a person who commits it is an offender.

(b) I am unable to agree with the contention that, if what the appellant did amounted to bribing a peace officer with intent "to protect (himself) from detection or punishment, etc.," within the concluding phrases of clause (a) of sec. 157, it cannot warrant his conviction for the crime of bribing a peace officer with intent to interfere corruptly with the due administration of justice provided for in the earlier and more comprehensive phrase of the same clause. That the act charged against the appellant was done with intent to interfere corruptly with the due administration of justice in the ordinary acceptation of that phrase is conceded. The mere fact that it might also warrant a conviction under the more restricted terms of the concluding phrase of clause (a) is not, in my opinion, a sufficient reason for cutting down the plain meaning of the earlier phrase. Other instances of similar overlapping occur in the Crim. Code.

Moreover, in order to bring the case within the concluding phrase of clause (a) a finding that the appellant has committed, or had intended to commit, a contravention of the Saskatchewan Temperance Act would be essential. No such finding has been made. No such issue was presented to the jury. No such charge was laid. Whether the appellant had in fact committed, or had intended to commit, an offence against the Saskatchewan Temperance Act was quite irrelevant and immaterial to that charge. It was only essential that, being apprehensive of prosecution for such an offence, the appellant should have bribed the police officer with intent to prevent the realisation of that possibility. Upon the case presented he could not have been convicted under the concluding phrase of clause (a); but upon the facts assumed in the reserved case he was, in my opinion, rightly convicted under the earlier clause.

It is quite unnecessary to consider whether the breach of a provincial statute which provides its own penalty would be a

"crime" within the meaning of that word as used at the end of clause (a) of sec. 157. Expressing no opinion upon that question, I allude to it merely to observe with great deference, that cases such as *In re McNutt* (1912), 10 D.L.R. 834, 47 Can. S.C.R. 259, 21 Can. Cr. Cas. 157, referred to by Haultain, C.J.S., in 53 D.L.R. 586, and the later and decisive case of *Mitchell* v. *Tracey* (1919), 46 D.L.R. 520, 58 Can. S.C.R. 640, 31 Can. Cr. Cas. 411, which deal with the meaning and scope of the words "arising out of a criminal charge" in sec. 39 (c) of the Supreme Court Act, R.S.C. 1906, ch. 139, would appear to me to afford little or no assistance in determining it.

The appeal fails.

Brodeur J.

BRODEUR, J.:—This is a criminal appeal. The appellant was convicted before a duly constructed tribunal with having corruptly interfered with the administration of justice in giving to a police officer a bribe of $1,000 in order to induce this police officer not to proceed against him for violation of the Saskatchewan Temperance Act.

The charge had been laid under sec. 157 of the Crim. Code which makes it an indictable offence for any person to give to a police officer employed for the prosecution, detection or punishment of offenders any money with intent: 1. to interfere with the administration of justice; or 2. to procure the commission of any crime; or 3. to protect from detection or punishment any person having committed or intending to commit a crime.

The reserved case which is now before us is submitted in the following words: "Was a bribe given in order to induce a police officer not to proceed against the accused for violation of the Saskatchewan Temperance Act given with intent to interfere with the administration of justice under sec. 157 of the Criminal Code?"

It is contended by the accused that he was prosecuted for having corruptly interfered with the administration of justice and that the giving of money to protect from detection any one committing a crime before any proceedings have been instituted for the punishment of that crime is not interfering with the administration of justice. It is another offence dealt with otherwise.

The Court of Appeal for Saskatchewan answered the reserved case in the affirmative. Newlands, J., dissenting, 53 D.L.R. 586.

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The administration of justice is a very wide term, covers the detection, prosecution and punishment of offenders. The police officer who received a bribe had been instructed by his superior officers to check the liquor sales made by the appellant and to see whether he had unlawfully sold any liquor contrary to the dispositions of the Saskatchewan Temperance Act, 7 Geo. V. 1917, ch. 23, and to find out whether information should not be laid against the appellant.

The work which the police officer was carrying was authorised by the law and was absolutely necessary to put the wheels of justice in motion.

I am of opinion that the "administration of justice" mentioned in sec. 157 of the Crim. Code should not be restricted to what takes place after an information had been laid; but it includes the taking of necessary steps to have a person who has committed an offence brought before the proper tribunal and punished for his offence.

The appeal should be dismissed with costs.

Mignault, J.

MIGNAULT, J.:—On the ground that the charge against the appellant, and on which a verdict of guilty was returned by the jury, comes within the terms of sec. 157 of the Crim. Code, the jury having found the appellant guilty of having, on December 20, 1919, with intent to interfere corruptly with the administration of justice, corruptly given a bribe to a police officer to induce him not to proceed against the appellant for violation of the Saskatchewan Temperance Act, I am of opinion that the question submitted should be answered in the affirmative. To give a bribe to a police officer with this intent is a corrupt interference with the administration of justice within the terms of sec. 157. It is, in my opinion, immaterial whether proceedings were then pending or merely likely to be taken, and I do not think that the fact that these proceedings were to be instituted under the Saskatchewan Temperance Act takes the case out of the operation of this section of the Criminal Code.

The appeal therefore fails and should be dismissed.

Appeal dismissed.

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Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck, Ives and Hyndman, JJ. October 25, 1920.

INTOXICATING LIQUORS (§ III G—87)—POSSESSION FOR EXPORT PURPOSES—LIQUOR ACT (ALTA.) SEC. 24—APPLICATION OF NON-COMPLIANCE WITH LIQUOR EXPORT ACT—PROSECUTION.

Where it is once established that a person has liquor in his possession for *bonâ fide* export purposes, sec. 24 of the Liquor Act of Alberta, 6 Geo. V. 1916, ch. 4. has no application although such act is directly within the prohibition of the section. If he has not complied with the provisions of the Liquor Export Act any prosecution should be under sec. 6 of that Act.

[*Rex* v. *Western Wine and Liquor Co.* (1917), 39 D.L.R. 397; *Gold Seal Ltd.* v. *Dominion Express Co.* (1920), 53 D.L.R. 547, referred to; see also *Rex* v. *Shaw* (1920), 54 D.L.R. 577.]

Statement.

APPLICATION by way of *certiorari* direct to the Alberta Supreme Court, Appellate Division, to quash a conviction under the Alberta Liquor Act, 6 Geo. V. 1916, ch. 4. Conviction quashed.

C. C. McCaul, K.C., and *H. A. Friedman*, for appellant.

H. H. Parlee, K.C., for the Crown.

Harvey, C.J.

HARVEY, C.J.:—The defendant was charged and convicted of having intoxicating liquor in other than a private dwelling house contrary to sec. 24 of the Liquor Act of Alberta, 6 Geo. V. 1916, ch. 4, and amendments thereto.

This is an application by way of *certiorari* direct to this Division to quash the conviction.

Sec. 24 is in part as follows:—

No person within the Province of Alberta by himself, his clerk, servant or agent, shall have, keep or give liquor, in any place wheresoever, other than in the private dwelling house in which he resides, except as authorised by this Act.

The rest of the section authorises exceptions for scientific, sacramental and medicinal purposes. In other sections certain other exceptions or qualifications are provided. Section 27 provided that nothing in the Act should prevent any person from having liquor in his possession for export purposes under the conditions specified. And sec. 72 provided that the Act intended and was to be construed as intending to prohibit transactions in liquor wholly in the Province and not as intending to prohibit transactions between a person in the Province and one without the Province.

Sec. 27 was repealed in 7 Geo. V. 1917, ch. 22, and sec. 72 in 8 Geo. V. 1918, ch. 4, but in 1918 at the same time as the repeal

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of sec. 72 there was enacted an Act called the Liquor Export Act, 8 Geo. V., ch. 8, which authorised the keeping of liquor for export purposes and imposed conditions in relation thereto.

It is quite apparent that anyone authorised under the latter Act to have liquor in a warehouse complying with the prescribed conditions could not be guilty of an offence under sec. 24 of the Liquor Act though he would come within its prohibition and the absolute prohibition of sec. 24 must necessarily have been qualified to that extent at least.

Prior to the repeal of sec. 72 and the enactment of the Liquor Export Act, I had held in *Rex* v. *Western Wine & Liquor Co.* (1917), 39 D.L.R. 397, that, notwithstanding the repeal of sec. 27 authorising the having of liquor for export in a warehouse complying with the specified conditions, a person who had liquor in his possession admittedly *bonâ fide* for export purposes was by reason of the rule of construction imposed by sec. 72 not within the prohibition of sec. 24 although there were no conditions imposed as to the place and manner of keeping such liquor. The new Act provided conditions for keeping liquor for export purposes. In 1920 it was very materially amended, 10 Geo. V. ch. 7 ,and altered in form from an Act permitting the keeping of liquor under conditions, which keeping would be otherwise prohibited by the Liquor Act, to one directly prohibiting the keeping of liquor except under the specified conditions. One of the conditions of the Amendments was that the liquor must be kept in a bonded liquor warehouse. The provisions of these amendments were considered by this Division in *Gold Seal Ltd.* v. *Dominion Express Co.* (1920), 53 D.L.R. 547, 15 Alta. L.R. 377. On the argument before us at which the Attorney-General was represented it was contended and not successfully answered that the conditions of the Act as amended effected a practical total prohibition of the keeping of liquor for export purposes.

It was held by the majority of the Court that effect could not be given to the Act to accomplish that result. It was not decided what conditions the Province could impose to control and regulate the keeping of liquor for export purposes but merely that effect could not be given to the Act to prohibit it.

In the case now before us the magistrate apparently was satisfied, and it is admitted by counsel for the Attorney-General,

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that the defendant had the liquor in his possession *bonâ fide* for export purposes and he had notified the Attorney-General and had applied for approval of his premises which, however, had not been granted.

Sec. 6 of the Liquor Export Act itself imposes penalties for breach of or neglect to comply with the provisions of that Act or regulations under it and it seems that this section would apply to the defendant's offence if he has committed any.

Having regard to the fact that in accordance with the foregoing decision one may lawfully import and export liquors and may therefore lawfully have liquor in his possession for that purpose though such act is directly within the prohibition of sec. 24. I am of opinion that sec. 24 should be deemed to have no application when it is once established that the liquor is kept *bonâ fide* for export purposes as is the case here.

It is apparent from what I have said that a mere excuse that liquor is kept for export purposes would be no answer to a charge under sec. 24 since it would depend on the evidence whether the defence is *bonâ fide* or not, but when the magistrate is satisfied of that fact, then a defence is established to a charge under sec. 24 and resort should be had to the Liquor Export Act for the prosecution of any alleged offence.

For these reasons I am of opinion that the conviction should be quashed. There will be the usual order of protection of the magistrate.

Stuart, J.

STUART, J., concurs with HARVEY, C.J.

Beck, J.

BECK, J.:—I concur in the result reached by Harvey, C.J. In doing so I understand I am maintaining the principle, which during the consideration of this case, I strongly urged, that where there are a variety of statutory prohibitions a person who is sought to be convicted and punished for a breach of one of such statutory prohibitions can be convicted only of a breach of the particular prohibition which the facts as proved shew is the precise particular offence he has committed and not of a breach of another prohibition to find him guilty of which it is necessary to take his breach of the particular prohibition as a premise in a mode of argumentation to find him guilty of an offence other than the particular offence. In the present case the precise particular offence of the accused (on the assumption of the

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validity of the Export Liquor Act or of some part of it) was a breach of a provision of that Act or of a regulation under it and it would be only by reason of that offence he could by a course of argumentation be held to be liable for a breach of the Liquor Act (on the assumption of its validity).

An accused can be convicted only of the offence he has in fact and in truth committed.

The principle above stated is in my opinion founded in sound reason and justice and its application in relation to the enforcement of penal statutes is of great moment in the administration of justice.

In order to guard against any misapprehension I take occasion to say that while this case is quite properly disposed of by the application of the above stated principle, I retain in all respects the opinions I expressed in the *Gold Seal* case, 51 D.L.R. 547.

Ives, J. Hyndman, J.

IVES and HYNDMAN, JJ., concur in the result.

Conviction quashed.

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Saskatchewan King's Bench, Embury, J. October 20, 1920.

PLEDGE (§ II B—20)—SALE OF GOODS BY PLEDGEE—GOOD FAITH IN MAKING SALE—FULL VALUE NOT RECEIVED—LIABILITY OF PLEDGEE IN DAMAGES.

The fact that a pledgee in selling goods pledged with him and unredeemed does not receive the full value of the goods sold, does not render him liable to the pledgor if he acted in good faith in making the sale. It is proper to consider the general circumstances of the case in coming to a conclusion as to whether the sale was so conducted.

Statement.

ACTION against a pledgee of goods to determine the amount due and owing on the goods pledged and for damages for conversion.

W. E. Knowles, K.C., and *Leroy Johnston*, for plaintiff.

W. B. Willoughby, K.C., and *N. R. Craig*, for defendant.

Embury, J.

EMBURY, J.:—On or about February 5, 1917, the plaintiff, by her agent, one J. Delmage, borrowed from the defendant the sum of $500 on the pledge of two diamond rings, the said rings to be redeemed by the plaintiff, or Delmage, who was acting for her as agent for an undisclosed principal, upon payment of the said sum of $500 and interest thereon at the rate of $25 per month. On the evidence it appears that it was intended that the ring

should be redeemed within 1, 2 or 3 months; and from time to time the defendant asked Delmage for the money, who on different occasions told defendant to go on and sell the rings, as they would never be redeemed; and defendant told Delmage of his intention to sell, although no definite date was stated as that after which sale would be made. The sale was made in August or September of 1919, for the sum of $700. Previous to the sale, however, in or about the months of March or April, 1919, the defendant had had the stones taken from the rings and re-set into a tie-pin and another ring. The plaintiff has tendered to the defendant the sum of $574.65, being the sum of $500 and interest thereon at 5% per annum to the date of the tender, but the defendant has not re-delivered the rings to the plaintiff. It is urged by the plaintiff that she is entitled to take advantage of sec. 4, R.S.C. 1906, ch. 120, an Act respecting Interest, as a result of which she would be called upon to pay the sum of 5% per annum instead of the sum of 5% per month. The memorandum of the transaction is in the nature of a receipt and is signed at the end thereof only by the defendant and not by the plaintiff or her agent, she being an undisclosed principal; and the defendant urges that this is not a contract in writing for the reason that it is not signed by all the parties to the transaction. The memorandum in question, however, was written out by Delmage, the plaintiff's agent, and his name appears in the body thereof, and it seems to me that this is a sufficient signature by the plaintiff's agent for the purpose of creating a document in writing. See *Lobb* v. *Stanley* (1844), 5 Q.B. 574, 114 E.R. 1366, and *Schneider* v. *Norris* (1814), 2 M. & S. 286, 105 E.R. 388. Accordingly it seems to me that the plaintiff's contention that she is liable only to pay the principal money and interest at 5% per annum must be upheld.

It is also urged on behalf of the plaintiff that the re-setting of the stones in the ring constituted such a conversion of the articles in question as made the defendant liable to pay the full value thereof as of the date of the conversion. But I think, on the authorities (see Beal on Bailments, Canadian ed., at 165, 166, 167, 168), that this would give to the plaintiff only an action for damages arising through reduction in the value by reason of the alteration. The stones themselves were the valuable part of the articles pledged, and were in no way altered, and there is

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no evidence whatever that the dealing with the diamonds by the defendant in this manner in any way prejudiced their selling value.

It is urged by the plaintiff, further, that the defendant sold these diamonds at a great sacrifice. Evidence is given that certain diamonds in Court had a value as follows: Stone (Ex. B), had a value: in February, 1917, of $1,125; in 1918, of $1,250; in August, 1919, of $1,500; December, 1919, $1,750; and at the present time, of $2,125, that the other stone (Ex. C), in 1917, had a value of $375; in 1918, of $500; in August, 1919, of $500; in December, 1919, of $600; and at the present time, of $700; and it will be plain on the evidence that considerably less than half the sworn value of the stones was obtained at the sale. It also appears from the evidence that the defendant made no systematic effort to effect a sale; that he did not advertise the stones for sale. It is in evidence that he did inquire once as to the value, but he did not attempt to sell to persons who deal in diamonds who would be in a position to give him a fair value for the stones. The question to be considered is, what duty is cast upon a pledgee in these circumstances? Certainly he can have no greater responsibility than would a mortgagee. In this connection I wish to refer to the following authorities:

Nutt v. *Easton*, [1899] 1 Ch. 873, at 877-878, where Cozens-Hardy, J., says as follows:

> In *Farrar* v. *Farrars, Ltd.* (1888), 40 Ch. D. 395, in the Court of Appeal, the present Master of the Rolls, in delivering the judgment of the Court, says this: "A mortgagee with a power of sale, though often called a trustee, is in a very different position from a trustee for sale. A mortgagee is under obligations to the mortgagor, but he has rights of his own which he is entitled to exercise adversely to the mortgagor . . . But every mortgagee confers upon the mortgagee the right to realize his security and to find a purchaser if he can, and if in exercise of his power, he acts *bonâ fide* and takes reasonable precautions to obtain a proper price, the mortgagor has no redress, even although more might have been obtained for the property if the sale had been postponed." Subsequent to that the law is laid down even more strongly and more clearly in the House of Lords by Lord Herschell in the case of *Kennedy* v. *De Trafford*, [1897] A.C. 180. He says, at 185: "My Lords, I am myself disposed to think that if a mortgagee in exercising his power of sale exercises it in good faith, without any intention of dealing unfairly by his mortgagor, it would be very difficult indeed, if not impossible, to establish that he had been guilty of any breach of duty towards the mortgagor. . . . It is very difficult to define exhaustively all that would be included in the words 'good faith,' but I think it would be unreasonable to require the mortgagee to do more than exercise his power of sale in that fashion." Lord Macnaghten says

this, [1897] A.C. at 192: "If a mortgagee selling under a power of sale in his mortgage takes pains to comply with the provisions of that power and acts in good faith, I do not think his conduct in regard to the sale can be impeached."

Also I wish to refer to *British Columbia Land & Investment Agency* v. *Ishtake* (1911), 45 Can. S.C.R. 302, Idington, J., at 308:

In every case I have seen, and I have read all that have been referred to, the Court has been (when the case turned on the question of sale at under price) careful to observe whether or not there was anything but mere under-price; and I think, in measuring the effect of a sale at less than the goods might have been sold for, regard must be had to all the circumstances in each case.

Duff, J., referring to *Kennedy* v. *De Trafford*, [1897] A.C. 180, and *Nutt* v. *Easton*, [1899] 1 Ch. 873, said, 45 Can. S.C.R. at 317:—

If the mortgagee proceeds in a manner which is calculated to injure the interests of the mortgagor, and if his course of action is incapable of justification as one which in the circumstances an honest mortgagee might reasonably consider to be required for the protection of his own interests; if he sacrifice the mortgager's interests "fraudulently, wilfully or recklessly," then, as Lord Herschell says, it would be difficult to understand how he could be held to be acting in good faith.

Applying the principles therein laid down, the defendant would no be liable in this action if he acted in good faith, or to put it another way, unless he exercised his power of sale "fraudulently, wilfully or recklessly." In coming to a conclusion as to whether the pledgee's power was so exercised, it is proper to consider the general circumstances of the case. The loan took place in 1917, and the sale took place in 1919; and during the intervening period the plaintiff might at any time have redeemed, and did not do so, although if her contention is correct the high value of these diamonds should have made it a simple matter for her to arrange a sale herself and so redeem. In the next place, Delmage had told the defendant that the stones would never be redeemed, and to go on and sell them. The defendant is not a man who is engaged in the pawnbroking business, nor does he appear to be one who would be familiar with the diamond trade or the value of diamonds. In his circumstances and with his knowledge he would naturally try to make a private sale of these diamonds to any person to whom he was able to make a sale. While his conduct may not have been that of a wise man looking out to protect the interests of the plaintiff, I cannot think that the power of sale was exercised by him either fradulently, or wilfully, or recklessly.

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Accordingly the plaintiff must be held to be indebted to the defendant in the sum of $500 and interest thereon at 5% per annum, from February 5, 1917, to September 30, 1919; and the defendant is liable to repay to the plaintiff the difference between this sum and the sum of $700 which he realised on the sale, such difference to bear interest at 5% per annum from September 30, 1919, and there will be judgment accordingly. In view of all the circumstances of the case, I think there should be no costs to either party. *Judgment accordingly.*

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DESROSIERS v. THE KING.

Supreme Court of Canada, Idington, Duff, Anglin, Brodeur and Mignault, JJ. February 3, 1920.

JUDGMENT (§ II E—166)—AGAINST AGENT—UNDISCLOSED PRINCIPAL—RIGHT TO RECOVER AGAINST PRINCIPAL WHEN DISCOVERED.

According to the Quebec civil law an unsatisfied judgment against an agent contracting in his own name does not preclude a judgment against the principal when discovered.

English decisions are not authorities in Quebec cases which do not depend upon doctrines derived from the English law.

Statement.

APPEAL from the decision of the Exechequer Court of Canada (1919), 46 D.L.R. 648, 18 Can. Ex. 461, dismissing the petition of right of the appellant. Reversed.

The facts of the case are as follows:—

The appellant sold hay to one McDonnell and sued him for the recovery of the purchase price. During the trial, McDonnell declared that he had bought the hay on behalf of the Imperial Government. The appellant obtained judgment against McDonnell. Later on the appellant discovered sufficient facts to establish that McDonnell had bought hay as agent of the Crown on behalf of the Dominion of Canada. The appellant then filed a petition of right against the Crown before the Exechequer Court of Canada, which was dismissed.

E. F. Surveyer, K.C., and *L. E. Beaulieu*, K.C., for appellant.

F. J. Laverty, K.C., and *O. Gagnon*, for respondent.

Idington, J.

IDINGTON, J. (dissenting):—I agree with the reasoning of Audette, J., in the Exchequer Court (1919), 46 D.L.R. 648, 18 Can. Ex. 461; and all the more so that instead of adopting, for the first time, a novel rule to be peculiar to Quebec we should, so far as we can, when applying relevant law which in its substance is

identical with that of the other Provinces wherein the law is founded on and is English law, aim at a degree of uniformity in its administration instead of deciding in a way that will tend to produce confusion and unjustifiable expense.

For obvious reasons I feel we should not only abstain from invading, but conform to, the settled jurisprudence of Quebec.

In this case there is no settled jurisprudence of Quebec in regard to the question raised by this appeal.

And, so far as the principles applicable thereto are concerned, the rule adopted in English decisions is in accord with reason and justice, as well as that practical business sense which always tends to minimise the operation of the purely litigious spirit.

Moreover there appears in the statement of defence a pretty clear statement from which I infer that the transactions in question were, if at all, entered into by the Dominion of Canada, as the agent of the Imperial Government, which would constitute the respondent itself a mere agent.

The allegation I admit might have been made more complete in that regard.

Are we entitled to so decide in such a way the legal novelty submitted, that hereafter it may be said this Court has laid down as law, that no matter how numerous the principals or chain of agents concerned in bringing about a contract, a litigious third party may select one after another of such agents and principals and sue to judgment unless and until one or other of numerous judgments so recovered has been satisfied, and that with costs? I submit we should not run any such risks but accept that jurisprudence, even if not absolutely binding, which manifestly in principle violates nothing in law or justice.

For the foregoing reasons and those assigned by the Judge appealed from, I am of the opinion that this appeal should be dismissed with costs.

DUFF, J.:—I am of the opinion that this appeal should be allowed. Duff, J.

ANGLIN, J.:—The sole legal question raised by the defence in this action which might properly be disposed of before the trial, under R. 126 of the Exchequer Court, is whether under the Civil Code of Quebec the mere recovery in the Courts of that Province of judgment on a contract against an agent, who had entered into it in his own name, debars the plaintiff's right of recovery against Anglin, J.

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the principal. Following *Priestly* v. *Fernie* (1863), 3 H. & C. 977, 159 E.R. 820, and *Kendall* v. *Hamilton* (1879), 4 App. Cas. 504, Audette, J., has held that it does. With deference, in applying these authorities the Judge would seem to have attributed to the Quebec judgment obtained by the plaintiff against the agent, McDonnell, consequences dependent in English law upon views held with regard to the nature of the liability of the principal and the agent in such cases and the effect of a judgment upon the contract sued upon which do not obtain in the Quebec system of jurisprudence. The reasons for his acceptance of these English decisions as authority on this question of the civil law of Quebec appear in the following paragraph of his judgment (46 D.L.R. at 651):

> I was, at the argument, referred to no jurisprudence of the Province of Quebec upon the subject in question, and after research I have been unable to find any. In the absence of the same I take it, as arts. 1716 and 1727 are different from the Code Napoleon and are borrowed from both Pothier and the English law, that general principles of the English law governing such doctrine should also be adopted in questions flowing from such doctrines and which are a sequence from the same, as Strong, J., seems to have found in the case above mentioned.

In the case in this Court to which the Judge alludes *V. Hudon Cotton Co.* v. *Canada Shipping Co.* (1883), 13 Can. S.C.R. 401, Strong, J., alone expressed the view—already taken by the majority in the Court of King's Bench, Dorion, C.J., and Ramsay, J., dissenting (1882), 2 Dorion 356, that the liability of the principal, even where he is undisclosed and the agent contracts in his own name, created by art. 1727 C.C., and put beyond controversy by the concluding clause of art. 1716 C.C., imports a correlative or reciprocal right on his part to sue upon the contract as recognised in English commercial law. Fournier, J., 13 Can. S.C.R., at 405, and Henry, J., at p. 413, were of the contrary opinion. Fournier, J., p. 409, notes, as did Dorion, C.J. (2 Dorion at 362), that while Pothier explicitly asserts the right of action of the third party against the principal, "he gives none to the principal against the third party." Pothier's Obligation, Nos. 82, 447 and 448; Mandat, No. 88. The other three members of this Court (Ritchie, C.J., Taschereau and Gwynne, JJ.), dismissed the appeal on what they deemed an admission of liability in the proceedings, expressing no views on the point dealt with by Strong, J.

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But, with respect, I find nothing in that Judge's opinion to sustain the sweeping inference drawn by Audette, J., in the passage I have quoted. On the contrary, alluding to Pothier as the source of the doctrine embodied in arts. 1727 and 1716 of the Quebec Civil Code, he merely notes, *en passant*, that in the particular matter with which he is dealing—the principal's right to enforce the contract, which in his opinion should "by an extensive construction" be held to be involved—the law of Quebec, as he views it, corresponds with English rather than with modern French law. In the latter notwithstanding that the language of art. 1998 C.N. seems quite as comprehensive as that of art. 1727 C.C., a contract made by an agent in his own name imposes no direct liability on his principal (Laurent, vol. 28, No. 62). The commissioners themselves in much the same way signalise the fact that Pothier's view upon the liability of the principal coincides with English, Scotch and American law. (Rapports des Codificateurs, 6th Rep., p. 12.) To each comment—that of Strong, J., and that of the commissioners—the maxim *expressio unius est exclusio alterius* would not seem inapplicable.

In English law the liability of the principal and the agent in a case such as that at Bar is alternative. The contract being one and entire creates but a single debt, though not a single cause of action as in the case of a joint liability since, in addition to the facts constituting the cause of action against the agent, his authority from the principal must be proved as part of the cause of action against the latter, *Cooke* v. *Gill*, (1873), L.R. 8 C.P. 107 at 116, on which but one of the two may be held liable as principal. Yet the agent, having contracted in his own name, is bound as a principal; and the undisclosed principal is likewise bound because the agent in fact acted by his authority. But both cannot be liable as principals simultaneously and jointly. Imposing the status of principal on the former involves according that of agent to the latter. The agent as such is not liable. Correlatively, treating the latter as principal involves a rejection of his agency, and by implication a relinquishment of any claim against the real principal. Either may be pursued; not both.

The conclusive operation of a judgment against the agent to debar the recourse against the principal, though often referred to—and with high authority—as the consequence of an irrevocable

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election of remedies (1 Hals., par. 445; 7 Hals., par. 937; *Morel Bros.* v. *Earl of Westermorland*, [1904] A.C. 11), depends rather upon the doctrine of English law that the single debt arising out of the contract has been merged in the judgment—*transit in rem judicatam*—as Earl Cairns, L.C., points out in *Kendall* v. *Hamilton*, 4 App. Cas. 504 at 515, and Vaughan Williams, L.J., in *Hammond* v. *Schofield*, [1891] 1 Q.B. 453 at 457. See too, *Sullivan* v. *Sullivan* (1911), 45 Ir. L.T. 198 at 200, and 13 Hals., par. 470 *in fine*. Although the application of the doctrine of election is readily defensible where, as here, the principal is known as such to the plaintiff before he takes his judgment against the agent, it is not so where that knowledge is lacking; and yet the judgment is then equally conclusive in its effect. *Kendall* v. *Hamilton*, 4 App. Cas. 504. A man can scarcely be held to have elected between two remedies of the existence of one of which he is in fact ignorant and is not presumed in law to be cognizant. The fact that, if the judgment against the agent is subsequently set aside as the result of an adjudication that it was erroneously pronounced (*Partington* v. *Hawthorn* (1888), 54 J.P. 807), the alternative right to sue the principal revives (although the same result apparently does not ensue if the judgment be vacated merely by consent, *Hammond* v. *Schofield*, [1891] 1 Q.B. 453 at 455, *per* Wills, J.; *Cross & Co.* v. *Matthews* (1904), 91 L.T. 500, 1 Hals., p. 209, note *p.*), presents another difficulty, since a valid election between remedies once made is irreversible: *Scarf* v. *Jardine* (1882), 7 App. Cas. 345, at 360. On the other hand, while, at first blush, such a decision as that of the Court of Appeal in *French* v. *Howie*, [1905] 2 K.B. 580; [1906] 2 K.B. 674, where a judgment for part of the plaintiff's claim entered against the agent on admissions, under a special rule of a Court, allowing that to be done without prejudice to the plaintiff's right to proceed with the action to recover balance of his claim, was held to debar a suit against the principal, is perhaps more easily upheld under the doctrine of election than under that of merger, it is equally maintainable on the principle that there can be but one judgment for a single and entire debt, to which the entry of a judgment for part of a claim permitted by the rule of Court is merely a special exception statutory in its nature. But the conclusive character of a judgment against one of the two parties alternatively liable for a single debt, which

likewise extends to the case of joint liability as understood in English law (*King* v. *Hoare* (1844), 13 M. & W. 494 at 503, 153 E.R. 206, approved in *Kendall* v. *Hamilton*, 4 App. Cas. 504,) is not found in a judgment against one of two debtors who are liable severally, or jointly and severally, since here there are two debts and the judgment on one is no bar to an action on the other, *Lechmere* v. *Fletcher* (1833), I Cr. & M. 623 at 633-5, 149 E.R. 549, *Isaacs & Sons* v. *Salbstein*, [1916] 2 K.B. 139 at 151, 153, 154-5. Nothing but satisfaction or release will extinguish a debt which has not passed into judgment.

Now under the Quebec Civil Code the principal and the agent who has contracted in his own name seem to be severally liable as an English lawyer understands that phrase; and the merger implied in the maxim *transit in rem judicatam*, as understood in English law, has no application in the legal system of that Province.

Articles 1727 and 1716 C.C. read as follows:—

1727. The mandator is bound in favour of third persons for all the acts of his mandatory, done in execution and within the powers of the mandate, except in the case provided for in art. 1738 of this title, and the cases wherein by agreement or the usage of trade the latter alone is bound.

1716. A mandatory who acts in his own name is liable to the third party with whom he contracts, without prejudice to the rights of the latter against the mandator also.

I agree with Mr. Surveyer's contention that the concluding word, "also," of art. 1716, C.C. is more consistent with the idea of a dual recourse successive or simultaneous, than with a single optional recourse. The purpose seems to be to create cumulative obligations for the fulfilment of a single contract, which can be discharged only by satisfaction, release or the expiry of a period of limitation.

The counsel also referred to art. 1108 C.C., found under the heading "Debtors jointly and severally obliged," which reads as follows:—"Legal proceedings taken against one of the co-debtors do not prevent the creditor from taking similar proceedings against the others."

But the undisclosed principal and his agent would seem not to be joint and several debtors within the group of arts. 1103-1120 C.C. They satisfy the definition contained in art. 1103 C.C. The fact that they are "obliged differently" does not exclude them. The difficulty presented by the inconsistency of the obligation of

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indemnification legally inherent in their relationship (art. 1720, C.C.) with arts. 1117-8 C.C. appears to be met by art. 1120 C.C. But the obligation to the creditor is not strictly a joint obligation. That of the agent arises directly *ex contractu*. That of the principal is imposed on him by law as a consequence of his mandate to the agent. Hence Pothier's designation of it as "accessorial." I therefore doubt the direct applicability of art. 1108 C.C.; but of that of the principle which it embodies—quite unnecessarily, says Langelier, vol. 4, p. 33,—I have no doubt.

The commissioners in referring to art. 1727 C.C. (Rapports des Codificateurs, 6th Rep., p. 12) expressly state that that article is based on Pothier's statement of the mandatary's liability where the agent has contracted in his own name and without disclosing the relationship and reject Troplong's view to the contrary, adding that (in this respect) "English, Scotch and American Law coincides" with Pothier's view. See too p. 87 of the 6th Rep., sec. 2, art. 23. In dealing with art. 1716 C.C., at p. 10 of the same report (6th Rep.), the commissioners note that it has no counterpart in the Code Napoleon and that the group of which it is a member "declare (s) useful rules of undoubted authority in our law"—("contiennent des regles utiles qui ne souffrent aucune difficulté dans notre droit"). At p. 85, sec. 2, art. 14, the authorities on which the articles is based are cited as follows:—Pothier, Mandat. No. 88; Paley, Prin. & Agent, Nos. 371, 372; Story, Agency, 266, 163, 269; Troplong, Mandat, Nos. 522 *et seq.*, *contra*, as to last clause.

Paley is cited for the first clause of the article as is also Story, para. 163, and Troplong. The passage from Pothier, however, and para. 266 and the concluding words of para. 269 of Story bear on the question immediately under consideration and leave little room for doubt that the liability intended to be created was a several liability of both the principal and the agent as co-debtors (each being "obliged to the same thing in such manner that each of them singly may be compelled to the performance of the whole obligation and that the performance by one discharges the other towards the creditor," (art. 1103, C.C.) and to that extent having the characteristics of the joint and several liability of the Civil Code) but neither the alternative nor the joint liability of the English law.

Pothier, Mandat, No. 88, is in the following terms:—

Although it be in performance of the business which is the object of the mandate, and within the bounds of the mandate, that the mandatary has entered into contracts with third persons; if he has contracted in his own name, instead of merely in his capacity as mandatary or attorney of another, in such a case it is the mandatary who is liable unto those with whom he contracted; it is he who becomes their principal debtor.

Nevertheless he binds jointly with himself the mandator, for whose business the contract was entered upon; in this case he is held to assume all obligations contracted by the mandatary in his behalf; and from this accessory obligation of the mandator arises an obligation called "*utilis institaria*," which those, with whom the mandatary has contracted in behalf of the mandator, have against the latter.

And Story On Agency, 9th ed., par 266, p. 319.

In the next place, a person contracting as agent will be personally responsible, where, at the time of making the contract, he does not disclose the fact of his agency; but he treats with the other party as being himself the principal; for, in such a case, it follows irresistibly, that credit is given to him on account of the contract. Thus, if a factor or broker, or other agent, buy goods in his own name for his principal, he will be responsible to the seller therefor in every case where his agency is not disclosed. But we are not therefore to infer that the principal may not also, when he is afterwards discovered, be liable for the payment of the price of the same goods; for, in many cases of this sort, as we shall hereafter abundantly see, the principal and the agent may both be *severally* liable upon the same contract.

The concluding sentence of para. 269, p. 330, of Story on Agency reads as follows:—

But it by no means is to be taken as a natural or necessary conclusion, that, because the agent is personally bound, therefore the principal is exonerated; for we shall presently see that both may in many cases be equally bound, if not in form, at least in substance, by the contract, so that a suit may be brought by or against *either* of them.

The same author in para. 270 says at p. 334: "Where the agent contracts in his own name he adds his own personal responsibility to that of the principal who has employed him."

In para. 163, p. 199, he had referred to Pothier's view that the obligation incurred by the principal is accessorial, citing Obligation, Nos. 447, 449, where the sense in which that writer uses the phrase "*obligation accessoire*" is fully explained.

Story, as will have been noted, speaks of the obligation as several while Pothier describes the two debtors as liable "conjointement"; and much was made of Pothier's use of this latter word in argument here, counsel for the respondent maintaining that it imports joint liability as known in English law. But under the civil law an obligation is "conjointe" whenever there is plurality either of creditors or of debtors; Baudry-Lacantinerie, Obligations,

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No. 1107. Ordinarily it entails a division of the right or of the liability, so that in the one case each creditor may recover an equal share of the debt, but no more, from the common debtor and in the other each debtor is liable for an equal share of the debt, but no more, to the common creditor. (26 Dem. 105, 110, 112.) There are as many distinct credits or debts as there are creditors or debtors. This is obviously not the sense in which the word "conjointement" is used by Pothier.

But it also clearly excludes the alternative liability of the English law, since it is the antithesis of "disjunctive" liability, Baudry-Lacantinerie, No. 1107 (n), which is most rare in modern civil law, 26 Dem. 112. In Pothier's text it merely signifies simultaneous liability upon the same obligation (26 Dem. 107), each debtor being liable for the whole. But how? Jointly or severally? "Severally" says Story, using the word as an English lawyer, in para. 266 above quoted, cited by the commissioners.

The passage quoted from para. 269 in which he speaks of the creditor's right to bring suit "against" either of them serves to make it clear that the joint liability of the English law was not contemplated. Story may in this latter passage have intended to indicate the liability to be alternative as it is understood in English law; but, if he did, the fact that the commissioners explicitly state that art. 1727 C.C., which imposes the liability on the mandator, is based on the doctrine taught by Pothier makes it probable that Story was not so understood by them. Pothier's conjoint accessorial liability of the principal is not a disjunctive alternative liability. His comparison of it with the liability of a surety while indicating the distinctions between the two, makes this reasonably clear. The principal and the surety are several debtors. An unsatisfied judgment against the principal does not preclude a judgment against the surety. (Arts. 1956 and 1958 C.C.) Art. 1716 C.C., read in the light of the commissioners' report and the texts they cite was, it seems reasonably clear, intended to assert neither the joint nor the alternative liability of the English law, but a several liability of the principal and the agent subject to the latter's right, and the former's obligation, of indemnification. (Art. 1720 C.C.)

In Langelier's Cours de Droit Civil, vol. 5, at p. 304, we read under art. 1716:—

When a mandatary contracts in his own name, those with whom he

contracted have the right to hold him personally responsible, but can they also involve the mandator? Our article answers in the affirmative. May the third persons then also prosecute both the mandator and the mandatary? There seems no doubt as to the affirmative. First of all, there is no doubt that the third persons can sue the mandatary, since our article says so plainly. And this same article, entitling them to redress from the mandator, shews clearly their right to sue both for the whole.

In *Huot* v. *Dufresne* (1890), 19 Rev. Leg. 360, at 363, the judgment of the Court of Review contains this "considérant":—

Considering that the person who contracts with a mandatary acting in his own name has recourse against this latter, but that if he discovers later that this mandatary was acting as agent for another, he also is entitled to recourse against this third party, in whose behalf the mandatary was acting, and this following the dispositions of said art. 1716 C.C.

In *Wilson* v. *Benjamin* (1888), M.L.R. 5 S.C. 18, in the judgment of the Superior Court we read:—

Considering that the mandatary, acting in his own name, is responsible to the third persons with whom he contracts, without prejudice to the rights of these latter against the mandate who is responsible unto them for all actions of his mandatary performed in the execution and within the bounds of the mandate, excepting in the case of art. 1738 C.C. or in a case where, according to the covenant or the usages of commerce, the mandator alone is responsible.

We have not been referred to and I have not found any other decisions in Quebec in which the nature of the liability of the principal and agent in such a case as this has been considered. Those referred to by Audette, J., bear very remotely on the question under consideration. On the other hand, though not dealing with the precise question before us, the authorities now cited seem to indicate that the liability is several and the remedies cumulative, and that the recovery of a judgment against the agent will not, so long as it remains unsatisfied, affect the creditor's right to pursue the principal. Apart from authority the terms of art. 1716 C.C. seem plainly to imply these consequences.

The idea of the merger of the debt under a contract in a judgment obtained upon it is foreign to the Quebec system of jurisprudence. *Rocheleau* v. *Bessette* (1894), 3 Que. Q.B. 96; *Turner* v. *Mulligan* (1894), 3 Que. Q.B. 523. As Hall, J., says, in delivering the judgment of the Court of King's Bench in the former case, at 98-99:

As the consensus of both minds was necessary to create the contract, so both must consent before its nature can be changed, although the creditor may be free, within the limits of the law to exercise his own choice of remedies, and the jurisdiction in which he will attempt to enforce them. The judgment

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which he may obtain from a particular tribunal does not create the debt, but only declares its existence and orders its payment. That it has not extinguished the debt is apparent from the fact that the creditor may renounce it by notice only to the debtor, and without the latter's consent, and thereupon the original debt may be sued upon anew, either in the same or another jurisdiction. Clearly this could not be the case if the judgment had effected novation and the original debt had been thereby extinguished. It is true that a judgment produces many of the effects of a new obligation . . . but these are only in recognition and qualification and extension of the original and still existing debt, and not in substitution and extinguishment of it.

While the Quebec law recognises the maxim *nemo debet bis vexari pro eadem causâ* in so far as it will not, speaking generally, permit a defendant against whom a plaintiff holds a judgment to be again sued by him for the same cause while that judgment subsists. By art. 548 C.C.P. it is expressly provided that

a party may on giving notice to the opposite party renounce either a part only or the whole of any judgment rendered in his favour, and have such renunciation recorded by the prothonotary; and in the latter case the cause is placed in the same state as it was in before the judgment.

It is therefore abundantly clear that in Quebec there is no merger of the debt in the judgment such as takes place under English law.

The maxim, *una via electa non datur regressus ad alteram*, has but a restricted application in French law (8 Huc. No. 328; 17 Laurent, No. 139; 13 Baudry-Lacantinerie et Barde, Nos. 916-7-8; but see arts. 1541-2 C.C.) and the renunciation of a right or a remedy is *de droit étroit*.

For this it is necessary that the facts from which waiver is inferred leave no doubt as to the intention.

I am for these reasons of the opinion that English decisions holding that a judgment against the agent who has contracted in his own name debars recovery against the principal are not in point and that the defence denying the right of the plaintiff to proceed against the defendant as mandator under art. 1727 C.C., expressly preserved by art. 1716 C.C., is not good in law. This case affords an excellent illustration of the danger of treating English decisions as authorities in Quebec cases which do not depend upon doctrines derived from the English law.

The Judge further expressed the view that the defendant was probably not liable under art. 1736 C.C. That defence is not raised in the plea of the Attorney-General and would therefore seem not to have been open for determination under Rule 126. But, if it were, I should incline to the view that His Majesty the

King cannot in any part of the British Dominions properly be regarded as resident in another country, and that the Crown in right of the Dominion, which is sued in this section, is resident in all parts of Canada.

I would allow the appeal and set aside the order of February 12, 1919, with costs here and in the Exchequer Court.

BRODEUR, J.:—The question to be settled in this case is; whether a person having obtained judgment against a mandatary, has the right to prosecute the mandator also.

This brings us to examine the purport of arts. 1716 and 1727 of the Civil Code.

Art. 1727, under the title *Concerning the obligations of the mandator towards third persons*, is couched in the following terms (see judgment of Anglin, J., *ante* p. 125):

In entrusting the administration of his goods (or property) to an agent, a person becomes by that very fact responsible for the actions of that representative; and the latter is released of all liability, if he gives the party with whom he contracts, communication of his powers. If, however, for special reasons, the mandatary does not reveal the fact of his representing another person, then, says art. 1716, he is liable to the third party with whom he contracts, without prejudice to the rights of the latter against the mandator also.

In the case which occupies us, the mandatary McDonnell did not think fit, when he bought merchandise from the appellant, to inform him that he was representing the Crown; therefore, in accordance with art. 1716 there can be no doubt as to his responsibility towards Desrosiers; and the latter was justified in bringing action against McDonnell and making him pay for the hay which he had sold and delivered unto him.

But during the hearing of the case, McDonnell declared for the first time that he was not acting in his own interest, but was merely the mandatary for the Crown. Judgment, however, was rendered against him; and I suppose that Desrosiers, having been unable to obtain from him payment of this judgment, now presents a petition of right claiming from the Crown the price of the hay sold to McDonnell.

The trial Court, abiding by the decisions rendered in England in the cases of *Priestly* v. *Fernie*, 3 H. & C. 977, 159 E.R. 820, and of *Kendall* v. *Hamilton*, 4 App. Cas. 504, decided that the action

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should be dismissed for the reason that Desrosiers, having decided to sue and take judgment against McDonnell, had no right to later seek the mandator, that is the Crown. The Court also rests on the dissenting opinion of Strong, J., in the case of *Hudon* v. *Canada Shipping Co.*, 13 Can. S.C.R. 401.

In the present case, I am of the opinion that the decisions rendered in England cannot be applied, and this for two reasons; firstly, because the Code has precise dispositions in the matter; and, secondly, because the right of *election* existing in England cannot be invoked in Quebec, for the good reason that it is absolutely contrary to the fundamental principles of the Civil Code.

Art. 1727 C.C. declares emphatically that the mandator is bound in favour of third persons for all the acts of his mandatary, done in execution and within the powers of the mandate. The article makes no distinction between a case where the mandatary has revealed his quality of agent or not. The mandator must execute the obligations contracted by his mandatary, whether the latter be known to third persons as his representative or not. The law makes no distinction; and in all cases the mandator is bound in favour of third persons for the actions of his mandatary. This article is confirmed by art. 1716 C.C., which reads that if the mandatary acts in his own name, if he does not make known his position, then he too is bound in favour of third persons, and this without prejudice to the rights which the latter may have against the mandator.

To my mind these two articles complete each other. We therefore find two debtors of the third persons, the mandator and the mandatary; the mandator, because he is under most circumstances responsible for the actions of his mandatary, and the mandatary because he failed to reveal his quality of agent.

In his factum the respondent tells us that the codifiers state in precise terms that they refuse to adopt the doctrine of the Roman and civil law and prefer that laid down by the English, Scotch and American law with whom Pothier coincides.

I do not know where the declaration was taken from that the commissioners had refused to adopt the rule of the civil law. It is quite true that the commissioners declared, when voicing their opposition to Troplong's opinion, that this opinion of Troplong's was in harmony with the doctrine of Roman law; and they add:

> But it is in direct opposition to the opinion of Pothier, who is in accord

with the English, Scotch and American laws. The article submitted is based on the statement of the rule of Pothier and covers all the actions of the mandatary, whether acting in his own name or that of the mandator.

Nowhere in the commissioners' report does it appear that they refused to adopt the principles of civil law; on the contrary, the text of their Code reproduces the doctrine of the civil law as expressed by Pothier. They do not say—as the counsel state in their factum—that they prefer to adopt the English law with which Pothier coincides; but they adopt, on the contrary, the rule of Pothier which is in accord with the English laws.

I must add that Pothier was not the only author expounding the old law to voice that opinion, we find the same idea in Domat, Book 1, *tit.* 15, sec. 2, No. 1.

It was therefore the recognised rule of civil law in the Province of Quebec, at the time the Code was written; and besides the codifiers have not given the rule as being new law, but as being the law then governing the contract of mandate.

Now what is the rule of Pothier? We find it in his treatise on Mandate, No. 88, in the following terms:

(See judgment of Anglin, J., *ante* p. 127.)

In para. 449, Obligations, he discusses clearly and at length this question and expresses the principle in the following way:

This accessory obligation involving the principal cannot arise unless the agent has contracted in his own name, although on behalf of his principal's business; but when he contracts in his capacity of factor or attorney for his principal, it is not he who contracts, but the principal who contracts through his agency (No. 74): the agent in this case does not bind himself, it is the principal alone, who, through the intermediary of his agent, contracts a primary obligation.

When the agent contracts in his own name, he must, to bind his principal, make this contract in the interest of the business entrusted to him, and he must not have exceeded the limits of his commission. . . .

The agents bind their principals as long as the commission lasts; and it is always supposed to last until its revocation, and until this revocation has been made known to the public.

As we see, he acknowledges the principle that a mandatary contracting in his own name, binds himself as principal debtor, but he at the same time binds his mandator as accessory debtor, since the latter, in entrusting the mandate to his agent, is supposed to have consented in advance to any engagements which that agent might contract to hold himself responsible therefor.

Now, whether these joint obligations of the mandator and mandatary are considered as accessory and principal obligations, or whether they are called joint obligations under the economy

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of our law, what is the nature of the right of action held by third persons? Are they obliged—as under the English law—to make a choice and sue either one or the other or else are they entitled to attack both?

The joint obligations endow the creditor with the right to sue both one and the other of the debtors. Art. 1108 C.C. declared it formally: "Legal proceedings taken against one of the co-debtors do not prevent the creditor from taking similar proceedings against the others."

And again I find the same principle stated in Pothier.

My opinion, therefore, is that the decisions rendered in England, invoked by the judgment *a gus* have no application in our law, and that Desrosiers was within his right in suing, not only McDonnell, but also his mandator.

For this reason the appeal should be maintained with costs of this Court and the trial Court.

Mignault, J.

MIGNAULT, J.:—In his notes of judgment the Judge of the Exchequr Court (Audette, J.), 46 D.L.R. 648, 18 Can. Ex. 461, has expressed himself as follows (see judgment of Anglin, J., *ante* p. 122):

May I be allowed to say, with all possible deference, that I do not share the Judge's opinion. Even though arts. 1716 and 1727 C.C. were borrowed from both Pothier and the English law, it does not necessarily follow that the general principles of the English law should be adopted to solve the questions raised by these articles. I would rather emphasise the doctrine of Pothier and of ancient French law, especially since the codifiers do not say that these articles are *borrowed* from English law, but, in referring to article 1727 C.C. they point out that this article is based on the statement of Pothier's doctrine, which they add, *agrees with* the English, Scotch and American laws. (See 6th Rep., p. 12). I respectfully incline to the belief that it is time to react against the habit of having recourse to the precedents of English common law in the cases of the Province of Quebec, just because it may happen that the Civil Code contains a rule in concordance with a principle of English law. On many points, and specially in a matter of mandates, the Civil Code and the "common law" contain similar rules. Nevertheless the Civil Code constitutes a complete system in itself and should be interpreted according to its own rules. If, on account of identity of

juridical principles, one should refer to English law for the interpretation of French civil law, one might as well, and with as much reason quote the monuments of French jurisprudence to throw light upon the rules of English law. Each system, I repeat it, is complete within itself, and except in a case where one system takes from another a principle, which heretofore was a stranger to it, one need not go outside of it to find the rule which applies to the various problems encountered in daily practice. The point awaiting our judgment is interesting.

The claimant had sold some hay to one named McDonnell. Having proceeded against the latter for recovery of the price, McDonnell declared at the trial that he had bought the hay in behalf of the Imperial Government. The claimant did not desist from his action, but obtained judgment against McDonnell. He alleges that, following the judgment, he was able to trace certain elements of proof pointing to the relations between McDonnell and the Crown. He then presented a petition of right before the Exchequer Court, and the Crown raised the objection, that the claimant, having elected to sue McDonnell to judgment, further action against the Crown was estopped.

The objection was upheld and the claimant's petition of right dismissed. Whence the present appeal.

We are concerned with arts. 1716 and 1727 of the Civil Code, which are not in the Code of Napoleon and read as follows (see judgment of Anglin, J., *ante* p. 125.)

The mandator is also answerable for acts which exceed such power, if he has ratified them either expressly or tacitly.

As I have pointed out, the codifiers state that art. 1727, C.C., which completes art. 1716 C.C., is based on the doctrine of Pothier. They also quote, under art. 1716 C.C., Story on Agency, para. 266. Let us then refer to these two authors, for they furnish the best commentary on these two articles, and indicate what the intention of the legislator was. Pothier says in his treatise on Mandate, No. 88 (see judgment of Anglin, J., *ante* p. 127).

And Story on Agency, para. 266, says (see judgment of Anglin, J., *ante* p. 127.)

It is different in English law, which declares that a person contracting with a mandatary acting in his own name without revealing the name of his mandator, can prosecute one or the

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other, but not both, and that if he asks judgment against the mandatary he cannot afterwards exercise recourse against the mandator: *Priestly* v. *Fernie, supra*. It was on the authority of this decision that Audette, J., refused to grant the petition of right of the claimant, 46 D.L.R. 648, 18 Can. Ex. 461.

The argument of Lord Bramwell in this case and of Lord Cairns in *Kendall* v. *Hamilton, supra*, is certainly very strong, and I should have been inclined to accept it as *raison écrite* if after serious reflection I have not come to the conclusion that the text itself of arts. 1716 and 1727 C.C. interpreted in the light of the passages from Pothier and Story which I have quoted, does not tolerate the acceptance of the solution adopted by the English law.

Thus, art. 1717 says that a mandatary acting in his own name is bound in favour of third persons with whom he contracts, "without prejudice to the rights of the latter against mandator." Therefore the recourse of third persons against the mandatary does not interfere with their recourse against the mandator. And Pothier and Story indicate clearly that one as well as the other are debtors of the third party, who, in this case, had negotiated with the mandatary.

Art. 1727 C.C. contains an expression which needs to be well understood. It makes the mandator answerable unto third persons for all the acts of his mandatary done in the execution and within the powers of the mandate . . . except in the case of art. 1738 (the case of a factor whose principal resides in another country), and in cases where, according to agreement, etc., etc., the mandatary alone is responsible.

It goes without saying that the agreement can render the mandatary alone responsible to the exclusion of the mandator, but in ordinary cases, where the mandatary contracts in his own name, no more than in the present instance, is this express stipulation found in the contract.

The Late Sir Francois Langelier in his "Cours de Droit Civil," vol. 5, p. 304, teaches us that in the case of art. 1716 C.C. third persons can sue the mandator and the mandatary. He says:

> When a mandatary has contracted in his own name, those with whom he contracted can hold him personally answerable, but can they also take action against the mandator? Our article answers in the affirmative. Can the third persons, therefore, proceed against both the mandator and the mandatary? There seems no doubt in the matter. First, there is no denying the right of

third persons to sue the mandatary, since our article says so plainly. And since this same article grants them recourse against the mandate, it means that they can sue both for the whole debt.

The claimant also quotes a decision of the Court of Revision in a case of *Huot* v. *Dufresne* (1890), 19 Rev. Leg. 360 at p. 363, where we find the following "considérant":

Considering that a person contracting with a mandatary acting personally, has recourse against the mandatary, but, that if he discovers later that this mandatary was acting in behalf of another, he also has recourse against this third party, for whom the mandatary was acting, and this according to the dispositions of said art. 1716 of the Civil Code.

There is in the English law a reason for decision which the civil law is lacking, because a person suing one of the two joint debtors and obtaining judgment against him, cannot afterwards sue the other debtor. Nothing like that exists in the civil law.

For these reasons I think the claimant's petition of right was wrongly rejected.

I would, therefore reverse the judgment *a quo* with costs and refer the case to the Court of Exchequer for further action on the petition of right of the claimant.

Appeal allowed.

LOURIE v. BARNETT.

New Brunswick Supreme Court, Appeal Division, Hazen, C.J., McKeown, C.J.K.B.D., and White, J. September 24, 1920.

CURTESY (§ I—2)—HUSBAND AND WIFE—PROPERTY IN WIFE'S NAME—MORTGAGED—MORTGAGEE UNPAID AND IN POSSESSION—ACTION FOR TRESPASS—RIGHTS OF HUSBAND.

Under the amendments to the Married Woman's Property Act, 6 Geo. V. 1916 (N.B.), ch. 29, it appears that the only interest of a husband in property owned by his wife is an inchoate right to enjoyment as tenant by the curtesy, should he survive his wife, and such right would be subject to the rights of an unpaid mortgagee, who is in possession.

APPEAL by defendant to vary or set aside a judgment of Grimmer, J., in an action for trespass. Affirmed. Statement.

J. F. H. Teed, supports appeal; *G. H. V. Belyea*, K.C., contra.

The judgment of the Court was delivered by

WHITE, J.:—Upon the argument of this matter before us, both parties agreed that we should at that time hear only argument on the question of title of defendant John Barnett to cut on the White, J.

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Cochrane lot (which is the lot which the plaintiff claims to own and on which he alleges the defendant John Barnett trespassed) and that if we decided that the defendant John Barnett had no such title then we should refer the case back to Grimmer, J., the trial Judge, to take further evidence as to the location of the dividing line between the said Cochrane lot and the lot abutting it northeasterly, referred to in the case as the Barnett lot, such dividing line to be run by one Wilson, a surveyor, each party paying half the surveyor's expenses and the expenses of the successful party so paid to form part of the costs in the cause.

Having gone carefully through the case we have come to the conclusion that the plaintiff has at least sufficient title to the Cochrane lot to enable him to maintain successfully against the defendant an action for trespass for breaking and entering the said Cochrane lot, provided such breaking and entering were proved to have taken place as alleged within the area of the Cochrane lot.

As the trial Judge has set forth the facts very fully in his judgment, it is not necessary to recapitulate them here. The Judge has found that the property in question was not conveyed to the defendant Alice Barnett upon trust as alleged by the defendant, John Barnett, and that finding we think is warranted by the evidence. The claim put forward by the defendant John Barnett, that the conveyance to the plaintiff of her equity of redemption in the property was obtained improperly by threats and undue pressure appears to have been abandoned. At all events no such claim is put forward by the defendant Alice Barnett nor does she put forward any claim that her conveyance of the equity of redemption to the plaintiff is other than a perfectly valid and good conveyance. Although the mortgage referred to from Alice Barnett to Joseph Cochrane, made to secure the unpaid portion of the purchase money, was not signed by the defendant John Barnett, we think that under the circumstances he cannot as against the mortgagee or his assignee stand in any other or better position than if he had signed it; hence the plaintiff having entered into possession of the property in question, as found by the trial Judge, would be entitled to maintain trespass for any subsequent entry upon the land or the cutting of lumber thereon by the defendant John Barnett, even if we were to assume that the

conveyance of the equity of redemption to him by Alice Barnett were void as claimed by the defendant John Barnett, because the plaintiff would then be an unpaid mortgagee in possession.

We think further that if the said defendant John Barnett has any interest whatever in the property in question that interest can only be an inchoate right to enjoyment of the same as tenant by the curtesy should he survive his said wife. That we think is the effect of ch. 29 of 6 Geo. V. 1916 (N.B.), entitled An Act to Amend the Married Woman's Property Act. Such right as tenant by the curtesy of course would be subject to the plaintiff's right as unpaid mortgagee, because such right as tenant by the curtesy could only exist upon the assumption that there was no merger of the mortgage under the conveyance made to the plaintiff by Alice Barnett.

For these reasons we think the defendant John Barnett has shewn no right to a present possession of the land, and that the plaintiff is entitled to maintain against him the action for trespass, provided the trial Judge finds on the further hearing of the case, under the agreement mentioned, that the defendant John Barnett trespassed upon and cut and hauled logs within the area of the plaintiff's lot.

Under the circumstances we think there should be no costs of this motion; that the order of the learned trial Judge that the defendant should pay the costs of the hearing before him should be set aside; and that upon the further hearing above provided for, the trial Judge should make such order as to costs of the rehearing and as to the costs of the original hearing before him as he shall deem right, having regard to the final result of the action.

Appeal dismissed.

ROBSON v. THORPE.

Saskatchewan Court of Appeal, Newlands, Lamont and Elwood, JJ.A. November 1, 1920.

EVIDENCE (§ IV C—401)—CRIMINAL CONVERSATION—PROOF OF MARRIAGE—EVIDENCE OF WIFE—COPY OF MARRIAGE CERTIFICATE—SUFFICIENCY OF PROOF.

In an action for criminal conversation the only evidence of the marriage was the evidence of the wife and what purported to be a copy of the marriage certificate, certified to by the superintendent registrar where the marriage took place, who also certified that he was the proper custodian of the register book containing the entry. *Held*, that the evidence of the wife together with the document were sufficient to prove the marriage and that the document was properly admitted in evidence.

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APPEAL by defendant from the trial judgment in an action for criminal conversation. Affirmed.

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

Russell Hartney, for respondent.

The judgment of the Court was delivered by:

ELWOOD, J.A.:—This is an action brought by the respondent against the appellant for criminal conversation with the wife of the respondent, and in which the trial Judge awarded to the respondent $3,000 damages.

Two objections were taken before us as to judgment:—(1) That there was no evidence or sufficient evidence of the marriage of the respondent with his wife, and (2) That the damages awarded are excessive.

So far as the first objection is concerned, the only evidence of the marriage is that of the wife herself who swore that she was married to the plaintiff in July, 1912, at the Registry Office in Sunderland. She was shewn a document and said that the document was a copy of her marriage certificate and that the persons referred to in that certificate as having been married were herself and the respondent. This certificate was tendered in evidence, and was received subject to objection by counsel for the appellant. The certificate in question is one which is stamped, and, at the foot of it, has the following certificate:—

"I, Henry Cunningham Lindsley, Superintendent Registrar for the District of Sunderland in the Counties of Durham and Sunderland, C.B., do hereby certify that this is a true copy of the Entry No. 51, in the Register Book of Marriages No. 175 for the Registry Office, and that such Register Book is now legally in my custody. Witness my hand this 20th day of February 1919.

(Sgd.) H. C. LINDSLEY,
Superintendent Registrar.
(Stamp) 20th Feb. 1919."

The marriage appears by the certificate to have taken place on July 24, 1912, at the registry office in the District of Sunderland in the Counties of Durham and Sunderland, and that the marriage was by license before the registrar and the superintendent registrar. It was objected that this certificate is not sufficient, and that, without the certificate, the evidence of the wife of the respondent

is not sufficient. In support of the necessity for strict proof of the marriage in cases of criminal conversation, the cases of *Morris* v. *Miller* (1767), 4 Burr. 2057, 98 E.R. 73, and *Birt* v. *Barlow* (1779), 1 Doug. 171, 99 E.R. 113, and *Monaluk* v. *Elaschuk*, [1917] 2 W.W.R., and *Pepin* v. *Lamoureux*, [1917] 3 W.W.R. 217, were cited, and, it seems to me that were the proof of the marriage in this case to depend solely upon the testimony of the wife, that proof would be insufficient, but I am of the opinion that the testimony of the wife, coupled with the certificate of the Superintendent Registrar above referred to is quite sufficient. Section 4, sub-sec. (*a*), of ch. 60, R.S.S. 1909, provides that:—"Imperial proclamations . . . or other Imperial official records, Acts or documents may be proved (*a*) in the same manner as the same are from time to time provable in any Court in England." Section 14 of ch. 99, 14-15 Vict. 1851 (Imp.), is as follows:—

14. Whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no statute exists which renders its contents provable by means of a copy, any copy thereof or extract therefrom shall be admissible in evidence in any Court of Justice, or before any person now or hereafter having by law or by consent of parties authority to hear, receive, and examine evidence, provided it be proved to be an examined copy of extract, or provided it purport to be signed and certified as a true copy or extract by the officer to whose custody the original is intrusted, and which officer is hereby required to furnish such certified copy or extract to any person applying at a reasonable time for the same, upon payment of a reasonable sum for the same, not exceeding fourpence for every folio of ninety words.

Section 33 of ch. 86, 6-7 Will. IV. 1836 (Imp.), being an Act for Registering Births, Deaths and Marriages in England, is as follows:—

33. And be it enacted, that the rector, vicar, or curate of every such church and chapel, and every such registering officer and secretary, shall, in the months of April, July, October and January respectively, make and deliver to the superintendent registrar of the district in which such church or chapel may be situated, or which may be assigned by the registrar general to such registering officer or secretary, on durable materials, a true copy certified by him under his hand of all the entries of marriages in the register book kept by him since the last certificate, the first of such certificates to be given in the month of July one thousand eight hundred and thirty seven, and to contain all the entries made up to that time, and if there shall have been no marriage entered therein since the last certificate, shall certify the fact under his hand, and shall keep the said marriage register books safely until the same shall be filled; and one copy of every such register book, when filled, shall be delivered to the superintendent registrar of the district in which such church or chapel may be situated, or which shall have been assigned as aforesaid to such registering officer or secretary.

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It will be observed that sec. 14 of ch. 99 referred to above provides that a copy of any document which is of such a public nature as to be admissible in evidence on its mere production shall be admissible in evidence provided it purported to be signed and certified as a true copy by the officer to whose custody the original is entrusted. The copy in question purports to be signed and certified by the superintendent registrar for the district in which the alleged marriage took place. Section 33 of ch. 86 6-7 Will. IV. 1836, provides that the register book shall, when filled, be delivered to the superintendent registrar, and as the person in this case purporting to sign and certify to the copy is the person to whom such filled book would be delivered, I think, in view of that fact and of the contents of the certificate itself, we are justified in assuming that the register book was in the custody of the superintendent registrar at the time he gave the certificate in question. I think when a public official comes to give a certificate such as was given in this case, a certificate which he would be entitled to give if the register book were filled and in his possession, the conclusion I have come to, as above stated, is justified. It is of course to be remarked that the certificate states that the register book is now legally in his custody. I, however, do not attach so much importance to the fact that the certificate does contain that statement as I do to the presumption which is raised from the fact of his having certified, and from the fact that he is the proper custodian of filled books.

It was suggested that the proper way to prove the marriage would be by a certificate from the Registrar General as provided by sec. 38, 6-7 Will. IV. 1836, ch. 86. I, however, do not consider that the provisions of sec. 38 exclude the mode of proof adopted in this case. The case of *The Queen* v. *Weaver* (1873), L.R. 2, C.C.R. 85, although it dealt with the question of the proof of birth seems to me to be on all fours with the case at Bar, and, in that case, it was held that a document, practically the same as the certified document in the case at Bar, was admissible in evidence on its mere production, under 6-7 Will. IV. ch. 86, sec. 32, and 14-15 Vict. 1851, ch. 99, sec. 14.

Section 32, above referred to, in effect deals with births and deaths in the same manner as sec. 33 deals with marriages. I

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am of the opinion, therefore, that the document in question was properly received, and it, together with the evidence of the wife of the plaintiff, sufficiently proved a valid marriage.

The next question is, whether or not the damages awarded are excessive? The chief ground for giving damages in actions of criminal conversation, prior to the abolition of that action in England, was the breaking up of the home, and depriving the husband of the society of the wife. Condonation was, however, no answer to the action and only went in mitigation of the damages. See *Bernstein* v. *Bernstein*, [1893] P. 292. In the case at Bar there has apparently been condonation, and therefore, that ground of damages is largely diminished. There is, however, the fact—as the trial Judge points out—that as a consequence of the acts of the defendant the wife has borne twins, which, I presume, the plaintiff will have to support. I think that the trial Judge was justified under the evidence in assuming that the defendant was the father of those twins. The evidence does point out to it being improbable that he is the father, but the medical testimony shews that it is quite possible that he is, and I do not think that the finding of the trial Judge in that respect should be disturbed. I must confess that if I had been assessing the damages I would not have allowed anything like as large a sum as the amount allowed by the trial Judge, but I am not prepared to say that it is so excessive under all the circumstances that we would be justified in ordering a new trial.

In my opinion, therefore, the appeal should be dismissed with costs. *Appeal dismissed.*

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S. C.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee and Ferguson, JJ.A. June 11, 1920.

LATERAL SUPPORT (§ I—2)—EXCAVATION—SALE—SUBSIDENCE OF ADJOINING LAND—LIABILITY OF OWNER AT TIME OF SUBSIDENCE.

A subsequent owner of land is answerable for the consequences of an excavation made in it by a former owner, which has the effect of withdrawing from his neighbour's land the lateral support to which it is entitled with the result that the land subsides and the soil falls away into the excavation.

[*Mitchell* v. *Darley Main Colliery Co.* (1884), 14 Q.B.D. 125; (1886) 11 App. Cas. 127; *Attorney-General* v. *Roe* [1915] 1 Ch.235, followed; *Greenwell* v. *Low Beechburn Coal Co.*, [1897] 2 Q.B. 165, not followed.]

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APPEAL by the plaintiff from the judgment of Widdifield, Co. Ct. J., dismissing the action as against the defendant Albert E. Brown. Reversed.

The action was brought in the County Court against Walter J. Brown and Albert E. Brown for damages for injuries to the plaintiff's land by excavating done by the defendants, or one of them, on land adjoining the plaintiff's, whereby the plaintiff's soil was deprived of lateral support and fell into the excavation.

The excavation was made by the defendant Walter J. Brown, when owner of the land. The subsidence of the plaintiff's land occurred after Walter J. Brown had conveyed his land to the defendant Albert E. Brown.

The learned Junior Judge gave judgment for the plaintiff against the defendant Walter J. Brown for $200 and costs, and dismissed the action as against the defendant Albert E. Brown.

W. A. McMaster, for appellant.

J. M. Ferguson, for respondent, Albert E. Brown.

Grayson Smith, for respondent, Walter J. Brown.

The judgment of the Court was delivered by

Meredith, C.J.O.

MEREDITH, C.J.O.:—This is an appeal by the plaintiff from the judgment of the County Court of the County of York, dated the 9th February, 1920, which was directed to be entered by a Junior Judge of that Court (Widdifield), after the trial before him without a jury on that day.

The respondent Albert E. Brown and the appellant are the owners of adjoining lots, and the action is brought to recover damages caused by the appellant's land having subsided and fallen into an excavation dug by the defendant Walter J. Brown, the predecessor in title of the respondent Albert E. Brown, in his land, and extending to the boundary-line between his land and the land of the appellant.

It was established by the evidence that, after the making of the excavation, a kind of retaining wall was built by the defendant Walter J. Brown for the purpose of providing support to the land of the appellant: it consisted of one inch planks supported by struts or braces. This retaining wall got out of repair and failed to answer the purpose for which it was built, and from time to time, as a result of this, a subsidence of the appellant's land occurred and the soil fell into the excavation. Owing to

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the condition of the wall, this occurred after the respondent became the owner of the land of Walter J. Brown.

On this state of facts, it is clear that some one is liable to the appellant for the damages he has sustained, and the question for decision is whether or not the respondent is liable.

The contention of the respondent, which was given effect to in the Court below, is that a subsequent owner of land is not answerable for the consequences of an excavation, made in it by a previous owner, which has the effect of withdrawing from his neighbour's land the lateral support to which it is entitled, with the result that his land subsides and the soil falls away into the excavation.

In support of this contention two English cases were cited, *Greenwell* v. *Low Beechburn Coal Co.*, [1897] 2 Q.B. 165, decided by Mr. Justice Bruce, and *Hall* v. *Duke of Norfolk*, [1900] 2 Ch. 493, decided by Mr. Justice Kekewich. These were cases in which the question arose between owners of the surface and persons engaged in mining operations, the surface and mineral rights being separately owned. Subsidence had been occasioned by the working of the minerals by the predecessor in title of the defendants, but the injury for which damages were claimed had occurred while the defendants were in possession of the mines, they being in both cases tenants of the owners.

In the first case it was held that "a lessee of underground strata is not liable in damages to the owner of buildings on the surface, who has acquired a right to have the buildings uninjured by underground workings, for injury occasioned to the buildings by reason of subsidence happening during the currency of the lease, caused, not by any act of commission on the part of the lessee, but resulting from an excavation made in the underground strata by the lessee's predecessor in title prior to the date of the lease." The view of Bruce, J., was that no duty rested on the defendant to prevent the subsidence, and that the maxim *sic utere* did not apply, because the defendants had done nothing to cause injury to their neighbours.

Kekewich, J., in the other case, followed this decision, and upon an independent consideration of the question came to the same conclusion as that reached by Bruce, J.

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The only subsequent case in which either of these cases has been considered, that I have been able to find, is *Attorney-General* v. *Roe*, [1915] 1 Ch. 235—a decision of Mr. Justice Sargant. He was there dealing with the case of an excavation immediately adjoining a highway, which was a source of danger and obstruction to persons using the road, and at p. 240 he distinguished between such cases as that and cases such as the *Greenwell* case, saying:—

"Cases such as *Greenwell* v. *Low Beechburn Coal Co.*, which deal with the obligations between private owners when support has been removed by a predecessor in title, appear to stand on a somewhat different footing, and even there the question of liability was left open in cases where there might be a structure to be maintained."

I understand that what is referred to is the passage in the judgment of Bruce, J., at p. 179, where, referring to the duty which it was argued rested on the defendants, he said:—

"But I may observe that if in any case any such obligation were imposed upon them, such obligation could only arise in cases where it is proved to be practicable for the defendants by artificial support to have prevented the subsidence. In the present case there is nothing to shew that that would have been possible."

Dealing with the same question, in Gale on Easements, 9th ed., p. 382, it is said:—

"On the other hand, questions of great difficulty will arise in the present state of the law in actions for subsidence caused by the acts of persons who have long ceased to be connected with the land."

In Halsbury's Laws of England, vol. 11, para. 635, p. 325, it is said:—

"A lessee, and probably an owner in fee, of minerals or underground strata is not liable to the owner of the surface who enjoys an easement of support in respect of his building for damage caused to such building during his possession, where such damage is the result of the removal of support by his predecessor."

It will be observed that this passage refers to an easement of support, and not to the right of support which is in question here, which is not an easement but a right incident to ownership, *ex jure naturæ*.

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In a work on the law of support (Banks), which Mr. Justice Bruce speaks of as a valuable text-book on that law by a learned writer, the view is expressed that the person who is liable for the damages caused by subsidence is not the person "who originally created the state of things which caused the subsidence," but "who was *in possession* of the property in which that state of things existed at the time when the subsidence took place" (p. 5); and, contrary to the views of Bruce, J., he treats *Darley Main Colliery Co.* v. *Mitchell* (1886), 11 App. Cas. 127, as a case in which that was decided to be the law.

If the rule laid down in the two cases to which I have referred is one of general application, and not subject to the qualification suggested by Mr. Justice Sargant, and they were well decided, the appeal must fail.

I shrink from holding that the law is as laid down in the two cases to which I have referred, and I see no reason why, if a person who is in possession of land in which there is an excavation which is a source of danger to the public, although the excavation was not made by him but by a predecessor in title, is liable for the consequences of his permitting the dangerous condition to continue, the same rule should not be applied where a lateral support has been withdrawn by a predecessor in title, and the condition so caused has been permitted to remain and to cause injury to his neighbour, the owner of the land at the time the injury occurs should not be answerable for it. The consequences of holding otherwise would be that where a land-owner had made an excavation in his land, and thereby removed the lateral support to which his neighbour is entitled, but had built a solid retaining wall to prevent subsidence, which, during his ownership, prevented it, and had then sold his land to another and that other to others, and, owing to a subsequent owner—it might well be fifty years after—permitting the retaining wall to decay and no longer to answer the purpose for which it was constructed, with the result that his neighbour's land has subsided, he would be liable to answer in damages for the injury, and the man whose failure to keep up the retaining wall was the effective cause of the injury would go scot free, and that too where the subsidence would not have occurred if the retaining wall had been kept in repair.

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Such a result may well lead one to doubt the correctness of the decisions in the two cases to which I have referred.

In *Mitchell* v. *Darley Main Colliery Co.* (1884), 14 Q.B.D. 125, the language of all the Judges and their reasoning are, in my opinion, opposed to the view taken by Bruce, J., and Kekewich, J. I refer particularly to the following passage from the opinion of Bowen, L.J., at p. 138:—

"It seems to me that there has really been, not merely an original excavation or act done, but a continual withdrawal of support: that is to say, not merely an original act the results of which remain, but a state of things continued, and a state of things continued which has led to and caused the subsequent damage."

And in that view Fry, L.J., expressed his concurrence.

It is true that in the case under consideration no question arose as to the liability of a subsequent owner; but, if the failure of the person who made the excavation to provide support in substitution for the coal which he had taken away was a continual withdrawal of support while that state of things existed, I am unable to understand why the failure of a subsequent owner to provide the necessary support, and *à fortiori* where he suffers a retaining wall to decay, is not equally a continual or continued withdrawal of support within the meaning of the expressions used by Lord Justice Bowen.

I am not impressed with the views expressed by Bruce, J., and Kekewich, J., as to *Darley Main Colliery Co.* v. *Mitchell*, which are directed mainly to shew that Lord Blackburn in the Lords did not agree with the views expressed by Lord Justice Bowen, and not to a criticism of those views.

Upon the whole, I have come to the conclusion that, in the circumstances of the case at bar, the respondent Albert E. Brown is liable for the damages which the appellant has sustained; and, if that conclusion is inconsistent with the decisions of Bruce, J., and Kekewich, J., I decline to follow them. In doing this I am fortified by the opinion of the Judges of the Court of Appeal in *Mitchell* v. *Darley Main Colliery Co.*, to some extent at least by the opinion of Sargant, J., to which I have referred, and by the opinion of the text-writer whom I have quoted.

In addition to this, I find some support in what is said in Gale on Easements, to which reference has also been made.

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It is to be regretted that the very important question which it has fallen to us to decide has arisen in an appeal from a County Court, our decision of which is final.

I would allow the appeal with costs and substitute for the judgment of the Court below judgment for the appellant against the respondent for the damages assessed with costs.

Since the foregoing was written, my brother Ferguson has called my attention to the statement of the case in 1 Corp. Jur. p. 1221, which accords with my view and is as follows:—

"A subsequent purchaser of land is not liable for an injury to adjoining land resulting from the removal of the soil from his own land prior to the time at which he became the owner, and which he did not anticipate, except to the extent of the damages caused by his failure to take steps to prevent further injury after he became the owner."

The authority cited for this proposition is *Cavanaugh* v. *Thornton*, 11 Kentucky Law Reporter 858.

Appeal allowed.

[The effect of the decision of the Court is to set aside the judgment for the plaintiff against the defendant Walter J. Brown.]

Re EAMER.

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S. C.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck, and Ives, JJ. November 1, 1920.

GUARDIAN AND WARD (§ II—14)—TRUST COMPANY—APPOINTED GUARDIAN BY COURT—NO SPECIAL DIRECTIONS—LIABILITY FOR NON-INVESTMENT OF FUNDS—COMPENSATION.

A Trust company which has been appointed guardian of the estate of an infant by an order of the Court, without special directions as to investment, is bound to keep the ward's funds invested, and in case of failure to do so is liable for interest thereon, and is not allowed to make a profit out of the office but is bound to act in all things for the infant's benefit, subject to its right to a reasonable remuneration for its care and supervision of the estate.

Statement.

APPEAL by the administrator of an infant's estate from an order of Simmons, J., on a petition by a trust company as guardian of the estate for the passing of accounts and allowance and fixing compensation. Varied.

F. C. Jamieson, K.C., for appellant; *G. B. O'Connor*, K.C., for respondent.

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Stuart, J.

HARVEY, C.J., concurs with BECK, J.

STUART, J.:—In 21 Cyc., p. 87, it is said:—"It is the duty of a guardian to keep the ward's funds invested and in the case of failure to do so he may become liable for interest thereon." And in Simpson's Law of Infants, p. 289, it is said, "From the doctrine that a guardian is a trustee it follows at once that he can make no profit out of the office but is bound to act in all things for the infant's benefit."

In this case the guardian received the estate of the infant into its hands under an order of the Court which gave no special or any direction as to investment. In those circumstances the guardian became subject to the general duties of a guardian of an infant's estate. A consequence of the principle enunciated in the passages above quoted seems clearly to be that the guardian has no right to act in the double capacity of guardian and as a person with whom the money is invested. In other words without special authority from the Court the guardian has no right to invest the infant's money with itself (being a company) and by the use of the money so invested with itself to make a profit thereon. The very fact that the company is known as a company whose business it is to receive money *for investment* seems to emphasise this view.

Whatever the situation may have been, therefore, if the guardian made no investment at all but simply kept the money in its own hands, when it appears that it did invest the money it seems to be absolutely clear that it must account for the interest actually received subject to its right to a reasonable remuneration for its care and supervision of the estate.

The moneys of the infant were apparently mingled with other trust funds and these were invested by the company in its own name. It should obviously be chargeable with the interest which it in fact received on the mingled funds so invested. Of course a small proportion of this general fund seems to have been retained and it was no doubt legitimate in the circumstances to retain uninvested a small proportion of this infant's estate. What was the proportion actually retained is of course difficult to determine upon the evidence but the best the Court can do is to make such allowance for this as would seem to be fair to the company.

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I concur in the view of Beck, J., as expressed in his judgment and agree that there should be a surcharge against the company of $1,000, as being upon the whole facts a fair and just charge to make against it. I agree also with Beck, J.'s disposition of the other matters involved.

BECK, J.:—This was a petition by the National Trust Co. as guardian of a portion of the estate of the infant who had died some time before, for the passing of accounts, and the allowance and fixing of compensation.

Accompanying the petition were the accounts of the company as guardian.

Upon receiving the petition and accounts the solicitors for the Imperial Canadian Trust Co. as administrators of the estate of the deceased infant, gave notice to the petitioning company that it would be urged in effect (1) that a sum of $107.79 credited as "interest on uninvested balances" ought to be $160.37; (2) that the remuneration to be allowed ought to be reduced by reason of neglect to invest during the following periods by the amounts stated below:

(a) June 14, 1911, to June 16, 1914, $1,440.87.

(b) June 17, 1914, to April 6, 1915, $67.02.

(c) April 1, 1918, to August 6, 1919, $223.19.

The portion of the estate of the infant in question came into the hands of the petitioning company as guardian on June 14, 1911. The estate consisted of a two-thirds undivided interest in the purchase price of certain farm land, the remaining one-third being the property of the infant's father. The land soon after the date of the petitioning company's appointment was subdivided and mortgages taken from the purchaser for the balance of the purchase price securing one-third to the infant's father and two-thirds to the petitioning company for the infant and the company received two-thirds of the down payment. There was a provision for partial discharges of lots which were to be sold by the father and upon receipt of the proper proportion of the purchase money.

The petitioning company claimed as compensation $4,000, that is for the period from June 14, 1911, to April 1920.

Simmons, J., before whom the petition came reduced this claim to $2,500. He disallowed the claims of the administrator

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for the surcharging of the petitioning company with items representing loss for failure to invest. He found that the total amount of the estate which had come to the company's hands as guardian, including interest on investments and interest allowed on credit-balances uninvested from time to time, amounted to $25,002.13; that the company had properly disbursed $7,502.26 leaving a balance of $17,499.17 and that there remained consequently in the company's hands,

Cash	$ 2,634.17
Investments of the capital value of	14,865.00
	$17,499.17

The company was to account for the above sum less the $2,500 allowed for compensation and the costs of the taking and passing of the accounts and fixing the compensation to be taxed.

The administrator of the infant's estate appealed from the order of Simmons, J., on the grounds that (1) the $2,500 was excessive as remuneration, and (2) that the company should be charged with additional interest for non-investment between June, 1911, and June, 1914, because of failure to invest and because the company had used the monies for its own purposes.

The original principal amount received by the company—not all in one sum—appears to have been about $18,000.

The company charged as paid a commission of 1% on investments of $14,500 but as far as I can find there is no further sum charged either as a fee or disbursement for obtaining an investment. The greater part of the additional money invested seems to have come from accumulations of interest.

The company also charged some small items for commission on investment or on interest collected.

There was nothing to be done by the company, as is commonly the case, in the way of converting the estate into money. It had however to render some considerable service in relation to the subdivision of the land; to check up the transactions of the sale of lots; see that they were satisfactory and that the company got its proper proportion of the purchase price and ultimately execute partial discharges of mortgage. There were a considerable number of such transactions. There were two instances in which the company paid the infant's share of taxes on land

being administered by the administrator of the infant's mother's estate—one on December 5, 1914, $368.54 and one on January 17, 1917, $136.67.

There was put in a copy of a diary of the actual work done by the company in connection with the estate. There are some 450 odd items extending over about 8½ years. It enables one to check to some extent other calculations of the proper amount of compensation.

It seems to me that having regard to the amount of the estate and the other circumstances to which I have pointed, $2,000 is ample compensation for the responsibility assumed and the services rendered by the company; but the difference between that and the amount allowed by Simmons, J., being not great perhaps his allowance of $2,500 should stand.

The question of non-investment during the period from June, 1911, to April, 1914, remains.

The company had 4 methods open for placing the funds of the estate at interest: (1) Paying its client 4% interest compounded quarterly according to its custom with regard to all uninvested funds of its clients; (2) investment on first mortgages at 8% per annum allocated specifically to the client, the client taking the risk of possible depreciation of the security arising without default on the company's part; (3) investment on mortgage or otherwise, the company being liable to return only the principal with 5% interest half yearly; (4) investment in Government or municipal bonds or debentures at current rates.

The order appointing the company guardian did not contain any directions as to the mode of investment and no directions were subsequently applied for.

It is contended that had the company invested in bonds or debentures the return in fact as experience shewed would not have been more than or even as great as 4% compounded quarterly. Had a private individual sent the company moneys for investment without any specific instructions I think it would be assumed that the client intended the investment to be made by the method which would produce the largest return, namely, first mortgages bearing 8% interest, the client taking the possible risk of loss arising without fault on the company's part. I think that was

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primâ facie the duty of the company as guardian in this case. The company might have applied for specific directions. In all probability a direction for investment by that method would have been made. Had it been made the company of course would have been entitled to certain allowances, charges or disbursements in relation to the investment—a reasonable time within which to obtain investments (during which interval the moneys would be at 4%) a charge or disbursement for obtaining the investment, a commission on the collection of the interest and possibly some other items.

The administrator company has made up a statement by which they claim to shew that the guardian company has caused a loss to the company by reason of non-investment for the period of 3 years—June, 1911, to June, 1914—of $1,400 odd; this calculation giving credit for the amounts allowed on the basis of 4% compounded quarterly. In this calculation the items which the company might properly make by way of allowances, charges or disbursements as above suggested are not taken into the account. The $1,400 is therefore excessive.

It is impossible to make an exact calculation. Taking it in several ways and checking one with another I think the company is not chargeable with more than perhaps $1,000 and I would allow that amount as revenue which the company ought to have earned, and in all probability in fact did earn.

I have considered all the grounds urged as reasons for not investing.

In the result then I would amend the order of Simmons, J., only by allowing the administrating company's surcharge to the extent of $1,000.

I would give the costs of the appeal to the appellant.

I have read the supplementary observations of my brother Stuart and concur with the opinion he has expressed.

Ives, J.

IVES, J., concurs with STUART, J.

Judgment accordingly.

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Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. November 1, 1920.

LANDLORD AND TENANT (§ II D—30)—TENANT DOING FORBIDDEN ACT—DAMAGES—GROSS NEGLIGENCE—VOLUNTARY WASTE—TERMINATION OF TENANCY AT WILL—TRESPASS—DAMAGES.

To do a forbidden act which actually causes the damage which the prohibition was intended to prevent is gross negligence which amounts to voluntary waste and terminates a tenancy at will and makes the tenant liable in trespass for damages.

[*The Countess of Shrewsbury's* case, (1590) 5 Co. Rep. 13 b, 77 E.R. 68; *Panton* v. *Isham* (1694), 3 Lev. 359, 83 E.R. 729; *Gaston* v. *Wald* (1860), 19 U.C.Q.B. 586, distinguished. See annotation: Landlord and Tenant, 52 D.L.R. 1.]

Statement.

APPEAL by plaintiff in an action against a tenant for negligently burning down the demised premises. Reversed.

C. E. Gregory, K.C., for appellant; *D. Buckles*, for respondent.

The judgment of the Court was delivered by:

Newlands, J.A.

NEWLANDS, J.A.:—The trial Judge found that the defendants were tenants at will of the plaintiff of the destroyed premises and that the fire was caused by their negligence. He says:

> The proximate cause of the accident was the manner in which the stove was being filled, the manner in which the tank was being filled with gasoline. It was not being filled in the manner in which instructions had been given that it should be filled and it was being filled in such a manner that when it was being put into the outside tank the gasoline spilled out over the stove. I consider this is a negligent manner of filling this tank and that this is the cause of the accident.

The gasoline which spilled over caught fire, and burned down the building.

The Judge further held that he was bound by the decision of Taylor, J., in *Paul* v. *Currah and Phillip* (1919), 12 S.L.R. 278, where he held that a tenant at will was not liable for damages arising from negligence. Taylor, J., came to this conclusion because an action on the case in the nature of waste would not lie against a tenant at will for permissive waste. Admitting this principle to be true, it does not, in my opinion, have any bearing upon this case. All of the old cases upon which the above principle was based were decided upon the form of action, and it has been expressly decided in *The Countess of Shrewsbury's* case (1590), 5 Co. Rep. 13 b, 77 E.R. 68, that an action on the case for permissive waste would not lie against a tenant at will,

> and the reason of the judgment was, because at the common law no remedy lay for waste, either voluntary or permissive against lessee for life or years, because the lessee had interest in the land by the act of the lessor, and

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it was his folly to make such lease and not restrain him by covenant, condition or otherwise that he should not do waste. So and for the same reason, a tenant at will shall not be punished for permissive waste. But the opinion of Littleton is good law, fol. (15) 152. If lessee at will commits voluntary waste, *soil* in abatement of the houses, or in cutting of the woods, there a general action of trespass lies against him. For as it is said in 2 and 3 Phil. & Mar. Dyer 122 b., when tenant at will takes upon him to do such things, which none can do but the owner of the land, these amount to the determination of the will, and of his possession, and the lessor shall have a general action of trespass without any entry.

Taylor, J., also relies upon *Panton* v. *Isham* (1694), 3 Lev. 359, 83 E.R. 729, and *Gaston* v. *Wald* (1860), 19 U.C. Q.B. 586. In both these cases it was decided that defendant, a tenant at will, was not liable for negligent waste. As *Panton* v. *Isham* was decided upon the authority of the *Countess of Shrewsbury's* case, which was a case of permissive waste, it only is an authority that the tenant at will is not liable for permissive waste. In *Gaston* v. *Wald*, *supra*, Robinson, C.J., held that the fire was accidental. That Judge points out the distinction between that case and cases like the present. At p. 590 he says:

> Was the fire in the defendant's chamber or booth an *accidental* fire within the meaning of the statute, or was it shewn to be a fire occasioned by such negligence of the defendant or his servants that it would bring upon him a civil liability to the plaintiff, although it was in this sense accidental, that it was not wilful?

In *Gibson* v. *Wells* (1805), 1 Bos. & Pul. (N.R.) 290, 127 E.R. 473, Sir James Mansfield, C.J., held that an action would not lie against a tenant at will for permissive waste, but he said, "There is no doubt but an action on the case may be maintained for wilful waste (*i.e.*, voluntary waste)."

In this case the trial Judge held that the negligent act which caused the fire was, in the stove not being filled with gasoline "in the manner in which instructions had been given that it should be filled," which would, in my opinion, be such gross negligence as would make defendant liable for the consequences. *Upton* v. *Pingree* (1851), 7 N.B.R. 186, which Taylor, J., also cites, is an authority in point. There the trial Judge directed the jury that, to entitle the plaintiff to recover, he was bound to prove what the law termed wilful or voluntary negligence in the defendants, which would amount to gross negligence, and if they were satisfied there was such gross negligence, the plaintiff was entitled to recover. On appeal it was held that the jury had been

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properly directed. See also *Murphy* v. *Labbé* (1896), 27 Can. S.C.R. 126, and *Klock* v. *Lindsay* (1898), 28 Can. S.C.R. 453.

To do a forbidden act which actually causes the damage which the prohibition was intended to prevent, is, in my opinion, a wilful act amounting to gross negligence which would render the defendants liable for the consequences. This would amount to voluntary waste, which would terminate the tenancy and make defendants liable in trespass for damages.

The appeal should, therefore, be allowed and judgment entered for plaintiff with costs. As there is no finding as to the amount of damages suffered by plaintiff, I would refer the matter to the local registrar to ascertain the same.

Appeal allowed.

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Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. June 25, 1920.

EASEMENT (§ II A—5)—SUBDIVISION OF LAND—LANE SET APART BY GRANTOR FOR USE OF OWNERS OF LOTS—EVIDENCE—CONVEYANCE RESERVING RIGHT OF WAY OVER PART OF LANE—EASEMENT APPURTENANT TO LAND OWNED BY GRANTOR—EASEMENT IN GROSS—EQUITABLE RIGHTS.

A lane having been set apart by the original owner as a right of way for all owners of lands appurtenant thereto, the owner of one lot to whom a portion of such lane has been conveyed by mistake may, by reserving a right over the same and by a proper grant acquire, as appurtenant to the property owned by such owner, a right of way over such portion.

The easement so created is not an easement in gross; and although the grantee did not execute the conveyance in equity he cannot prevent the easement from being enjoyed by the grantor or claimants under him.

[*Miller* v. *Tipling* (1918), 43 D.L.R. 469, 43 O.L.R. 88, applied; *May* v. *Belleville*, [1905] 2 Ch. 605; *Canada Cement* v. *Fitzgerald* (1916), 29 D.L.R. 703, 53 Can. S.C.R. 263, followed.]

Statement.

APPEALS by the plaintiff in the first action and the defendant in the second from the judgment of the County Court of the County of Simcoe, after the trial without a jury. The question for decision is as to the right of way of the respondent over a strip of land 10 feet wide and 37 feet in length, being the southerly 10 feet of the westerly 37 feet of the north half of lot No. 16 on the east side of John street—now Maple avenue—in the town of Barrie, according to registered plan No. 115. The judgment of the County Court declared that the respondent was entitled to the right of way which it claimed.

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Elizabeth Ross (the mother of the appellant in the first action) was the owner of a block of land bounded on the west by John street, on the north by Elizabeth street, on the east by Bayfield street, and on the south by the lands of G. Lount, Esq. This block consisted of lots Nos. 16 and 17 on the east side of John street and lots Nos. 10 and 11 on the west side of Bayfield street.

On the 9th December, 1903, Elizabeth Ross conveyed to Mary Elizabeth Perkins the westerly 37 feet of the north half of lot No. 16 and the westerly 37 feet of lot No. 17, and the appellant in the second action derived his title by various mesne conveyances from the grantee in this conveyance (registry No. 7908).

The right of way which the respondent claims as appurtenant to the land owned by it, which consists of a part of the block owned by Elizabeth Ross lying to the east of and separated by lots owned by other persons from the 37 feet conveyed to Mary Elizabeth Perkins, is a right of way over a strip of land 10 feet in width extending from John street to Bayfield street and forming the southerly 10 feet of the north halves of lots Nos. 16 and 11.

The respondent's right to the way over the 10-foot strip from Bayfield street to the 37 feet is not disputed, but the contention of the appellants is that it ends there, and that the southerly 10 feet of the 37 feet are not burdened with any right of way over them.

E. D. Armour, K.C., for appellants.

A. W. Anglin, K.C., and *W. A. Boys*, K.C., for respondent.

Meredith, C.J.O.

MEREDITH, C.J.O.—It is clear, I think, that the intention of Elizabeth Ross was to subdivide her block of land into lots, and that there should be a lane 10 feet wide extending from John street to Bayfield street for the use of the lots which she intended should abut upon it.

The first two conveyances made by her (registry Nos. 3325 and 3326) were made on the 20th October, 1887—one of them to her daughter, Martha Elizabeth Ross, and the other to Robert A. Ross. The parcel conveyed to the daughter consisted of part of lots Nos. 10 and 11, having a frontage of 18 feet 7 inches on Elizabeth street and a depth of 89 feet more or less, extending, as the conveyance states, "to the north side of a right of way running across said lot 11," with a right of way over what is described as "a certain right of way 10 feet wide also with free ingress . . .

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into along and upon and out of a certain right of way over and upon the southerly 10 feet of the north half of lot 11 on the west side of Bayfield street and the southerly 10 feet of the north half of lot 16 on the east side of John street, Edgar's plan;" and the parcel conveyed to Robert A. Ross consisted of part of lots Nos. 10 and 11, having a frontage of 34 feet on Elizabeth street and a depth of 89 feet more or less, extending, as the conveyance states, "to the north side of a right of way running across said lot 11," with a right of way described in the same words as the right of way granted to the daughter is described. Both of these conveyances were registered on the 15th December, 1887.

Another conveyance was made by Elizabeth Ross on the 11th February, 1890. It was made to Mary Anne Ross, and conveyed part of No. 11, commencing at the south-east angle of it, having a frontage of 33 feet on Bayfield street and a depth of 72 feet. This parcel lies south of the 10-foot strip, and its northerly limit is the southerly limit of the strip.

The next conveyance in the order of time is the conveyance to Mary Elizabeth Perkins to which reference has been made.

The proper conclusion is, in my opinion, that Elizabeth Ross definitely set apart as a right of way for the use of all the lots into which she should subdivide her block, and which should abut upon it, the strip of land 10 feet wide extending from John street to Elizabeth street, which formed the southerly 10 feet of the north halves of lots Nos. 11 and 16.

It is clear that she so treated it in the conveyances of the 20th October, 1887, and granted to the grantees in them rights of way over the strip. After doing this, it was not competent for her to derogate from the grant she had made; and, the conveyances being registered, her grantee, Mary Elizabeth Perkins, and those deriving title under her can stand in no better position that that occupied by Elizabeth Ross. Elizabeth Ross also granted rights of way in similar terms in her conveyances of all the other lots in the block.

It was, doubtless, owing to a mistake or misapprehension on the part of the conveyancer who prepared the conveyance to Mary Elizabeth Perkins that the 10-foot right of way was not made the southerly boundary of the 37 feet conveyed to her.

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It is evident that Elizabeth Ross was not aware of the mistake that had been made, because, on the 18th March, 1905, she conveyed (registry No. 8402) to Marion Eleanor Perkins another part of the block, having a frontage of 15 feet 4 inches on Elizabeth street, and extending to the right of way, with a right of way over the southerly 10 feet of lots Nos. 11 and 16, described in the same terms as the rights of way granted by the conveyances of the 20th October, 1887, are described in them.

Again, on the 26th April, 1905, Elizabeth Ross conveyed (registry No. 8507) to Martha Elizabeth Ross part of the block, having a frontage of 95 feet on Elizabeth street and described as extending southerly 89 feet more or less to the north side of a lane or right of way running across said lots Nos. 11 on the west side of Bayfield street and 16 on the east side of John street aforesaid, and also all that part of lot No. 11 not theretofore sold and conveyed by the grantor. This conveyance also contains a grant of a right of way over the 10-foot strip, expressed in substantially the same terms as the grants made by the conveyances of the 20th October, 1887.

Martha Elizabeth Ross, on the 4th October, 1906, by registry No. 9409, conveyed to Mary Elizabeth Perkins all that part of lot No. 11 conveyed by Elizabeth Ross to the grantor by registry No. 8507, and Mary Elizabeth Perkins (then Bridgeland), on the 16th August, 1909, conveyed it by the same description, by registry No. 1099, to Marion Eleanor Perkins.

By these deeds there was conveyed the parcel described in registry No. 12692 and another parcel lying to the east of it and abutting on the lane and the soil and freehold in that part of the 10-foot strip which formed part of lot No. 11, subject to the rights over it which had been granted. There are two other conveyances, both dated the 27th January, 1905, which appear upon the abstract of title, both from Elizabeth Ross to Mary Anne Ross. These conveyances were not put in evidence; but, according to a solicitor's abstract which I find among the papers, they were conveyances of parts of lots Nos. 10 and 11, and contain grants of the use of "a certain lane or right of way over and upon the southerly 10 feet of the north half of said lot No. 10, and the southerly 10 feet of the north half of lot No. 16."

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On the 11th March, 1908, Elizabeth Ross conveyed to Mary, Anne Ross the southerly 10 feet of the north halves of lots Nos. 11 and 16, "otherwise known as the lane, subject however to and excepting all the rights and privileges heretofore granted by the said party of the first part unto Martha E. Ross, Robert A. Ross, Marion E. Perkins, and the said Martha E. Ross, by instruments registered in the registry office as Nos. 3325, 3326, 8402, and 8507 of the said town of Barrie."

The land owned by the respondent is part of the parcel conveyed by Elizabeth Ross to Martha Elizabeth Ross by the conveyance of the 26th April, 1905, registry No. 8507; the chain of title being Martha Elizabeth Ross to Harry D. Jamieson, 25th May, 1913, registry No. 12694, and Harry D. Jamieson to the respondent, 28th May, 1913, registry No. 12695. The appellant Mary A. Adamson herself conveyed to Marion Eleanor Perkins, by registry No. 12692, a part of lot 11, 23 feet square, situate at the north-west corner of the lot, and included in the conveyance a grant of a right of way in the same terms as were used to describe it in the conveyances of the 20th October, 1887.

I turn now to the chain of title of the westerly 37 feet. On the 1st January, 1908, Mary Elizabeth Perkins conveyed to Alfred B. Wice, by registry No. 10197, the land described in registry No. 7908, "excepting and reserving unto the grantor her heirs and assigns full right and liberty at all times hereafter in common with all other persons who may hereafter have the like right to use the lane 10 feet in width being the south 10 feet of the north half of said lot 16 for all necessary purposes either with or without cattle or other animals, carts, waggons, carriages, and other vehicles."

This was a clumsy effort to rectify the error that had been made by including the part of the 37 feet occupied by the lane in the conveyance of the 9th December, 1903, and to secure the right of way to the grantor to the other parcel which she owned—the parcels conveyed to her on the 4th October, 1906, by registry No. 9409.

Wice, on the 15th July, 1914, conveyed to William C. Thompson, by registry No. 13220, the 37 feet, "subject however to all registered rights of way over the southerly 10 feet of said north half of said lot No. 16 together with all rights of way (if any) to

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which the grantor is entitled over the lane extending easterly to Bayfield street from the said south 10 feet of the said lot No. 11."

Thompson conveyed to the appellant Adamson (the plaintiff in the first action), on the 23rd August, 1916, by registry No. 14265, by the same description as that contained in registry No. 13220.

Adamson subsequently conveyed to William John Lang, by registry No. 14496, dated the 25th April, 1917, the southerly 10 feet of the 37 feet; and Lang, on the 14th August, 1917, conveyed it to Joseph Levinsky, by registry No. 14709. The appellant Mary A. Adamson had in the meantime executed a conveyance to Lang by registry No. 14530, dated the 10th May, 1917, of the parcel conveyed to him by her husband, in which it is recited that she is "the owner of certain portions of lot 16 hereinafter mentioned and is entitled to a right of way over the lands and premises hereinafter particularly described, and . . . the party of the second part has recently purchased the lands and premises hereinafter particularly described together with other lands and has requested the party of the first part to release to him the party of the second part all the rights of way she the party of the first part may claim in respect to other lands and premises hereinafter particularly described."

Levinsky on the 7th January, 1918, by registry No. 14964, in consideration of one dollar, conveyed to the appellant William Adamson the southerly 20 feet of the 37 feet, "with all the rights granted to William John Lang according to registered instrument No. 14530 by Mary A. Adamson being all the rights of way she had or claimed to have in respect to" the southerly 10 feet of the 37 feet.

The reference to the right of way to other lands of Mrs. Adamson is to the fact that she had acquired the parcel conveyed by Elizabeth Ross to Martha Elizabeth Ross by registry No. 3325, and in the conveyance it had been described as it was described in the conveyance to Martha Elizabeth Ross, and as I have stated in referring to that conveyance.

The conclusion to which I have come, on the facts as before stated, is sufficient to support the judgment from which the appeals are brought; but it may also, in my opinion, be supported on the ground that the effect of the conveyance from Mary Elizabeth Perkins to Alfred B. Wice (registry No. 10197) was to

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extend the easement to which she was undoubtedly entitled in respect of the other land then owned by her so as to include the southerly 10 feet of the 37 feet which had been conveyed to her by registry No. 7908.

There is no case which requires us to hold that Mary Elizabeth Perkins could not by a proper grant acquire, as appurtenant to the parcel owned by her described in registry No. 8507, a right of way over the southerly 10 feet of the 37 feet, and none of the cases cited by Mr. Armour go that far.

It is doubtless the law that there is no such thing as an easement in gross in the proper sense of the word, and that the grantee of an easement must at the time of the creation of it have an estate in the tenement to which the easement is to be appurtenant. That requirement is satisfied in the case at bar, because, as I have said, Mary Elizabeth Perkins was the owner of the land to which the easement was to be appurtenant.

The law is that, as my brother Riddell said in *Miller* v. *Tipling* (1918), 43 D.L.R. 469, 477, 478, 43 O.L.R. 88, 97, 98, "properly speaking, there can be no easement the subject-matter of an exception;" but, as he points out, "where the instrument . . . purports to reserve an easement . . . in favour of the owner of the dominant tenement, the true effect is to create an easement in favour of the latter by a new grant of the right to the grantor of the servient tenement by the grantee."

It was contended by Mr. Armour that this law does not apply, because the conveyance to Wice was not executed by him, and therefore there could be no new grant of the easement. That would no doubt be so at law; but it is clear that in equity it would not, and that in equity the grantee would not be permitted to prevent the easement from being enjoyed by his grantor or those claiming under him: see *May* v. *Belleville*, [1905] 2 Ch. 605, and *Canada Cement Co.* v. *Fitzgerald* (1916), 53 Can. S.C.R. 263, 29 D.L.R. 703.

It was further contended by Mr. Armour that, inasmuch as the parcel in respect of which the way was reserved was not contiguous to the land conveyed to Wice, the easement must be treated as an easement in gross, and for that proposition he cited *Ackroyd* v. *Smith* (1850), 10 C.B. 164, 138 E.R. 68.

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S. C.

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BELL TELEPHONE CO. OF CANADA v. ADAMSON.

Meredith, C.J.O.

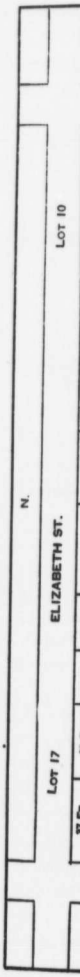
That case has, in my opinion, no application. It was pointed out in *Thorpe* v. *Brumfitt*, (1873), 8 Ch. App. 650, 657, that the case had been misapprehended, and that the opinion expressed that the right of way in question there was in gross was not necessary to the decision, and that the purposes for which the right of way was granted "were to a great extent unconnected with the use of the close to which that right was claimed as appurtenant."

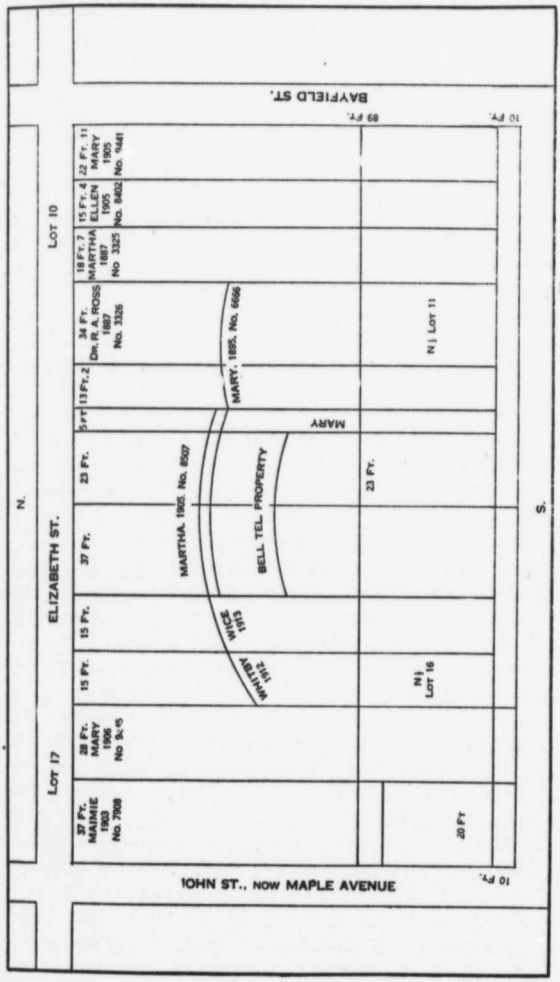
In the case at bar, as I have said, Wice's grantor had, as appurtenant to her other parcel owned by her, if not a right of way over the lane from John street to Bayfield street, a right of way over the whole of it except the westerly 37 feet, and the law is not so absurd as to make it necessary to hold that she could not acquire a right of way appurtenant to that other parcel over the 37 feet.

In any case, the conveyance to Wice is cogent evidence of the existence of a lane extending from Bayfield street to John street, and I am inclined to think that Wice and those deriving title under him are estopped, as between them and subsequent purchasers of lots in the block, from denying the fact of the existence of the lane and their right to use it.

Exhibit No. 1 is a plan which shews the subdivisions of the block, and reference to it will enable what I have said to be better understood.

(The plan is reproduced on the following page.)





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I would, for these reasons, affirm the judgment and dismiss both appeals with costs.

Maclaren, J.A. Hodgins, J.A.

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

Magee, J.A.

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

Appeals dismissed.

SASK.

C. A.

DALRYMPLE v. CANADIAN PACIFIC R. Co.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. November 1, 1920.

ESTOPPEL (§ II C—36)—INJURIES RECEIVED DURING COURSE OF EMPLOYMENT —ACTION DISMISSED—DAMAGES ASSESSED UNDER WORKMEN'S COMPENSATION ACT—APPEAL FROM DISMISSAL OF ACTION.

Where an action brought by a workman for damages for injuries sustained in the course of his employment is dismissed, and the workman thereupon applies to the trial Judge to assess damages under the Workmen's Compensation Act, 1 Geo. V. 1910-11 (Sask.), ch. 9, which is done and a formal judgment entered dismissing the action and assessing the damages under the Act, such workman is estopped from prosecuting an appeal from the dismissal of the action.

[*Neale* v. *Electric and Ordnance Accessories Co.*, [1906] 2 K.B. 558, followed.]

Statement.

MOTION for an order setting aside a notice of appeal and for an order quashing the appeal. Motion granted.

W. F. A. Turgeon, K.C., for appellant.

L. J. Reycraft, K.C., for respondent.

The judgment of the Court was delivered by:

Elwood, J.A.

ELWOOD, J.A.:—This is an action brought by the appellant to recover from the respondent damages for injury sustained by the appellant while in the employ of the respondent, which it was alleged arose through the negligence of the respondent.

At the conclusion of the appellant's case counsel for the respondent asked the trial Judge to withdraw the case from the jury, on the ground that there was no evidence of negligence on the part of the respondent. The trial Judge acceded to this request, and adjudged that the appellant's action be dismissed and that the respondent recover from the appellant its costs of defence. Immediately thereafter counsel for the appellant applied to the trial Judge to assess to the appellant damages under the Workmen's Compensation Act. The trial Judge immediately assessed damages in favour of the appellant in the sum of $2,000, and directed that the appellant should have the

costs of the action as on the District Court scale, and from these should be deducted the costs of the respondent on the King's Bench scale. The costs of the appellant on the District Court scale were taxed, and a formal judgment roll was entered by the solicitors for the respondent adjudging the dismissal of the appellant's claim for damages with costs, and adjudging that the appellant have judgment for the said amount assessed under the Workmen's Compensation Act with costs, and further adjudging that from this amount should be deducted the said costs adjudged to be paid by the appellant to the respondent. Thereafter the solicitor for the appellant served notice of appeal against the decision of the trial Judge in the original action, alleging that the trial Judge erred in withdrawing the case from the jury, in not allowing the jury to assess the damages, and in not allowing the jury to adjudicate on the weight of evidence adduced in support of the alleged negligence on the part of the respondent. Counsel for the respondent has now moved before this Court for an order setting aside the notice of appeal above referred to, and for an order quashing the appeal, on the ground that the appellant at the close of the common law action applied for and obtained judgment under the Workmen's Compensation Act; that such judgment has been formally entered and stands as a judgment against the respondent, and that the appellant is not entitled to both a judgment under the Workmen's Compensation Act and at common law.

The sections of the Workmen's Compensation Act applicable to this appeal are, 1 Geo. V. 1910-11 (Sask.) ch. 9, sec. 8, as amended by sec. 28 of 6 Geo. V. 1915, ch. 43, and sec. 12 of the original Act.

Section 8, as amended, is as follows:

8. If within the time limited for bringing an action under this Act an action is brought to recover damages independently of this Act for injury caused by an accident and it is determined in such action that the injury is one for which the employer is not liable in such action but that he would have been liable to pay compensation under this Act the action shall be dismissed; but the Judge before whom such action is tried shall, if the plaintiff so chooses, either immediately or in case of an unsuccessful appeal upon notice to the opposite party within 30 days after the disposition of such appeal, proceed to assess such compensation and to adjudge the same to the plaintiff, and he shall be at liberty to deduct from such compensation all or part of the costs which,

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in his judgment, have been caused by the plaintiff bringing his action independently of this Act instead of proceeding under the same, and also, in cases where there has been an appeal, the costs of the appeal.

And sec. 12 is as follows, 1 Geo. V. 1910-11, ch. 9:

12. In the case of any injury for which compensation is payable under this Act the plaintiff may at his option proceed either under this Act against the employer or independently of this Act against the said employer or any other person from whom he may be entitled at law to recover damages; but the plaintiff shall not be at liberty to proceed both under and independently of this Act.

No steps have been taken to reverse the judgment above referred to under the Workmen's Compensation Act, and that judgment still stands as a judgment against the respondent.

The question involved in this motion seems to me to be—for all practical purposes—the same as that involved in *Neale* v. *Electric and Ordnance Accessories Co. Ltd.*, [1906] 2 K.B. at 358. The head note to that case is as follows:

Where, upon the dismissal of an action brought by a workman under age, by his next friend, against his employers to recover damages in respect to personal injuries occasioned to the plaintiff by an accident arising out of and in the course of his employment, an application was made to the Judge who tried the action to assess compensation to the plaintiff under the Workmen's Compensation Act (60-67 Vict. (Imp.), ch. 37) 1897, sec. 1, sub-sec. 4, and the Judge accordingly awarded such compensation:—

Held, that the plaintiff was estopped by the election to take such compensation and the award thereupon made from proceeding further with the action, and therefore a subsequent application by him for judgment or a new trial in the action could not be entertained.

The English Act of 1897 under discussion in the case of *Neale* v. *Electric, etc., supra*, was, in its practical effect, similar to the above sections of our own Act; except that under the English Act there is no provision giving the plaintiff the option to wait until after the determination of an unsuccessful appeal before applying for the assessment of damages. In the English Act the provision is that, when the Court assesses the compensation, it shall give a certificate of the compensation it has awarded and such certificate shall have the force and effect of an award. Under our Act, it will be observed, the Judge shall proceed to assess such compensation and *to adjudge* the same to the plaintiff.

In the course of his judgment in the *Neale* case, Collins, M.R., discusses the case of *Isaacson* v. *New Grand*, [1903] 1 K.B. 539, and distinguishes that case from the *Neale* case. In the *Isaacson* case there was merely an application for an assessment, but no

assessment actually took place, and it was there held that the mere application for the assessment did not amount to the exercise of an option so as to estop the plaintiff from appealing against the dismissal of the action. Without expressing any opinion as to the correctness of the decision in the *Isaacson* case, Collins, M.R., distinguishes the *Neale* case from it by saying, [1906] 2 K.B. at 565:

> Here the matter did not stop short at a mere application, but ripened into an award of compensation which is unimpeached. Therefore the two cases are quite distinguishable.

He says further, at 566:

> It appears to me, therefore, that on principle, and on the true construction of the words of the Act, and also upon the authorities, the plaintiff, having obtained a remedy under the Workmen's Compensation Act, 1897, cannot now recur to a remedy by action.

Fletcher Moulton, L.J., at p. 567, is reported as follows:

> I am of opinion that in these circumstances there was an election conclusively and irrevocably exercised by the next friend, acting on behalf of the infant, by which the plaintiff is estopped from taking further proceedings in the action.

Farwell, L.J., at p. 568, is reported as follows:

> The plaintiff has availed himself of the option given by that sub-section, and has obtained a certificate from the Judge at the trial, which is equivalent to an award of compensation under the Act, and therefore, by virtue of r. 26 of the Workmen's Compensation Rules, is enforceable as a judgment or order of the Court. It seems to me that the award so obtained clearly has the effect of an estoppel by judgment.

It is suggested that, inasmuch as, under our Act, the appellant was given the right to wait until after the determination of an unsuccessful appeal before applying to have the damages assessed under the Act, the case at Bar is distinguishable from the *Neale* case.

I do not agree with that contention. It seems to me that, if anything, it weakens the case of the appellant. The appellant did not need to elect immediately; he could have waited until after the determination of the unsuccessful appeal, but he did elect immediately, and, in addition to that, he taxed his costs payable in consequence of the assessment under the Workmen's Compensation Act.

On behalf of the appellant, the affidavit of his solicitor was filed, stating that the object of having the damages assessed was to save the time and costs of applying to the trial Judge in Chambers in the event of the appellant herein being unsuccessful.

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Without expressing any opinion as to what the effect would be if, by mutual arrangement and in order to save time and cost, the parties to the action had agreed that the assessment should be made pending the appeal, it is only necessary to point out that there is no evidence of any such mutual arrangement, or that the alleged object in the said affidavit was ever brought to the attention of the trial Judge by counsel for the respondent, and I am of the opinion that what was in the mind of the counsel or solicitor for the appellant, and undisclosed to the Court or the respondent, cannot be considered in coming to a conclusion as to the effect of the application to assess damages.

I cannot distinguish the case at Bar from the above case of *Neale* v. *Electric, etc. Co.* My attention has not been brought to any case which decides the point raised differently from the decision in *Neale* v. *Electric, etc., Co., supra*, and it seems to me that the decision in that case is one which this Court should follow.

I would, therefore, allow the motion made on behalf of the respondent, and set aside the notice of appeal served and quash the appeal, and allow to the respondent the costs of the motion and of the appeal. *Judgment accordingly.*

CAN.

S. C.

GAUVREAU v. PAGE.

Supreme Court of Canada, Idington, Duff, Anglin, Brodeur and Mignault, JJ. February 3, 1920.

HIGHWAYS (§ I A—2)—DEDICATION—USER—PRESCRIPTION—MUNICIPAL AND ROAD ACT, LOWER CANADA, 18 VICT. 1855, CH. 100, SEC. 41—QUEBEC CIVIL CODE, ART. 2242.

Private property may become a public highway in Quebec by dedication, but there must be an unequivocal intention on the part of the owner to so dedicate it. Allowing the public to pass over a private roadway which is kept in repair by the owner and which is necessary in order to approach his store and residence does not shew such an intention.

Sub-sections 8 and 9 of 18 Vict. 1855, ch. 100, sec. 41 (Municipal and Road Act of Lower Canada), allowing title by prescription of ten years, are still in force in Quebec, but apply only to roads in existence and in public use for ten years prior to 1855, and in order to acquire title under art. 2242 of the Civil Code (30 years' prescription by possession) it is necessary that the possession be continuous and non-interrupted, peaceable, public, non-equivocal and as owner.

[*Harvey* v. *Dominion Textile Co.* (1917), 50 D.L.R. 746, 59 Can. S.C.R. 508, followed; *Mann* v. *Brodie* (1885), 10 App. Cas. 378, referred to.]

Statement.

APPEAL from a judgment of the Court of King's Bench, appeal side, Province of Quebec (1918), 27 Que. K.B. 490, reversing the judgment of the Superior Court, Roy, J., and maintaining the respondent's action. Affirmed.

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The appellant and the respondent both lived in St. Octave de Mètis, in the Province of Quebec. In that village two roads crossed at right angles, the main road or maritime road and the church road or Kent road. The grandfather of the respondent was the owner of a property having both roads as boundaries; and, having constructed his residence at a certain distance from these roads, he opened a road communicating with both and passing in front of his house. This small road was always opened at both ends, except during winter; and it was fenced on each side except in front of the house. Until 30 years ago, the respondent kept a store at his house, where was also the post office of the village. The public was using this small road continually, either to go to the store or post office, or to shorten the distance from the maritime road to the church road. The road was kept in order by the respondent except in the summer of 1916 when the corporation made small repairs. When the cadastral plan was prepared in 1878, an official number was given to this small road on the official plans, after the surveyor had obtained from the father of the respondent particulars as to these lands.

F. Roy, K.C., for appellant; *L. St. Laurent*, K.C., for respondent.

Idington, J.

IDINGTON, J.:—This appeal was well presented and counsel on either side seems to have left nothing unnoticed either in law or fact. Therefore, we have had some very interesting questions presented for our consideration which would, if the case had to turn upon some of them, involve further investigation of the basis upon which the law of dedication rests in the Province of Quebec, and much municipal legislation might have to be considered if it were necessary to follow that line of thought.

The Court of King's Bench (1918), 27 Que. K.B. 490, has held that there was no dedication under the peculiar circumstances existent for over 40 years under which the public were permitted to use this alleged public highway, or lane as I think it might more properly be called. I cannot see that the Court below erred at all in reaching such conclusion and for that reason alone the appeal should be dismissed. The many other interesting questions I have referred to need not therefore be examined.

Duff, J.

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

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ANGLIN, J.:—While I incline to the view that it is sufficiently established that under the law of Quebec a highway may be created by dedication (*Chavigny de la Chevrotière* v. *City of Montreal* (1886), 12 App. Cas. 149, at p. 157; *Mignerand dit Myrand* v. *Légaré*, (1879), 6 Q.L.R. 120, at p. 122; *Rhodes* v. *Perusse* (1908), 41 Can. S.C.R. 264, at 273; *Harvey* v. *Dominion Textile Co.* (1917), 50 D.L.R. 746, 59 Can. S.C.R. 508;) I am clearly of the opinion that the evidence in this case falls short of what would be necessary to establish the existence of the necessary *animus dedicandi* on the part of the plaintiff or his predecessors in title. The position of the house and barns on the plaintiff's property sufficiently accounts for the opening of the lane or road in question as a private way; and whatever significance might otherwise be attached to the absence of gates at the ends of the road, where it abuts on the two highways, the facts that the post office was located in the plaintiff's house for many years down to 1881 and that Henry Page kept a store there sufficiently account for any user of the road during that period by persons seeking access to that building and for its having been left open as it was, without ascribing to the owner an intention to dedicate it to the public as a highway. Such an intention is not to be presumed from acts of user which admit of another equally probable or even more probable explanation.

For the same reason the user shewn during this period would not avail to support title by prescription. The possession of the public was neither exclusive nor unequivocal. It was concurrent with the owner's user for his private purposes.

Moreover, the cadastral plan drawn up in 1881 in accordance with a survey made in 1878 based on information supplied by the Pages affords evidence of an assertion of ownership of the road by them. It is given a cadastral number on this plan. One act of this kind by the owner is of much more weight upon the question of intention than many acts of enjoyment. *Poole* v. *Huskinson* (1843), 11 M. & W. 827, at 830, 152 E.R. 1039; *Chinnock* v. *Hartley District Council* (1899), 63 J.P. 327, at 328. After 1881 many acts of interruption of user by the owner are shewn by the evidence.

Moreover, if the road in question became a highway by dedication, the ownership of the soil would have remained in the

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plaintiff and the defendant could not justify sinking a well and carrying a pipe under the surface of the road.

I discussed the purview and operation of the statute, 18 Vict. 1855 (Can.), ch. 100, very fully in *Harvey* v. *Dominion Textile Co.*, 50 D.L.R. 746, 59 Can. S.C.R. 508, and I adhere to the view there expressed. That statute does not apply to a road first opened in 1847.

If arts. 749 and 750 of the Municipal Code apply, since they deal with roads established in a particular manner, they must be regarded as exceptions to art. 752, which deals with municipal roads generally and effect must be given to their explicit provisions that the property in the land over which roads within their purview are carried continues vested in the owner or occupant. Although, therefore, arts. 749 and 750 should apply to the road here in question, the defendant was nevertheless a trespasser in digging a well and laying a water pipe in it. Permission of the municipal council could not authorise such an invasion of the plaintiff's property.

The appeal in my opinion fails and should be dismissed with costs.

Brodeur J.

BRODEUR, J.:—This case has been brought to ascertain if a road called "Chemin Page" (Page road) which bears the number 6 on the cadastre of the parish of St. Octave de Mètis, is the property of the municipal corporation or of the respondent Page.

The appellant, with permission of the municipal authorities, dug a well on the border of this road and laid water pipes from it. An *action négatoire* for a servitude has now been brought against him by the respondent Page who claims that he and his predecessors have always been owners of this road. The appellant says, on the contrary, that the municipal corporation has become owner by dedication, by a prescription of 30 years or by the prescription of 10 years provided for by the Act 18 Vict. 1855, ch. 100.

In the case of *Harvey* v. *Dominion Textile Company* (1917), 50 D.L.R. 746, 59 Can. S.C.R. 508, I questioned whether or not this doctrine of the *common law dedication* of the English law could be invoked in the Province of Quebec, and without expressing a definite opinion, I then mentioned some of the reasons which

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led me to believe that it was contrary to the express text of the Civil Code. Having considered the question again in the present case I have arrived at the conclusion that this doctrine has not the force of law.

"Dedication" is the result of a situation peculiar to England which is not found even in Scotland. Thus the House of Lords in the case of *Mann* v. *Brodie* (1885), 10 App. Cas. 378, refused to apply to Scotland the principles of dedication.

Lord Blackburn, in this case of *Mann* v. *Brodie, supra*, indicates clearly the following circumstances as having given rise to this doctrine. In England the acquisition of a right could be made by prescription but the prescription could only operate through possession for a time beyond the memory of man, proof of which was practically impossible, and then the legal fictions called "lost grant," "presumed grant" or "dedication" came to the aid of those who were apparently the real owners of the right but who were unable to produce any title.

"Dedication" has not, however, been received with enthusiasm. But, as Lord Blackburn says, in this case of *Mann* v. *Brodie*, 10 App. Cas. 378, if one was able by means of dedication to rid himself of the consequences of the defective theory of prescription "an opposite evil of establishing public rights of way on very short usurpation has sometimes been incurred" (p. 386). And it is for this that the jurisprudence in England has decided that it is necessary to establish "dedication" that the intention to give to the public the right to use the property as a road should be well proved. *Poole* v. *Huskinson*, 11 M. & W. 827, at 830, 152 E.R. 1039.

These are the circumstances which gave rise to this theory of dedication and Lord Blackburn, still in *Mann* v. *Brodie* (p. 386), says of this theory of English law, that it was not the "perfection of reason or such as ought to be introduced in the law of Scotland," and then the House of Lords decided *Mann* v. *Brodie*, by applying the prescription of 40 years, which existed in Scotland. See *Macpherson* v. *Scottish Rights of Way* (1888), 13 App. Cas. 744, at 746.

In the Province of Ontario and in the other Provinces administering the English law the theory of "dedication" is in force. The municipal laws of Quebec have, I am aware, been copied in

great part from those of Ontario. But it is not necessary to conclude from that that all the English law upon the matter and especially the doctrine of "dedication" have become incorporated in our legislation, and that we should not seek to ascertain if in the exercise of certain rights we do not violate any elementary principles of our own law as we find it in our Civil Code, or in our Municipal Code. If the House of Lords was not willing, in the case of *Mann* v. *Brodie*, *supra*, to introduce into Scotland the theory of "dedication" because it was based upon conditions which are not found in Scotland, it seems to me that we are justified in seeing that we do not violate any principles of our law in applying them here. Thus in Quebec as in Scotland we have prescription by a fixed period. It is 40 years in Scotland, it is 30 years with us (art. 2242 C.C.). If by reason of a certain period for prescription in Scotland the House of Lords refused to introduce "dedication" there, is that not a reason why we should do the same thing for a case in Quebec?

Municipal corporations are governed by the laws affecting individuals says art. 356 of the Civil Code. They can only become owners in the manner provided by the special laws which govern them or by the common law (art. 358 C.C.). The Municipal Code nowhere indicates that "dedication" is recognised and accepted. The only articles which come near doing so are arts. 749 and 750 of the old Municipal Code which are now art 464 of the new Code, and of which I shall speak later.

The appellant Gauvreau claims that there was on the part of Page a dedication or donation of the site upon which the road is situated. But can a donation of immovables be made without passing title? Art. 776 of the Civil Code declares that deeds providing for donations *inter vivos* should be executed in notarial form on pain of nullity. This formal provision of the Code disposes, I believe, of the claim of the appellant. If the establishment of the road is considered to be a servitude upon the lands of the respondent, the appellant finds himself again contravening art. 549 of the Civil Code, which declares that no servitude can be established without the title passing.

But it is said: The theory of "dedication" is accepted in Quebec by a series of decisions which begins with the case of *Mignerand dit Myrand* v. *Légaré* (1879), 6 Q.L.R. 120, and com-

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prises *De la Chevrotière* v. *City of Montreal*, 12 App. Cas. 149, decided by the Privy Council, and *Rhodes* v. *Perusse* (1908), 41 Can. S.C.R. 264, decided by this Court.

The case of *Myrand* v. *Légaré, supra*, raised at the same time the question of the 30 year prescription, that of the application of the Act 18 Vict. 1855, ch. 100, and that of "dedication." It was decided as we find in the Judicial Reports that every road open and frequented as such without dispute by the public for the period of ten years or more should be considered as a public road and to have been equally recognized as a public road according to the spirit of the law.

In this case the Act of 18 Vict. 1855, ch. 100, which is, moreover, discussed at length, was evidently applied. Incidentally, in his notes, the Honourable Chief Justice mentioned with approbation the 30 year prescription, and declared also that private property could become public property by dedication. But the latter point does not appear to be that upon which the case was decided. It is an *obiter dictum*.

In the case of *De la Chevrotière*, Lord FitzGerald, 12 App. Cas. at 158, after he had discussed a special statute which had been invoked and which served as the basis of the decision, used the following words, which I consider also to be *obiter dicta*:—

> There has been made out independently of any statutory provision an ample case of user on the one side and dedication or abandonment on the other which would constitute the place in question a public place over which, not the citizens of Canada or Montreal alone, but the public at large had rights which the law would give effect to independently of the provisions of any statute.

In the case of *Rhodes* v. *Perusse*, 41 Can. S.C.R. 264, Fitzpatrick, C.J., of this Court, who gave judgment for the majority, discussed the question of the 30 year prescription which had been raised and the question of "dedication;" but the street in question there had been opened by virtue of a formal obligation imposed by the Crown on the grantee. It was not a case of a donation by the owner of a part of his land but one of the execution of an obligation on his part.

In none of these cases does it appear to have been formally decided whether or not an owner can make a donation of his property for a road without executing a deed for the purpose.

If there was no express provision in our Codes upon the matter I could understand the force of the claim that "dedication" can be invoked, but municipal corporations are governed, as I have already said, by the laws affecting individuals and they have no other privileges than those which are formally recognised by law and rights incompatible with a provision of our law cannot be claimed by them.

I might refer upon this point to the luminous dissertation by Sir Louis Hyppolite LaFontaine in the celebrated cause of *Wilcox* v. *Wilcox* (1857), 8 L.C.R. 34.

Even admitting that dedication may exist in Quebec I am of opinion that the evidence given in the present case does not clearly shew that the Pages, grandfather, father and son, ever had the intention to dedicate their land to the municipal corporation.

I would be of opinion that this evidence establishes at the most that this road was occupied as a *chemin de tolérance* under the provisions of arts. 749 and 750 of the old Municipal Code (art. 464 of the new Code). This road is enclosed on each side, with the exception of a small space occupied by the house and its appurtenances; it has not been habitually closed at its two ends and it has always been maintained by the owner. It has, in other words, the characteristic features of a *chemin de tolérance* and would be thereby a public road; but as these articles say the property in this road appertains to the owner, the respondent. The appellant then could not with the mere permission of the municipal corporation dig a well there and connect it with his house by means of a drain. Those were acts of ownership which required the authorisation of the owner of the land.

By the provisions of art. 2242 of the Civil Code, the rights and actions for which prescription is not otherwise provided are prescribed by 30 years. But, says the appellant, the public has had possession of this road for more than 30 years and consequently there is prescription.

Art. 2193 C.C. contains the necessary conditions to prescribe by means of possession. It is necessary that it should be "continuous and non-interrupted, peaceable, public, unequivocal and as proprietor."

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The possession proved in the present case combines several of the necessary conditions but it appears to me to be equivocal and lacks, therefore, an essential quality. The owner has always himself made all the works of maintenance, of repair and of construction upon this road.

The situation would be different if the municipal corporation had itself made these works or had ordered them to be made. (Proudhon Domaine Publique, vol. 2, p. 369.) This road was used not only by the public but the owner used it, especially for the working of his farm and carrying on of his business.

Dalloz, tit. Prescription, No. 333, says in speaking of the prescription which municipal corporations may invoke "to prescribe against one of its inhabitants on waste lands a municipality requires a possession, *ut universi* and exclusive; the possession at the same time of the owner is an obstacle to this prescription."

Beaudry-Lacantinerie, vol. 25, No. 289, in discussing this question of possession says: "Acts of enjoyment which relate only to the detached products of land or to certain advantages of land only constitute an equivocal possession insufficient for the acquisition by prescription of ownership in the land; such would be certain acts of passage, of digging, of depositing material."

Dalloz Répertoire, tit. Prescription, No. 203; Aubry and Rau, 5th ed., p. 137, para. 181, and p. 538, para. 273.

The appellant invokes in support of the prescription of 10 years, the Act 18 Vict. 1855 (Can.), ch. 100, sec. 41, sub-sec. 9. Sub-secs. 8 and 9, joined by the conjunction "and," read as follows:—

8. Every road declared a public highway by any *procès verbal*, by-law or order of any grand voyer, warden, commissioner or municipal council, legally made, and in force when this Act shall commence shall be held to be a road within the meaning of this Act, until it be otherwise ordered by competent authority.

9. And any road left open to and used as such by the public without contestation of their right, during a period of 10 years or upwards shall be held to have been legally declared a public highway by some competent authority as aforesaid and to be a road within the meaning of this Act.

This sub-section 9 formed part of the Act of municipalities and of roads. After several attempts, more or less successful, to establish municipal authorities in Lower Canada the Legislature, in 1855, passed this law of municipalities and roads, which

established the municipal organisation which is yet largely maintained in the Province of Quebec. The Legislature, by this Act, placed the administration of highways under the control of municipal authorities and at the same time created municipal councils. Up to about this time the administration of highways had been in the hands of the superintendent of roads and the Legislature deemed it proper to take away the jurisdiction from this official in order to place it in the hands of persons who would be directly elected by the people.

It was evidently intended by the text which we are about to recite to determine what would be roads which would fall under the control of this new public body which is called the "Municipal Council."

By sub-sec. 8 all the roads as to which *procès-verbal* had been issued should be considered as public roads, and as to those for which no ordinance could be produced the fact that they had been open for 10 years would be considered sufficient proof of their quality as public roads.

The Act of 1855 was re-enacted in 1861 but no trace of sub-sec. 9, of sec. 41, of the Act of 1855, can be found in the re-enactment. Nor do we now find it in the Municipal Code enacted in 1870. Why? It is because, in my opinion, this provision of the Act of 1855 had only been made to affect the roads then in existence and there was, therefore, no necessity to continue to place it in the statute. It was an Act essentially temporary.

In the present case the evidence does not establish that the road in question existed in 1845, that is to say 10 years before the Act of 1855. Consequently the appellant cannot have authority under this Act to invoke the ten-year prescription.

In these circumstances I have come to the conclusion that the judgment of the Court of Appeal which has maintained the *action négatoire* of servitude of the respondent should be affirmed with costs.

The appellant should be allowed to have, up to June 15, next, to fill in the well and remove the pipes.

MIGNAULT, J.:—The respondent sues the appellant, by *action négatoire*, alleging that he is owner of the Lots 2, 3 (part), 4, 5, 6, 6a and 7 of the Cadastre of St. Octave de Mètis; that the appellant is owner of an adjoining immovable and that he exercises

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without right a servitude of digging a well upon the immovable of respondent; and the respondent asks that his immovable be declared free from any such servitude and that the appellant be forbidden to exercise it in future.

The appellant contests this action and alleges that the lots 6 and 6a where his well and water-pipes are situated do not belong to the respondent, but have been for more than 40 years a public road by dedication, user by the public and destination by the respondent and his predecessors in title, and he asks for dismissal of the action. By an amendment the appellant invokes against the action of the respondent the prescription of 30 years without saying for whose profit this prescription would be acquired.

The action of the respondent was dismissed by the Superior Court but its judgment was reversed by the Court of Appeal, (1918), 27 Que. K.B. 490, and the appellant asks us to restore the judgment of the Superior Court.

The sole question discussed in these decisions is the question, which assuredly is not new, of whether or not the land on which the appellant claims to exercise the right of digging a well has become a public road by destination of the owner, or by the thirty year prescription, and all the decisions, very numerous, of our Courts, upon destination as a means of establishing a public road have been cited. That is the sole defence which the appellant sets up against the action of the respondent, and this defence was open to him because, if well founded and if the land in question did not belong to the respondent, his *action négatoire*, founded upon his right of ownership, absolutely lacks any basis in law.

As briefly as possible, first, because I have said that the question raised is not new, I will state the conclusions which I believe should be adopted.

And first the thirty-year prescription—if really it can be invoked under the Civil Code of Quebec as a means of establishing a public road—does not appear to me to have been acquired in this case. This prescription is necessarily founded upon the possession which by the terms of art. 2193 C.C. should be continuous and uninterrupted, peaceable, public, unequivocal and as proprietor. The public who pass freely over a road cannot be regarded, in my opinion, as having possession of it, and even if it has a kind of possession, it cannot be said, especially in the

case submitted, that this possession is non-equivocal and as owner. It is especially a promiscuous possession, and none of those who pass over the road performs an act of ownership. Our law forbids prescription as a mode of acquiring servitude although the Code Napoleon admits it with certain restrictions which can probably explain some opinions of authors in France; and I cannot believe that by repeated acts of passage which could not create the servitude of passage, and which would not be the possession required by art. 2193, it is possible to change by prescription private land into a public road, moreover prescription should be pleaded and can only exist, in my opinion, in favour of those for whose profit it runs, and the appellant is not such in this case.

But viewing the prescription invoked by the appellant as really connected with the destination of the land in question as a public road, I will, in a few words, explain the circumstances of the case.

There are at St. Octave de Mètis two roads which cross at right angles, the Front or Maritime road and the Church or Kent road. The grandfather of the respondent, Henry Page, had land bordering upon both and having built a house some distance from them he opened a road communicating with the two and passing before his house which still exists. This road appears to have always been open at both ends, except that it is claimed that Page closed it in winter by placing stakes at the two entrances, and it was closed on each side, except that before the house and the farm of Page it was only closed on one side. Up to about 30 years ago the post office of the locality was in Page's house, and the latter also had a store. The public passed freely over this road as well to reach the store and post office as to traverse the route when going from the Maritime road to the Kent road, and reciprocally. The road was always maintained by the Pages, but, in the summer of 1916, the municipality sent a person to put a little sand on it. When the Cadastre of the Parish was prepared, in 1877-78, by the witness Lepage, William Page, son of Henry Page and father of respondent, furnished him with information on the matter of these lands, and Lepage gave a number upon the official plan to the road, by reason, he says, of the information that he received from Page.

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In 1881 William Page sold to the appellant's mother a parcel of land situated at the angle of the Page road and the Maritime road, which is the land served by the well of which the respondent complains. The deed of sale describes the parcel as being "along the short road on the property of the plaintiff."

This short road is that which it is alleged has become a public road, and the respondent claims that the description made in the deed shews that William Page claimed, in 1881, the ownership of this road.

Such are briefly enough the salient facts upon which is based the contention that the Page road had become a public road by destination of the owner. There is no dispute as to these facts and the case depends upon the conclusions or inferences which may be drawn from them.

The creation of a public road by destination or by "dedication" as it is called, has been recognised in the Province of Quebec, wrongly, perhaps, by a long series of decisions, but it necessarily supposes as does every act of abandonment of rights, an unequivocal intention by the owner of the land to abandon it to the public. This unequivocal intention appears to me to be wanting here because the opening of the road is explained by the situation of the house of Henry Page, and by the fact that he kept a store and the post office, and it became necessarily as well for his own needs as to permit his customers and the public to come to his store and the post office, to establish a way of communication in order to do so. That he had passed over all the right to use the short cut between the Maritime road and the Kent road does not prevent the conclusion that the intention of Page had only been to give access to his own premises and shews at the most that Page did not strictly control the traffic over his road.

There is invoked in this case, as is usual, the Act 18 Vict. 1855, ch. 100, art. 9. In the case of *Harvey* v. *Dominion Textile Co.*, 50 D.L.R. 746, 59 Can. S.C.R. 508, my honourable colleague, Anglin, J., demonstrated in a satisfactory manner, in my opinion, that this Act, which dates from 1855—if really it is not a provision of a nature purely transitory—can only be applied to roads which were open to the public 10 years before it was passed. I accept this interpretation and it follows that the Act cannot be invoked in this case.

But I believe that we are in presence here of a case in which arts. 749 and 750 (the second being the counterpart of the first) of the Municipal Code of 1870 apply and that the road in question has all the characteristics of the road of tolerance mentioned in these articles. But, the chief observation to be made, the land of such a road remains the property of him who opened it although under art. 752 of the Municipal Code the land of ordinary municipal roads belongs to the municipality. It is necessary to state that the comparison of the text of arts. 749 and 750, and of art. 752 of the old Municipal Code (arts. 464 and 466 in the new Code) is not very satisfactory, because the road of tolerance is a municipal road (art. 749) and yet by the difference of the municipal roads mentioned in art. 752, its site remains the property of him who opened it. But granting here that arts. 749 and 750 apply, it results therefrom that the respondent is owner of the site of this road and that the public (so long as the road is not legally closed and it is not necessary here to say whether or not the owner, as he has been adjudged, can close it) have only the right of passing over it. This right of passage over this road does not give to the appellant the right to dig a well and lay water pipes. It follows that the ground of defence which the appellant sets up to the action of the respondent is not well founded.

One question which I reserve and upon which it is not necessary that I should now give a decision, is whether or not there can be invoked the doctrine of the English origin of "dedication" in the localities to which the Municipal Code applies.

In other words, is there in these localities any other dedication than that recognised by the articles of the Municipal Code above cited? This question is important and I certainly would not undertake to decide it before it has been the subject of full argument before us.

It is regrettable that the parties instead of raising this great discussion had not come to a friendly agreement because it is the attempt of the appellant to provide himself with drinkable water which gave rise to this action. The respondent does not appear to suffer any prejudice on account of the well and water pipes of the appellant, and with a little goodwill and without sacrificing any real right, the parties would have been able to live together as good neighbours. But each of them held himself to his strict

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and absolute rights and as the appellant cannot acquire a servitude without title and as he has not succeeded in contesting the right of ownership of the respondent, his defence should be dismissed. I am of opinion that the judgment of the Court of Appeal should be confirmed with costs. The delay given by the latter Court to fill up the well, take up the pipes and replace the land in the same condition as it formerly was, should be extended to June 15 1920. *Appeal dismissed.*

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Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands and Lamont, JJ.A. November 1, 1920.

LANDLORD AND TENANT (§ II D—30)—LEASE—ACCEPTANCE OF RENT—TERMINATION OF TENANCY—NOTICE—PROCEEDINGS BY ORIGINATING SUMMONS—WHEN ALLOWABLE.

By accepting rent due for premises held under a lease the landlord admits the tenancy until the expiration of the time for which the rent is paid, although he has previously given notice terminating the tenancy for breach of covenants, and before he can commence proceedings by originating summons under Rule 600 (Sask.) against the lessee as an overholding tenant, he must do something to terminate the lease, and notice in writing after such termination must be given to the tenant.

Statement.

APPEAL by both parties from a Judge in Chambers in an action by originating summons under Rule 600 Sask. Rules of Court against defendants as overholding tenants. The plaintiff appealed on the ground that as he had obtained possession of the premises by a writ of possession issued pursuant to the order of the Master, the Chamber Judge could not relieve the defendants from the forfeiture and the defendant Widen on the ground that the local Master had no jurisdiction to make the order which he originally made.

P. H. Gordon, for appellant; *P. M. Anderson*, K.C., for respondents.

Haultain, C.J.S.

HAULTAIN, C.J.S., concurs with NEWLANDS, J.A.

Newlands, J.A.

NEWLANDS, J.A.:—The plaintiff issued an originating summons under Rule 600 of the Rules of Court against the defendants as overholding tenants, for wilfully overholding after the termination of the term and after notice in writing given for possession of the premises. The grounds upon which he claims that the term has terminated are, amongst others, a breach of the covenant

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against gambling and a breach of the covenant to give the bond of a guarantee company for the sum of $2,000. The lease in question was dated April 22, 1919, and was for a term of 5 years. On May 5, 1919, the defendants were convicted of keeping a common gaming house, and no bond of a guarantee company had been given up to the time of the issuing of the originating summons. On November 28, 1919, the plaintiffs served on the defendants a notice requiring them to make good their defaults, so far as the same were capable of being remedied, within 10 days, and on December 20, 1919, served the defendants with a notice in writing that the lease was at an end and that the plaintiff would re-enter on December 28, 1919. Plaintiff also states that he attempted to re-enter, but was ejected by defendants. On January 27, 1920, the defendants paid the rent up to January 22, 1920, and plaintiff accepted same. These proceedings against the defendants were commenced by originating summons on February 27, 1920.

By Rule 1 of the Rules of Court every action except where otherwise provided shall be commenced by a writ of summons. Rule 600 provides that proceedings by a landlord to recover possession of premises from an overholding tenant may be commenced by originating summons.

The first question to be decided is, were the defendants overholding tenants at the time of the originating summons? Otherwise these proceedings could not be taken against them, but plaintiff should have proceeded by writ of summons.

The acceptance of rent by plaintiff on January 27, 1920, admitted that the tenancy continued until January 22, 1920, the date to which the rent was paid up, and waived the breach of all covenants on the part of the defendants prior to that date. (*Rex* v. *Paulson* (1920), 54 D.L.R. 331, decided by the Privy Council.) The tenancy did not, therefore, terminate before that date. The Landlord and Tenant Act, 9 Geo. V. 1918-19 (Sask.), ch. 79, sec. 40, provides that, where a tenant wilfully holds over after the determination of the term and after notice in writing given for delivering the possession thereof by his landlord, such tenant so holding over shall pay to the landlord double the yearly value of the land so detained for so long as the same is detained, to be recovered by action in any Court of competent jurisdiction, against the recovery of which penalty there shall be no relief.

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The notice required by this section for the delivery of possession is a notice that can be given only after the determination of the term. This notice is a condition precedent to the tenant being liable to double rent. In these proceedings the plaintiff claims double rent as well as an order for possession. In my opinion he cannot succeed, unless the notice given by him on November 28, 1919, or the final notice given on December 20, 1919, are sufficient to satisfy the Act.

Penton v. *Barnett*, [1898] 1 Q.B. 276, was cited to us as an authority for the fact that this notice was sufficient. In that case the landlord gave the tenant a notice to repair within 3 months under the Conveyancing Act. Three days afterwards the tenant paid his rent, but the Court held that, the breach of the covenant to repair being a continuing breach, notice given prior to the payment of the rent was sufficient under that Act. This decision goes no further than this, that, in an action claiming possession of the premises for breach of a covenant, a notice given under the provisions of the Conveyancing Act was sufficient to comply with that Act although the plaintiff had accepted rent subsequent to the giving of the notice, the breach of covenant having continued until the action. The provisions of the Conveyancing Act are similar to sec. 10, sub-sec. 2, of the Landlord and Tenant Act, which provides that a right of re-entry or forfeiture for a breach of a covenant shall not be enforceable by action or otherwise unless and until the lessor serves on the lessee a notice specifying the particular breach complained of, and if the breach is capable of remedy, requiring the lessee to remedy the breach, and the lessee fails within a reasonable time thereafter to remedy the breach.

The notice given in this case would, under that decision, be a sufficient notice to enable the plaintiff to enforce his right of re-entry and forfeiture of the lease by action, but it is not a sufficient notice to make the defendants overholding tenants and liable for double rent under these proceedings.

As the payment of rent up to January 22, 1920, admits the continuation of the tenancy up to that date, something must be done by the landlord subsequent thereto to terminate the lease. He cannot accept rent from defendants as his tenants up to January 22, 1920, and at the same time claim that the lease was terminated on December 20, 1919.

It cannot be claimed that the lease is terminated by these proceedings, because they can only be taken against an overholding tenant, that is, the lease must have been determined and a notice in writing after such termination be given to defendants, before plaintiff could proceed under Rule 600 by originating summons.

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

Newlands, J.A.

LAMONT, J.A.:—The plaintiff by an indenture made April 22, 1919, leased to the defendants the premises known as the King George Hotel, Kamsack, together with the furniture and other personal property therein, for 5 years, at a rental of $450 per month, payable on 22nd day of each month. The lease contained the following provisions:—

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And it is expressly agreed by the lessees that should any gambling be carried on in the said hotel with the knowledge or consent of either of them . . . the provisions of this lease shall be null and void and the time here granted at an end and the lessor shall be entitled to immediate possession of the said premises . . .

The lessees covenant and agree to provide a bond of indemnity in the penal sum of $2,000 to be made by an indemnity and bond company on the trustee list for the Province of Saskatchewan, in favour of the lessor conditioned on them maintaining, replacing and at the end of the said lease delivering to the said lessor, the personal property leased and demised . . .

The lease also contained a provision for re-entry by the lessor for non-payment of rent, also non-performance of covenants. The defendants entered into possession on April 22. Two days later gambling was carried on in the hotel, and both defendants were convicted of permitting it. Shortly afterwards the defendant Bullock retired from the business. From that time until November 28, 1919, the defendant Widen paid the rent every month to the plaintiff, who accepted the same. On November 28, the plaintiff gave notice to the defendant to remedy within 10 days a number of defaults specified in the notice, particularly his default in furnishing the indemnity bond of $2,000 provided for in the lease, and which up to that time had not been furnished, or make compensation in damages for the lack of said bond. The notice also stated that the lessee had been convicted of permitting gambling on the hotel premises, but did not ask any compensation therefor. The notice concluded with a declaration that, unless the defaults

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specified were remedied within 10 days, the plaintiff would take steps to forfeit the lease. The defendant Widen did not within the time specified secure the required bond. On December 20 the plaintiff notified Widen that the lease was at an end. On January 27, 1920, the plaintiff accepted a cheque of $200, being the balance of the rent to January 22, 1920, and on February 27 he took out an originating summons and asked for an order for the possession of the premises, and for an order for payment of double the yearly value of said land so detained. On the return of the originating summons the local Master held that there had been a forfeiture of the lease, on two grounds: (1) that the lessees had failed to furnish the required bond, and (2) that the lessees had been convicted of permitting gambling on the premises. He also held that he had no jurisdiction to relieve against the forfeiture, and made an order that the lessees vacate the premises by June 11, 1920, and in default of their so doing, a writ of possession would issue. The defendant Widen appealed from this order to a Judge in Chambers. The Chamber Judge held that by the receipt of rent after he was aware of the conviction for allowing gambling on the premises, the plaintiff had waived all rights to forfeiture for that breach. As to the defendants' failure to furnish the bond called for in the lease, he affirmed the judgment of the local Master that such failure entitled the plaintiff to have the lease declared forfeited, but as the defendant Widen had, before the hearing of the application in Chambers, furnished the required bond, he was entitled to be relieved from the forfeiture, and an order to this effect was made. From that order both parties appealed to this Court, the plaintiff on the ground that, as he had obtained possession of the premises by a writ of possession issued pursuant to the order of the Master, the Chamber Judge could not relieve the defendants from the forfeiture; and the defendant Widen on the ground that the local Master had no jurisdiction to make the order which he originally made.

The proceedings by way of originating summons are taken under Rule 600, which reads as follows:—

> 600. Proceedings commenced by originating summons in the Supreme Court of Judicature in England may be so commenced under these rules, unless otherwise provided, and proceedings by a landlord to recover possession of demised premises from an overholding tenant may be so commenced.

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It will be observed that the proceedings by a landlord provided for by this rule are limited to the recovery of possession from an overholding tenant. The first question, therefore, is: Was the defendant Widen an overholding tenant?

An overholding tenant is one who holds possession of the demised property after his lease has expired or been determined. Had the lease in this case been determined when the plaintiff issued his summons? On January 27, after the notices above referred to had been given, the plaintiff accepted payment of the rent up to January 22. This was a recognition by him that the lease was a valid and subsisting lease up to the 22nd.

In the recent case of *Rex* v. *Paulson* (1920), 54 D.L.R. 331, the Judicial Committee of the Privy Council held that a landlord by receiving rent from his tenant with full knowledge of a breach of covenant by the tenant involving a liability to forfeiture of the lease, shews a definite intention to treat the lease as subsisting, has made an irrevocable election to do so, and can no longer avoid the lease on account of such breach. This principle is applicable even though the lease contains a provision requiring a waiver to be expressed in writing, and may apply even though the rent is expressed to be only accepted conditionally. A provision that failure by a lessee to do certain things "shall subject the lessee to the forfeiture of the lease and to resumption of the land" by the lessor, merely means that the lessee shall render himself liable to have his lease forfeited at the option of the lessor. Even where such a condition is most absolute in form the lease is only void at the option of the innocent party.

All breaches of the provisions of the lease were, therefore, waived up to January 22, 1920. The breach of the provision requiring the lessees to furnish a bond was, however, a continuing breach, which entitled the plaintiff to take proceedings to forfeit at any time after January 27. He took no steps whatever to forfeit it until he issued his originating summons. Up to that time, therefore, the defendants were not overholding tenants, because, as pointed out by the Judicial Committee in the case above referred to, the lease was not void on breach of condition, but only voidable at the option of the plaintiff. It was therefore necessary for him to elect to avoid it before the lease could be said to be determined. His only act of election was the issue of the

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summons. The issuing of the summons asking for possession did constitute an irrevocable election on his part to determine the lease, but, until he took that step, the defendants were rightly in possession under the lease and not overholding tenants. Not being overholding tenants prior to the issue of the originating summons, it was not open to the plaintiff to take proceedings to recover possession by way of such summons. The whole proceedings, therefore, were abortive.

The appeal of the defendant Widen should be allowed with costs, the orders made, both in Chambers and by the local Master, set aside, and the application by way of originating summons dismissed with costs. *Appeal allowed.*

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MONTREAL TRUST CO. v. RICHARDSON.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee and Ferguson, JJ.A. June 25, 1920.

CONTRACTS (§ II D—175)—FOR PURCHASE OF STOCK OF COMPANY—CONSTRUCTION—EVIDENCE.

The parol evidence as to the circumstance which led to the making of an agreement to purchase and pay for 100 shares of the capital stock of a company, and the language of the agreement itself, shewed that it was not an absolute and unconditional agreement to purchase, but was an agreement to do so if $150,000 of the shares were not taken up by the public, and when the $150,000 of stock was taken up, the liability under the agreement was at an end and a pledge of it passed only the contingent liability that the original maker had undertaken.

Statement.

APPEAL by defendant from the judgment of ROSE, J. (1920), 46 O.L.R. 598. Reversed.

A. B. Cunningham, for appellant.

J. L. Whiting, K.C., and *J. B. Walkem*, K.C., for respondents.

The judgment of the Court was delivered by

Meredith, C.J.O.

MEREDITH, C.J.O.:—This is an appeal by the defendant from the judgment, dated the 7th January, 1920, which was directed to be entered by Rose, J., after the trial before him, sitting without a jury, at Kingston, on the 17th November, 1919.

The action is brought to recover the purchase-money of 100 preferred shares of the capital stock of Canadian Jewellers Limited, of $100 each, which it is alleged that George T. Richardson, deceased, whose executor the appellant is, agreed to purchase from J. A. Mackay & Co. Limited, at 95 per cent. of the par value of the shares, the deceased to receive, in addition to the 100

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shares, 50 per cent. of their par value in "the bonus common stock of the company," and it is also alleged that it was "understood that the underwriting might be pledged or hypothecated with any banking institution for advances to be made on the security of the said subscription." It is further alleged that J. A. Mackay & Co. Limited accepted the said subscription, and by an agreement in writing, dated the 30th October, 1914, "transferred or pledged the same to the respondents as collateral security for advances made by them, the amount at present due in respect thereof being the sum of $123,522.69." It is alleged that a copy of the agreement of the 30th October, 1914, was served on the deceased on the 23rd December, 1914, and that on the 30th April, 1917, the "proper stock certificates" were tendered to the appellant and demand made for payment of the amount claimed to be due by the deceased to the respondents, and that the original contract of the deceased and the original agreement between the respondent and J. A. Mackay & Co. Limited were at the same time shewn to the appellant.

The defence to this claim is that the agreement upon which it is based was procured by Henry Timmis, the agent and associate of J. A. Mackay & Co. Limited, for the purpose of the deceased taking part in an underwriting of $150,000 of the stock of Canadian Jewellers Limited, which was a company being promoted by Timmis and J. A. Mackay & Co. Limited, and which stock that company had undertaken to sell. The agreement is attacked on the ground that it was procured by means of false and fraudulent representations by them, and fraudulent concealment of material facts which it was the duty of Timmis and J. A. Mackay & Co. Limited to disclose; it is also alleged that the $150,000 of stock of Canadian Jewellers Limited was disposed of by J. A. Mackay & Co. Limited, and that there was, therefore, no liability on the part of the deceased to take the 100 shares.

Shortly stated, the contention of the appellant is, that the agreement on which the action is based, in its legal effect, did not operate as an absolute agreement to purchase the shares, but only to do so if the $150,000 of shares were not otherwise disposed of by J. A. Mackay & Co. Limited, in other words, taken up by the public; and that, the $150,000 having been dis-

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posed of, the liability of the deceased came to an end, and he was entitled to the bonus shares which, according to the terms of the agreement, he was entitled to receive.

The respondents dispute this, and further contend that, whatever might have been the deceased's rights as against J.A. Mackay & Co. Limited, the deceased having agreed that "the underwriting may be pledged or hypothecated with any banking institution as security for advances," those rights cannot be set up against them as pledgees of the agreement.

The agreement entered into by the deceased, in my opinion, in fact and in its legal effect, was not an absolute and unconditional agreement to purchase and pay for the 100 shares, but was an agreement to do so if $150,000 of the shares which J.A. Mackay & Co. Limited had subscribed for and were about to put on the market, were not taken up by the public.

The parol evidence as to the circumstances which led to the making of the agreement, and the language of the agreement itself—which speaks of it as an "underwriting"—makes this clear, and indeed that is not seriously disputed by the respondents. What they do dispute is that it was only in respect of $150,000 of the stock that the deceased was to underwrite, and they say further that, even if the appellant's contention as to this prevails, they are, nevertheless, as pledgees, entitled to recover, because they had no notice of the conditional nature of the agreement, and because of the provision as to the pledging or hypothecation of the "underwriting" to which I have referred.

Canadian Jewellers Limited was promoted by Timmis and J. A. Mackay & Co. Limited. It was formed for the purpose of taking over several jewellery businesses which Timmis had acquired. The authorised capital stock was to consist of $2,500,000 of preferred shares, $600,000 of which it was proposed to issue, and a similar amount of common shares, of which it was proposed to issue approximately $450,000.

The promoters concluded that, with what they could dispose of of the surplus merchandise of the concerns whose businesses had been acquired, the new company, with $150,000 of stock which the Mackay company had undertaken to sell to their clients, would have ample cash capital, and in Timmis's letter to the

deceased, of the 8th September, 1911, which contains that statement, the writer says: "so that it is exceedingly improbable that any payment whatever will ever be called on the undertaking."

This letter was what led to the making of the deceased's agreement, and, in my view, evidenced the nature and extent of the obligations which the deceased was invited to enter into. The stock-ledger of the company shews that, at the date of the deceased's agreement, no shares had been subscribed for by J. A. Mackay & Co. Limited, but later on, in the month of December, a large number of shares, far exceeding the $150,000, was allotted to that company.

It will have been noticed that in Timmis's letter he does not say that no payment from the deceased will be called for, but that it is "exceedingly improbable that any payment will be called for." The meaning of that is, I think, that it is exceedingly improbable that the $150,000 shares which it is said the Mackays had undertaken to sell, will not be sold by them, and therefore highly improbable that the deceased will be called on to pay anything. Why? Because he was to pay only in the event of the $150,000 not being taken up by the public. That the agreement was subject to some condition as to the event on the happening of which the deceased's obligation would be satisfied, is clear, and I am at a loss to understand what the condition was, unless that the $150,000 stock which the Mackays had undertaken to sell should not be taken up by the public. Surely it was not intended that he must continue liable until the whole $2,500,000 should be taken up.

I come, therefore, to the conclusion that, if and when the $150,000 of stock was taken up, the deceased's liability as between him and J. A. Mackay & Co. Limited ceased.

There remains the question as to whether the respondents are in any better position than was J. A. Mackay & Co. Limited, and that question should, I think, be answered in the negative; and, in my view, none of the cases cited by counsel for the respondents has any application.

The deceased's agreement provided that his "underwriting" might be pledged or hypothecated. It was plain, therefore, that his agreement to take and pay for the shares was not an absolute one, but was conditional upon the shares in respect of

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which he was underwriting not being taken up by the public, and that put the respondents upon inquiry as to what the condition was. What they are seeking to do is to enforce the agreement as an unconditional and absolute agreement to take and pay for the shares. The agreement shews on its face that it was not such an agreement, but only an underwriting agreement; and what the authority to pledge or hypothecate means is, that it might be given to a banking institution as security for advances; and, assuming that the pledge of it passed anything to the respondents, it passed only the contingent liability that the deceased had undertaken, namely, a liability to take and pay for the shares if the $150,000 of the shares should not be taken by the public.

There were other questions discussed upon the argument; but, as I have come to the conclusion which I have mentioned, it is unnecessary to consider them.

For these reasons, I would allow the appeal with costs and substitute for the judgment which has been directed to be entered judgment dismissing the action with costs.

Appeal allowed.

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Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin and Mignault, JJ. October 12, 1920.

SALE (§ III—45)—OF GOODS—NOTICE OF INTENTION NOT TO DELIVER—RIGHT OF PURCHASER TO TREAT CONTRACT AS AT AN END.

Notice of intention not to deliver goods in accordance with the terms of a contract is notice of intention to rescind the contract and entitles the other party to agree to the contract being put an end to, subject to the retention by him of his right to bring an action for such wrongful rescission, and such other party may by his conduct in effect declare that he also treats the contract as at an end, but if he adopts the renunciation he has no action for wrongful rescission.

[*Geddes Bros.* v. *American Red Cross* (1920), 52 D.L.R. 547, 47 O.L.R. 163, reversed; *Johnstone* v. *Milling* (1886), 16 Q.B.D. 460; *Scarf* v. *Jardine* (1882), 7 App. Cas. 345, followed.]

Statement.

APPEAL by defendants from the judgment of the Supreme Court of Ontario, Appellate Division (1920), 52 D.L.R. 547, 47 O.L.R. 163, in an action for the price of yarn sold by the plaintiffs to the defendants, or for damages for refusal to accept yarn ordered by the defendants. Reversed.

D. L. McCarthy, K.C., for respondent.

DAVIES, C.J.—This action is one brought to recover damages for non-acceptance by the defendants, appellants, of a quantity of woollen sweater yarn tendered by the plaintiffs under a contract, called throughout Order 1788, for the sale by the plaintiffs to the defendants of 20,000 pounds of such yarn.

There is no dispute between the parties as to the facts and the single question argued at Bar and to be disposed of on this appeal is whether an unequivocal and absolute written renunication by the plaintiffs of their contract for the delivery of the yarn contained in a letter of October 2, 1918, had been adopted by the defendants.

On the receipt of plaintiffs' letter of renunciation the defendants' manager, Reed, gave instructions that the contract was to be marked "cancelled" on the defendants' records, and it was so marked, but no letter was written to plaintiffs notifying them that their renunciation of the contract had been accepted. The defendants had forwarded written instructions to the plaintiffs as to the shipping of the yarn dated the same day as the plaintiffs had sent their renunciation letter. The letter covering the shipping instructions sent by the defendants, and that embodying the renunciation by the latter of the contract crossed each other.

The plaintiffs, however, when they received these shipping instructions knew they must have been forwarded before the receipt by the defendants of the plaintiffs' letter of renunciation of the contract.

After October 5, when these crossing letters were received by the respective parties, one sending shipping orders, and the other renouncing the contract, there were no further communications between them respecting this yarn now in dispute, being Order 1788, until December 10, 1918, when portions of the yarn were offered for delivery to the defendants, and were refused. But it does not seem to me that this subsequent offer materially affected the legal position of the parties.

The contention on the part of the appellants was that the plaintiffs' letter of October 2, 1918, being an unequivocal and absolute refusal to carry out contract 1788, was received and adopted by the defendants, who at once cancelled the order in their records. They further contended that the plaintiffs' failure afterwards to deliver the 4,000 pounds of spot yarn, immediately

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on receipt of shipping instructions, and the first monthly instalment of 2,000 pounds within a month after receipt of shipping instructions, was evidence that they were aware the defendants had accepted their repudiation.

The question then, it seems to me, in every such case must be whether under the proved facts adoption of one party to a contract of its repudiation by the other party may be inferred from the proved facts, or whether an actual notice of acceptance or adoption must be given by the party receiving notice of the repudiation to the party repudiating.

It seems to me from reading the authorities that such an actual notice of acceptance or adoption is not necessary but that adoption may be reasonably inferred from all the circumstances as proved.

It would, of course, have been better business on the part of the defendants to have acknowledged and accepted plaintiffs' letter of renunciation, but that they as a fact did accept it is proved by the evidence of their having cancelled the order in their records. Then, what view did plaintiffs entertain on the crucial point of their repudiation having been accepted? Undoubtedly they fully understood and believed it had been, as the evidence of Geddes clearly shews. He says:—

Q. Now did you receive any reply to your letter of October 2nd? A. No. Q. Then what did you do? A. Well, I waited about three weeks, as near as I can recall, and was firmly convinced—I waited what I thought was a reasonable time—and felt Mr. Reed was taking our letter as final, and the order would be cancelled.

It is true, he afterwards changed his mind, for reasons best known to himself, without giving defendants any notice, or inquiring from them whether they were satisfied with his renunciation of the contract or not.

However, we have here the explicit evidence of the letter of renunciation; its receipt by defendants; the cancelling of the order in its books, and the firm conviction sworn to by the renouncing party that the contract was at an end. No notice of any kind was sent by the plaintiffs of their desire or intention to withdraw their renunciation while, as a matter of fact, they failed to deliver or offer delivery of two instalments of yarn which the contract specifically called for, namely, 5,000 pounds as soon as reasonably possible after October 5, and 2,000 pounds which should have

been forwarded about November 5. In my judgment, the fair inference which should be drawn from all these proved facts is that the contract had been put an end to by consent and assent of both parties.

I can see little difference between writing an adoption of the renunciation on the letter containing it, or directing the cancellation of the contract renounced in the records of the party receiving the renunciation. In either case, it is some evidence of adoption of the renunciation, and a letter to the renouncing party, though a prudent and businesslike course, is not an essential necessary to complete the adoption in cases where facts proved allow of a fair inference of acceptance of renunciation being drawn.

The law in cases of this kind is laid down by Lord Esher, M.R., in giving judgment in the case of *Johnstone* v. *Milling*, (1886), 16 Q.B.D. 460, at 467, as follows:—

Accordingly the defendant has recourse to the doctrine laid down in several cases cited, the best known of which is perhaps the case of *Hochster* v. *De la Tour* (1853), 2 El. & Bl. 678, 118 E.R. 922. In those cases the doctrine relied on has been expressed in various terms more or less accurately; but I think that in all of them the effect of the language used with regard to the doctrine of anticipatory breach of contract is that a renunciation of a contract, or, in other words, a total refusal to perform it by one party before the time for performance arrives, does not, by itself, amount to a breach of contract but may be so acted upon and adopted by the other party as a rescission of the contract as to give an immediate right of action. When one party assumes to renounce the contract, that is, by anticipation refuses to perform it, he thereby, so far as he is concerned, declares his intention then and there to rescind the contract. Such a renunciation does not of course amount to a rescission of the contract, because one party to a contract cannot by himself rescind it, but by wrongfully making such a renunciation of the contract he entitles the other party, if he pleases, to agree to the contract being put an end to subject to the retention by him of his right to bring an action in respect of such wrongful rescission. The other party may adopt such renunciation of the contract by so acting upon it as in effect to declare that he too treats the contract as at an end, except for the purpose of bringing an action upon it for the damages sustained by him in consequence of such renunciation. He cannot, however, himself proceed with the contract on the footing that it still exists for other purposes, and also treat such renunciation as an immediate breach. If he adopts the renunciation, the contract is at an end except for the purposes of the action for such wrongful renunciation; if he does not wish to do so, he must wait for the arrival of the time when in the ordinary course a cause of action on the contract would arise. He must elect which course he will pursue. Such appears to me to be the only doctrine recognised by the law with regard to anticipatory breach of contract.

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I accept this extract as correctly stating the law on the subject which I think applicable to this present appeal. I find that the reasonable and necessary inference from the proved facts is that the plaintiffs' letter of repudiation of October 2, never withdrawn or qualified by them, had been adopted and acted upon by the defendants and the contract put an end to by mutual assent. See also *Frost* v. *Knight* (1872), L.R. 7 Exch. 111.

I would, therefore, allow the appeal and dismiss the action with costs throughout.

Idington, J.

IDINGTON, J.:—Geddes, a member of the respondent firm, tells that they were carrying on, in Sarnia, Ont., a retail dry goods and woollen business as well as jobbing when he, in the early part of August, 1918, went to Washington to solicit orders from the appellants, "for wool, knitting yarn."

He met, on that occasion, Reed, an associate director of the Bureau of Purchases for the appellants and they agreed on terms for two orders to be sent respondents.

One order was to be for sock yarn, which is now, save incidentally in its results as shedding light on the course of the business, out of the question raised herein.

The other was to be yarn for knitting sweaters. That was, pursuant to the agreement, reached orally, forwarded on August 14, 1918, to respondents. It was numbered and will be referred to herein as No. 1788.

To induce the giving of it, Geddes had represented that respondents had on hand ready for shipment, 4,000 pounds of the desired quality.

The Order 1788, so forwarded by appellant specified 20,000 pounds at a price of $1.80, delivery 4,000 pounds at once, and 2,000 pounds a month. Shipping instructions to be given later—and to ship, freight collect, f.o.b. Sarnia.

Presumably this was received in due course by mail a couple of days later.

The first response was dated August 24, 1918, and so far as related to Order 1788 was as follows:—

> Re your Order No. W1788 for 20,000 lbs. knitting yarn.
>
> We regret to say there is some doubt about our ability to fill this order. The 4,000 lbs. spot yarn was sold and delivered to the American Red Cross at this same price prior to receipt of your order, and the mill from whom

we bought this yarn claims they are unable to deliver the balance. We will make every effort to secure this delivery, and will force the issue at once, and if we receive all or any part of it, will deliver it as per your order.

On September 26, 1918, the appellant wrote as follows:

Sarnia, Canada,
Sept. 26, 1918.

Messrs. Geddes Bros.,
Sarnia, Canada.

Gentlemen:—

We write you in reference to order numbers W 1787, calling for 35,000 pounds of worsted yarn, and order W 1788, calling for 20,000 pounds of woollen yarn.

We received your letter of August 26th, and do not understand your letter, and we will expect this yarn delivered as contracted with us.

I would ask you to wire at once how much of this yarn can be shipped immediately, and when contract can be completed as we are issuing shipping instructions now on all the yarn we have purchased and wish to know just when we can count on delivery.

Be sure to wire on receipt of this letter, and oblige,

Edward T. Reed,
Associate Director, Bureau of Purchases.

And on October 2, as follows:—

Washington, D.C.,
Oct. 2nd, 1918.

Geddes Bros.,
Sarnia, Canada.

Gentlemen:—

Referring to your letter of September, 25th, we will say that complete shipping instructions are being sent you for order Nos. Washington 1787 and 1788, and we will be glad if prompt shipments can be made on both these orders.

Edward T. Reed,
Associate Director, Bureau of Purchases.

That was accompanied by the following shipping instructions relative to No. 1788:—

To Geddes Brothers,
Sarnia, Canada.

Please ship the following to addresses specified below. Ship via Freight Collect.

20,000 lbs., Code No. 1033B, Yarn.

Distribution:

6,200 lbs. Atlantic Division, American Red Cross, 20 E. 15th Street, New York City; 7,000 lbs. Lake Division, American Red Cross, 724 Prospect Ave., Cleveland, Ohio; 6,800 lbs. Northern Division, American Red Cross, 10th and Nicollett Ave., Minneapolis, Minn.

Alternate shipments to the Different Divisions.

Approved: Edward T. Reed,
For Director, Bureau of Purchases.

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I can find no letter of September 25, 1918, in the case, or explanation relative thereto.

The letter of October 2, 1918, crossed in the mail the following from respondents:—

Sarnia, Canada,
Oct. 2nd, 1908.

Mr. Edward T. Reed,
c/o American Red Cross, Bureau of Purchases,
National Headquarters, Washington, D.C.

Dear Sir:

Replying to your favour of the 26th inst., we wired you to-day as per your request, and enclose confirmation herewith. Regarding your order, No. 1878, for 35,000 pounds of worsted yarn, we expect to be able to deliver this complete, and as we stated to you in our telegram, have approximately 6,000 pounds ready for immediate delivery, which we are holding until we receive shipping instructions from you.

Regarding your order No. 1788, for 20,000 pounds of woollen yarn at $1.80, it will be impossible for us to deliver this as the mills are not able to make it, they state, on account of having government orders which require their whole attention.

At the time this order was taken, *i.e*, August 14th, Mr. Geddes pointed out to you that there was a possibility that it might not be possible for us to fill these orders complete, and we believe the circumstances were outlined to you at that time. We wrote you on August 26th, explaining just what we would be able to do in reference to these orders and as we received no reply, we presumed you understood the situation.

We greatly regret, naturally, that we are not able to fill this order, but it is something over which we have no control, and we trust that under the circumstances you will consider this entirely satisfactory.

Geddes Bros.

No such telegram is in the case, nor is there any telegram from respondents as requested by appellants' letter of September 26, 1918.

The appellants on receipt of the letter, marked in their books that the Order 1788 was cancelled; but, evidently, in absence of such telegram as requested, and through pressure of work, omitted to write or wire such cancellation had been made.

Nothing more, however, was heard, in regard thereto, by appellants, until December 10, 1918, when they received from Bates & Bates notification of a shipment by them from Montreal account respondents.

The correct inference of cancellation agreed to had, however, been properly drawn as appears from the evidence of said Geddes who testifies as follows:—

Q. Then what did you do? A. Well, I waited three weeks, as near as I can recall, and was firmly convinced—I waited what I thought was a reasonable time—and felt Mr. Reed was taking our letter as final, and the order would be cancelled. After I waited a certain length of time I began to get worried about it, and having the last two exhibits in my mind, I felt perfectly satisfied that Mr. Reed would force us to deliver that yarn. I got busy and canvassed the jobbing trade, and places we did not usually expect to get yarn in that quantity. I covered London, Toronto, and finally got to Montreal. Q. With what result? A. I found some small quantity at Duncan Bell's, at a high price, and I thoroughly covered all the jobbing houses there and located another small quantity through McIntyre, Son & Co., also at a high price.

He drew the correct inference but failed to telegraph the fact; though he had been, as appears above, urged to do by the letter of appellants of September 26, above quoted, which the respondents must have received 4 or 5 days before wiring as desired.

I am unable to reconcile with any sense of fair dealing such conduct on their part.

Instead of doing as they should have done they changed their minds. I suspect by reason of their omission to fairly consider the whole correspondence and act accordingly, that the true reason for change of mind was not any worry about what Reed would do, but a change of market more favourable to them 6 weeks later.

It hardly lies in the mouth of one so failing himself to act and answer promptly to complain of another he so treated doing the same. Had they done so on receipt of the letter of September 26, in all probability we never would have had the confusion presented by the crossing letters of October 2, or, I venture to think, this lawsuit.

Yet the basis of the argument in the way of excusing the respondents' conduct in first repudiating their contract, making, pursuant to such repudiation, default from month to month and then suddenly turning round and tendering goods in pretended fulfilment of it, is that the appellants had failed to answer a letter.

Moreover, the argument overlooks the fact that respondents had, by their letter of August 24, 1918, which I quoted above, assured the appellant that they would make every effort to secure this delivery and would force the issue at once, etc., etc. What effort they made to carry out the said promise does not appear.

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It certainly does not appear a very solid basis upon which to rest such an argument when they kept appellants waiting a whole month to hear the result of such assurances as said letter contained.

And when they got the letter of September 26 from appellants referring thereto insisting upon due fulfilment of their contract, instead of pleading for forbearance they tell appellants that this one is absolutely impossible of fulfilment.

If that is not an absolute repudiation of it, what would be? Must we have violent and ill-natured words used to render repudiation effective?

Indeed, it is fairly arguable on the evidence that the respondents never had become bound and this letter was a distinct refusal to become so and hence nothing more to be said. They doubtless hoped for generous treatment, and got it by the actual cancellation.

The other contract got from appellants at the same time, and by virtue of the same soliciting effort, and which in a close sense, as to giving of orders for shipment, and all else ran concurrently with that now in question, has been fulfilled or adjusted in a common-sense fashion.

They were grouped together in the correspondence up to the point when the respondents said they found that one now in question impossible of fulfillment, and then much correspondence continued relative only to the other. It evidently was assumed by both parties that that alleged contract had ended.

The respondents must have been much more dense than I take them to be if they did not infer and clearly understand under all the foregoing circumstances that their abandonment or repudiation of the other order now in question had been assented to by appellants.

There were half a dozen shipments, under 1787, and all implied therein relative to that contract recognised it as on foot; and most of these before the appellants had ever heard of anything to suggest that the respondents pretended that they were assuming that appellants recognised the order now in question as being on foot and in force.

How could respondents imagine that appellant during all that time and under such circumstances was distinguishing thus

its treatment of one contract and ignoring its twin, unless by reason of assent to the respondents' renunciation?

On November 6, appellants wrote respondents asking how fast shipments would be made on Order 1787, but made no reference to any claim under Order 1788, now in question.

Seeing this was but a few days after Geddes had, as he professes, begun to get worried lest he might be called upon to fill the Order 1788, it seems very remarkable he did not cease worrying or ask how it came about that appellants seemed only concerned as to Order 1787.

Indeed, he carefully abstained, after October 2, 1918, from ever referring to the matter of Order 1788 in any communications he had with appellants.

Instead of worrying about being possibly liable to be called on for delivery thereunder, a careful study of all the evidence leads me to interpret his conduct early in November as the result of a treacherous intention to take advantage, if he could safely, of the omission, on the appellants' part, to formally assent by letter to the repudiation of respondents.

The numerous cases cited by the respective authors and editors of Benjamin on Sales and Blackburn on Sale, 3rd ed., relative to contracts for delivery by instalments, fail to disclose anything like a parallel to the features of this case. And those cited in argument fail to fit these peculiar features.

We have, however, as the result of much discussion, the opinions of may eminent Judges on the question of what may constitute such a renunciation as to relieve the other party to the contract.

I accept that expressed by Lord Selbourne in the case of *Freeth* v. *Burr* (1874), L.R. 9 C.P. 208, at 213, as follows:—

> In cases of this sort, where the question is whether the one party is set free by the action of the other, the real matter for consideration is whether the acts or conduct of the one do or do not amount to an intimation of an intention to abandon and altogether to refuse performance of the contract. I say this in order to explain the ground upon which I think the decisions in these cases must rest. There has been some conflict amongst them. But I think it may be taken that the fair result of them is as I have stated, viz., that the true question is whether the acts and conduct of the party evince an intention no longer to be bound by the contract. Now, non-payment on the

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one hand, or non-delivery on the other, may amount to such an act, or may be evidence for a jury of an intention wholly to abandon the contract and set the other party free.

Apply this to the terms of the respondents' letter declaring it absolutely impossible to fulfil the contract as interpreted by both himself and Reed, and the fact that the latter did accept and cancel the contract and the conduct of respondents in accord with that assumption, and I think we have a safe guide which leads to the conclusion that respondents are not entitled to recover.

The appellants could not on the facts disclosed have recovered anything for any breach of contract.

On these grounds alone the appellants are entitled to succeed herein.

But, beyond all that and the relevant law I cite as to one aspect of the case, there is to my mind clear and convincing evidence to be inferred from the steps taken by and the conduct of both parties, that there was a well understood mutual rescission of any contract that by any possible conception of the facts may have existed.

Moreover, there seems no ground whatsoever upon which to rest the judgment recognising a right to insist on the right to a delivery of the goods after the times specified in the contract.

If the times fixed thereby are to be observed, then the time for delivery as to the first 4,000 pounds was on August 14, subject always, of course, to the shipping order and by the time that had been given in the letter of October 2, the time had then elapsed for immediate shipment of at least 6,000 pounds, and for another 2,000 pounds before respondents had thought of buying a single pound to ship.

I am unable to understand how in any view of the facts the respondents could claim any rights as to these early instalments; whatever might be said as to the later instalments on another view of the facts than I hold.

And as to these later instalments if the contract could be held on foot, that would seem to have been ended and reduced to a question of damages by the frank declaration of appellants that it could take no further deliveries and must submit to compensation in cases where the contract was still in force.

An armistice having been declared on November 11, 1918, the appellants made an appeal to all those who had sold it goods to cancel their contracts and adjust on an equitable basis.

That to the respondents, dated November 27, 1918, reads as follows:—

Washington, D.C.,
November 27th, 1918.

Geddes Brothers,
Sarnia, Ontario, Canada.
In Re: Order Washington 1787.

Gentlemen:—

On November 20th the War Council of the American Red Cross sent you the following telegram:—

"In view of the signing of the armistice the needs of the Red Cross for merchandise have been very much reduced. We would appreciate it therefore if you would be willing to cancel on an equitable basis such part of our contract with you as has not already been shipped. Will you be good enough to advise us if you will assist us in this matter?

"War Council, American Red Cross."

We have not as yet heard from you in reference to this telegram and we hope very much that you will be able, on an equitable basis, to do something in the way of cancellation of unshipped part of order.

I will be in Washington the first four days of next week, and will appreciate, very much, if you could take the matter up with me then.

Edward T. Reed,
Associate Director, Bureau of Purchases.

And to that respondents replied as follows:—

Sarnia, Canada,
Dec. 2, 1918.

Mr. Edward T. Reed, Associate Director,
Bureau of Purchases, American Red Cross,
Washington, D.C.

Dear Sir:

We have your letter of November 27th, and beg to state that we did not receive telegram from the War Council of the American Red Cross. Your letter is the first intimation that you desire to cancel the balance of your order.

We suggest that you outline to us the basis on which you desire us to accept said cancellation, and we will do anything possible to meet you.

Geddes Bros., per Gordon G. Geddes.

And then appellants made a special appeal to respondents by the letter of December 5, 1918, as follows:—

December 5, 1918.

Geddes Brothers,
Sarnia, Ontario, Canada.
In Re: Order Washington No. 1787.

Gentlemen:—

We are in receipt of your letter of December 2nd and have wired you as per enclosed "confirmation telegram." We would like to have you accept

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cancellation for the unshipped portion of this order, as you know, owing to the present conditions the needs of the Red Cross have been very greatly lessened and we are not in position to use the supplies of yarn we have on hand and bought. This yarn was not bought for business purposes, and we are not in position to, and should not, throw a lot of yarn on the market, and we have asked firms to accept cancellation.

We have been very much pleased with the manner in which practically all of the firms, having orders from us, have accepted cancellation, and we certainly hope that you can do the same. We believe you appreciate, fully, the situation and the facts that the Red Cross is not organized, and should not be organized to dispose of merchandise, and we hope that you can accept cancellation of the unfilled portion of this order and relieve us of this amount of yarn.

In reference to this cancellation you will remember that we placed an order with you—No. 1788, for 20,000 pounds of yarn and had entered into this contract in good faith with you, and you cancelled this order—and without making any trouble in regard to it, we accepted this cancellation on your part although we had grounds for demanding the delivery of this yarn, and we hope that you will go over this matter carefully and consider it from every side.

I will appreciate it if you could advise me by wire, promptly, as to what you will do in the matter.

Associate Director, Bureau of Purchases.

That of November 27, and this, of course, was an appeal in respect of Order 1787, and so recognised by the respondents' reply to the former. They made no allusion to Order 1788, and no reply to this later one.

Meantime respondents were assiduously working away through Bates & Bates, to get ready to tender goods under Order 1788.

The goods had not yet been shipped or delivered f.o.b. as nominated in the bond. And they never were so. The contract provided for the delivery at Sarnia f.o.b., and that term never was departed from, but unfortunately escaped the observation of the Court below or I imagine we never would have been troubled with this appeal.

I, therefore, fail to see how respondents are entitled to recover by virtue of a tender at a place other than that specified in the contract, and never named or dreamed of.

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

Duff, J.

DUFF, J.:—I am unable to agree with the conclusion at which the Appellate Division arrived (1920), 52 D.L.R. 547, 47 O.L.R. 163. I do not find it necessary to pass any opinion upon the point whether the seller, having made default in delivery of part of the goods, the subject of a sale in which delivery is to be made

by instalments, and such default in itself either constitutes sufficient evidence of an intention of the party to abandon the contract, or is accompanied by a declaration on his part to that effect, it is necessary that the buyer must notify his intention to concur in the abandonment of the contract before tender by the seller of delivery of an instalment deliverable at a later date.

There are two ground upon which, in my opinion, the respondents' action fails.

First: The basis upon which the parties entered upon their agreement was, I think, the fact, which the appellants believed upon the representation of the respondents, that they had 4,000 pounds of yarn ready for immediate delivery; and the delivery of that quantity of yarn forthwith upon the receipt of shipping instructions was, I think, an essential term of the contract breach of which invested the appellants with the right to treat the contract as no longer binding upon them, and I see nothing whatever in the course of events as divulged by the evidence which could be successfully relied upon by the respondents as depriving the appellants of their right to declare their election after the tender of delivery by the respondents.

Secondly: It is abundantly shewn that the respondents quite plainly declared their intention not to fulfil the terms of the contract, and that they interpreted the conduct of the appellants as expressing an intention on their part to concur in that abandonment. I think that was a perfectly reasonable interpretation to put upon the appellants' conduct when viewed by the respondents as a whole; including the pressing communications of September 26, and October 2, followed by the silence which succeeded the despatch of the respondents' letter of the latter date. That was a perfectly reasonable interpretation and was the interpretation upon which the respondents continued to act until circumstances arose which seemed to offer them more favourable prospects in another direction. It is equally clear that the appellants intended to acquiesce in the abandonment of the contract by the respondents. We have here then a declared intention to abandon on part of the seller, and, a concurrence in fact on the other side accompanied by conduct which was treated by the seller as evidencing such concurrence.

The appeal should be allowed and the action dismissed with costs.

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Anglin, J.

ANGLIN, J.:—The facts out of which this litigation has arisen are fully stated in the judgments delivered by Rose, J., and in the Appellate Division, 52 D.L.R. 547, 47 O.L.R. 163. After much consideration and not a little hesitation—the latter due largely to the respect in which I hold the opinion of the trial Judge unanimously affirmed by the Divisional Court—I have reached the conclusion that this appeal must be allowed and the action dismissed.

Although the defendants have pleaded that the acceptance of their order by the plaintiffs was conditional—and this would seem to have been the position taken by the plaintiffs in their letters of August 24 and October 2—the evidence puts it beyond reasonable doubt that the sending of the order itself was an unconditional written acceptance or confirmation of acceptance by the defendants of an oral proposal made by the plaintiffs, which had probably been orally accepted by the defendants when made, and that there was in fact a firm contract in the terms of that order.

Parol evidence adduced to shew that the definite terms of delivery clearly specified were not intended to bind the plaintiffs, but that they were entitled to deliver the wool contracted for as speedily as it could be procured, was, I think, inadmissible. The real question on this branch of the case is whether the contract was rescinded—whether the conduct of the parties was such that the proper inference from it is mutual rescission, or whether the plaintiffs so acted as to justify the defendants in declining to carry out the contract when they did.

There is no reason for not fully accepting the view, which I gather prevailed in the trial Court and on appeal, that both the plaintiffs and the defendants acted throughout in entire good faith. That of the defendants is not impugned and the fact that the plaintiffs made purchases at the beginning of November, before there was any material decline in prices, to enable them to carry out their contract would seem sufficient to establish that they were also acting *bonâ fide*. The defendants believed the contract was put an end to by the plaintiffs' letter of October 2; the plaintiffs early in November believed that it was still on foot and that they might be held to performance.

But it must be at least equally clear that both parties were sadly lacking in ordinary business diligence. A letter written by either of them to the other within a reasonable time after the receipt of the letters of October 2, 1918, which crossed, such as ordinary prudence would seem to have required from each, would have prevented the situation now existing from which serious loss must inevitably fall on one or the other.

If the case should be viewed purely as one of anticipatory breach affected by the plaintiffs' letter of October 2, intimating that they could not supply the yarn for which they had contracted, I should have agreed that the defendants could not succeed because of their failure to communicate by word or act their election to accept this declaration as a renunciation of the contract and to treat the attitude of the plaintiffs as having put an end to it. *Scarf* v. *Jardine* (1882), 7 App. Cas. 345, at 360, 361; *Johnstone* v. *Milling* (1886), 16 Q.B.D. 460, at 469, 471; *Ewart on Waiver Distributed*, pp. 89 and 95. The first intimation of acceptance is found in defendants' letter of December 5. Long before that letter was written the plaintiffs had changed their position in the belief that they were still bound by their contract.

But, in my opinion, the subsequent conduct of the parties is in this case of paramount importance and, as put by Lord Coleridge, C.J., in *Freeth* v. *Burr* (1874), L.R. 9 C.P. 208 at 213, "the real matter for consideration" is whether, having regard to the terms of the contract and viewed in the light of the plaintiffs' letters of August 24 and October 2, their subsequent inaction and silence "do not amount to an intimation of an intention to abandon and altogether to refuse performance of the contract . . . (do not) evince an intention no longer to be bound by the contract." After referring to this passage from Lord Coleridge's judgment (p. 213), with approval in *Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.* (1884), 9 App. Cas. 434, the Earl of Selbourne, L.C., adds, at 439-440:

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

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The same extract from the judgment of Lord Coleridge was again accepted as stating "the true test" by Lord Collins in *General Billposting Co.* v. *Atkinson*, [1909] A.C. 118, at 122.

Now what was the conduct of the parties material to the question at issue? Having intimated by their letter of October 2, that they would be unable to fulfil their contract, the plaintiffs made default in delivering 4,000 pounds of yarn which, according to its terms, should have been shipped as soon as reasonably possible after October 5, when shipping instructions reached them, and they again made default in shipping the first monthly instalment of 2,000 pounds which should have been put in transit about November 5. No explanation was made by them of these failures to carry out the contract and no complaint or demand for delivery came from the defendants. Indeed, both parties acted as if the contract had ceased to exist—as if the defendants were acquiescing in the plaintiffs' request to be relieved from it and in their treating it as abandoned.

Meantime deliveries were being made by the plaintiffs upon, and correspondence took place in regard to, another order for yarn (No. 1787) placed with them by the defendants at the same time as the order now in question (No. 1788). This state of affairs continued down to December 10. No doubt the plaintiffs made successful efforts to obtain the yarn during the month of November. But because uncommunicated to and unknown by the defendants, except as indicative of their honesty of purpose and as establishing a change of position which precluded subsequent acceptance of their letter of October 2, as an anticipatory breach those purchases are quite as irrelevant to the issue to be determined as is the defendants' entry in their own books of the cancellation of contract No. 1788 on receipt of the plaintiffs' letter of October 2. Although in a letter written on December 5, in regard to contract No. 1787, the defendants state that the plaintiffs had cancelled contract No. 1788 and that they (the defendants) had accepted that cancellation without making any trouble about it, it was not until December 10 that the defendants were apprised of any departure by the plaintiffs from the attitude of inability to fulfil the latter contract intimated in their letter of October 2, and of their intention to carry it out.

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While the defendants cannot be heard to aver that the contract now in question was terminated by their uncommunicated acceptance of the plaintiffs' declaration of inability to carry it out and acquiescence in its thus being put an end to, the plaintiffs' subsequent failure to deliver the instalments due in October and November, although possibly not such non-performance as would *per se* justify rescission by the defendants, viewed in the light of their letter of October 2, in my opinion, "amounted to an intimation of an intention to abandon and altogether to refuse performance . . . evinced an intention no longer to be bound by the contract" (see *Freeth* v. *Burr*, L.R. 9 C.P. at 213), and this, as Lord Selbourne, L.C., puts it, gave the defendants the option "to relieve themselves from a further performance of the contract." (See L.R. 9 C.P. at p. 440.) See also *Millar's Karri* v. *Weddell* (1908), 100 L.T. 128 at 129, *per* Bigham, J.; *Cornwall* v. *Hensen*, [1900] 2 Ch. 298, at 303, *per* Collins, L.J.; *Bloomer* v. *Bernstein* (1874), L.R. 9 C.P. 588. That option they promptly exercised by rejecting on its arrival the first yarn shipped to them by the plaintiffs' agents and by writing their letters of December 10, on receipt of the first invoice, to the plaintiffs and their agents, Messrs. Bates & Bates, respectively.

The principle of the decision in *Morgan* v. *Bain* (1874), L.R. 10 C.P. 15, I think, applies and governs. That was the converse case of tender of price and demand for performance by a purchaser who, after he had notified his insolvency to the vendor, had allowed the dates specified for delivery of two instalments to pass without protest, and without any offer to pay the price on delivery or any demand for explanation. On receipt of his subsequent demand of delivery the vendor promptly repudiated any obligation on the ground that the contract had been put an end to. The notice of insolvency did not terminate the contract but gave to the subsequent failure to deliver and to the absence of protest from the purchasers and of tender of price by them a significance as evidence of abandonment which they would not otherwise have had.

So here the plaintiffs' letter of October 2, while ineffectual to put an end to the contract because acceptance of it was not communicated and although it should be regarded, as the plaintiffs now contend, not as an intimation of abandonment or refusal to

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perform but merely as a request to be relieved from the obligations of the contract, gave to the subsequent non-delivery by them and to the defendants' silence in regard thereto a significance as indicative of a determination to renounce the contract that they might otherwise have lacked. From the non-delivery under the circumstances the defendants had a right to conclude that the plaintiffs had abandoned their contract and, if they did so conclude, to abandon it themselves. Their announcement that they regarded the contract as at an end by their letters written as soon as they had the first intimation of the plaintiffs' intention to treat it as still subsisting and to carry it out was, I think, a sufficient exercise of the option which the plaintiffs' conduct had given them to decline performance, notwithstanding that those letters were written on the erroneous assumption that the acceptance of the plaintiffs' withdrawal from the contract on October 2, entered in their books, though unnotified, had already terminated it.

Treating the notice of insolvency in the *Morgan* case, L.R. 10 C.P. 15, as practically of the same legal value as the unaccepted notice of inability to perform in the case at Bar (*Tolhurst* v. *Associated Portland Cement Manufacturers*, [1902] 2 K.B. 660, at 671,) the material circumstances of the two cases are scarcely distinguishable. In both there was non-delivery of two instalments, silence in regard to the defaults and equally prompt repudiation when the party who had given the notice subsequently sought to treat the contract as still subsisting and enforceable. If not (as I incline to think it may be) a case of termination by mutual abandonment, as put by Keating, J., in *Morgan's* case, *supra*—the view of that case also taken by Jessel, M.R., in *In re Phœnix Bessemer Steel Co.* (1876), 4 Ch. D. 108, at 114—we have here a case of conduct of the vendors warranting an inference of intention to renounce, and an exercise by the purchasers of the option to withdraw thus afforded them, which seems to have been the ground of decision of Lord Coleridge in *Morgan* v. *Bain*, L.R. 10 C.P. 15.

Moreover, in order to succeed in this action, the plaintiffs must prove delivery or tender of delivery in accordance with the terms of the contract. Under those terms delivery of 6,000 or at the most 8,000 pounds of yarn had fallen due at the beginning of December. The amount shipped was 10,332 pounds. The

contract provided that delivery should be made in monthly instalments of 2,000 pounds each, commencing a month after the first "spot" delivery of 4,000 pounds. Such stipulations in mercantile contracts are not negligible. *Bowes* v. *Shand* (1877), 2 App. Cas. 455, at 465-6, *per* Lord Cairns, L.C. While not disposed to attach much importance to the fact that the shipment was made from Montreal instead of from Sarnia, since any difference in freight rates would be readily adjustable, I question the sufficiency of the tender of over 10,000 pounds actually made by the plaintiffs early in December to support the averment of performance essential to their claim. *Hoare* v. *Rennie* (1859), 5 H. & N. 19, 157 E.R. 1083.

It would rather shock one's sense of what is just and fair between man and man if, upon the state of facts presented in this case, the purchasers should be legally bound to accept and pay for the goods in question, notwithstanding the vendors' early intimation of their inability to carry out their contract; their subsequent undoubted default in delivery of at least two instalments (nearly one-third of the whole) and the complete change in circumstances brought about by the armistice. The conclusion that they are not so bound is therefore all the more satisfactory.

I do not find in the circumstances enough to warrant a departure from the ordinary practice that costs throughout should follow the event.

MIGNAULT, J. (dissenting):—This case possesses some features which render it rather a hard one for the appellants, but that is certainly no reason why perfectly settled legal principles should not be applied regardless of the hardship entailed thereby, and for the existence of which the appellants are not without blame. Nevertheless these features have received my very serious consideration, for the question, as it is now presented to this Court, is, in final analysis, whether the conduct of the respondents has been such as to deprive them of recourse under the contract which they admittedly made with the appellants for the sale to the latter of 20,000 pounds of Oxford woollen yarn under Order 1788.

Mignault, J.

Admitting the existence of a valid contract, the letter of the respondents of October 2, 1918, was either a request to be freed from their contractual obligations, a request which was not granted, or an anticipatory breach of their contract.

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Taking it to be an anticipatory breach of contract, it gave the appellants the option either to insist on the performance of the contract or to take the repudiation of the respondents as a definite breach and treat the contract as rescinded. For obviously one contracting party cannot of his own will and without the assent of the other rescind a valid contract. Obviously also this option required due notice to the respondents of the choice made by the appellants.

As far as the appellants are concerned there was, after the anticipatory breach, no valid exercise of this option. The appellants did not answer the respondents' letter of October 2, but made an entry of cancellation of Order 1788 in their books, which, not being notified to the respondents, could not operate as an exercise of its option or as a rescission of the contract.

So far there can be no difficulty. But it is now argued that the subsequent conduct of the respondents and their failure, after receiving the shipping instructions of the appellants, also dated October 2, 1918, to make shipments according to the terms of the order, 4,000 pounds at once and 2,000 pounds per month, and their silence until December when the shipments in question were made and notice thereof given to the appellants, amounted to an abandonment of the contract disentitling the respondents to ship the yarn in December and claim payment from the appellants.

A careful examination of the record has convinced me that this issue of abandonment—as distinguished from the question whether the anticipatory breach of the respondents and their failure to make deliveries in time had relieved the appellants from liability under the contract—was not submitted to the Courts below. In the appellants' plea the ground taken is: 1. That the respondents had repudiated the contract and that thereafter the appellants treated the same as terminated, and purchased other yarn to take the place of the yarn which they had intended to purchase from the respondents, no proof of the latter statement having been made; 2. That the respondents made default in delivering the yarn within the time specified in the appellants' order and shipping instructions and consequently there was no effective tender of delivery by the respondents under the alleged contract. These two grounds were also taken in the appellants' appeal to the Appellate Division as follows:—

3. If there was a concluded contract between the parties the plaintiffs' letter to the defendants of 14th August, 1918, was a repudiation thereof and such repudiation continued until after the expiration of the time for delivery under the terms of such contract.

4. If there was a concluded contract between the parties and no effective repudiation thereof the plaintiffs did not make deliveries within the times specified in such contract.

In view of the issue thus presented to the Courts below, we have not the benefit of an express finding of the trial Judge on the question whether there had been an abandonment of the contract by the respondents acquiesced in by the appellants as distinguished from a rescission by reason of the anticipatory breach of the respondents and the acceptance thereof by the appellants. The issues really presented were decided by both Courts below, and in my opinion rightly decided, adversely to the appellants, and it was held: 1. That the anticipatory breach of the contract gave to the appellants an option to treat the same as rescinded, but that the appellants never had signified to the respondents their intention that the contract should be treated as rescinded; 2. That (I take this in somewhat abbreviated form from the judgment of Hodgins, J., in the Appellate Division, 52 D.L.R. 547, 47 O.L.R. 163) time not having been made of the essence of the contract, the failure to deliver before December was an actual breach, which, if it went to the root of the contract, would merely entitle the appellants, if they saw fit, to treat the non-performance as a repudiation of the whole contract and to sue for damages.

I cannot help thinking that the question whether the contract was by reason of the conduct of the parties abandoned by them, is entirely distinct from the two questions to which I have referred and which were really in issue. At all events, it is clear that the abandonment must have been concurred in by both parties, for both must agree to an abandonment as well as to a rescission and an act of abandonment by one of them alone without acceptance or acquiescence by the other cannot effect the continued existence of the contract.

I may add that the question of abandonment is essentially a question of fact, being an inference to be drawn from all the circumstances of each case, and decisions in particular cases, where it has been held that the circumstances warranted the presumption of abandonment, are of little assistance, unless the circumstances are the same, a coincidence which is hardly to be expected.

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I may now refer to the case of *Morgan* v. *Bain*, L.R. 10 C.P. 15, probably the nearest in point which is cited in the appellants' factum. There a purchaser of pig-iron to be delivered in specified portions at fixed dates, became insolvent subsequently to the contract and notified the vendor of his insolvency. A petition was filed by the purchaser in the Bankruptcy Court whereupon a person was appointed to collect sums due and carry on the business. A meeting of creditors was held at which a composition at 5s. in the pound was agreed to. No mention was made of the contract in the statement of his affairs submitted by the purchaser, and no deliveries under the contract were made by the vendor at the determined dates. The price of iron having risen, the purchaser, who had obtained fresh capital by forming a new partnership, demanded delivery, tendering cash payment, but the vendor refused to deliver. It was held under these circumstances, on a special case stating the facts, that the purchaser had abandoned the contract, and that the vendor, by not making deliveries which had become due, assented to its rescission.

After full consideration, I think that the *Morgan* case, *supra*, cannot assist us here, the circumstances being different. The respondents had, it is true, declared on October 2 that they could not carry out the contract, but, on the same date, the appellants had written insisting on its performance. As matters then stood, under the authority of cases such as *Frost* v. *Knight*, L.R. 7 Exch. 111, and *Johnstone* v. *Milling*, 16 Q.B.D. 460, the appellants not having exercised their option to treat the contract as rescinded, on the contrary insisting on its performance, the respondents could subsequently carry it out notwithstanding their previous declaration that they would not do so. The only remaining material point is whether the respondents' subsequent failure to deliver before December and the absence of protest by the appellants, gives rise to the presumption of abandonment of the contract by all the parties thereto. I think no such presumption arises here. The anticipatory breach of the respondents was caused by their failure to obtain yarn. Subsequently, fearing that notwithstanding their letter of October 2 they would be held to make deliveries—and the unretracted letters of the appellants dated September 26 and October 2, gave them every reason to believe this—they made fresh enquiries for yarn and, in the

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beginning of November, secured it in Montreal at a price but little below the contract price, and the appellants' letter of December 5 was the first intimation to them that the appellants accepted cancellation of the order. There is no suggestion whatever that the respondents acted otherwise than in perfect good faith, and while it would have been more prudent no doubt to answer the appellants' letter of October 2 and thus clear up the matter—and the appellants themselves were wanting in ordinary business caution in not answering the respondents' letter of the same date—still I must find that the appellants' insistence on the performance of the contract fully justified the subsequent conduct of the respondents and that no presumption of abandonment by reason of delay in delivery can arise.

On the whole, I fully agree with the judgments of the Courts below and my opinion is that the appeal should be dismissed with costs. *Appeal allowed.*

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Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Elwood, JJ.A. October 11, 1920.

INTERPLEADER (§ I—10)—BY SHERIFF—LANDS TAKEN IN EXECUTION—WHEN ENTITLED TO INTERPLEAD.

Interpleader may be granted where a claim is made in respect of lands taken in execution, but to entitle the sheriff to interplead where the land is claimed he must be willing to pay the subject matter into Court; where the sheriff has sold the land and given a transfer he is not in a position to pay or transfer it into Court, or dispose of it as the Court may direct, and not being in a position to comply with the rule he is not entitled to interplead.

[See annotation: Summary Review of the Law of Interpleader, 32 D.L.R. 262.]

Statement.

APPEAL by claimant in an interpleader proceeding from an order of a District Court Judge barring his claim and ordering him to pay the costs of the sheriff and execution creditors. Reversed.

C. R. Morse, for appellant.

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

H. E. Grosch, for respondent International Harvester Co.

H. A. Rutherford, for various respondents.

Haultain, C.J.S.

HAULTAIN, C.J.S.:—On May 4, 1920, the sheriff of the Judicial District of Saskatoon sold certain land belonging to Elmer James Hyland under a writ of execution. The purchasers were the

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plaintiffs James and Walter Thompson, and the purchase price was $500, and a transfer of the land to the purchasers was duly executed and delivered by the sheriff on May 11, 1920. On May 11, 1920, a notice was served on the sheriff on behalf of Hyland, claiming the land in question as his homestead. Notice of this claim was given by the sheriff to the purchasers and execution creditors, who in reply disputed the claim. On June 8, 1920, a summons was taken out by the sheriff to confirm the sale to the Thompsons. On the return of the summons the application was refused by the local Master, for want of proper material, but leave to renew the application was granted. On June 22, notice of motion for an interpleader order was given by the sheriff to Hyland and the execution creditors, in which Hyland was described as the claimant. This notice called upon the claimant to appear and state the nature of his claim to the goods and chattels seized by the sheriff under the writs of *fieri facias* issued in the several actions mentioned in the style of cause. In his affidavit in support of this application, the sheriff stated that the land had been sold and that $500, the proceeds of the sale, was still in his hands. The application for interpleader was made on June 29, when Hyland was represented by his solicitor Mr. Morse, who took certain objections, which are mentioned by the District Court Judge who heard the application in the following memorandum made by him:—

> Mr. Morse objects to this procedure on the ground that the sheriff has already made an application to confirm the sale, which was dismissed on the ground of insufficient material, and leave was given on that application to renew it at a future date if so advised.
>
> I hold that the fact that the sheriff made the application to confirm the sale, which was abortive, does not of itself preclude him from instituting interpleader proceedings, the material shewing that the property sold is claimed by the execution debtor as exempt from seizure and sale by virtue of the Exemptions Act (see 9 Geo. V. 1918 (Sask.) ch. 24).
>
> Mr. Morse also says that the rights of the execution debtor could have been fully disposed of on an application to confirm the sale, that the proceedings are unnecessary, and he refers to *Abell Engine & Machine Co.* v. *Scott* (1907), 6 Terr. L.R. 302, and *In re Dallin* (1911), 4 S.L.R. 158.
>
> Mr. Morse then applies for an adjournment for the purpose of getting an affidavit.
>
> To stand enlarged for two weeks.

The matter came up again on July 15, when an order was made barring the claim of the claimant and ordering him to pay the

costs of the sheriff and the execution creditors. From this order the claimant appeals on the following, among other grounds:

1. Because the trial Judge should have held that the matters set forth in the motion were not the subject matter of an interpleader action at all. 2. The trial Judge did not have jurisdiction to make the order. 3. The trial Judge erred in holding that the claimant had made or filed any claim with the sheriff against the goods and chattels, the subject matter of the interpleader. 4. The trial Judge erred in holding that the sheriff had not disposed of the subject matter claimed by the claimant before such claim was filed. 5. The sheriff had waived his rights to an interpleader action when he instituted proceedings to have the sale of the land confirmed. 6. The trial Judge erred in holding that the money in the hands of the sheriff could be the subject matter of an interpleader action. 7. The Judge erred in allowing the sheriff to take a two-fold remedy and thereby penalise the claimant with double costs. 8. The Judge had no right to saddle the claimant with costs when he withdrew before the motion was heard. 9. The Judge erred in holding that the sheriff was in a position to bring the subject matter claimed into Court.

On the facts above set out I think that this appeal should be allowed.

In the first place, the claimant never made a claim to any goods and chattels or to the money, the proceeds of the sale of the land, which, by the sheriff's affidavit, was the only property in his hands with regard to which he could interplead. The only claim made was that the land in question was the homestead of the claimant, and therefore exempt from seizure and sale under execution.

There was no claim made to the proceeds of the sale, and consequently no basis for interpleader in respect of the money. The claim to the land was not made the ground for the interpleader application in the notice of motion. The affidavit of the sheriff, upon which the motion for interpleader was made, alleges a sale of the land, a transfer of the land to the purchasers, and the holding of the purchase money by the sheriff. The order barring the claimant's claim either barred a claim that was never made, or barred a claim which was not mentioned in the notice of motion,

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and which, further, in my opinion, could not under the circumstances have been a good ground for interpleader by the sheriff. The whole proceedings were, in my opinion, a nullity, and the appeal should be allowed with costs against the sheriff and the order appealed from set aside. As, according to the notice of appeal, the claimant "withdrew before the matter was heard," there will be no costs of the motion.

LAMONT, J.A.:—During the year 1918 there was placed in the hands of the sheriff of the Judicial District of Saskatoon a number of writs of executions against the goods and lands of the claimant. On January 26, 1920, the sheriff made a return of *nulla bona* in regard to an execution in which J. H. Thompson and W. E. Thompson were plaintiffs and the claimant one of the execution debtors. Acting under instructions from the solicitors of these plaintiffs, the sheriff proceeded to sell a certain quarter-section of land of which the claimant was the registered owner. The sheriff in his affidavit says that, on May 4, 1920, he did offer for sale the interest of the said defendant Hyland in the N-E. ¼-24-29-29-W. 2nd, and that he sold the said land to the highest bidder for $500. On May 11, the claimant Hyland served a notice upon the sheriff claiming the said land as his homestead. On the same day the sheriff issued to the purchasers, who were J. H. Thompson and W. E. Thompson above referred to, a transfer of the said quarter-section, subject to certain encumbrances. On June 8 the sheriff made application to the local Master in Chambers for an order confirming the sale which he had made of the said land. This application was refused because the material presented to the Court was not sufficient, in that it did not show that there had been a return of *nulla bona* made in respect of the execution against the goods of the execution debtor, nor that the land had been advertised for sale as required. Leave however was given to the sheriff to renew the application on proper material. Instead of renewing the application to have the sale of the land confirmed, the sheriff applied to the Judge of the District Court for an interpleader order. On the return of the application the claimant appeared by his solicitor, and contended that the sheriff was not entitled to interplead, he having sold and transferred the land seized. This objection was overruled, the order applied for granted, and the claim of the claimant Hyland was barred. From that decision the claimant now appeals.

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In my opinion the interpleader order should not have been made. Rule 559, in part, reads as follows (Saskatchewan Judicature Act):—

559. Relief by way of interpleader may be granted:

2. Where the applicant is a sheriff or other officer charged with the execution of process by or under the authority of the Supreme Court and claim is made to any money, goods, or chattels, taken or intended to be taken in execution or attachment under any process, or to the proceeds or value of any such goods or chattels by:

. . .

(d) The execution or attachment debtor claiming the benefit of any exemptions from seizure allowed by law.

And Rule 563 reads:

563. The applicant must satisfy the Court or a Judge by affidavit or otherwise:

1. That the applicant claims no interest in the subject matter in dispute, other than for charges or costs; and 2. That the applicant does not collude with any of the claimants; and 3. That the applicant . . . is willing to pay or transfer the subject matter into Court, or to dispose of it as the Court or a Judge may direct.

It will be observed that relief by way of interpleader may be granted where a claim is made in respect of lands taken in execution. But to entitle the sheriff to interplead where the land is claimed, he must be willing to pay or transfer the subject matter into Court. These words import that the sheriff must have possession of the subject matter, unless he makes his application before actual seizure. (Ann. Prac. 1920, p. 1058.)

The subject matter in this case is the land itself. No claim was made to the purchase money for which the land had been sold. The sheriff, having sold the land and given a transfer thereof, was not in a position to pay or transfer it into Court, or dispose of it as the Court might direct. Not being in a position to comply with the rule, he was not entitled to interplead.

Counsel for the claimant also appealed on the ground that the Judge had no jurisdiction to decide the matter in a summary manner. This contention, in my opinion, is correct.

Rule 569 is as follows:—

569. The Court or a Judge may, with the consent of both claimants or on the request of any claimant, if, having regard to the value of the subject matter in dispute, it seems desirable so to do, dispose of the merits of their claims, and decide the same in a summary manner and on such terms as may be just.

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C. A.

HYLAND v. CALDER AND THOMPSON.

Lamont, J.A.

There is not the slightest evidence in the appeal book of any consent on part of the claimants or of the request of any claimant for a summary disposal of the matter. To give the Judge jurisdiction, he must have such consent or request.

In *Harrison* v. *Wright* (1845), 13 M. & W. 316, 153 E.R. 342, it was held that the consent must appear on the face of the order. Without desiring to go that far, I would say that, if the consent or request does not appear on the face of the order, there must be other evidence of it in the appeal book in order to entitle us to hold that the Judge had jurisdiction to make a summary disposition of the matter.

Furthermore, in this case there was no occasion whatever for these interpleader proceedings, as the question of the land being the homestead of the claimant, and therefore exempt from seizure, could have been very properly determined on the application to confirm the sale.

The appeal should, therefore, be allowed with costs, the order made set aside, and the application dismissed.

Elwood, J.A.

ELWOOD, J.A., concurs with HAULTAIN, C.J.S.

Appeal allowed.

B. C.

C. A.

WEIR v. WEIR.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher and McPhillips, JJ.A. October 5, 1920.

DEEDS (§ III F—65)—AGED WOMAN—GRANT OF PROPERTY TO SON—UNDUE INFLUENCE.

The grantor, a woman about 87 years of age, sought the advice of her son the defendant as to the state, condition, and future prospects relative to her real estate which comprised her whole estate, and on his report and advice made a conveyance of it to him.

Macdonald, C.J.A., and Galliher, J.A., held that there was no evidence of undue influence, and the evidence being clear as to the mental disposing power of the mother at the time of the conveyance it should not be set aside notwithstanding a will made some time before, giving the appellants and respondents an equal share in the property after her death.

McPhillips and Martin, JJ.A., held that the trial Judge having found that there was evidence of fraud and undue influence his judgment should not be disturbed, there being evidence to support it.

[*Ingram* v. *Wyatt* (1828), 1 Hagg. Ecc. 384, 162 E.R. 621; *Craig* v. *Lamoureux*, 50 D.L.R. 10, [1920] A.C. 349, 26 Rev. Leg. 306; *Parfitt* v. *Lawless* (1872), L.R. 2 P.D. 462; *Gibson* v. *Jeyes* (1801), 6 Ves. 266, 31 E.R. 1044; *Hoghton* v. *Hoghton* (1851), 15 Beav. 278, 51 E.R. 545, referred to.]

Statement.

APPEAL by defendant from the judgment of Murphy, J., in an action to set aside a conveyance made to the defendant on the ground of fraud and undue influence. Affirmed, Court divided.

Joseph Martin, K.C., for respondent.

MACDONALD, C.J.A.:—I would allow the appeal.

I am in accord with the reasons to be handed down by my brother Galliher. I only wish to add this, that even if the judgment in the main should be held to be right, still the defendant would be entitled to a lien upon the property for the money expended by him in paying off the incumbrance which existed in the form of arrears of taxes.

Macdonald, C.J.A.

MARTIN, J.A., would dismiss the appeal.

Martin, J.A.

GALLIHER, J.A.:—I would allow the appeal.

Galliher, J.A.

In my opinion, the evidence in this case meets the standard alluded to by Sir John Nicholl in his judgment in *Ingram* v. *Wyatt* (1828), 1 Hagg. Ecc. 384, at 401, 162 E.R. 621, at 626, and which is expressed in these words:—

> The averment to be contained in a common condidit is, that the testator was "of sound mind, memory, and understanding, talked and discoursed rationally and sensibly, and was fully capable of any rational act requiring thought, judgment and reflection." Here is the legal standard. When all this can be truly predicated of the person, bare execution is sufficient.

Mr. Martin urged strongly that to support the deed it must be shewn that the grantor had the benefit of the intervention of a third party, in other words, had independent advice and relied upon *Griffiths* v. *Robins* (1818), 3 Madd. 191, 56 E.R. 480. The trial Judge also relied upon this case.

I must confess that the proposition struck me as too broadly stated, but I find the *Griffiths* case so clearly dealt with by Brougham, L.C., in *Hunter* v. *Atkins* (1834), 40 E.R. 43, at 52 and 53 (3 My. & K. 113), that I need do no more than make reference thereto.

Smith v. *Kay* (1859), 7 H.L. Cas. 750, 11 E.R. 299, was also relied on by Mr. Martin but the facts in that case are so different as to constitute it no authority here. *Toker* v. *Toker* (1863), 46 E.R. 724, 3 DeG. J. & S. 487, is in appellants' favour. The evidence in this case seems to me clear that Mrs. Weir, the deceased, was capable of fully understanding what she was doing in deeding her property to the appellants, and that she did what she intended to do without any undue influence on the part of the appellants. The fact that when she found her property getting out of repair and taxes piling up, she sent for her son John Weir, to see what could be done and that when he came and after examination told her the true state of affairs, surely cannot be used against him.

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Mr. Martin made much of the circumstance that when John Weir made his report to his mother, it convinced her that the property was in worse shape than she supposed, that this fact alarmed her and was the inducing cause of her turning it over to him. John Weir did exactly what I think an honest man should do, told her the truth as he saw it and found things. When told she said: "Take the property, I am through with it," or words to that effect.

There is, as I view it, no evidence of undue influence or of any scheme or fraud practiced by John Weir upon the mother. The fact that a will had been made and altered slightly from time to time and which after her death would give to appellants and respondents equal shares in the property, is of course a circumstance which must be taken into consideration, but where the evidence is so clear as to the mental disposing powers of the mother at the time the deed was executed, and in the absence of undue influence, it cannot be said that that fact should weigh very heavily against the deed unless we are to curtail the power of free disposition of property by persons in every way capable of understanding the nature of the transactions they enter into.

McPhillips, J.A.

MCPHILLIPS, J.A.:—This appeal, in my opinion, should be dismissed. The mother, the grantor, conveys her whole estate, consisting of land of some considerable value and rental bearing in the city of Vancouver, to one son and one daughter to the exclusion of the plaintiffs. The plaintiffs in the action are also members of the family, being a son and two daughters and all the parties litigant are legatees under the will of the mother executed on January 4, 1917—all to participate equally in the distribution of the estate. The plaintiffs attack the conveyances made to the defendants—both executed on October 11, 1918—alleging fraud and undue influence.

The mother, the grantor, was of a very advanced age—being about 87 years of age at the time of the execution of the conveyances—yet the evidence does shew that she was of extraordinary mentality up to the end of her life—still there is evidence that she turned to the defendant John Henry Weir for advice as to the state, condition and future prospects relative to her real estate, which may be said to be the whole estate.

Now the report made upon the properties by the defendant John Henry Weir was by no means an optimistic one, and there

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was no independent advice given to the mother. One cannot look into the mind of another—but upon full consideration of the facts the trial Judge arrived at the conclusion that the report upon the properties was not in accordance with the facts and that it was established that there was evidence of fraud and undue influence. I cannot say that the evidence is so conclusive that but one opinion is capable of being taken in view of all the facts and circumstances, still I am of the opinion that it is not a case for disturbance of the judgment arrived at by the Judge (*Coghlan* v. *Cumberland*, [1898] 1 Ch. 904), there being evidence to support it. The transaction which is impeached being *inter vivos* admits of considerations that would not obtain if it was testamentary. (See *Craig* v. *Lamoureux*, 50 D.L.R. 10, [1920] A.C. 349, 26 Rev. Leg. 306, *per* Viscount Haldane; *Parfitt* v. *Lawless* (1872), L.R. 2 P.D. 462.)

In my opinion the present case may be said to be one of constructive fraud, taking all the facts as favourably as possible for the defendants and the facts afford evidence of undue influence and imposition and the burden of proof resting in this case on the defendants has not been discharged. (See Lord Eldon, *Gibson* v. *Jeyes* (1801), 6 Ves. 266, 31 L.R. 1044; *Hoghton* v. *Hoghton* (1852), 15 Beav. 278, 51 E.R. 545; *Cooke* v. *Lamotte* (1851), 15 Beav. 234, 51 E.R. 527, and also see Indermaur & Thwaites' Manual of Equity, 275-304.)

I therefore cannot arrive at the conclusion that the judgment is wrong and should be set aside, I do, however, think that it is a case where in the proper exercise of equitable principles, an account should be directed and the defendants allowed in the taking of the accounts all payments made in respect of the lands for taxes or interest or other out-goings made in the proper preservation and up-keep of the properties, the defendants to be chargeable with all rents and profits actually received, and if there should be a balance in favour of the defendants that the defendants should be held to be entitled to a lien against the lands for any such balance.

I would therefore dismiss the appeal and affirm the judgment with the variation that accounts be taken.

Appeal dismissed by an equally divided Court.

SASK.

C. A.

BOUCHER LIVESTOCK & LAND Co. Ltd. v. ELECTRICAL SUPPLY Co.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont, and Elwood, JJ.A. November 1, 1920.

SALE (§ II A—26)—OF MOTOR—GUARANTEE AGAINST ELECTRICAL OR MECHANICAL DEFECTS—PROOF OF BREACH—EVIDENCE.

A breach of guarantee against electrical or mechanical defects given on the sale of a motor is sufficiently proved if by the evidence each and every cause suggested other than electrical or mechanical defects is expressly negatived as a producing cause of the burning out of the motor.

Statement. APPEAL by plaintiff from the trial judgment in an action for breach of guarantee given on the sale of a motor to be used for crushing grain. Reversed.

D. Fraser, for appellant; *W. H. McEwen*, for respondent.

Haultain, C.J.S. HAULTAIN, C.J.S., concurs with LAMONT, J.A.

Newlands, J.A. NEWLANDS, J.A. (dissenting):—The plaintiffs purchased a motor from defendants under the following written warranty: "We hereby guarantee the 10 H.P. C.C.W. Westinghouse Motor 1120 R.P.W. 220 volts 60 cycle Serial No. 1105 sold you on this date, from any electrical or mechanical defects for a period of one year from date."

The plaintiffs allege that this motor burnt out, and that this burning out was due to a mechanical or electrical defect. None of the plaintiffs' witnesses can say what that defect was, and an expert witness called by them says that he cannot say that either a mechanical or electrical defect caused the burning out of the motor.

In an action for a breach of warranty the burden of proof is on the plaintiff. *Eaves* v. *Dixon* (1810), 2 Taunt. 343, 127 E.R. 1110. In that case the Court held:

> On the warranty of a horse, it is not sufficient for the plaintiff to give such evidence as to induce a suspicion that the horse was unsound; if he only throws the soundness into doubt he is not entitled to recover; the plaintiff must positively prove that the horse was unsound at the time of the sale.

In this case there is no positive evidence that the motor burnt out through a mechanical or electrical defect, and there is, therefore, no evidence of a breach of the warranty.

The appeal should therefore be dismissed with costs.

Lamont, J.A. LAMONT, J.A.:—This is an action on a guarantee given on the sale of a motor to be used for crushing grain. In September, 1918, the plaintiffs purchased an electric motor from the defendants for $275, and received with it the following guarantee: (See judgment of Newlands, J.A., above.)

The motor was duly installed. In its operation the plaintiffs had more or less trouble on account of its overheating until June 10, 1919, when the motor burnt out. The defendants were notified that it had burned out, and they came and took it away and had it still in their possession at the date of the t...

In his evidence Dr. Boucher stated that they had operated the motor in accordance with the instructions given them; that they kept it well oiled and were careful not to overload it, but, notwithstanding these precautions, the motor from time to time became overheated. Thomas Flowers, electrical foreman for the City of Regina, was called for the plaintiffs and gave the following testimony:—

Q. Now, on those facts as you have heard them, would you say that the burning out of this motor was due to an electrical or mechanical defect? A. I would not say because I have never seen it. Q. But on the facts you have heard here? A. Well, it is possible to be a mechanical defect and possible to be an electrical defect. Q. What else might it be? A. Several things, over-load would burn it out; low voltage would burn it out, a one unit fuse on a three circuit if the motor gives smoke it would burn out, the fuses would blow out. Q. Supposing that blew out, would that be an electrical defect? A. That would be an electrical defect certainly if one of the fuses blew out. . . . Q. The motor would then be electrically defective? A. Practically speaking, yes. Q. This was a 10 horse power motor and the evidence is that 25 bushels per hour were put through the crusher; what would you say in regard to that as an over-load? A. Oh, it was not overloaded.

Further on he said, "the burning out might be due to a loose connection," but admitted that this would be an electrical defect. As to the low voltage, he stated that he had himself examined the motor the preceding March and found the voltage to be normal.

Counsel for the plaintiffs also put in a portion of the examination for discovery of the defendant Brown, which, in part, reads as follows:—

Q. Is burning out due to a mechanical defect? A. Indirectly, yes. Q. Is it due to an electrical defect? A. Indirectly it might be due to an electrical defect. Q. Explain that? A. If through an over-load or something like that the coils were damaged and then the load were removed from the machine it would roast and burn out, but that would have to be after it was overloaded. Q. Any other cause for burning out? A. Yes, if it had been under water, if wrong fuses had been used, too much load on it, if they didn't oil the bearings, the rotor would drop and burn out the motor. Q. Any other cause? A. That is about all I know.

It was not suggested that the motor had been under water.

No evidence was given on behalf of the defendants. The trial Judge held that the evidence did not establish that the

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burning out of the motor had been caused by an electrical or mechanical defect. With deference, I am of opinion the Judge erred in so holding.

The evidence established that the burning out of the motor might have resulted from electrical or mechanical defects covered by the guarantee, or it might have been produced by a number of other causes specified by the expert Flowers, and the defendant Brown in his examination for discovery. But it also established that each and every cause suggested other than electrical or mechanical defects had been expressly negatived as a producing cause. Under these circumstances the proper inference to be drawn, in my opinion, was, that the burning out resulted from an electrical or mechanical defect. When the plaintiffs negatived each suggested cause other than those covered by the guarantee, they had made out a *primâ facie* case which, unless rebutted, entitled them to judgment. The witness Flowers stated that he could not say the burning out of the motor resulted from a mechanical or electrical defect because he had not seen it. The defendants had the burned-out motor in their possession. If the burning out had not resulted from a defect covered by the guarantee, all they had to do was to produce the motor to the expert, and ask him to say from its appearance what caused the burning out. This they did not do. They made no attempt to rebut the plaintiffs' *primâ facie* case. The plaintiffs are therefore entitled to damages for breach of warranty. They paid $275 for the motor and the defendant Brown said it was burned out to a crisp.

I would therefore allow the plaintiffs as damages the sum of $275.

The appeal in my opinion should be allowed with costs, the judgment below set aside, and judgment entered for the plaintiffs for $275 and costs.

Elwood, J.A.

ELWOOD, J.A., concurs with LAMONT, J.A.

Appeal allowed.

Re TORONTO SUBURBAN R. Co. AND ROGERS. ONT.

Ontario Supreme Court, Appellate Division, Magee, J.A., Clute, Riddell, Sutherland and Masten, JJ. June 25, 1920. S. C.

DAMAGES (§ III L—241)—EXPROPRIATION—COMPENSATION—ESTIMATE OF —TIME—NOTICE.

In fixing the compensation for lands expropriated under the provisions of the Ontario Railway Act, 1906, the date for valuation is that of the giving of the notice of expropriation and not the registration of the plan of location by the railway company.

[*Toronto Suburban R. Co.* v. *Everson* (1917), 34 D.L.R. 421, 54 Can. S.C.R. 395; *City of Edmonton* v. *Calgary and Edmonton R. Co.* (1916), 30 D.L.R. 222, 53 Can. S.C.R. 406, 22 Can. Ry. Cas. 182, followed. See also annotation, 1 D.L.R. 508.]

Statement. APPEAL by the railway company from an order of Middleton, J. (1919), 46 O.L.R. 201, on a special case stated in an expropriation proceeding. Affirmed.

R. B. Henderson, for appellant.

D. J. Coffey, for respondents, Ford and Roome.

J. M. Bullen, for respondent Rogers.

Clute, J. CLUTE, J.:—This case came on for hearing on the 10th October, 1919, at a weekly sittings of this Court, upon a special case, in the presence of counsel for the Toronto Suburban Railway Company, the claimants Ford and Roome, and W. T Rogers. I take the facts as stated in the judgment of Mr. Justice Middleton, delivered on the 16th October, 1919, upon the special case. He declared that there should be an arbitration to determine "the compensation to be paid by the railway company to the claimants Ford and Roome, respectively, for the portion of their lands respectively taken and the injurious affection of their respective remaining lands, such arbitration to proceed upon the basis of a taking on the 30th May, 1913," with costs.

This appeal is from that judgment. In the notice of appeal objection is taken (1) that the learned Judge holds that the distinction between the case of *Toronto Suburban R.W. Co.* v. *Everson* (1917), 34 D.L.R. 421, 54 Can. S.C.R. 395, and *City of Edmonton* v. *Calgary and Edmonton R.W. Co.* (1916), 30 D.L.R. 222, 53 Can. S.C.R. 406, 22 Can. Ry. Cas. 182, is to be found in the difference between the Ontario Act and the Dominion Act, and the appellant company endeavoured to controvert this finding.

In his reasons for judgment, the learned Judge says (46 O.L.R. at pp. 205, 206): "In *Toronto Suburban R.W. Co.* v. *Everson*, 54 Can. S.C.R. 395, 34 D.L.R. 421, the Supreme Court of Canada

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decided that the governing statute was the Act of 1906. In the same case it was also determined that the giving of the notice of expropriation, and not the registration of the plan, was the taking of the lands, which first conferred a right upon the railway company. When it is borne in mind that the filing of a plan not only imposes no obligation upon the railway company, but authorises it to take any land within the limits of deviation provided (sec. 59 (13) of the Act of 1906), i.e., one mile on each side of the line as originally projected, the reasonableness of this holding can be appreciated."

He then points out that "in *City of Edmonton* v. *Calgary and Edmonton R.W. Co.*, 53 Can. S.C.R. 406, 30 D.L.R. 222, a case under the Dominion Railway Act, it was held that under that Act, 'by the deposit of the plan,' the owner 'was divested of the power to dispose of its property, within the limits of the right of way: the land was put *extra commercium*. The deposit of the approved plan with the registrar fastened a servitude upon the land taken and gave the company a statutory right to acquire a complete title to it for railway purposes:' *per* the Chief Justice (30 D.L.R. at 225.) 'It was, in my opinion, not within the power of the land-owner, after the deposit of the location plan, etc., in anywise to affect the land thereby designated as that which the company intended to acquire for its right of way so as to interfere with the right of expropriation or to render its exercise more burdensome or less advantageous to the company:' *per* Anglin, J., at 226. The same Court that declared this to be the meaning of the Dominion Act having immediately thereafter declared the notice of expropriation under the Ontario Act of 1906 to be the first proceeding that gave the railway company any right, it follows that the land was not, before the 5th May, 1913, *extra commercium*, and that all transactions prior to that date must be given effect to."

Counsel for the appellant company contended that in effect this decision was wrong, and that Rogers, the prior owner of the block in which Ford and Roome claimed interests, was the only person with whom arbitration proceedings could or should be had, and that distinct arbitrations with the parties who became owners prior to expropriation was not the proper course and practice under the Act, and that therefore the judgment which directed the arbitration with these claimants is erroneous.

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Clute, J.

I agree with Mr. Justice Middleton (46 O.L.R. at p. 207) that these two purchasers, Ford and Roome, "are entitled to have the arbitration proceed to determine the compensation to be paid to them respectively, on the footing that the railway company had offered to them respectively amounts mentioned in the schedule to the order of the 30th May, 1913—the value to be determined as of the date of service of the notice of expropriation."

Here, as in the *Everson* case, the Act of 1906, as amended by an Act of 1908, 8 Edw. VII. ch. 44, is the Act to be looked to, for the reason that the Act of 1913 came into force on the 1st July, 1913, and notice of expropriation was given on the 5th May, 1913—in other words, prior to the last-mentioned Act coming into force. I think it perfectly plain from the judgment in the *Everson* case that the Act of 1906, as amended, evidently contemplates a valuation as of the date of the notice.

In my opinion, and under the authorities referred to in his judgment, Middleton, J., was right in the order he made directing arbitration, and this appeal should be dismissed with costs.

Magee, J.A.

MAGEE, J.A., agreed with CLUTE, J.

Sutherland, J.

SUTHERLAND, J.:—For the reasons stated therein, I am of opinion that the judgment of Middleton, J., is right, and I agree that this appeal therefrom should be dismissed with costs.

Masten, J.

MASTEN, J. (dissenting):—This is an appeal by the railway company from the order of Middleton, J., dated the 16th October, 1919, pronounced in Single Court on a special case stated by the parties.

The claimants, Roome and Ford (respondents), are persons interested in lands taken by the railway company under its compulsory powers.

As the facts are fully set forth in the judgment appealed from, which is reported in 46 O.L.R. 201, they need not here be repeated, but a chronological memorandum of dates may be convenient.

27th March, 1911.....Rogers, as owner of a block of land, agreed to sell certain lots to one Clements, not a party to this application.

16th May, 1911.....Clements agreement registered in the registry office.

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3rd August, 1911.....The railway company deposited its plan of location in the registry office.

4th August, 1911.....The railway company published notice of such deposit.

26th August, 1911.....Rogers's plan of a subdivision of these lands was filed in the registry office.

9th May, 1912.....Roome agreed to purchase from Rogers two lots — agreement never registered.

21st October, 1912.....Ford agreed to purchase two lots.

7th November, 1912.....Ford registered his agreement.

5th May, 1913.....Railway company served on Rogers notice of expropriation.

10th May, 1913.....Railway company served notice for immediate possession.

Subsequent to 10th May, 1913. The railway company first received actual notice of the sales by Rogers to Roome and Ford.

The questions raised by the special case are as follows:—

(1) Was the registration of the Clements agreement (instrument No. 10475) on the 16th May, 1911, above referred to, notice to the company of the plan of subdivision 1602? And, if so, what, if any, effect will such notice have on the question at issue between the parties herein?

(2) As to effect (if any) of the deposit of the said plan of right of way upon:—

(a) Purchasers purchasing prior thereto, but who did not record specified notice thereof.

(b) Purchasers who purchased subsequent to the deposit and who did not record notice thereof.

(c) Purchasers who purchased subsequent to the filing of the company's plan and subsequent to the recording of the owner's plan, but before the giving of the notice of expropriation.

(3) What effect upon the registration of the said plan of right of way has the fact that the company did not serve notice of expropriation till more than one year after the deposit of its plan.

(4) As to what effect, if any, the deposit of the said plan of right of way has in respect to the streets laid out in the said plan of subdivision, and the consequent severance.

(5) As to what date the damages to the different respective classes should be assessed as against the railway company for the taking of the said lands.

(6) As to whether the compensation should be determined in one arbitration, to which the registered owners only are parties, or whether the company is bound to arbitrate with each owner whether registered or not.

The order or judgment appealed from provides as follows:—

"1. This Court doth declare that there should be arbitration to determine the compensation to be paid by the railway company to the claimants Ford and Roome respectively for the portion of their lands respectively taken and the injurious affection of their respective remaining lands, such arbitrations to proceed upon the basis of a taking on the 30th of May, 1913."

It is not contested that the statute governing the present controversy is the Ontario Railway Act, 1906, as amended in 1908, and that the more important sections of that Act bearing on the present application are sec. 2, sub-sec. 8, and secs. 61, 66, 67, and 68.

By its appeal the railway company seeks to have it declared that its right arose on the 3rd August, 1911, when its plan was deposited in the registry office, and that the respondents took subject to the prior right of the railway company acquired by it on the filing of its plan, with the result that there should be only one arbitration, namely, that founded on the notice of expropriation given to Rogers on the 5th May, 1913.

The crucial point in the case is, when did the right of the railway company as against purchasers from Rogers arise? Was it on the deposit of the plan or was it when the railway company served written notice of expropriation on Rogers?

In the first event, the right of the railway company would be superior, and the purchaser must come in under the Rogers arbitration. In the second event, having regard to the dates as above set out, Ford and Roome would be owners in priority to the railway company, and their rights as such would have to be

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individually expropriated in the ordinary way; this last statement, however, is subject to Mr. Henderson's first point, to which I shall advert later.

The judgment in the Court below adopts the latter conclusion, based on two cases recently determined in the Supreme Court of Canada, namely, *City of Edmonton* v. *Calgary and Edmonton R.W. Co.*, 53 Can. S.C.R. 406, 30 D.L.R. 222, and *Toronto Suburban R.W. Co.* v. *Everson*, 54 Can. S.C.R. 395, 34 D.L.R. 421. In view of the opinion expressed in the case now under review, a critical examination of these two decisions of the Supreme Court becomes necessary.

The *Edmonton* case depends on sec. 153 of the Dominion Railway Act of 1903. The corresponding section of the Ontario Railway Act of 1906, 6 Edw. VII, ch. 30, is sec. 67. For convenience of consideration I have placed these two sections in parallel columns:—

Dominion Act, 1903, sec. 153.	*Ontario Act, 1906, sec. 67.*
"The deposit of a plan, profile and book of reference, and the notice of such deposit, shall be deemed a general notice to all parties of the lands which will be required for the railway and works; and the date of such deposit shall be the date with reference to which such compensation or damages shall be ascertained."	"The deposit of a map or plan and book of reference, and the notice of the deposit, shall be deemed a general notice to all such persons as aforesaid of the lands which will be required for the railway and works." To which the decision in the *Everson* case adds:— "And the date of serving notice under sec. 68 shall be the date with reference to which such compensation or damages shall be ascertained."

It is common ground that the Ontario Railway Act contains no express provisions in regard to the date at which compensation is to be ascertained; and, in consequence, the question had to be determined by the Supreme Court of Canada on a consideration generally of the provisions of the Ontario Railway Act.

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In determining the date with regard to which the arbitrators are to fix the compensation, it was relevant to consider the date when the railway company began to take active steps to acquire possession of the lands, and that point is considered in the judgment of the Court, but the fact that the compensation is to be assessed as of the date of service by the railway company of notice of taking has no bearing, it seems to me, on the question whether the railway company had at an earlier date, by deposit of its plan, acquired a first claim on the lands to be taken, and imposed a servitude on the owner. It also appears to me that the learned Judges of the Supreme Court did not treat the date at which such servitude is imposed as a determining factor in their conclusions.

Dealing with that question Mr. Justice Anglin says (34 D.L.R. at 429):—

"If the Act of 1906 applies, although notice of the deposit of the plan is by section 67 declared to be general notice to all persons owning lands shewn thereon of the lands required for the railway, until the notice to the owner prescribed by section 68 is given, the land to be taken is not fixed, since the company may desist, or may deviate within the limit of one mile from the line as located on the filed plan (sec. 59, sub-sec. 13). Moreover, this notice must be accompanied by a declaration of the company's readiness to pay a sum certain as compensation for the land or damages, which a disinterested Ontario Land Surveyor must certify to be fair. No other date being mentioned, the compensation here referred to is presumably based upon valuation as of the date of the notice and certificate."

And Mr. Justice Duff, at 423, after demonstrating that the Act of 1906, as amended in 1908, governs, says:—

"Section 68 of the Act of 1906, as amended in 1908, evidently contemplates a valuation as of the date of the notice."

The judgment in review holds that, because the *Everson* case determines that the date with reference to which compensation is to be assessed is the date of notice of expropriation, therefore the Supreme Court (inferentially, I assume) "determined that the giving of the notice of expropriation, and not the registration of the plan, was the taking of the lands, which first conferred a right

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upon the the railway company" and that "the notice of expropriation under the Ontario Act of 1906" was "the first proceeding that gave the railway company any right."

With the greatest respect, I am unable to deduce these conclusions from the *Everson* case. While in the *Everson* case the attention of the Court was confined to the date which the arbitrators are to observe in fixing the amount of the compensation, in the *Edmonton* case the attention of the Court was directed exclusively to the question of the time when the railway company first acquired a right in the lands—the very question which falls to be determined in the present case. It is manifest that the acquisition of a right by the railway company in the land is one thing and the date at which the compensation is to be fixed quite another thing. They are not necessarily contemporaneous; whether they are, or not, depends entirely upon the terms of the Railway Act. It was held in the *Edmonton* case that the deposit of the approved plan with the registrar fastened a servitude upon the land taken, and gave the company a statutory right to acquire a complete title to it for railway purposes. The result was, that the claim of the railway company was held to be senior to the claim of municipalities in respect to certain highways crossing the railway, which highways had been laid out after the filing of the plan. In the determination of that question no reference whatever is made by the Court to the date with regard to which compensation is to be assessed. The decision seems to me to be based solely on the first clause of sec. 153, which is substantially identical with sec. 67 of the Ontario Act. While the *Edmonton* case was determined under the Dominion Railway Act, yet a comparison of its provisions with those of the Ontario Act, above quoted, leads me to the conclusion that there is no substantial difference in the statutes, and that nothing in the *Everson* case suffices to displace the decision in the *Edmonton* case, by which we must, I think, be governed.

It appears to me, moreover, that sec. 66 of the Ontario Act affords indication that the deposit of the map or plan and book of reference itself conferred upon the railway company a right over the lands shewn on the map or plan and in the book of reference. That section evidently contemplates that when a railway company goes to an owner pursuant to that section, it does not

go seeking to buy a right of way which the owner may utterly refuse, but, on the contrary, that it goes with a superior right over the lands shewn on the map or plan, for the purpose of negotiating the terms of compensation which it is to make for the land taken.

The subsequent provisions of sec. 68 only come into play in case of disagreement regarding such terms.

This disposes of the main question, and I would answer the questions submitted for the opinion of the Court as follows:—

Question (*1*): The registration of the Clements agreement was constructive notice only to the railway company of the plan of subdivision, and under the provisions of the Ontario Registry Act such constructive notice does not affect the rights of the railway company: *Re McKinley and McCullough* (1919), 51 D.L.R. 659, 46 O.L.R. 535.

Question (*2*): The deposit of the plan of the right of way gave to the railway company priority over any purchaser, whether prior or subsequent to the deposit of the plan, except a purchaser who had purchased and registered prior to the deposit of the plan, or a purchaser of whose right the railway company had actual notice prior to the deposit of the plan.

Question (*3*): The rights of the parties are governed by the statute of 1906, as amended in 1908, and the fact that the railway company did not serve notice of expropriation until more than one year after deposit of the plan has no bearing.

Question (*4*) is sufficiently answered by the above.

Question (*5*): The damages to Roome and Ford should be assessed as of the date of the service on Rogers of the notice of expropriation, that is to say, the 5th May, 1915.

Question (*6*): Compensation should be determined in one arbitration, but the purchasers should be allowed to intervene in such arbitration, and the arbitrators should so mould the arbitration as to determine the rights of Ford and Roome in the same manner as though they were claimants in separate arbitrations.

I have not overlooked Mr. Henderson's first argument, that Rogers was served with the notice of expropriation and for immediate possession, and that he was, and still is, the registered owner, having an interest in the property; that, under sec. 2, clause 18,

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he is an owner, and under sec. 61 entitled to convey, and that the railway company is empowered to deal with the owner as described in the Act. In view, however, of the conclusions which I have reached as above, I find it unnecessary to discuss further this phase of the case.

The appeal should be allowed, and an order issued in the terms indicated above. Costs of the motion below and of this appeal should be costs to the railway company in any event of the arbitration.

Riddell, J.

RIDDELL, J., agreed with MASTEN, J.

Appeal dismissed.

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Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin, Brodeur and Mignault, JJ. November 2, 1920.

EVIDENCE (§ VI A—515)—WRITTEN GUARANTEE TO BANK—CONDITIONS STIPULATED FOR AT TIME OF SIGNING—ORAL EVIDENCE OF—CONDITION PRECEDENT—CONDITION SUBSEQUENT—CONDITION NOT FULFILLED—LIABILITY OF GUARANTOR.

The respondent at the time of signing a guarantee to the bank stipulated that unless and until certain notes to the bank upon which he was liable as an endorser were paid, the guarantee given by him should not become operative or effective. Held, *per* Davies, C.J., and Idington and Brodeur, JJ., that the stipulation was a condition precedent, which could be proved by parol evidence and not having been fulfilled the respondent was not liable on the guarantee. *Per* Duff, Anglin and Mignault, JJ., that the stipulation was at most a condition subsequent or a term of the contract and parol evidence in proof of it was not admissible.

Statement.

APPEAL by plaintiff from the judgment of the British Columbia Court of Appeal in an action on a guarantee given to the plaintiff. Affirmed by equally divided Court.

The judgment of the British Columbia Court of Appeal, which is affirmed is as follows:

Macdonald, C.J.A.

MACDONALD, C.J.A.:—I would dismiss the appeal.

The evidence of the defendant as to the condition upon which he signed the guarantee sued on is as follows:—

He said:—

"I am prepared to sign this on the distinct condition of you seeing that the two notes, the Bank of Montreal note and the Douglas note, are paid out of the advances to be raised from this guarantee. I want it distinctly understood that if they are not paid this does not go, you understand that," and with that Mr. Perkins nodded a sort of approval and I took up the pen and filled up the body of the guarantee, including the amount and the date, and signed it in the presence of Mr. Russell.

(And again): "I was emphatically clear that the condition attached to the use of the guarantee was that those notes were to be paid or it could not be used."

Some argument turned on the meaning of the last sentence, but I interpret the words to mean that the defendant made it emphatically clear to Perkins that the conditions attached to the use of the guarantee was that these notes were to be paid. Russell says: "He (the defendant), told Mr. Perkins in the most positive way that he would sign it on the distinct understanding and condition that the moneys forthcoming were to be used to pay off those two notes." The denial of this evidence is not very emphatic, but the denial is of little importance in view of the fact that the trial Judge accepted the above as the truth.

The defendant's story of why he insisted on the condition aforesaid is entirely reasonable. He, with a number of others politically interested in the fortunes of the Vancouver *Sun*, a newspaper published by the Burrard Publishing Co., Ltd., had before this time endorsed two promissory notes of the said company, payable one to the Bank of Montreal for $10,000, the other to a Miss Douglas for $15,000. These were overdue and I think the evidence shews that they were pressing obligations. Before, therefore, committing himself to a fresh obligation on account of the company, he demanded as a condition thereto that these two notes should be retired.

It was suggested in argument by appellant's counsel, that it was absurd to suppose that the appellant would accept respondent's obligation to pay $5,000 with a condition attached that the appellant should pay off an indebtedness of $25,000 for which the respondent was liable. But this suggestion overlooks the fact that the notes held by the Bank of Montreal and Miss Douglas were endorsed by a large number of others than the respondent, and that the amount which he might be called upon to pay by reason of his said endorsement might be very much less than the sum of $5,000, and also that these others were giving guarantees similar to the one in question.

It was also submitted by appellant's counsel that respondent's subsequent conduct was inconsistent with the defence which he now sets up. He signed the document (Ex. 10), in which he was described as a "guarantor" approving of the sale of the

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Burrard Company's assets but he has sworn and the Judge has found that he did this without prejudice to any defence which he might have to set up against the guarantee.

To my mind the decision of this case turns on the credibility of the parties and the witnesses, and after careful consideration of the evidence, I am unable to say that the trial Judge came to a wrong conclusion. I think he came to the right conclusion.

MARTIN, J.A., would dismiss the appeal.

McPHILLIPS, J.A. (dissenting):—The respondent was sued upon a guarantee in writing for the sum of $5,000, given to the appellant (the bank) in respect to the indebtedness that might be due and owing to the appellant by the customer, the Burrard Publishing Co. The form of guarantee may be said to be the usual bank guarantee and to secure to the bank any ultimate balance due to the bank. The appeal is taken by the bank from the judgment of Murphy, J., who dismissed the action upon the ground that the guarantee was executed upon a condition which was, that the bank was to see that a certain indebtedness upon which the guarantor (the respondent) was liable would be discharged. The indebtedness was by way of the endorsement of certain negotiable paper by the guarantor, also being indebtedness of the Burrard Publishing Co., and that by reason of non-performance of this condition the bank was disentitled to recover upon the guarantee. The evidence is very voluminous, but, in my opinion, the case is indeed a simple one, and the documentary evidence is all in favour of the bank and the bank should succeed upon this appeal. The attempt is made, upon parol evidence, to destroy the efficacy of the guarantee—which I do not consider, upon the special facts of the case, is permissible nor do I consider the parol evidence at all within the bounds of probability when all the attendant circumstances are taken into consideration. It would take too long to, in detail, elaborate all the evidence, but it may be generally stated that the whole transaction was one that had to be arranged with the head office of the bank as I note it was not an arrangement that was left to be dealt with or decided by the local manager at Vancouver, and this was well known to the guarantor—the local manager merely carried out the instructions given to him by his principals—the bank—from the head office and the guarantor knew and understood, and it

was made plain to him, the conditions upon which the bank would make further advances and the guarantee of respondent and others was essential to obtain further advances to the publishing company. It is significant to also note that the respondent (the guarantor) was the solicitor as well as a director of the publishing company and the active agent in behalf of the publishing company to obtain the further advances from the bank. After the lapse of 3 years, the respondent repudiates his liability to the bank and during this time the assets of the publishing company have, with his assent, passed to another company. The facts sworn to by the respondent, and agreed with by Russell, who was in company with the respondent when the guarantee was signed are. that in the presence of Perkins, the local manager of the bank, the respondent stated, before signing the guarantee, that two certain promissory notes, upon which he was liable, as endorser, being representative of indebtedness of the publishing company for $10,000 and $15,000 respectively would be paid out of the further advances to be made to the publishing company upon the security of the respondent's guarantee as well as that of others. I here set out the evidence of the respondent when giving his evidence—under examination-in-chief—Perkins, the local manager of the bank, is the person he is referring to:—

The Witness: He wanted me to sign the individual guarantee stating that I was one of the last ones and it was rather holding up the deal and wanted me to sign. I demurred, and I said that I wanted to see Mr. Perkins before I would sign that, that I wanted to put it squarely up to him as to payment of these two notes. With that Mr. Russell said: "Come on down to the bank." So we went down to the bank together and I saw Mr. Perkins in Mr. Russell's presence, and I put it up flatly to him and as that is more or less the crux of the matter I will endeavour to give the conversation in as nearly as accurate language as I can do it, certainly the effect of it. I said: "I am prepared to sign this (meaning the bank guarantee form) on the distinct condition of your seeing that the two notes, the Bank of Montreal note and the Douglas note, are paid out of the advances to be raised from this guarantee. I want it distinctly understood that if they are not paid this does not go. You understand this." And with that Perkins nodded a sort of approval and I took up the pen and filled up the body of the guarantee including the amount and the date and signed it in the presence of Mr. Russell who was sitting in a chair right next, and I handed it to Mr. Perkins in his own office in the Standard Bank. There was not the slightest chance for misunderstanding. I went there for one purpose only, as I was from the start reluctant to go on it. I only went on it to relieve myself from a much heavier liability. Mr. Perkins was familiar with the matter and knew that the notes were not paid. *I would have been a fool to sign without taking the precautions which I went down for*

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that one purpose to see that those notes were to be paid. Q. And Mr. Russell was there when that took place? A. He was there when the conversation took place. Q. Now was there any chance for you to be mistaken about that? A. Not the slightest. Mr. Taylor: This is cross-examination. Mr. Craig: I might mention that Mr. Perkins on the examination for discovery swears that he had not seen you until long after the guarantee was signed. A. He swears that I did not see Mr. Russell until he gave him his cheque. Q. Knowing what Mr. Perkins has sworn in that subject have you any doubt about your evidence? A. None whatever. I was emphatically clear that the condition attached to the use of the guarantee was that those notes were to be paid or it could not be used. I did not have to go on the thing, I dictated the terms, I did not wait for Perkins to ask me to go on, I did the dictating of the terms on which I signed the guarantee. As a matter of fact at the last minute I nearly refused to sign that. Mr. Hugh Fraser did. Mr. Taylor: I understand that is subject to my objection, my Lord as to this varying a written document. The Witness: I am not attempting to vary. Mr. Taylor: It is your counsel, not you. You are a witness this time. Mr. McCrossan: I am sorry, my Lord, I have never been in the box before.

Now, I do not purpose to enter into any mathematical calculations as to the liabilities of the publishing company or its *pressing* liabilities which have to be met, but it is clear and beyond question that the further advances obtained from the bank upon the respective guarantees were obtained to discharge *pressing* liabilities and made to keep the publishing company on foot and the respondent's efforts were all in that direction and it would not appear that the $10,000 and $15,000 notes were being pressed at or about the time of the advances and it is clear that if these notes were paid at the time of the further advances the available moneys derived would be practically exhausted—the facts demonstrated the idle contention made or that there is any probability in what is stated. It might well be said that at most, if the respondent's story of what took place with Perkins was to be accepted, that a collateral contract was entered into whereby the bank agreed to see to the retirement of the two notes and that the action the respondent might have would be for a breach of a collateral contract, but that is not this action nor do I say that it would be sustainable. The counsel for the respondent took two positions in the argument at this Bar—firstly, he strongly insisted that the guarantee was in escrow with the local manager, and secondly, that it was given subject to a condition not performed and therefore not enforceable. This is clear, the bank would accept nothing but the usual bank guarantee—that was the decision of the head office and well known to the respondent.

He was advised of this. Further this was known to Russell, and the extraordinary contention is, that, with all this knowledge, and the giving of the guarantee in the usual form, the bank has now to have imposed upon it a condition nowhere to be found in the document. It is inconceivable that any such condition was agreed to and Perkins, the local manager, denies the respondent's story throughout, and the respondent's conduct rebuts in the strongest way any such condition being agreed to. The long delay and subsequent acknowledgment of his guarantee to the bank (although it is attempted to weaken this by saying that whilst he outwardly and openly admitted to the guarantee to the bank and to the knowledge of his associate guarantors he privately advised Perkins that he repudiated it), is a circumstance that cannot be overlooked in weighing the evidence. The bank was in no way anxious to make these new advances, in fact was prepared to accept its loss but the propulsion was all from the publishing company, and the respondent was the most active in the matter, to obtain the further advances. All that is alleged has such a badge of improbability, without otherwise describing it, that it is impossible, with respect, to agree with the conclusion of the trial Judge. To well indicate what the position was, it is only necessary to read the terms of the trust deed entered into by Hepburn, as trustee—to which the bank and the guarantors were parties—the respondent being one of the guarantors. It is there recited that the bank would not make the further advances save on the terms therein mentioned, one being that the written guarantee was to be in Form No. I, L.F.—the usual bank guarantee—and Hepburn was to be sole manager of the funds realised upon the guarantees and to act in concert with the bank. Not a word is set forth that out of these moneys there is first to be discharged no less a sum than $25,000 upon which the respondent alone was personally responsible—the moneys were only obtainable upon the collective guarantee—but what is put forward is that the respondent giving a guarantee for $5,000 is to be discharged of a debt of $25,000 and his fellow-guarantors are to contribute in the payment of it. Again we have a circumstance of great improbability. All these matters are pertinent when weighing the evidence. The truth is, that the whole transaction of obtaining the further funds would have been illusory and

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frustrated at the outset if any such agreement had been come to. Then is it reasonable to find that such was agreed to? I find it impossible to so conclude. The respondent knew that the notes he contends should have been paid, were not paid and allowed 3 years to eapse before he repudiates his liability. It is true he says that he spoke to Perkins on occasions about the matter but even that was after a long lapse of time. There came a time when it was necessary to carry out a sale of the assets of the publishing company and the assent of the guarantors thereto was asked for by the bank—and what do we find the respondent doing? He, along with his fellow-guarantors, addresses the bank in the following terms:—

The Standard Bank of Canada,

Vancouver, B.C. July 13th, 1915.

The undersigned guarantors for the indebtedness of the Burrard Publishing Company, Limited, hereby approve of the sale of the assets of the said Company to E. C. Sheppard for Forty thousand Dollars gross, made up of cash to Bank $24,281.62 and preferred claims $15,718.38.

Vancouver, B.C.
July 8th 1915.
R. S. Ford.

F. C. Wade, L. H. Guertin, F. R. McD. Russell, A. M. Pound, E. Keenleyside, G. E. McDonald, W. Hickey, T. F. Paterson, Chas. E. Campbell, Robert Kelly, C. B. Sword, Geo. E. McCrossan.

It is true he says that he signed it without prejudice—protecting himself, as he states, by a telephone message, so advising Perkins. This, however, is denied by Perkins and, at this stage, let me say that, quite apart from any contention made by the respondent, the contract the respondent made was with the bank direct, not a contract made with the agent of the bank within the scope of his agency. It was well known to the respondent that the whole transaction was one beyond the authority or scope of agency of the local manager, Perkins, and it is impossible for the guarantors to build anything upon the alleged agreement with the local manager, even if any such contract could be said to be established.

Now in this case, unquestionably, the burden of proof was upon the respondent, the guarantee is to the bank. The bank made the advances upon the security of the guarantee, and it was for the respondent to displace the legal effect of the guarantee. That burden of proof, in my opinion, the respondent has

failed to discharge. Here we have a solicitor and director of a company actively negotiating with a bank for advances to be made to prevent the insolvency of a company of which he is a solicitor and director and in connection therewith finds that he must get the assent of the head office of the bank. The head office states its terms, *i.e.*, it must have the usual bank guarantee upon the usual form. The guarantee is given in this form, and the advances made. When called upon to pay under the guarantee it is alleged that the guarantee is without legal effect because of some condition not being performed, a condition never made known to the bank at all and to which it was not a party. Even if agreed to by the local manager it would have been valueless upon the facts of the present case, but it is denied and all the probabilities are against any such agreement being made. (*Banbury* v. *Bank of Montreal*, 44 D.L.R. 234, [1918] A.C. 626, Lord Parker of Waddington at 294, Lord Wrenbury at 303.) Here we have the delivery of the guarantee to the bank and if anything what is contended for is to vary the written contract by parol evidence, that is to in effect insert a provision that the guarantee is to be of no effect unless the two notes for $10,000 and $15,000 be first paid.

In passing, it may be remarked, that before this action was brought the notes were in fact paid, it is true not out of the funds advanced to the publishing company upon the guarantees, but was that even the agreement sought to be set up? Assuredly the main object was to so finance the publishing company that insolvency would be prevented and the debts to be paid were the pressing debts—not to go and voluntarily pay off that which was not pressing and there is no evidence that the two notes were ever in the category of pressing debts. Here, we have a written guarantee acted upon by the bank and what evidence is there to vitiate or render it voidable or void? It cannot be suggested or supported that there was any fraud practised upon the respondent by the bank and failing the establishment of that it is idle to attempt to deny the legal effect of the guarantee.

The guarantee upon the evidence, in the present case, was to take effect when given—even the contention of the respondent does not prove otherwise—the moneys were to be advanced—they were advanced. The payment of the two notes was some-

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thing to be done at a later time. The case is not within the proposition as put by Anson on Contracts, 15th ed., at 319:

It may also be shewn by extrinsic evidence that a parol condition suspended the operation of the contract. Thus a deed may be shewn to have been delivered subject to the happening of an event or the doing of an act. Until the event happens or the act is done the deed remains an *escrow*, and the terms upon which it was delivered may be proved by oral or documentary evidence extrinsic to the sealed instrument.

In like manner the parties to a written contract may agree that, until the happening of a condition which is not put in writing, the contract is to remain inoperative.

At best, if established, all that the respondent can effectively claim is this—there was a collateral contract that the notes should be paid and if he suffered any damages by reason thereof they would be recoverable or possibly the guarantee would not be enforceable if the notes were outstanding and unpaid but the fact is that when this action was commenced they were not outstanding but paid and it is evident no damages have been suffered.

The present case, rightly viewed, is supported by *Pym* v. *Campbell* (1856), 6 El. & Bl. 370, 119 E.R. 903 (approved in *Pattle* v. *Hornibrook*, [1897] 1 Ch. 25). There Earle, J., said (at p. 373):

The point made is, that this is a written agreement, absolute on the face of it, and that evidence was admitted to shew it was conditional: and if that had been so it would have been wrong. But I am of opinion that the *evidence shewed that in fact there was never any agreement at all* . . . The parties met and expressly stated to each other that, though for convenience they would then sign the memorandum of the terms, yet they were not to sign it as an agreement until Abernethie was consulted. I grant the risk that such a defence may be set up without ground; and I agree that a jury should therefore always look on such a defence with suspicion; but, if it be proved that in fact the paper was signed with the express intention that it should not be an agreement, the other party cannot fix it as an agreement upon those so signing. The distinction in point of law is, that *evidence to vary the terms of an agreement in writing is not admissible, but evidence to shew that there is not an agreement at all is admissible.*

Here the attempt is to vary the terms of the guarantee and the evidence is not admissible—it is idle to consider, upon the facts of the present case, that there never was a guarantee. I am, therefore, of the opinion that the appellant should have been given judgment upon the guarantee—the respondent not establishing any defence to the action which could be given effect so as to vitiate the guarantee and render it void or voidable in law.

I would, therefore, allow the appeal.

S. S. Taylor, K.C., and *F. G. T. Lucas*, for appellant.

C. W. Craig, K.C., for respondent.

DAVIES, C.J.:—Accepting as I do, the evidence of the respondent defendant as to the facts and conditions under which the guarantee sued upon was handed to the bank, maintained as it was by the trial Judge and confirmed by the Court of Appeal, ante p. 238, I cannot entertain any doubt that this appeal should be dismissed with costs.

After reading the evidence of all the parties, I cannot reach any other conclusion than that both parties, the guarantor McCrossan and the bank manager, understood that the stipulation which respondent swore he made at the time of his signing the guarantee was clearly made as a condition precedent to any liability arising under it against him. That stipulation was substantially that, unless and until the notes to the Bank of Montreal and Miss Douglas upon which the respondent was liable as an endorser were paid, the guarantee given by him should not become operative or effective.

Both the trial Judge and the Court of Appeal reached that conclusion and, so far from feeling myself justified in reversing their finding, I find myself in complete accord with them.

As to the contention that the language used by the defendant should be construed as a condition subsequent and so not provable by oral evidence, I am, with respect, unable to appreciate it. Such a construction seems to me to involve plainly a repudiation of the simple and plain, but, to my mind, unequivocal meaning of the language used. To attribute to it any other meaning than what I construe as its plain and obvious meaning is to defeat the very object the defendant had in view in signing and handing over his guarantee, namely, the express limitation of his liability for the debts of the company he was guaranteeing. He was quite willing to remain surety to the extent of $5,000 but he was not willing to add to this existing liability on the Bank of Montreal and Douglas notes another $5,000 or more. Therefore, he insisted that he signed and handed over the document on the distinct condition that, unless and until these notes were paid, his guarantee, which he was about to sign, should "not go." "I want it distinctly understood," his evidence was "that if they (that is the two notes) were not paid, this does not go,

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you understand that." The language was not, perhaps, classical, but it was plain and, to my mind, has only one meaning which was understood alike by the guarantor signing, and the manager receiving, the guarantee, and that was that the guarantee was not to become operative or effective unless and until the notes were first paid and the defendant's liability on them discharged.

IDINGTON, J.:—I am, after the most careful consideration of the arguments which appellant's counsel presented, unable to find any good reason for reversing the judgment of the Court of Appeal upholding that of the trial Judge upon both the facts and the relevant law.

The first question, and the serious one for consideration, is whether respondent and his witness Russell were telling the truth. It seems to me from the outset that it was extremely improbable that two such men could be found to have deliberately conspired together to frame such a perjured story.

Yet counsel with ability and pertinacity persisted in presenting most elaborate argument intended to demonstrate that such was the case; or at all events that they had sworn falsely. And I cannot see, in light of the evidence of Perkins, the appellant's manager of its Vancouver agency, any alternative view save that Perkins has forgotten, and that the others are stating the facts.

He, even in error, may only be chargeable with absolute want of memory as to the incident.

The histories of the relations of the respondent with his former client, the Burrard Publishing Co., and with his fellow shareholders and directors and fellow guarantors, were each and all relied upon to demonstrate the falsity of the story.

A consideration of each and all of the incidents in those histories and the several documents respectively framed in each of such connections, has led me to the conclusion that there is really nothing therein to support either the charges of fraud or fraudulent intent demonstrated by any alleged inconsistency between the said several documents and the sworn testimony of respondent.

There is, in regard to all of them, except one I am about to refer to, complete harmony if we assume, as the circumstances tend to prove, that all concerned, or nearly so, had contemplated the payment of the Bank of Montreal and Miss Douglas out of the new line of credit expected from the appellant bank as the result of either of these various schemes.

The one exception that struck me at first as inconsistent was that of the respondent assenting to Ex. 10. But when we read his explanation that he did so to accommodate Perkins, the said manager, in working out his plan, and that expressly on the understanding that doing so was to be without prejudice to the very position respondent then contended for in way of repudiation of the liability now in question and still so stoutly maintained, and which reservation Perkins does not venture to contradict, I am forced to the conclusion that there is no alternative but to accept the respondent's story of the condition on which he left his guarantee in the hands of said Perkins.

But let us turn for a moment to Perkins and see how dubious he was on his cross-examination for discovery, though positive on same points elsewhere.

He says:—

Q. Did you tell Mr. Russell that the arrangement was between the company and the bank before he got the bank form guarantees signed up? A. I don't know. Q. If you don't know we will pass on? A. Just give me time on that—you like that kind of an answer don't you? Q. I am not trying to hurry you. A. I don't know whether I did or not. Q. Did you discuss with Mr. Russell the contents of this letter which I shew you (producing Ex. 23)? A. I likely knew Mr. Russell at this time, yes. Q. Did you discuss with Mr. Russell the contents of that letter with Mr. Russell before he got the bank forms of guarantee signed up? A. Likely. Q. Did you tell Mr. Russell what was to be done about the $10,000 and the $15,000 note? A. No. Q. Are you sure about that? A. Yes, I wasn't worrying about that. Q. I didn't ask whether you were worrying, but whether you told Mr. Russell what was to be done about them? A. No, I don't remember whether I did or not. Q. Then it may be that you told Mr. Russell about the $10,000 note and the $15,000 note were to be paid out of this money? A. No, I didn't tell him that. Q. That what was to be done was to clear these up—A. No, that is what the Burrard Publishing Co., when they started out to get this, would have liked to have done. Q. And they explained that to you? A. Mr. Ford—yes, that was mentioned. . . . Q. Will you listen to this Mr. Perkins—questions 190, 191 and 192 of your examination for discovery—before I read it you have pledged your oath you never told Mr. Russell anything about the $10,000 note and the $15,000 note being paid out of the moneys being raised? A. That I would pay them? Q. That they were to be paid? A. That is a question—you said a minute ago that I would pay them. Q. What did you tell him? A. I don't know that I told him anything, but I never told anybody I would pay those two notes. Q. Then listen to this—questions 190 to 192 (reading): "Q. Now didn't you discuss with J. A. Russell, before he got the guarantees on the bank's form the question of what was to be done with the money that the bank would advance; and didn't you refer particularly to those two notes for $10,000 and $15,000 to which I have just referred? A. I don't remember, I don't think so, but I don't remember." Q. Will you deny it, I suppose you

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cannot deny it if you don't remember it. A. No I cannot deny it. Q. Now, my instructions are that you told Mr. J. A. Russell and that this $10,000 note and this $15,000 note would be paid out of the moneys that the bank was to advance. What do you say as to that? A. I don't remember whether it was ever mentioned or not. Q. That is what you swore a few weeks ago. A. I don't know, but I swear now that I never said I would pay them.

Another incident of this lack of memory was the forgetfulness of what the general manager had written him on two points, one relative to his taking no guarantee unless it was unconditional, and evidently being accused by Kelly of doing akin to what respondent accuses him of in this case, and impliedly admitting he could not remember in that case what evidently had taken place.

Again in another phase of the case where he speaks as follows:

Q. Wouldn't the discounting of these notes have the effect that there would be that much less of the $50,000 that was to be advanced on the trade paper that the bank was ready to advance. A. Yes. Q. What would be the effect? A. Let me tell you the rest—if you have trade paper, a bank will let anybody increase the amount of trade paper, as long as it is good, above the $50,000; and there possibly was lots of room for it, because at that time they were having difficulty getting enough trade paper to meet their pay roll. Q. So if the company brought that up to $50,000, you would have been entitled to scrutinise it much more closely. A. No, you would scrutinise it anyway, because a lot of paper is brought in that you would not have any use for because they had a line of credit. Q. But when you gave them a line of credit on trade paper, that means that you will accept their ordinary trade paper up to the amount of the line of credit, doesn't it? A. Yes, or over, of trade paper. Q. The effect of having these notes, part of the $15,000, discounted, was that there was that much of the $15,000 already taken up? A. Yes, but I didn't tie them to the $50,000; if they had brought me in any trade paper they could have gone over that.

I am much surprised to find these statements which seem in conflict with the express evidence furnished by the general manager's letter of May 21, 1914, which says:—

As you introduce, it will be impossible to forecast what the future of this company will be, and our first consideration must be to keep the bank in a safe position and which it now appears to occupy, but to this end pay particular attention to keeping the accommodation borrowings within $85,000 and the business paper at a maximum of $50,000, and especially will you be careful to insist that this business paper shall be strictly business paper, and which means given for moneys due the company, and that the various makers are believed good for their undertakings.

It seems to me in light of his assertions that he could exceed that maximum of business paper in discounts and that he put in that class the contributions of friends coming to the rescue of the company and trying to make up the required $15,000 which

the general manager insisted on, by giving their notes for discount at their bank instead of going to another bank to have same discounted, his memory was hopeless.

Accepting respondent's statement, I read it as clearly, in plain Canadian English, making the very express stipulation as a condition precedent that unless and until the notes of the Bank of Montreal and Miss Douglas, upon which respondent was liable as an endorser, were paid, this form of guarantee signed by him and now in question, was not to be effective or in force.

Unless in the millionaire class, why should a man, liable already as an endorser for $25,000, subscribe $5,000 more for such a hopeless client?

I was rather amused, after having listened patiently and attentively to counsel's argument herein as to the meaning of the language used by respondent and his witness Russell being incapable of that kind of condition the respondent contends for, to find in the perusal of Perkins' evidence this summary of its effect which I quote from the same counsel's summary of the evidence: "Mr. McCrossan has stated that at the time he signed the guarantee, Ex. I, he stipulated with you, in your office, that it was on the express condition—or words to that effect—of the Douglas and Bank of Montreal notes being paid first? Was there any such discussion as far as you know?"

The counsel evidently at that stage had become so very much impressed with the same view I take of that evidence, that he found it necessary to rely on the able and elaborate argument founded on other things to lead us to the conclusion it never had any basis on fact and could only be assailed by that line of argument.

Whether or not I misapprehend the situation of the counsel, I have fully considered his argument and conclude that there never was any but the one intention in the mind of respondent, and that was that unless and until the notes in question were paid the form of guarantee submitted to and signed by him was not to become operative.

And I have no doubt Perkins was also impressed in like manner, and, from knowledge he was at the time possessed of, from perusal of documents and otherwise, he looked upon the payment of said

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notes almost as a settled fact in regard to which so many influential men were in same position as respondent, that he need not worry over the matter and thus came to forget it.

In short he should have filed it away for use only when that condition had been thereby complied with.

Of course when a crisis arose he first hesitatingly failed to remember, and later grew more and more positive as men unfortunately will in such like cases.

The case is merely one of fact and that appreciated as I do leaves no question of doubtful law to decide.

I think the appeal should be dismissed with costs.

Duff, J.

DUFF, J., would allow the appeal.

Anglin, J.

ANGLIN, J.:—The trial Judge held that the story told by the defendant as to his interview with the bank manager on the occasion of his delivering the guarantee sued on should be accepted. The provincial Appellate Court affirmed this finding. I agree that a case has not been made which would justify our reversing it. But I am, with respect, of the opinion that, in view of all the circumstances in evidence, the defendant's pleading and the tenor of the document of July 13, 1915 (Ex. 10), the proper conclusion is that the oral stipulation to which he deposes was not a condition precedent to the use of his guarantee, but was rather a term of the guarantee, at the highest the nature of a condition subsequent, and consequently that it could not be proved by parol evidence.

The mistakes of lawyers in conducting their own affairs are proverbial. The defendant probably failed to advert at the time of giving his guarantee to the importance of the distinction in regard to proof between a condition precedent and a condition subsequent in the case of a contract in writing. He was content to rely on the oral undertaking of the bank manager that the guarantee would not be enforced against him unless the two notes in question had been paid out of the proceeds of the transaction. He either did not anticipate that the existence of this understanding might be subsequently contested, as it has been, or did not have in mind or appreciate the applicability of the rule which precludes the variation of written contracts by parol evidence.

The trial Judge has found that there was no breach by the bank of the agreement as to the line of credit to be given the

Burrard Publishing Co. There is evidence which warrants that finding and counsel for the respondent did not satisfy me that it is wrong. On the contrary, the fair inference from all that took place would seem to be that the $15,000 worth of accommodation paper obtained to meet the stipulation in the agreement with the bank that the company should raise $15,000 from outside sources was discounted by the bank as part of the company's trade paper with the concurrence of everybody interested because the company had not sufficient trade paper without it to exhaust the $50,000 line of credit which had been given for that purpose.

I would allow the appeal.

Brodeur, J.

BRODEUR, J.:—The question in this case is whether the guarantee given by McCrossan was made with the condition precedent that two certain notes of the Burrard Publishing Co. should be paid. There was a conflict of evidence at the trial and it was found by the trial Judge that the evidence of McCrossan and of Russell should be believed in preference to the evidence adduced by the appellant. This judgment was confirmed by the Court of Appeal, *ante* p. 238.

If it were purely and simply a question of credibility of witnesses, we should then have to adopt the common findings of the two Courts below. But it was claimed by the appellant before this Court that the condition in question was not precedent but subsequent to the execution of the guarantee. We have then to construe the evidence which has been given by McCrossan and Russell and I see that the whole case turns upon this sentence in McCrossan's evidence: McCrossan told that he went to see the manager of the bank after having been asked to sign the guarantee and he then adds: "I am prepared to sign this (meaning the bank guarantee form) on the distinct condition of your seeing that the two notes, the Bank of Montreal note and the Douglas note, are paid out of the advances to be raised from this guarantee."

The appellant lays a great deal of stress on this, but if those words were alone his construction of the nature of the condition might well be founded and much of the argument which has been adduced at Bar is based upon the words which I have just quoted. But McCrossan, the respondent, had added: "I want it distinctly understood that if they (meaning the two notes) are not paid, this (meaning the guarantee) does not go."

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Those last words are conclusive, according to my mind, to the effect that if the notes which McCrossan had endorsed were not paid by the Standard Bank and were not taken over, in such a case the guarantee would have no effect. There was no money to be advanced by the bank out of the guarantee itself. The guarantee was for an existing debt which had been incurred by the Burrard Publishing Co. with the Standard Bank. McCrossan and his friends were anxious, however, that the business of the Burrard Publishing Co. should go on and they were willing to give a guarantee provided the bank would make advances to the extent of $35,000 and provided that some other friends should have advanced a further sum of $15,000.

The bank agreed to make the advances.

Then it was stipulated by McCrossan that in order that this guarantee should be properly considered as delivered the notes in question should be paid.

That was a condition precedent and it seems to me that in those circumstances the judgment which has construed the condition as a condition precedent was well founded. The appeal should be dismissed with costs.

Mignault, J.

MIGNAULT, J.:—The principal question here is whether the respondent signed the guarantee on which the appellant's action is based subject to a condition precedent, which could be proved by parol evidence, and which, he alleges, not having been fulfilled, renders his guarantee ineffective and unenforceable by the appellant. The trial Judge accepted the respondent's version of what took place before the guarantee was signed, so it is on the basis of the facts being as represented by the respondent that I will state whether in my opinion there was really a condition precedent as the respondent contends.

The respondent was a director of the Burrard Publishing Co., which published the Vancouver *Sun* and which was in financial difficulties at the time when the guarantee in question was signed. The respondent and other gentlemen interested in this newspaper were anxious to obtain a line of credit from the appellant. With several of these gentlemen he had previously endorsed two notes then overdue, one for $10,000 in favour of the Bank of Montreal, and the other for $15,000 in favour of a Miss Douglas. Several schemes were proposed and the respondent

and his associates endeavoured to obtain from the appellant a line of credit of $50,000, and the appellant finally agreed to advance $35,000, provided the Burrard Company obtained $15,000 outside, and on condition that the respondent and his associates guaranteed the advance to be made by the bank by signing the usual bank guarantee, each for a specific amount, the respondent undertaking to sign a guarantee for $5,000. This guarantee was signed by the respondent on April 17, 1914, and, as stated, is in the usual form without any conditions restricting the respondent's liability.

The respondent, however, gives his version of what took place in the bank manager's office when he signed the guarantee. This version was accepted by the trial Judge and by the Court of Appeal, and I feel, subject to the question of the admissibility of the parol evidence, that the question being one of credibility, I should also accept it. But, I may add, I am entirely free, and it is my duty, notwithstanding the judgments of the Courts below, to place my own construction on the respondent's statement.

Having considered every word of this statement, I have no hesitation in expressing the opinion that the so called condition, "dictated," to use the respondent's own word, by the latter, that the bank manager would see that the Bank of Montreal and the Douglas notes "are paid out of the advances to be raised from this guarantee," was not a condition predecent but a term of the contract by the respondent with the appellant. Money was to be advanced by the bank on the guarantee of the respondent and his associates and this condition referred to the use of the moneys to be advanced by the bank. It is impossible therefore to consider this as a condition precedent to the liability of the respondent, for it was on his guarantee that the bank was to advance the money, and therefore the advance necessarily preceded the use to be made of the moneys so advanced. A useful test, among many others, to determine whether a condition is precedent or subsequent, is to look at the nature of the acts to be done and the order in which they must necessarily precede and follow each other in the progress of performance (12 Corp. Jur., p. 409). It therefore matters little that the respondent used such language as this: "I want it distinctly understood that if they (the notes) are not paid this does not go," for the payment of the notes was

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to be effected out of the advances made by the bank and therefore subsequently to these advances. The so-called condition was in consequence not a condition precedent but at the most a condition subsequent or a term of the contract, and unfortunately for the respondent was not expressed in the contract and cannot be proved by parol evidence. Any defence founded on this condition consequently fails.

It was also contended that the appellant did not advance the full amount, $35,000, it had promised to advance. The Burrard Company did not really perform its part of the contract by raising the $15,000 outside of the bank, but obtained accommodation notes for this amount and discounted them with the appellant. The trial Judge, however, found that there was no evidence that this reduced the line of credit for trade paper discount purposes below $50,000. He adds:

> What evidence there is goes to shew that these notes (the $15,000 accommodation notes) were so utilised because no further trade paper acceptable to the bank was available for discount. Mr. Perkins says he would have expanded the limit of $50,000 had acceptable trade paper been forthcoming and his evidence is borne out by the bank account filed, which shews he did, in fact, do so during several months of 1914.

I here find myself in full agreement with the trial Judge, but on the other point, with respect, I am of opinion that the appeal should be allowed with costs throughout and that judgment should be given for the full amount of the appellant's claim.

Appeal dismissed, the Court being equally divided.

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K. B.

ROBERTS v. ROBERTS.

Saskatchewan King's Bench, Taylor, J. November 2, 1920.

DIVORCE AND SEPARATION (§ V B—50)—ACTION FOR INTERIM ALIMONY IN ACTION FOR PERMANENT ALIMONY—JURISDICTION OF COURT TO GRANT.

The Court of King's Bench (Sask.) has jurisdiction to grant interim alimony in an action brought for permanent alimony.

[*Secrest* v. *Secrest* (1912), 5 D.L.R. 833, 5 Alta. L.R. 389, followed.]

Statement.

ACTION for interim alimony in an action brought for permanent alimony.

L. L. Dawson, for plaintiff; *C. H. J. Burrows*, for defendant.

Taylor, J.

TAYLOR, J.:—Objection is taken to the jurisdiction of the Court to grant interim alimony in such an action, and the decision

in *Sunderland* v. *Sunderland* (1914), 6 W.W.R. 40, McLorg, L.M., is cited. The local Master so decides, following *Dorey* v. *Dorey* (1912), 9 D.L.R. 150, 46 N.S.R. 469. Wetmore, C.J., in *Diebert* v. *Diebert* (1908), 7 W.L.R. 458, made an order for interim alimony in an action, and in *Secrest* v. *Secrest* (1912), 5 D.L.R. 833, 5 Alta. L.R. 389, the question of jurisdiction was raised, and the reasoning of Beck, J., that jurisdiction exists, is equally applicable to the Court of King's Bench in this Province. I am advised that *Sunderland* v. *Sunderland*, *supra*, has not been followed in practice, and as pointed out by Beck, J., the jurisdiction to grant interim alimony has been exercised for many years in Ontario, Manitoba and British Columbia on analogous legislation.

There will be an order for interim alimony and an allowance for costs. The material on which to base the amount is very meagre. The wife has the custody of the only child of the marriage, and its support. She asks $25 a week. The English rule is to allow one-fifth of the husband's income. The sum asked would not, I gather, amount to more than that, nor was any argument made that it would be more. There has been great delay in making this application, and for that reason the allowance will date from the time of the service of notice of the application, the sum of $100 to be paid monthly in advance at the office of the plaintiff's solicitors.

The material contains nothing on which I can estimate the probable costs. The plaintiff is now in the State of Iowa. It is obvious that she will be required as a witness on the trial, but whether there temporarily or not does not appear. It will be referred to the Local Registrar at Regina to fix the allowance for costs, if the parties cannot agree.

Leave to defendant to appeal if so advised.

Judgment accordingly.

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Re OSBORNE AND CAMPBELL.

(Annotated.)

Ontario Supreme Court, Middleton, J. September 30, 1918.

DOWER (§ I C—20)—CLAIM FOR—DEED—POWER OF APPOINTMENT—EXERCISE BY WILL—VALIDITY—WILLS ACT, R.S.O. 1914, CH. 120, SEC. 30—SERVICE ON DOWRESS—RULE 602—TITLE TO LAND.

A power over an inheritance may co-exist with a fee in the same person, and where a valid demise of the fee is made by will, the will operates as a due execution of the power sufficient to defeat a claim for dower by a wife who has been served with notice under Rule 602 but who has not appeared to assert her claim.

[See annotation following this case.]

Statement. MOTION by vendors, under the Vendors and Purchasers Act, for an order declaring invalid an objection taken by the purchaser to the vendors' title to land which they had agreed to sell.

H. R. Frost, for vendors; *R. B. Beaumont*, for purchaser.

Middleton, J. MIDDLETON, J.:—On May 30, 1912, the land in question was conveyed to M. "in fee simple," "to have and to hold unto the said M., his heirs and assigns forever, to such uses as he shall by deed or deeds in writing or by his last will and testament appoint and in default of appointment to the use of him and his heirs absolutely."

M. died on April 22, 1915, and by his will gave all his property to his executors in trust to convert and divide the proceeds.

The executors had now contracted to sell, and objection was taken by the purchaser to the title. M. was married, and it was said that his wife would be entitled to dower. Notice was served on her, under the provisions of Rule 602, and she had not appeared to assert any claim.

The vendors' contention was that, under the Wills Act, the will operated as a due execution of the power, and the estate passed by virtue of the exercise of the power.

That this was the effect of sec. 30 of the Act, R.S.O. 1914 ch. 120, was plain from the decision in *In re Greaves' Settlement Trust* (1883), 23 Ch. D. 313.

In the absence of any claim on the part of the wife, the difficult question as to the true construction and effect of this deed, suggested in Armour's note (Real Property, 2nd ed., p. 114), should not be considered. See, *per* Draper, C.J., in *Lyster* v. *Kirkpatrick* (1866), 26 U.C.R. 217, 228: "It appears to have been settled ever since *Sir Edward Clere's* case (6 Co. 18*a*.) that a power over the inheritance may co-exist with a fee in the same person; as where

A. seised in fee made a feoffment to the use of such person and of such estate as he should limit and appoint by his last will, and died, making a will . . . the devise was upheld as a valid execution of the power." See also *Maundrell* v. *Maundrell* (1805), 10 Ves. 246, 254, 255, 32 E.R. 839.

It should be declared that the wife was not entitled to dower, and that the objection was not well taken.

CONVEYANCES TO DEFEAT DOWER.

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ANNOTATION.

By

MR. E. DOUGLAS ARMOUR, K.C., OF THE ONTARIO BAR,
Author of the "Law of Devolutions of Estates"; "The Law of Titles"; "The Law of Real Property" and "Law Lyrics".

In *Re Osborne and Campbell* (1918), 15 O.W.N. 48, it appears that a conveyance was made to M. in fee simple, "to have and to hold unto the said M. his heirs and assigns forever to such uses as he shall by deed or deeds in writing or by his last will and testament appoint, and in default of appointment to the use of him and his heirs absolutely." M. died without having exercised the power by deed, and by his will gave all his property to his executors on trust to convert and divide the proceeds. Upon a sale by the executors, the purchaser objected that the widow of the testator should bar her dower. The Judge held (1) that the will was a good exercise of the power (R.S.O. 1914, ch. 120, sec. 30; *In re Greaves' Settlement Trusts* (1883), 23 Ch. D. 313); (2) that in the absence of the widow, who did not appear, though notified, the question as to the true construction of the deed (on the point whether the power could co-exist in M. with the fee) should not be considered; and (3) that the widow was not entitled to dower; and that the objection was not well taken.

In *Re Cooper and Knowler* (1920), 19 O.W.N. 27, a similar deed was up for interpretation, but in this case the vendor was the grantee in the deed. The limitations were in fee simple, "to have and to hold unto the said grantee his heirs and assigns to and for such uses as the grantee may by deed or by will appoint and in default of appointment then to hold unto the said grantee his heirs and assigns in fee simple." On an objection by a purchaser that the vendor's wife should bar dower, Orde, J., held that the question was too doubtful for a final decision in the absence of the wife, who apparently had not been notified, and refused to force the title on the purchaser. *Re Osborne and Campbell* was not cited on the argument, but on the Judge's attention being called to it subsequently, his Lordship adhered to his opinion for reasons stated in (1920), 19 O.W.N. 123.

Although Orde, J., was of opinion that the fact that the grantee was dead in the one case and living in the other in no way affected the principle involved, it is submitted that it is an important factor in each case.

Taking *Re Osborne and Campbell* first. Although the Judge stated that in the absence of the widow the question as to the interpretation of the deed (on the point whether the power could co-exist with the fee) should not be considered, his Lordship held that the power was well exercised by the will,

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which certainly seems to involve a determination that the conveyance to M. to such uses as he should appoint was a well drawn conveyance to enable the grantee to defeat dower. It may be that his Lordship intended, not to decide this point, but merely to re-state the argument of the vendor's counsel, following it by his refusal to consider the interpretation of the deed, and declaring that the wife had no dower because she did not appear to claim it. The report is neither full nor accurate enough to ascertain clearly the grounds of the decision.

Assuming, however, that according to his Lordship's dictum the power was well exercised by the will, it does not follow, in the writer's opinion, that dower was defeated. The effect of a conveyance to a grantee in fee simple to such uses as he may appoint, is to vest in him an estate in fee simple by common law, the conveyance so operating: *Savill Brothers Ltd.* v. *Bethell*, [1902] 2 Ch. 523 at 541. The limitation in fee vests the estate in him, and he is in by the common law; and the addition of a declaration of uses does not add anything to his estate. The utmost that can be said of it is that it may afford an alternative mode of conveyance to the simple grant. Even on the interpretation of the limitations and habendum (in this case) M. was grantee in fee simple, because, by the habendum, in default of appointment the land was limited to him and his heirs. As there was no appointment during his life-time he died seised of a legal estate in fee simple by direct limitation to him and his heirs, and in default of appointment, which estate was capable of being directly devised without resort to the power.

The next step in the case is to ascertain the conditions at the moment after his death. On the moment of his death, his widow became entitled by law to her dower, as he died seised of a legal estate, unless the will was intended to operate, and could only operate, as an exercise of the power. For, if the will did not operate as an exercise of the power, but as a direct devise of the legal estate, it is quite clear that it could not deprive the widow of her dower. A dowress is always a favourite in the Courts, and if there is any ambiguity in the interpretation of the will, *i.e.*, if it is open to question as to whether it opefates directly as a devise of the legal estate, or, on the other hand, as an exercise of the power, it cannot be said that the widow is deprived of her dower —assuming for the purpose of the argument that the exercise of the power would have defeated dower. And it must therefore be determined (apart from the statute to be mentioned shortly) whether the will could and did operate only as an exercise of the power. The Judge determined that it was governed by sec. 30 of the Wills Act, R.S.O. 1914, ch. 120, and that *In re Greaves' Settlement Trusts*, 23 Ch. D. 313, made this plain. Section 30 provides that a general devise of the real estate of the testator, or of the real estate in any place . . . or otherwise described in a general manner, will include real estate over which the testator has a power to appoint by will in any manner, and will operate as an execution of such power, unless a contrary intention appears by the will. That is to say, if a testator has a power over, but no property in, a piece of land, and makes a general devise, without expressing that it is an exercise of the power, the general devise will operate as an execution of the power. But, with deference, there is nothing in the section to indicate that, where a testator has both property in and a power over land, and makes a general devise, that devise is to be taken as an exercise of the power and not as a direct devise of the property.

Nor does *Re Greaves' Settlement Trusts* determine this. In that case land was settled on trustees on trust to pay the income to G.'s wife during her life-

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time, with a power in G. to appoint by deed or will. The trustees sold the land, pursuant to a power in the settlement, and invested the proceeds in their own names in the 3 per cents pending another investment in land, which if bought was to follow the trusts of the settlement. Before land was purchased G. died, and by his will bequeathed "all the money and moneys that I die possessed of, &c." Fry, J., held that the will did not pass the moneys in the 3 per cents because they stood in the names of the trustees, and the testator was not possessed of them, and that it derived no aid from sec. 27 (our sec. 30) as an exercise of the power. The decision as reported is therefore not an authority for his Lordship's dictum. But, even if the decision had been the other way, it would not have helped. For in that case the property in the 3 per cents (treated as land under the direction for conversion) was in trustees, and G. had only a power of appointment; whereas in the case in hand M. had both property and power, and had the power to devise directly without resort to the power.

It is therefore submitted with deference, that M. had all the legal and beneficial interest in the land in fee simple, by the limitations in the conveyance, and in default of appointment, and having died seised his widow was entitled to dower.

Assume, however, that the conveyance is to be interpreted as a conveyance to M. to such uses as he should appoint, and that it must operate only by virtue of the Statute of Uses, *i.e.*, that M. could only dispose of it by exercising the power. Upon this view another consideration arises.

By R.S.O. 1914, ch. 70, sec. 4, where a husband dies beneficially entitled to any land which does not entitle his wife to dower at common law, and such interest whether wholly equitable or legal and partly equitable is, or is equal to, an estate of inheritance in possession, his widow will be entitled to dower out of such land. If M. could not be considered as legal tenant in fee simple, he had at least an interest equal to an estate of inheritance in possession; and though he might possibly have defeated his wife's right to dower by a conveyance under the power in his life-time, yet as he died entitled to an interest equal to an estate of inheritance in possession, she would upon his death be entitled to dower.

The previous paragraph may be a fitting introduction to a consideration of *Re Cooper and Knowler*. Though the death of the grantee does not affect the interpretation of the deed, it does affect the right to dower; and in that way the cases are not exactly similar, and *Re Osborne* affords no assistance in determining what should have been the decision in the later case. The point presented in that case for determination was squarely put, viz., whether, on a grant to A. or his heirs to such uses as he should by deed or will appoint, and in default of appointment, to A. his heirs and assigns, A. could by exercising the power of appointment by deed defeat his wife's right to dower. His Lordship declined to decide this in the wife's absence, and, as there is a doubt about it, refused to force the title on the purchaser. As a matter of law, the wife was at the moment entitled to dower, for the husband was seised of an inheritance in fee simple; and the question put was whether a conveyance made under the power would divest her of her right. The question whether he can do so under the limitations in that case must therefore still remain in doubt. And meanwhile it is wise in drawing conveyances to uses to defeat dower to introduce a grantee to uses who is not also the *cestui que use*. Then the terms of the statute will be fulfilled, for there will be a person seised to the use of some other person, who may exercise the power over the use.

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THE KING v. FORSEILLE.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. November 1, 1920.

TRIAL (§ V C—290)—CRIMINAL LAW—CHARGE CONTAINING TWO COUNTS—MANSLAUGHTER—CAUSING GRIEVOUS BODILY HARM—ACQUITTAL ON FIRST COUNT—CONVICTION ON SECOND—VALIDITY.

An accused was tried on a charge containing two counts, one for manslaughter and the other for causing grievous bodily harm. Held, that the second count should not have been allowed to go to the jury. The jury having found him not guilty of manslaughter he could not be convicted on the second count.

[*Rex* v. *Ozley* (1914), 19 D.L.R. 721, 25 Can. Cr. Cas. 262, referred to.]

Statement.

CASE stated for the opinion of the Court of Appeal by the trial Judge on a criminal trial.

H. E. Sampson, K.C., for the Crown.

No one *contra*.

Haultain, C.J.S.

HAULTAIN, C.J.S.:—The evidence in this case establishes one main fact, that is, that one James McLarty was accidentally shot and killed by the accused, whether the act which caused death was lawful or unlawful.

The accused was tried on a charge containing two counts, one for manslaughter and the other for causing grievous bodily injury. In my opinion the second count should not have been allowed to go to the jury. On the evidence, if the accused was guilty of anything he was guilty of manslaughter. The jury found him not guilty of manslaughter, and that, in my opinion, put an end to the case. If he was guilty of doing grievous bodily harm which resulted in immediate death, he was guilty of manslaughter.

The jury found him not guilty of manslaughter, and that finding takes away all possible ground upon which a verdict of guilty on the second count could be based.

Holding this opinion, I do not consider it necessary to answer the question submitted to us, but would simply quash the conviction.

Newlands, J.A.

NEWLANDS, J.A.:—The accused was tried before a Judge and jury at the city of Prince Albert on February 12, 1920, on the following charge:—

1. For that he the said Victor Forseille did on or about the 1st day of January, 1920, at or near Jordan River in the Province of Saskatchewan and within the said Judicial District, unlawfully kill and slay one James McLarty contrary to the provisions of sec. 262 of the Criminal Code of Canada.

2. For that he the said Victor Forseille did at the time and place aforesaid, by an unlawful act to wit: hunting game out of season, cause grievous bodily injury to one James McLarty, contrary to the provisions of sec. 234 of the Criminal Code of Canada,

and was convicted on the second count.

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The questions submitted to the Court are: "1. Was I right in telling the jury that hunting moose out of season is an unlawful act within the meaning of secs. 252, sub-sec. 2, and 284 of the Criminal Code of Canada? 2. Should the accused get a new trial?"

The evidence disclosed that the accused while hunting moose out of season on January 1, 1920, which had been seen in the vicinity by the deceased McLarty, shot and killed the said McLarty mistaking him for a moose.

The hunting of moose out of season is an offence under a provincial statute. It would only be a crime under the Criminal Code, sec. 164, if no punishment was provided in the provincial statute for that offence. There is a penalty provided for a breach of this statute, as well as for accidentally killing a person while out hunting. Where such punishment is provided, it does not appear to be the intention of the Criminal Code to make the breach of a provincial statute, or the results that follow that breach, a crime.

In a similar case in Nova Scotia, *Rex* v. *Oxley* (1914), 19 D.L.R. 721, 23 Can. Cr. Cas. 262, Russell, J., directed a jury not to convict of manslaughter. He does not give any reasons, but the following citation from Foster's Crown Cases, is referred to, 19 D.L.R. at 721:—

> A. shooteth at the poultry of B. and by accident killeth a man. If his intention was to steal the poultry which must be collected from circumstances it will be murder by reason of that felonious intent, but if it was done wantonly and without that intention it will be barely manslaughter.
>
> The rule I have laid down supposeth that an act from which death ensued was *malum in se*, for if it was barely *malum prohibitum* as shooting at game by a person not qualified by statute law to keep or use a gun for that purpose the case of a person so offending will fall under the same rule as that of a qualified man for the statutes prohibiting the destruction of the game under certain penalties will not in a question of this kind enhance the accident beyond its intrinsic moment.

If the law is otherwise than as stated in this quotation, then the accused should have been convicted of manslaughter. The evidence is that he shot and killed the deceased and if that killing is not manslaughter it is not doing him grievous bodily harm.

Both questions should therefore be answered in the negative, and the conviction should be quashed.

LAMONT, J.A.:—I agree that the conviction should be quashed. Lamont, J.A.

ELWOOD, J.A., concurs with HAULTAIN, C.J.S. Elwood, J.A.

Conviction quashed.

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DENNIS v. IVEY AND BOYCE.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. November 1, 1920.

EVIDENCE (§ VI A—515)—ORAL EVIDENCE TO VARY WRITTEN INSTRUMENT—WHEN ADMISSIBLE—PRIOR OR COLLATERAL AGREEMENTS.

Oral evidence is not admissible to add to, vary, modify or contradict a written instrument, but this rule does not apply where the instrument is not intended by the parties to operate as an agreement unless a certain condition is fulfilled.

[*Bell* v. *Ingestre* (1848), 12 Q.B. 317, 116 E.R. 888; *Commercial Bank of Windsor* v. *Morrison* (1902), 32 Can. S.C.R. 98; *Ontario Ladies College* v. *Kendry* (1905), 10 O.L.R. 324, referred to, and see *Standard Bank* v. *McCrossan*, *ante* p. 238.]

Statement.

APPEAL by plaintiff from the trial judgment in an action on a promissory note. Affirmed.

C. E. Gregory, K.C., for appellant; *D. Buckles*, for respondent.

Haultain, C.J.S.

HAULTAIN, C.J.S.:—The plaintiff was the holder of a promissory note for $1,000, made in his favour by the firm of Ivey & Binney, of which the defendant Ivey was a member, in consideration of a loan of that amount by him to that firm. This note was renewed several times, the last renewal being made on September 14, 1918, and payable 3 months after date. Some time in November, 1918, the firm of Ivey & Binney made an assignment for the benefit of their creditors to the Canadian Credit Men's Trust Ass'n. After the assignment, and several days before the maturity of the above-mentioned note, namely, on December 14, 1918, a promissory note for $1,046.70, payable 6 months after date, was made by the defendant Ivey and his father-in-law, the defendant Boyce, in favour of the plaintiff. The plaintiff filed with the assignee of Ivey & Binney a claim in respect of the first-mentioned note, and received from the assignee a dividend or dividends amounting to $499.25. This action was then brought by the plaintiff against the defendants for the balance alleged to be due on the note of December 14, 1918, after crediting the defendants with the amount received from the assignee of Ivey & Binney.

The plaintiff set up in the course of the trial that the note of December 14 was given to him under the following circumstances: He met the defendant Ivey on December 14 and requested further security in respect of the Ivey & Binney indebtedness. It was arranged that further security be given in the form of a promissory note to be made by Ivey and Boyce, and it is claimed that the note in question was given in pursuance of that arrangement.

The trial Judge has found on the evidence (and I quite agree with that finding), that the note in question was not given under the circumstances and arrangement as related by the plaintiff. His finding on this point is as follows:—

The defendant Ivey was anxious to start again in business. He met the plaintiff on the street on this 14th of December and had a discussion with him in which the question of the plaintiff's note against the firm of Ivey & Binney was brought up. Ivey intimated that he wanted to start in business again and would pay it out of the new business. The plaintiff asked for further security and it was arranged that the defendant Boyce, who was the father-in-law of Ivey, should be asked to give further security. The defendant Ivey and the plaintiff, on the plaintiff's suggestion, went to the office of one Gatenby and the plaintiff had Gatenby draw up the note and evidently the circumstances under which the note was to be given were explained to Gatenby by Ivey and Dennis. Then they looked up Boyce, had some discussion with him as to going on the note, then went to Gatenby's office and Gatenby in the presence of all parties explained to the defendant Boyce why he was being asked to go on the note, telling Boyce that if Ivey started in business again the note was to be paid, if he did not start in business it was to be returned. On this statement the note was signed by the two defendants.

After making this finding of fact, the trial Judge expressed some doubt as to the admissibility of the evidence upon which he based his finding, and proceeded to dispose of the action on the assumption that the plaintiff's version of the transaction was true, and held, on the cases cited in his judgment, that the action must fail on the ground of want of consideration for the note. He pointed out that the note was given some days before the Ivey & Binney note was due, and that, as no new consideration was given, the plaintiff was not a holder in due course or a holder for value. He also commented on the fact that when the plaintiff filed his claim with the assignee on the Ivey & Binney note he did not comply with the provisions of the Assignments Act, R.S.S. 1909, ch. 142, by stating any collateral security held by him. This fact is very significant in considering the very conflicting evidence as to how and under what circumstances the second note was given.

I am inclined to agree with the Judge's reasons for his decision, but think that a finding of want of consideration can more properly, and equally conclusively, be reached on the real facts of the case as found by him upon evidence which was properly receivable under the circumstances.

The plaintiff brought this action on a promissory note. The defence stated facts which, if true, would not vary the terms of a

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written agreement, but would go to the whole question of consideration. Those facts have been found to be true by the trial Judge on conflicting evidence. They were put in issue by the plaintiff in his reply, and there is no reference in the pleadings to the facts set up by him at the trial and upon which he relied, that is, that the note was given as collateral security to the Ivey & Binney note. The trial proceeded on the question of want of consideration. The plaintiff closed his case after merely formal proof of the note. The defence then proceeded to prove want of consideration, by giving evidence of the circumstances and conditions under which the note was given. That evidence, if not rebutted, clearly established a total want of consideration, and was in my opinion clearly admissible. The plaintiff then put in evidence in reply, and gave his version of the transaction as set out above. The trial Judge evidently did not believe the plaintiff's story, and found the transaction to be in accordance with the defendants' evidence. That finding, as I have said, establishes the defence of want of consideration.

In any event, in view of the pleadings and the proceedings at the trial, the plaintiff undertook to establish good consideration, and failed because the trial Judge found that his alleged consideration was not, in fact, the consideration at all.

The appeal should, therefore, be dismissed with costs.

Newlands, J.A.

NEWLANDS, J.A., concurs with LAMONT, J.A.

Lamont, J.A.

LAMONT, J.A.:—The plaintiff claims upon a promissory note executed by the defendants. The defence is that the document sued on was an obligation binding on the defendants only in the happening of a certain event, which event never happened. The facts are that the defendant Ivey and one Binney were carrying on business under the firm name of Binney & Ivey. In the course of their business the firm became obligated to the plaintiff in the sum of $1,000, for which the plaintiff held the firm note, dated September 14, 1918, payable 3 months after date. In November the firm made an assignment for the benefit of its creditors. The plaintiff on learning of the assignment approached Ivey for security for the firm's obligation. Ivey was anxious to effect a compromise with his creditors and continue the business; so it was agreed, as the trial Judge has found, that the defendant Boyce—who was Ivey's father-in-law—should go

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on a note with Ivey for $1,046.70, which was the amount of the Binney & Ivey obligation, but upon the condition that the note was to be payable only in case Ivey was able to arrange with his creditors and continue the business. If he failed to do so, the document was to be returned. Ivey was unable to arrange with his creditors and the business was wound up. The plaintiff filed a claim with the assignee under the Binney & Ivey note, which he still retained, and received a dividend thereon of $499.25. This he credited on the note now sued on, and he has now brought this action against the defendants for the balance. The trial Judge gave judgment for the defendants.

In my opinion this judgment should be affirmed. It was contended at the trial that evidence was not admissible to shew the condition upon which the note sued on was given, on the ground that parol evidence was not admissible to contradict or alter the terms of a written agreement. The trial Judge admitted the evidence, although he appeared to have some doubt as to its admissibility. In my opinion it was clearly admissible.

It is quite true that, in general, oral evidence is not admissible to add to, vary, modify or contradict a written instrument, but this rule does not apply where the instrument was not intended by the parties to operate as an agreement unless a certain condition was fulfilled. 13 Hals., pages 566-7.

In *Bell* v. *Ingestre* (1848), 12 Q.B. 317, 116 E.R. 888, the defendant endorsed two bills of exchange and handed them over to the endorsee for the express purpose of retiring overdue bills and on the express condition that such last-mentioned bills were to be returned to him by the next post, which condition was not complied with. In an action on the bills it was held that evidence of the condition upon which the bills were endorsed, and that such condition had not been complied with, was admissible.

In *The Commercial Bank of Windsor* v. *Morrison* (1902), 32 Can. S.C.R. 98, the Supreme Court of Canada, following the case of *Pym* v. *Campbell* (1856), 6 El. & Bl. 370, 119 E.R. 903, held, that a promissory note endorsed on the express understanding that it should only be available upon the happening of a certain condition was not binding upon the endorser where the condition

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had not been fulfilled. See also *Ontario Ladies' College* v. *Kendry* (1905), 10 O.L.R. 324; *Carter* v. *C. N. Ry. Co.* (1911), 23 O.L.R. 140.

Lamont, J.A.

As the note in question in this case was only to become a binding obligation in case Ivey was able to arrange with his creditors and continue the business, and as that condition was never fulfilled, the plaintiff cannot recover.

The appeal should, therefore, be dismissed with costs.

Elwood, J.A.

ELWOOD, J.A., concurs with HAULTAIN, C.J.S.

Appeal dismissed.

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HAPPY FARMER Co. Ltd. v. DOHERTY.

Alberta Supreme Court, Walsh, J. November 19, 1920.

SALE (§ III A—57)—OF GOODS—PAYMENT—EXTENSION OF TIME—RELEASE FROM ALL WARRANTY AND RESPONSIBILITY.

When a man of ordinary intelligence, for valuable consideration, signs a document which he thoroughly understands, there being no fraud or over-reaching on the part of the other party to it, he will be bound according to its terms.

Statement.

ACTION to recover the amount due on several promissory notes, given in payment of a tractor.

H. H. Parlee, K.C., for plaintiff; *N. D. Maclean*, for defendant.

Walsh, J.

WALSH, J.:—The plaintiff is entitled to judgment on the notes sued on for the amount properly owing on the same at the contract rates of interest after giving credit for $98 for the commission certificate and $200 cash, both credits to be as of November 1, 1918, and the allowance of $13.25 for repairs made by Casebeer on April 29, 1918 (Ex. 9). The clerk will compute the amount for which the plaintiff shall have judgment.

The defendant's counterclaim for rescission which I allowed to be set up at the hearing comes too late. The remedy if any to which he is entitled is by way of damages for breach of warranty. If he is entitled on the merits to this relief he has by his course of conduct made it more than usually difficult to give it to him.

He contracted for the purchase of the tractor in July, 1917. It was delivered to him about the first of the following September and was shortly after set up and adjusted and operated by an expert of the plaintiff. The defendant says that he was not satisfied with its work then but that the plaintiff's representative calmed him with the assurance that this was because it was new

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and that it would improve with use. Two weeks later the plaintiff's men came again and operated the tractor for an hour. At the end of this test the defendant signed a certificate that the machinery was in good working order and he thereby waived all claims whether "real or supposed that I may have or have had against" the plaintiff. Below this is a written memo, as follows: "Lined up gears perfectly, pulled 3 fourteen inch plows good depth, made 4 miles in 1 hr. 20 min., burned kerosene perfectly." The signatures of the expert and the defendant are under this memo. After this the defendant's son, a boy then of 17 years with no experience in the operation of any engine but a small stationary one, attempted to do his father's fall-ploughing with this tractor but failed. They kept at it until the ground froze up and he claims that it took 22 days to plough 60 acres when an engine such as this was represented to be should have ploughed from 8 to 10 acres a day. The defendant complained to the agent through whom he bought the tractor but he did not get an expert out to him until the following spring. On April 29, 1918, an expert of the plaintiff and its collection manager went to the defendant's farm. The expert examined the engine, made all necessary adjustments and set it to work. He kept at it all day, the defendant's son assisting and the defendant himself being present a good deal of the time. The result of that day's operations seems to have satisfied the defendant and his son, and at the end of it he signed a document which the collection manager then prepared by which in consideration of an extension of time being granted for the payment of his then overdue notes he did thereby forever release and discharge the plaintiff, its officers and agents from any claim, demand and cause of action whatsoever for any cause arising prior to the date thereof and did release it from all warranty and responsibility expressed or implied growing out of any transaction theretofore had. He says that he read this and thoroughly understood it. His excuse for signing it is that he did so on the strength of the agent's promise to thereafter keep the engine in good running order and to send an expert to attend to it if necessary. The agent denies having made this promise and says that on the contrary it was distinctly understood that this was the last expert assistance he was to have from the company except at his own expense. I think that the surrounding

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circumstances point to the correctness of the agent's evidence in this respect and I accept it. A few days later the defendant's sons started to plough a neighbour's stubble with this engine but after ploughing 20 acres in two weeks a cap covering the connecting rod broke. The evidence satisfies me that this break was not due to a flaw in the metal of which it was made but rather to a break caused by a loose connection. He ordered repairs from the plaintiff not only to remedy this break but apparently for other parts of the tractor and he paid for them without any protest though they amounted to more than $100. He did not get these repairs until the following August and of course in the meantime the tractor was idle. During this period he wrote the plaintiff a letter complaining of the tractor's lack of power, stating that he did not want to have anything more to do with it and suggesting an exchange with the plaintiff for another tractor. This letter was undoubtedly written because of the poor results he got in ploughing for the neighbour. Nothing seems to have come of this complaint or of his proposition. The next thing in order of date is a letter from him to the plaintiff of August 14, 1918, written after his repairs had come explaining why his note given for this tractor which fell due on the first of that month had not been paid, and promising to pay part of it in the next month and the balance of it as soon as possible. There is not in it a word of complaint of the machine. It is simply an apology for his default and a promise to remedy it. In November, 1918, he paid $200 on account of the notes given for the tractor. Though the repairs above referred to reached him in August, 1918, the machine lay idle the rest of that year and all of 1919 and until October, 1920, when in preparation for this trial the defendant's son gave it what he calls a thorough overhauling and then made some tests of it in ploughing and threshing which were quite unsatisfactory. This means that from April 1, 1918, when he gave the plaintiff the release after being satisfied from the work done in and with it by the expert that it would suit him until October, 1920, the tractor lay idle and unused except for the 2 weeks of ploughing for the neighbour in the spring of 1918. The evidence as to its unsatisfactory condition after the last that the plaintiff had to do with it in April, 1918, is to be found in what the defendant and his son and two neighbours, for one of whom the ploughing

was done in the spring of 1918, and for the other of whom some threshing was attempted in October of this year, say of it.

My conclusion is that the tractor, after the adjustments made by the plaintiff's expert on April 29, 1918, and under its operation by him and the defendant's son was demonstrated to the defendant's satisfaction to be of the agreed power and to be capable of doing the work that it was warranted to do. I can find no fraud or over-reaching in the conduct of the plaintiff's representatives on that occasion, and I have already found against the contention that the release then signed was based upon the promise to keep the machine in running order and to render expert assistance when needed. The release being for good consideration, namely, an extension of time for the payment of the defendant's notes, and not being procured by fraud or founded upon a condition which has not been performed, should I think bind the defendant according to its terms.

It is undoubted that the defendant was not able in the limited use that he thereafter made of the tractor to develop in it the warranted power. There is no dispute of the evidence of his witnesses on this head and I see no reason to doubt it. I am strongly inclined to the opinion though that the youth and inexperience of his son who was in charge of it had as much to do with this unsatisfactory result in the spring of 1918 as had the tractor if, indeed, it had not more. He was then a lad of between 17 and 18 who knew practically nothing of operating such an engine as this, beyond what he had picked up in a month's course at a technical school in the previous winter and what he had learned from the plaintiff's experts in their handling of this tractor. A younger son of the defendant was with him in this operation of the tractor and during the absences of the elder brother he ran it. The 1920 tests were not conducted in such a manner as to induce in me the belief that they were made under proper conditions. The machine had then lain idle for two years and a half. I doubt very much if the defendant's son, who then overhauled it, was competent to put into proper running order a machine which had for so long been out of use. No details were given of the overhauling to which he then subjected it. He simply says that he overhauled it thoroughly. No expert evidence was offered on the part of the defendant. This son was the

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nearest approach to an expert whom he called and he cannot in my opinion qualify as such. I have therefore practically nothing before me but the results to which the lay witnesses have sworn, and their evidence fails to bring to my mind the conviction that these results are any more attributable to lack of power in the engine than to lack of skill in the operator.

I put my opinion that the plaintiff is not responsible to the defendant for the breaches of warranty of which he complains entirely upon the release of April 29, 1918. When a man of ordinary intelligence puts his signature unconditionally to a document which he thoroughly understands without any fraud or over-reaching on the part of the other party to it he must, I think, be held to it no matter how disastrous the consequences to himself may be. In this particular case I fear that the refusal of relief will be exceedingly serious to this struggling farmer, and if I could have helped him I would gladly have done so, but in my conception of the evidence I can find no ground upon which I can properly do this and therefore I must not do it.

The counterclaim will stand dismissed with costs.

Judgment accordingly.

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ROYAL BANK v. NATIONAL FIRE INS. Co.

British Columbia Supreme Court, Murphy, J. September 14, 1920.

WRIT AND PROCESS (§ II B—26)—COMPANY—METHOD OF MAKING LEGAL SERVICE DEFINED BY DOMINION STATUTE—COMPLIANCE WITH—EXECUTION ACT.

Where a Dominion statutory provision defines the method of effecting legal service on an insurance company, the service required by sec. 23 of the Execution Act, R.S.B.C. 1911, ch. 79, must comply strictly with the method defined.

Statement.

ACTION to mandamus the defendants to remove a person's name as a shareholder and to substitute another person as a shareholder on the register of shares.

A. Bull, for appellant.

S. S. Taylor, K.C., and *D. N. Hossie*, for defendant.

Murphy, J.

MURPHY, J.:—Many points were raised by way of defence but in my view I need deal with but two, the method of service adopted by the sheriff and his failure to comply with the provisions of sec. 23 of the Execution Act, R.S.B.C. 1911, ch. 79. This Act provides a method of execution against shares held by a judgment

debtor by constructive as distinguished from actual seizure. In consequence it may well happen that such an execution may be carried out without the judgment debtor even hearing of it, before his property has been sold under execution. This being so, I am of opinion that the provisions of the Act relating thereto must be strictly carried out. Defendant company has a Dominion charter which defines a method whereby legal service can be effected upon it.

The Fire Insurance Act, R.S.B.C. 1911, ch. 113, sec. 10, provides as a condition of obtaining a license to do business in British Columbia by a company other than a provincial company that such company must appoint an attorney in fact on whom service of legal process against the company may be effected. Defendant company has complied with this provision but the sheriff did not serve this attorney but served an agent whose only authority was to write policies. It is argued that because sec. 47 of the Fire Insurance Act contains a proviso that nothing contained in said Act should render invalid service in any other mode in which the company may be lawfully served, therefore the service so effected by the sheriff herein is good by virtue of Marginal Rules 1016 and 55, sub-sec. (a). Said sub-section is the rule on which this argument rests. The rule expressly states its provisions apply only in the absence of any statutory provision regulating service of process. There is as stated a statutory provision both by the Dominion and by the Province for service on this company. True the provincial provision preserves other methods of service that are lawful but there remains the Dominion statutory provision which if valid would, in my opinion, bring this case within the qualifying words with which Marginal Rule 55 opens. There can be no question of the validity of the Dominion provision. *Jordan* v. *McMillan* (1901), 8 B.C.R. 27. In fact, that case seems to go much further than merely to determine the validity of such a provision. It is argued that the defendants cannot be heard to raise this point since by letter they admitted receipt of the documents so served. But it is to be remembered the Court is being requested to mandamus the defendants to remove Stewart's name as a shareholder and to substitute some other person as owner on its register of shares. Although Stewart is not before the

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Court, the order asked for would if made affect him and the Court I think must have regard to this situation to the extent of seeing that what the Execution Act requires to be done has been legally done.

The action is dismissed. *Action dismissed.*

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S. C.

Re SMITH AND DALE.

(Annotated.)

Ontario Supreme Court, Middleton, J. December 13, 1919.

DEEDS (§ II A—17)—FREEHOLD ESTATE COMMENCING IN FUTURO—CONVEYANCE OF BENEFICIAL ESTATE—CONSTRUCTION—ESTOPPEL—VALIDITY.

A conveyance of land from a wife to her husband "from and after the death of the party of the first part unto and to the use of the party of the second part (should he survive the party of the first part) for and during the term of his natural life, with remainder over in fee simple" . . . "in trust for the purposes of my will"; *held*, not to be inoperative as creating a freehold estate commencing *in futuro*, but that the beneficial interest was subject to a power of appointment to be exercised by the wife by will, and when she sold and her husband joined for the purpose of conveying his life estate the effect was to convey the whole beneficial interest to the purchaser.

[See annotation following this case.]

Statement.

MOTION by a vendor of land, under the Vendors and Purchasers Act, for an order declaring the purchaser's objection to the title invalid and that the vendor could make a good title.

W. A. McMaster, for vendor; *T. B. Richardson*, for purchaser.

Middleton, J.

MIDDLETON, J.:—The vendor derives title under a conveyance made by Amanda Wiggins and Joseph Wiggins subsequent to the instrument next to be mentioned.

On September 5, 1903, Amanda Wiggins, then the owner in fee simple of the land in question, executed a conveyance bearing that date, in which she is the party of the first part and her husband the party of the second part. By this, in consideration of $1, she conveyed the land in question, "from and after the death of the party of the first part, unto and to the use of the party of the second part (should he survive the party of the first part) for and during the term of his natural life, with remainder over in fee simple to David R. Boucher," of etc., "in trust for the purposes of my will." The habendum follows this grant strictly.

Mrs. Wiggins and her husband, having, as mentioned, conveyed the land and received the price, cannot now be found, and it is not known whether she is yet alive. Boucher, it is said, left the

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RE SMITH AND DALE.

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Province for the West years ago, and so far has not been located. He was not a party to the conveyance under which the vendor claims.

The property has passed through several hands, but objection is now taken that, by reason of the provision of the conveyance which I have quoted, a good title cannot be made.

It was argued before me on behalf of the vendor that the deed in question was inoperative for that it purported to create a freehold estate commencing *in futuro*, "from and after the death of the party of the first part," and, therefore, the property was still vested in the grantor. As I understand the law, the statement that no estate in freehold can be created to commence *in futuro* is confined to attempts at such creation by common law conveyance, and where, as here, the word "grant" is used, it has a wider significance and operation; and, even if no actual conveyance of the legal estate is effected, the conveyance would operate as a covenant to stand seised.

I am, however, of opinion that the remainder expectant on the lives of Amanda and Joseph would be held, under the conveyance, by Boucher as trustee, and that the beneficial interest would be subject to a power of appointment to be exercised by Mrs. Wiggins by will; and that, when she sold and her husband joined for the purpose of conveying his life-estate, the effect was to convey the whole beneficial interest in the estate to the purchaser. I come to this conclusion upon the principle on which I acted in *Re Campbell Trusts* (1919), 17 O.W.N. 23, and upon the authority of the cases there cited.

In this view, I think that the vendor can now make a good title to the lands in question.

Had it been practicable, I should have directed notice of this application to be given under Rule 602; but there is no one whom I can notify. No one can assert any title to the lands save as deriving title through Mrs. Wiggins. She, having conveyed the property and received the price, would be estopped, and those claiming title under her would also be estopped; so good title is made by estoppel.

Before the order issues, I think it advisable that formal notice of motion and an affidavit setting out the facts should be filed. The deeds alone have been left with me.

Annotation.

GRANT OF FREEHOLD ESTATES IN FUTURO.

ANNOTATION

by

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THE CASE OF RE SMITH AND DALE, *ante* page 274.

Re Smith and Dale, ante page 274, involves the question whether a freehold estate to commence *in futuro* can be created by a grant.

A married woman conveyed land by deed of grant (presumably the short form conveyance) to her husband "from and after the death of the party of the first part (the wife) unto and to the use of the party of the second part (the husband) should he survive the party of the first part for and during the term of his natural life with remainder over in fee simple to B. in trust for the purposes of my will." An habendum followed in the same terms. The husband and wife sold and conveyed the land, which subsequently passed through several hands to the present vendor. At the time of the application under the Vendors and Purchasers Act the whereabouts of husband, wife and B. was unknown. It was objected by the purchaser that the deed was inoperative because it affected to create an estate of freehold to commence *in futuro, i. e.*, from the death of the grantor. As to this point, the Judge said, "As I understand the law, the statement that no estate in freehold can be created to commence *in futuro* is confined to attempts at such creation by common law conveyance, and where, as here, the word 'grant' is used, it has a wider significance and operation."

It is submitted, with all respect, that this is not the law. The origin of the rule dates back to a time when land was actually delivered to the feoffee, and it was impossible to make the conveyance by feoffment with livery of seisin at the present moment to take effect in the future. In other words a feoffor could not deliver seisin and at the same time not deliver it. The formula prescribed for effecting livery of seisin ended with the words "enter and take possession." But the nature of a future transaction would require the feoffor to say, "Do not enter until, etc." And he would have been obliged to appear at the future date and actually make livery at that time. When uses were invented, it was possible by resorting to a conveyance to uses to produce results that were impossible at the common or feudal law. And after the Statute of Uses was passed it became possible to effect what the feudal law could not effect, namely, the creation of an estate of freehold to arise or commence in the future, which would vest by virtue of the statute at the appointed time. The rule remained, however, that an estate of freehold could not at common law be created to commence *in futuro*. But in expressing the rule the common law was contrasted with the Statute of Uses. Thus, when it was said that a freehold estate could not be made to commence *in futuro* by common law conveyance, what was meant was a conveyance not operating under the Statute of Uses, and if any other conveyance were substituted for feoffment with livery of seisin, having the same direct effect, the result would be the same.

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Pausing here for a moment to consider the effect and operation of a grant, it appears that it was a common law conveyance, but was not effective to convey the immediate freehold, as the feudal law required an open and notorious delivery of the lands. It was used to convey interests in land which were incapable of livery, as remainders and other incorporeal rights, such as easements. But its operation was direct and immediate. As the conveyances in use in the early part of the last century were inconvenient, the statute (now R.S.O. 1914, ch. 109, sec. 3) was passed by which it was enacted that "All corporeal tenements and hereditaments shall, as regards the conveyance of the immediate freehold thereof, be deemed to be in grant as well as in livery." No additional significance, no different operation, no wider meaning were given to the word "grant," but it was applied to a new interest, namely, the immediate freehold. It still remained a conveyancing word having direct and immediate operation; and became an additional mode of conveying the immediate freehold. The point arose acutely in *Savill Brothers* v. *Bethell*, [1902] 2 Ch. 523, where a grant was made of a piece of land to become operative at a future date. Stirling, L.J., in delivering the judgment of the Court of Appeal, said at pages 539-40: "Formerly a deed of grant was a mode of assurance applicable only to incorporeal hereditaments, including reversions and remainders in land, but by 8-9 Vict. ch. 106, sec. 2, it was enacted that corporeal hereditaments, as regards the conveyance of the immediate freehold thereof should be deemed to be in grant as well as in livery. The statute, however, in no way alters the rules of law with respect to the creation of estates." And the Court held the conveyance to be void. So we have the direct authority of the Court of Appeal that a grant of an estate of freehold to commence *in futuro* is contrary to the rules of law, and is therefore ineffective to convey the estate.

COVENANT TO STAND SEISED.

His Lordship, however, followed on, after the passage above quoted, to say, "even if no actual conveyance of the legal estate is effected, the conveyance could operate as a covenant to stand seised." Where there is a valid covenant to stand seised, the legal estate does in fact pass to the covenantee. The covenantor, being seised, covenants that he will stand seised to the use of the covenantee, and the Statute of Uses executes the use and passes the legal estate to the covenantee. But the consideration for a covenant to stand seised must be either blood or marriage: Sanders on Uses, vol. 2, page 80. If a consideration of money be added to the consideration of marriage, the use will arise on the latter consideration only: *Ibid*, vol. 2, page 81. In the present case the consideration was $1.00. As it was quite apparent from the nature of the transaction that the land was intended to be conveyed only because the grantee was the husband of the grantor, it might be concluded that the consideration of marriage existed, and the benevolent construction that the deed might be treated as a covenant to stand seised might be accorded to it. But here another difficulty arises. Sanders says (vol. 2, page 81), "If a covenant be made to stand seised to the use of a person related to the covenantor by blood or marriage and of a stranger the whole use will vest in the relative." That is to say, that the consideration of blood or marriage moves wholly from the husband, wife or relative, and is the only consideration that will raise the use, and therefore the use will be raised only in favour of the spouse or relative, and the stranger gets nothing. If the consideration be

Annotation. divided, and the relation of marriage be attributed to the grantee's life estate, and the $1.00 to that of the remainder man, there is still no operation in favour of the latter, for the money consideration will not raise a use on a covenant to stand seised.

Whether the conveyance be treated as a grant or as a covenant to stand seised, the intention was that it should not become effective until the death of the grantor. Although the Judge held that the remainder to B. was good, it is impossible for the writer to see how it could stand. A remainder must have a particular estate to support it, and in this case, whatever complexion the deed may assume, it must be taken not to have passed any estate at the time of its delivery; and, there being no particular estate to support the remainder to B., it must fail as a vested remainder. If it could operate at all in favour of B., it could only operate as a contingent remainder, expectant upon the husband surviving the wife, and still there is no freehold estate to support it. Thus the problem becomes more and more involved by departing from the simple rule that a freehold estate cannot be created to commence *in futuro* by a deed of grant, which the deed purported to be in all its terms.

For the purpose of the case, a better result would have been arrived at by so holding, than that which the Judge reached. Holding the deed to be void as an attempt to create a freehold estate *in futuro*, neither the husband nor the remainder man would take anything; and the wife would thus be able to convey the whole legal and beneficial interests to the purchaser, which interests he was entitled to receive. Whereas, by holding that the remainder to B. was good, the only declaration that could be made was that the purchaser would get the beneficial interest and no regard is paid to his right to receive the legal estate.

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KELLY v. WATSON.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Ives, JJ. March 31, 1920.

SPECIFIC PERFORMANCE (§ I E—30)—SALE OF LAND—AGREEMENT VAGUE—PART PERFORMANCE—CONSTRUCTION OF BY COURT.

When the purchaser has taken possession under an agreement for sale of a farm, and has worked the farm and made improvements thereon, the Court will decree specific performance and construe the vague parts of the agreement although owing to the vagueness it would not decree specific performance if there had been no part performance.

[*Hart* v. *Hart* (1881), 18 Ch. D. 670, followed, and see also *Western Transfer Co.* v. *Fry* (1920), *post*, page 291. See annotation, Vague and Uncertain Contracts, 31 D.L.R. 485.]

Statement. APPEAL by the defendant from the judgment of Walsh, J., at the trial. The action is one to obtain possession of a parcel of farm lands.

H. R. Milner, for appellant; *J. F. Lymburn*, for respondent.

The judgment of the Court was delivered by

Beck, J. BECK, J.:—The title of the plaintiff alleged in the statement of claim is that one Symington, being the registered owner of the

land, entered into an agreement dated February 26, 1918, for the sale to the plaintiff of the land, under which agreement the plaintiff is entitled to possession.

The defendant among other defences sets up that: On April 8, 1918, the plaintiff through her agent, one Raymer, by an agreement partly in writing and partly oral agreed to sell, and the defendant agreed to buy, the land for the price of $4,800, of which $300 was to be paid in cash on or before July 10, 1918, and the balance by the delivery to the plaintiff of one-half of the crop grown on the land, while interest at the rate of 8% per annum was to be computed annually and added to the unpaid principal; that it was agreed that formal, written articles of agreement should be drawn up and executed; that it was in pursuance of this agreement that the defendant entered into and continues in possession; that since entering on the land the defendant has farmed it, cropping during 1918 upwards of 40 acres; that he has fenced part of the land and moved on to the land a house of the value of $500 and a shed of the value of $40 besides making other improvements; that the defendant has always been and still is ready and willing to carry out his agreement.

The defendant counterclaimed for specific performance. In her reply the plaintiff amongst other things sets up that: On April 8, 1918, the defendant approached Raymer with a view to purchasing the land. Raymer told the defendant that he was not in a position to sell the land at that time but that he was negotiating for the purchase of the same and that if he completed the purchase he was prepared to sell to the defendant at the price of $4,800—$300 in cash on or before July 10, 1918, and the terms of payment of the balance to be adjusted when the agreement for purchase by Raymer was completed. A memorandum in writing of the arrangement was made out and signed by the parties and it was verbally arranged that the defendant should go into possession pending the completion of the agreement and that if the agreement was not completed the defendant would move off and allow Raymer one-third of the crop; that the defendant did not pay the $300 and no agreement was ever made as to the manner of payment of the balance of the price; and that the value of one-third share of the crop exceeds the value of the improvements

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placed on the land by the defendant (meaning, I suppose, that the defendant could keep the plaintiff's one-third of the crop as payment for the improvements).

At the time of the negotiations between Raymer and the defendant, Raymer was a tenant of the land under a lease from Symington and was already in correspondence with him with the view of purchasing it.

The plaintiff had already received a letter from Symington dated March 8, 1918, containing an offer to sell to Raymer on terms quite distinctly set forth at the price of $4,000, payable $500 cash and the balance in 5 annual payments of $700 each, and interest at 7% per annum, subject to getting the consent of a third party, the formal agreement to be dated February 25, 1918.

The memorandum in writing between Raymer and the defendant referred to in the defendant's pleadings was in the following words, and was drawn up by Raymer personally:—

Mirror, April 6, '18.

This is to certify that I have this day sold all my right and interest in the N.W. ¼ of section 22, Township 40, Range 22 W. 4th for the sum of $4,800.00. Mr. Watson of Mirror being the purchaser, he to pay the sum of $300.00 in cash on or before the 10th day of July, 1918, a further payment to be made from the proceeds of the crop to be grown on above quarter. An agreement for sale to be executed during this season and the bal. of payments to be payable yearly at 8% interest; it is further understood that there is to be 12 acres to be broken this spring in time for crop the same to be done by Wm. Crook and to be turned over to Mr. Watson at $90.00, the said $90.00 being in addition to the $4,800.00 payable to H. J. Raymer.

(Sgd.) H. J. Raymer.
" C. H. Watson.

Raymer gave the following evidence:

Q. Was that (the memorandum between him and the defendant) all the arrangement that was made that day in regard to the terms of the lease? A. That is all. Q. Was there any discussion between you as to what was to happen if the agreement didn't go through? A. Oh, yes, there was a discussion that *in case I didn't make the deal with Mr. Symington and wouldn't be in position to deliver this land* that for the use of the land for 1918 I was to get one-third of the crop, the usual rental prevailing in that district for the use of land. Q. That is, he was to go in possession immediately and if the agreement wasn't completed between you he was to allow you one-third of the crop? A. One-third of the crop. Q. Was there any arrangement made in regard to the payment of the balance? This agreement that has been put in says: "A further payment to be made from the proceeds of the crop to be grown, and an agreement for sale to be executed during this season." A. There was a cash payment to be made in July, and the balance, as near as I could figure

according to what I would have to pay Mr. Symington, I thought that forty acres would produce the difference with the three hundred would make a substantial payment as a first payment. Q. How much of the crop for that year? A. The entire crop for 1918. Q. Plus $300 you figured would be a good cash payment? A. Yes. Q. What about the balance of the payments? A. *The balance of the payments were to be governed by the contract I would make with Mr. Symington.* In all agreements of that kind, crop payments, we have to provide for a certain amount of payment, and if the acreage didn't produce it the balance would have to be made up in cash. Of course, this contract (between me and the defendant) was never drawn up. Q. What was the arrangement in regard to completing the terms of the agreement, when was that to be done? A. After I had finally consummated the deal with Mr. Symington. Q. There was no definite agreement then made at the time that memorandum was made out and signed as to how the balance was to be paid? A. No, because Mr. Watson, I very distinctly remember, came in to my place three or four times subsequent to that time, and he said, "Have you heard anything from Winnipeg?" I said: "Nothing." He said: "About how much do you think the annual payments are going to be?" I said: "Mr. Watson, *I can't tell you that until I finally conclude the deals with Mr. Symington.*" Well, that was all right, no objections made, no discussion.

At this date the correspondence between Raymer and Symington had been such that Raymer could and doubtless did feel that there was no doubt that he would secure an agreement of sale of the land from Symington on the terms set forth in his letter. The correspondence was continued and Symington occupied some time in communication with these other parties one of whom lived in England. Ultimately Raymer accepted Symington's proposal by telegram on September 3.

A formal agreement, dated February 25, was executed shortly afterwards in favour of the plaintiff who is Raymer's daughter as his nominee.

Further on in his evidence Raymer says: "The agreement for sale would have to be made for sufficient to cover what I would have to pay Symington."

In his examination of Raymer for discovery the following appears:

Q. You consider that under this agreement you sold the land on the 6th April? A. Sold my interest in it. Q. You sold your interest in it? A. Yes. Q. And you considered that was final? A. Yes; provided that I came through with Symington.

Based on this Raymer was asked:

Q. So you considered if you finally closed out your agreement with Symington that the land was sold to Watson? A. I had a right to change my mind after that little agreement was made.

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Raymer further says that when he was drawing up the memorandum of agreement he "intended to have the entire proceeds of the crop of 1918 instead of a further payment." He says that the subsequent payments were to be made in cash whether the money came from the crops or not.

Still further on Raymer, after explaining that he cannot trust his memory owing to past serious illness, says that he was not only to get the whole of the first year's crop but also the whole of the second year's crop (meaning, I think, of each crop). Then he says that later on when he saw how the defendant was handling the land he thought the defendant would never be able to pay for the place out of the crop.

In answer to the Judge, Raymer says: "The balance (of the payment) was to come out of the land; if there wasn't sufficient to meet the payment we agreed upon per year it would have to be provided for in cash" and that those annual payments were to be based upon the Symington agreement.

It seems to me, taking the evidence of Raymer alone, in conjunction with the written memorandum (1) that it is quite clear that both parties intended an absolute sale subject only to the sale going off by reason of Raymer being unable to secure an agreement from Symington; and (2) that it is reasonably clear that the down payment was to consist of $300 in cash to be paid on or about July 10, and the entire crop for 1918, and that the balance of the purchase money with 8% interest was to be paid in instalments to correspond with the instalments payable by Raymer to Symington, these instalments being payable out of the crop so far as it would extend and as a matter of law giving the vendor a lien upon the crop; and (3) that the proper inference with reference to Raymer's "equity," that is, his profit of $800, is that the balance of the profit after payment of the $300 and the proceeds of the first year's crop should be apportioned so as to accord with the terms of the Symington agreement, that is, being "based upon" or "governed by" that agreement, they should be paid at the same dates, though probably larger in amount, and carry 8% interest, while the Symington agreement carried 7%.

The defendant gave evidence as follows:

Q. Did you have any discussion as to terms? A. Yes. Q. Were any terms finally agreed on? A. Yes, sir. Q. What were they? Give us first,

was there any purchase price agreed on? A. Yes, sir. Q. Did you reach any agreement as to the price at which you were to purchase the land? A. Yes, sir. Q. What was it? A. $4,800. Q. How was that made up? A. There was to be $300 paid in cash— Q. No, no, what price per acre? A. $30 per acre, I believe. Q. That was the price, was it, $30 an acre? A. Yes, sir. Q. Then what was said as to the terms of payment? A. There was some little discussion as to the terms of payment; I first wanted to buy it on a straight crop payment, and I told him if he would accept a straight crop payment, without any cash payment, that I would give him the whole of 1918 crop without any cash payment, and he said he had to make a payment to the parties he was buying from, so it would be necessary to have a cash payment before the crop was harvested. He insisted on a $300 payment to be made in the summer, he insisted on that, and I said a half crop payment would be agreeable with me with the $300 payment in mid-summer, $300 payment in July, and half the crop from that on, and that was agreed on. Q. How was interest to be paid? A. Annually, that was to be computed with— Q. Every year? A. Each year at the price of the farm. Q. At the rate stated in the agreement? A. At the rate stated in the agreement, yes sir. Q. Let us have this clear, the final agreement then, the first suggestion made by you, you should pay him the full crop for 1918? A. Yes, sir. Q. It was finally agreed, however, that three hundred dollars plus half the crop should take the place of the full crop? A. Yes, sir. Q. What did you say again about the subsequent payments? A. The balance of it was to be paid in half crop payments. Q. Half of the annual crop? A. Yes, sir. Q. Until the balance was paid? A. Until the balance was paid off. Q. Was there any discussion at this time regarding the plaintiff's title to the land? A. Yes; he said that he was under contract with Mr. Symington, I believe the name is, for the title to the land, and that owing to this pipe line being across the place and the damage not being calculated for that yet they were withholding their contract from him because the transfer would perhaps prolong the damage on this pipe line. Q. It was not completed on account of the pipe line? A. Yes. Q. Was there anything said by him at this time regarding the possibility of him being unable to complete the contract? A. No, sir. When I was ready to move on the place I asked him is there any danger of his deal with Mr. Symington falling through, and he said, "No, they have to sell it to me; I have it in black and white." Q. You have heard what the plaintiff said, that in the event of certain circumstances you might only be allowed to hold as tenant subject to payment of one-third of crop as rent; was there any discussion as to the possibility of relationship of landlord and tenant between you? A. No, sir; not until fall. Q. That was not mentioned at the time of the agreement? A. No, sir. Q. Did you notice at the time that you signed the agreement that there was nothing definite regarding future payments? A. I didn't notice that, no. Q. Did he give you possession of this land? A. He did. Q. When did you go on it? A. I went on to that farm—I went to work on it very shortly after this contract was drawn up. I wouldn't say just exactly how long, but just in a very short time. Q. A very short time afterwards? A. Yes, sir. Q. And you went on to the land? A. I didn't move on it, I went to work on it and put in the most of the crop before I moved on it. Q. Did you finally move on it? A. Yes, sir.

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Then he tells of the improvements he made.

Q. When did you first have a conversation with Raymer about this rental business? You said a little while ago that wasn't mentioned at the time the contract was entered into; you say that was subsequently mentioned? A. I can't say exactly the date the rental question was first brought up. Q. Whereabouts did that conversation take place? A. The first time it was mentioned was in his office. Q. Was there anybody else there? A. I believe not, not that I remember of. Mr. Paton was in there one time when we talked about the rental, but I don't think that was the first time. Q. What happened? A. I was in his office and he spoke—he said he was not going to be able to deliver the title to the place to me and consequently he would have to settle that on a rental basis instead of a cash. Q. Was that before he went to Winnipeg? A. Yes, sir. Q. After he returned from Winnipeg did you have any conversation with him? A. Yes, sir. Q. What did he have to say then? A. He told me that the deal had fallen through, that the land had been purchased by another party. Q. Did he say that other party was his daughter? A. He didn't tell me who. Q. . . . You say before this agreement was signed you actually agreed that the payments should be half crop payments? A. That was the agreement before this was signed. Q. Your agreement was all completed before this was made out? A. Yes, sir. Q. Absolutely there is no question about that? A. Yes, sir.

By the defendant's evidence it is made absolutely certain that both parties intended an absolute sale, subject only to the condition already mentioned.

Raymer and the defendant are absolutely agreed upon this and differ only as to the terms of payment; the defendant insisting that the terms were $300 and half the annual crop until the balance of the purchase-money with 8% interest should be fully paid.

On the whole evidence, I think the defendant's evidence that the first payment was to be $300 and one-half of the crop must be accepted.

The defendant says the value of his crop in 1918 was about $1,000.

It seems difficult now to ascertain the exact amount.

The trial Judge finds that Raymer and the defendant did agree for the sale and purchase of the land conditionally upon the Symington agreement going through; that the defendant tendered the $300. He says his only difficulty is as to the terms of payment of purchase-money after the initial payment of $300. He finally holds that the parties were not *ad idem* as to the terms of payment.

There are some propositions of law applicable to such a case as this which it seems to me are sufficient to enable us to solve the difficulty with which the trial Judge was faced.

In Fry on Specific Performance, 5th ed., p. 165, it is said, after saying that a contract must be certain, fair and just:

In regard to objections founded on the want of any of these qualities in the contract or on the incapacity of the Court to perform the contract, or its illegality, the Court is, from obvious motives of justice, somewhat unwilling to entertain the objection, *when it is made after part performance* from which the defendant has derived benefits and the plaintiff cannot be fully recompensed, except by the performance of the contract *in specie*. When a contract has been partly executed by possession having been taken under it, the Court, it has been said, "will strain its power to enforce a complete performance," (*Parker* v. *Taswell* (1858), 2 DeG. & J. 559, 571, 44 E.R. 1106.)

And see Fry, pp. 50, 190; and 27 Hals. *tit*: Specific Performance, pp. 23, 28; *Chattock* v. *Muller* (1878), 8 Ch.D. 177 at 181 (citing *Gregory* v. *Mighell* (1811), 18 Ves. 328, 34 E.R. 341); *Joy* v. *St. Louis* (1890), 138 U.S. 1; *Hart* v. *Hart* (1881), 18 Ch.D. 670; *Milnes* v. *Gery* (1807), 14 Ves. 400, 33 E.R. 574.

In *Hart* v. *Hart, supra*, Kay, J., says at p. 685;

It is the duty of the Court, as far as possible to do so, to ascertain the terms of the agreement and to give effect to it. That is, as I understand, the rule of equity, that although there may be considerable vagueness in its terms, and although it may be such an agreement as the Court would hesitate to decree specific performance of, if there had not been part performance, yet *when there has been part performance the Court is bound to struggle against the difficulty ensuing from the vagueness.*

Again, In Fry, p. 181, it is said:

It is of course essential to the completeness of the contract and it should express not only the names of the parties, the subject-matter and the price, but all the other material terms. What are, in each case, the material terms of contract, and how far it must descend into details to prevent its being void as incomplete and uncertain, are questions which must of course be determined by a consideration of each contract separately. It may however be laid down that the Court will carry into effect a contract framed in general terms where the law will supply the details.

And at p. 183:

Besides the express terms of the contract there are others which in the absence of any expression to the contrary are implied by law. With regard to such terms, therefore, whether they be necessary terms or not, the silence of the contract does not render it incomplete . . . (if) there arises from the language of the contract itself, and the circumstances under which it is entered into, such an inference that the parties must have intended the stipulation in question, that the Court is necessarily driven to the conclusion that it must be implied (and see Fry, p. 190, and 27 Hals. pp. 27, 28).

Again, In Fry, p. 185, it is said:

Where a contract contains stipulations which are simply and solely for the benefit of the purchaser and are severable, the purchaser may waive them and obtain judgment for specific performance of the rest of the contract. (*Hawksley* v. *Outram*, [1892] 3 Ch. 359, 376), (and see Fry, p. 484).

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And in 27 Hals., p. 48: "Where the mistake is that of the defendant only, the Court may give the plaintiff the option of having his action dismissed or of having specific performance in the terms of the contract as understood by the defendant (*Preston* v. *Luck* (1884), 27 Ch.D. 497)," and see p. 49.

Still again, in 27 Hals., p. 41, it is said: "In some cases a plaintiff is not granted specific performance, except on certain terms imposed to avoid hardships which otherwise would result to the defendant," and see *Davis* v. *Hone* (1805), 2 Sch. & Lef. 341, 348.

In view of these principles I think it is proper and within the power of this Court to declare the defendant entitled to specific performance if within one month he signifies his willingness by notice filed and served to accept the judgment now proposed.

The judgment will contain a declaration to the effect that the contract is one for the payment of $300 on July 10, 1918, and for the payment of one-half of the proceeds of the crop of 1918, the value of the one-half being fixed (on the defendant's evidence) at $500; and for the payment of the balance $4,000 of the purchase-money in 5 equal annual instalments with interest at 8% on February 25, in each of the years 1919-23; interest on the purchase price of $4,800 (except the $300 which was refused by the plaintiff) to be calculated from April 8, 1918.

The judgment should also provide in some form for the protection of the defendant against the plaintiff's non-payment to Symington. It should allow the defendant one month from the date of his acceptance of this judgment for the payment of the arrears owing to the plaintiff.

These amounts can be calculated and inserted in the formal judgment.

If the defendant declines to accept this judgment his counterclaim will be dismissed with costs, and the judgment for the plaintiff will stand. If the defendant accepts this judgment he will have his costs of the action, and the plaintiff's action will be dismissed with costs. If the defendant accepts this judgment he will have his costs of the appeal, otherwise the appeal will be dismissed with costs.

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This judgment if accepted by the defendant will go on the usual form of a judgment for specific performance which in case of default in payment will leave it open to the plaintiff without express provision to move to rescind the agreement.

Judgment accordingly.

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Nova Scotia Supreme Court, Russell, J. November 24, 1920.

1. ALIENS (§ I—3)—IMMIGRATION—THROUGH TRANSIT FROM COUNTRY OF ORIGIN—DEPORTATION ORDER NOT SHEWING JURISDICTION OF AN "OFFICER IN CHARGE"—REVIEW ON HABEAS CORPUS.

A deportation order which an immigration officer in charge is authorised to make only when there is no Board of Inquiry in the vicinity of the port of entry must shew on its face that there was no Board of Inquiry there; otherwise the order does not disclose any jurisdiction in the officer to make the same and a discharge may be ordered on *habeas corpus*. In such case the limitations of review by sec. 23 of the Immigration Act, 9-10 Ed. VII. 1910 (Can.), ch. 27, are not a bar to *habeas corpus*.

[*Re Walsh, Collier, etc.* (1913), 13 D.L.R. 288, 22 Can. Cr. Cas. 60, followed.]

2. HABEAS CORPUS (§ I B—6)—AFTER UNSUCCESSFUL APPEAL TO STATUTORY AUTHORITY—DEPORTATION ORDER UNDER IMMIGRATION ACT 1910 (CAN.)—JURISDICTION NOT APPEARING ON FACE OF DEPORTATION ORDER.

Habeas corpus will lie in respect of a deportation order made by an officer whose jurisdiction to act in lieu of a Board of Inquiry is not shewn on the face of the order, although the applicant had first taken an unsuccessful appeal to the Minister of the Interior under sec. 19 of the Immigration Act, 1910 (Can.).

[*Re Ruggles* (1902), 5 Can. Cr. Cas. 163, applied.]

Statement.

THE applicants, Hianson and Moller, arrived at the port of Halifax on the S.S. Caronia. They were rejected by the officer-in-charge W. L. Barnstead as having violated an Order in Council, passed under the Immigration Act, 9-10 Ed. VII. 1910 (Can.), ch. 27, and 9-10 Geo. V. 1919 (Can.), ch. 25. The Order in Council reads as follows:—

"From and after the date hereof the landing in Canada shall be and the same is here hereby prohibited of any immigrant who has come to Canada otherwise than by continuous journey from the country of which he is a native or naturalised citizen and upon a through ticket purchased in that country or prepaid in Canada" (P.C. 23, of January 7, 1914).

The applicants appealed to the Minister of the Interior under sec. 19 of the Immigration Act. That appeal was dismissed.

RUSSELL, J., granted writs of *habeas corpus* and *certiorari*, and bailed the applicants during the hearing.

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The present motion was for discharge on the return of the writs.

W. J. O'Hearn, K.C., and *H. L. Webber*, for the applicants:—The evidence shews that Hianson proceeded direct from Bucharest to Antwerp and was there delayed on account of a lost ticket. Mallor was originally destined to Chicago from Poland but changed his mind at Antwerp and sailed to Canada. He was delayed on account of illness of his children. "Continuous passage" must not be construed literally, if so an individual missing a boat would have to begin all over again. It must be construed the same as "forthwith," which has been held to mean "within a reasonable time."

The order does not shew on its face that the officer in charge was acting "in the absence of a Board." *Re Walsh* (1913), 13 D.L.R. 288, 22 Can. Cr. Cas. 60.

[Russell, J.:—Mallor never originally intended to come to Canada; he changed his mind. How can you say his journey was "continuous?"]

O'Hearn:—The statute does not regard intention. The question is whether on arriving in Canada he has made a continuous journey from the place of his nativity or naturalisation:

R. H. Murray, K.C., *contra*.—The finding of Mr. Barnstead was one of fact. It cannot be reviewed on *habeas corpus*, 9-10 Ed. VII. 1910 (Can.), ch. 27, sec. 23. *Rex* v. *Schoppelrei* (1919), 31 Can. Cr. Cas. 255, 30 Man. L.R. 137; *Rex* v. *Alamazoff* (1919), 47 D.L.R. 533, 31 Can. Cr. Cas. 335, 30 Man. L.R. 143. Applicants having appealed cannot have *certiorari* or *habeas corpus*. *Ex parte Ross* (1895), 1 Can. Cr. Cas. 153.

O'Hearn, K.C., in reply:—If there was no evidence before the Board there is no jurisdiction. *Rex* v. *Mackey* (1918), 29 Can. Cr. Cas. 167, and cases cited therein. *Certiorari* will always lie if there is no jurisdiction. *Re Ruggles*, (1902), 5 Can. Cr. Cas. 163; *Re Jeu Jang How* (1919), 47 D.L.R. 538, 31 Can. Cr. Cas. 341, 27 B.C.R. 294, and *Rex* v. *Jeu Jang How* (1919), 50 D.L.R. 41, 59 Can. S.C.R. 175, 32 Can. Cr. Cas. 103.

Russell, J.

RUSSELL, J.:—These cases were argued together and involve some questions common to both. As to the latter case, it is not necessary for me to determine whether I am prevented from reviewing the decision of the immigration officer in charge by sec.

23 of the Immigration Act, because I do not think the immigrant can be said to have complied with the requirements of the Order in Council. I think he has not come into Canada by a continuous journey from Poland. When he left Poland his intention was to go to Chicago in the United States, and his statement is that he had a prepaid ticket for that destination. It was only after his arrival at Antwerp that he changed his intention and it was then arranged that his ticket to Chicago should be, as it was, exchanged for transportation from Antwerp to Toronto *via* Halifax. I do not see how it is possible to overcome this difficulty. I have nothing to say about the hardships of the case, further than that I regret that I have not the power to order that the immigrant should be discharged.

In the other case, that of the immigrant Hianson, exception is taken to my jurisdiction to deal with the matter, because of the prohibitions in sec. 23. I think I am warranted in ignoring this prohibition by the decision of the late Graham, E.J., in *Re Walsh* (1913), 13 D.L.R. 288, 22 Can. Cr. Cas. 60. The order is made by "the Immigration Officer in charge" and it is not shewn on the face of the order that there was not a Board of Inquiry here or at a neighbouring port of entry which Graham, E.J., held to be necessary in order to give the officer jurisdiction.

The contention of the opposing counsel if pushed to an extreme would lead to the rejection of an immigrant if he were in every other respect admissible and desirable, simply because he had through some accident missed his train or steamer. I cannot imagine that this was the intention of the statute or of the Order in Council based on the provisions of the statute.

The immigrant has sworn that he left Bucharest intending to come to Canada and that his passage had been prepaid by his uncle from Bucharest to Canada, by providing him with the money for his transportation to Antwerp and from Antwerp by the Cunard line *via* London, England. The statement is, I must confess, a little vague at this point, but I infer from the affidavit that transportation had been provided for by the uncle from Antwerp to Canada and that the delay and detention at Antwerp were caused by the loss of the ticket thence to London or to Canada. The immigrant was compelled in consequence to await the transmission of a second ticket from Antwerp to Canada. I

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should regard this as a substantial compliance with the requirements of the statute and Order in Council.

I do not attach much importance to the statements of the immigrant at the examination by the immigration officer, which it is contended are at variance with his affidavit. He was asked where he last resided. His answer is that he resided 2 months in Antwerp and 3 years in Berlin. Doubtless his residence in Antwerp refers to the detention at that place necessitated by loss of his ticket. It is quite consistent with his affidavit that he may have been for 3 years with his mother in Berlin, and if this country were still at war with Germany, I should be induced to scrutinise that part of the examination somewhat closely. But the order for deportation is not based on any question as to the citizenship of the immigrant or his nationality. It is simply that he has not complied with Order 23 of the King's Privy Council for Canada. I hold that he has so complied in the sense in which the order may fairly be construed.

A supplementary brief was presented to me on behalf of the immigration officer after the conclusion of the argument. The contention is made here, which also was made at the argument but for which no authority was cited, that the immigrant could not resort to *habeas corpus* after appealing to the Minister. The decision of the Court *in banco* in *Re Ruggles*, 5 Can. Cr. Cas. 163, is opposed to this contention, and establishes the right even to *certiorari* after appeal where the defect alleged is want of jurisdiction.

The other case cited in the brief related to the admission of the immigrant to bail. The question as to bail is not before me. If and when it should come before me I should have to hear a further argument as to the question. It does not seem necessary that I should do so now as I have come to the conclusion that the immigrant is entitled to be discharged from custody.

P.S.—Since the above was written I have been favoured with another supplementary brief citing the case of *Rex* v. *Morris*, not reported. This would be in point if the objection were merely a technical one. But if I have rightly interpreted the statute and Order in Council, there was no want of compliance with the statute or Order in Council, nor any evidence on which such failure to comply could be found.

Order for discharge of Hianson.
Discharge of Moller refused.

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Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Ives, JJ. November 11, 1920.

LANDLORD AND TENANT (§ II A—8)—LESSEE SUBLETTING PART OF BUILDING —PAROL AGREEMENT TO REDUCE RENT—PROOF—VALIDITY.

The plaintiffs were the lessees of a certain building and leased a portion of it to the defendants at a rental of $150 per month. Owing to conditions caused by the Great War the defendant sought to have the rent reduced to $100, and in an action to recover the balance of the rent reserved in the lease, claimed that it had been reduced by parol agreement. The trial Judge held that the defendant had failed to establish any substantive agreement to reduce the rent either express or implied and that a promise to reduce upon the plaintiff receiving a reduction from his landlord was without consideration and had been withdrawn. This judgment was affirmed on appeal by an equally divided Court.

[*Kelly* v. *Watson* (1920), *ante* page 278, referred to.]

Statement.

APPEAL by defendant from a judgment of Simmons, J., in an action to recover the balance of rent due under a lease. Affirmed by an equally divided Court.

Frank Ford, K.C., for appellants; *G. B. O'Connor*, K.C., for respondents.

Harvey, C.J.

HARVEY, C.J.:—The plaintiffs were the lessees of a certain building and on October 9, 1913, leased a certain portion of it to the defendants for a period of approximately 5 years at a rental of $150 per month. By reason of the situation created by the outbreak of the Great War in the summer of 1914 both parties approached their respective landlords with the object of obtaining a reduction of rent. The result of the plaintiffs' negotiations with their landlord was that for 4 months commencing with October, 1914, they paid $900 a month instead of $1,050, the rent reserved by their lease; and from February to July inclusive, 1915, $850; for August, 1915, $800, then from September, 1915, to April, 1917, $750. During all this period, however, the plaintiffs' landlord, while accepting the rent paid, declined to accept it in full payment for the rent but held the balance in abeyance. In April, 1917, however, a definite settlement was made with the landlord and a new lease entered into at a new rental of $600 a month and no claim was made for any balance of past rent which was apparently abandoned.

Defendants' manager had several interviews with plaintiffs' manager about reduction of rent during this period and he says that the latter promised that as soon as he got his reduction he would reduce the defendants' rent *pro rata*.

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As what took place between the parties in this regard is in my opinion of considerable importance, I quote part of the evidence of the plaintiffs' manager, Leonard, as follows:—

Q. You say you told Mr. Jarman (defendants' manager) on several occasions you were not able to see Purcell (plaintiffs' landlord) because he was away ill? A. Yes. . . . Q. What had Purcell's reducing it to you permanently to do with any arrangement with Jarman? A. It had everything to do. Q. What had it to do? A. Until I could get this lease cleared up and put on a permanent basis I did not propose to reduce it to Jarman. Q. You promised Jarman something, conditional upon getting a reduction from Purcell? A. Yes, but mine was a conditional reduction at all times which he could come back and claim on me. Q. But there has been no claim made and you say you did (do?) not owe him anything? A. Yes. Q. Then you did get a permanent reduction? A. Not until May, 1917. . . . Q. And you did not tell him you got any reduction, conditional or otherwise? A. No, I did not.

It is true that the witness as above quoted stated that he promised to reduce defendants' rent when he got plaintiffs' reduced, yet, when further pressed by counsel, he qualified that by saying that he promised to consider the request for a reduction. The trial Judge, however, states that the promise to reduce was admitted, which I take it means as I would feel no doubt that the first answer represents the fact without the qualification later suggested.

In April, 1916, no arrangement having been arrived at and plaintiffs having reduced the rent in favour of other tenants, some of whom at least, however, were in premises which plaintiffs held under lease from a different person, Jarman had another interview and insisted on his right to have the rent reduced as the others had and he says he told Leonard that otherwise they would have to go out of business. Leonard does not deny that he was told this but says he does not recollect it but he admits that he knew that their business had been much injured by war conditions. Jarman then tendered a cheque for $100 as sufficient for the monthly rental. This was refused but subsequently the plaintiffs' book-keeper was sent to get the cheque. There is a dispute as to whether a statement was made as to its being taken on account but I do not find it necessary to consider which is the correct view because it is clear that the plaintiffs continued to send a monthly statement charging $150 for rent while the defendants continued to pay $100 a month regularly and in November following a demand was made for the unpaid balance up to that time. The defendants replied stating

that they were to get a reduction as soon as plaintiffs received a reduction, and the letter implies that they considered the plaintiffs had then received that reduction though as pointed out it was not definitely settled until April following. The plaintiffs replied denying that any promise was ever made for a reduction of rent and renewed the demand.

From that time till the end of the term in December, 1918, the defendants continued to pay $100 a month, which was received without demur, though the monthly notice for $150 continued. The last cheque bore on its face the words, "In full settlement of all rent to 31st December, 1918, of premises occupied by us in Purcell Block." This was deposited in the bank to the plaintiffs' credit without any exception being taken.

The plaintiffs' book-keeper who received the cheque said he could not recollect seeing these words, but he also said he could not recollect the cheque. He also says that he would not have accepted the cheque in the ordinary course with that endorsement, but the fact is that he did, so that does not help much, and it is worth noting that the words are written very plainly on the face and not on the back of the cheque.

This is an action to recover the balance of rent unpaid on the basis of the rent reserved in the lease. Judgment was given for the plaintiffs by the trial Judge, Simmons, J., who held that the defendants had failed to establish a substantive agreement to reduce the rent to $100 either express or implied. The promise to reduce upon receiving a reduction from the plaintiffs' landlord he considered to be without consideration and to have been withdrawn.

I am by no means satisfied that there was not consideration for this promise. It is true the defendants were liable to pay the rent reserved by the lease, but they were not bound to remain in the premises, and the plaintiffs might well have considered it worth while to keep in occupation a satisfied tenant especially one who would have cartage work for them to do from time to time rather than have their reputation injured by the tenant being known to have left because the landlord refused to do what many people would consider only the fair thing. But it is said that we cannot determine the amount of the reduction because the plaintiffs furnished heat to the defendants and there is no evidence of its

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value or that its cost altered. As I have stated, during all the period during which the payments were made at $100 a month, and for a considerable time before the plaintiffs were in receipt of a reduction of their rent which, though conditional at first, subsequently became absolute. For the first year from April, 1916, the plaintiffs' reduced rent was 71.4% of the original rent reserved and for the final 21 months it was 57.1%. In addition to this the arrangement which the plaintiffs made with their landlord confirmed a considerable previous reduction for a year and a half during which the defendants paid the full rent. The $100 paid by the defendants was 66 2-3% of the rent reserved so that it would appear that even with a reasonable allowance with reference to heating it was not a greater proportionate reduction than the plaintiffs had even during the period while it was paid.

It appears to me that the reasonable inference to be drawn from the evidence is that the $100 was accepted on the same basis as the plaintiffs considered the rent paid by them was being accepted, not as absolutely but only as conditionally a satisfaction of the rent and that when the rent paid by the plaintiffs became an absolute satisfaction of their liability the rent paid by the defendants was intended to be and did become a complete satisfaction of their rent. The acceptance of the final cheque stated to be a final payment is in complete harmony with this view but not with the case now set up by the plaintiffs.

In this view clause 7 of sec. 10 of the Judicature Ordinance, C.O.N.W.T. 1915, ch. 21, seems to be applicable. It provides that:—

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

This, besides making the question of consideration for the promise immaterial, also does away with any need for considering the application of the Statute of Frauds to the promise.

I would, therefore, allow the appeal with costs and dismiss the action with costs.

Stuart, J.

STUART, J.:—I think that this Court in *Kelly* v. *Watson* (1920), *ante* page 278, went to the boundary line of its power to find (or create) an agreement between the parties and I for my part

cannot bring myself to go beyond that line which I think I would have to do if I were to agree to the reversal of the judgment now under appeal. I agree with IVES, J.

BECK, J., concurs with HARVEY, C.J.

IVES, J.:—This is an appeal from the judgment of Simmons, J. The facts are sufficiently set out in the judgment.

The defendants rely upon a parol agreement to reduce their rent from $150 to $100 per month. They admit that neither in the plaintiffs' promise to reduce the rent nor in any discussion about a reduction, up to April 19, 1916, was there mention of the sum of $100, or of any particular sum.

It is equally clear that in each month during the term of the lease the defendants were billed with rent at $150. There is no evidence from which they had a right to infer that their monthly payment of $100, which sum they alone had arbitrarily fixed upon, was being accepted in full payment. In November, 1916, the arrears were demanded by letter. Then there were the two cheques of June and July, 1917, for $100 each which defendants marked for June and July rent but which plaintiff restrictively endorsed "not in full of June" and "July rent." I would think that in fact the defendants had every reason to know that they had not completed any agreement for a reduced rent but perhaps ample reason to hope that concessions would be made.

But defendants urge the acceptance of their last cheque under the lease not only as evidence of the agreement set up but as having been accepted in full settlement of the dispute.

This was a cheque dated December 6, 1918, for $100 and in the body of the cheque appears "In full settlement of all rent to 31st December, 1918, of premises occupied by us in Purcell Block."

This cheque was deposited by plaintiffs' accountant with an unrestricted endorsement. His evidence is that he did not notice the words I have quoted. But the words do not of themselves establish the agreement, and in the face of the monthly bills and of the correspondence of November, 1916, surely the acceptance of this cheque as a full settlement would require to be in express terms in order to effect the purpose contended for. In their letter of November 11, 1916, the plaintiffs say in reply to defendant's reference to the agreement, "No agreement was ever

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made with you for a reduction of the rent." Upon the whole evidence I have no doubt that plaintiffs never agreed to accept this cheque in full satisfaction and unless they did so agree it is not a payment in full. *Day* v. *McLea* (1889), 22 Q.B.D. 610; *Mason* v. *Johnston* (1893), 20 A.R. (Ont.) 412.

The question raised as to the agreement for reduction of rent being parol and so ineffective to vary the lease, it is unnecessary to deal with.

The appeal should be dismissed with costs.

Appeal dismissed by an equally divided Court.

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THE KING v. ALLINGHAM; Ex parte GREGORY and WALSH.

New Brunswick Supreme Court, King's Bench Division. Chandler, J. October 14, 1920.

SUMMARY CONVICTIONS (§ VI—60)—PROHIBITION ACT, N.B.—MINUTE OF CONVICTION—SEC. 22, CH. 123, C.S.N.B. 1903—FORM TO BE FOLLOWED—VALIDITY.

The Prohibition Act, 6 Geo. V. 1916 (N.B.), ch. 20, sec. 201, does not provide any mode for the recovery of the penalty or fine and the provisions of sec. 22 of ch. 123, C.S.N.B. 1903, are applicable and a minute of conviction which does not order that the penalty imposed be levied by distress and sale of the goods and chattels of the accused and in default of sufficient distress, imprisonment, according to Form 15 of the Summary Convictions Act, cannot be sustained.

[*Regina* v. *Perley* (1885), 25 N.B.R. 43, followed.]

Statement.

APPLICATION on *certiorari* to quash convictions under Intoxicating Liquor Act, 6 Geo. V. 1916 (N.B.), ch. 20, for operating an automobile while in an intoxicated condition.

W. B. Wallace, K.C., shews cause; *W. A. Ross*, supports order.

Chandler, J.

CHANDLER, J.:—On the application of Willard Gregory and Fred T. Walsh, I made an order for the issue of a writ of *certiorari* to bring up certain convictions made against Gregory and Walsh before W. H. Allingham.

It appears that Gregory and Walsh were charged with operating an automobile on the Rothesay Road in the county and the city of Saint John on June 15, 1920, while in an intoxicated condition. These charges were heard before the Justice on July 15, last, and on July 28 the Justice found Walsh guilty of the offence charged against him and he ordered that he forfeit and pay the sum of $25 and one-half of the costs of Court or 10 days in jail in default of payment. On the same day the Justice found that Gregory was guilty of the offence charged against him, and ordered

that he forfeit and pay a fine of $25 and one-half of the costs of the Court, or in default thereof 10 days in jail, and a minute of conviction under the hand and seal of the magistrate was drawn up and signed by him on July 28, 1920.

On the hearing of the application before me there was a good deal of discussion as to when the judgment was actually given by the magistrate in this case, but I have concluded to accept the minute of conviction made by the magistrate and dated July 28, 1920, as a formal minute of the decision in this matter.

The proceedings were at first returned to me without any convictions whatever but afterwards two convictions were returned by the magistrate to me, one against each of the accused. The conviction against Gregory states that he is convicted for that he the said Gregory on June 15, in the year of Our Lord 1920, did operate an automobile on a public road in the Province of New Brunswick called the Rothesay Road while under the influence of liquor, and it adjudges the said Gregory for his said act to forfeit and pay the sum of $25 to be paid and applied according to law, and also to pay Robert Crawford the sum of $5.40 for his costs in that behalf; and the conviction further adjudges that if the said several sums be not paid forthwith the said Gregory is to be imprisoned in the common jail of the said county for the space of 10 days unless the said several sums and all costs and charges of commitment and conveying of the said Gregory to the said common jail be sooner paid.

A similar conviction against Walsh was returned by the magistrate.

A great many objections were taken to the proceedings in this matter with which I do not think it necessary to deal.

I think that these convictions cannot be sustained, for the reason that there is no proper or sufficient minute of conviction to warrant the convictions. I also think that the convictions are improperly drawn. See sec. 29 of ch. 123 C.S.N.B. 1903, relating to summary conviction proceedings, which provides that if the Justice convict or make an order against a defendant he shall make a minute thereof and afterwards draw up a conviction or order, etc. The headnote in the case of *Regina* v. *Perley* (1885), 25 N.B.R. 43, is as follows:

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Chandler, J.

The minute of conviction made under the Summary Convictions Act, 32-33 Vict. 1869 (Can.), ch. 31, sec. 42, should state the adjudication of the Justices both as to the amount of the fine and the mode of enforcing it, whether by distress or imprisonment, so as to be a complete judgment in substance.

The case quoted deals very fully with the requirements of a minute of conviction.

It is true that in *Regina* v. *Perley* the Court was dealing with a conviction made under the Canada Temperance Act, but I think the principles laid down in this case are equally applicable to a conviction under the New Brunswick Summary Convictions Act, C.S.N.B. 1903, ch. 123.

FRASER, J., in *Regina* v. *Perley, supra*, at p. 48, in his judgment quotes from Oke's Magisterial Synopsis, 12th ed., at 165, as follows:

> Having determined to convict or make an order the Justices should openly pronounce their complete judgment according as they are by law empowered to do in the particular case, neither for too much or too little, as a judgment for too little is as faulty as a judgment for too much, and in doing so they should distinctly state according to the particular Act or Acts bearing upon the case the amount of the fine, or mitigated fine, or imprisonment with or without hard labour or imprisonment in default, the mode of recovery, etc.

I do not think that the minute of conviction made by the magistrate in this case is a complete judgment as required by law, according to *Regina* v. *Perley*.

Sec. 22 of C.S.N.B. 1903, ch. 123, provides as follows:

> 22. Subject to the provision of sec. 27, when the law imposes a penalty payable in money or a fine, and no mode is provided therein for the recovery of the penalty or fine, or when the law imposing the penalty or fine directs that the same shall be levied by distress of the defendant's goods and chattels, and in default of goods and chattels he shall be imprisoned, the conviction shall be according to the Form 15.

Form 15 provides that if the several sums awarded to be paid be not paid forthwith the same shall be levied by distress and sale of the goods and chattels of the accused, and in default of sufficient distress, imprisonment, etc.

The penalty in this case was imposed under the provisions of sec. 201, 6 Geo. V. 1916, ch. 20, being the Prohibition Act, so-called, and this section does not provide any mode for the recovery of the penalty or fine; and I think that the provisions of sec. 22 of ch. 123, C.S.N.B. 1903, are applicable in this case and that the conviction in this case should be according to the Form 15 in ch. 123.

If I am correct in this view, the Justice in his minute of conviction should have ordered that the penalty imposed be levied by distress and sale of the goods and chattels of the accused and in default of sufficient distress imprisonment according to Form 15 already mentioned. There is nothing in the minute of conviction returned by the magistrate as to distress of the defendant's goods and chattels in default of payment of the penalty imposed. He simply awards 10 days in jail in default of payment in each case. There is in the minute of conviction no order that the fine should be levied by distress nor any adjudication that in default of sufficient distress the defendant should be committed to jail, and, following the decision in *Regina* v. *Perley*, I do not think that the minute of conviction in this matter can be sustained or that there was a sufficient minute of conviction to warrant the making of the convictions returned to me.

In addition to this, I think that in preparing the convictions in these cases the wrong form was followed. Instead of following Form 15, given in ch. 123 C.S.N B. 1903, the Form 16 was followed, which is intended for a case where the law imposes a penalty payable in money or a fine and provides that in default of payment the defendant shall be imprisoned, see sec. 23, ch. 123, C.S.N.B. 1903. The law does not in this particular case provide that in default of payment the defendant shall be imprisoned, and, therefore, I think it was wrong to follow Form 16 in preparing these convictions. I think as stated above that Form 15 should have been followed.

The result is that both these convictions must be quashed.

Convictions quashed.

MANDZIUK v. CZAHLEY.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Ives, JJ. October 23, 1920.

SPECIFIC PERFORMANCE (§ I E—32)—SALE OF LAND—ORAL AGREEMENT—WRITTEN AGREEMENT AFTERWARDS DRAWN—AMBIGUITY—STATUTE OF FRAUDS—CONSIDERATION—VALIDITY.

Certain parties having entered into an oral agreement for the sale and purchase of land, the owner some days afterwards had a written agreement drawn up which was signed by him and his wife but not by the purchaser. At the time the oral agreement was made the purchaser paid the vendor the sum of $185, but no further sum was paid when the written agreement was signed, although the agreement stated that the sum of $2,000 was to be paid on the execution of the agreement. It was clear from the evidence that the parties either never in fact agreed

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that the $2,000 should be paid when the agreement was signed, or that they never intended the agreement to become effective at all until the $2,000 was paid. The Court held that in the former case the Statute of Frauds would be a bar; in the latter case there was no agreement on which to base an action for specific performance.

[*Cushing* v. *Knight* (1912), 6 D.L.R. 820, 46 Can. S.C.R. 555, applied.]

[See also annotation, Oral Contracts as affected by admissions in pleading, 2 D.L.R. 636; also annotation on the Statute of Frauds, 55 D.L.R. 1.]

Statement.

APPEAL by the defendant vendor from the judgment at the trial in favour of the plaintiff ordering specific performance of an agreement of sale of a certain quarter section of land. Reversed.

H. H. Parlee, K.C., for appellant; *G. H. Steer*, for respondent.

The judgment of the Court was delivered by

Stuart, J.

STUART, J.:—The parties had come to an agreement orally and then a few days afterwards a written agreement was drawn up by one Stogrin. It was signed by the defendant, the owner, and by his wife but not by the plaintiff and was left in Stogrin's possession.

The written agreement, dated and signed on June 17, 1919, provided that the price was to be $4,000 "to be paid in the following manner: The sum of $2,000 upon the execution of this agreement as a deposit and in part payment of the said price, the sum of $1,000 on December 1, 1920, the sum of $1,000 on December 1, 1921," with a provision as to interest, not now material.

One clause of the agreement read thus: "The purchaser shall immediately after execution of this agreement but subject to the terms of any lease affecting the said land have the right of possession of the said premises and shall have the right to occupy and enjoy the same until default, etc."

At the time the oral agreement was made the plaintiff paid the defendant $185 in cash with the idea, no doubt, that it would in some way "bind the bargain." When the written agreement was signed no further money was paid. The plaintiff was unable at that time to pay the balance of the $2,000 mentioned in the agreement as the down payment. Whether anything was said then about the $2,000 is not very clear from the evidence. There is no direct suggestion in the evidence that any reference to the subject was then made. The defendant in his evidence stated that the agreement was that the plaintiff was to have a month within which to pay the $2,000. He said: "It was sold on a month's time $2,000, in a year's time another $1,000, in two years the

balance of $1,000." Whether he meant that this understanding about a month's time was arrived at in the prior oral bargaining or at the time of signing the agreement is not very clear.

I think, however, that it is quite clear from the plaintiff's evidence that it was never really agreed that he should pay the $2,000 cash down on the execution of the agreement as stated therein. He spoke of an interview on June 28, at which he asked the defendant to give him a transfer so that he could raise the down payment by a mortgage and it was referred to by him in such terms as to lead almost necessarily to the inference that he meant to say that the question of such a transfer had been mentioned between them already and there was admittedly no interview between the 17th and the 28th. This is the inference which the trial Judge made as he listened to the evidence and he so expressed himself, counsel for defendant assenting and counsel for plaintiff making no dissent.

There was an interview on June 28, at which the plaintiff requested the defendant to give him a transfer of the land so that he could raise by loan the balance of the $2,000. The defendant refused to do this, but on his own admission he then said that he would give the plaintiff 8 days to get the money. Before these 8 days had expired, however, the defendant went to the plaintiff and offered him back the $185 which had been paid but the plaintiff refused to take it saying that he still had time.

On July 3 the plaintiff's solicitors wrote a letter to defendant at Smoky Lake, Alberta, where the parties lived, saying that on behalf of the plaintiff they had filed a *caveat* against the land and that they had the money in their office to pay over to him and asking for instructions as to where they would send the money or alternatively that he should come into Edmonton and get it.

The defendant took no notice of this communication but sold the land to another party for the same price.

At the close of the hearing the trial Judge expressed the view that there had been a valid agreement entered into and that owing to what had passed between the parties that agreement was still in force and available for the plaintiff to rely upon. He therefore gave judgment for specific performance and made a reference to the Master to assess damages in respect of the breach of the agreement to give possession.

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The Statute of Frauds had been pleaded by the defendant.

Before a formal judgment was entered an application was made to the trial Judge on behalf of the defendant to hear further evidence so as to let the defendant prove that the real agreement between the parties was that possession was not to be given until April, 1920.

This application the trial Judge refused and there is an appeal from this refusal as well as from the judgment at the trial.

Upon the argument before us counsel for the plaintiff admitted that the fact is that the parties had agreed that the defendant could retain possession until April 1, 1920. This fact it appears was not known to the solicitor for either party until the trial was over.

When making the admission of this fact before us counsel for the plaintiff suggested that he should be allowed to amend his statement of claim so as to add a prayer for the reformation of the written agreement to make it correspond to the real agreement between the parties and for the specific performance of the agreement as amended.

I have little doubt that this variation between the written and the real oral agreement would be fatal to the plaintiff's right to succeed in the face of the Statute of Frauds. But in the circumstances, the point not having arisen at the trial, it might appear unfair to the plaintiff to refuse the amendment asked for were it not for two circumstances. In the first place, it seems to be open to grave doubt whether the relief which the plaintiff would be seeking if his proposed amendment were allowed is one which the Court will grant. In 27 Hals., at p. 50, par. 86, it is stated that specific performance of a written contract with a rectification on the ground of mistake will be granted except in cases where the Statute of Frauds is a bar.

Of course, the defendant would not have much merit on his side upon the point in question in this case because he did enjoy possession in any case up to April, 1920, or would have done so if he had not sold to another party. Aside from the circumstance of that second sale the point would have been by the time the trial came on purely a technical one and it would then have been absurd to decree specific performance with the variation for that part of the agreement, viz: that as to possession up to April, would have been already performed.

But there is another ground upon which I think the appeal should be allowed. It seems very clear from the evidence that the parties either never in fact agreed that the $2,000 should be paid when the written agreement was signed as the agreement states or that they never intended the agreement to become effective at all until the $2,000 was paid. In the former case the Statute of Frauds would still be a bar. In the latter case the situation would be that there was no agreement and the principle of *Cushing* v. *Knight* (1912), 6 D.L.R. 820, 46 Can. S.C.R. 555, would apply. Indeed, the facts that the agreement was left with Stogrin, that the plaintiff never signed it himself, that he knew, very well, that he could not pay the full amount in cash and tried to hold the defendant to an alleged agreement to give a transfer for the purpose of a loan all lead almost conclusively to the inference that the parties did not intend that the agreement should be effective until the money was paid.

The evidence in my view suggests very strongly that the plaintiff was attempting to hold the defendant to an agreement to give a transfer for the purpose of a loan and this would be another point of variation.

On the other hand, if the parties did not agree that the $2,000 should be paid when the written agreement was signed then the statute is again a bar.

The trial Judge seems to have taken the view that there was an agreement to pay the $2,000 in cash on the execution of the agreement but that there had been a subsequent waiver and extension of time by the defendant. But I am convinced that this was not the true state of the facts. The defendant stated that he had agreed to give a month but that was done not after the agreement was signed but was before or at the same time and should therefore have been in the written document. The plaintiff's own account of what happened was such that one must infer either that this statement of the defendant was correct or that the alternative which I have above suggested was the true position of the matter.

I would, therefore, allow the appeal with costs and dismiss the action with costs. *Appeal allowed.*

QUE.

S. OF P.

THE KING v. PLAMONDON.

Quebec Sessions of the Peace, Choquette, J.S.P. September 14, 1920.

COURTS (§ II A—175)—INLAND REVENUE ACT, R.S.C. 1906, ch. 51, sec. 180—PENALTY—JURISDICTION.

When a statute says that the penalty for an offence is fine and imprisonment, and in default of payment of said fine a further term of imprisonment, the Court has no discretion and must impose both.

[*The Queen* v. *Robidoux* (1898), 2 Can. Cr. Cas. 19; *Rex* v. *Auerbach* (1919), 45 D.L.R. 338, 31 Can. Cr. Cas. 46, referred to.]

Statement.

SUMMARY conviction under the Inland Revenue Act, R.S.C. 1906, ch. 51, sec. 180, for having possession of an unlicensed still.

Morand & Alleyn, for the Crown.

Sevigny & Sirois, for defendant.

Choquette, J.S.P.

CHOQUETTE, J.S.P.:—The defendant being accused under sec. 180 of the R.S.C. 1906, ch. 51, of having stills in his possession, without a license, pleaded guilty.

His attorney then asked according, he said, to instructions received from the Department of Inland Revenue, that only the minimum fine of $200 be imposed, alleging that the Court had discretion to impose either the fine or imprisonment as *per* a judgment rendered some 20 years ago by Wurtele, J., in *The Queen* v. *Robidoux* (1898), 2 Can. Cr. Cas. 19, and another similar decision rendered in 1903 in Nova Scotia: *Ex parte Kente* (1903), 7 Can. Cr. Cas. 447.

With all due respect for those Judges, I could not so interpret the statute, and I condemned Plamondon to $200 and costs, and 2 months in jail, and if said sum was not paid, a further term of 6 months in jail, the whole according to law.

To my mind, the statute clearly shews that both *fine and imprisonment* must be imposed, and the word "further" means that a previous term of prison had to be imposed.

We find in divers sections of this statute, and in the Criminal Code, that different penalties for different offences are mentioned, such as fine only, or fine or imprisonment, or both, etc.; but as Wurtele, J., said in this *Robidoux* case, 2 Can. Cr. Cas. at 21, when a statute says fine and imprisonment, these words being connected with 'and' and not with 'or,' the Court has no jurisdiction.

Plamondon's attorney also referred me to article 1028 of the Criminal Code, saying that "when it is provided that defendant shall be liable to different degrees or kinds of punishment, the Court

has discretion," but this section also says: "Subject to the limitations contained in the statute, etc."

Moreover, in this case the defendant is not accused under an article of the Criminal Code, but under a special statute imposing fine and imprisonment, and this section 1028 of the Criminal Code does not apply.

When the statute makes no distinction, the Court has no right to make one, and as Simmons, J., said in *Rex* v. *The Dominion Drug Store* (1919), 31 Can. Cr. Cas. 86 at 109:—

> It is not the function or prerogative of the Courts to amend or ameliorate the plain meaning and effect of these provisions by giving an artificial interpretation different from the plain ordinary meaning of these provisions.

and on the next page:—

> The Judges do not make the law, they administer it, and that however much they may disapprove or dislike it.

I entirely agree with these words, and it is for Parliament to amend the law when it is not clear, and say plainly that fine only, or imprisonment, or both shall be imposed in cases like this one.

But I am of opinion that the intention of the legislators is clear in this statute, and their intention was to impose both fine and imprisonment so that defendant would not escape punishment.

After sentence, defendent's attorneys asked for a reserved case, which I granted, because the liberty of a citizen was in jeopardy, and because the Court of Appeal was going to sit some 10 days after the application, but the case did not proceed, the Government having in the meantime seen fit to pardon the defendant and release him from jail provided he paid the $200 and costs, which he did.

NOTE:—Since the above decision was given, I was shewn a judgment rendered in Montreal in January, 1919, by Martin, J., in the case of *Rex* v. *Auerbach*, (1919), 45 D.L.R. 338, 31 Can. Cas. Cr. 46. This decision was only a few days ago brought to my attention, but although I have the greatest respect for the opinion of this Judge, I could not have followed it.

Judgment accordingly.

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FRALECK v. JOHNSTONE.

Alberta Supreme Court, Walsh, J. November 5, 1920.

DISCOVERY AND INSPECTION (§ IV—20)—SEIZURE AND SALE UNDER CHATTEL MORTGAGE—EMPLOYMENT OF SHERIFF AND BAILIFF—RULE 234 (ALTA.).

The sheriff and bailiff who make a seizure and conduct a sale under the authority of a chattel mortgage are employed within the meaning of Rule 234 (Alta.), and may be examined for discovery under that part of the rule which permits examination of "any person who is or has been employed by any party to an action, and who appears to have some knowledge touching the questions in issue acquired by virtue of such employment.

[See annotation, Discovery and Inspection, 2 D.L.R. 563.]

Statement.

APPEAL by defendant from the refusal of a Master to grant leave to examine a sheriff and bailiff for discovery. Reversed.

D. W. Mackay, for appellant; *L. Y. Cairns*, for respondent.

W. Mustard, for the sheriff; *H. J. Carr*, for the bailiff.

Walsh, J.

WALSH, J.:—The plaintiff, a mortgagee of certain mules, brings action against his mortgagor and another claiming to be the purchaser of the mules at a public sale thereof under his mortgage, to set aside this sale. He joins as defendants the sheriff to whom his warrant was directed for the seizure and sale of these animals and the bailiff who was employed by the sheriff to make the seizure and conduct the sale. The plaintiff's contention in brief is that the mules were not sold at this sale at all, or if they were, they were sold at a gross undervalue, as the result of a fraudulent conspiracy between the mortgagor and the purchaser to prevent bidding. His claim against the sheriff and the bailiff is in the alternative for damages through their negligence in the conduct of this sale should it be upheld. The defendant, the purchaser, on the motion for directions asked for leave to examine the defendants, the sheriff and the bailiff, for discovery, and this the Master refused to do. From this refusal this defendant appeals.

He puts his right to this examination on two grounds. He says in the first place that these defendants are examinable under that part of Rule 234 which permits the examination of a party by any person adverse in interest to him.

I do not think that they come within this part of the rule. There is no issue whatever between them and this co-defendant on the pleadings. They are not necessary parties to the action against him. The plaintiff could carry on his action against him alone if they were not parties to it. The present action is in

substance a consolidation of two separate and distinct causes of action against different people arising out of the same transaction. The plaintiff could have sued these two defendants in one action and their co-defendant in another. It is undoubtedly to their interest that the plaintiff should succeed against him in this action, for that would mean the failure of the action as against them. To that extent their interests are adverse, but I do not think that that makes them adverse in interest within the meaning of the rule. If they were examined their depositions could not be used against the plaintiff on the trial. They could only be used against themselves, and as there is, as I have said, no issue between them and this co-defendant they could not be used at all. The appeal on this ground must fail.

The other ground is that they are examinable under that part of the same rule which permits the examination of "any person who is or has been employed by any party to an action and who appears to have some knowledge touching the questions in issue acquired by virtue of such employment." These defendants clearly come within this part of the rule unless they are excluded from it by reason of the fact that they are public officers who were employed by the plaintiff not of his own free choice but because under the law he was obliged to employ men of their class. Under the law as it stood before the passing of the Act respecting Extra-Judicial and other Seizures, 1914 (Alta. Stats., ch. 4), he would have placed his warrant for the seizure and sale of these goods in the hands of whomsoever he chose for that purpose and the person whom he so chose and his assistants would undoubtedly have been employed by him for the making of this seizure and the carrying on of the sale. I am unable to see how the mere fact that the Legislature has stepped in and limited his choice for this purpose to certain classes of public officers, can make those thus selected any the less his employees than they would be if they were the selections of his own unfettered choice. They are not officers of the Court as they are in the execution of the process of the Court. They are the bailiffs of the plaintiff to whom they are responsible and for whom he is responsible. I think the plaintiff is entitled to examine them as such employees.

The costs of this appeal will be in the cause.

Judgment accordingly.

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Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. November 1, 1920.

FRAUDULENT CONVEYANCES (§ VI—30)—CONVEYANCE OF HOMESTEAD BY DEBTOR—RIGHT OF CREDITOR TO LIEN ON PROPERTY—FRAUD—VALIDITY.

A conveyance from husband to wife of homestead property which, owing to its exempt character, is not immediately available in payment of a creditor's execution but which had it remained in the debtor's name would have entitled the creditor immediately to a lien thereon is a conveyance which, if the debtor has not sufficient property left wherewith to pay his debts, is a fraud upon creditors and will be set aside.

[See annotation, Fraudulent Conveyances, 1 D.L.R. 841; also Fraudulent Preferences, 14 D.L.R. 503.]

Statement.

APPEAL by defendants from the judgment at the trial in an action to set aside a transfer from husband to wife, as a fraud upon creditors.

C. E. Gregory, K.C., for appellants.

F. L. Bastedo, for respondent.

Haultain, C.J.S. Elwood, J.A.

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

Newlands, J.A.

NEWLANDS, J.A.:—This is an action to set aside a transfer from the defendant Phillip Bolley to his wife, Mary Bolley, of the N-E¼-27-6-28-W2nd, as a fraud upon his creditors.

The plaintiffs are execution creditors, having obtained judgment against the defendant Phillip Bolley on December 11, 1918, for the sum of $3,850.99. The transfer in question was dated July 19, 1918, and was registered on the 20th. Two defences were set up: (1) that the transfer was made for valuable consideration, and (2), that the quarter section was the homestead of the defendant Phillip Bolley, and it being exempt from seizure the transfer of it was not a fraud upon creditors. The trial Judge found that the defence that the transfer was made for valuable consideration failed, and that there would therefore be a declaration that the transfer in question was a fraud upon creditors. He made no finding as to the land being the homestead of the defendant Phillip Bolley. The appellants do not on this appeal question the correctness of the Judge's finding as to the consideration; they rest their appeal entirely upon the fact that the land in question was the homestead of the defendant Phillip Bolley, and therefore the transfer of it to his wife was not a fraud upon his creditors.

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Upon the trial evidence was given that the quarter section was the defendant Phillip Bolley's homestead, and on the argument before this Court the fact was not disputed by either counsel that it was his homestead under the provisions of the Homestead Act, 6 Geo. V. 1915 (Sask.), ch. 29.

That Act provides that the following real and personal property of an execution debtor and his family is free from seizure by virtue of all writs of execution, namely, the homestead, provided the same is not more than 160 acres, R.S.S. 1909, ch. 47, sec. 2. [See 9 Geo. V. 1918-19, ch. 24, sec. 2.]

I would here point out that the transfer of this land to his wife does not alter its character as a homestead, because the Act provides that the real property of the debtor "and his family" being the homestead is exempt. Therefore as long as he and his family reside upon this land it cannot be sold under execution.

The Exemptions Act freed this land from the operation of any writ of execution against the lands of the debtor. Under this Act he could dispose of it as he saw fit free from any such execution. *North-West Thresher Co.* v. *Fredericks* (1911), 44 Can. S.C.R. 318. Since this decision, however, the Land Titles Act has been amended, 8 Geo. V. 1917 (2nd sess. Sask.), ch. 18. Sec. 149 of that Act, sub-sec. 2, reads:

> (2) Such writ shall from and only from the receipt of a certified copy thereof by the registrar for the land registration district in which the land affected thereby is situated bind and form a lien and charge on all the lands of which the debtor may be or become registered owner situate within the judicial district the sheriff of which transmits such copy, including lands declared by the Exemptions Act to be free from seizure by virtue of writs of execution, but subject, nevertheless, to such equities, charges or incumbrances as exist against the execution debtor in such land at the time of such receipt:
>
> Provided that nothing herein contained shall be taken to authorise the sheriff to sell any lands declared by the Exemptions Act to be free from seizure by virtue of writs of execution.

The execution of the plaintiffs therefore, when registered, would bind and form a lien and charge upon the land, but, while it remained the defendant Phillip Bolley's homestead, it could not be sold to satisfy such debt.

Now in this case the land could not be sold under the plaintiffs' execution while it remained the homestead of the execution debtor; it is still his homestead, though standing in the name of his wife, and it cannot be sold to pay such debt.

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Under these circumstances, is this transfer a fraud upon creditors?

In *Roberts* v. *Hartley* (1902), 14 Man. L.R. 284, the same question was before the Court. In that Province a certificate of judgment may be registered against a homestead and it would bind all his interest or estate in the same as though charged in writing under his hand and seal, but no proceedings could be taken to realise on the judgment debtor's homestead. The judgment debtor conveyed his homestead to his wife and the Court held that such conveyance should be set aside as a fraud upon creditors. Killam, C.J., said, at p. 288:

> Whenever it should cease to be of the character necessary to make it exempt, he would be able to proceed upon the judgment against it. If the debtor abandoned it or died, the judgment creditor could proceed. If it should rise in value to over $1,500, he could do so.

And Bain, J., at p. 291, says:

> This land, then, while it stood in Hartley's name was subject to the payment of his debts, though as an exemption it was not immediately available to his creditors; and I think the plaintiff is, at any rate, entitled to have the deed declared void and set aside as against the lien or charge that he has on the land by the registration of his certificate of judgment.

In *Scheuerman* v. *Scheuerman* (1916), 28 D.L.R. 223, 52 Can. S.C.R. 625, the Supreme Court of Canada held, in effect, that a transfer by a debtor to his wife of exempt property was a fraud upon creditors because they refused to set aside such a transfer at the suit of the husband, because he had to set up that he conveyed the same to his wife to protect it against his creditors until a certain debt was paid. The language used by Duff, J., 28 D.L.R. at 229, coincides with that of the Judges in *Roberts* v. *Hartley*, *supra*. Duff, J., says:

> The object I have said, of taking the transfer in the name of the wife was that her *ex facie* title should protect the property from pursuit by the husband's creditor, the design being that so long as the debt remained unpaid she should hold the title. Whether or not they had in mind a possible advance in value the scheme necessarily involved the hindering of the creditor in the exercise of his rights in the event of the value of the property reaching a point at which the surplus would become properly exigible.

I have therefore come to the conclusion that the transfer in question is one that must be declared void as against the lien or charge that the plaintiffs have upon the land by virtue of their execution, and that the judgment should be amended accordingly. With this exception, the appeal should be dismissed with costs.

LAMONT, J.A.:—This is an action to set aside a transfer of a quarter section of land from the defendant Phillip Bolley to his wife, Mary Bolley. On July 11, 1918, the plaintiffs issued a writ against the defendant Phillip Bolley for some $3,800, which writ was served on Bolley on July 18. Two days later he transferred the land in question to his wife, which left him without sufficient means to pay his debts. In December, 1918, the plaintiffs obtained judgment for the amount of their claim and issued execution, and placed the same in the hands of the sheriff, who filed a certified copy thereof in the proper Land Titles Office. The plaintiffs then brought this action to have the transfer of the said land to Mary Bolley set aside, on the ground that it was a voluntary transfer and was made with intent to defeat, hinder and delay the plaintiffs and other creditors. The defence set up was: (1) That the transfer was given for valuable consideration, and (2), That the land in question was the homestead of the defendant Phillip Bolley, and therefore exempt from seizure and sale under execution. The trial Judge held that the defendants had failed to establish that the transfer was given for valuable consideration. He found also that it had been given with intent to defeat, hinder and delay the plaintiffs, and he gave judgment setting aside the transfer. The defendants now appeal.

On the argument before us, counsel for the appellants did not seriously attack the finding of the trial Judge that the transfer had been made with intent to defeat, hinder and delay the plaintiffs, but he did strongly contend that the land was the homestead of the defendant within the meaning of the Exemptions Act, which fact was admitted by counsel for the respondents, and the transfer thereof was therefore unimpeachable.

Sec. 2, sub-sec. 9, of the Exemptions Act, R.S.S. 1909, ch. 47, reads as follows:

> 2. The following real and personal property of an execution debtor and his family is hereby declared free from seizure by virtue of all writs of execution, namely:
>
> (9) The homestead, provided the same be not more than one hundred and sixty acres; in case it be more the surplus may be sold subject to any lien or incumbrance thereon.

Under this section it was held in *North-West Thresher Co.* v. *Fredericks*, 44 Can. S.C.R. 318, that an execution did not attach to a homestead, and therefore the execution debtor was entitled

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to transfer his exempt homestead to his wife freed from the execution. In 1917 (8 Geo. V. (2nd sess.) ch. 18), however, the Legislature enacted sec. 149 of the Land Titles Act, which deals with executions, and sub-sec. (2) of which reads as follows: See judgment of Newlands, J.A., *ante* p. 309.]

The intention of the Legislature in the amendment made by this section is, I think, clear. It was intended to give to an execution creditor a lien upon the lands of the debtor for the amount of his execution, although the creditor could not enforce that lien as regards the exempt lands so long as the land remained exempt in the hands of the debtor and his family.

It was argued that the above section gave to the execution creditor a right of lien upon such land only as the debtor was the registered owner of at the time a copy of the execution was filed at the Land Titles Office, and such other lands as might subsequently become his and of which he was registered as owner.

While the language of the statute declares that the writ shall form a lien and charge on lands of which the debtor may be or may become registered owner, it has never been held to be a defence to an action to set aside a transfer of non-exempt lands, made with intent to defeat, hinder or delay creditors, that the land was not registered in the name of the execution debtor at the time the execution was filed in the Land Titles Office. That it was not so registered, was the whole complaint in such actions. Therefore, if non-exempt lands can be made available for the execution creditor, I do not see any reason why the same rule should not apply to land exempt from sale but available as a security. The defence in this case, if it can succeed, must rest upon the ground that the quarter section in question is exempt from seizure and sale under the execution, and therefore that the plaintiffs were not defeated, hindered or delayed in respect of their execution.

The point in question in this action came before the Manitoba Court *en banc* in *Roberts* v. *Hartley*, 14 Man. L.R. 284. In that case the plaintiff issued a writ against the defendant, Bridge Hartley. About the time he was served with the writ he transferred his homestead exempt from seizure and sale under execution to his wife, thereby depriving himself of the means of paying his debts. The plaintiff, having obtained judgment, brought an action

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to set aside the transfer. Under the Manitoba law then in force, the registration of a judgment created a lien or charge upon exempt lands, although no proceedings could be taken to enforce the charge so long as the land retained the character which entitled it to such exemption. The trial Judge held that, as the land was the actual home of the defendant and his wife and, as such, was exempt from sale under the judgment, nothing had been withdrawn from the property to which the creditor could resort for payment, and that, therefore, the transfer could not be set aside. In appeal, however, this judgment was reversed, on the ground that, although the land was not immediately available in payment of the creditor's execution, yet eventually, if the execution was kept renewed, it would be so available. Killam, C.J., in his judgment 14 Man. L.R. at 288, said:

> The property transferred away was not, then, property to which the creditor could not in any event resort for payment. Whenever it should cease to be of the character necessary to make it exempt, he would be able to proceed upon the judgment as against it. If the debtor abandoned it or died, the judgment creditor could proceed. If it should rise in value to over $1,500, he could do so.

And Bain, J., at 291, said:

> And so, while the registration of a certificate of judgment may not give a judgment creditor any immediate right to reach any of the judgment debtor's lands that are exemptions, it puts him in a position to reach them if, for any reason at some future time, the claim that the lands are exemptions cannot be maintained. This might be the case, for instance, were the judgment debtor to remove from the land and make his residence and home somewhere else.

In *Scheuerman* v. *Scheuerman*, 28 D.L.R. 223, 52 Can. S.C.R. 625, the plaintiff transferred a house and lot to his wife to protect them from pursuit by his execution creditor. The property was their home and exempt up to $1,500. The agreement was that the wife should hold title until the husband paid off the execution and then reconvey to him. He paid off the execution, but she refused to reconvey. He brought action for a declaration that she held the property in trust for him, and for a reconveyance. In the judgments given, certain observations on the part of their Lordships seem to me to be pertinent, but one of which only I shall refer to. Brodeur, J., says, 28 D.L.R. at 234.

> Cases of the same kind with regard to homesteads have been decided in the United States. I find a case of *Kettleschlager* v. *Ferrick* (1900), 12 S. Dak. 455, where it was held that a transfer of the homestead from husband to wife

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without consideration to prevent creditors from subjecting such premises to the satisfaction of their claims *in case the debtor should remove therefrom is fraudulent as to creditors.*

Similar decisions have been rendered in Texas: *Taylor* v. *Ferguson* (1894), 87 Tex. 1; *Baines* v. *Baker* (1883), 60 Tex. 139.

We have also *Barker* v. *Dayton et al.* (1871), 28 Wis. 367, which was decided in the Wisconsin Courts.

I am therefore of opinion that a conveyance of property which, owing to its exempt character, is not immediately available in payment of a creditor's execution, but which, had it remained in the debtor's name, would have entitled the creditor immediately to a lien thereon, is a conveyance which, if the debtor has not sufficient property left wherewith to pay his debts, does defeat, hinder and delay his creditor, and is, therefore, impeachable and may be set aside.

As the homestead in this case would, but for the transfer, be immediately available to the creditors as a security, they are entitled to have the transfer declared void as against them to the extent necessary to enable them to have a lien upon the land (15 Hals., para. 184), but it should not be set aside *in toto*, as it is good between the parties.

The judgment below should, therefore, be varied so as to provide for the setting aside of the transfer to such extent as may be necessary to permit of the attaching of the plaintiffs' execution. This end can be attained by a declaration that the homestead in the hands of the wife is subject to the execution.

As the entire contest in this case was over the question of the appellants' right to have the land freed from execution, and not as to the form of the judgment, the respondents are entitled to their costs of appeal. *Appeal dismissed.*

ALTA.

S. C.

WINSLOW v. JENSON.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Ives, JJ. November 12, 1920.

SALE (§ II B—37)—OF STALLION—WARRANTY—BREACH—SALE OF GOODS ORDINANCE 1898, CH. 39—PURCHASER RELYING ON HIS OWN JUDGMENT—FRAUD—NEW TRIAL.

Where an action is based upon sec. 16 of the Sale of Goods Ordinance 1898, C.O.N.W.T., ch. 39, but the evidence shews that the plaintiff did not rely on the seller's judgment but upon his own, his action will be dismissed, but where the evidence further shews that he would have succeeded on the ground of fraud he will be allowed to bring a new action.

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Harvey, C.J. Stuart, J. Beck, J.

APPEAL by plaintiff from a judgment of Simmons, J., in an action for alleged breach of warranty of a stallion. Affirmed.

E. H. Jones, K.C., and *H. G. Scott*, for plaintiff.

Frank Ford, K.C., for defendant.

HARVEY, C.J., and STUART, J., concur with IVES, J.

BECK, J.:—The action is based upon a breach of an alleged implied warranty that a stallion sold by the defendants to the plaintiff was reasonably fit for the purpose for which it was required, namely, for breeding.

The argument was devoted largely to a consideration of the meaning and effect of sec. 16 (Implied conditions as to quality and fitness) of the Sale of Goods Ordinance, C.O.N.W.T. 1898, ch. 39, which is in the same terms as sec. 14 of the English Act.

That section, so far as is material to the present case, is as follows:—

> Subject to the provisions of this Ordinance (Act) and of any Ordinance (statute) in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale except as follows:
>
> (1) Where the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required so as to shew that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not) there is an implied condition that the goods shall be reasonably fit for such purpose.

It is quite clear on the evidence that the plaintiff made known to the defendants the particular purpose for which the stallion was required, and that it was not at all fit for that purpose, by reason of an injury which prevented it from performing the necessary physical act. The provisions of the statute apply to all classes of goods, whether manufactured or not, provided they are the subject of sale by a dealer in such goods whether the dealer be the manufacturer of the goods or not.

Wallis v. *Russell* (1902), 2 Ir. R. 585, Benjamin on Sale, 5th ed., page 627.

The evidence shews that the defendants were dealers in horses. Consequently the stallion and the defendants both come within the terms of the statute. The words (C.O. 1898, ch. 39), "Where the buyer . . . makes known to the seller the particular purpose for which the goods are required" are immediately

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followed and restricted by the words "so as to shew that the buyer relies on the seller's skill or judgment." I should say that "judgment" here includes any knowledge that the seller has acquired at any time relating to the goods.

There is distinct evidence that the defendants declined to give a warranty as to the breeding capabilities of the stallion. There is evidence from which it might, I think, be inferred that the defendants knew that the stallion was useless as a stallion, and perhaps that there was conduct on the part of the defendants inducing the plaintiff to believe that the stallion was a foal-getter and hence a case of fraud. Possibly under these circumstances assuming them to be made sufficiently clear the implied warranty might still persist. It seems, too, that perhaps a case of warranty of soundness is disclosed. The question of reliance upon either warranty is also open to argument. But inasmuch as the case was conducted on the basis of an implied warranty of reasonable fitness and it is not clear that all the available evidence is before this Court so as to justify us in moulding the pleadings to accord with what might perhaps be our view of the evidence as it stands, we are agreed that the plaintiff cannot succeed, but in order to give the plaintiff an opportunity of establishing his case if he can upon some other legal aspect suggested by the evidence, and to save unnecessary costs, I think that the appeal should be allowed and a new trial directed, with leave to the plaintiff to amend his statement of claim, as he may be advised; the defendants to have the costs of the appeal and so much of the costs of and incidental to the former trial as the Judge, before whom the new trial or other disposition of the case shall take place, considers have been thrown away; but that in default of the plaintiff amending within one month the action should be dismissed and the costs of the action as well as the costs of appeal be payable by him.

Ives, J.

IVES, J.:—This is an appeal from the judgment of Simmons, J. The judgment sets out the facts. The plaintiff relies upon the exception found in sub-sec. 1 of sec. 16 of the Sale of Goods Ordinance, C.O. 1898, ch. 39. The evidence is clear, that the purpose for which the stallion was bought was made known to the defendants and equally clear, I think, that the purpose was *not* made known to the defendants so as to shew that the plaintiff

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relied on their skill and judgment. He clearly relied upon his own. Having regard to the state of the pleadings and proceedings, I think the appeal should be dismissed with costs. But upon the evidence of the defendants themselves as it now appears I am satisfied the plaintiff would have succeeded upon the ground of fraud and it may be upon a warranty of soundness if it had been pleaded and for that reason I think he should be allowed to bring a new action. If a new action is brought within one month and prosecuted to trial then the costs of the present action shall be in the discretion of the trial Judge of the new action. Meantime, payment of the costs of this action not to be enforced.

Appeal dismissed.

HOLDEN v. MOSKOVITCH.

SASK.

C. A.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont, and Elwood, JJ.A. November 1, 1920.

NEGLIGENCE (§ I A—4)—ACTION FOR—DAMAGE TO PROPERTY—EVIDENCE. An action for negligence cannot be sustained unless there is some affirmative evidence that there has been negligence on the part of the defendant.

[See annotation, Evidence Sufficient to Go to the Jury in Negligence Actions, 39 D.L.R. 615.]

Statement.

APPEAL by defendant from the trial judgment in an action for negligently leaving a motor running and so injuring an elevator. Reversed.

D. A. McNiven, for appellant; *L. L. Dawson*, for respondent.

Haultain, C.J.S.

HAULTAIN, C.J.S., concurs with NEWLANDS, J.A.

Newlands, J.A.

NEWLANDS, J.A.:—The statement of claim states that defendant on November 9, 1918, after operating the plaintiff's elevator in plaintiff's building, 2338 Dewdney St., Regina, carelessly and negligently left the motor, which supplied the power for the elevator, running so that the motor was burnt out and the attachments thereto injured, the defendant having no authority from and being previously strictly forbidden by plaintiff to operate the elevator in question.

The only evidence is that defendant admitted to plaintiff that, "I used the elevator, but I did not do any damage; if I did, you will have to prove it."

The defendant and two other men had been left alone in the plaintiff's building during the noon hour, during which time defendant admits having used the elevator. Neither the plaintiff nor any of his employees were in the building during that time.

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The back door was left open, and other parties having goods stored in the building could have entered during that time. The two men who were in the building with defendant were not called as witnesses, but plaintiff said they stated they had not used the elevator and did not know anything about it. Upon this evidence the trial Judge held:—

He used it within the hour that the accident occurred. He was an unskilled man in the use of the elevator and did not understand how to use it properly—the evidence establishes that he was unskilled and did not understand the use of it. Nevertheless he did use it and within the hour the accident happened, and used it at the time when, according to the evidence, he and two other men were the only parties in the building, and the evidence further shews that the other men did not use it, and the accident happened. I think the conclusion is irresistible. I think the circumstances are such as to compel me to draw the conclusion that the accident occurred as a result of his unskilled use of the elevator within the hour in which the accident happened.

In actions of negligence the law is as stated by Erle, C.J., in *Hammack* v. *White* (1862), 11 C.B. (N.S.) 588, 142 E.R. 926:—

I am of opinion that the plaintiff in a case of this sort is not entitled to have his case left to the jury unless he gives some affirmative evidence that there has been negligence on the part of the defendant.

This case was followed by *Manzoni* v. *Douglas* (1880), 6 Q.B.D. 145, and in *Falconer* v. *The European & North American Ry. Co.* (1872), 14 N.B.R. 179, Ritchie, C.J., at 183, 184, said:—

The fact that an accident has occurred is not of itself evidence of negligence, because its occurrence is quite consistent with due care having been taken. The plaintiff is not entitled to have his case left to the jury unless he gives some affirmative evidence of negligence: *Hammack* v. *White*, *supra*. In *Daniel* v. *The Metropolitan Ry. Co.* (1868), L.R. 3 C.P. 216, Willes, J., says that, to entitle a plaintiff to recover in an action for negligence, he must establish in evidence circumstances from which it may fairly be inferred that there is reasonable probability that the injury resulted from the want of some precaution to which the defendant might, and ought to have resorted.

In this case there is no evidence that defendant left the motor running after he had used the elevator, and as the evidence shewed that other parties could have come in the building and used the elevator, no presumption can be drawn from the fact of the defendant using the elevator that he left the motor running. In order to sustain the plaintiff's action that the defendant negligently left the motor running and so injured the elevator, there must be some affirmative evidence of that fact.

I think the appeal should be allowed with costs.

Lamont, J.A.

LAMONT, J.A.:—I concur in the conclusion reached by my brother Newlands, and only desire to point out that there was no evidence that the two men who, with the defendant, were left in

the plaintiff's building at the noon hour, did not use the elevator. The only evidence on the point given was that of the plaintiff, who said that he had inquired of these men as to what they knew about the damage to the elevator and that they had denied that they had used it or knew anything about it. The men were not called as witnesses at the trial. The evidence of the plaintiff is not evidence that the men did not use the elevator. It is only evidence that in a conversation with the plaintiff they said they had not. No one at the trial pledged his oath that they had not used it. The trial Judge was therefore not justified in finding as a fact that they had not used the elevator. As these men, along with anyone else who cared to walk into the building at the noon hour, had an equal opportunity with the defendant of using the elevator, and, therefore, of leaving it running, and as leaving it running was the negligence which caused the damage, such negligence must be brought home to the defendant, and this the plaintiff, in my opinion, failed to do.

Lamont, J.A.

The appeal should be allowed with costs.

ELWOOD, J.A. (dissenting):—In this case it seems to me that there was evidence which justified the trial Judge in coming to the conclusion that it was through the negligence of the appellant that the motor was burnt out. So far as the evidence goes, the last person to use the elevator was the appellant. Some little time after he used it, it was found in a damaged condition. Quite apart from the statement of the respondent as to what the men who were in the building had told the respondent, the evidence that I have above referred to seems to me to raise a presumption of the appellant's responsibility for the damage, which shifted to him the responsibility of meeting the onus. He did not do so. He did not give evidence, as he might have.

Elwood, J.A.

In a civil action it is not necessary that the plaintiff should exclude every possibility of some person else having caused the accident, it is quite sufficient if he shews that the defendant is the one who probably is responsible for it. The statement of the appellant to the respondent that he did not do any damage does not, in my opinion, amount to anything. It is capable of any construction.

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

Appeal allowed.

ALTA.

S. C.

NORTON v. SMITH.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck, and Ives, JJ. October 15, 1920.

COSTS (§ II—28)—SCALE—TAXATION—COUNTERCLAIM—APPLICATION OF RULE 33.

Rule 33, Alberta, which provides that "where in an action in the Supreme Court a judgment is obtained which could have been recovered in the District Court and no order is made by the Judge to the contrary, the plaintiff shall recover only such costs as are appropriate to the judgment recovered and the defendant shall be entitled to tax his costs on the scale appropriate to the plaintiff's claim and to set off against the plaintiff's judgment and costs the difference between the amount so taxed and the proper amount of costs of defence appropriate to the judgment recovered," does not apply to a counterclaim, and where a defendant has claimed $2,300 and only recovered $100 the plaintiff is not entitled to set off the difference between the costs of defence under columns 3 and 1 respectively. Rule 3, known as the analogy rule, does not apply.

Statement. APPEAL from a direction of Walsh, J., upon an appeal to him from the taxation of costs.

J. P. Ferguson, for appellant; *A. M. DeLong*, for respondent.

The judgment of the Court was delivered by

Harvey, C.J. HARVEY, C.J.:—The trial of the action was before Walsh, J., and he gave judgment for the plaintiff upon its claim with costs and judgment for the defendant on his counterclaim for $100 with costs, without any further direction. The plaintiff's judgment was for $847.06, which entitled it to costs under column 2, but by reason of Rule 27 the maximum amount which could be allowed for fees was $162.05, and this was allowed. The defendant taxed his costs of the counterclaim under column 1 as the amount recovered was less than $400, but as the maximum he could receive for fees was $50 they were reduced to that. Rule 33 provides that where in an action in the Supreme Court a judgment is obtained which could have been recovered in the District Court and no order is made by the Judge to the contrary, the plaintiff shall recover only such costs as are appropriate to the judgment recovered and the defendant shall be entitled to tax his costs on the scale appropriate to the plaintiff's claim and to set off against the plaintiff's judgment and costs the difference between the amount so taxed and the proper amount of costs of defence appropriate to the judgment recovered. The plaintiff contended that this rule should be applied to the defendant's counterclaim, and that as the defendant had claimed $2,300 and only recovered $100 he was entitled to set off the difference between the costs of defence

under columns 3 and 1 respectively. The taxing master refused to allow this and he appealed to the trial Judge, who allowed it, and it is from that allowance that the defendant now appeals. It is to be noted that the rule in terms only applies to an action brought by the plaintiff, but by reason of the fact that a counterclaim is considered to be a counter action and having regard to Rule 3, frequently referred to as the "analogy rule," the Judge thought that the rule should be applied as against the defendant's claim under his counterclaim.

We are referred to the case of *Amon* v. *Bobbett* (1899), 22 Q.B.D. 543. In that case in an action in the High Court the plaintiff recovered judgment for £48 and costs, which he could have recovered in the County Court, and also judgment dismissing a counterclaim for £123 with costs which was beyond the County Court's jurisdiction. It was held that the claim and counterclaim were to be treated as if they were separate actions as to taxation of costs, and that while the costs of the former were on the County Court scale, those of the latter were on the High Court scale. In *Foster* v. *Viegel* (1889), 13 P.R. (Ont.) 133, which is also referred to, it was held that the scale of costs of a counterclaim should be the scale of costs of the Court in which the action is brought by the plaintiff unless the Judge for good cause otherwise orders and that the fact that the recovery is for a sum within the jurisdiction of an inferior Court is not good cause for such an order.

Both of these cases as well as the other authorities cited seem to make it clear that a counterclaim is not within the words of Rule 33, though in view of our Rule 21 the exact decision in the last case in part may not be applicable here.

The definition of "plaintiff," too, in the Judicature Ordinance, which by sec. 2 is declared to apply to the Rules of Court, shews that it does not include a defendant in case of a counterclaim. Rule 3 provides that: "As to all matters not provided for in these Rules the practice as far as may be shall be regulated by analogy thereto."

It is to be noted that that rule has no application except where no provision is made by the rules.

Rule 33, however, is merely an exception from a general provision already made. Provision is made for the recovery and amount of the costs recoverable by the party entitled, and then

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this qualification is made but it is quite clearly limited to the costs of a plaintiff. It cannot be said that there is no provision for the taxation of the costs of the counterclaim for they were in fact taxed according to the provisions of the rule. I think it would be extending much too far the application of Rule 3 to hold that it would warrant the extension of exceptions to actual provisions. It would be then applied to set aside actual provisions and not to supply a provision where none exists. In my opinion there is no case here for its application, and Rule 33 does not apply, and I think, therefore, the direction of the Judge should be set aside and the decision of the taxing officer affirmed.

The plaintiff asks us if we allow the appeal to allow a counsel fee which was an actual disbursement in respect of which he appealed from the taxing master's decision.

I find on reference to the bills as taxed that in the plaintiff's bill of costs of the action there is charged $125 as a disbursement as paid counsel fee and there is also charged a second counsel fee in the fees column. This has been dealt with by the taxing officer by taxing off the $125 and allowing the maximum amount of the tariff for counsel fee in the fees column. Inasmuch as the total taxed for fees had to be reduced by nearly $200 to comply with Rule 27, it is apparent that the plaintiff lost the full amount of this counsel fee by having it transferred to the fee column if it might properly be treated as a disbursement. Now a counsel fee is a disbursement only if it is a disbursement. While the costs are the costs of the party they are so because they are the costs of his solicitor, and if the solicitor pays someone else to appear as counsel, the fee he pays him is a disbursement, but if on the other hand he acts as counsel himself the counsel fee is not a disbursement and must be considered as part of his fees. After the judgment appealed from the plaintiff taxed another bill in respect of the counterclaim, and in that I find the same counsel fee of $125 appearing again as a disbursement and taxed as such by the taxing officer. It is true that according to the conclusion I have expressed he is not entitled to that bill but it is also true that in that bill and not in the other the item should appear.

The action was on a promissory note of the defendant. The counterclaim was for damages for breach of warranty of machinery.

The trial Judge in giving his reasons for judgment says at the very outset, "This contest is entirely over the defendant's counterclaim." The plaintiff was given the costs of the action which involved no contest, the defendant the costs of the counterclaim which involved the whole contest. The amount of costs which the defendant could recover was very small, because the amount of the judgment he recovered was small, but the trial Judge thought he ought to have whatever costs were appropriate to the judgment in his favour. Rule 21 provides that the amount of the items of costs shall be in the discretion of the taxing officer within the limit of the amount set out in the appropriate column of the tariff. The plaintiff's taxed bill shews that in every single instance the amount taxed off each item in the bill only reduced it to the maximum allowed by the appropriate column and that but for the provision of Rule 27 it would have taxed the maximum as well as some items for which I can see no authority whatever notwithstanding that there was no contest whatever in its action and that it could not have recovered more costs if its action had been of the most involved nature and entailed the most severe contest, the same amount being recovered. This is not in accordance with what is intended by the rules, but it is quite impossible to say whether the result is due in this case to the neglect of the taxing officer or of the opposing solicitor. Certainly the latter did not appeal from the taxation. If he had I would have been ready to send it all back to be retaxed upon the proper principle. I only wish to add that litigants are entitled to all the protection that can be furnished them by their solicitors and the officers appointed to assist in the due administration of justice.

The Judge gave no costs of the application before him because the point came up for the first time. Under ordinary circumstances I might be disposed to apply the same rule here, but in view of the fact that the plaintiff has already taxed a very considerable sum more than he should have against the defendant, I see no reason for departing from the usual rule that gives the successful party his costs. I would therefore give the defendant the costs of the appeal both before us and before the Judge below.

Judgment accordingly.

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CORKRUM v. HOPE.

Alberta Supreme Court, Scott, J. October 22, 1920.

STAY OF PROCEEDINGS (§ I—14)—WHEN GRANTED—THE SOLDIERS RELIEF ACT, 6 GEO. V. 1916 (ALTA.), CH. 6—SOLDIER NOT NECESSARY PARTY—APPLICATION TO BE ADDED—RIGHT TO.

A soldier within the meaning of the Soldiers Relief Act, 6 Geo. V. 1916 (Alta.), ch. 6, who is not a necessary party to an action as originally instituted to realise upon a mortgage security may, as owner of an equitable interest, or legal interest subsequently acquired, apply to be made a party defendant in order to be in position to contest the action, but is not entitled to be made a party merely for the purpose of obtaining a stay of proceedings in an action under the Act. The nature of the possession referred to in the Act is actual possession, not the constructive possession which one tenant in common may be entitled to claim by reason of the actual possession of another tenant in common.

Statement.

APPEAL by plaintiff from certain orders of the Master at Calgary, in an action brought to realise upon a mortgage security. Reversed.

R. Ure, for plaintiff; *Short, Ross & Co.*, for defendants.

Scott, J.

SCOTT, J.:—The action is brought to realise upon a mortgage security given by the defendant Donald Hope and was originally instituted against him alone by the deceased in his lifetime. It was commenced in March, 1915, and an order *nisi* was obtained in June of that year.

On October 30, 1919, the Master made an order to the effect that the action be stayed during the period of time that Percy C. Hope is entitled to protection as a soldier under the statutes of the Province.

On June 24, 1920, the Master ordered that Percy C. Hope be made a party defendant to the action and that he be at liberty within 5 days to file a defence to the action.

On July 6, 1920, the Master ordered that his order of October 30, 1919, be dated and given effect to as of October 24, 1919.

It was admitted by counsel that the deceased died a few days before the order of October 30, 1919, and that the action had not then been revived in the name of his executrix. It was also admitted that the object and intention of the order of July 6, 1920, was to constitute the former an order made during the lifetime of the deceased and thus render it a valid order.

The orders now appealed from are the order of June 24, 1920, adding Percy C. Hope as a party defendant, the order of July 6, 1920, reviving the order of October 30, 1919, and the order so revived.

The mortgage in question was given by the defendant Donald Hope to one McPherson to secure a portion of the purchase money of the lands comprised in the mortgage which was afterwards assigned by him to the deceased.

Percy C. Hope in his affidavit, filed on the application for the order of October 30, states that he was in partnership with his father Donald Hope at the time the property was purchased, that the initial cash payment of the purchase money was made by the partnership, that he is now the registered owner of an undivided interest in the property and that such interest was actually vested in him since the initial purchase thereof and he shews that he was a soldier within the meaning of the Soldiers Relief Act, 6 Geo. V. 1916 (Alta.), ch. 6. It was not shewn upon that application that he was then in possession of the property.

As he was not then a party to the action he would be entitled to a stay of proceedings only upon the ground that he was in possession of the property and having failed to shew this the order was therefore unauthorised even if the action had not then abated by reason of the death of the deceased.

For the same reason neither the order of July 6, 1920, reviving the order of October 30, 1919, and dating it back to October 24, 1919, nor the order so revived can be sustained. The latter order must be construed as one issued upon the day of its present date and at that date Percy C. Hope was neither a party to the action nor has he shewn that he was then in possession.

In his affidavit filed on the application of Percy C. Hope to be added as a party defendant Donald Hope states in effect that he purchased the land for and on behalf of himself and Percy C. Hope, that each was then entitled to a half interest therein, that each supplied one-half the initial payment on account of the purchase, that early in 1917, being about to undergo a surgical operation and being desirous that the interests of the several persons interested in the property should be shewn, he transferred the land to his wife and three of his children under which transfer they became the registered owners, Percy C. Hope thereby acquiring a $\frac{1}{5}$ interest therein.

In the defence filed by Percy C. Hope under the order making him a party defendant, he alleges that he is a soldier within the meaning of the Act, that he is entitled to an equitable interest in

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the property from the time of its purchase and to a ½ interest therein under the transfer from his father and that he is in possession thereof in common with his co-owners and enjoying the rents and profits thereof in proportion to his interest therein.

He was not a necessary party to the action in the first instance but I see no reason why, as the owner of an equitable interest or a subsequently acquired legal interest in the property, he should not be entitled to apply to be made a party defendant in order that he may be placed in a position to contest the plaintiff's right to the relief claimed in the action, but I doubt whether he is entitled to be made a party merely for the purpose of obtaining a stay of the proceedings in the action under the Act referred to and it is apparent that that was the only purpose of his being made a party.

To hold, for instance, that after proceedings had been taken under a mortgage the mortgagor may fraudulently or otherwise transfer his equity of redemption to a soldier and that the latter as such would thereupon be entitled to stay the proceedings would open a wide door for fraud, as it would provide an effectual means of obtaining a stay of proceedings in every mortgage action.

In my view the nature of the possession referred to in the Act is actual possession, which is something more than the constructive possession which one tenant in common may be entitled to claim by reason of the actual possession of the property by another tenant in common.

I entertain a strong suspicion that the application to make Percy C. Hope a party to the action was made entirely in the interest of his father Donald Hope and solely for the purpose of enabling him to stay the proceedings in the action and thus enable him to retain possession of the property. It was under his instructions that the application was made, his son having left for South America (where he now resides) some months before it was made. It is true that the father claims to be acting under a power of attorney from the son given in March, 1918, but it appears that he resided in Calgary after his discharge for about a year, during which it does not appear he sought to be made a party.

I allow the appeal with costs and direct that the orders appealed against be set aside. *Appeal allowed.*

Re WAYNE COAL Co. Ltd.
SCHULTZ'S CASE.

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S. C.

Alberta Supreme Court, Walsh, J. October 6, 1920.

COMPANIES (§ VI F—350)—PAYMENT FOR SHARES OF STOCK IN COMPANY—PAYMENT OVER AGAIN BY MISTAKE—RECOVERY—GARNISHEE PROCEEDINGS—MONEY IN COURT—LIQUIDATION OF COMPANY—RIGHTS OF CREDITORS.

A person who pays for shares of stock of a company and afterwards pays again for the same shares in mistake and seeks to recover the amount mistakenly paid in garnishee proceedings, the money being in Court under his garnishee summons when the company goes into liquidation, is simply a creditor of such company and is not entitled to any priority over the other creditors.

Statement.

APPEAL from the decision of the Master in an action to recover money paid to a company in mistake, the company having gone into liquidation while the money was in Court under a garnishee summons. Affirmed.

C. T. Jones, K.C., for appellant.

W. T. D. Lathwell, for liquidator.

Walsh, J.

WALSH, J.:—Schultz, after paying $400 in full for the shares of this company's stock for which he had subscribed, paid the company again in full for the same by mistake. He sued the company for this money some 6 months after the second payment was made and in that action he issued a garnishee summons against the Standard Bank of Canada which paid into Court the sum of $399.25 being the amount which it admitted owing the company at the date of the service of the garnishee summons. Shortly afterwards and whilst this money was still in Court the company went into liquidation. Schultz claims to be entitled to this money and the liquidator also lays claim to it. The Master at Calgary has given effect to the liquidator's claim and from his decision Schultz appeals.

The question asked is whether or not Schultz is entitled to have this money paid out to him in priority to all other creditors. The money is in Court under his garnishee summons but that summons of course was spent when the winding-up order was made. On the argument the case for him was not put upon the ground that the money had been secured under his garnishee summons but upon the ground that he is not a creditor of the company but that the company was under the circumstances attending the receipt of this money from him a trustee of it for him so as to entitle him to repayment of it in full in priority to the claims of creditors.

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If the identical money which he paid in error to the company had been preserved in specie or so ear-marked as to have retained its identity there might be some force in this contention. But that is not the case at all. What I am asked to order is that out of the assets which should otherwise be available for distribution *pari passu* amongst the creditors $400 should be taken and set apart for repayment to him of the money which the company improperly received from him. I do not think that I can do that. In my opinion neither this particular fund nor any other part of the assets of the company is impressed with a trust in favour of Schultz. The company undoubtedly owed him this money but in my judgment as his debtor and not his trustee. He sued the company as his debtor and so if there was any question of election about it he determined the matter by the form of his action. His statement of claim is not before me but it must have been for money had and received. Under the rules he could only have issued a garnishee summons in an action for a debt or liquidated demand and so it must be that his action was in a form which clearly shewed that he treated the company as his debtor. The garnishee summons which he issued could only have issued upon an affidavit proving the company's indebtedness to him. If he was not before I think he thereby elected to become and became a creditor of the company and his claim must be disposed of on that basis. If he had carried that action to judgment it would simply have been for the recovery of the amount of this debt. The money paid into Court by the garnishee would not have been his but would have been available for distribution amongst the creditors, under the Creditors Relief Act, 1 Geo. V. 1910 (Alta., 2nd sess.), ch. 4. And so I think he is but a creditor of the company and must come in with others of his class.

I do not think the reference to Chitty on Contracts, 15th ed., at p. 67, which Mr. Jones gave me helps him. Upon the authority of the cases there cited, if the plaintiff had paid this money to the liquidator instead of to the company and even under a mistake of law the Court could order its repayment to him. That, however, is a vastly different thing from the facts of the present case.

I think the Master's disposition of the matter was the right one and the appeal is therefore dismissed with costs.

Appeal dismissed.

LAPRAIRIE DE LA MAGDELEINE v. LA COMPAGNIE DE JÉSUS.

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Judicial Committee of the Privy Council, Viscount Haldane, Viscount Cave, Lord Dunedin, Lord Atkinson, Duff, J. October 19, 1920.

PUBLIC GROUNDS (§ I—1)—GRANT BY JESUIT FATHERS FOR A COMMON—AGREEMENT AS TO TAKING LAND TO EXTEND VILLAGE—CESSION OF CANADA TO ENGLAND—ESCHEAT TO CROWN—STATUTORY ENACTMENTS—COMPANY OF JÉSUS, INCORPORATION OF—RIGHTS OF PARTIES.

The Jesuit Fathers were the owners, under a grant made by the French Government in 1647, of the Seigniory of Laprairie de la Magdeleine. In the year 1694 the Jesuit Fathers made a grant of about 3,000 arpents of land in the neighbourhood of the village of Laprairie, being part of the lands belonging to the Seigniory, to the inhabitants of Laprairie and of certain neighbouring districts for a common. In 1724 an agreement was made between the inhabitants and the Jesuit Fathers authorising the latter to grant, out of the common land, *emplacements* or building lots for the extension of the village. After the cession of Canada to England in 1763 the Jesuits gradually disappeared from the country, and on the death of the last of them, in or about 1800, their seigniories escheated to the Crown. In 1817, the common having become derelict and the village requiring extension, the inhabitants petitioned the Crown authorities, with the result that in the year 1820 a part of the common, defined in a plan drawn by the Crown Surveyor, M. Saxe, was set aside by the Crown for building. In 1822 an Act, 2 Geo. IV. (Que.), ch. 8, provided for the election by the commoners of a president and syndics to define and regulate the common. This Act was from time to time continued, and was ultimately rendered permanent, and the appellants are the president and syndics elected under that Act. In 1867 the Crown rights in the common passed, under the B.N.A. Act of that year, to the Province of Quebec. By the Act of 1887, 50 Vict. (Que.) ch. 28, the Jesuit Fathers were incorporated as La Compagnie de Jésus, being the respondent corporation. In 1888 the Governor of the Province, acting under the authority of an Act passed in that year respecting the settlement of the Jesuit estates, 51-52 Vict. 1888 (Que.) ch. 13, ceded to the respondent corporation all the rights of the Province in Laprairie common. The result of the above transactions was that as from 1888 the respondents became the owners of all rights in the common formerly belonging to the Jesuit Fathers, subject to the grant of 1694.

Shortly after the events last mentioned it was ascertained that the soil of the common was suitable for brick-making, and questions arose as to the rights of the respondent and the commoners in the soil. By a series of statutes passed by the Legislature of Quebec permission was given to alienate certain parts of the common for that purpose, the rights of all parties interested being reserved. Ultimately, by the above-mentioned Act of 1912, 3 Geo. V. ch. 78, provision was made for the ascertainment of the rights of the parties by means of questions to be submitted to and answered by the Quebec Court of King's Bench, appeal side, subject to an appeal to the Privy Council, and the appellants were authorised to represent the persons having rights in the common before all Courts for the purpose of the Act.

The questions submitted to the Court of King's Bench and to the Privy Council were as follows: (1) What are the respective rights of the Society of Jésus and of the parties entitled to the common in the said Common of Laprairie? (2) Do any particular rights exist as regards the lands immediately adjoining the Common of Laprairie, and if so, what are they and what lands are affected by those rights? (3) Is the deed passed on November 30, 1724, before Mtre. G. Barrette, N.P., still in force and if so what are the rights which result from it?

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Statement.

The Board held as to question one that the Society of Jésus had over the Common of Laprairie a right of *domaine direct*, a right of ownership of the soil and subsoil as well as to the rent of 30 "sols" for each inhabitant pasturing animals thereon, and that the commoners had the co-ownership limited to rights of pasturage for their beasts and to enjoyment for communal purposes only without being able to dispose of these rights without the consent of the seigneur; that the second question should not be answered, and that the deed of November 30, 1724, was not in force. (if it ever had any validity, it appears to have lapsed)

APPEAL from a judgment of the Court of King's Bench, appeal side, for the Province of Quebec rendered under the Act 3 George V. 1912 (Que.), ch. 78, whereby it was provided that the respective rights of the respondents, the Society of Jesus, and of the persons having rights in the Laprairie common in the Province of Quebec should be determined by that Court subject to the appeal provided by law.

The judgment of the Board was delivered by

Viscount Cave.

VISCOUNT CAVE (after stating the facts as set out in the headnote):—The replies to the above questions, as rendered by the majority of the Court (Archambeault, C.J., and Lavergne, Carroll and Pelletier, JJ.) were as follows:—

"To the first question; The Society of Jesus has over the Common of Laprairie a right of *domaine direct*, a right of ownership of the soil and sub-soil, a right to the strands, rivers, timber and quarries, as well as to the rent of 30 'sols' for each inhabitant who puts beasts upon it. There can be no difficulty as regards the timber, for it no longer exists. The commoners (*les ayants-droit de commune*) have the co-ownership, limited to the right of pasturage for their beasts and to enjoyment for communal purposes only, without being able to dispose of these rights without the consent of the seigneur.

"The replies to the second and third questions must be identical; the Reverend Jesuit Fathers have the right to cede building lots (*emplacements*) for the purpose of enlarging the village or the town of Laprairie from this time forward. The application of the deed is without restriction as to time."

Cross, J., dissented from the above decisions and expressed his opinion as follows:—

"I would therefore say, in answer to the first question, that the ownership of the land of the common was and is vested in the commoners, subject to the claim of the Company of Jesus to thirty sols per year from each head of family and the right to

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stumpage mentioned in the deed of 1694. . . In answer to the third question, I would therefore say that the Society of Jesus is entitled to sell for its own profit and account any of the lots shewn on the Saxe plan of 1820 for village extension which may remain unsold and of which the Crown in right of the Province of Quebec was in possession on the 5th November, 1889. In so far as not answered by the answer to the third question, the second question could relate only to the strip of one arpent outside the village reserved by the grantor in the deed of the 19th May, 1694; but that strip, never having formed part of the common, is not now in question, and the second question need not therefore be answered."

Against the decision of the majority of the Court the present appeal is brought.

From the above statement it is obvious that the decision on the first question must depend mainly upon the construction of the grant of 1694, and accordingly it is to the terms of that grant that the greater part of the argument before their Lordships has been addressed. The grant is contained in an "Acte" passed before a public notary, Maître Adhémar, on May 19, 1694, and found among his records in the archives of the Superior Court of Montreal. It is headed:—"Sold by Reverend Father Levaillant, S. J., manager of the affairs of the Seigniory of Laprairie, to M. Pierre Gagnié and others for the inhabitants of Laprairie de Magdeleine" and, after recording the presence of the Reverend Father Francois Levaillant, Superior of the Residence of Ville-Marie, managing the affairs of the Seigniory of Laprairie de la Magdeleine under authority granted by the Superior General of the Jesuit Fathers in New France, the grant proceeds as follows:—

Who in the said capacity has voluntarily given and granted and by these presents doth give and grant by title of rates and seigniorial rents from this time and forever has promised and doth promise to warrant against all troubles and hindrances whatever to the inhabitants of Laprairie de Magdeleine who now reside there and to those who will reside there in future together with those who will inhabit to the Coast of the Tortue and from there to the Commune of Laprairie St. Lambert to the Fork and to Fontarabie, to Messieurs Pierre Gagnié, Claud Caron, Jean Caillaud Caron, Etienne Bisaillon and Charles Deno for them and for all other inhabitants of the said place of Laprairie de Magdeleine by virtue of the powers that he has over them, executed in my office, and to those who will reside on the said Coast of the Tortue, the Fork and Fontarabie and by these presents and accepting for them their heirs and future claimants. The land consists, etc. (here follows a description of the land). Reserving to the said Father Levaillant, in his

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said capacity, the entire village as it is at present and an arpent of land all around it and beyond to the said fort to do with it as seems best to him, but so that the said reserved arpent to the said fort and adjoining it at the foot cannot prejudice the said inhabitants accustomed, and to become accustomed, to have their cattle pass over the said place to reach the land above given and granted.

Which the said Reverend Father Levaillant, in his said capacity, has given and granted to the said inhabitants to be used in common, except that the said Reverend Fathers are not prevented from free pasturage in the said common for the cattle that they or their farmers will have who are, or will be upon the said places above described, and so that said Reverend Fathers and their farmers will not be obliged to contribute to any work done upon the said common. Holding the said extent of land, etc. (here follow the boundaries).

So that the said extent of land above given shall be enjoyed by the said inhabitants, accustomed, and to become accustomed, to use the premises above described as appertaining to them by means of these presents, saving that they will not be able to sell any part of it nor to use it for any other purpose than as a common without the express consent of the said Reverend Jesuit Fathers. It is expressly agreed that it will be lawful for the said Reverend Fathers and the inhabitants accustomed, and to become accustomed, to do so, to take in the said common, wood from which to make planks and boards, carpenter wood and other wood, that they will require to build for themselves only; and in case they or other persons take wood therefrom for sale they will be obliged to pay twenty sous for each foot of lumber that they cut in the said common, which money will be used for the benefit of the Commune.

Subject to the charge that the said present and future inhabitants will be obliged to pay for each of them to the said Reverend Jesuit Fathers or to the holder of these presents, thirty sous by each inhabitant as a head of a family; that they will be obliged to pay the same to the said Reverend Fathers on the first day of December in money, the first payment to become due and to be made on the first of December next, at the said place of Laprairie de la Magdeleine and to continue thenceforward and in perpetuity. In case of default by the said inhabitants who own cattle to pay the said thirty sous per head they will be deprived of the said right of the common. And the said Reverend Father Levaillant and the said Caillaud have agreed that as by the lease of a farm made to him of the lands of the said Reverend Fathers the land above granted or part of it is incorporated in the said farm, the Reverend Father transfers to him half the revenue of the said common for the time during which the lease has to run without his being able to claim any other reduction and without any reduction of the rent reserved in said lease.

The deed was signed by Father Levaillant and the 5 representatives of the inhabitants above named in the presence of witnesses, as well as by the notary.

Before considering in detail the construction of the above deed, it appears to be desirable to consider a contention raised on behalf of the respondent corporation during the argument, viz.,

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that by the law of Quebec no grant of proprietorship could be made to a fluctuating body of inhabitants. In their Lordships' opinion this contention is unfounded.

The subject is dealt with by Denisart, "*Collection de Decisions Nouvelles*," Paris, 1786, who says, vol. 4, page 746:—

The word "commune" has two principal meanings. It signifies first a kind of society which the inhabitants of the same town, of the same township, of the same place, began to form in France in the reign of Louis VI., in the 12th century, by permission of the sovereign, with power to meet together, to elect officers, to assess themselves for the needs of the society. We have spoken of it by the name "communauté d'habitans." In the second place, the name "commune" or "communaux" is given to lands which belong to a community of inhabitants and which the inhabitants generally enjoy in common.

Thus the word "commune" was used sometimes as signifying the general body of inhabitants of a town or village, who were treated as a quasi-corporation capable of owning land or other property, and at other times as signifying the property owned by such a community. In the former sense it was also referred to as a "*communauté d'habitans*," and such a *communauté* was authorised to elect officers (generally known in rural communities as syndics), and to hold general meetings or *assemblées d'habitans*. Such a community could be formed without letters patent. (Vol. 4, page 728, *tit.* "*Communauté d'habitans.*")

To the same effect is Merlin's "*Répertoire de Jurisprudence*," 1812 ed., vol. 2, page 587, *tit.*, "*Communauté d'habitans*" who says:—

The communities of inhabitants possess in certain places property in common, such as houses, lands, woods, meadows, pastures, the ownership of which belongs to all the community and the use of it to each inhabitant except that which may be leased for the benefit of the community as is generally the case with respect to houses and lands; the common revenues realised from them are those which are called the moneys of the patrimony.

He adds that such communes cannot acquire land without the previous authorisation of the Government (*Ibid.*, and *see* vol. 7, page 606, *tit.*, "Mainmorte"); but such an authorisation may be presumed after so long a period.

It is stated by Denisart, vol. 4, page 747, that the word "commune" is not properly applied to land over which a community of inhabitants have limited rights of usage, but only to land of which it is the proprietor; but according to Merlin, vol. 2, page 592, *tit.*, "*Communaux*" the distinction was not always observed, for he says:—

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We should say nevertheless that frequently one speaks also of "communaux" as being property which is only such by means of user and of which the commune do not possess the title to the land. This manner of speaking has even crept into our laws.

Turning now to the construction of the deed of 1694, with particular reference to the question whether it passed to the inhabitants of Laprairie the proprietorship of the soil or only the right of user, it is plain that the language used in the early part of the deed, if taken alone, would be in favour of the former view. The words: "Gives and grants by the title of rates and seigniorial rents," with which the grant commences, are appropriate to a feudal grant by seigneur to *censitaire* (see the Decisions of the Courts of Lower Canada on Seigniorial Questions (1856), vol. A., page 126A *et seq.*); and the same may be said of the initial words of the habendum (as it would be called in English Law), viz.: "In order that the said quantity of land conveyed as above shall be enjoyed by the said inhabitants present and future of the premises above described as appertaining to them by means of these presents."

But it is necessary, as pointed out by Carroll, J., when stating the reasons for the judgment of the majority of the Court, to consider the other expressions used in the deed and to construe the document as a whole. No safe inference either way can be drawn from the fact that the grant is made to the inhabitants "*pour leur service de commune*" for the word "*commune*" is (as appears by the above quotation from Merlin) used sometimes as indicating proprietorship and sometimes with reference to a right to profits only. But there are other elements in the deed which point to the conclusion that something less than full proprietorship was intended to pass. The grant is not made to the inhabitants of Laprairie only, but to them and the inhabitants of other neighbouring districts. The words prohibiting sale or use for any purpose other than as a common, "without the express consent of the said Reverend Jesuit Fathers, "are incompatible with proprietorship, and are inadequately explained by the fact that a right of pasture is reserved to the seigneurs. The grant to the inhabitants of a right to cut timber was unnecessary if they were to own the soil. The reservation of a rent or payment of thirty sols a year for each inhabitant who is the head of a family would not fall under the ordinary description of "*cens et rentes*"

and tends to shew that the seigneur was to retain something more than the *dominium directum* only. And lastly, the provision that, on the default of any inhabitant holding cattle in paying the thirty sols a year, those inhabitants "*seront deschus du dit droit de Commune*," is hardly explicable on the theory that the soil passed to the inhabitants; for the obligation of a commoner to pay this sum to the seigneur would be inadequately secured by the penalty of a forfeiture of common rights in favour of other commoners. The effect of these considerations is to throw great doubt upon the inference which might otherwise be drawn from the initial words of the grant and the habendum, and to give weight to the argument that the deed passes no more than a right of user.

In view of the ambiguity of the grant, it is permissible to take note of the manner in which it was construed at or about the time of its execution; and accordingly reference may be made to certain agreements entered into before the same notary in 1705 and 1724 to which some of the inhabitants who signed the deed of 1694 were also parties. By a convention entered into between the Jesuit Fathers and a number of inhabitants of Laprairie on January 21, 1705, and found among the notarial acts of Maître Adhémar, it was agreed that the Jesuit Fathers should be at liberty to dispose of 4 arpents of the common on the terms of replacing them by other land of equal extent; and by another convention entered into by a meeting of inhabitants of Laprairie with the Jesuit Fathers on November 30, 1724 (to which more particular reference will be made hereafter), it was agreed that the Jesuit Fathers and their successors should be at liberty to grant as building lots (*concéder pour emplacements*) such parts of the common as might be required for that purpose. In each of these agreements it is assumed that, subject to the consent of the commoners, the seigneurs are in a position to alienate the soil. These agreements, therefore, support the view that the soil had not passed under the grant of 1694, but was still vested in the seigneurs.

Reference may also be made to the Act of 2 George IV. 1822, (Que.), ch. 8, by which the management of the common was entrusted to the appellants. By that Act it is recited that:—

Certain of the inhabitants of the village and seigneurie of Laprairie de la Magdeleine, in the county of Huntingdon, are in possession of a Com-

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mon, (which is described, and that) the general benefit of the proprietors of the said Common and of the inhabitants of the said village and seigneurie of Laprairie de la Magdeleine would be materially promoted if provision were made for the well ordering of the said Common,

thus distinguishing the proprietors of the common from the inhabitants of the village. Provision is then made for the election by the inhabitants "entitled to the benefit of the said common" of a chairman and 4 trustees (*président et syndics*) to "manage and direct the business relating to the said common," and such trustees are incorporated by the name of the appellants. The trustees are to cause the common to be surveyed and the limits thereof to be ascertained and fixed by a surveyor; but the Commissioners representing the Crown (in which the seigniorial rights were then vested) are authorised to appoint a surveyor to act jointly in making the survey, and no survey or act of the trustees or their surveyor is to be valid or binding unless agreed to or ratified by the Commissioners, their surveyor or agent. The Act also requires the trustees to ascertain the "persons having any pretensions to right of common in the said common of Laprairie," and to determine the number of horses and cattle which shall be allowed to graze upon the common. No provision is made for vesting the common in the trustees. The recitals and provisions of this statute appear to recognise a substantial interest in the common as being still vested in the seigneurs; and some of the expressions used are inconsistent with the view that the soil had passed to the commoners.

Upon the whole and having regard to all the above considerations, their Lordships are not satisfied that the deed of 1694 vested the proprietorship of the common in the inhabitants, and accordingly they do not differ from the conclusions of the Court of King's Bench as to the reply which should be given to the first question.

The meaning of the second question is obscure. If, as the Court appears to have thought, it was intended only to raise the point which is more specifically raised in the third question, it is unnecessary to reply to it. But if some other point relating to lands adjoining the common was intended to be raised, then the question is not formulated with sufficient clearness, nor are the facts sufficiently stated, to enable a reply to be given. In these circumstances it appears to their Lordships that this question

should be left unanswered, leaving it to the parties to formulate the question again in the "clear and distinct manner" required by the Act of 1912 if they should desire to do so.

The third question relates to the Acte or agreement of 1724 to which reference has already been made for another purpose, and it is desirable now to state in more detail the nature of that document. It is headed:—

Procés verbal of a meeting of interested residents in the Commune of Laprairie at the request of the Reverend Father d'Heu, Superior of the Jesuits, and of an agreement for a grant of land: Adhémar, Royal Notary, 30th November, 1724.

and is in the following terms:—

Year 1724 the 30th November, after High Mass on the said day had been said and sung in the church of the said place of Laprairie de la Magdeleine, were called together at the request of the Reverend Father d'Heu, Superior of the Reverend Fathers of the Company of Jesus, Superior of the Palace of Ville de Marie, Manager of the affairs of the Seigniory of Laprairie de la Magdeleine, the greater part of the inhabitants of the said place of Laprairie de la Magdeleine who have rights of common at the house of M. Pinsonno, to which said inhabitants it was represented by the said Reverend Father d'Heu that it was very important to labour for the increase of the establishment of the said village of the said place and being now able to do so only by new grants of lots outside of the said village which are joined to the Commune of the said place and before doing so, the said Reverend Father d'Heu requires for this purpose the agreement and consent of the said inhabitants assembled therefor in considerable numbers and after the examination made by the said inhabitants it seemed that the said village would be more settled and be in a condition to maintain itself and to defend itself in the future against enemies, they have, for this purpose, with the exception of M. Pierre Brosso, unanimously said that they had consented and did consent by these presents in good faith, full and free will that the said Reverend Father should from this day forward, himself and his successors and future claimants dispose of the land which will be necessary to grant for sites beyond the village which can be now granted around the said village to dispose of them by grant of sites from this day forward and to appropriate the seigniorial rights in them. And in acknowledgement of the consent given by the said inhabitants to the said Reverend Father d'Heu, he agrees to give to their church a portrait of St. François Xavier from ten to twelve feet long and from six to seven feet wide, with a gold border around it, as soon as possible.

The procès-verbal is signed by Father d'Heu and 9 inhabitants of Laprairie, present at the meeting, and it is stated that others had declared that they did not know how to sign. There is annexed to the procès-verbal a document dated December 19, 1724, by which 4 other inhabitants (including Pierre Gagnier, one of the accepting parties in the deed of 1694) approve and ratify it; and also a minute of another "*assemblée de la plus grande partie*

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des habitants de la paroisse," which appears to have been held on July 25, 1725, and at which Father d'Heu, at the request of the meeting, substituted for the promised painting of St. François Xavier a payment of 600 livres for the needs of the church.

It appears to their Lordships to be open to serious question whether this agreement was valid and binding upon the general body of the inhabitants of Laprairie. It is stated in Denisart, vol. 4, page 729, *tit.*, "*Communauté d'Habitans*" that, while a small number of inhabitants present at a meeting is sufficient for the election of officers, etc., yet when it is proposed to take a step of more importance for the *communauté*, such as the alienation of any of its property, etc., it is necessary that the meeting should be regularly summoned by the "chefs de village," and that two-thirds of the inhabitants of the village should be present at the discussion. Merlin, vol. 2, page 588, adds that under certain ordinances of 1683 and 1687 no alienation can be made except for certain purposes of which the acquisition of a painting is not one; but it is not clear whether these provisions had become law in Quebec in 1724. Had there been no objection of substance to the transaction, it might perhaps after this lapse of time have been presumed that the proper forms were followed and the necessary majority obtained. But the agreement now in question purports to bestow upon the seigneurs, in consideration of the gift of a painting, the right at any time thereafter to make grants of parts of the common for building; and it would not be right to assume the validity of such an agreement, which might result in time in the complete destruction of the common rights, without strict proof that it was entered into with the proper sanction. It is true that in the years 1817 to 1820, the inhabitants of Laprairie having petitioned the Governor-General to pass legislation for the appropriation of a part of the common to building purposes, the commissioners to whom the petition was referred, after investigating the matter, recommended that building lots should be granted by the Crown under the agreement of 1724, and this appears to have been done. But it is to be observed that the commoners were not less desirous than the Crown that grants of building lots should be made, and no inference prejudicial to their rights can be drawn from the fact that they made no objection to the manner in which effect was given to their wishes. It would

appear that some other *emplacements* were granted under the agreement, but the dates and circumstances of these grants are not stated.

But even if the validity of the agreement of 1724 be assumed, there is good ground for saying that it is no longer operative. The Act of 1822 directed, as has been already stated, that the trustees, with the concurrence of the seigneur, should ascertain and fix the limits and boundaries of the common, and no reference is made to any power or authority enabling the seigneurs afterwards to encroach upon the limits so fixed. Further, by the Acts of 1854-1855 and the consolidating statute of 1861 (C.S.L.C. 1861, ch. 41), provision was made for the abolition of all feudal rights and duties in Lower Canada, and it was provided that no land should thereafter be granted by a seigneur to be held by any other tenure than *franc-alleu roturier*, or free and common socage. It is true that the seigniories of the late Order of Jesuits and other seigniories held by the Crown were excepted from the compulsory clauses of the Act (sec. 60), but provision was made for bringing these seigniories within the Act (sec. 61). In view of this legislation, it is difficult to see how the respondent corporation could now make grants of *emplacements* under the "Acte" of 1724 "*et s'en approprier les droits seigneuriaux.*" Further, it seems doubtful whether the "Acte" contemplates a sale of building lots at a profit and it is clear that it would not cover a grant for brick-making purposes. The deed, therefore, if it ever had any validity, appears to be now obsolete.

For these reasons, which do not appear to have been brought to the notice of the Court of King's Bench, their Lordships are of opinion that no grant could now be made under the agreement of 1724.

Their Lordships will accordingly humbly advise His Majesty that the order appealed from should be affirmed as regards the reply to the first question and set aside as regards the replies to the second and third questions; that the second question should be left unanswered; and that the reply to the third question should be that the Acte of November 30, 1724, is not in force.

Their Lordships think that, having regard to their decision, there should be no costs of this appeal.

Judgment varied.

ALTA.

S. C.

HORNER v. CANADIAN NORTHERN R. Co.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Ives, JJ. November 15, 1920.

1. MASTER AND SERVANT (§ II D—80)—DOCTRINE OF COMMON EMPLOYMENT ABOLISHED—APPLICATION OF DOCTRINE OF RES IPSA LOQUITUR.
In Alberta where the doctrine of common employment has been abolished the doctrine of *res ipsa loquitur* does not depend on any general rule and may be applied in actions for negligence between master and servant if the case is one in which it would otherwise apply.

2. EVIDENCE (§ II B—95)—ACCIDENT—DEATH—IMPOSSIBILITY OF ESTABLISHING PRECISE FAULT—ESTABLISHING CLAIM—RES IPSA LOQUITUR.
In a case to which the doctrine of *res ipsa loquitur* applies and in which it is impossible to say what was the precise fault which caused the injury it is not necessary for the plaintiff to prove it, and an attempt on the part of the jury to answer the question which is not to the point should be disregarded as valueless; an express finding of negligence by the jury being sufficient to support a verdict for the plaintiff.

Statement. APPEAL by defendant company from a judgment entered against it for damages under the ordinance respecting compensation to the families of persons killed by accidents. Affirmed by an equally divided Court.

N. D. Maclean, for appellant.

D. Campbell and *H. A. Friedman*, for respondent.

Harvey, C.J. HARVEY, C.J.:—The plaintiff is the widow of a brakeman whose death was caused in a train wreck while in the employ of the defendants.

There is no doubt that the accident was due to the train running into an open switch. That is admitted by the defendants whose evidence was for the purpose of shewing that they could not be held to be to blame for the switch being open.

The switch in question was 5 or 6 miles from a summer resort. The accident was on a summer Sunday night. Persons not connected with the railway were in the habit of being on the track on Sundays, and on the day in question a hand car of the section foreman was stolen from a place a short distance east of this switch and discovered later some miles further east. The switch in question was not in a station yard or in the neighbourhood of any settlement, but at a junction where a branch left the main line and was apparently only required to be opened occasionally when it was desired to turn a train to the opposite direction. It had been used the night before for that purpose and the brakeman who had closed it stated that he had locked it after closing it. It had been examined the following morning, the day of the accident,

by the section foreman who said he found it locked, a train had passed into and through it going east, the same direction as that of the wrecked train, about noon and later had returned in the opposite direction at about 8 or 9 o'clock, an hour or two before the accident. From the evidence and from the conditions it seems almost, if not quite, certain that when the train went through at noon the switch must have been closed, and although when the train returned running through the switch from the rear the witnesses say they saw nothing wrong; that really adds nothing, because, naturally, if the switch were open, the wheels of the engine and cars would put and keep the rails in the same place as they would be if it were properly closed and locked. It seems to follow almost necessarily that the switch was opened some time on Sunday afternoon with as much likelihood of it being done before the train went west as after. There is nothing in the evidence to suggest that this was done by any employee of the defendants, indeed the evidence is quite to the contrary. As against the view that it might have been done by anyone else is the fact that it could not have been done without the possession of a key which would unlock the padlock, for the padlock was not broken. The evidence does shew, however, that the section foreman and trainmen have keys, so that there are apparently many keys which will unlock it. The theory of the defendants seems to be that the miscreants who took the hand car probably knew something about railways and were able to, and did, unlock and open the switch, or, that if those particular persons did not, that someone else over whom they had no control did.

The jury found that the defendants were guilty of negligence, and that the negligence consisted in the "switch known as west main track switch leading to the 'Y' at Peace River Junction not being properly set and locked causing the derailment and wreck of train known as extra east No. 2087."

Having regard to what I have said about the facts and evidence, the difference between that finding and the allegation of negligence in the statement of claim which charges it as "permitting or causing the switch to be improperly set," appears to me significant. The answer is a finding of the cause of the accident rather than a fixing of the responsibility for it. It appears to me quite clear that on the evidence the jury felt that it could not find that the defend-

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ants "caused" or in any ordinary sense "permitted" the switch to be open. Counsel for the plaintiff contended that the jury may have disbelieved the evidence of the brakeman, who said he locked the switch, and come to the conclusion that he did not lock it and thus was neglectful of his duty. The obvious answer is that the jury did not say that, and in view of the fact that there is nothing whatever beyond the circumstance of the switch being subsequently unlocked to cast doubt on its correctness, and that the witness was not cross-examined, his evidence thus apparently being accepted by the plaintiff's counsel, the latter could not have asked the jury to make such a finding. See *Browne* v. *Dunn* (1893), 6 R. (The Reports) 67. The finding that the switch was open was not a finding of negligence on the part of the defendants unless involving the finding that it was the duty of the defendants to keep it closed under all circumstances, in other words, that it was the duty of the defendants to have a man on duty at the switch. Whatever might be said as to this, if it had been a passenger who had been killed, it appears to me that such a contention cannot be successfully raised in favour of the present deceased. He was a brakeman who had been in the employ of the defendants for 4 years, and, therefore, knew that there was no switchman at this switch, and he must be deemed to have voluntarily incurred the ordinary risks incidental to that situation. Much was said in argument as to the doctrine or rule *res ipsa loquitur* and its application as between an employee and employer. In the view of the case I have expressed it seems to me that the question does not arise or require consideration other than as just indicated.

Though other acts of negligence were alleged, they were, in effect, negatived by the jury's silence and, as, for the reason I have stated, in my opinion, what they did find as negligence cannot be said to be negligence, the result is to free the defendants from negligence and entitle them to a dismissal of the action.

The case of *Newberry* v. *Bristol Tramways* (1912), 107 L.T. 801, seems to be somewhat in point.

I would allow the appeal with costs and dismiss the action with costs.

Stuart, J.

STUART, J.:—This is an appeal by the defendant company from a judgment entered against it for $25,000, upon the verdict of a jury, for damages under the ordinance respecting compensation

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to the families of persons killed by accidents. The plaintiff is the widow and administratrix of the estate of the deceased and sues on behalf of herself and two infant children.

The deceased Horner was a brakeman in the defendant's employ. On July 6, 1919, at about 11.20 p.m., he was engaged as head-end brakeman on a freight train of the defendant which was proceeding easterly from Alberta Beach, a station on the defendant company's line, towards Peace River Junction the next station to the eastward. He was with the fireman and engineer in the cab of the engine. As the train passed a switch just west of Peace River station the engine and some 15 cars left the rails and were piled up at the side of the track. All three men on the engine were killed.

The conductor of the train, one Farrel, the rear end brakeman, one Myer, and a telegraph operator, one Dowker, travelling as a passenger, were in the caboose at the rear end of the train.

The plaintiff in her statement of claim alleged negligence on the part of the defendant's servants and stated that the particulars of the negligence complained of were as follows:—

(a) In running the said train at the time and place of the said occurrence at an excessive rate of speed. (b) In permitting or causing the said "Y" switch to be set or placed improperly to allow the said train to pass along and upon the main track safely. (c) In having a defective switch and railway tracks at the time and place of the said occurrence, whereby the said locomotive was caused or allowed to leave the railway tracks as aforesaid.

The plaintiff at the trial called, first, the physician who made the autopsy to shew the nature of the injuries and the apparent cause of death. Then portions of the examination for discovery of Irwin, superintendent of the division of the railway within which the accident occurred, were put in evidence. These shewed the position of the deceased as an employee of the defendant, the general location and nature of the tracks at the place in question, the fact of the accident and derailment, the fact that the track and equipment were under the defendant's control and the amount of the deceased's earnings. The plaintiff herself was then called to testify in respect to her husband's health, age and earnings, and her means of support before his death. Then one Killam, an actuarial expert, was called in respect to mortality tables and annuities.

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The plaintiff then closed her case. Thereupon a motion for a non-suit was made and in consequence of what was said during the argument on this application the trial Judge gave the plaintiff leave to adduce further evidence. This consisted of further portions of the examination for discovery of Irwin. These shewed in detail the nature of the mechanical device called a switch, and how it operated at the place in question. It was shewn that at the switch in question the south rail of the main line track was a stock rail, *i.e.*, a fixed and immovable rail, that the corresponding stock rail on the north was on the main line of course west of the switch, but that this stock rail at the point of the switch turned northerly and became the northerly or north-westerly rail of the switch track. At the point of the switch there was placed between these two stock or fixed rails two parallel rails which each came to a point pointing westerly. These rails were distant from each other some five or six inches less than the distance between the rails on an ordinary track, *i.e.*, than the distance between the two stock rails at the switch point. They were firmly fixed to each other by iron bars but were not affixed to the ties. Thus they could be shifted from one side to the other as desired. The continuation easterly of the northerly of these two rails became the north rail of the main track while the continuation easterly of the southerly of these adjustable rails became the southerly or south-easterly rail of the switch track. When the switch was fixed for the main track the northerly point would fit closely against the inner side of the northerly stock rail and the southerly point would be some 5 or 6 inches from the southerly stock rail. When the switch was fixed for the switch track the southerly point would fit closely against the inner side of the southerly stock rail and the northerly point would be 5 or 6 inches from the northerly stock rail. The wheels of railway cars have flanges which drop down on the inner side of each rail of the track, thus if the switch were fixed for the main track this flange on a wheel going easterly would pass south of and within the northerly point and this would direct and keep the cars on to the main track while the flanges on the southerly wheels would pass along the southerly stock rail easily through the 5 or 6 inch space between the southerly point and the southerly stock rail. On the other hand, if the switch were fixed for the switch track the southerly point being fitted closely against the inner side of the

south stock rail would be caught by the flange of the south wheel and so turn the wheel upon the switch track, the north wheel flanges passing along inside the north stock rail and between it and the northerly point in the 5 or 6 inch space.

These points, connected firmly as described, were shifted as desired by a strong iron bar that passed under the south stock rail to a switch stand situated some 5 or 6 feet south of that rail. This bar was worked by a lever or handle on the switch stand. When the switch points were fixed properly for either the main track or the switch track this lever or handle would drop down and hang vertically into a notch and was then locked by a padlock which was attached to the switch stand by a chain. During the operation of shifting the switch from one position to another this handle or lever would be horizontal, would point northerly towards the track and could not drop to its vertical position and it could not be locked.

Upon this switch stand there was a round or oval board called a target which would move when the lever was moved. With the switch set for the main track this target would be parallel with the main track and would thus present only its thin edge to a person going in either direction on the main track. When the switch was set for the switch track this target would stand at right angles to the track and so present its broad surface to such an observer. Above the target was a lamp set in a socket and having 4 colored glass windows. When the switch was set for the main track a green light would be shewn to a person approaching either way along the track. When it was set for the switch track a red light would be shewn. It appeared, also, from Irwin's examination, that it was found immediately after the accident that the switch points had apparently not been in their proper position immediately before the accident, but that the southerly point was shifted an inch or two north, so as to allow the south wheels to continue on the south stock rail along the main track, and that the north point was not closed in against the north stock rail, but that a similar space was left so that the north wheels were not caught by the switch point but continued along the north stock rail and so along the north rail of the switch track. In other words, the switch was open and not fixed for either track, with the consequence that the

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car wheels would drop to the ties as soon as the distance of divergence between the two stock rails became great enough to let the wheels drop.

It also appeared from Irwin's evidence that the target was found nearly, but not quite, parallel to the main track as it should be if the switch were properly set for that track, but that there was at any rate, immediately after the accident, no light burning in the lamp. The switch lever was found unlocked and not in either of its two proper positions as described but resting between the two and horizontal. The lock itself was in good working order. It also appeared that the last train to use the switch track used it at 5.20 p.m. on July 5, that is some 30 hours before the accident, and that about an hour before the accident a train had safely passed west along the main track, not using the switch, and had crossed the train derailed at the first station west of the switch.

The plaintiff made no further attempt to shew the exact cause of the accident, or, assuming that the misplacement of the switch was the immediate cause, to shew how this in fact came to exist.

The defendant then renewed formally its application for a dismissal of the action, but this was refused, and the defendant then adduced its evidence which consisted of the testimony of the following witnesses: Calder, the conductor of the derailed train; Dowker, the telegraph operator, travelling in the caboose with him; Vincent, the head of the defendant's mechanical department at Edson, the divisional point to the west from which the train had started; Farrel, the head brakeman on the train which passed westward on the main track through the switch about an hour before the accident; Wellington, the fireman on this latter train; Fallon, the engineer on that train; Macdonald, the brakeman on the train which used the switch track at 5.20 p.m., the day before; Jordan, the section foreman for that portion of the line which included the *locus* of the accident; Hodgkinson, a car inspector at Edson, who inspected the cars of the derailed train before it left Edson; and Henry, the roadmaster for the defendant, for the division in question. Myer, the rear-end brakeman on the derailed train, who was travelling with Calder and Dowker in the caboose, was not called on account of illness.

Practically nothing further was disclosed directly as to the cause of the accident by the evidence of these witnesses. The

evident purpose of the defendant in calling them was to shew that so far as the action of its employees was concerned everything reasonably possible had been done to keep the track safe for the passage of trains and that none of them had done any specific act conducing to the accident which could be called a negligent one.

Calder said, omitting some facts already stated, that the air-brakes were working properly when applied by the engineer, that there were 37 cars, and the caboose, on the train, that the average rate of speed for the 39 or 40 miles west of the accident had been between 20 and 22 miles an hour, that for the last 6 miles the average had been 10 to 12 miles an hour because up to 1½ or 2 miles west of the switch there was an up grade, that he was riding in the cupola of the caboose and could see ahead down the train and could see a certain house at the switch track for a mile or mile and a half before he reached it, that there was no emergency application of the brakes until after the first shock indicating a derailment, that when the derailment occurred he and the others in the caboose at once walked forward to the switch, that they found the switch lever or bar pointing horizontally across the main track, the target very nearly parallel to the track, the lamp out, the lock hanging open on the west of the switch stand and the marks of the wheel flanges on the ties beginning 16 ft. east of the switch, that as they were not going to stop at the junction where the switch was it was his duty to exchange signals with the engineer or front brakeman for the purpose of indicating to the engineer to proceed but that this had not been done, that he did not look for the switch lamp on approaching the junction though he could have seen it if it was lit and in place, that all officials of the company and all employees down to section foreman have keys for these switch locks but he could not say whether the sectionmen under the foreman would have one or not, and that the switch points were found connected properly to the switch stand by the bar referred to.

In answer to a juryman, Calder stated that with the switch half-way open the engineer could not, at that point, tell whether the target was parallel to the track or facing him. At least, I infer the reference was to the target. He stated, also, that he found one car with its west wheels still on the track and its east wheels derailed, that 15 cars were piled up with the engine in a depression

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between the main track and the switch track, the engine lying on its right side. He said that the switch lamp could be seen by him a mile and a half or two miles away, but that, in fact, he did not discern whether the switch was set for or against him, and I take his evidence to mean, also, that it was his duty to pay attention as to whether switches were set for or against him. Indeed Rule 105 of the Train Rules says:—

> Both conductors and engineers are responsible for the safety of their trains, and under conditions not provided for by the rules must take every precaution for their protection. Immediate precaution must be taken to protect all trains against any obstruction or defect in the track.

Calder also said that his 37 cars were loaded to their full capacity of 1,750 tons, that going down the grade approaching the switch they were going between 20 and 22 miles an hour, that when he got down to the switch and found the lamp out he did not examine it so as to find out whether it had just been put out or had been out for some time. He said nothing about the lamp being found on the ground as sworn by a later witness. He said also that the engineer could see the switch stand and could know whether it was set right or not, and that it was the engineer's duty to stop if the proper light signal was not displayed. He said also that he could not say anything about the possibility of the wreck having put the light out; also, that if the switch had been set and properly locked for the switch track when the previous train passed west along the main track an hour before, the spikes would have been torn out of the switch stand, or some of the fastenings would have been broken, and that he did not see any spikes torn out of the switch stand or anything twisted or broken, but he did not definitely say that he had looked for that purpose.

Dowker, the operator, in addition to confirming some of Calder's testimony, said that he thought the train was going about 15 miles an hour just before the accident.

Vincent gave evidence tending to shew that the engine was in good repair when it left Edson.

Farrel said that his train had passed the switch going west, between 9 and 10 o'clock, when it was not yet dark, that he rode on the left-hand side of the cab of the engine and was looking out to see that everything was all right ahead, that as far as he noticed the switch was all right, that he would have noticed if the switch handle had been horizontal or the target at right angles to the track

at the time, that he noticed neither of these things, but he said he could not actually remember seeing this switch more than any other, but repeated that if it had been wrong he would have noticed it. He said the train passed the switch on the main line without any trouble, that his train was going 15 miles an hour or so, that it was not dark enough for him to discern whether the switch light was burning or not. He said, also, that it was the duty of the engineer and the conductor and not of a brakeman to regulate the speed of a train, that he had returned to the scene of the accident about 5 o'clock next morning, and that he still found the switch handle horizontal having about a quarter turn. In answer to a juryman, he said his train would go through the switch quite safely without any effect even if the switch was open, and that the switch, *i.e.*, the points, would spring back about half way.

Wellington, the fireman on Farrel's train, said he was looking out of the gangway between the engine and tender when the train passed the switch a little after 9 o'clock, that he had a good view to the south and was looking ahead and saw the switch, that the target was shewing all right for the main line, but he could not say how the handle was as he could not remember seeing it, but it would probably have jumped up and down and attracted his notice if it had been horizontal as they passed, that they were going about 12 miles an hour, that the time was "just between the two lights," and that he did not notice the switch light as it would not shew in the dusk.

Macdonald, the brakeman on the excursion train to Alberta Beach, which passed east on Saturday afternoon, said that his train had stopped at the switch in question at about 8.45 p.m., that his train had backed down from Alberta Beach and had turned into the switch in question in order to use the "Y" at that place to turn his train and go ahead east back to Edmonton, that his mate, Maclean, had unlocked the switch, that he, witness, dropped off the train when it had got into the "Y" and threw the switch back for the main line. Then the following questions and answers occurred:—

Q. What did you do to that switch? A. Set it in its normal position. Q. What is the normal position? A. It is parallel with the main line. Q. What did you do with the switch lever and lock? A. I done the same that a million others— Q. What did you do, tell the jury? A. I threw the switch, that is as definite as I can give it to you, I raised the lever of the switch, and

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I forget now which direction that lever turns, but I raised the lever and threw it back and set it down again. Q. Set the lever down? A. Yes. Q. What did you do then? A. Well, put the lock on it. A. Did you put the lock on it? A. Why, certainly.

This witness was not cross-examined.

Fallon, the locomotive engineer on the freight train that passed west an hour before the accident, said that he had left Edson about 5 or 6 in the morning and had gone east, and had left Edmonton to go west about 7 in the evening, that he passed the switch in question on the main track twice that day, the first time going east about noon, that the switch was all right then, because if it had been wrong it would have derailed them, that returning west an engineer could not see the switch as he sat on the north side of the cab, but that it could be seen from both sides of the cab on a train coming from the west owing to the slight curve in the track, and that he passed west at a time of day when a light would not shew very good.

Jordan, the section foreman, said that his duty was to inspect the switches on his section once on Sunday in the forenoon, and to light the lamps twice a week, that the switch stand in question was "one of the best switches on the line," that the lamp was the best light of the six, that he patrolled the switch between 10 and 11 in the forenoon of Sunday, that it was then in good condition, that the lock and lever handle were then in proper place, properly locked and set for the main line, that the Alberta Beach summer resort is about 6 miles from the switch and that people were frequently on the track along there, that about 3 o'clock on the Sunday afternoon he found his hand car had been stolen from the tool house which was situated about two miles east of the switch, and taken eastward nearly to Edmonton, *i.e.*, to St. Albert, and that he had lit the lamp on the Saturday before the accident.

"Q. That is you trimmed and lit it properly? A. Yes, we always trimmed and lit it properly."

He said the lamps would sometimes go out and sometimes blow out with a high wind but he never knew of the lamp in question going out, that he had never at any time found this switch unlocked, that he was at the wreck about an hour after it occurred and examined the whole switch, that the lamp was out then and off the switch stand, *i.e.*, on the ground, that ordinarily the lamp bracket in which the lamp rests is fastened to the top of the switch stand

by set screws, that the lamp when he found it was "jammed up some, naturally would be, but not too bad," that some physical force had by the look of it come in contact with the lamp, that it was dented in certain places but the glasses were not broken, and that he did not examine it to see if there was oil in it. He stated, also, that if the switch lever is in the notch of the switch stand it will not come out even though unlocked unless it is lifted by some one as it is heavy, that to take the bowl of the lamp off the stand he just had to unscrew slightly a set screw and pull it towards him, but he could fill the lamp without taking it out.

Hodgkinson said he had tested the air on the engine at Edson and had found it in good condition, referring, doubtless, to the air brakes.

Henry, the roadmaster, said that he reached the scene of the accident shortly after daylight on Monday morning, but added nothing to the evidence of the previous witnesses except to say that he found the lock hanging by its chain to the switch stand, and that he tried it with his key and found it in good working order, that he found the switch apparently in good working order though he could not actually work it then owing to the car wheels being in the way, that the track was safe for trains going 35 miles an hour, that if the switch had been properly locked either for the main track or the switch track just before the train came on the points could not have got into the position in which they stood. He said there was quite a heavy bruise on the corner of the frame of the lamp.

There was no rebuttal evidence.

The trial Judge told the jury that the doctrine of *res ipsa loquitur* applied although he did not use the Latin words in addressing them. He told them this:—

> There was a duty on the company to exercise care. The circumstances in which Horner's injuries were sustained were such that with the exercise of the necessary care the accident would not have happened. In my view of the law that shifted the burden on to the defendant of proving that the accident did not occur through its negligence, and so in accordance with the ruling which I gave at the close of the plaintiff's case, the defendant then took up the burden of shewing as well as it could just how this accident happened.

Then he made some extended references to the question of negligence consisting in excessive rate of speed, in the course of which he said:—

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You will remember what we are trying to find out in this case is not whether this rule or that rule or the other rule of the company was violated, whether this thing that thing or the other thing was done improperly, what we are trying to find out is what caused the accident, and it is only for some negligence or some improper act on the part of the railway employees which actually caused the accident which we are concerned with in this case.

He then proceeded to deal with the question of the open switch points and told the jury, mistakenly as I will shew, that it was from the defendant's witnesses that the jury had first heard about the switch points being open. As a matter of fact, the plaintiff had put in as part of his case the following portion of the examination for discovery of Irwin:—

Q. And they would be off the track because of the fact that they had reached a point east of the switch, where the south rail of the main track and the north rail leading into the "Y" track had diverged or been so far apart that they would drop between the rails? A. Yes. Q. Indicating that they had passed upon the stock rails, what is known as the two stock rails, the flanges of the north wheel between the north stock rail and the switch point and the flanges of the south wheel likewise between the south stock rail and the south switch point? A. Yes. Q. Indicating that the switch points were sufficiently away from the stock rails to allow the wheels to pass between the stock rails? A. Just a minute. There is a distinction with a difference there. You say the wheels, if you will say the flanges of the wheels— Q. Yes. A. I thought that is what you meant. Q. To allow the flanges of the wheels to pass between the switch points and the stock rails? A. Yes.

The Judge, however, proceeded as follows:—

If you accept the evidence which these three men give it seems to me it is so obvious that it did not call for the expression of an expert opinion of anybody that the accident happened because of this open switch. There is really not much need for you to go any further. There is the scoring of the ties by the wheels when they left the track, when they left the rails, some sixteen or seventeen feet to the east of the switch, just the point that would be the proper place to look for the train to have left the tracks if the accident occurred in the way in which it has been described. So that if you accept the evidence of these men and come to the conclusion that the accident happened because that switch was open, then you have accomplished something. The question then for your decision would be this, was that switch open through the negligence of any employee of the railway company, or was it opened by someone who had not any right to open it and who did it either maliciously or because he was crazy? There is no person here who has given evidence before you who has assumed to tell you how that switch was opened. No person who gave evidence before you saw it opened. All they can do is to describe the condition they found after the wreck, when the switch was unquestionably open, if their evidence is right. You are entitled to draw such inference from that evidence as you think the evidence justifies. It is very often impossible to find an exact reason for anything in the direct evidence that is given before you. I feel quite justified in saying that in my opinion all the evidence that could be given has been given in this case, except perhaps the evidence of the

man by whom this switch was opened and who apparently is not known to any person, and you are entitled to draw such inference from all that evidence as that evidence will justify. You are entitled if you think the surrounding circumstances warrant it in coming to the conclusion that some employee of the railway company in a fit of absent-mindedness or carelessness having turned the switch for a perfectly legitimate purpose neglected to return it to its proper position and secure its position by the locking of it. You are entitled to draw the inference if the facts warrant it that that is not so, that on the contrary some person who had not any right to do it did this thing.

He then proceeded to discuss the evidence. Referring to the evidence of Macdonald, the brakeman of the excursion train, and Jordan, the section foreman, he said:—

Practically all there is in his (Macdonald's) evidence is this, that the lock of the switch was all right. He set the lock on that Saturday night. Of course, that was twenty-four hours before this accident happened, and all sorts of things may have taken place in that interval of time between the time he set the lock and the time of this accident. Then there is Jordan, the section foreman, who inspected the switch on the Sunday morning some time, and found it all right.

Then he asked the jury:—

Can you say upon this evidence without more, and that I think is all the evidence that there is on the subject that that switch was in that condition through some negligence upon the part of the railway employees? If so, undoubtedly this defendant company is guilty of negligence, negligence of its employees and must be held responsible.

He then proceeded to discuss the possibility—upon the evidence—of an inference being made that some malicious person had opened the switch.

Next he proceeded to discuss the question whether the engineer who was also killed might not have been negligent in proceeding through the switch when the green light may have been out and, although he indicated on strong opinion that it was unlikely that the light was out for he would not have gone ahead in that case, yet he clearly indicated to the jury that it was open to them to find such negligence, although no such charge of negligence was given in the particulars of negligence of the plaintiff.

Then after discussing the possible amount of damages he left three questions to the jury, which, with his words of explanation, were as follows:—

(1) Was the death of Horner caused by the negligence of the defendant? There is a plain simple question to which your answer will be yes or no. If you answer this question and you say no to this question you need not bother about the other two, because that settles the case; there is nothing more for you to consider. If you say yes, then I ask you to consider: (2) In what did such negligence consist? In answer to that question you will state the particu-

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lar negligence which you think resulted in the death of this man. Then the third question is: (3) If the plaintiff is entitled to recover, what amount of damages is she entitled to recover?

Then after some objections to his charge by counsel for the plaintiff, he recalled the jury and told them this:—

I told you at the start of my charge that the plaintiff, by the simple proof of the fact that this accident had occurred, had imposed upon the company the onus of proving that it did not occur through its negligence. I think I made myself quite plain as to that. And it follows from that, of course, that if the company has not satisfied you that the accident did not occur through its negligence then it did not discharge that onus, and the plaintiff is entitled to a verdict.

The jury answered "yes" to the first question. To the second they said:—

Of switch known as west main track switch leading to the "Y" at Peace River Junction not being properly set and locked causing the derailment and wreck of train known as extra east No. 2047.

And they assessed the damages at $25,000.

The objections raised by the notice of appeal were: (a) that the presiding Judge should have withdrawn the case from the jury at the close of the plaintiff's case; (b) that there was no evidence that the defendants were guilty of negligence; (c) that the verdict was perverse or due to a misunderstanding of the Judge's charge; (d) excessive damages; (e) that the answers to questions 1 and 2 were not a finding of negligence on the defendant's part, and (f) that the doctrine of *res ipsa loquitur* does not apply to master and servant cases.

Taking the last of these objections first, I am of opinion that it cannot be sustained. As I understand the doctrine it simply amounts to this, that in certain actions for negligence the plaintiff is permitted to prove certain facts which constitute the accident and then to contend: "These facts shew on their face that there must have been negligence and the defendant must shew that he was in fact guilty of no negligent act causing or contributing to the accident." In other words, there being a *primâ facie* case of negligence shewn the burden lies upon the defendant to rebut that case. The plaintiff is not bound in these cases to discover and disclose to the jury the precise cause of the accident, *i.e.*, the precise act or omission which directly caused it. If the defendant can do so and can convince the jury that that act or omission was not negligent on his part in the circumstances then of course the *primâ*

facie case for the plaintiff is rebutted. The cases in which the doctrine may be taken advantage of by the plaintiff are various of course but one class of cases is that in which the instruments and machinery during the management and operation of which the accident occurred are under the power control and inspection of the defendant, so that it is he, if anyone, who is in possession of the only available information, and we have a case of this class now before us. Undoubtedly if the deceased had been a passenger the doctrine could have been applied. The objection is that he was himself an employee, using and operating or aiding in the use and operation of the instruments and machinery in question. If the doctrine of common employment were in force in this jurisdiction it is obvious that a strong argument could be made against the applicability of the doctrine. But now that the master is responsible to his servant for the negligence of a fellow servant, I can see no reason in the existence of the relationship of master and servant for refusing to apply the doctrine of *res ipsa loquitur* if the case is one in which it would otherwise apply. Indeed, it appears to me to be dangerous to attempt to make the applicability of the principle depend upon any general rule. It simply ought to be applied where it is just and right to apply it. I do not find any satisfactory authority for the proposition that the principle cannot be applied in any case as between master and servant. The case in *Paterson* v. *Wallace* (1854), 1 Macqueen, 748 (H.L.), though quoted by 21 Hals., page 439, note m., does not seem to me to touch at all the real essence of the principle because it was clear on the facts there that the deceased knew and complained of the danger shortly before the accident and yet seemed possibly to have rashly walked into it. Even as it was, the decision reversed the trial Judge who had withdrawn the case from the jury and ordered a new trial.

With respect to the fifth objection, I am unable to discern any intelligible difference between it and the second, while the first and second are also, I think, substantially the same.

Substantially, I think, the objection raised against the verdict, aside from the amount of damages, is this, that there was no evidence of negligence to submit to the jury, and that the actual negligence found by them in their answer to the second question could not in the circumstances be reasonably considered as negligence at all.

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Other than that contained in the last objection with which I have already dealt there was no objection raised either in the notice of appeal or upon the argument to the Judge's charge to the jury.

With respect, it does appear to me, however, that the Judge went, perhaps slightly, astray in his explanation of the way they should apply the doctrine in question to the facts in evidence. As will appear from the passages quoted above, he undoubtedly considered the "res" which "spoke of itself," *i.e.*, which raised the presumption of negligence to be the mere fact of the derailment, and he stated to the jury that the plaintiff had brought forward no evidence to explain its cause. He apparently overlooked the passage from Irwin's examination which I have quoted. He did, however, leave the whole examination with them with a plain suggestion that they read it for themselves and see if they could find anything else in it. Nevertheless his charge was throughout, except possibly one passage, based upon the assumption that the mere fact of derailment furnished a presumption of negligence. Whether the defendant could not properly have complained of that direction is a grave question in my mind in a case where the person injured was not a passenger but an employee upon the train derailed. It must be remembered that all three men working on the engine were killed. Were it not for the position of the points we would not know what the plaintiff himself may have done, and whether some unusual and improper act of his own, in connection with the operation of the engine, may not have caused the accident to happen.

Looking at the case after a long and careful examination of the reported evidence, I think I should have preferred to take the fact of the misplacement of the switch point as the "res," which would raise a presumption of negligence which the defendant would be called upon to rebut upon the ground that the condition of the track was something with which the plaintiff could not possibly have had anything to do, and which was entirely under the control of other employees of the defendant, and that, unless the defendant satisfied the jury that that condition was not due to any negligence of any of those other employees, the plaintiff could succeed if the jury considered the presumption strong enough in the plaintiff's favour to justify them in adopting it as a satis-

factory basis of inference—a matter undoubtedly always and still within their judgment and discretion.

But the trial Judge did adopt the fact of derailment as the basis of the possible presumption, and while it was perhaps open to the defendant to question the correctness of this course, it seems to me to be clear that the jury practically adopted in their own minds the view I have just suggested and held that the whole facts of the case, including the fact of derailment and the fact which admittedly was the immediate cause of it, viz., the condition of the switch points furnished to their minds a presumption of negligence which the defendants had not satisfactorily cleared away.

It is pertinent, I think, at this point to observe that there seems to me to be something rather illogical, in a case where *res ipsa loquitur* applies, in asking the jury to say in what particular act or omission the negligence consists unless there be added to the question the condition "if you can discover from the defendant's evidence what that was"; because with the mere question as asked without such condition attached, it appears still to throw upon the plaintiff the burden of proving the precise cause of the accident, a thing which the very basis of the doctrine seems clearly to indicate that he is not bound to do. I confess that I prefer the view of Farwell, L.J., in *Newberry* v. *Bristol Tramways*, 107 L.T. 801, to that of the other two members of the Court. He there said, at p. 804:—

> The real issue is whether the defendants have proved affirmatively that they have done everything that skill and care can provide; not whether the plaintiff has himself proved some specific case of omission if the evidence given by the defendants permit of the finding that everything possible has not been done.

In the present case I think the answers of the jury substantially amount to this: You say we may, if we think right, infer negligence from the fact of derailment. But we know that the actual immediate cause of that was the condition of the switch points, and taking everything together, we do infer the existence of negligence, and when you ask us in what the negligence consisted, all we can say is that it consists in the mere fact of the switch points being open when that train was coming along, and we do not think that the defendants have shewn that they exercised due care to avoid that situation. To what precise negligent act or omission of the defendant this was attributable, we do not say, but there must have been

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some such act or omission or the condition would not have existed.

I think that is clearly what they meant, and that that is sufficient to sustain the verdict of liability.

The only possible ground upon which such a verdict could be attacked seems to me to be this, that the jury ought to have found upon the evidence that the defendants had satisfied the burden thrown upon them. That, however, was in my opinion entirely for the jury to decide.

It is suggested that the jury were bound to accept the evidence of the brakeman that he had locked the switch the day before, and of the section foreman that he had found it properly locked when he inspected it about noon. The brakeman was not cross-examined and the case of *Browne* v. *Dunn*, 6 R. 67, is referred to. I do not know why that case was not reported in the regular reports and there may be a reason for it. It is to be observed that in the case in the Supreme Court of Canada in which *Browne* v. *Dunn* was followed, viz., *Peters* v. *Perras* (1909), 42 Can. S.C.R. 244, the witness in question was himself a party, and there was no jury. I can understand why the reasoning of *Browne* v. *Dunn* might apply in such a case, but I confess with profound respect that I fail to appreciate the necessity for such tender regard for the interests of a mere witness who has no real interest in the litigation at all. The whole reasoning of the case is based upon a supposed unfairness to the witness in not letting him know that it will be suggested to the jury that they may not believe him. Why his interests should override the interests of the parties litigant I really fail to understand. So far as the parties here are concerned I think there will be found frequent questions by counsel of the plaintiff at least to other witnesses which plainly suggested that the plaintiff was casting doubt upon the question whether the switch had been locked. It is true that it appears from the Judge's charge that counsel for the plaintiff, in his address to the jury, did not impugn the honesty of the witnesses, but it also appears, plainly, that with respect to some of the other witnesses the Judge, although commending their apparent honesty, told the jury that they were at liberty to accept their evidence or not as they pleased, and I think it not unnatural that the jury might apply that remark to the evidence of the witnesses generally. Moreover, if I had been a juryman, listening to the brakeman as he told of locking

the switch in the words I have quoted, I would certainly have doubted his sincerity and would have concluded that he was speaking, not from any then present recollection, but, from his usual course of procedure and perhaps from a desire to screen himself from a very grave charge of criminal negligence if he confessed to an omission of duty; with respect to Jordan, he was cross-examined, if not upon the precise point, at any rate upon other points nearly related, in such a way as to suggest doubt as to the accuracy of his statements.

Jurymen are themselves at liberty to ask questions and they did so of some of the witnesses in this case. I cannot think that they can properly be held to have erred if they took the view of the brakeman's evidence that I have suggested and silently suspected it and refused to accept it finally simply because the plaintiff's counsel did not cross-examine him.

And I gravely question whether it is not more unjust to the plaintiff to raise the point of *Browne* v. *Dunn*, 6 R. 67, against her, though it was not cited or the point of it referred to on the argument, than it was to the defendant to omit to cross-examine a witness who gave such evidence as the brakeman and then to suggest on appeal that the jury may have disbelieved him.

The trial Judge did not tell the jury that they were bound to believe the brakeman, and the objection I am now considering amounts, in effect, to a charge of non-direction to the jury. If they were necessarily bound to believe him, as a matter of law, they should have been told so by the trial Judge, when plaintiff's counsel would have had an opportunity before verdict of contesting the point. Clearly the jury considered they had a right to believe him as well as Jordan, or not, as they pleased, in which opinion I think they were right.

That being so, I am unable to discover any reason for saying that the jury could not reasonably have refused to be satisfied that there was no negligence on the part of the defendant. They might, upon the evidence, quite reasonably, I think, infer that when the other train passed eastward on Sunday morning the north point of the switch just happened to be close enough at the moment for the first flange to catch it, in which case the pressure of the south wheels might keep it close enough until the train passed. It is true that there was a hint of the possibility of

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malicious crime. But as was said by Palles, C.B., delivering the judgment of the Court in *Flannery* v. *Waterford and Limerick Ry. Co.* (1877), I.R. 11 C.L. 30, at p. 36:—

> But it will not, I apprehend, be contended that the latter assumption, involving as it does a criminal offence, ought to be made in the absence of any evidence pointing in that direction.

The theft of the hand car in the afternoon, at a point some miles eastward and its taking still further eastward, would not, in my opinion, be sufficient to justify a reasonable inference that another different crime had been committed, and in any case it was open to the jury, as they undoubtedly did in view of the Judge's charge, to take that hypothesis into consideration and it was for them to deal with it.

On the general aspect of the case, I think the observations of Palles, C.B., in the case cited are also very pertinent and present a sound view of the law.

I therefore think that the verdict of liability cannot be disturbed.

As to the *quantum* of damages allowed, I am certainly dissatisfied with it even after the reduction to $20,000 made voluntarily, and as I understand absolutely and finally, by the plaintiff. But I see at present no safe ground upon which we could interfere with it, and in view of the opinions of the other members of the Court with respect to the whole case I see no advantage in discussing the matter in detail.

I would dismiss the appeal with costs.

Beck, J.

BECK, J.:—The application and meaning and effect of the so-called doctrine of *res ipsa loquitur* is raised. It was raised at the trial. At the conclusion of the evidence for the plaintiff, counsel for the plaintiff said: "We rest here, my Lord, and rely upon the doctrine of *res ipsa loquitur*."

Counsel for the defendant moved to dismiss the action mainly on the ground that that doctrine does not apply as between master and servant. The trial Judge refused to dismiss the action and the defendants called evidence.

The trial Judge in addressing the jury made these observations:—

> The position that the plaintiff took was practically this: Here is a railway system which is owned and operated by the C.N.R. Co. Here is a train which was under the management of employees of that company. All we know practically is this, that that train ran off the track at Peace River Junction

and in consequence of that Horner was killed. It is not for us to know how that occurred, we are not supposed to be familiar with all the details of the railway system at that point or any other point, those are things which are practically within the knowledge of the defendant company itself. All we know is that an accident occurred, that the train ran off the track, the man was killed, that is a thing which would not have occurred if due care had been exercised, if everything had been all right, and for that reason we simply content ourselves with shewing that this accident did take place and that this death resulted, and we call upon the defendant to prove that that did not occur through any negligence upon its part. There is a Latin maxim which is much used in the law which means in English: "The thing itself speaks," that is to say, here is the accident which takes place, it speaks for itself, and that is all we are called upon to prove. There was a duty on the company to exercise care. The circumstances in which Horner's injuries were sustained were such that with the exercise of the necessary care the accident would not have happened. In my view of the law that shifted the burden on to the defendant of proving that the accident did not occur through its negligence, and so in accordance with the ruling which I gave at the close of the plaintiff's case, the defendant then took up the burden of shewing as well as it could just how this accident happened. Now I think I may say with perfect propriety that in my opinion the railway company has acted with great candour and with great fairness in the number and class of the witnesses whom it has placed before you. It seems to me that they practically exhausted the witnesses who were able to cast any light upon this tragedy, and it is to be commended for that. Those men who were called were without exception all employees of the railway company. There has not been a suggestion made against their perfect honesty, and I am very glad that that is so. These men struck me as being fair-minded, honest, intelligent men, who gave the evidence they did give with perfect candour and straightforwardness. That is my opinion of them. You may have a different opinion. I am simply expressing my own opinion, but there is no suggestion that simply because they are employees of the railway company they twisted their evidence to suit the purposes of their employer. We all know, in these days at any rate, that the sympathies of railway men are just as apt to be with each other as they are with their employer.

. . . . . .

It is for you to say now, upon a review of all of the evidence, whether in your opinion this unfortunate accident occurred through the negligence of the railway company.

There are some suggestions made as to how it occurred, etc.

Then he gives a very full survey of the facts, leaving it to the jury to form their own conclusion, but submitting to them the following questions:—

(1) Was the death of Horner caused by the negligence of the defendant? (2) In what did such negligence consist? (3) If the plaintiff is entitled to recover, what amount of damages is she entitled to recover?

The jury answered these questions as follows:—

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(1) Yes. (2) Of switch known as west main track switch leading to the "Y" at Peace River Junction not being properly set and locked, causing the derailment and wreck of train known as extra east No. 2047. (3) $25,000.

The English and Irish cases on the doctrine of *res ipsa loquitur* are to a large extent collected, examined and discussed in the Irish case of *Coughlan* v. *Monks*, [1918] 2 I.R. 306—Court of Appeal affirming Court of King's Beach—to which my brother Ives has called attention.

The American cases, with some others, are discussed at great length in the first 249 pages of vol. 1917 E. of the Lawyers' Reports, Annotated. There is also a very useful note of Canadian and other cases in 23 Can. Ry. Cases, pp. 305 *et seq.*

Though the maxim is general in its terms it has been restricted, in treating it as a doctrine, so that its meaning is now settled to be this: "Where the thing is shewn to be under the management of the defendant or his servants and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of the explanation by the defendants that the accident arose from want of care," *per* Erle, J., in *Scott* v. *London & St. Katherine Docks Co.* (1865), 3 H. & C. 596, at 601, 159 E.R. 665.

Once the circumstances surrounding the accident bring it within the rule, and, therefore, once a *primâ facie* case is made out which ought to be left to the jury, it seems settled that the jury are not bound as a matter of law in the absence of any evidence on the defendant's behalf to find for the plaintiff; for it is a case of inference of fact not presumption of law. The weight of American authority seems to be to the effect that even in a case in which the rule applies, the burden of proof throughout the case remains upon the plaintiff. The English decisions appear to support a somewhat different proposition, namely, that the burden is cast upon the defendant of displacing the *primâ facie* case of negligence by evidence leading to the conclusion that there was no negligence on his part. This seems to be the correct view and to be impliedly laid down by the Privy Council in *McArthur* v. *Dominion Cartridge Co.*, [1905] A.C. 72.

In some jurisdictions it has been held that the rule has no application in cases between master and servant; but it seems that

the ground given for this is the doctrine of common employment, which has been abolished in this jurisdiction, and the cases already cited seem to reject the distinction.

In view of the law being as I understand it, I think the law and the facts were excellently put to the jury by the trial Judge; and in fact no exception was taken to his charge nor to the questions he submitted to them.

It seems to be quite clear that, in a case to which the doctrine *res ipsa loquitur* applies, the circumstances may be such as to make it impossible to say what was the precise fault which caused the injury; and in such cases it is not necessary for the plaintiff to prove it and obviously the jury could not answer the question: "In what did the negligence consist?"

In the present case the jury evidently attempted to give an answer to this question without being obliged to do so; and their attempted answer is not to the point. It leaves the precise fault undetermined, and probably in their view it was not possible of determination; and on the whole evidence I think this a reasonable view. Had the jury found a general verdict for the plaintiff with damages, I think it could not be disturbed. They have expressly found negligence. They may have done so because they were not ready to believe some of the witnesses on behalf of the defence. They were at liberty to do so. We cannot tell. I think the answer to the second question can be and ought to be disregarded as valueless. For these reasons I would uphold the verdict for the plaintiff.

As to the damages, they have been reduced by unconditional abandonment of $5,000, leaving the amount for which the plaintiff is entitled to sign judgment or issue execution as the case may be, $20,000. This practice we established for this Court in *Collard* v. *Armstrong* (1913), 12 D.L.R. 368, 6 Alta. L.R. 187, where we distinguished *Watt* v. *Watt*, [1905] A.C. 115. This practice accords with the old practice to be found referred to in the Law Lexicons under the title *Remittit damna* or *Remittitur damnum* and some learning on it can be found in 1 Wms. Saund. 285-6, 85 E.R. 371-2-3.

The $20,000 seems large, but I fear there is no ground upon which it can be reduced.

I would therefore dismiss the appeal with costs.

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Ives, J.

IVES, J.:—This is an appeal from the judgment of Walsh, J., sitting with a jury.

This action is brought to recover damages for the death of plaintiff's husband. He was killed on July 6, 1919, while employed as a brakeman on defendant's train No. 2047 which was derailed at Peace River Junction by running into an open switch on defendant's track. The trial Judge held, and I think rightly under the circumstances here, that the principle *res ipsa loquitur* applied. It should be noted here that after the argument as to whether the rule applied and before the defence offered evidence the plaintiff's counsel applied for leave to lead further evidence to obviate the necessity of relying upon the rule and though the defendant's counsel stated that he would call Mr. Irwin, defendant's superintendent, as a witness, plaintiff's counsel answers as to getting his evidence by cross-examination: "That would not at all meet the point that we have in consideration. We want to be permitted to put in these questions—from the examination for discovery of Mr. Irwin—as part of our original case and not in any respect or by way of cross-examination." Leave having been granted one of the questions put in was: "Q. When prior to the accident was the switch in question last operated? A. 17.20 o'clock, July 5th. That would be 5.20 p.m." Now this evidence is clearly part of the plaintiff's case and is nowhere contradicted. The employee brakeman, Macdonald, whose train used this switch, as stated by Mr. Irwin, was called by the defendant and his evidence was that after his train had passed through he set the switch properly for main line and locked it and he was not cross-examined. See *Browne* v. *Dunn*, 6 Reports 67. The defendant called its section foreman, one Jordan, who had charge of the section of track in which this switch is. He stated that he had inspected his section on the morning of July 6, the day of the accident, and inspected this switch about 11 o'clock a.m.; that it was properly set for main line and locked. It was his business to inspect this switch and track. The defendant's train No. 2147 east bound passed over this switch, that is against it, about noon of July 6. The train crew of No. 2147 were called by the defendant and say the switch was properly set. Fallon, the engineer, says that if it had not been it would have derailed his train. This same train, 2147, and crew returned west over this switch about an hour before the accident,

and while Fallon and his fireman, Wellington, say the switch was properly set, their train, westbound, would be going with it and, even if it were open, would automatically close it, without accident.

In his charge to the jury the trial Judge speaks of the witnesses called by the defendant in response to the burden of proof shifted to it by application of the rule *res ipsa loquitur* and says:—

Now I think I may say, with perfect propriety, that, in my opinion, the railway company has acted with great candour and with great fairness in the number and class of the witnesses whom it has placed before you. It seems to me that they practically exhausted the witnesses who were able to cast any light on this tragedy, and it is to be commended for that. These men who were called were, without exception, all employees of the railway company. There has not been a suggestion made against their perfect honesty, and I am very glad that that is so. These men struck me as being fair minded, honest intelligent men, who gave the evidence they did give with perfect candour and straightforwardness. That is my opinion of them.

No objection was taken to this.

The questions left to and answered by the jury were:—

(1) Was the death of Horner caused by the negligence of the defendant? A. Yes. (2) If so, in what did such negligence consist? A. Of switch . . . not being properly set and locked causing the derailment and wreck of train known as extra east No. 2047.

Having regard to the evidence and to the Judge's charge to the jury, I cannot interpret the jury's answer to the 2nd question as anything more than a finding that it was an open switch that caused the accident. I cannot construe it as fixing the defendant with responsibility for the state of the switch unless upon the principle that defendant was an insurer. The burden upon the defendant was to prove that it exercised all due care in the construction, maintenance and operation of its plant at this point reasonably necessary to safety under the surrounding circumstances, one of the circumstances being that Horner was an experienced railway man.

If the jury meant to fix the defendant with responsibility upon the bald fact that this switch was open it must follow that the only answer would be the continuous presence of a switchman at this point but under the circumstances disclosed in evidence I do not think the law demands that degree of care.

I would allow the appeal with costs and dismiss the action with costs.

Appeal dismissed, the Court being equally divided.

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KIDSTON v. STIRLING & PITCAIRN Ltd.

Supreme Court of Canada, Idington, Duff, Anglin, Brodeur, and Mignault, JJ. November 23, 1920.

SPECIFIC PERFORMANCE (§ I A—3)—SALE OF FRUIT—CONTRACT—DEFINITENESS AS AFFECTING—REFUSAL TO DECREE—REASONABLE PRICE FOR GOODS SOLD—REFERENCE TO ASCERTAIN.

The vendor (appellant) agreed in writing to sell the crop of fruit in his orchard for a period of several years, the price being the "Market price of such fruit in each year."

The Court held, reversing the judgment of the British Columbia Court of Appeal and sustaining the trial Judge, that the parties never were *ad idem* as to what was to be the market price and that they never had in fact arrived at a contract in terms of which specific performance could be decreed, but that the vendor was entitled to recover a reasonable price for the goods sold and that there should be a reference to ascertain what this should be.

[*Kidston* v. *Stirling & Pitcairn* (1920), 53 D.L.R. 29, reversed. See also annotations on Specific Performance, 1 D.L.R. 354, and 31 D.L.R. 485.]

Statement.

APPEAL by vendor from the British Columbia Court of Appeal in an action on a contract for the sale and purchase of fruit. Reversed.

E. Lafleur, K.C., and *W. H. D. Ladner*, for appellant.

W. J. Taylor, K.C., for respondent.

Idington, J.

IDINGTON, J.:—I am of the opinion that this appeal should be allowed in respect of three of the specific matters in question.

In the first place, I cannot find anything in the interpretation and construction of the several respective contracts made between appellant on his own behalf and on behalf of the two others he represented, which should maintain the application of the particular "sliding scale" put forward in the evidence as the only one fitted for determining the rights of the parties.

It was neither expressly nor impliedly incorporated in any of the said contracts or in the terms upon which the appellant was admitted as a shareholder or director of the respondent.

It was not put forward in the negotiations as a final determination for the term of the ensuing 7 years these contracts were to run; but simply as an illustration of the mode in which the respondent had for a year or two, then past, been trying to adjust the yearly settlement of its accounts with those selling their products to it.

It was not applied for such purpose in regard to the first year's entire products sold the respondent under the contracts now in question.

Indeed it is doubtful if it was applied as to any material part of such products.

In order to help the Court in the interpretation of an ambiguously written contract, extrinsic evidence may be given of the surrounding circumstances under which it was entered into.

The identity of the object which the parties had in view, as well as the identity of the subject matter with which they were dealing, may be better understood when read in light of such surrounding circumstances.

For example, take one of the contracts before us which reads as follows:—

Agreement made (in duplicate) this twenty-ninth day of May, A.D. 1914,
Between
John Kidston (hereinafter called the vendor) of the one part and
Stirling & Pitcairn Limited, a body corporate duly incorporated under the Statutes of British Columbia, and having its head office at Kelowna, in the Province of British Columbia, (hereinafter called the purchasers),
of the other part.

Whereby it is agreed as follows:—

The vendor will sell and the purchaser will buy the crop of fruit now growing or to be grown on the trees of the orchard of the vendor as present planted, situate near Vernon, in the Coldstream Municipality, for a period of seven (7) years from the First of May, 1914.

The purchase price shall be the market price of such fruit in each year.

The vendor shall pick and gather the said fruit in due course, and when sufficiently mature for the purpose of gathering and taking the same, shall deliver the same to the purchaser's warehouse, reserving such fruit as may be required for the use of the ranch.

Signed, sealed and delivered,

JOHN KIDSTON
(Vendor).
STIRLING & PITCAIRN LTD.
(Purchasers).

In the presence of
E. C. Kidston.

Others in question are on same form.

The "purchase price" as thus defined when using the words "the market price of such fruit in each year" is capable of several distinctly different meanings.

Was it to be the market price in the nearest town on the day of delivery for each respective kind and quantity and quality as delivered and to be paid in cash on delivery?

Or was it to be determined by means of arriving at some average price for the fruit season for each kind and grade in quality of each kind?

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And was that to be according to what the application of fair dealing and reasonableness applied to the course of business in each year would disclose?

In the latter alternative, or something akin thereto, a knowledge of the surrounding circumstances would materially assist in understanding what the parties were about.

That once discovered would in its turn doubtless admit of the application of proper methods to demonstrate what would be fair and reasonable methods of determining what had been the market price for any given year.

What is fair and reasonable often can be applied in law to help out what the parties have inadvertently failed to make as expressly clear as a Court might desire.

It is even conceivable that a "sliding scale" of some kind may, when the accounts come to be taken, be found a valuable auxiliary to work out the result to be determined.

But it never would be permissible to act upon the theory that the "sliding scale" mentioned above had become incorporated in the foregoing contract or the others in same form.

Had it been demonstrated that the said "sliding scale" had been, to the knowledge of all the parties, actually applied without objection as a factor in determining the price for the year (in July of which the contract was executed though dated in May), it might have been possible, acting upon many decisions which rest upon what the parties did immediately after the execution of the contract, and in pursuit thereof as a means of determining what they had in fact intended by the language used.

It is not pretended that the said "sliding scale" is commonly used in carrying on such business as in question herein.

In short, I can find no ground upon which to rest the provision in the formal judgment of the Court of Appeal (1920), 53 D.L.R. 29, for the application of the said "sliding scale," and would allow the appeal.

There is much to be said in favour of the course of dealing which both parties agreed in and adopted immediately after execution of the contract as demonstrating that both adopted the view that what was in fact intended to be the market price was to be the result of respondent's marketing elsewhere than in British Columbia, and that to be determined by deduction of expenses and

a fair commission. I think that is likely to be best determined by a referee proceeding on the basis of what was fair and reasonable.

In the next place, I think that the trial Judge was right in allowing the plaintiff, now appellant, the sum of $562.50 balance due for dividend on his stock.

The contention that the first payment of $1,500 account 50 shares of stock must be first applied in payment of the premium, seems to me quite unfounded whether we look at the nature of the purchase or the letter of appellant appropriating the money and receipt of the secretary of respondent expressly putting it as $30 per share.

It is quite true that the late Mr. Pooley's record of his way of looking at the payment was in accord with what the respondent contends, but that is by no means clear in what he submitted to the appellant.

The judgment of the trial Judge ought to be restored. The appeal ought to be allowed on this case with costs throughout to the appellant.

The respondent brought an action against the appellant for specific performance of said contract.

I am unable to find any ground in evidence herein upon which such jurisdiction can be exercised if regard is had to the principles which have settled the limitations of the exercise of such jurisdiction.

The adequate and usual remedy of recovery for damages for breach of contract was open to the plaintiff in that connection.

The many complications involved in the performance of the contract and to be pursued in the remedy given by means of specific performance, were such as to bar a resort to that remedy.

The ambiguous nature of the contract of which so many varying views have been taken render specific performance inappropriate.

I need not continue my list of serious objections to the exercise of such a mode of relief, but may be permitted to refer to the authorities cited on p. 26 *et seq.* of Fry on Specific Performance, 4th ed., relative to my first objection; to p. 38 *et seq.* of the same work relative to my second and to p. 294 *et seq.* of same work, as well as foregoing, in relation to the third objection I take.

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The interim injunction which was granted was only ancillary to the specific performance which was sought, and that should have ended with the proper dismissal of the action by the trial Judge.

Another injunction of a similar nature was granted in the Court of Appeal pending the hearing of appeal thereto.

That of course falls, or should fall, in my opinion, with the failure to establish a right to specific performance, which, I repeat, is the remedy specifically sought in and by the said action.

If the relief by injunction is to be held as sought independently of the right for specific performance, then I can find no authority that would entitle respondent to such mode of relief in such a case as presented.

The authorities on that head are collected in Kerr on Injunctions, ch. 10, wherein, or in reports of later cases, I can find none to uphold such a contention.

The respondent relies upon the decision in the case of *Metropolitan Electric Supply Co.* v. *Ginder*, [1901] 2 Ch. 799, which I respectfully submit does not, in its essential features, dependent upon a statutory obligation and a covenant, of which the practical effect was to maintain the right of the company to carry out that obligation, maintain the right to an injunction herein.

It does not, in my mind, present very much resemblance to the features of this case. Yet of all of those cited, on behalf of respondent, it, in principle, comes nearer than any other cited on its behalf, to touching the operation of the principles involved.

The decision of Sir George Jessel in the case of *Fothergill* v. *Rowland* (1873), L.R. 17 Eq. 132, is almost exactly in point in this, and is adverse to the respondent herein.

In conclusion, I think the action for specific performance was rightly dismissed by the trial Judge, and that dismissal should be restored with costs throughout.

The respective counsel for the parties hereto are agreed that there is no local statutory provision under which the damages for breach of the undertaking given on the obtaining of the said injunctions can be dealt with herein.

They are also agreed that respondent obtained the delivery of the crops of fruit for the balance of the 7 year period, whether or not as result of an injunction, which I hold should not have been granted, is not clear.

The appellant's action, according to my opinion, must be maintained, but whether it covers anything beyond the time up to when begun, and thus the later results to be decided thereafter, I refrain from dealing with.

There is thus ample room for a fine crop of litigation.

I would allow the appeal and meantime dismiss the action for specific performance, with costs throughout, and I would direct a reference similar to that which the trial Judge directed, but guarding against his expression that there was no contract.

I think there was a contract which may be well illuminated by the conduct of the parties relative thereto, whilst excluding the sliding scale in question, and applying the doctrine of what is fair and reasonable which helps so much under our law in the administration of justice.

DUFF, J.:—My conclusion is that the trial Judge was right in his finding that the parties had never arrived at a contract in terms.

On the other hand, fruit, the property of the appellant, was received and disposed of by the respondents in circumstances which exclude the hypothesis that they were not to pay for it; and it follows, of course, that the appellant is entitled to recover from the respondents a reasonable price. My conclusion is that the trial Judge's judgment directing a reference to ascertain the value of the fruit understood in this sense should stand. I adhere, however, to the view expressed in the argument that the dealings of the parties afford up to a certain point a satisfactory guide for the ascertaining what is reasonable in the circumstances, and I think the order of reference ought to contain a direction to the referee on this point. The direction should be that the price is to be ascertained by taking the average price realised by the respondents for fruit sold by them of each kind and grade furnished by the plaintiff and from that should be deducted first expenses incurred in handling this fruit received from the plaintiff and, second, a sum representing a reasonable profit.

As to the question of the appropriation of the moneys paid by the appellant on his shares, I concur with the reasoning of Idington, J.

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It follows of course that the respondents' counterclaim for specific performance should be dismissed.

ANGLIN, J.:—I am, with respect, of the opinion that the trial Judge reached the proper conclusion upon all the evidence in this case. It discloses a great many incidents which taken together make it reasonably certain that the minds of the parties never met as to the meaning of or the method of computing the "market price" to be paid the plaintiff. They are agreed that this term is not used in the ordinary sense—that it meant the average yearly price received by the defendant on each grade and variety of fruit sold by it less certain deductions for expenses and profits. But upon the basis of computation of these deductions they were never agreed. Moreover, there is a difference between them as to whether sales for export should be included in ascertaining the average prices. If this latter were the only matter in dispute, however, I should have had little hesitation in determining it in the plaintiff's favour. *Stuart & Co.* v. *Kennedy* (1885), 23 Sc. L.R. 149, cited by the appellant from Benjamin on Sale, 5th ed., p. 103, seems closely in point.

I also agree with the trial Judge that the payments made by the plaintiff on account of his subscription for 50 shares of stock in the defendant company should be apportioned *pro rata* between the premium of 20% at which he subscribed and the par value of the shares. That I think is the true meaning of the contract on which the shares were taken and, with respect, I am unable to understand the application of the doctrine of imputation of payments to the single debt which the plaintiff incurred.

The conclusion that the parties were not *ad idem* as to a vital term of the contract necessarily involves the failure of the action of *Sterling & Pitcairn Ltd.* v. *Kidston*.

I would allow the appeal of the plaintiff Kidston with costs in this Court and the Court of Appeal, 53 D.L.R. 29, and would restore the judgment of the trial Judge in each action, and would dismiss the cross-appeal also with costs.

On the reference, however, directed by the trial Judge the value of the fruits delivered by the plaintiff (by which I take it a reasonable price for them is meant) should, under the special circumstances of this case, be ascertained by deducting from the average price realised by the defendant in each year for all fruit sold by it

of each kind and grade furnished by the plaintiff the expenses incurred by the defendant in handling the plaintiff's fruit and a reasonable sum for profits on the sale thereof. The evidence warrants the conclusion that a fair price will be best arrived at by this method.

BRODEUR, J. (dissenting):—The main question on this appeal is whether or not the contract is a binding one. The trial Judge found that the parties were not *ad idem* and that the contract never existed. The Court of Appeal, 53 D.L.R. 29, decided there was a valid contract.

The respondent company is a co-operative corporation composed of shareholders engaged in the cultivation of fruits. It looked after the marketing and the sale of the fruits of what is called in the case affiliated orchards, viz., orchards of which the shareholders of the company were the owners. The shares were allotted according to the cultivated area of each orchard.

In 1914, Kidston, who is a producer of fruits, wanted to become a shareholder of the respondent company and to have his fruits marketed and sold by it, and he applied for 50 shares which were allotted to him at $120 a share, meaning a premium of $20 over the par value. In the correspondence and the negotiations which then took place, Kidston was advised that the affiliated orchards sold their fruit to the respondent company for a price to be calculated upon the net returns after deducting for expenses and profits according to what was called the "sliding scale." This sliding scale was communicated to Kidston and he then signed a contract providing for the sale of his crop to the respondent company for a period of 7 years at a price which is to be "the market price of such fruit in each year."

He delivered his fruits and he received during those years the same price as was paid to the affiliated orchards, but he claims that he should have received a larger sum and he takes an action in *reddition de compte*.

He had paid at first on his 50 shares $1,500, of which a sum of $1,000 was deducted by the respondent company for the premium of $20 a share, and on which he did not receive any dividend. He claims that this $1,500 should have been apportioned equally on the par value of the shares and on the premium and then he should have received larger dividends.

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Kidston, after having instituted his action in 1917, continued, however, to deliver his fruits to the respondent company until 1919, when, having refused to go on with his contract, the respondent took an injunction to prevent him from selling to other persons. The injunction was dismissed by the trial Judge who decided that the contract was not binding, but the injunction was restored by the Court of Appeal, 53 D.L.R. 29.

The case then turns almost entirely on the construction of these words "market price" in the contract.

In its ordinary sense the market price means the actual price at which a commodity is commonly sold at the place of the contract.

In this case, there is no market at the place where the contract was made. These fruits have to be shipped away to the United States or to some cities of the Canadian Provinces; and Kidston, in his particulars and in his evidence, admits that these words had a special meaning in this contract and would not cover the market price of the locality.

They mean, according to his opinion, the average price realised by the respondent company for each grade and variety of fruit, less the expenses and a reasonable commission on the sale.

In view of this admission of the appellant and in view of the statements made by the respondent company in its pleadings and at the trial, I cannot reconcile myself to the idea that there is no binding contract between the parties. If two persons entered into a contract and understood it in a different sense, it is binding upon them. Stevens' Mercantile Law, p. 102. There is no difference of opinion as to the determining of the average price of each variety of fruit. There is no serious difficulty either as to the expenses connected with the sale of the goods.

As to the profits, the respondent company claims that the sliding scale should be used to determine these profits. The appellant opposes this idea.

For my part, I would think that the sliding scale should be considered as part of the contract. It was communicated to the appellant before he signed his contract, and was referred to time and again by both parties during their course of dealings. That scale was used with regard to all the co-operative associates.

But if the sliding scale should not be considered as part of the contract, it would form at least a basis on which a reasonable profit could be ascertained.

As to the appropriation of the money made by the appellant on his shares, I consider that out of the amount paid at first the necessary sum for the premium should be deducted and that the appropriation made in that respect by the respondent is well founded.

With regard to the injunction or specific performance, I concur with the views expressed by Macdonald, C.J.A., of the Court of Appeal, 53 D.L.R. 29.

Brodeur, J.

On the whole, I am of the opinion that the appeal should be dismissed with costs.

MIGNAULT, J. (dissenting in part):—The more I have studied the voluminous record in this case, the more I have become convinced that the parties were wide apart from the very beginning as to a vital term of their contract, to wit: the price to be paid the appellant for his fruit. They drew up and signed, in May, 1914, a contract which, on its face, appears clear and unambiguous. The appellant (vendor), by this contract, undertakes to sell and the respondent (purchaser) to buy during 7 years the appellant's crop of fruit, the purchase price to be the market price of such fruit in each year, and the vendor to gather and pick the fruit and when sufficiently mature to deliver the same to the purchaser's warehouse.

Mignault, J.

Such a contract, I have said, is on its face clear and unambiguous. The Court could easily define the expression "market price," which, of course, would vary from year to year, possibly from month to month, according to the condition of the fruit market, and the appellant would obtain from the respondent the selling price prevailing at the time and place of the sale for fruit of the same kind and quality as that sold to the respondent. With a contract so worded, there would, of course, be no question of expenses incurred by the respondent or of any profit realised by it on the resale of the fruit.

Both of the parties, however, agree that the obvious meaning of the language of their contract is not that which they had in mind when they made it. The contract was not an ordinary contract of sale, but it involved a kind of agency of the respondent for the appellant in the sense that the price to be considered, the parties admit, is the price not of the sale by the appellant, but of the resale by the respondent, and that certain expenses and charges, as well as a reasonable commission, must be allowed the latter.

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Having thus both agreed that the contract does not mean what its language clearly imports, the parties follow widely divergent courses when they attempt to define the "market price" which is to rule, and from the very start they appear to have been hopelessly apart as to the price which was to be paid for the fruit. The appellant defined "market price" in his particulars as the average price realised by the respondent from all sales made by it in each year of each grade and variety respectively, less the expenses properly incurred in handling the same and a reasonable commission on the sale of the fruit. The explanation of the respondent covers nearly a page in the appeal book, and involves considering its policy with what were termed the affiliated orchards, and then, at the end of the selling season, taking the average selling price of a carload lot of each particular variety of fruit, deducting from this a profit on each box in accordance with a scale called the sliding scale adopted by the respondent, in its dealings with the affiliated orchards, in addition to which a further sum for packing, overhead and handling charges by package, as per the "sliding scale," would also be deducted. The net result would give the net amount per pound payable to the appellant and would be the market price as the respondent understood it.

With the parties so far apart from the very start, it is not surprising that after 4 years of dealings there is a very considerable difference between what the appellant contends should have been paid and what he actually received from the respondent. The appellant's action involves an accounting so as to establish the amount of this difference, and as his discussions with the respondent brought about no result, he finally refused to make further deliveries and notified the respondent that he would sell his fruit elsewhere. The respondent then took an action for specific performance with an injunction to prevent the appellant from selling his fruit to any other purchaser.

I must confess that I endeavoured at first to find out which of the versions of the parties was the correct one, and it is noticeable that the respondent before us shewed an inclination to accept the appellant's definition of "market price," while contending that the "sliding scale" should be applied in determining the deductions for expenses and the profit to be charged. The appellant, however, strenuously argues, and I think rightly, that the "sliding scale"

formed no part of the contract. That the conduct of the respondent in fixing the amounts to be deducted for expenses and the commission to be paid it was arbitrary there can be no doubt, and its board of directors, of whom appellant was, during the first years, a member, but a constantly dissenting one, attempted to define the meaning of "market price" and finally proposed that a new contract be made stating that the price payable should be fixed by the directors in each year. Under these circumstances it appears to me impossible to place on this vital term of the contract a meaning which can, in any way, be considered as ever having had that consensus *ad idem* of the parties which is essential for the existence of a valid contract.

I find myself, therefore, in agreement with the opinion of the trial Judge that there was no valid contract. I may add that there is no room for construction here because the natural and legal meaning of the term "market price" was not intended by the parties and they never agreed as to the special meaning which it should bear.

The question of the payments made by the appellant on the shares purchased by him in the capital stock of the respondent company is a rather difficult one to solve. The appellant's application for shares stated that these shares, of a nominal value of $100 each, were issued at a premium of $20 per share, and the appellant, applying for 50 shares, sent his cheque for $1,500, being a deposit of $30 per share and promised to pay $22.50 per share on May 1, 1915, and a like amount on May 1, of the years 1916, 1917 and 1918. He made besides the deposit of $30 per share, the first payment of $22.50 per share due on May 1, 1915. The respondent acknowledged receipt of the application and of the deposit of $1,500, stated in the formal receipt sent to the appellant to be a deposit of $30 per share on an application for 50 ordinary shares of $100 each issued at 20% premium, but in its books the respondent credited $1,000 to the premium account and $500 to the capital account, so that, of the first payment of $30 per share, $20 went to the premium and $10 to the share itself. The result was that inasmuch as dividends are paid by the respondent on the paid-up portion of its capital, the respondent received a lesser dividend than if the payment had been credited ratably on the

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premium and on the shares, which the appellant contends, but without citing any case supporting his contention, should have been done.

I do not think that authorities as to appropriation of payments can help us here, for there was only one debt, *i.e.*, for fifty $100 shares sold for $120 each. If there had been two debts, one for the premium and the other for the share itself as distinguished from the premium, I would think that there has been no appropriation by the appellant, who paid first $30 and subsequently $22.50 generally on each of the shares subscribed by him, but that there was an appropriation by the respondent which credited $1,000 to premium and $500 to the 50 shares, and this appropriation was subsequently notified to the appellant when he asked for explanation as to the amount of the dividend cheque sent to him. So that it seems to me that when the trial Judge allowed the payments made by the appellant to be ratably applied to the premium and to the share itself, thus treating the premium and the share as if they were two separate debts, he could not, under the authorities, ignore the appropriation made by respondent and notified to appellant. In this view of the matter the case of *Cory Bros. & Co.* v. *Owners of "The Mecca,"* [1897] A.C. 286, at p. 293, cited by the respondent, would be in point and would sustain the judgment of the Court of Appeal.

But here I find one debt only, that of $120 for each share of a nominal value of $100. As I have said, the appellant paid generally, at first $30 and subsequently $22.50 on each share purchased by him and the receipt given him for the first payment of $30 is also general. The notes of the appellant's conversation with the respondent's manager Pooly, when a subscription of 40 shares was contemplated, shew that total liability of $4,800 was mentioned, on which 25% of the total price was to be paid on allotment, and the balance in 4 equal annual instalments. When the appellant made the first payment of $30 per share subscribed for at $120, he still owed $90 on each share, for the price to him of the shares was $120 each. The dividends of course were paid on the par value, but unless the premium and the par value be distinguished so as to form two separate debts—and then the rules governing appropriation of payments would apply—the appellant still owes $67.50 on his shares and can certainly not claim dividends

on the balance due by him on shares, which he purchased at $120. If the premium and the par value be differentiated, it does not seem unnatural that the premium, which is the profit of the company for the privilege of purchasing its shares and not a part of its capital, should be paid first.

I, therefore, on this point, and for these reasons, agree with the Court of Appeal, 53 D.L.R. 29.

There remains the action for specific performance with the injunction taken by the respondent against the appellant. In my view that there was no valid contract, it is clear that this action was rightly dismissed and the injunction dissolved by the trial Judge.

I would therefore allow the appeal of the appellant with costs here and in the Court of Appeal except as to the claim of the appellant for additional dividends and the costs properly ascribable to this claim. The respondent's cross-appeal which presupposed a binding contract between the parties should be dismissed with costs. *Judgment accordingly.*

LUSE LAND & DEVELOPMENT Co. v. NORTH SASKATCHEWAN LAND Co.

Saskatchewan King's Bench, Taylor, J. October 11, 1920.

CONTRACTS (§ IV F—372)—CONSTRUCTION—COMPUTION OF TIME—TERMINATION OF HOSTILITIES—MEANING OF.

Hostilities between England and Germany did not terminate until the date of the exchange of ratifications of the treaty for the purpose of compelling Germany to accept the terms on which Great Britain was willing to make peace and declare the war at an end. This was January 10, 1920.

APPLICATION in accordance with an agreement, to a Judge of the Supreme Court, to determine when hostilities between England and Germany terminated. Statement.

W. H. McEwen, for the receiver.

A. Ross, K.C., for the Luse Land Co.

TAYLOR, J.:—The National Trust Co., Ltd., trustee and receiver of certain of the assets of the North Saskatchewan Land Co., Ltd., under an order made in this Court, applies, with the concurrence of the Luse Land & Development Co., Ltd., for the advice and opinion of a Judge of this Court as to the proper construction of an agreement made between the receiver and the said company. Taylor, J.

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The agreement in question, made on October 30, 1916, recites certain contracts made between the Luse Land & Development Co., therein called the Luse company, and the North Saskatchewan Land Co., therein called the Land company (and I will use these terms throughout my judgment as designating these companies), for the purchase of certain lands set out in the schedule; that the Luse company was in default; had made representations that it was unable to carry out the contracts according to the terms thereof, and requested that they be varied and modified, and an agreement is therein made remitting interest up to and including March 31, 1917, and fixing a new time for payment of interest and principal payments. Then follows this paragraph:

> The time for the payment of the principal moneys due under the said contracts in respect of the lands set forth in Schedule "A" hereto, shall be extended so that the whole balance of such principal moneys shall become payable in five equal consecutive yearly instalments; the first of such instalments to become due and payable at the expiration of one year from the date of the termination of hostilities between Great Britain and Germany. In the event of any dispute between the parties hereto as to whether or not hostilities shall have terminated on any named date, the question of whether or not that such hostilities have terminated shall be referred for decision to a Judge of the Supreme Court of Saskatchewan, whose decision shall be final and who in making such decision may proceed upon such evidence or information as he may deem proper without regard to the technical rules of evidence.

The parties are unable to agree upon the construction of the agreement, and are in dispute as to when hostilities between Great Britain and Germany terminated, and apply in accordance with their previous agreement for a decision thereon, counsel for all parties concurring in the application and the procedure under which the application is made.

The contention of counsel for the receiver is that November 11, 1918, the date on which the armistice was signed, or at any rate the date of the signing of the treaty, is the date of the termination of hostilities between Great Britain and Germany; whilst counsel for the Luse company contends that January 10, 1920, the date of the exchange of ratifications of the Treaty of Versailles, and fixed by the Imperial Parliament pursuant to the Imperial Statute, 8-9, Geo. V. 1918, ch. 59, passed on November 21, 1918, is the proper date.

In arriving at a conclusion I first observe that the word "hostilities" in the agreement is unqualified by anything in

the context and used in its widest sense, save of course that it must be understood as referring to the hostilities in connection with the war then being waged between Great Britain and Germany. A hostile act is defined in Webster's Dictionary (p. 1039) as "one having or shewing the disposition of an enemy;" "an act of open enmity." In the Standard Dictionary (p. 1187), hostilities, as the plural of hostility, is defined as "warlike measures;" and in Murray's New English Dictionary (vol. 5, p. 410) as "hostile acts; acts of warfare, war."

War in the present day affects a nation and its commercial relations everywhere, and as war is now waged not only is the field operation or battle important but the multifarious devices and the production of material for war are as vital; and it seems to me, therefore, that hostilities as acts of warfare will include not only acts on land and sea in open opposition to the enemy but the many acts and undertakings necessary as essential preparation for the proper maintenance of the application of the war force to the enemy.

The reason for the making of this agreement was that society was disrupted and ordinary commercial relations embarrassed by the necessity of waging war in the sense in which I have outlined it, and therefore the parties would mean in using the word not only the hostilities at the front but would surely intend to include a termination of all those acts of warfare which led to the making of the agreement in question.

In the first place, it appears to me that November 11, 1918, cannot be termed the termination of hostilities between Great Britain and Germany. It is quite correct that an armistice is defined as a cessation of hostile proceedings, but in deciding whether hostilities as meant by this agreement did or did not terminate on that date the actual understanding then arrived at between the commanders-in-chief of the opposing forces must be taken into consideration. As put by the counsel for the Luse company, an armistice is a military arrangement, not a political act, and whilst Germany may be said to have agreed wholly to have ceased hostilities on November 11, 1918, because she had to so agree, yet the blockade of her ports was continued by Great Britain and a portion of her territory was occupied and other measures taken by the allied forces which would surely

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be termed hostile acts, solely for the purpose of preventing an effective resumption by Germany of hostile acts; and it seems to me that it cannot be said that hostilities, acts of warfare, had really terminated until the exchange between Great Britain and Germany of the ratifications of the Treaty of Peace on January 10, 1920. Until then the blockade, the occupation of German territories and the maintenance of a war status on the part of Great Britain was deemed necessary for the purpose of forcing Germany to accept the terms upon which Great Britain was willing to cease from further acts of warfare, and would therefore be acts of warfare or hostilities within the meaning of the agreement.

The point which I have to decide has not apparently been before any Court in any decided case. The Imperial Parliament on November 21, 1918, passed the statute to which I have referred, 8-9 Geo. V. ch. 59, The Termination of the Present War (Definition) Act, 1918, which enacts that:

I. (1) His Majesty in Council may declare what date is to be treated as the date of the termination of the present war, and the present war shall be treated as having continued to, and as having ended on that date for the purpose of any provision in any Act of Parliament, Order in Council, or Proclamation, and, except where the context otherwise requires, of any provision in any contract, deed, or other instrument referring expressly or impliedly and in whatever form of words, to the present war or the present hostilities:

Provided that in the case of any such Act conferring powers on any Government Department, or any officer of any Government Department, exerciseable during the continuance of the present war, if it appears to His Majesty that it is expedient that the powers shall cease before the date so fixed as aforesaid, His Majesty in Council may fix some earlier date for the termination of those powers.

(2) The date so declared shall be as nearly as may be the date of the exchange or deposit of ratifications of the treaty or treaties of peace:

Provided that, notwithstanding anything in this provision, the date declared as aforesaid shall be conclusive for all purposes of this Act.

(3) His Majesty in Council may also similarly declare what date is to be treated as the date of the termination of the war between His Majesty and any particular State.

II. This Act may be cited as the Termination of the Present War (Definition) Act, 1918.

Pursuant to this authority, on February 9, 1920, His Majesty in Council made an order that January 10, 1920, should be treated as the termination of the war between Great Britain and Germany, this being the date of the exchange of ratifications of the treaty.

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If a different date had happened to be fixed the application of this enactment to this Province would have had to be considered, especially insofar as it related to the construction to be put upon the contracts, deeds or other instruments ordinarily interpreted under the laws and rules of interpretations having the force of law by reason of legislation of the Province of Saskatchewan. The statute is not expressly made applicable to the colonies, but that portion of it at least which provides for a determination of the date of the termination of the war between Great Britain and Germany might well be argued to apply by necessary implication, but I would doubt if it could be successfully contended that it was ever intended that the portion of the statute referring to the construction to be put upon contracts and other instruments was intended to apply and extend to the colonies. See *New Zealand Loan & Mercantile Agency Co.* v. *Morrison*, [1898] A.C. 349.

Any authorities in England to which I have been referred are in accord with the conclusion which I have indicated.

In *Kotzias* v. *Tyser*, [1920] 2 K.B. 69, Roche, J., held that peace between Great Britain and Germany was not concluded on or before June 30, 1919; that is to say, that on the construction of the policy of insurance then under consideration the signatures of the plenipotentiaries representing Great Britain and Germany to the Treaty of Peace on June 28, 1919, did not conclude peace thereby. At p. 77, Roche, J., states:

> In the first place the authorities shew that, in the absence of any specific statutory or contractual provision to the contrary, the general rule of international law is that as between civilized Powers who have been at war, peace is not concluded until a Treaty of Peace is finally binding upon the belligerents, and that that stage is not reached until ratifications of the Treaty of Peace have been exchanged between them.

It had been argued that in the Treaty of Peace, in the recital or preliminary part of the treaty, it is stated that the Powers agree that from the coming into force of the treaty the state of war would terminate, but closely examining the provisions of the treaty the Judge concludes:

> The Treaty of Peace thus provides that it is to come into force or, in other words, that peace is to be concluded by a deposit of ratifications of the Treaty, and a procès-verbal thereof.

In *Rattray* v. *Holden*, [1920] W.N. 283 (July 12, 1920), Darling, J., held that the provision in an agreement which provided for

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the payment of the sum of £1,000 6 months from the date of the signing of peace between Great Britain and Germany referred to January 10, 1920, and is reported to have said:

It seemed doubtful whether the Powers could sign peace, but, however that might be, there could not be peace until the termination of war, and there was no peace between Great Britain and Germany until January 10, 1920, which was the date fixed by the Order in Council as the termination of the war between those two Powers.

War is the resort of nations to force for the purpose of compelling an acceptance of certain demands, and the conclusion I arrive at is that between Great Britain and Germany, the former maintained the application of force and hostilities were continued until the date of the exchange of ratifications of the treaty, for the purpose of compelling Germany to accept the terms on which Great Britain was willing to make peace, and declare the war at an end. This date is undoubtedly January 10, 1920, and the agreement should, in my opinion, be construed accordingly.

It is not a case for costs. The receiver will have costs out of the receivership. *Judgment accordingly.*

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CRIDLAND v. CITY OF TORONTO.

Ontario Supreme Court, Middleton, J. September 27, 1920.

MUNICIPAL CORPORATIONS (§ II C—66)—BUILDING BY-LAWS—RIGHT OF LANDOWNER WISHING TO BUILD—EXISTING LAWS—COMPLIANCE—BY-LAW MAKING UNLAWFUL—LEGALITY.

A landowner desiring to build is entitled to do so if he complies with the law as it is at the time of the application for the building permit is made, and a city by-law which delays him while the council considers the passing of a law which would make that unlawful which is lawful under the existing law is beyond the powers of the council.

[See annotation on Municipal Regulation of Building Permits, 7 D.L.R. 422.]

Statement.

MOTION by plaintiffs in an action, for a mandatory order directing the defendants, the Municipal Corporation of the City of Toronto and inspector of buildings, to issue to the plaintiffs a building permit upon the ground that by-law No. 8284 of the city corporation was *ultra vires*.

T. N. Phelan, for plaintiffs; *C. M. Colquhoun*, for defendants.

Middleton, J.

MIDDLETON, J.:—The applicants desire to erect a factory in a district not declared to be "residential," and have filed plans, etc., in accordance with the provisions of the building by-law.

By by-law 8284, the building by-law was, on the 15th December, 1919, amended by adding clause 12, reading as follows:—

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"12. When an application or the drawings or specifications accompanying the same relate to property on a street residential in character but not so declared by by-law, the inspector of buildings shall forthwith report the particulars thereof to the committee on property, which shall consider the advisability of declaring the whole or some part of the property on said street residential, and report the matter to the council, and pending the decision of the council thereon the inspector shall withhold the issuing of a permit and shall act in accordance with the decision of the council."

The inspector of buildings, deeming the street to be residential, refuses to issue a permit pending the decision of the council on the question of declaring the street or some part to be residential.

For some reason the matter has not been reported to the property committee, but the board of control has directed that a permit be not issued.

It is said that the building inspector should not have found this "street residential in character," as at the part where this factory is to be placed there are large city stables and other buildings of a commercial character. I do not think I should enter upon the discussion of this matter.

I think the amending by-law is beyond the power of the municipality. No doubt it can declare a district residential and so prevent the erection of a factory, but it has no power to compel a land-owner to refrain from the exercise of his rights under the law as it is to-day, so as to enable the city council to consider the enactment of a law which will make that unlawful which is to-day lawful. The citizen desiring to build is entitled to do so if he complies with the law as it is to-day as to building, and the building by-law must not be used as a means of delaying him until the council considers a question which arises under an independent section of the statute.

The amending by-law is also objectionable from another point of view. The council has power to pass laws binding on all those who are subject to its jurisdiction; but an attempt to regulate the conduct of any individual rather than to pass a general law is bad. This situation indicates that the council does not really intend to

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pass a law setting apart a residential district, but to prohibit this factory because this particular industry may prove to be a nuisance to the owner of the adjoining premises.

I think the mandatory order sought may go, and that costs should be awarded against both respondents.

The validity of the city by-law being attacked, the city corporation is a proper party to these proceedings; and, as the civic officer was acting in obedience to the by-law, the city corporation ought to bear the costs. *Judgment accordingly.*

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McCORMACK v. McCORMACK.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck, and Ives, JJ. June 29, 1920.

DIVORCE AND SEPARATION (§ II—5)—ACTION BY WIFE—HUSBAND'S DOMICIL OF ORIGIN, SCOTLAND—NO PERMANENT RESIDENCE IN ALBERTA—JURISDICTION OF COURT.

In an action for divorce brought by a wife married in England to a Canadian soldier born in Scotland, but living in Alberta at the time of enlisting and who was afterwards returned to Alberta where she subsequently joined him, and where he deserted her, the Court held that the defendant's domicil of origin was Scotland and there was nothing in the evidence from which it would be safe to infer that he had ever established a permanent residence in Alberta and the Court had therefore no jurisdiction to grant the divorce, but it being intimated in the argument that the plaintiff was then able to supplement the evidence in this respect she should be allowed to do so.

[See *Chaisson* v. *Chaisson* (1920), 53 D.L.R. 360, and notes thereto; also annotation, Divorce Law in Canada, 48 D.L.R. 7.]

Statement.

REFERENCE by Walsh, J., in an action for divorce.

A. E. Dunlop, K.C., for plaintiff.

A. H. Clarke, K.C., for Attorney-General of Alberta.

Harvey, C.J.

HARVEY, C.J.:—This is a reference by Walsh, J. The action is one for divorce and is undefended but on the argument we have had the assistance of Mr. Clarke, representing the Attorney-General.

The evidence of the plaintiff, the wife, establishes that she was married to the defendant in February, 1917, in England where she lived, that her husband was then a private in the Canadian military forces overseas, that they lived together until June, 1918, when he was sent back to Canada, that she came out after the armistice as soon as she could be permitted to come and arrived at Lethbridge, in this Province, in April, 1919, where her husband then was in the employ of the railway company.

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He was then living with the widow of a soldier killed in France and he took the plaintiff to live there also. After a few months he left Lethbridge apparently with that widow and he was served with the statement of claim in this action at Montreal where he was then found to be.

The plaintiff says that he was born in Glasgow, Scotland, and that she believes that he lived in Lethbridge before they were married and that he enlisted at Moose Jaw in Saskatchewan, and she thinks he told her he had lived 7 years in Canada. She also says she has no idea whether he is coming back to Alberta.

There is no other evidence touching the subject of his domicil and the question which is reserved is whether on this evidence this Court has jurisdiction to grant a decree of divorce.

Only last month the Court of Appeal of Saskatchewan held (*Kalenczuk* v. *Kalenczuk* (1920), 52 D.L.R. 406, 13 S.L.R. 262), that the Court has no jurisdiction unless the parties are domiciled within its jurisdiction when the proceedings are commenced. The recent English authorities are cited in that case, which clearly shew that to be the settled jurisprudence of England. The same rule applies in Australia which has a constitution similar to ours and the case of *Parker* v. *Parker* (1908), 5 C.L.R. 691, is instructive as shewing that the jurisdiction of the Court of any of the States depends upon the domicil of the parties within that State and also in its bearing upon the subject of proving domicil.

In that case is given the definition of domicil taken from the Roman Code as follows:

> It is not in doubt that every man has his domicil in the place where he sets up his household shrine and his principal establishment, whence he has no intention of again departing unless something should call him away, so that when he goes thence he regards himself as a wanderer, whereas when he returns his wandering is ended.

It is apparent that a person may reside for many years in a place and yet may never acquire a domicil there and that on the other hand, he may acquire a domicil at the moment he takes up his residence, it being a question of intention. In the Saskatchewan case there had been a residence of 6 or 7 years but it was held not sufficient to establish a domicil. Haultain, C.J.S., points out that jurisdiction should be clearly established. This is more important in divorce actions than in probably any other class of actions. As *Bater* v. *Bater*, [1906] P. 209, shews,

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a foreign Court will recognize the validity of a decree of divorce when it is established that the Court granting the decree had the jurisdiction conferred by the fact of the parties being domiciled there. The consequences of a decree dissolving a marriage are so important that if that decree is not recognised by other Courts, the results may be very serious. There is the further fact that in a large proportion of divorce actions the defendant does not defend and in many cases is indifferent as to the result. This naturally casts an additional burden on the Court to satisfy itself of its jurisdiction.

The fact that by law the domicil of the wife is that of the husband seems to place her somewhat at a disadvantage but inasmuch as the consequences both as respects divorce and many other matters are so much concerned with international law, the subject cannot be dealt with adequately by local legislation and any attempt to give the Court a jurisdiction which would not be recognised in other jurisdictions might do more harm than good.

In two or three cases in England, in which the Court of the domicil had held that there never had been a valid marriage although a valid marriage was recognised in England the Divorce Court assumed a jurisdiction since by the law of the husband's domicil she was not his wife and therefore had no domicil conferred by the marriage. See *de Montaigu* v. *de Montaigu*, [1913] P. 154.

Apart, however, from these apparent exceptions the practice of the Courts in England is uniform that jurisdiction will not be exercised unless the parties are domiciled in England. Such being the state of the law it seems clear that the rule should be as it is stated to be in Saskatchewan that jurisdiction or in other words domicil should be clearly established.

The evidence in this case shews that the defendant's domicil of origin was Scotland and there is nothing from which it would be safe to infer that he had ever established a permanent residence in this Province or ever had any intention of making his fixed home here. He had a brother in Fernie, B.C., and he enlisted apparently in Moose Jaw, Saskatchewan. There is the barest evidence that he ever was in Lethbridge before he enlisted.

This is not sufficient, in my opinion, to warrant a Court in holding that a case had been made out for the exercise of its jurisdiction. A reference to the case of *Winans* v. *Att'y-Gen'l*, [1904] A.C. 287, shews how particular the Courts should be to find a change from a domicil of origin and a choice of new domicil. In that case though the party in question at the time of his death, had had for more than half his lifetime his chief residence in England, where he spent part of every year with his family, and, apparently, had not been in America where he was born for more than 30 years, it was held that there was not sufficient to establish a domicil of choice. That case was one for the purpose of determining whether legacy duty was payable and it was held that the duty of shewing the abandonment of a domicil of origin was upon the party who asserted it.

In *Coleman* v. *Coleman*, [1919] 3 W.W.R. 490, Walsh, J., applied the principle of that case in a divorce action. I think he was quite clearly right in principle but in a divorce action having regard to possible consequences to persons yet unborn if the Court exercises a jurisdiction improperly, it may well be that the burden which is imposed upon a party who does not appear in the action should be shifted to the party who is prosecuting the action upon evidence which would not be considered sufficient in such a case as the *Winans* case, *supra*. The fact that the husband is out of the Province at the time of commencement of the proceedings as in the present case while by no means conclusive of anything essential is of course a circumstance against the view that his domicil is within the Province though coupled with nothing more it will be of little weight.

Though the evidence does not justify the finding of an Alberta domicil acquired by the defendant, it was intimated in the argument that the plaintiff was now able to supplement the evidence in this respect and I see no reason why the trial Judge if he considers it advisable should not allow further evidence to be given.

STUART, J.:—I agree with the main principle laid down by Harvey, C.J., in his judgment, viz., that the jurisdiction of this Court to entertain an action for a decree of divorce depends upon the parties having their domicil in Alberta. The law of England as it stood in 1870, both with regard to the law to be administered and the jurisdiction of the Court as a Superior

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Court to administer it is the basis upon which, in accordance with the decision in *Board* v. *Board*, 48 D.L.R. 13, [1919] A.C. 956, our action in divorce matters rests. And there is no doubt that the Court for Matrimonial Causes did not in 1870 assume jurisdiction unless domicil was shewn. But I would venture to point to some considerations which should be kept in mind as we proceed in the future, as we apparently must, to deal with petitions for divorce. 6 Hals. at p. 268, para. 396, says:

> The English Courts will recognise as having extra-territorial validity any decree of divorce which is also recognised as valid by the Courts of the country of the domicil, whether those Courts have themselves pronounced the decree or not. Reference must therefore always be made to the law of the domicil at the date of the divorce, wherever that divorce may have been obtained, and provided that the Courts of the country of the domicil recognise its validity the English Courts will give effect to it.

Now, in the present case if we assume that the defendant's domicil is still in Scotland the question whether a decree for divorce granted by this Court in this case would be recognised by the English Courts (and therefore by other Courts which have adopted the rules of private international law followed by the English Courts) might come to depend upon what view the Scotch Courts would take of a divorce granted by this Court in the circumstances of the present case. I have at present no means of ascertaining this. But if upon enquiry it should be found that the Scotch Courts would recognise the validity of a decree granted by this Court upon the facts of the present case it would follow that the English as well as many others, *e.g.*, all Canadian Courts following the English law Courts, would recognise it. And if all these Courts would recognise it then the argument against assuming jurisdiction based upon the danger of non-recognition abroad would apparently be shorn of a good deal of its weight.

Furthermore, it is the fact, I think, that most of the adjacent American States recognise the right of a married woman to obtain a domicil of her own for the purposes of divorce and this would still further lessen the danger referred to.

Then the English Court of Appeal in *Ogden* v. *Ogden*, [1908] P. 46, clearly indicated that it would have been prepared to admit an exception to the rigid rule. Practically they intimated that Lord St. Helier (then Sir Francis Jeune) should not in 1903 have

rejected jurisdiction to grant a divorce to a wife who had been married in England to a domiciled Frenchman but who had been deserted by him. They said, [1908] P. at p. 83: "The necessities of the case would call for the intervention of the Courts of her own country in order to do her justice, etc." The observations of Gorell Barnes, P., delivering the judgment of the Court of Appeal in that case shew, it seems to me, that at any rate, the English Courts were prepared to make a new rule for a special case, to meet the justice of it, although no such rule had been laid down prior to 1870. And my query is, why should not this Court also be privileged to develop the law according to principles of natural justice and to lay down a rule to fit the justice of the case as well as the Courts of England where the facts present very special circumstances of injury and wrong?

Here we have a woman married to a Canadian soldier in England, who, upon demobilisation, precedes her to Alberta; we have her detained by the necessities of transport in England, then following her husband across an ocean and a continent expecting to live with him as his wife, coming into a community where she was an utter stranger to find him living in adultery with another woman, and forced by her lonely condition to live with them and be the actual witness of their adulterous intercourse and then deserted by him. We have him going back across a continent to eastern Canada in company with the other woman and living with her there. It is certainly cold comfort to her to be told that she should go to Scotland or to England for relief and adduce at enormous expense before the Courts there the evidence of her husband's wrongdoing. To tell her this is comparable only to the famous lecture by Maule, J., wherein before 1857 he informed one accused before him of bigamy what course he (or was it she?) should have taken in order to be relieved of the first marriage tie.

If the plaintiff here were to live in Alberta long enough to evidence an intention of making this Province her home I confess my preference for the manner in which the Courts of most American States would deal with her case. Even if she went back to the Courts of England or Scotland it might very well be that they would hold that the husband had acquired a domicil in Alberta.

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Upon the facts, however, as they are revealed in the meagre evidence before us I do not think we should yet venture to assume jurisdiction in the case but I agree that the wife should still be allowed if she is so advised to adduce further evidence of her husband's domicil.

If the English Courts should follow the suggestion made in *Ogden* v. *Ogden*, *supra*, they would undoubtedly, I think, grant her a divorce because the marriage was celebrated in England and she, before marriage, was domiciled there. For myself I cannot fully see the justice of denying her, a British subject, access to the King's Court in the jurisdiction where by the gross wrongs of her husband, she has been left stranded and alone. But no doubt any rule will at times work injustice in individual cases and it is perhaps well that we should in the general public interest go carefully in any attempt to enlarge jurisdiction.

Beck, J.

BECK, J.:—We are asked to make a pronouncement upon the law of domicil as applicable to cases of divorce. The evidence in this case which was undefended is admittedly incomplete and can be supplemented by material evidence directed to the question of domicil.

I am unwilling to express an opinion either upon the case as the evidence stands or as it is expected it will stand. Any decision upon the question of domicil, which we may ultimately be compelled to give, will be of a far-reaching effect; for the fundamental principles of the law of domicil affect in some degree, at least, not merely divorce but marriage, status (including legitimation *per subsequens matrimonium*), succession (including wills of personal property), and other topics of law.

Furthermore, while doubtless it is true to say domicil refers to a territory which is subject to one system of law, I should like to hear argument upon the question whether in the case or marriage or divorce, etc., that territory is to be considered in the case of Canada, where these subjects are both under the jurisdiction of the Dominion Parliament, Canada, as a whole, or one or other of the Provinces having their differing laws upon other subjects and some only having jurisdiction to try cases for divorce, and also, in that connection, some argument upon the question of the territorial jurisdiction of the Provincial Courts over persons subject to such territorial jurisdiction as distinguished

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from domicil in that jurisdiction. Mr. Clarke, K.C., who argued the case for the Attorney-General who intervened, was, I think, afforded little time and opportunity to cover the questions involved as fully as they deserve.

I concur in sending the case back for further evidence.

IVES, J., concurred with Harvey, C.J.

Case sent back for further evidence.

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Alberta Supreme Court, Walsh, J. November 8, 1920.

DIVORCE AND SEPARATION (§ II—5)—DOMICIL FOR PURPOSES OF DIVORCE ACTION—JURISDICTION OF COURT.

The Alberta Court is without power to grant divorce where the husband's domicil of origin is foreign and he has not acquired a domicil in Alberta, although the marriage took place in Alberta and the plaintiff (wife) still lives there.

[See *Chaisson* v. *Chaisson* (1920), 53 D.L.R. 360, and note thereto; also annotation, Divorce Law in Canada, 48 D.L.R. 7, and note to *Peppiatt* v. *Peppiatt* (1916), 30 D.L.R. 1, referred to.]

Statement.

ACTION by wife for divorce on the ground of adultery and desertion. Dismissed.

Walsh, J.

WALSH, J.:—With very great regret I am forced to the conclusion that this Court is without the power to give to the plaintiff the divorce to which she is in all conscience entitled. Her husband's adultery and his desertion of her for a period of fully 6 years are amply established, but the evidence quite fails to shew that he was ever domiciled in Alberta and so, though the marriage ceremony was performed here and the plaintiff still lives here, this Court is without jurisdiction to free her from it. His domicile of origin was foreign. The plaintiff met him in Alberta 2 or 3 months before her marriage with him, and she lived with him for 2 years after her marriage. Then he left her and went to Winnipeg where he has lived for the past 6 years and where he was living when this action was started. This, which is really all that is disclosed of him by the evidence, falls very far short of proof of loss of his domicil of origin and of his selection of Alberta as his domicil in its stead. This was my opinion at the close of the evidence but I reserved my judgment until the judgment of the Appellate Division should be given in the case of *McCormack* v. *McCormack* (1920), *ante* p. 386,

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which I referred to. In the face of that judgment, I have no course open to me but to dismiss the action for divorce for lack of jurisdiction to entertain it.

I gave the plaintiff leave to amend by asking for a declaration of nullity of marriage upon the ground that she was only 14 years of age when the ceremony was performed and the marriage was entered into without the knowledge or consent of either of her parents both of whom were then alive. These facts have been proved to my satisfaction, but under the authorities I feel bound to hold that they do not justify such a judgment. I have not considered at all the question whether or not this Court has any more jurisdiction to decree nullity of this marriage than it has to decree its dissolution, but if it has, no grounds which in law would justify such a judgment are present here: *Burns* v. *Hills* (1915), 22 D.L.R. 74; *Peppiatt* v. *Peppiatt* (1916), 30 D.L.R. 1, 36 O.L.R. 427; *Harris* v. *Meyers* (1916), 30 D.L.R. 26. See also the very useful annotation to *Peppiatt* v. *Peppiatt*, 22 D.L.R. at 14. Since the decision of Stuart, J., in *Burns* v. *Hills*, *supra*, the Legislature has amended the Marriage Ordinance so as to require the deposit of the written consent of the party whose consent is necessary before the issue of a license or the performing of the ceremony. Whatever the effect of this amendment may be it can in no manner affect the validity of this marriage for it took place in 1912, whilst this amendment was not passed until 1916.

I am regretfully obliged to wholly dismiss the action.

Action dismissed.

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RAYMOND v. THOMAS.

New Brunswick Supreme Court, Appeal Division, Hazen, C.J., White, and Grimmer, JJ. September 24, 1920.

1. EVIDENCE (§ II E—181)—MALICIOUS PROSECUTION—INFORMATION SUBSEQUENTLY ACQUIRED—ADMISSION OF AS MATERIAL ON QUESTION OF MALICE AND REASONABLE AND PROBABLE CAUSE.

What the defendant learned from a third party after the commission of an alleged crime is admissible in an action for malicious prosecution to prove what was in his mind at the time he laid an information against the plaintiff as being material on the question of malice and of reasonable and probable cause.

2. MALICIOUS PROSECUTION (§ II A—10)—PRACTICE IN NEW BRUNSWICK COURTS—PLAINTIFF WISHING QUESTION SUBMITTED TO JURY—PROCEDURE—DETERMINATION OF QUESTION OF REASONABLE AND PROBABLE CAUSE—QUESTION FOR JURY.

Under the recognised practice of the New Brunswick Court, it is quite open for the plaintiff in an action for malicious prosecution if he wishes

a question submitted to the jury as to whether the defendant had reasonable grounds for an honest belief that the plaintiff had been guilty of the alleged crime to frame the question himself and procure the Judge to submit it. Failure of the Judge to do so is not ground for setting aside the verdict.

While the question of reasonable and probable cause is one to be determined by the trial Judge, yet when the determination of that question depends wholly or in part upon a disputed question of fact, the Judge is entitled to the assistance of the jury in finding as to such facts, and even if the Judge may not have required the assistance of the jury to decide the question if the answer given by the jury is the only one possible on the evidence, the verdict will not be set aside on this ground.

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RAYMOND v. THOMAS.

MOTION by plaintiff, appellant, to set aside verdict for defendant, and for a new trial. Refused. Statement.

D. Mullin, K.C., for appellant; *M. G. Teed*, K.C., for respondent.

The judgment of the Court was delivered by

WHITE, J.:—This is an action for malicious prosecution tried before the Chief Justice of the King's Bench Division and a jury at the St. John Circuit in January last. White, J.

The defendant carries on business as a furrier at a store on Main St., St. John. The plaintiff is the wife of T. Kenneth Raymond, to whom she was married September, 1914. For about 2 months, expiring October 30, 1918, she and her husband resided at the Prince William Apartments. During the day her husband was employed as manager at the Royal Hotel. According to the plaintiff's evidence on cross-examination, the relations existing between her and her husband were not very cordial during the 2 months' residence referred to, nor for 1 or 2 months immediately preceding such residence. The plaintiff testified that about the last of September, 1918, she went to the defendant's store in company with a lady who was a guest at the Prince William Apartments and who was having some furs renovated by the defendant. She says that she then told the defendant she was desirous of purchasing a fur collar; that he shewed her a grey lynx collar, saying the price was $65 and that he could furnish the muff to match at $50, though he had not the same then on hand; that she made no purchase that day, but a few days later 'phoned the defendant to send the grey lynx collar to her at the Prince William Apartments, which he did according to his statement, on October 1. About October 10 the plaintiff called at defendant's store and ordered the muff corresponding with the collar. This was delivered on October 17. While in defendant's store ordering the muff, the plaintiff examined several Hudson seal coats, and tried on two of

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them. Defendant says: "She was very much impressed with one of them. She said she always wanted a coat and Mr. Raymond had promised her a coat a number of times." And she likewise said: "If I change my mind and take a coat will you take these furs back and allow me for them?" I said: "Certainly if they have not been damaged."

Q. Was there anything said about the price of the coat? A. The price of the coat was marked in plain figures $325. . . . Mrs. Raymond said she would like to have the coat very much and would consider it and perhaps let me know later. . . . Q. What further occurred about the coat, if anything? A. I heard nothing further until late in October—October 29th. Q. What occurred on that date? A. It was a wet day and I had not hurried back from dinner. I was called to the 'phone at the house and a woman's voice said it was Mrs. Kenneth Raymond that was speaking. She said: "You remember the coat I was looking at." I said: "Yes, I think I do." She said "Mr. Raymond would like you to have that coat sent over, as he is going away and he would like to see the coat on me." I said "Well it is not a very nice afternoon." She said she was anxious it might be there that afternoon, and I said "We will send it." Q. Was there anything said as to where he was going? A. She mentioned something about his going hunting. Q. Do you recall anything further being said on that occasion over the telephone? A. I don't remember just now unless I can refresh my memory. It was to be sent on his approval.

Mr. Mullin:—I object to that—he must give the words and not sum it up in that way.

Q. Tell us what, if anything, was said over the telephone on that subject? A. She said he wanted to see it on her and I would take from what she said —(Objected to). Q. Was there anything said about the muff and collar that you recall, over the telephone? A. I am not sure whether she said at that time that she would return the muff and collar. I know she did say it previously.

Being asked on cross-examination by Mr. Mullin to repeat this conversation over the phone, the defendant detailed it as follows:—

Mrs. Raymond called me on the phone. I would judge it was about three o'clock in the afternoon, and asked me if I remembered the coat that she had tried on—the Hudson seal coat—and I said I thought I did. She said there were so many people listening and I don't want them to hear. She evidently went to another 'phone and asked me if I remembered the coat and I said yes. She said: "Mr. Raymond would like to see the coat." He was going away and would like to make her a present before he went. I said something about the weather. She said—"He is going away to-night." I said, "Then I will make an effort and send it over to you." She spoke about the style of trimming and lining, so that my memory might serve me. Q. Was that all that was said? A. She said that it was to be sent so that Mr. Raymond might see it. Q. Did you mention it was to be sent for Mr. Raymond's approval before you mentioned it here this morning? A. I think I did. Q. Where? A. I don't remember. She asked me if I would send it over for Mr. Raymond to see it, that he would like to see it on her,

that he was going away that night, and that is the reason she wanted it that disagreeable afternoon. Q. There was nothing else said? A. I think she said he was going away on a hunting trip.

The plaintiff's version of this conversation differs materially from that of the defendant. She avers that it took place either on the 26th or 27th and not on October 29, she says:—

I telephoned Mr. Thomas at his store and told him I was undecided—that I would like to have the coat as well as the furs but that Mr. Raymond was not there just then. Mr. Thomas said, why don't you, and added that I would have to pay more for the coat if I got it at one of the King Street stores. I told him to send the coat over. I think Mr. Thomas asked me just when I wanted it, and I said that day.

Q. Did you get it that day? A. Yes—as far as I can remember it came that day. Q. Did you hear anything further from Mr. Thomas on the subject of the coat? A. No. Q. Did you ask to have the coat sent on trial? A. No. Q. Did he say anything to you in the conversation about the coat—that he would send it on approval? A. No. Q. Did you say that you were particularly anxious to have it that afternoon—that is the afternoon of the day that you were telephoning that Mr. Raymond was going away that night and he wanted to see the coat before he went away? A. No. Q. Did you say that Mr. Raymond was going away on a hunting trip on that occasion when you were telephoning to Mr. Thomas regarding the coat? A. I did not say anything about a hunting trip to Mr. Thomas. Q. Did you say anything about a hunting trip to him at any time? A. No.

The plaintiff states that she left for the United States on October 30, and that she decided to go about 2 days before she went away. She said that her decision to go came about through a conversation with her husband, and was, apparently, proceeding to give this conversation, when, upon objection being interposed by the defendant's counsel and the Judge intimating that he did not think the evidence relevant, the conversation was not given.

The defendant states that about 2 days after October 29, on which day according to him, the coat was delivered, Miss Baird, the proprietress of the Prince William Apartments, was in his store on business, and, subject to objection, she gave the following testimony:—

Q. What if anything took place between you and Miss Baird with reference to Mrs. Raymond and this coat you had sent out? A. After she was through with her business she said to me: "Do you know that"—

COURT:—This conversation took place prior to the laying of the information? A. Yes. She asked me if I was aware that Mrs. Raymond had left the city. I said no, I was not. She likewise asked me did I receive my coat back or the pay for it? I said no. . . . Q. Do you recall anything further being said on that occasion referring to this subject matter? A. That was about all that would relate directly. She said other things. She said she likewise had been left in as bad a plight as I was. Q. Anything

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further with regard to the coat? A. She said she understood she took it with her. That would be just about the conversation. Q. Was that the first intimation you had that Mrs. Raymond had gone away or intended going away? A. Yes. Q. You think that was two days after the coat was sent? A. The day after Mrs. Raymond had left the city.

The defendant states that having received this information from Miss Baird he took steps to see whether it was correct, that he got into communication with the Retail Merchants Assn. and that their agent, Miss Alward, made inquiries at the Immigration Office and reported to him that the immigration authorities had informed her that Mrs. Raymond had made application on the 30th for entry into the United States. The defendant says that he then called up Raymond, the plaintiff's husband, at the Royal Hotel, by telephone, and had a conversation with him about the coat.

Q. What did you say to him? (Objected to.) (Admitted subject to objection.) A. I asked him about the coat. I told him about the coat being sent down and asked him if he knew anything about it and what he was going to do about it. He said "I never told her to get a coat and never saw a coat, and won't pay for it." Q. Anything further said? A. He further said "won't be able to pay because my financial affairs are in the hands of an attorney at present arranging for a compromise." Q. Anything else said? A. That was all. Q. What did you do next? A. Mr. Armour went over—I gave him some instructions. He went over and interviewed the Chief of Police and said—(Objected to). Q. What did Mr. Armour report to you in regard to this matter? (Objected to.) (Admitted subject to objection.) Q. What did Mr. Armour report to you in regard to this matter? A. He said that I would have to go over myself. Q. Did you go over? A. Yes, I did go over. Q. Did he tell you anything else? A. They said they knew her. (Objected to.) Q. This he reported to you? A. Yes. Q. Did you go over? A. Yes. Q. Whom did you see, and where? A. I saw Chief of Police Simpson in his own office. Q. What took place between you? A. I told him the circumstances. Q. What did you tell him?

Mr. Mullin:—I am raising the general objection that I did before.

Q. Tell us the circumstances. What, if anything, did Mr. Simpson say to you about Mrs. Raymond or what you should do? A. He said "Yes I know her and she has been known as Kitty McDonald;" and he likewise said "she has some record." He likewise said she had been accused of stealing a diamond. Q. Tell us more in detail what you told the Chief of Police? A. I told him just how it had been ordered over the telephone and I felt I had been deceived in the matter; that Mr. Raymond knew nothing about it. I told him I had called Mr. Raymond and what he had said. Q. And the coat had gone out on approval? A. Yes.

Mr. Mullin:—I object to my learned friend leading the witness.

A. (continuing) I told him I had been called to the 'phone and asked to send it over particularly that afternoon as her husband was going out of town, and she had left town and taken the goods with her and I had found out from

Mr. Raymond that he knew nothing about it and would not pay for it. I asked him what to do. He said it was a case of obtaining money under false pretences and he would have no trouble in locating her and getting my goods. Q. What, if anything, further did you do? A. He told me to go upstairs to Mr. Henderson and lay a charge and I did so. Q. What did Mr. Henderson do? A. Mr. Henderson made out the necessary papers. Q. Did you attest to them before the Magistrate? A. Yes. Q. After laying the information did you have anything further whatever to do with the matter of the issuing of the warrant or instructions with regard to the warrant? A. Nothing whatever. Q. What is the next thing you knew of this Police Court prosecution that is stated to be November 2nd? A. About a year afterwards. Word was received at the store that Mrs. Raymond had arrived in town and had been arrested and for me to go over to the Police Court. Q. And you went over? A. Yes. Q. What did you find? A. I found Mrs. Raymond there and the Magistrate and Mr. Mullin, and I took Mr. Belyea with me. Q. The proceedings were had before the Magistrate and you gave evidence? A. Yes. Q. And others gave evidence? A. Yes. Q. And the party was committed for trial eventually? A. Yes. . . . Q. After Mrs. Raymond was sent up for trial, which I think was about the seventeenth of November, did you have anything whatever to do with the preparing of the indictment or proceedings in the Supreme Court? Give any instructions whatever or consulted in regard to that? A. No. Q. When you gave your evidence before the Magistrate on the preliminary inquiry, were you called upon to enter into the usual recognizance to appear at the Circuit Court? A. Yes. Q. And you appeared at the Circuit Court? A. Yes.

The information laid by the defendant against the plaintiff was placed in evidence, and is as follows:—

The information and complaint of Frederick S. Thomas of the City of St. John, taken the second day of November in the year of our Lord one thousand nine hundred and eighteen before the undersigned Robert J. Ritchie, Police Magistrate for the Police District in the City of St. John, in the City and County of Saint John, on oath, who saith—that a woman known to him as Kitty Raymond alias Kitty McDonald at the City of Saint John on the twenty-ninth day of October, A.D. 1918, did unlawfully and by false pretences obtain from this deponent one Hudson Seal Fur Coat of the value of three hundred and twenty-five dollars with intent to defraud contrary to the statute in such cases made and provided. The false pretences being a message from the said Kitty Raymond saying that her husband Kenneth Raymond was going away and he wanted deponent to send the said coat to her and that he was making a present of said coat to her before going away.

Taken and sworn to in the day in the year and at the place first above mentioned, before me,
(Signed) ROBERT J. RITCHIE,
Police Magistrate, City of Saint John.

(Signed) F. S. THOMAS.

The prisoner being sent up for trial by the Police Magistrate, the Crown Prosecutor framed an indictment based upon the information above set forth, and laid the same before the Grand Jury, who found no bill. It seems that Thomas, who, on the hear-

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ing before the Police Magistrate, proved the delivery of the coat, was not called or sworn before the grand jury; so that the grand jury had before it no proof that the coat was in fact delivered. Raymond being called as a witness at the trial, stated, that until he had received word by telephone from the defendant after October 30, on which date he and his wife separated, he knew nothing of his wife having obtained from Thomas or anybody else, a lynx collar; that somewhere about 6 days before his wife went away he saw her wearing a new collar, and asked her where she got that fur, and that she told him it was loaned to her by a lady friend. He further stated, that he did not know at any time before she went away that she had purchased a muff similar to the collar, and he never knew of her having a Hudson seal coat sent to her at the Prince William Apartments by Mr. Thomas.

Q. Was it ever spoken of between you and her about you giving her one at any time? A. I have no recollection of it. Q. Did you tell her at any time that summer or winter about giving her or making her a present of a fur coat? A. No. . . . Q. Did you contemplate going away, leaving the city on a hunting trip about the 29th October? A. No. Q. On a hunting trip or otherwise? A. Not the twenty-ninth. Q. About that time? A. I was away on a hunting trip. Q. About that time? A. From the 8th to the 22nd I was away for two weeks. Q. Then you were not away and did not contemplate being away any time between the twenty-second or twenty-third and the end of the month? A. Not out of the city.

It appears that Mr. Raymond, at the time he went to reside at the Prince William Apartments, was in financial difficulties; and that just before going there he had sold the household furniture which had been in use at the home where he had previously resided in Wentworth street. The plaintiff, after first stating that she did not know her husband was in financial difficulties, subsequently gave testimony as follows:—

Q. You knew of course then that your husband was in financial difficulties and was not getting any better? A. What did Mr. Raymond do with the money he got from his furniture? When he told me he was in financial difficulties I was glad to help him sell the furniture to pay the bills. Q. When was the furniture sold? A. Before we went to the Prince William. Q. Where did you stop after your furniture was sold? A. At the Prince William. We had an auction sale before we went to the Prince William.

At the trial the Chief Justice submitted to the jury four questions which, with the jury's answers thereto, are as follows:—

1. Did the defendant take reasonable care to inform himself of the true facts of the case when he proceeded against the plaintiff? A. Yes. 2. Did the defendant honestly believe in the full charge which he laid before the

Magistrate? A. Yes. 3. Was the defendant actuated by malice and indirect motives in the proceedings taken against the plaintiff? A. No. 4. To what amount of damage do you find plaintiff is entitled by reason of her arrest and and detention by the complaint of defendant made against her? A. Not answered.

The first three of these questions are the same as were left to the jury by Cave, J., in *Abrath* v. *N. E. Ry. Co.* (1883), 11 Q.B.D. 79; in the Court of Appeal (1883), 11 Q.B.D. 440; and in the House of Lords (1886), 11 App. Cas. 247.

Upon the jury's returning the foregoing questions answered as above stated, the trial Judge directed the jury's findings to be entered, and he himself thereupon made a finding that the defendant had reasonable and probable cause, and directed a verdict to be entered for the defendant with costs.

The plaintiff now moves for a new trial:—

1. On the ground of improper admission of evidence. 2. Misdirection and non-direction by the Judge. 3. The jury's findings are not supported by the evidence. 4. Findings against evidence and the weight of evidence. 5. Findings against law and evidence. 6. Verdict against law and evidence.

The specific instances in which the plaintiff's counsel claims evidence was improperly admitted are set forth in his factum as follows:—

1. The learned trial Judge was in error in admitting the evidence of the conversation of the defendant with Miss Baird, which conversation was not evidence being merely hearsay and did not come under any of the exceptions to the hearsay rule. 2. Improper admission of the evidence of the witness Armour of his conversation with Chief of Police Simpson, such conversation being a violation of the hearsay rule. 3. Improper admission of the evidence of the witness Armour as to his calling the attention of the defendant to the condition of the charge slip. 4. Improper admission of the evidence of the witness Armour that he kind of questioned it, referring to the transaction of the fur coat, which he said the defendant gave him to make a parcel of and send to the plaintiff, which was allowed to stand against the objection of plaintiff's counsel. 5. Improper admission of the evidence of the defendant with regard to what the witness Armour reported to him as the result of his interview with the Chief of Police. 6. Improper admission of the evidence of the defendant of the conversation with Chief of Police Simpson, in violation of the hearsay rule. 7. Improper admission of the conversation over the telephone between the defendant and Kenneth Raymond.

I have already set forth the testimony given by Miss Baird. This was claimed to have been improperly admitted on two grounds: 1. That it was conversation with a third party and

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therefore hearsay. 2. That to be admissible it must relate to the alleged crime and have a bearing on that, and not to something in regard to a subsequent occurrence after the crime was committed; that the evidence was in connection with something that transpired subsequently, and was not pertinent.

I think that the objections taken with regard to the admissibility of this evidence were properly overruled. What the defendant learned from Miss Baird formed part of the information which was in his mind at the time he laid the information against the plaintiff, and was material both upon the question of malice and upon that of reasonable and probable cause. It was not, perhaps, very important, but it helped to explain how it came about that the defendant learned, or came to believe, that he had been defrauded.

As to the second ground, the only objection which the plaintiff's counsel appears to have made was as follows: The defendant on examination of Mr. Armour having asked—

Q. What did the Chief of Police tell you? A. He said—

Mr. Mullin:—I object—

Q. What did you tell the Chief of Police acting for Mr. Thomas? A. I told the Chief of Police that on Tuesday Mrs. Kenneth Raymond had gotten a coat from our store on approval and we had telephoned to her husband and he said he did not know anything about it. Also that the United States Immigration records had shewn that she left for the United States on Wednesday, and he said "What was her maiden name?" I said "McDonald." He said: "Oh yes, Kitty McDonald. We know her. She has a record." He said: "She was suspected of stealing a diamond or diamond ring and she was too smart for us to find them on her." Q. Where did he say this occurred? A. In the City of Saint John. Q. Any particular place? A. I think he said where she boarded. Q. Anything further? A. He said "That is a case of false pretences, you should get a warrant out and we can apprehend her and secure the goods." I said I was not the owner of the goods, that Mr. Thomas owned the goods, and he said: "Well send him over." I went back and communicated to Mr. Thomas what I have related. Mr. Thomas left then. Q. You did not accompany him back? A. No.

It already appears from what I have quoted from the record, that when the defendant went to see the Chief of Police, the latter repeated to him what he had said to Armour. Objection by Mr. Mullin was made at the trial to the defendant stating the conversation had between him and the Chief of Police, in these words: "I am raising the general objection that I did before." That is to say, the objection taken at the trial to the admissibility of this evidence was upon the same two grounds which, as I have stated,

formed the basis of objection to the testimony of Miss Baird. With these grounds I have already dealt. Upon the argument before us, Mr. Mullin claimed that the statement by the Chief of Police, as to the plaintiff having been accused of stealing a diamond, was inadmissible because it afforded no proof that she had stolen a diamond, and if it did, would have been inadmissible upon the trial of the plaintiff had the jury found a true bill upon the charge laid by the defendant.

It is quite true that, as a general rule, where a person is being tried for crime, evidence cannot be given against him, either of his bad character, or of his having committed other crimes. But, where the intent to defraud is an essential element of the crime charged, evidence of prior criminal acts of the accused may, sometimes, be admissible for the purpose of proving such intent. I would not wish to be understood as holding that had the plaintiff been placed on trial upon the charge made against her of obtaining goods by false pretences, it would, on the facts of this case, have been open to the Crown to shew that she was of previous bad character, or had been guilty of stealing. Upon the present trial the issue is not as to the guilt or innocence of the plaintiff, but whether the defendant, in laying the charge, acted without malice, and he had such reasonable grounds for believing the plaintiff guilty, as would have led a reasonable and prudent man to so believe. The defendant, of course, knew from what had taken place over the 'phone between himself and the plaintiff, what statements were made to him by the plaintiff in reference to her husband. He had learned from the plaintiff's husband that these statements were false. It is not sufficient, however, to constitute the crime of obtaining goods by false pretences, to shew merely that the goods were obtained by means of statements which were false; but it must also appear that the false statements were made with intent to defraud. I think what was said by the Chief of Police to the defendant as to the plaintiff having been accused of stealing a diamond would very naturally affect his belief upon the question whether or not the plaintiff had made to him the false statements in reference to her husband, with the intent to defraud. But whether I am right or wrong as to that, cannot, I think, affect the present case; not only because, as I have already pointed out, objection to the evidence was not made at the trial upon that

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ground, but because the plaintiff herself, in her statement of claim, sets forth that the defendant "falsely and maliciously, and without any reasonable or probable cause, appeared before the Police Magistrate of the City of St. John in the City and County of St. John, and in an information under oath charged the plaintiff by the name of Kitty Raymond, alias Kitty McDonald, well knowing that she was the wife of the said Kenneth Raymond, and had never been known as Kitty Raymond alias Kitty McDonald." And in his opening to the jury, Mr. Mullin claimed that the defendant by thus referring to the plaintiff in the information had shewn malice. The counsel, I think, thereby opened the door, if it was necessary to open it, to the defendant to shew why he had referred to the plaintiff in the way he did, by testifying what the Chief of Police had said to him.

It is quite clear from the proceedings that the defendant made no attempt upon the trial of this action to prove that the plaintiff had, in fact, been guilty of stealing, or attempting to steal, a diamond. I do not think, therefore, that a new trial should be granted upon the ground that the evidence as to what the Chief of Police stated to defendant was improperly admitted. Inasmuch as the evidence as to what the Chief of Police stated to Armour shews such statement to have been substantially the same as that afterwards made by the Chief of Police to the defendant, and that it was communicated by Armour to the defendant, I do not think it was improperly admitted.

Objection number 4 relates to the following evidence of Armour, given upon direct examination:—

Q. When Mr. Thomas came back from the house what, if anything, did he do? A. He told me—(Objection interposed). Q. What was done? A. He gave me the fur coat to make a parcel of and send to Mrs. Kenneth Raymond, at the Prince William Apartments. I kind of questioned it—

Mr. Mullin:—I submit the word "questioned" is improper in view of the ruling.

He did not ask to have the word stricken out; and the further examination of the witness by other questions proceeded without objection. To merely state the facts is, to my mind, sufficient to shew how unreasonable it would be to grant a new trial upon this ground.

In view of what I have said, I do not think it is necessary to further deal with any of the above specified grounds, as to the

improper admission of evidence, save the third. With reference to that, it appears from the defendant's testimony that he had been in business some 38 years or so; that his business began in a small way, and that, until very recently, he had continued the system of keeping accounts adopted at the inception of his business. Under that system, when goods were sold, or sent out on approval, the first entry was made upon what is termed a counter slip, a blank form of which was placed in evidence. In making such entries, a carbon sheet was placed between the original and another blank slip, so that a carbon copy was made of whatever was written upon the original. What became of the original was not, I think, expressly stated; but I infer it would go to the purchaser with the goods. The carbon copy was placed on file. When goods are sent out on approval and returned, this slip would, in most cases, be taken from the file and destroyed. But when a sale was effected, a charge copied from the slip on file, or based thereon, would be made in a book, which appears to have been the only account book kept in defendant's business. The defendant says that upon the counter slip relating to the sale of the coat in question, the entry was "Mrs. Kenneth Raymond, One Hudson Seal Coat $325.00 App." explaining that "App." meant "on approval." He states that the several counter slips with reference to the sale of the fur collar, the muff and the Hudson seal coat in question, were, in the ordinary course of business, placed upon the file in the office, and were not entered in the account book until some time in January, 1919. With this knowledge of the plaintiff's system of bookkeeping (if his method of keeping accounts can properly be dignified by the term bookkeeping) one is able to appreciate how much, or rather how little, there is in objection 3, taken to the admissibility of the evidence of Armour. Following is the report of that portion of the testimony of Armour objected to:—

Q. This entry on October twenty-ninth, that is the date on the charge slip? A. Yes. Q. Your attention was directed to this very shortly after the twenty-ninth of October, about the trouble that had arisen about it? A. Yes.

By Mr. Teed:—Q. Do you know anything about the entry in the book at page 313, copied from the charge slip? A. That was put there in my presence. I called Mr. Thomas's attention to the condition of the charge slip. (Objected to.) Q. That would be when? A. Some time in the month of January last.

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Coming now to the objections urged against the charge of the Chief Justice. These objections are set forth in the plaintiff's factum in 18 different paragraphs, covering altogether nearly 7 typewritten pages. I do not think it necessary to quote all of them at length, because nearly all of them are based upon one or more of a few grounds only, to each of which I will try and make reference.

In the first place, the plaintiff places great reliance upon the fact that the defendant had admitted on cross-examination that he really sold the articles which the plaintiff purchased, including the fur coat, on the credit of the plaintiff, believing her to be a good mark, and that being so there was and could be no case of false pretences. As to the claim of the plaintiff's counsel that the goods were sold upon her credit, I think it well to quote a portion of the evidence bearing upon that point. Questions to the defendant by Mr. Mullin:—

Q. You really sold the articles on whose credit? A. Mrs. Kenneth Raymond's. Q. You will swear to that? A. I will swear that that is the way the entry is made. Q. Will you swear you sold all these three articles to Mrs. Kenneth Raymond on her credit, believing her to be a good mark? A. Yes. Q. It was not on the credit of her husband? Was it on the credit of her husband? A. I supposed the two were one. Q. Having had in mind the person you were giving the credit to when you parted with your property, did you have in your mind that you were giving the credit to Mrs. Kenneth Raymond? A. Not answered. Q. To whom were you entrusting it? A. Mrs. Kenneth Raymond. Q. And that is the person you expected to pay you? A. I expected her husband to give her the money to pay for it. Q. But you made no inquiries to see whether her husband would do that or not, before you parted with your property? A. No. Q. You had not a doubt in your own mind as to the standing and reliability of Mrs. Kenneth Raymond before this communication was made to you on the occasion you mention of Miss Baird coming in your shop 61 which you have detailed to my learned friend? A. No, I had not. Q. And you thought she was perfectly good for all these things which had been charged to her at that time on the counter slips? Is that correct? A. That is correct. Q. Then you parted with these goods on the faith that she was a good mark for the goods and would pay for them? A. Yes. Q. And that is what moved you to deliver the goods to her? A. Certainly. Q. If you did not believe that you would not have delivered the goods to her, if you did not believe she was a mark and of good standing? A. No, I would not have delivered them. Q. And also she was the wife of Mr. Kenneth Raymond, the son of W. E. Raymond, of the Royal Hotel, King Street, St. John? A. Yes. Q. And you thought the wife of the son of the chief owner if not the real owner of the Royal Hotel would be a perfectly good mark for you to sell a fur coat to? A. I thought they were honourable and reputable people. Q. And you thought she was? A. Yes. Q. And that is the reason you let her have these goods that you have described? A. Yes. Q. You did not render any account to anyone for these goods?

A. The first two items I billed Mr. Kenneth Raymond with. Q. When did you first send the bill? A. I could not just tell the date, but sometime afterwards. . . . Q. Was it after the information was laid in the Police Court against Mrs. Raymond that you sent the bill to Mr. Raymond for the first two items? A. It would be after that. Q. And I suppose it was because you had laid the information in the Police Court that you did not include the Hudson seal coat? A. That is the reason.

On re-examination the following occurred:—

Q. You told me that the coat was sent out on approval? A. Yes. Q. You also told Mr. Mullin this morning that you sold the goods to Mrs. Raymond believing she was a good mark and on her credit. In the first place I wish to ask you what you meant by the statement to Mr. Mullin that the goods were sold on credit? A. All goods that go out must be kept a record of, and they are put on a slip, and as I said before that coat was sent on approval. Q. Is that what you mean when you say it was "sold?" A. I did not think it was necessary to add each time the word "approval," but that is what I meant. Q. Having regard to the statement you made that Mrs. Raymond made to you over the telephone regarding her husband and his going away and wanting to see the coat and that sort of talk. Subject to whose approval did you send out the coat?

Mr. Mullin:—I submit on re-examination this is not proper when it was gone into on direct examination.

Mr. Teed:—When the mind of the man is to be investigated, if he believed the goods were to go subject to her husband's approval, he is the man to put the interpretation on it for the purpose of these goods.

Court:—If this were on direct examination it would be open to Mr. Teed to ask that question, and if you think you have not had a chance to cross-examine on it, I would open the door for that rather than to exclude a question to my mind important. If Mr. Mullin wants to cross-examine on it he may do so.

Mr. Mullin:—I want to draw the attention of the Court to the act that the witness has said that the goods were sold to Mrs. Raymond because of her standing and because he had faith in her and believed that she was responsible and there was no question about it.

Court:—The only question here on which this prosecution is based is the coat. This witness has said that Mrs. Raymond said to him that her husband wanted it this afternoon and he sent it over on approval. Then the question comes on whose approval, his or hers? I will allow it. A. That would be the approval of Mr. Raymond. Q. That is what you had in your mind? A. Yes.

In the deposition of the defendant taken before the Police Magistrate and put in evidence on this trial by Mr. Mullin the following occurs:—

I previously swore that I charged this fur coat to Kenneth Raymond, the husband of the accused. Also I said I charged the items of sale of October 1st and 17th to the husband. I also stated I had rendered him an account to him for the first two items. I say now that it was rendered to him for these same two items. I did say that I sold this coat on the credit of Kenneth Raymond to the defendant. I say that now too. It is our general rule to send the account to the husband, even when the charge is to the wife.

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And on direct examination of the defendant is the following:—

Q. I see also this is charged to Mrs. Kenneth Raymond. Is it your habit to make the accounts in the name of the lady of the household when the account is really against the husband? A. Unless we have a family account we just charge it up to the woman or person buying. Q. The accounts principally are in the names of the wives? A. Yes.

The plaintiff claims that this testimony is inconsistent with the defendant's contention, that an operating cause inducing him to send the fur coat in question to the plaintiff was the statement he alleges she made to him, that her husband was going away and wanted the defendant to send the coat as he was making a present of the same to her before leaving, and that he was going away that night hunting.

The plaintiff further claims, that as the defendant was not asked whether the statements which he alleges the plaintiff made to him as to her husband going away that night and wishing first to see the coat, was an operative cause in inducing him to send the coat over, and has not distinctly stated that his mind was operated upon by such statements, there is no evidence that he was induced to part with the coat by reason of the plaintiff's false pretences. The defendant in the sworn information made by him charged that the plaintiff did "unlawfully and by false pretences obtain from this deponent one Hudson seal coat of a value of three hundred and twenty-five dollars with intent to defraud contrary to the statute in such case made and provided," the false pretences being a message from the said Kitty Raymond saying that her husband Kenneth Raymond was going away and he wanted deponent to send the said coat to her and that he was making a present of said coat to her before going away.

The burden is upon the plaintiff to shew an absence of reasonable and probable cause, and also to prove malice. So that where there is nothing to indicate malice or a want of reasonable and probable cause, the action must fail. Here, if the plaintiff's evidence as to the conversation she says she had with the defendant which resulted in the coat being sent over to her is to be accepted as true, then there would be proof of a want of reasonable and probable cause. But on the other hand if the defendant's testimony in reference to that conversation is accepted, there is no such proof, but there is evidence of reasonable and probable cause. Indeed, having read the evidence very carefully, I think the jury might

very well have reached the conclusion that the evidence, taken as a whole, afforded proof on the part of the defendant, that he was induced to part with the coat as he did through his belief in, and reliance upon, the false statements made by the plaintiff that her husband was making a present to her of the coat and was anxious to see it upon her.

The fact that the defendant had admitted that he sent the coat to the plaintiff upon her credit, believing her to be a good mark, is by no means inconsistent with the finding that the plaintiff was induced to send it by the false pretence alleged. On the contrary, the very reason why he believed the plaintiff to be a good mark may well have been his belief, created by the false statements of the plaintiff, that her husband proposed making a present to her of the coat, and knew of her getting it.

The Chief Justice in his charge instructed the jury as follows:—

Very considerable has been said as to whom credit was given, whether the goods were sold to Mrs. Raymond on her credit or whether they were sold on Mr. Raymond's credit. As the case presents itself to me, gentlemen, I do not think that is the determining feature in it at all, because even if the goods were sold on Mrs. Raymond's credit, that would be no answer to a charge based upon a complaint that "she had got the credit extended to her under false pretences." It does not appear to me that the question to whom the credit was actually extended is the turning point in the case. The important part of this branch of the case I am alluding to now is, what were the circumstances under which Mr. Thomas parted with his fur coat? If he parted with that coat in the belief that Mrs. Raymond, being the wife of Kenneth Raymond naturally had the credit that anybody would have in that station in life, that is the end of it. There would be no justification for the defendant doing what he did, and there would be no false pretences at all in her going and getting the coat under those circumstances. On the other hand, if, as he says, she led him to believe that Mr. Raymond was right there and the coat was to be sent over for his approval, and it was that idea that made him part with it, and if you come to the conclusion that that was false, then you will so find.

In view of that instruction, and the jury's answers to the questions put to them by the Court, it is manifest that the jury must have accepted and believed the defendant's version of the conversation between him and the plaintiff which led up to the coat being sent to her, rather than the version given by the plaintiff.

The plaintiff's counsel claims that the Judge was in error in charging the jury as he did in the first portion of that part of his charge quoted, inasmuch as the information laid in this case was for

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obtaining goods by false pretences, and not for obtaining credit by false pretences. And he further argued that if there is evidence of any offence it is that of obtaining credit on false pretences, and not of obtaining goods.

Even if we take the above quoted portion of the Judge's charge alone, and certainly if we take the whole charge together, it is quite apparent that when he spoke of the plaintiff getting "credit extended to her under false pretences" he meant that she had got the coat upon credit, that is without paying for it, upon false pretences. It had not been suggested by anybody during the course of the trial that if the plaintiff had been guilty of a crime at all, it was that of obtaining credit under false pretences rather than that of obtaining goods. If the plaintiff's arguments are well founded then the absurd result would follow that in no case where goods were obtained upon credit, by false pretences with intent to defraud, could criminal proceedings be taken for obtaining goods by false pretences.

Complaint is made by the plaintiff's counsel that the Judge failed to draw the jury's attention to certain portions of the evidence which he claimed should have been pointed out and commented upon by the Judge to the jury. In reply to that I can only say that I think the Chief Justice laid the case very fully and very fairly before the jury, and at the close of his charge, bearing upon the first three questions submitted, and before he began his charge upon the question of damages, he used the following language:—

> I am now going to say something to you on the question of damages, and in the meantime I would say that if either of the counsel want any fuller or further instructions upon the matters which I have already touched upon, that after what I have to say about the damages and the principle on which they should be assessed, I will gladly listen to anything you want to say on that question.

If counsel for the plaintiff had wished the Judge to point out to the jury any particular portion of the evidence, or to give any particular instruction in reference thereto, he should have asked for it. The plaintiff's counsel did, toward the close of the charge, address the Court as follows:—

> There is one point with regard to the first question. Did the defendant take reasonable care to inform himself of the true facts of the case when he proceeded against the plaintiff? In connection with that I would ask for a direction in considering what would be a prudent thing for one placed in the

circumstances of the defendant at that time, would be the consultation with counsel as to the proper course to proceed upon a statement to him of the full facts in connection with the case. And the omission, if there is an omission, on the part of the defendant, is a matter the jury may take into consideration in determining that question.

It is law, settled now beyond dispute, that where a defendant in an action for malicious prosecution proves that he correctly and fully stated the facts to counsel, and was advised to bring the prosecution, that is evidence of reasonable and probable cause. But I know of no case in which it has been held that failure to consult counsel affords proof of a want of reasonable and probable cause. It is, perhaps, possible to conceive of a case of such character that no prudent man would lay a criminal charge without first consulting counsel; but certainly that is not the case here. The defendant, whom the jury have evidently believed rather than the plaintiff where the testimony of the two is in conflict, states in effect that he went to the Chief of Police for advice, believing he was competent to give it, and laid the case before him as the facts were, and accepted as correct the Chief's advice that those facts constituted a case of obtaining goods by false pretences, and acted upon it.

The plaintiff's counsel further contended, in para. 17, under the head of mis-direction and non-direction, as follows:—

Error on the part of the learned Judge in leaving the first question to the jury: "Did the defendant take reasonable care to inform himself of the true facts of the case when he proceeded against the plaintiff?" in the absence of any evidence on the part of the defendant that he was induced to part with the fur coat because of the alleged misrepresentation or untrue statements of the plaintiff regarding her husband attributed to her by the defendant, there being no other material facts which would justify the defendant in making the charge against the plaintiff and it having reference to the question of reasonable and probable cause which in the circumstances the learned Judge should have determined himself there being no material facts disputed which could affect that question.

I have already dealt with the contention that there was no evidence on the part of the defendant that he was induced to part with the fur coat because of the alleged misrepresentations of the plaintiff regarding her husband. As to there being no material facts disputed which could affect the question of reasonable and probable cause, it is only necessary to recall the vital difference between the testimony given by the plaintiff and that given by the defendant, as to the terms of the conversation which led to her obtaining the coat.

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The plaintiff's counsel also complains of what he claims to have been a failure of the Judge to leave a question to them, as suggested by plaintiff's counsel, as to whether the defendant had reasonable grounds for an honest belief that the plaintiff had been guilty of the crime of obtaining goods under false pretences. Under the recognised practice in this Province, it was quite open for the plaintiff, if he had wished such a question submitted to the jury, to have framed the question himself and procured the Judge to submit it. This he did not do.

The plaintiff contends that the first question left to the jury should not have been submitted to them because a question of reasonable and probable cause is one to be determined by the Judge alone. In *Lister* v. *Perryman* (1870), L.R. 4 H.L. 521, referred to with approval by Strong, J., in *Archibald* v. *McLaren* (1892), 21 Can. S.C.R. 588, it was laid down that while the question of reasonable and probable cause is one to be determined by the trial Judge yet when the determination of that question depends wholly or in part upon a disputed question of fact the Judge is entitled to the assistance of the jury in finding as to such facts.

Now I think that under the evidence in the present case no one could reasonably have answered question 1 otherwise than as the jury have done. Hence the Judge may not have required the assistance of the jury to decide this subsidiary question. But if the evidence is so clear as to admit of only one answer—that given by the jury—what harm is done by obtaining their answer?

A more arguable contention possibly is that put forward by the plaintiff, that the first question is, under the circumstances of this case, wholly irrelevant, and, therefore, should not have been put to the jury. That contention was not made at the trial, but was put forward for the first time on argument before us. Assuming that under the circumstances it was not necessary to ask the jury this question in order to enable the Judge to determine the question of reasonable and probable cause, yet I fail to see how the plaintiff is prejudiced by the submission of such question. Had the answer been adverse to the defendant, and the Judge had thereupon found a want of reasonable and probable cause, the defendant might have had cause for complaint. If the fact be, as the plaintiff contends, that under the circumstances here, the question whether there was or was not reasonable and probable

cause, does not depend upon this preliminary question, No. 1, surely it cannot afford any ground against the finding by the trial Judge that there was no want of reasonable and probable cause, that the jury have found the defendant did, as a matter of fact, take such reasonable care to inform himself of the facts.

Finally, I may say that a careful reading of the evidence in this case has satisfied me, that when once it is determined that the defendant's evidence as to the conversation with the plaintiff over the 'phone which led to his sending her the coat, is to be accepted as true, rather than the version of such conversation given by the plaintiff, no one could reasonably come to any other conclusion than that there was a failure on the part of the plaintiff to shew a want of reasonable and probable cause.

As I am anxious not to unnecessarily prolong this judgment, and for the reasons stated have come to the conclusion that reasonable and probable cause has been established, I will not discuss any contentions made by the plaintiff's counsel which go solely to the question of malice.

For the reasons stated, I think this appeal should be dismissed with costs. *Appeal dismissed.*

Re CROTEAU and CLARK Co. Ltd.

Ontario Supreme Court in Bankruptcy, Orde, J. November 29, 1920.

BANKRUPTCY (§ I—7b)—PETITION IN—RETURN OF NOTICE—ASSIGNMENT—RECEIVING ORDER—VALIDITY—BANKRUPTCY ACT 1920, 9-10 GEO. V., ONT., CH. 36.

Sub-sec. 6 of sec. 4 of the Bankruptcy Act does not apply to a case where the debtor, with the palpable intention of choosing his own trustee, makes an assignment after he is served with the petition in bankruptcy and before the return of the notice of hearing, and a receiving order made on the return of the notice renders such assignment ineffective.

[See exhaustive annotation on the Bankruptcy Act of Canada, 53 D.L.R., commencing page 135.]

Statement.

MOTION by the Canadian Credit Men's Association Limited, as receivers under a receiving order, for an order directing the London and Western Trusts Company to deliver possession of the estate of the Croteau and Clark Company Limited to the applicants.

A. W. Ballantyne, for the applicants.

H. S. White, for the London and Western Trusts Company.

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ORDE, J.:—This matter came before me on the 17th and 18th November, 1920; and, although the motions were disposed of summarily, the questions involved seemed of sufficient importance to require that the reasons for my orders should be reduced to writing.

On November 1, 1920, Nisbet and Auld Limited filed a petition in bankruptcy against the Croteau and Clark Company Limited, an incorporated company carrying on business as general merchants at Essex, Ontario. Notice of hearing of the petition was given for November 11, 1920, and the petition and notice were served on the debtors on November 2, 1920.

Upon the return of the notice of hearing, on November 11, no one appeared for the debtors, and a receiving order was made, adjudging the debtors bankrupt, and appointing the Canadian Credit Men's Association receivers of the estate.

When the receivers proceeded to take possession of the assets of the debtors, they found the London and Western Trusts Company in possession, under what purported to be an authorised assignment under the Bankruptcy Act, 1920, which the debtors had made to them, as authorised trustees, on November 8, 1920. The London and Western Trusts Company had taken charge and called a meeting of creditors for the afternoon of November 17, 1920.

The Canadian Credit Men's Association, as receivers under the receiving order, thereupon, upon leave given by me, moved before me on November 17, 1920, for an order directing the London and Western Trusts Company to deliver possession of the estate to the duly appointed receivers under the receiving order.

It was urged before me on behalf of the London and Western Trusts Company that, as sec. 9 of the Bankruptcy Act provides that an insolvent debtor "may, at any time prior to the making of a receiving order against him, make to an authorised trustee" an assignment of all his property for the general benefit of his creditors, the voluntary assignment which the debtors had made on November 8 had priority over the receiving order of November 11, and rendered the latter ineffective. That this cannot be its effect is, however, quite clear from the fact that an authorised assignment is itself an act of bankruptcy upon which the Court may, if it see fit, upon the petition of a creditor, declare the debtor

bankrupt and make a receiving order: sec. 3 (*a*) and sec. 4 (1); and that the Court may upon such application, if satisfied that the estate can be best administered under the assignment, dismiss the petition: sec. 4 (6).

Upon the presentation of the petition to the Court, the Court's power is absolute to determine whether or not a receiving order shall be made, notwithstanding any prior authorised assignment. Sections 3 (*a*) and 4 (6) doubtless were intended to apply to cases where the authorised assignment had been made before the filing of the bankruptcy petition; but, that being so, sub-sec. 6 of sec. 4 cannot, *â fortiori* apply to a case where the debtor, with the palpable intention of choosing his own trustee, makes an assignment after he is served with the petition and before the return of the notice of hearing. If that were not so, then the whole scheme of the Act could be frustrated in every case by the debtor's making a voluntary assignment immediately after the service of the petition. The provision in sec. 9 that an assignment may be made before the making of a receiving order cannot have been intended to authorise or justify any such practice. The words "at any time prior to the making of a receiving order against him" in that section are perhaps unfortunate as lending colour to the suggestion that it is open to a debtor to make an assignment after a petition has been served, and the strict language of the section apparently entitles him to do so; but, having done so, he stands, upon the return of the notice of hearing of the petition, in no better position than if he had made the assignment prior to the service of the petition upon him. In my judgment, the authorised trustee who claims under an assignment made to him under such circumstances does not stand in as good a position before the Court as one to whom an assignment is made before the service of a petition, because such an assignment is clearly made with a view to thwarting the proceedings in bankruptcy. There may be exceptional cases where, for the purpose of preserving the property of a debtor, such an assignment after service of a petition might be justified, but the circumstances would have to be unusual. It ought to be clearly understood that insolvent debtors will not be permitted to make a practice of choosing their own trustees after a bankruptcy petition has been served.

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I therefore declared upon the motion that the receiving order of November 11 had rendered the assignment of November 8 ineffective, and that the London and Western Trusts Company should forthwith deliver the debtors' property to the receiver appointed by the receiving order.

This order was, the next day, by agreement varied by setting aside the receiving order and allowing the estate to be administered under the assignment, under sub-sec. 6 of sec. 4, but the only reason for permitting this was that the creditors, including the creditor who presented the petition in bankruptcy, so desired it, and the London and Western Trusts Company had acted in good faith and in the belief that in claiming to hold possession in spite of the receiving order, they were acting within their legal rights.

Judgment accordingly.

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SHORTILL v. GRANNAN.

New Brunswick Supreme Court, Chancery Division, Hazen, C.J. October 6, 1920.

GIFT (§ I—7)—BANK DEPOSIT PLACED IN JOINT NAMES OF UNCLE AND NIECE—UNCLE KEEPING CONTROL OF FUNDS—INTENTION OF PARTIES—EFFECT OF DEATH OF UNCLE.

Where a person deposits money in a bank to the joint account of himself and another person it is a question of intention whether such transaction is a gift *inter vivos* or is a transfer of property by way of trust or whether it is a gift which is not to take effect until the donor's death, and where the evidence shews that this latter is the case the transaction is of no validity by reason of the formalities of the Wills Act, requisite in such cases, having been disregarded.

[*Re Daly* (1907), 39 Can. S.C.R. 122, *Heartley* v. *Nicholson* (1874), L.R. 19 Eq. 233, *Van Wart* v. *The Synod of Fredericton* (1912), 5 D.L.R. 776, 42 N.B.R. 1, *Hill* v. *Hill* (1904), 8 O.L.R. 710, *Payne* v. *Marshall* (1889), 18 O.R. 488, considered and applied.]

tement.

ACTION by executor to recover moneys deposited in a joint bank account in the names of the deceased and the defendant. Judgment for plaintiff.

J. J. F. Winslow, for plaintiff; *G. T. Feeney*, for defendant.

Hazen, C.J.

HAZEN, C.J.:—This suit was brought by Frank I. Shortill, as executor of his father's will, against Helen Grannan, concerning certain moneys that will hereafter be referred to.

Prior to April, 1914, the late Owen Shortill had in the savings department of the Bank of Nova Scotia at Fredericton a deposit to the amount of $1,100 or thereabouts. He withdrew this money on April 15, 1914, and on the same day deposited it in the Bank of

Montreal at Fredericton in his own name and that of the defendant, the defendant being described as Helen M. Grannan. At the same time he and the said Helen M. Grannan signed an agreement with the Bank of Montreal to the effect that all moneys from time to time deposited to the said account, and interest, might be withdrawn by either of them, and each of them authorised the bank to accept as sufficient acquittance for any amounts withdrawn from said account from time to time, any receipt, cheque or other document signed by either or both of them. It is further provided in the agreement that the death of either the said Owen Shortill or Helen M. Grannan should in no way affect the right of the survivor to withdraw the moneys deposited in the said account. It will be seen, therefore, that the deposit in the Bank of Montreal in the joint names of Shortill and his niece was on the condition that the money could be drawn by either or the survivor. After Shortill's death, which took place on August 6, 1919, the balance then in the Bank of Montreal to the credit of joint account amounting to $1,147.22 was withdrawn on August 11 1919, by the defendant. The plaintiff claims that the money was not the property of the defendant, but belonged to him as executor under his father's will. This will was not put in evidence, but throughout it was treated as having been made some years before the money was withdrawn from the Bank of Nova Scotia by Shortill and re-deposited in the Bank of Montreal.

From the evidence given by William S. Thomas, Manager of the Bank of Nova Scotia at Fredericton, it would appear that the money that was in that bank and which was withdrawn by Shortill and re-deposited in the Bank of Montreal, was in his own name, at least there is nothing to the contrary. Thomas was asked if the late Owen Shortill had an account at his bank in Fredericton, and he said "yes." He also produced the withdrawal slip that closed out the account, shewing that the amount at that time was $1,153. He further produced Owen Shortill's receipt therefor, and stated that the amount was withdrawn absolutely and the account finally closed out, and that he never had any further account with Shortill in the bank. It is clear, however, from the evidence given by the plaintiff that he was aware of the money being on deposit in the Bank of Nova Scotia and in some way was connected with it, for he states in his evidence

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that in 1910 his father made an arrangement with the Bank of Nova Scotia whereby at his death he, Frank I. Shortill, could draw the money, and produced a slip from the bank for him (Frank) to sign so in case of his father's illness and death he could go to the Bank of Nova Scotia and get the money without having to administer the estate. He was then asked:—

Q. You said that before 1914 your father did arrange a joint account in his own name and yours at the Bank of Nova Scotia? A. He didn't arrange a joint account. Q. He gave you power of attorney? A. He gave me power of attorney. Q. Then your father probably knew the distinction between a power of attorney—did he speak to you and tell you what it was at that time? A. No, he didn't. Q. He produced this slip for you to sign from the bank? A. Yes, I signed the slip and returned it to the manager of the bank there next day. Q. Having power of attorney would not be sufficient to give you authority to exercise it after your father's death? A. Well, I don't know. I am not versed enough in business matters for that.

Unfortunately the matter was not gone into further by the counsel for either party, and I have not evidence before me from which I can decide just what the arrangement was with regard to the funds when they were in the Bank of Nova Scotia, but it is clear from the evidence of Frank Shortill that he believed that the arrangement was of such a character that if his father died he could go to the bank and get the money without having to administer the estate. Had it not been for this statement about a power of attorney I would have thought that there had been a joint account similar to the one that he afterward entered into at the Bank of Montreal with Miss Grannan, the defendant, but in view of the scarcity of evidence on the subject, I can come to no definite conclusion, and the only fact of which I am satisfied in this connection is that Frank Shortill believed that when the money was in the Bank of Nova Scotia he had a right to withdraw it after his father's death without taking out letters of administration.

Claims like the present are included in one of three classes. *First*, that of gifts *inter vivos*, which this is said to have been. *Second*, transfer of property by way of trust or with a valid declaration of trust, or as claimed by the defendant's counsel, a gift which creates a joint tenancy, with right of survivorship. *Third*, where there is a gift but not to take effect until after the donor's death, and which is therefore testamentary in its character.

There are in the Reports a great many cases dealing with claims like the present, none of which are similar in all details, and in this connection I think I might properly quote the words of Davies, J., in *Re Daly; Daly* v. *Brown* (1907), 39 Can. S.C.R. 122, 131, in which he says:—

> A large number of cases, Irish and American, were cited at Bar to which I have referred. There is no general governing principle applicable to questions of the kind I am now considering. In every case it is a question of intention, to be gathered from the special facts and circumstances, and the family relations or otherwise of the parties.

At this point I might say that evidence was given at the trial with regard to the state of mind of Owen Shortill at the time he withdrew the money from the Bank of Nova Scotia in April, 1914, and Mr. Winslow, counsel for the plaintiff, stated that he did not wish to abandon that phase of the case in any way whatsoever, but that he did not intend to produce any further evidence in respect to Mr. Shortill's state of mind than he had already done. He added—"I submit we do not have to go that far. All we have to shew is that he was under the influence of Miss Grannan."

He was an old man, in his eighty-second year, at the time of his death, which occurred in August, 1919, with no doubt some infirmities of temper, and was in the habit as many old men are of repeating the same stories on different occasions to people to whom he had previously told them. He was in the habit of talking about the Saxby Gale and other things which had occurred in his lifetime, and especially impressed him, and was apparently annoyed with his son for having left the farm. At the time of the withdrawal from the Bank of Nova Scotia he walked from his home in Devon across the bridge to the bank, then from there to the Bank of Montreal and back to Devon again, and there is nothing in all the evidence that would lead me to conclude that he was not at that time of a sound and disposing mind and memory and fully responsible, and there is nothing whatever in the evidence, and I have read it very carefully, to lead me to conclude he was under the influence of Miss Grannan or that she exercised any improper influence over him.

Until he became an old man Owen Shortill resided on his farm on the Royal Road in the parish of Douglas in the county of York. The plaintiff lived there with him and helped with the work of the farm. He was never paid any wages, but got his

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board at home and received what money he required for his clothing and incidental expenses. After his mother's death, which occurred on March 6, 1906, the farm-stock and some machinery were sold and Owen Shortill and the plaintiff went to board in St. Marys, now spoken of as Devon. They stayed there until the following spring, when the father went back to the farm and lived there alone for the greater part of the summer. After that he came back to Devon and boarded again, his son boarding at the same place, and in the following spring he went up and stayed at the farm again for a few months. A little later on he bought a house in St. Marys in which he and his son lived for a time, and in the following June he went up to the farm again and the plaintiff repaired the house at Devon and did certain carpentering work to it, and in his own language "fixed it up in first-class condition." In the same year the father sold the house and boarded with his sister Mrs. Grannan, the mother of the defendant, at Devon. He continued to board there for some time, the plaintiff also boarding there, each paying their own expenses and in 1911, the plaintiff was married, and set up housekeeping for himself at Devon, and his father made his home with him from that time until his death. The plaintiff seems to have been a loyal and devoted son. During the years from 1911 until his death in 1919, while he lived with his son, Owen Shortill did not pay any board. His washing was done by the plaintiff's wife or by hired help, and the plaintiff at different times gave him money for the purpose of buying what were described in the evidence as "little necessaries in the way of small clothing and tobacco, church dues, ordinary small expenses." There is evidence that at times he was discontented and it would appear that he felt that his son should not have left the farm, although apparently from the latter's evidence, it was to his advantage that he did so.

The defendant in the case during the greater part of her life lived on the Royal Road with her parents, who were near neighbors of Owen Shortill and his wife. Shortill's wife was in poor health for a good many years, and it appears that before her death Miss Grannan was in the habit of going to the house and rendering certain assistance such as is rendered to one another by neighbours in the country districts, and that after her aunt's death she for a time kept house. The services rendered were such as would

naturally be expected between neighbours, and especially between those who were relatives, although it is stated in evidence and admitted that she was paid certain sums for her services or as she states herself she received certain presents in the way of money from her uncle. It also appears that at one time when Mrs. Shortill was in Montreal for the purpose of medical treatment, Miss Grannan stayed at the Shortill house and did the housekeeping for Shortill and his son, and that she also did so on another occasion when Mrs. Shortill was in Portland consulting a physician, and that she also stayed there all one winter when Mrs. Shortill was alive though in failing health. When asked how much remuneration if any she received for staying at the Shortill household she stated it was "more as a gift, four or five dollars a month." And she says on cross-examination that while she took this money as a gift, not as wages, it amounted to practically the same thing as wages. Later on her mother moved to Devon, and it was at her house that Shortill and his son boarded for a time before the son married and set up an establishment of his own. The relations between Shortill and his niece were apparently of a close and friendly character, and there is no evidence to shew that there was any lack of good feeling during Shortill's lifetime between the plaintiff and the defendant. The principal evidence of what took place at the time of the transfer of the funds from the one bank to the other is given by the defendant. There is no other witness to it, and there is little or no evidence on the subject apart from that which she has furnished. She says that one day in April, 1914, when they were living at Devon, Owen Shortill asked her when she was going over to town, and she said that she was going over some day that week. He said: "I want to know the day—I want to go over with you," and she told him she was going over the next morning. He thereupon said: "I will go with you" and at about half past eight o'clock he came down to the house where she was living and they went over to town. As they were walking over he said he was going to change his money. He had made up his mind he was going to change his money—he thought he had done enough for Frank, he was leaving him the farm, and he intended on changing his money. This conversation took place on the Fredericton bridge, and they then proceeded to the Bank of Nova Scotia. This conversation,

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coupled with the evidence given by Frank Shortill regarding the power of attorney to which I have previously referred, might fairly lead to the conclusion that Shortill when he placed the money in the Bank of Nova Scotia, or afterwards, had some arrangement whereby in the event of his death it should go to his son Frank. It seems to me that his expression that he had done enough for Frank, that he intended on changing his money, might fairly lead to such a conclusion. The money having been drawn from the Bank of Nova Scotia, Shortill then asked Miss Grannan to go with him to the Bank of Montreal, and she states in answer to a question if she knows how much money he withdrew from the Bank of Nova Scotia that she did not until after he had deposited it in the Bank of Montreal, and that he said he was going to have it "put in joint" in his name and hers. This was said on the way from the Bank of Nova Scotia to the Bank of Montreal and she adds "on our way to the Bank of Montreal he said he was going to have it in my name and his name joint and at his death I was to have the money." Having reached the Bank of Montreal a conversation took place between the teller and Shortill and herself. She heard the teller ask him what his occupation was, and he said a farmer; and she says the teller said: "Miss Grannan you can draw whenever you want to." She repeats the statement and says the teller said: "You can draw whenever you want money." She states that at this time Shortill was standing there and did not say anything. The deposit having been made and the agreement with the bank signed by Shortill and herself, the teller gave him the pass-book, and when they returned to Devon from the bank her uncle came to her house and handed her the bank-book saying: "There is the bank-book, you keep it" and she says he always called the money "ours," he never called it his. He gave her the bank-book on that day and never received it back again up to the time of his death that she remembers. Asked what reason if any Shortill gave for changing his money from the Bank of Nova Scotia to the Bank of Montreal she says that Frank (meaning the plaintiff) knew that he had money in the Bank of Nova Scotia. She further says that the money was used for her uncle's maintenance, and that no mention had been made about the money to her by Shortill until the day they came over to Fredericton together. She is asked the following questions:—

Q. You said that he made the remark to you that day that he wanted you to have it at his death? A. Yes. Q. Was that before or after you went into the Bank of Montreal? A. Well, it was when we went home and he gave me the bank-book. He said if there was any money left at his death I was to have it.

She further says that during the last two years of his life he wanted her to draw the money out and have it in her own name, but she thought it was just as well the way it was, that it was hers as much as if she drew it out. She states that on one occasion she heard him remark that he had made his will and that that was the only one he was going to make; that while she did not know what his will contained she understood he was to leave Frank his property. After this other moneys of Shortill's were deposited to the joint account. During this time there is evidence to the effect that Frank Shortill was paying his father money, on one occasion giving him a cheque for $20. During the time that intervened between the deposit in the Bank of Montreal until Shortill's death, Miss Grannan, though in possession of the bank-book, did not draw out any money on her own account or for her own purposes. She drew money at different times at his request, which she gave him and which he used for his own purposes. On one occasion $1,000 was drawn out by direction of her uncle. It was during the war and he got worried about the money, thinking perhaps it was not safe in the bank and had it drawn out. He first asked the defendant's advice about it and she had said that she would draw the money out if he thought so. So in June, 1917, this amount was drawn out and was kept in her house in a box, and on February 18, 1918, it was deposited again to the same account in the Bank of Montreal, and this was done by instructions from Shortill, who said it might as well be drawing interest. The amounts which were drawn from the bank by direction of the uncle appear to have been $50 at one time and other amounts at different times, and on one occasion $40 was drawn out by Shortill himself. These sums were all used by him, and as I said before during the period of 5 years between the deposit of the money and the death of Shortill himself, Miss Grannan exercised no ownership over it in the way of drawing any money which was used for her own purposes. When the $1,000 was in the box in Miss Grannan's house, Shortill had access to it himself, and on one occasion he went to her and got $50, to which he added $15 and lent

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it to Miss Grannan's brother. This was subsequently paid back and put into the box before the deposit was made again in the Bank of Montreal. If her evidence is to be relied upon the bank-book was in her possession from the time the deposit was made until she withdrew the amount from the bank after her uncle's death and re-deposited it, but she did not in any way interfere with the money except by his direction, and the $1,000 when drawn out was not drawn at her suggestion but by order of her uncle, and during the time the money was in her house he had free access to it. After Miss Grannan had given her evidence I made the following statement:—

The Court:—I understand all the money she withdrew from the bank after the money was put in their joint names was money withdrawn at the request of Mr. Shortill and paid over to him.

Mr. Winslow (counsel for the plaintiff):—Except one case when he withdrew the money himself.

In cross-examination the defendant repeats what she said before to the effect that Shortill told her that he thought he had done enough for Frank and didn't intend him to have the money. She was asked: "Q. Did you understand that you were to have it before his death? A. I thought I had the use of it just the same when it was put in joint. I thought I had the privilege of using it if I needed it." She stated that she did not have any occasion to use it, and that she did not use it because she did not have any need to.

The defendant's brother, William Grannan, was called as a witness, and says that he understood from his uncle Owen Shortill on several occasions that Frank Shortill was going to have the farm but he would not get another dollar from him, and he says that he told him this 3 or 4 years before his death, as nearly as he could recollect.

This is the evidence in support of the defendant's contention that the money is hers, and the claim must be included in one of the three classes to which I have referred.

It seems to me that the claim of the defendant that this is a gift *inter vivos* cannot be sustained on the evidence of the defendant herself. The money was in the Bank of Nova Scotia, and in some way or other the plaintiff had, or he and his father thought he had, some control over it. For this reason his father decided to change it and put it in the joint name of himself and Miss

Grannan, at the Bank of Montreal. For what purpose he was doing it can only be judged from Miss Grannan's statement of the conversation she had with him. Her statement that he said he was going to have it in their names jointly, and at his death she was to have the money; her statement that he made the remark to her that he wanted her to have it at his death; his further statement that if there was any money left at his death she was to have it, all seem to me to negative the idea of a gift *inter vivos*, and though the bank-book remained in her possession it seems to me that it was so left for the sake of convenience, and in order that his son Frank, with whom he lived, might not be aware of his having made any change in the disposition of his property. I have not overlooked the statement of Miss Grannan made at the time of the hearing, to the effect that the teller told her in Shortill's presence she could draw whenever she wanted money. As between the bank and Miss Grannan this would undoubtedly be true, but there is no evidence to the effect that Shortill heard the statement, or if he did that he acquiesced in it in the sense that counsel for the defendant would have us believe. There is no evidence regarding what took place at the time by any of the officials of the bank, simply the statement of Miss Grannan herself.

Having decided that there was no gift *inter vivos*, the question then arises if this claim can be included under the class of a transfer of property by way of trust or a valid declaration of trust. This question has been considered in a number of cases to which my attention was called. In delivering the judgment in the case of *Clark* v. *Clark* (1909), 4 N.B. Eq. 237, Barker, C.J., at page 240, quoted from the judgment of Jessel, M.R., in *Richards* v. *Delbridge* (1874), L.R. 18 Eq. 11, as follows:—

> A man may transfer his property without valuable consideration, in one of two ways:—he may either do such acts as amount in law to a conveyance of assignment of the property, and thus completely divest himself of the legal ownership, in which case the person who by those acts acquires the property takes it beneficially, or in trust, as the case may be; or the legal owner of the property may, by one or other of the modes recognized as amounting to a valid declaration of trust, constitute himself a trustee, and without an actual transfer of the legal title, may so deal with the property as to deprive himself of its beneficial ownership, and declare that he will hold it from that time forward on trust for the other person. It is true that he need not use the words, "I declare myself a trustee," but he must do something which is

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equivalent to it, and use expressions which have that meaning; for, however anxious the Court may be to carry out a man's intention, it is not at liberty to construe words otherwise than according to their proper meaning." In that case it appeared that Delbridge who was the owner of a mill and machinery and stock in trade connected with the mill business, made and signed the following memorandum endorsed upon the lease of the mill property:

"7th March, 1873. This deed and all thereto belonging I give to Edward Bernetto Richards from this time forth, with all the stock in trade." Soon after making this memorandum Delbridge delivered the lease on behalf of Richards who was then an infant, to his (Richards') mother, and she retained possession of it. The bill was filed for a declaration that by the memorandum Delbridge created himself a trustee of the property for Richards. A demurrer to the bill for want of equity was sustained. It was clear there that a voluntary gift was intended but the donor had not executed any transfer of the legal estate, he had not done all that he might to perfect the gift and as a volunteer he had no equities which he could ask the Court to enforce by way of completing the gift.

In *Milroy* v. *Lord* (1862), 4 DeG. F. & J. 264 (45 E.R. 1185), Turner, L.J., said, at 274:—

I take the law of this Court to be well settled, that, 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 upon him. He may of course do this by actually transferring the property to the persons for whom he intends to provide, and the provision will then be effectual, and it will be equally effectual if he transfers the property to a trustee for the purposes of the settlement, or declares that he himself holds it in trust for those purposes; and if the property be personal, the trust may, as I apprehend, be declared either in writing or by parol; but, in order to render the settlement binding, one or other of these modes must, as I understand the law of this Court, be resorted to, for there is no equity in this Court to perfect an imperfect gift. The cases, I think, go further to this extent, that if the settlement is intended to be effectuated by one of the modes to which I have referred, the Court will not give effect to it by applying another of those modes. If it is intended to take effect by transfer, the Court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust. These are the principles by which, as I conceive, this case must be tried.

In *Heartley* v. *Nicholson* (1874), L.R. 19 Eq. 233, Bacon, V.C., is thus reported:—

That no perfect transfer was at any time made by the testator appears to be perfectly clear; but it is not less clear to me that the testator intended to give, and on the eleventh February, believed he had given, the shares in question to the plaintiff, his daughter. It is, however, established as unquestionable law that this Court cannot by its authority render that gift perfect which the donor has left imperfect, and it will not and cannot convert an imperfect gift into a declaration of trust, merely on account of that imperfection.

I fail to find any evidence of intention on the part of Shortill to create a trust or become a trustee. By no act which admits of any other interpretation did he evidence that he himself had ceased to become the beneficial owner of the money in question and that such legal right to it, if any, as he retained was held by him in trust for Miss Grannan. At any time during his lifetime he could himself have drawn out every cent of the amount under the agreement entered into, and Miss Grannan would have had no redress.

A large number of cases were cited by the defendant, but as I said before, in the language of Davies, C.J., there is no general principle applicable to questions of the kind I have been considering, and the question of intention must be gathered from the facts and circumstances of each particular case.

In the case of *Re Daly*, 39 Can. S.C.R. 122, it was held that where Daly deposited money in a bank in the joint names of himself and a daughter, with power in either to draw against it, and the daughter never exercised this power, that the money in bank remained the property of Daly and did not pass to the daughter at his death. The contention was made that the form of the receipts given for the deposits made the father and his daughter Jane joint tenants of the money, so that at the father's death the daughter became entitled to the whole as survivor. In giving judgment in the case McLennan, J., said, at pages 148, 149:—

> I do not see how that can be so. In a case of joint tenancy neither party is exclusive owner of the whole. Neither can appropriate the whole to himself. Here, however, the father did not lose his right to take the whole, by authorising his daughter also to draw. He could still draw the whole whenever he pleased, up to the day of his death, and if he did it would all be his own money. Could his daughter have done that? I do not think so. She could as against the bank have drawn it all, and a payment to her would have discharged the bank; but the money would still have been the father's money in her hands. She would have been accountable to him for it all. If I authorise another to draw a cheque on my bank account that is not necessarily or *primâ facie* a gift. My mandatory would be responsible to me for so much money, unless I gave it to him expressly as a gift. Here there are no words at all of gift used by the father. He gave her nothing but authority to draw or to receive his money, expressly reserving and retaining his own right. It is no more than if he wrote to the bank saying I authorise you to honour my daughter's cheques on my deposit.

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This language would apply in the present case. All the authority which Shortill gave to Miss Grannan was authority to draw and receive the money, expressly reserving and retaining his own right, subject to his statement that she was to receive the balance that was left after his death.

In *Van Wart* v. *The Synod of Fredericton* (1912), 5 D.L.R. 776, 42 N.B.R. 1, it was held that where money was deposited in a bank by a husband in the joint names of himself and wife, the presumption of a gift enuring for the benefit of the wife as survivor was held to be rebutted by shewing that the wife's name was added as a matter of convenience for the husband, who through physical incapacity was unable to attend personally at the bank. The mere fact that the money was made payable to either party or the survivor did not make the presumption irrebuttable.

In the case of *Hill* v. *Hill* (1904), 8 O.L.R. 710, the plaintiff's father owned $400 on deposit in a bank to his credit. He procured from the bank a deposit receipt for the amount payable to himself or the plaintiff, or either, or the survivor. The understanding between the father and son was that the money should remain subject to the father's control and disposition while living, and that whatever should remain at his death should then belong to his son. The trial Judge in that case, Anglin, J., said, at 711:—

> If the deposit receipt stood unexplained, so that I might treat its form as truly evidencing the substance of the transaction . . . the plaintiff's contention might be sustained on the authority of such cases as *Payne* v. *Marshall* (1889), 18 O.R. 488, . . . and *Re Ryan* (1900), 32 O.R. 224 . . . But, upon the plaintiff's own evidence, I find myself driven to the conclusion that the purpose of . . . deceased was by this means to make a gift to . . . the plaintiff . . . in its nature testamentary . . . The father retaining exclusive control and disposing power over the $400 during his lifetime, the rights of the son were intended to arise only upon and after his father's death. That is, in substance and in fact, a testamentary disposition of the money, and as such, ineffectual.

This case differs from the one under consideration, in this respect, that the father retained the receipt intact in his own possession, while in this case the bank-book was left in the possession of Miss Grannan. In view of the fact, however, that it was subject at all times to the control of Shortill, this does not, to my mind, interfere with the principle that is involved.

In the present case I have come to the conclusion, in view of the evidence, that the intention of Owen Shortill was that the gift

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should not take effect until after his death. The fact that he had believed that he had arranged with the Bank of Nova Scotia that the money should go to his son Frank: the fact that he evidently changed his mind and decided that his son Frank should only get the farm and that what was left of the money in the bank should after his death go to Miss Granman: the statements he made to Miss Grannan which I have already quoted, and which are practically the only evidences of his intention, all indicate that the gift which he intended was testamentary in its character, and this to my mind is sustained by the way in which the money was treated after it had been deposited in the Bank of Montreal. The fact that Miss Granman did not for years, not until after Shortill's death, draw one cent of the money; that she treated it as if it was his absolutely, and acted upon his directions in regard to it, confirm me in this view, and are of such a character as to almost lead to the conclusion that Miss Granman viewed the matter in that light.

Having concluded that there was no gift *inter vivos*, and that there was no transfer of the property by way of trust, and that the gift was not to take effect until the donor's death and was therefore testamentary in its character and therefore of no validity by reason of the formalities of the Wills Act, requisite in such cases, having been disregarded, I have reached the conclusion that the plaintiff must succeed.

There will be a decree as prayed for.

Judgment accordingly.

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Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands and Lamont, JJ.A. May 3, 1920.

1. NEW TRIAL (§ IV—31)—WHEN GRANTED—DISCOVERY OF NEW EVIDENCE—DIFFERENT VERDICT IF ADMITTED.

A new trial will not be granted on the ground of the discovery of fresh evidence unless there is a reasonable probability that such evidence would result in a different verdict.

[*Thomas* v. *David* (1836), 7 C. & P. 350, followed; for other cases see Canadian Consolidated Ten Year Law Digest, 1911 to 1920, *tit.* New Trial IV.]

2. EXECUTORS AND ADMINISTRATORS (§ III B—70)—ACTION BY CREDITOR AGAINST ESTATE—EXECUTOR NOT PLEADING PLENE ADMINISTRAVIT—ADMISSION OF ASSETS.

An executor who in an action by a creditor of the estate does not plead *plene administravit* in his defence must be taken as admitting assets to satisfy the judgment.

[*Ruttle* v. *Rowe* (1919), 50 D.L.R. 346, 13 S.L.R. 79, followed.]

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Statement.

3. EXECUTORS AND ADMINISTRATORS (§ VII—140)—EXECUTOR DE SON TORT —LIABILITY AS.

A son and daughter of a decedent are not liable as executors *de son tort* because they requested another party who was afterwards appointed administrator to take charge of the estate and dealt with the estate under his instructions before letters of administration were granted to him.

APPEAL and motion for new trial by defendants on the ground of discovery of fresh evidence. The appeal was dismissed as against the executor but allowed as against parties sued as administrators. The motion for a new trial was refused.

The facts of the case are as follows:—

The plaintiff, Helen May Langstaff, carrying on business as The Western Fruit & Provision Company, was the wife of one W. F. Langstaff and brought the present action against one Harvey Langstaff and one Maud Langstaff as administrators of the estate of their deceased father, one James Dudley Langstaff. At the time of action no letters of administration to the estate of James Dudley Langstaff had issued, but at a subsequent date letters were granted to one F. G. Squirrell who was thereupon joined as a defendant. The plaintiff claimed payment of two promissory notes for $3,000 and $2,000 respectively, alleged to have been made by James Dudley Langstaff. Separate defences were delivered by Harvey and Maud Langstaff and by Squirrell. The first-named note was admitted at trial, but all the defendants denied the signature of James Dudley Langstaff to the second note. Harvey and Maud Langstaff denied that they were administrators. Squirrell admitted that he was administrator appointed after the commencement of action but did not plead *plene administravit* or want of assets. The action was tried before Bigelow, J., without a jury and the evidence as to the execution of the note by James Dudley Langstaff was contradictory. The plaintiff was not called as a witness. It appeared that the note in question was claimed to have been given by James Dudley Langstaff to W. F. Langstaff for an alleged loan. It was dated May 6, 1918, was payable on demand but no demand for payment had been made in the deceased's lifetime. The plaintiff claimed as holder in due course. In support of the plaintiff W. F. Langstaff testified to the signature of James Dudley Langstaff, and one Meech, who deposed that she kept a boarding-house and who appeared to have variously been known as Miss Meech, Mrs. Meech and Mrs. Langstaff and who on cross-

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examination at trial refused to state what her real name was, testified that she saw the note signed. One Ruby Cairns, a bookkeeper and stenographer in the plaintiff's employ, also testified to having seen the note in question in the possession of W. F. Langstaff during the lifetime of James Dudley Langstaff. The defence endeavoured to discredit the testimony of these parties by shewing an alleged conspiracy between the plaintiff, Meech, one Bigford, a nephew of the deceased, and one Patton, both of whom had been employed as stable hands during the lifetime of the deceased in a livery barn conducted by him. Evidence was adduced that Meech had sued the administrator for some $3,000 for board, lodging and services supplied to the deceased extending over a period of some five years; that Bigford had sued for some $5,000 for wages extending over a considerable period and that Patton had sued for some $800; that Bigford and Patton boarded and lodged with Meech and that there was hostility between different members of the Langstaff family. The defendants further endeavoured to shew that the deceased was in good circumstances financially and had no need of the alleged loan, that W. F. Langstaff on his own admission at trial had no interest in the money supposed to have been loaned but that the money was supposed to be that of his wife, the plaintiff, and that the alleged loan was supposed to have been made in actual cash in place of by chèque, W. F. Langstaff having taken the actual cash from Saskatoon to Biggar where the deal was made, although it was quite contrary to his usual custom to pay out money except by cheque. For the defence Squirrel deposed that he was familiar with James Dudley Langstaff's signature and that although he could not give reasons the signature to the $2,000 note was not that of James Dudley Langstaff. Three witnesses were called as experts in handwriting who all gave opinions that the signature was not that of James Dudley Langstaff. It further appeared in evidence that Harvey and Maud Langstaff were children of and next of kin of James Dudley Langstaff and shortly after his death requested Squirrell, who was a justice of the peace and a real estate agent at Biggar, to take charge of the estate and apply for administration, which Squirrell did, and that any dealings Harvey and Maud Langstaff had with the estate were under the instructions of Squirrell, to whom they accounted. It also appeared that Harvey and Maud

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Langstaff constituted the next of kin. If further appeared that within two weeks after the death of James Dudley Langstaff, W. F. Langstaff filed with Squirrell a claim against the estate for the note in question.

The judgment appealed from is as follows:—

"Although the $2,000 note is suspicious, and the circumstances justify the administrators in disputing it and insisting on strict proof, after looking at the evidence with great care and thoroughly sifting same I have come to the conclusion that the note was made by the deceased. Against the opinion evidence of some bankers as to the signature we have the positive evidence of W. F. Langstaff, corroborated by Flora Meech and Ruby Cairns.

"Although no administration had been taken out at the time of the issue of the writ against Harvey Langstaff and Maud Langstaff, I think they are liable as executors *de son tort*. They had intermeddled with the estate.

"There will be judgment for the plaintiff declaring that the defendants are liable to pay the amount claimed with interest and costs to be taxed in the course of administration of the estate, with liberty to the plaintiff to apply further if necessary. The form of judgment against the administrators should, in my opinion, follow the judgment of Beck, J., in *J. I. Case Threshing Company* v. *Bolton* (1908), 2 Alta. L.R. 174.

"As I think the defendants were justified as to the $2,000 note in seeking a judgment of the Court before recognizing liability, their costs, in so far as the issue on the $2,000 note is concerned, will be paid out of the estate."

The defendants appealed and also moved for a new trial on the ground of discovery of fresh evidence, such fresh evidence being the existence of circumstances tending to impeach the testimony of the witness Cairns.

A. E. Bence, for appellants; *F. F. MacDermid*, for respondent.

The judgment of the Court was delivered by:

Haultain, C.J.S.

HAULTAIN, C.J.S.:—The appeal on the merits in this case should, in my opinion, be dismissed.

The trial Judge, after seeing the witnesses and hearing their evidence, has found for the plaintiff, in spite of the fact that he considered the note in question "suspicious."

There is ample evidence to support that finding, and I do not think we should be justified in reversing it.

I am also of opinion that the appellants have not shewn sufficient grounds for obtaining a new trial. A new trial is asked for on the ground of the discovery of further evidence since the trial. This evidence, according to the material filed, would establish that, before and at the time of the trial, improper relations existed between W. F. Langstaff, the husband of, and principal witness for, the plaintiff, and Ruby Cairns, a witness for the plaintiff. On the authority of *Thomas* v. *David* (1836), 7 C. & P. 350, this witness might have been cross-examined with regard to her relations with Langstaff, and if she had denied improper relations rebuttal evidence to contradict her would have been admissible. This evidence was not available to the defendants at the trial and through no remissness on their part.

Per Barnes, J., in *Taylor* v. *Taylor* (1899), 81 L.T. 494:—

The principles which ought to guide the Court in granting a rehearing on this ground seem to me to be correctly stated in the headnote to *Anderson* v. *Timas* (1877), 36 L.T. 711, which is as follows: "A new trial will not be granted on the ground of the discovery of fresh evidence, unless the proposed evidence is such that there is a reasonable probability that, if brought before the jury, a different verdict to that in the former trial would be given."

Per Collins, L.J., in *Young* v. *Kershaw* (1899), 81 L.T. 531, at p. 532:—

The party asking for the new trial must shew that there was no remissness on his part in adducing all possible evidence at the trial. Then, again, as to the class of new evidence, the rule is that the new evidence must be such that, if adduced, it would be practically conclusive—that is, evidence of such a class as to render it probable almost beyond doubt that the verdict would be different.

In the same case Williams, L.J., said, at p. 532:—

It is not sufficient to produce affidavits shewing that new or additional evidence has been discovered since the trial, however important that evidence may be. It is necessary that, upon looking at the new evidence, the Court should be of opinion that the verdict given at the trial resulted from mistake, surprise or fraud. I do not say that the affidavits must shew that the verdict, if the case were tried again, must necessarily be different. One cannot judge of that until the evidence has been heard in the witness box. I do say, however, that the new evidence, if I understand the cases aright, must be evidence of such a character as to justify one in saying that the verdict cannot, in the interests of justice, be relied upon, because it was based upon mistake, surprise, or fraud. I do not believe that the Court can grant a new trial simply because there is new evidence, which was not available at the trial, unless it can also be shewn that the verdict was based on mistake, surprise, or fraud, and that another jury ought therefore to consider the matter.

The new evidence in this case does not seem to me to meet the

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above requirements. The only question to be tried was whether or not J. D. Langstaff signed the note in question. The fact of his signing is sworn to by two witnesses, W. F. Langstaff and Miss Meech. The witness Cairns was not a witness to his signature, and her evidence only went to shew that the note in question was in existence and in the possession of W. F. Langstaff later on. To impeach this witness by suggesting bias on account of her relation with Langstaff could not in my opinion materially affect the result, and for that reason I do not think that there should be a new trial.

The trial Judge has directed that the judgment against the administrator should be for payment of the amount due and costs in due course of administration according to the form suggested in *J. I. Case Threshing Machine Co.* v. *Bolton* (1908), 2 Alta. L.R. 174. I think, however, that, as the administrator did not plead *plene administravit* in his defence, he must be taken as admitting assets to satisfy the judgment. *Ruttle* v. *Rowe* (1919), 50 D.L.R. 346, 13 S.L.R. 79. The judgment should therefore follow the form referred to in that case.

The defendants Maud and Harvey Langstaff also appeal against the finding that they had intermeddled with the estate and were liable as executors *de son tort*. According to the evidence it is shewn that within a fortnight of the death of J. D. Langstaff the defendant Squirrell, at the request of the other two defendants, the son and daughter of the deceased, took charge of the estate and applied for administration. Neither of the Langstaffs dealt with any of the property belonging to the estate except under instructions from Squirrell, to whom they accounted. Squirrell was subsequently appointed administrator.

These facts do not support the finding that they were executors *de son tort*. In any event this action has been brought against them as administrators.

The appeal on this point shall be allowed with costs, and the judgment against Harvey and Maud Langstaff be set aside and judgment entered for them below dismissing the action as against them with costs.

The respondents should have their costs of this appeal against the administrator as indicated above, and the administrator should have his costs out of the estate.

Appeal allowed in part.

BOSTON BOOK Co. v. CANADA LAW BOOK Co. Ltd. ONT.

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Ontario Supreme Court, Appellate Division, Mulock, C.J.Ex., Clute, Riddell, Sutherland, and Masten, JJ. September 24, 1920.

CONTRACTS (§ II D—145)—SALE OF SET OF LAW BOOKS—150 VOLUMES MORE OR LESS—FIXED PRICE PER VOLUME—CONSTRUCTION.

By the terms of a contract the defendant company agreed to take 200 copies of each volume of a set of a reprint of English law reports (one hundred and fifty volumes more or less) reduced to 150 copies per volume (of the full set of 150 volumes more or less) at a price, etc. *Held*, that the plaintiff company was not bound to complete the set in exactly 150 volumes, and that the defendant company was liable for a reasonable number of volumes in excess of that number at the contract price per volume, and that at the time the action was brought the number of volumes in excess of 150 was not unreasonable within the meaning of "more or less" and that until it became so unreasonable as to be actionable a counterclaim for damages for breach of contract was premature.

APPEAL by defendant from the judgment of MIDDLETON, J. (1918), 44 O.L.R. 529, in an action upon a contract to purchase a number of copies of volumes of a law publication, the reprint of the English reports. Affirmed. Statement.

R. T. Harding, for appellant.

MULOCK, C.J. Ex.:—This is an appeal from the judgment of Middleton, J., in the plaintiff company's favour for $1,734.40 and costs, and dismissing with costs the defendant company's counterclaim. Mulock, C.J.Ex

The facts are as follows:—

The publishing house of William Green & Sons, of Edinburgh, contemplating the publication of a reprint of the English Reports, entered into negotiations with the plaintiff company with a view to giving them the sole agency for the sale of such reprint in the United States and Canada, but before any agreement had been entered into between William Green & Sons and the plaintiff company, the latter entered into a written agreement with the defendant company, bearing date the 5th day of June, 1900, in the following words:—

"The Boston Book Company agree to give to the Canada Law Book Company the sole Canadian market for the English Reports reprint, to be published by William Green & Sons, of Edinburgh, Scotland, first volume to appear about September 1st. They agree not to sell any copies themselves in Canada, and so far as possible to protect the Canada Law Book Company from sales in Canada by English firms or by other firms in the United States.

"The Canada Law Book Company agree to take two hundred copies of each volume of the set (one hundred and fifty volumes

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more or less) at a price of ten shillings and sixpence (10*s.* 6*d.*) per volume, bound in half roan, f.o.b. Edinburgh; payment to be made by the Canada Law Book Company on each volume three months after shipment of the volume from Edinburgh.

"In case the Canada Law Book Company should not succeed before the issue of the first volume in securing the full number of retail subscriptions to make this order, the Boston Book Company agree to reserve from shipment and charge, for six months after October 1st, a number not to exceed fifty copies, at the option of the Canada Law Book Company.

"The Boston Book Company further agree to supply any number of additional volumes at the same price, provided that the order for such volumes is given by the Canada Law Book Company before the expiration of William Green & Sons' option to the Boston Book Company."

By subsequent agreement bearing date the 19th November, 1900, made between the Boston Book Company and the Canada Law Book Company, it was agreed that "instead of 200 copies of each volume of the set the Canada Law Book Company agree to take only 150 copies (of the full set of 150 volumes more or less) and the Boston Book Company only agree to furnish 150 copies, at the price and under the conditions named in the original agreement."

By agreement in writing made between Messrs. Green & Sons, Stevens & Sons (the latter being associated with Green & Sons in the publication in question), and the plaintiff company, the latter were appointed agents for the sale in the United States and Canada of the reprint, "to be printed according to the prospectus hereto annexed," and the plaintiff company agreed to take a certain number of "copies of each volume of the reprint as issued," at the named price.

The annexed prospectus says: "It has been found as a result of these" (referring to certain initial experimental work) "that, provided sufficient interest is evoked to justify the start of this enormous undertaking, involving an expenditure of $500,000, a complete set of all the decisions from the earliest times to 1865 can be given to the profession in about 150 volumes of 1,500 pages each, at the very low price of $6 net per volume bound in half leather. The volume can be issued at intervals of less than a

month, and the set when complete will occupy actually less room than a set of the official Law Reports from 1865 to date. How this desirable result will be attained is shewn on the specimen pages enclosed." There are two specimen pages, one page indicating type of the original reports, and the other the intended type of the reprint, and between these two specimen pages is a note worded as follows:—

"The original reports again were printed on thick paper in volumes of from 500 to 600 pages, while the re-issue will be printed in volumes of about 1,500 pages each. . . . By these means from 6 to 8 volumes of the reports will be condensed into one volume of the 'English Reprints,' of the handy size, on the other side."

The publication of the reprints began; 150 volumes were printed, delivered to, and paid for by, the defendant company, when it was apparent that the number would materially exceed 150, the excess being occasioned at least partly by the fact that Moore's Indian Appeals, contrary to the terms of the prospectus, were included in the reprint, and that the average number of pages in each volume was substantially less than 1,500.

Volumes 151, 152, 153, and 154 were delivered to the defendant company and resold by them to their customers, but the company refused to pay therefor, and this action was to recover payment for these four volumes. The defendant company contend that, under the contract, they are entitled to have the complete reprint in 150 volumes, and that if the number exceeds 150 the plaintiff company are bound to supply such excess free.

During the negotiations which culminated in the contract of the 5th June, 1900, the plaintiff company shewed to the defendant company the prospectus above mentioned. Subsequently, in order to assist the defendant company in securing subscribers for the reprint, the plaintiff company furnished to the defendant company a number of copies of the prospectus, having then printed at the foot thereof the defendant company's name; but, so far as appears, the defendant company made no use of such prospectus.

The first question to determine is whether the defendant company are bound to pay for volumes 151, 152, 153, and 154.

By the terms of the contract of the 5th June, 1900, the defendant company agree "to take two hundred copies of each volume

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of the set (one hundred and fifty volumes more or less)" reduced to "150 copies per volume (of the full set of 150 volumes more or less) . . . at the price," etc.

The defendant company by their defence and counterclaim contend that the meaning of the contract, as amended, is, that a complete reprint of the original reports to be delivered to the defendant company was to number not more than 150 volumes, and that if it overran that number the defendant company were entitled to the excess free; that it has overrun that number; and, therefore, the plaintiff company are liable in damages for breach of contract.

In support of this contention the defendant company gave evidence at the trial that during the negotiations which led up to the contract of the 5th June, 1900, the plaintiff company produced to the defendant company the prospectus and sample pages and in substance agreed that the reprint would be in accordance with the representation and statements contained in the prospectus. This the plaintiff company deny. The written contract signed by the parties contains no such term. Its language is unambiguous, and no case is made for its reformation, nor do the defendant company seek reformation; and I am unable to discover any ground entitling the Court to read into the contract a term qualifying the meaning of the express language of the parties. To accede to the defendant company's contention, the Court must disregard the words "more or less," which appear in the contracts of the 5th June and of the 19th November, 1900. Even if admissible, there is no evidence that the number of the reprint volumes was to be 150 absolutely, neither more nor less. Thus there is nothing, either written or without the actual words of the contract, which would permit the Court to say that, although the parties have in each of the two contracts expressly agreed that the number of volumes may be more or less than 150, still it may reject such qualifying words. They are material, and proper effect must be given to them.

The prospectus issued by the publishers, William Green & Sons, and sent to the plaintiff company and by them submitted to the defendant company, was not then signed by the plaintiff company, who, so far as appears, had not then adopted its language. It was not until after the contract and amended con-

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tract in question had been entered into that the plaintiff company's name was printed at the foot thereof. As quoted above, the unsigned prospectus stated that it had been found that "provided," etc., "a complete set of all the decisions from the earliest times to 1865 can be given to the Profession in 150 volumes of 1,500 pages each, at the very low price of," etc. This prospectus was made part of the contract between Green & Sons and the plaintiff company, but not of the contract between the plaintiff company and the defendant company, and the implied promise to the plaintiffs contained in it to furnish a complete set of all the decisions in 150 volumes was not a term of the contract between the plaintiff and defendant companies. They each knew that the details involved in the publication were to be under the control of Green & Sons; and, therefore, it may be that the plaintiff company were unwilling and the defendant company did not require them to be bound as to the precise number, but that each party took the chance of its being 150. But, whatever be the reason, the fact is that no such term appears in the contract; both parties agreed therein, in unmistakable language, that the number of volumes constituting a complete set might not be exactly 150, but might be more or less than that number. The fact that the price fixed by the contract is a certain sum per volume, and not a bulk sum for the complete set, furnishes an argument against the defendant company's contention.

For these reasons, I am of the opinion that under the terms of the contract the defendant company are bound to pay for 150 volumes more or less, and that the learned trial Judge rightly disposed of the plaintiff company's claim.

As to the counterclaim, the defendant company suggest that the number of volumes constituting a complete set of the reprint may greatly exceed 150, and claim damages because of such anticipated excess. Until such excess is actually determined, it is impossible to say whether it is so unreasonable as to be actionable, and, if so, to what extent. I therefore think that the defendant company's counterclaim is premature, and should be dismissed with costs, but that there should be reserved to the defendant company the right to maintain an action for damages in the event of the excess being so unreasonable as to give the defendant company a cause of action.

The appeal should be dismissed with costs.

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CLUTE and SUTHERLAND, JJ., agreed with MULOCK, C.J. EX.

MASTEN, J.:—In this case I have had an opportunity of perusing the judgment of my Lord the Chief Justice, and I agree with him that in the result this appeal must be dismissed; and, in view of the opinions expressed in this Court, the defendant must be free to assert hereafter the claim now put forward by way of counterclaim, unprejudiced by the opinions now expressed. But, as I reach my conclusion on grounds somewhat different from those expressed by my Lord, it is perhaps desirable that I should state my views.

The questions at issue in this action arise out of a written contract dated the 5th day of June, 1900, made between the plaintiffs and the defendants for the purchase of a set of volumes to be thereafter printed and published by a third party.

Of this set, 150 volumes have been received and paid for by the defendants; volumes numbered 151, 152, 153, and 154 have been delivered to the defendants and resold by them. The plaintiffs' action is for the price of these four volumes so sold and delivered. The defendants allege by way of defence that, under the contract, they are entitled to receive these volumes without further payment. In the alternative the defendants counterclaim for damages to the amount of $20,000 for breach of contract.

The disposition of the defendants' counterclaim raises the more difficult and important questions, and, in the view which I take of the case, involves the disposition of the plaintiffs' claim. I, therefore, proceed in the first instance to consider the questions raised by the counterclaim.

The first question that arises is as to the admissibility in evidence of the negotiations which took place and of representations made (including a certain prospectus prepared by the Scotch publishers) anterior to the signing of the contract, and as to the legal effect, if any, to be given to those negotiations and representations.

The second question is whether the words of the contract "150 volumes more or less," read in the light of whatever evidence is admissible to explain them, are to be construed as a warranty that the total number of volumes to be supplied by the plaintiffs and paid for by the defendants shall not exceed 150 more or less.

Subsidiary to the second question there arises a third point as to the admissibility of correspondence between the parties sub-

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sequent to the contract for the purpose of construing the contract in the light of the interpretation placed upon it by the parties themselves.

With respect to the first question, viz., what preceded the contract, I observe that the defendants' counterclaim is for breach of contract. It is not an action of deceit, for false representation, nor is it an action for rescission on equitable grounds of misrepresentation, nor is it an action to reform the contract. In such actions the negotiations and representations preliminary to the contract would of course be admissible, but that is not this case. The counterclaim is on a contract. I am not sure whether or not the defendants seek to found their counterclaim on a collateral independent contract outside the written agreement; but, if they do, I think the evidence fails entirely to meet the test prescribed by Lord Moulton in *Heilbut Symons & Co.* v. *Buckleton*, [1913] A.C. 30, where he says (at p. 47):—

"Such collateral contracts, the sole effect of which is to vary or add to the terms of the principal contract, are therefore viewed with suspicion by the law. They must be proved strictly. Not only the terms of such contracts but the existence of an *animus contrahendi* on the part of all the parties to them must be clearly shewn."

See also *Canadian General Securities Co.* v. *George* (1919), 59 Can. S.C.R. 641, 52 D.L.R. 679, decided in the Supreme Court of Canada, reversing the judgment in (1918), 42 O.L.R. 560, 43 D.L.R. 20, where the same rule is applied.

The first point is thus reduced to a question of how far the preliminary negotiations and representations, including the prospectus, are admissible in evidence to construe the written contract.

It is to be borne in mind in this connection that the contract between the parties to this action was made on the 5th June, 1900, in anticipation of a contract between the plaintiffs and the British publishers, which did not eventuate in a formal agreement until the 17th May, 1901. Further, it must also be borne in mind that the prospectus now under discussion was issued prior to the 5th June by the British publishers; and while, on the 5th June, 1900, it was by the plaintiffs brought to the attention of the defendants,

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it is evident that the defendants knew as much about it on that date as the plaintiffs. It was in fact a representation not of existing facts but of an intention; also it was a representation, not of the intention of the plaintiffs, but of what the British publishers had told the plaintiffs they proposed to do. Such representations regarding the future are well discussed by Pollock in his work on Contracts, 8th ed., p. 558 and top of p. 559:—

"If, on the other hand, the statement is of something to be performed in the future, it must be a declaration of the party's intention unless it is a mere expression of opinion. But a declaration of intention made to another person in order to be acted on by that person is a promise or nothing. And if the promise is binding, the obligation laid upon its utterer is an obligation by way of contract and nothing else: promises *de futuro*, if binding at all, must be binding as contracts. There is no middle term possible. A statement of opinion or expectation creates, as such, no duty. If capable of creating any duty, it is a promise. If the promise is enforceable, it is a contract. The description of promise or contract in a cumbrous and inexact manner will not create a new head of law. 'There must be a contract in order to entitle the party to obtain any relief.'"

In the present case the plaintiffs allege that the prospectus was incorporated in and formed part of the contract. The defendants do not admit, and therefore deny, that allegation. I can find no words in the contract either expressly or by implication incorporating into it the prospectus.

The well-known rule is that: "To interpret a contract the circumstances and grounds upon which the contract was entered into may be looked at:" Beal, 2nd ed., p. 123.

The limitations on this rule are well illustrated by the leading case of *Inglis* v. *Buttery* (1878), 3 App. Cas. 552. The head-note in that case is as follows:—

"A firm of shipbuilders agreed to lengthen and repair an iron steamship; the object being that she might be classed 100 A 1 at Lloyd's. The specification forming part of the contract contained this stipulation, 'Iron work:—The plating of the hull to be carefully overhauled and repaired, *but if any new plating is required the same to be paid for extra* (fourteen words deleted, signed A. and

J. I., D.G.). Deck beams, ties, diagonal ties, main and spar deck stringers, and all iron work, to be in accordance with Lloyd's rules for classification:'—

"*Held*, affirming the decision of the Court below, that the shipbuilders were bound to supply without extra charge any new plates required to enable the vessel to be classed 100 A 1 at Lloyd's; and that neither the letters of the parties before the contract was signed, nor the initialed deleted words in the contract, could be considered for the purpose of interpreting the intention of the parties."

Lord Blackburn, at p. 576, says:—

"Now, my Lords, as to the £1200, upon which I think the decision of the Court of Session was right, although I think it my duty to state distinctly that in my opinion the reasons upon which the Lord Justice Clerk mainly relied were not good reasons for the judgment. He lays down a principle which is not quite accurate. He says that in all mercantile contracts, 'whether they be clear and distinct or the reverse, the Court are entitled to be placed in a position in which the parties stood before they signed;' and that he applies, so as to say that you are entitled to look at all that they said and did during the time of the communings, as they are called in Scotland; that is to say, whilst the matter was in negotiation, as it is more generally called in England, because unless you look at all those things you cannot be in the position in which the parties were, and he takes the document, in which there is a deletion, and looks at the deleted sentence, which in my mind is merely a communing. I cannot think that that is correct.

"I think that Lord Ormidale, who comes to the same conclusion, comes to it upon right grounds. He says that you are entitled to look at the surrounding circumstances to a great extent, but not at the communings, and he therefore says, I have been 'examining the proof and correspondence and taking the benefit of such aid as it affords. I have endeavoured to eliminate and disregard everything except those circumstances which can be fairly and legitimately comprehended by the expression "surrounding circumstances" in its legal sense.' That, I apprehend, is perfectly right and sound."

At p. 572, Lord O'Hagan says:—

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"I need say no more than has been said already as to the impossibility of allowing the class of evidence of what is called 'communings,' that is to say, negotiations, to be admitted at all, whether those negotiations or 'communings' occurred before the contract was completed or afterwards."

And Lord Hatherley, at p. 569, says:—

"When I turn to the deleted words, and find that in spite of a line being drawn through them I can read the words, which words, being fourteen in number, are these: 'but if any new plating is required the same to be paid for extra,' it appears to me that, those words having been deleted, and a marginal note affixed shewing that they were deleted before the contract was finally concluded, it is not in the power of any Court to look at words, which have been so dealt with and absolutely taken out of the contract, for any purpose whatever connected with the construction of that contract of which they form no part whatsoever."

The principles relating to the admissibility of extrinsic evidence are elaborately discussed in Phipson's Law of Evidence, p. 544, and six rules are laid down and cases are cited as examples indicating when and where such evidence may be given, but none of them appears to me to admit the representations here in question. I think that evidence is admissible of the circumstance that it was to be published, and the circumstance that it was to be published in Edinburgh by a third party is admissible, also that the plaintiffs had no bargain with the publisher; but I fail to see that any representations made at that time limiting the set to 150 volumes are admissible to extend or add to the words of the contract, "150 volumes more or less."

I turn now to the third point mentioned above, viz., the admissibility of the correspondence which took place between the parties after the contract had been entered into and had been partially performed.

That point was raised and was fully argued and carefully considered in the case of *Lewis* v. *Nicholson* (1852), 18 Q.B. 503. 118 E.R. 190. A contract having been made by correspondence, a question arose as to whether its terms could be extended by subsequent correspondence between the parties. The case was argued before Lord Campbell, Wightman, J., Erle, J., and Crompton, J. Lord Campbell says, at p. 510:—

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"I am clearly of opinion that we cannot look to subsequent letters to aid us in construing the contract. It is always legitimate to look at all the co-existing circumstances, in order to apply the language, and so to construe the contract; but subsequent declarations shewing what the party supposed to be the effect of the contract are not admissible."

Wightman, J., says (p. 512): "Now I think that, if we look only at the legitimate evidence of the contract, there is no ambiguity at all. It all depends on the two letters; these formed the complete contract; and no subsequent statements written or verbal can have any effect on the construction of the contract already complete."

See also the statement of Erle, J., to the like effect in the same case, as reported in 21 L.J. (Q.B.) 311, at p. 317.

A like statement of the law is given by Farwell, J., in *Bruner* v. *Moore*, [1904] 1 Ch. 305, at p. 310.

It is, no doubt, a sound rule of legal interpretation that the acts of the parties done under a contract can be looked at to ascertain the intention, if the words of the contract are ambiguous, or to shew that the contract does not express that which the parties intended to express in it. But the acts of the parties done under the contract are one thing, and declarations and admissions contained in correspondence are quite another thing. All that one finds in the present case with regard to the acts of the parties, as distinguished from their written statement, is that the volumes up to 150 were accepted and paid for at the price named in the contract, and that the four succeeding volumes were accepted and not paid for.

The intention of the parties as contained in the correspondence does not seem to me to be admissible.

Turning now to the contract itself, the counterclaim before us is based on the following clause in the agreement:—

"The Canada Law Book Company agree to take 200 copies of each volume of the set (150 volumes more or less) at a price of 10*s.* 6*d.* per volume, bound in half roan, f.o.b. Edinburgh; payment to be made by the Canada Law Book Company on each volume three months after shipment of the volume from Edinburgh."

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The question is: do the words "150 volumes more or less" constitute a warranty that the set will be complete in 150 volumes, or are they surplusage? I think they are neither the one nor the other.

The bargain was for the set. Both parties expected it to contain about 150 volumes. They believed the estimate or forecast contained in the prospectus issued by the British publishers, but not one single volume had been printed or published. It was not an existing set of 150 volumes. The plaintiffs had no contract with the British publishers, and did not get one for a year, and so the bargain is for the set of 150 volumes more or less; and the phrase "more or less," under these circumstances, is to be construed in its widest and most extended sense so as to cover not two or three or four more volumes but a very much larger number if the set contained that many.

I think that the parties contracted, having in view this very circumstance, with the intention of making the contract relate to the whole set, whatever it might be, they being unable, with the information then before them, to describe the subject-matter otherwise than in the most elastic form.

That being my view of the contract as drawn, I think that no foundation is laid for importing extrinsic evidence in order to extend or modify the words of the contract, either by evidence of prior negotiations or by evidence of subsequent communications. Much less can I see grounds in this for adding to the contract a warranty which is not expressed in it.

For these reasons, as well as for reasons stated by the learned trial Judge, I would dismiss the appeal with costs.

Riddell, J.

RIDDELL, J., (dissenting in part):—This is an appeal from the judgment of Mr. Justice Middleton in favour of the plaintiffs, reported (1918), 44 O.L.R. 529.

William Green & Sons, a publishing firm in Edinburgh, Scotland, proposed to publish an edition of the English Reports up to 1865; and prepared a prospectus containing their proposed scheme. They entered into business relations concerning this reprint with the plaintiffs, a company carrying on business in Boston, Mass.; and the plaintiffs sent their agent Soule to make a contract with the defendants, arming him with a copy of the

prospectus for that purpose. Soule produced to Cromarty, acting for the defendants, the prospectus, and a contract was entered into in the following terms:—

"Memorandum of Agreement between the Boston Book Co. of Boston, U.S.A., and Canada Law Book Co. (R. R. Cromarty sole proprietor) of Toronto, Canada.

"The Boston Book Company agree to give to the Canada Law Book Company the sole Canadian market for the English Reports reprint, to be published by William Green & Sons, of Edinburgh, Scotland, first volume to appear about September 1st. They agree not to sell any copies themselves in Canada, and so far as possible to protect the Canada Law Book Company from sales in Canada by English firms or by other firms in the United States.

"The Canada Law Book Company agree to take two hundred copies of each volume of the set (one hundred and fifty volumes more or less) at a price of ten shillings and sixpence (10*s.* 6*d.*) per volume, bound in half roan, f.o.b. Edinburgh; payment to be made by the Canada Law Book Company on each volume three months after the shipment of the volume from Edinburgh.

"In case the Canada Law Book Company should not succeed before the issue of the first volume in securing the full number of retail subscriptions to make this order, the Boston Book Company agree to reserve from shipment and charge, for six months after October 1st, a number not exceeding fifty copies, at the option of the Canada Law Book Company.

"The Boston Book Company further agree to supply any number of additional volumes at the same price, provided that the order for such volumes is given by the Canada Law Book Company before the expiration of William Green & Sons' option to the Boston Book Company.

"The Boston Book Co.
"per Charles C. Soule, Pres.
"Canada Law Book Co.
"R. R. Cromarty, Manager.
"Toronto, June 5th, 1900."

This agreement has been called an agency agreement; but it is obviously a contract of sale and purchase, with an undertaking that the vendors shall protect the purchasers' market as far as possible, by themselves staying out and keeping others out to the best of their ability.

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A few months later, the agreement was modified by the following agreement:—

"Memorandum of agreement between the Boston Book Company of Boston, U.S.A., and the Canada Law Book Company (R. R. Cromarty sole proprietor) of Toronto, Canada.

"The agreement between us dated June 5th, 1900, in regard to the agency and sale in Canada of the English Reports reprint, to be published by William Green & Sons, of Edinburgh, Scotland, is hereby modified by mutual agreement:—

"Instead of 200 copies of each volume of the set the Canada Law Book Company agree to take only 150 copies per volume (of the full set of 150 volumes more or less) and the Boston Book Company only agree to furnish 150 copies, at the price and under the conditions named in the original agreement.

"Signed Nov. 19, 1900. The Boston Book Co.,
"per Charles C. Soule
"President."

In view of the dispute which subsequently arose and which is the cause of the present action, it should be mentioned that the prospectus stated that "careful calculations and experiments have been made" and "it has been found as the result of these that . . . a complete set . . . can be given . . . in about 150 volumes of 1,500 pages each;" and it further said, "How this desirable result will be attained is shewn on the specimen pages enclosed." "Specimen pages" are given, and it is admitted that, using such pages as are given, the whole work would have been completed in 150 volumes of 1,500 pages each. The difficulty has arisen through the dishonesty of the publishing firm—a firm of supposedly high character—in reducing the number of pages in many of the volumes much below 1,500.

A number of copies of the publishers' prospectus were delivered by the plaintiffs to the defendants for their use in effecting sales, but the defendants did not use them, and they seem to have been returned. The defendants sold a large number of sets throughout Canada.

The first matter calling for comment is that in 1902 the publishers, whose prospectus was for the publication of the Privy Council Reports in 6 volumes, after publishing volumes 12-17 of the series, and thereby completing the Privy Council Reports ordin-

arily referred to, added three volumes, 18-20, of Indian Appeals, not, it is said, contemplated in the original proposition. This, the plaintiffs say, was due to Stevens & Sons, whose name appears with Green & Sons as publishers, owning the copyright, and that they "were unwisely grasping in extending these additional volumes to three reprint books, when they could easily have been put into two at most, or even by maintaining the size of the early volumes consistently these additions could have been so combined as to make only one extra volume beyond original announcement" (letter May 21, 1902). When we see that volumes 12-17 have an average of 820 pages only, 4,960 pages in all, and volumes 18, 19, and 20 have 999, 1099, and 926 respectively, an average of 1,008 pages, 3,024 pages in all, the truth of the statement just referred to is manifest. The total paging of the Privy Council Reports is 7,984 less than 6 volumes of 1,500 pages each.

The plaintiffs themselves had sold to certain of their own customers, explicitly stating that there were 150 volumes in the set, and they informed the defendants that they did not know whether the publishers would later make up for these three volumes by shortening the others in some mechanical way, but they did not anticipate any "serious or numerous complaints at 153 instead of 150" books; they cannot explain the circumstances "other than Stevens & Sons overreaching themselves and wanting the subscription for the three *extra* books to pay for their copyright on original volumes."

The explanation was accepted by the defendants (see letter September 28, 1094), apparently on the assurance that overrunning would not occur again (see letters July 18, Aug. 15, and Nov. 13, 1902, from the plaintiffs); and, if there were no other ground of complaint, the defendants could not be heard as having an honest claim.

But much more was to follow—the plaintiffs' president informed the defendants: "I think Green said he had found that volumes of the average of 1,200 pages would bring the whole series of the reprint into 150 volumes" (letter Nov. 13, 1902); and the volumes thereafter issued ran almost all to not more than 1,200 pages, some indeed very much less.

The volumes continued to arrive—to save expense, duty, etc., the plaintiffs directed delivery to the defendants by the publishers.

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Complaints were made by the defendants, but they accepted and dealt with the volumes sent. At length, from letters from the customers of the defendants, it became obvious to them that the work could not be completed in 150 volumes, and they wrote to the plaintiffs (April 29, 1907): "This is to notify you that our contract calls for the work to be completed in 150 volumes, and we must insist upon it being adhered to. If there should be any additional volumes, we will call upon you to supply them free of charge, as we proposed supplying to our subscribers as per our undertaking." The plaintiffs answered: "If you will kindly refer to your contract with us you will see that . . . your letter is not correctly stated. The number of volumes in the set is not stated absolutely, but qualified. The language used in the original prospectus was to the effect that the set could 'be given to the profession in about 150 vols'" (letter May 7, 1907). Apparently this was immediately after the delivery of vol. 71 with 944 pages and vol. 72 with 1,017. The answer (May 11, 1907) points out that "about" might cover two or three additional, "but, when you advertise in the original prospectus the five series now published will occupy 60 volumes and really take 71, you will have some difficulty in explaining the discrepancy," and the representation in the prospectus of the volumes being of "1,500 pages each" is brought to the plaintiffs' attention. There the correspondence ceased as far as appears.

In October, 1904, the defendants again complain, and an estimate by one of their customers that the number of volumes would be 195, instead of 150, was sent in with the statement: "Our contract with you is that the work will be complete in 150 volumes more or less. This would allow in law a latitude of two or three volumes at least" (apparently a slip for "at most"). "We now serve notice on you that we will enforce our contract as regards the number of volumes to complete the work. If they exceed more or less over the 150 volumes these will have to be supplied by you to us without charge" (letter October 7, 1909); to this no reply was made.

The volumes continued to be sent to the defendants, and they paid for them up to vol. 150—up to that volume the average page-matter is said to be 1,292 (86 per cent. of 1,500). Volumes 151,

152, and 153, of 1,316, 1,462, and 1,460 pages, have been also delivered to the defendants and to their customers, but for these they refuse to pay.

This action is brought for the price of these volumes and other goods—the real controversy, so far as the plaintiffs' claim is concerned, being over these three volumes.

The position taken by the parties makes the appeal hopeless so far as this matter goes. The defendants contend: "We took the contract to receive and pay for 150 volumes more or less—you have satisfactorily explained an increase of three volumes, we therefore receive 153 volumes, but we expect you to send us the remainder of the series gratis." The plaintiffs say: "We supplied you with 153 volumes, these you took and made your own, and you must pay for them;" and they are judiciously silent as to the balance.

In any view, the defendants cannot escape paying for the volumes 151, 152, and 153, and in that respect the appeal should be dismissed. But it is obvious that this is a very minor matter; the main dispute is on the counterclaim. The defendants claim that it is a term of the contract that the work shall be completed in 150 volumes more or less—that the plaintiffs knew that the reprints were to be sold by the defendants, that they supplied them with circulars containing the representations to use in the sale to their customers, that these representations were naturally made by them to their customers, as the plaintiffs knew they would be, and that they have suffered damage.

The first thing to be done is to determine what is the contract.

In determining the meaning of a contract we are often "to look to the words of the instrument and to the acts of the parties to ascertain what their intention was:" *per* Tindal, C.J., in *Doe dem. Pearson* v. *Ries* (1832), 8 Bing. 178, at p. 181, 131 E.R. 369. "We may look at the acts of the parties also; for there is no better way of seeing what they intended than seeing what they did:" *per* Tindal, C.J., in *Chapman* v. *Bluck* (1838), 4 Bing. (N.C.) 187, at p. 193, 132 E.R. 760. "A written instrument was produced . . . to shew the nature of the contract . . . and we are to interpret that instrument like all others, according to the intention of the parties:" *per* Tindal, C.J., in *Budd* v. *Fairmaner* (1831), 8 Bing. 48, at p. 51 and *per* Bosanquet, J., at p. 53. (131 E.R. 318).

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Moreover, "a representation made in the course of negotiations for a contract may amount to a condition or warranty. Whether it does so or not depends upon whether it was intended by the parties to form part of the contract:" Halsbury's Laws of England, vol. 7, p. 521, para. 1046, and cases cited in note (*o*). To shew whether a representation is or is not a warranty "the jury ought . . . to hear what the parties said to each other, what is their conduct, and what has passed between them . . . That would shew what was their real intention . . . :" *Stucley* v. *Baily* (1862), 31 L.J. (Exch.) 483, at p. 488, 1 H. & C. 405, at p. 414.

In the present case there can be no doubt that the plaintiffs, however innocently, represented that the series could be completed in "about 150 volumes of 1,500 pages each;" that on that representation the contract was entered into, which contains the statement that the set is "150 volumes more or less"—the only question is whether the plaintiffs are bound by the representation as a warranty. What was the intention of the parties? That to my mind is shewn by their conduct, their own words—the defendants say, "Our contract calls for the work to be completed in 150 volumes:" the plaintiffs do not deny that the contract calls for the completion of the work in a certain number of volumes, but they say: "The number of volumes in the set is not stated absolutely but qualified." It seems to me that both parties understood and intended the statement in the contract "150 volumes more or less" as a warranty that that should be the number of volumes completing the work.

The defendants are entitled to damages for breach of this warranty. By the plaintiffs undertaking to supply the remaining volumes gratis these damages will be much diminished, otherwise they may be difficult to estimate.

In the absence of an agreement between the parties, there should be a reference to the Master to fix the damages, once for all—the amount of the plaintiffs' judgment should be paid into Court to await the result of the reference.

Success being divided, there should be no costs of action or appeal; costs of the reference should be in the discretion of the Master.

Appeal dismissed.

FREDERICTON MOTOR SALES Ltd. v. THE EARL OF ASHBURNHAM. N. B.

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New Brunswick Supreme Court, Appeal Division, Hazen, C.J., White and Grimmer, JJ. November 19, 1920.

NEW TRIAL (§ III B—16)—ANSWERS RETURNED BY JURY SHEWING CONFUSION AND UNCERTAINTY.

Where the answers returned by a jury to questions submitted to them at a trial shew, beyond doubt, confusion and uncertainty which led to the very apparent inconsistencies in their answers, there should be a new trial.

MOTION by defendant, appellant, to set aside verdict for plaintiff and to enter a verdict for defendant, or for a new trial. New trial ordered. Statement.

P. J. Hughes, for appellant; *J. B. M. Baxter*, K.C., for respondent.

The judgment of the Court was delivered by

GRIMMER, J.:—This action was brought to recover the sum of $3,850 for goods sold and delivered, and for $143.47 on a special contract for work and labour, and was tried at the York Circuit Court in January last, before Crocket, J., and a jury, a verdict being entered for the plaintiff for $3,993.47, the amount of the claim. It appears to have been admitted that if the defendant was liable the sum stated was the correct amount of his liability. The defence substantially was formal, putting the plaintiff to the proof of the allegations in the statement of claim, but it also alleged that the subject of the action, a motor car called or known as a limousine, was not furnished or equipped according to contract; that it was not built with care and first-class workmanship; could not be used with comfort for want of sufficient room, and was dangerous to operate; that many of the accessories were not supplied; that the car was so negligently built it was of no value and was useless, and that the defendant was induced to enter into the contract through fraud of the plaintiff. The last statement, however, was in no wise substantiated. Grimmer, J.

The plaintiff is the agent for the Willys-Knight and Chalmers motor cars. In March, 1919, its agent called at the defendant's residence for the purpose of selling him a car, and finding him absent left a catalogue of each motor company. Shortly after the manager of the company by arrangement met the defendant at his home and after an interview between the parties during which Lady Ashburnham was present, and after considering the catalogues and the statements and representations of the plaintiff's manager, the following contract was duly entered into between the parties:

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FREDERICTON MOTOR SALES, LTD.

Sirs:—

You are authorized to enter my order for 1 Chalmers Limousine Automobile, upon the following terms and conditions: 1. The price to be forty-eight hundred and fifty dollars ($4,850.00). I agree to pay one thousand dollars ($1,000.00) upon your acceptance in writing of this order, and the balance of thirty-eight hundred and fifty dollars ($3,850) within forty-eight (48) hours after I have been notified by you that the above automobile is ready for delivery. The same to be delivered f.o.b. F'ton. 2. I agree to accept automobile from you immediately upon notice that it is ready for delivery. Upon my failure to do so within forty-eight (48) hours you may dispose of it to another customer or in any way you desire, and you are not to be held liable for failure to deliver to me, the above mentioned first payment to be forfeited by me at your option. 3. It is agreed that this automobile will be finished and equipped as per regular specifications, and any and everything else furnished beyond said specifications shall be extras, to be paid for by me at schedule prices as shewn on this agreement in paragraph below marked "Extras." 4. This order is given by me subject to your acceptance, and when approved by a duly authorised executive officer of Fredericton Motor Sales, Ltd., from whom ordered, it shall constitute a valid contract and shall be binding between us. 5. It is further agreed that this automobile is purchased by me exclusively subject to the terms and provisions of the warranty made by the manufacturers thereof which is hereby made a part of the contract between us and that this is the only guaranty and warranty, either express or implied, made under this contract.

Manufacturers' Warranty.—We warrant the motor vehicles manufactured by us for ninety days after the date of shipment, this warranty being limited to the furnishings at our factory of such parts of the motor vehicle as shall, under normal use and service, appear to us to have been defective in material and workmanship.

This warranty is limited to the shipment to the purchaser, without charge, except for transportation, of the part or parts claimed to have been defective, and which, upon their return to us at our factory for inspection, we shall have determined were defective, and provided the transportation charges for the parts so returned have been prepaid.

We make no warranty whatever in respect to tires or rims, electric apparatus, or other accessories, or parts not manufactured by us.

The condition of this warranty is such that if the motor vehicle to which it applies is altered or repaired outside of our factory our liability under this warranty shall cease.

6. Extras: Coronet on doors. Special painting as agreed. Special painting to be extra. Spare tire included in above and electric cigar lighter. 7. The above is a full agreement of every kind and nature pertaining to this sale, and no agreement will be recognized other than embodied herein, and no erasures or additions will be recognized unless approved of in writing hereon by a duly authorized executive officer of the company.

Signed Ashburnham

Address.....

Witness:

.....

Approved for Fredericton Motor Sales, Ltd.

By (Sgd.) J. Stewart Neill.

Upon the execution of the contract the defendant paid the plaintiff $1,000 on account of the purchase price of the car, but no cross-action or counterclaim was taken or made for this sum, which it would seem might very properly have been done in view of the defendant's attitude in his defence to the action. "The regular catalogue specifications" referred to in para. 3 of the contract, to which particular reference was made during the trial, appear on pages 10 and 14 of the Chalmers catalogue as used at the trial but are too long to be set out, and in fact are not necessary to be related for the purposes of this judgment. There were, however, some extras under the contract, consisting of special painting and upholstering, which were specially priced and included in the verdict. The Court left the following questions to the jury, which with their answers are as follows:—

1. Was the defendant induced to sign the written contract by Mr Neill's assurance that there would be ample room in the Chalmers limousine for six passengers to ride comfortably? A. Yes. 2. Was there ample room in the limousine which the plaintiff company delivered to the defendant for six passengers to ride comfortably? A. Yes. 3. Was there room for three good-sized persons to ride comfortably in the rear seat? A. Yes. 4. Were the curtain and window regulator in proper workable condition? A. Yes. 5. Were double dome lights provided, operated by a button switch, which light automatically with the opening of the doors, and light the interior and step on entrance and exit? A. Yes. 6. Was a proper dictaphone provided? A. No. 7. Did the top properly fit the chassis? A. Yes. 8. Were the windows properly fitted? A. Yes. 9. Was the limousine built with care and first-class workmanship? A. Yes. 10. Was the defendant, after he discovered the defects of which he complained to Mr. Neill, induced by any representations of Mr. Neill to retain the car until the missing accessories arrived? A. Yes. 11. Was it agreed and understood between the defendant and Mr. Neill after the defendant complained of the defects stated by him and of the non-delivery of the accessories, that the defendant should have the right to retain and use the car for the purpose of further trial. A. Yes. 12. Did the defendant return the car within a reasonable time? A. No. 13. Did the defendant, after receiving the car on June 14th, make any further use of it than was reasonably necessary for the purpose of making an examination and fair trial of it to see if it fulfilled the conditions of the contract? A. Yes.

The plaintiff also presented six questions, which with their answers are:—

1. Was the defendant induced to enter into the contract by the fraud of the plaintiff's officers? A. No. 2. If so, in what did the fraud consist? 3. Was the car to be specially built for the defendant, or was it to be specially finished? A. Specially finished. 4. If you say it was to be specially finished, was it in point of fact specially finished in accordance with the contract?

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A. Specially finished per contract. 5. Did the defendant accept the car as turned over to him and agree that the missing accessories should be put in later? A. Yes. 6. Did not the defendant, by retaining the car for two weeks and by driving it over 600 miles, evidence his intention of accepting the car? A. 5 yes, 2 no.

Upon the answers to these questions the Court ordered a verdict to be entered for the plaintiff as stated, against which the defendant appeals upon the following grounds:

1. The contract was an entire one for the car and accessories and cigar lighter. Part of the equipment was not delivered or tendered to the defendant, and the defendant had the right to refuse to take delivery of anything less than the contract called for, and he did refuse to take delivery of it. 2. The defendant never accepted the car. It was sent to him, and after he had examined it he proposed to return it as not being satisfactory, and plaintiff induced him to keep it for further trial and until the accessories came. The accessories did not come, and after further trial and after finding further defects, he sent the car back to the plaintiff. 3. The defendant in giving the order for the car, expressly relied upon the plaintiff to furnish a car which would provide plenty of room for six passengers and a chauffeur, and it was agreed that if it was not satisfactory, plaintiff was to take it back. The car was not satisfactory to defendant, and he returned it. 4. The findings of the jury are against evidence and the weight of evidence. 5. The verdict is against law. 6. The verdict is against evidence. 7. The verdict is against the weight of evidence. 8. The answers of the jury are inconsistent one with the other. 9. Misdirection of the learned Judge,

moving that the verdict entered for the plaintiff be set aside and verdict be entered for the defendant, or for a new trial.

It was contended on behalf of the defendant that the contract was an entire one for an automobile equipped as described in the Chalmers catalogue, with an electric cigar lighter in addition to other accessories, and that the defendant had the right to refuse to accept any other than a complete performance of the contract, which never was fully performed. That many of the accessories were not in the car when it was delivered to the defendant, and were never tendered to him. In fact, that they were not received by the plaintiff until after the car had been returned. That the cigar lighter was not attached and was useless; that the windshield was not finished; that the dictaphone, a most important article in the car, was defective and would not work; that there were other defects rendering the car at the time of trial not fit for delivery, and that the plaintiff cannot recover unless the defendant waives his rights and accepts an incomplete car in performance of the contract.

The plaintiff contended the contract was not an entire one, and the failure to supply the accessories was to be treated not as a condition conferring a right to treat the contract as subject to repudiation, but rather as a warranty, the breach of which carried damages. There was an express agreement in the contract by the defendant to accept the car immediately upon notice that it was ready for delivery. It does not, however, appear that this notice ever was given. The car reached Fredericton on a Friday and was delivered to the defendant on Saturday morning for trial. It was driven several hours that day, was not taken out on Sunday, but the defendant, according to his evidence, took the car down to Neill's shop on Monday, Neill being the manager of the plaintiff company, and the person who had sold the car to the defendant. That he saw Neill outside his shop on Queen street and pointed out to him the car was not "the least bit" the one he had ordered. That there was no room in it; that the steering wheel was so placed there was no room for the chauffeur; that there was no room in the tonneau; that there was no clock nor cushions, and the cigar lighter was not fitted; that the top made the car top-heavy, and the hood over the engine did not fit tight. That he then asked Neill if he thought the car was satisfactory, who replied, "Yes, quite satisfactory," and the defendant said, "Then you better keep it," to which Neill replied he hoped he would not make him do that, is it would be a great loss to him. The defendant also pointed out that the windows rattled, and after some further conversation, said he would keep the car for further trial until the rest of the equipment came.

Mr. Neill differs as to the time of this conversation; stating that it was a day or two before the car was returned, and not the Monday following the delivery, but he does say that defendant came to him and asked him if he thought the car was satisfactory, to which he replied he thought it was, and the defendant then told him if he thought so he had better keep it. Neill also says the defendant as that time pointed out the different things that were wanting about the car, under the contract. On his re-examination Neill gives the version of the conversation so far as taking the car back is concerned, as follows:

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Q. Just tell us what conversation took place with reference to taking the car back on that occasion between you and him? A. The day he met me at the store? Q. Yes? A. He drove down to the store and in his usual way he says, "Neill what do you think of the car?" I said, "It is all right, I think it is a very nice car." He said, "If you like it so well, how would you like to have it back?" I said, "What do you mean?" Then he went on to say it was not satisfactory and I would have to take it back. I said I simply could not take it back because it was a special order, special painting for him, had his coronet on the door and was a limousine car, not in demand in Fredericton. I could not dispose of it.

While no reference is made to the matter in the contract, a great deal of evidence was given as to the roominess of the car, two questions in respect to which were left by the Court to the jury, but the findings are absolutely against the evidence, which is practically all one way, and could not be sustained were it not perhaps for the fact that the jury viewed the car and may have based the answers on such view, in disregard of the evidence. This, in view of the fact that defendant's witnesses all testified to the discomfort in riding in the car by reason of the want of room in the tonneau when the auxiliary seats were up, and the jury only saw the car when it was idle in the garage, would detract very largely from the answers, even if it could be held to justify them on the ground of being such, under the evidence, as reasonable men ought to find. There is no doubt, however, but defendant was induced to enter into the contract by the representations of the plaintiff's manager, Neill, that there was plenty of room in the tonneau for five persons to ride comfortably, and that he would stand behind the car, and the motor company would stand behind him.

Upon the argument of the appeal it appeared to me that the matters involved were simply questions of fact which the jury had disposed of, but a careful examination of the evidence and study of the case has created such doubt in my mind as to the results of answers to the questions and the method by which these were arrived at, that I am of the opinion there should be a new trial. The contract was an entire one, covering the car and accessories named, for which a stated price was to be paid. A cigar lighter which was not attached to the car, and so was useless, alone of all accessories was delivered with the car. And the defendant, while he enjoyed the right of trial and examination, also had the right to refuse to take delivery of anything less than

the contract called for, and I was satisfied from the evidence he never accepted or intended to accept the car. If the property in the car passed, that would end the controversy, but did it pass? The fact is the car was delivered without the accessories, and after a short trial and examination the defendant proposed to return it as being unsatisfactory and not up to contract, telling the plaintiff's manager he better keep the car, but he was induced, and the jury so find, to keep it for further trial until the accessories had arrived, which apparently did not arrive until after the car had been returned by the defendant some two weeks after its delivery to him, so I am not able to convince myself the defendant ever accepted the car or that the property passed.

Further, there is the evidence as to the room in the car, and that the plaintiff agreed if it was not satisfactory in this respect, it would take it back, so that taking all this evidence together it is hard to find justification for the answer of the jury to the question of the acceptance of the car. In some respects the answers of the jury are also inconsistent; in so much as to lead me to the conclusion there was at least some infusion in their minds, possibly from the nature of the questions themselves, which resulted in findings indicating very clearly a failure to understand the effect or result of the answers as given. By questions 10 and 11 of the Court the jury find that the defendant after he discovered defects in the car which he pointed out to Neill was induced by representation of Neill to retain the car until the missing accessories arrived, and that it was understood and agreed between the defendant and Neill, after the defendant complained of the defects stated by him, and the non-delivery of accessories, that the defendant should have the right to retain and use the car for the purpose of further trial. By their answer to Q. 5, submitted by counsel for plaintiff, the jury say the defendant accepted the car as turned over to him, and agreed that the missing accessories should be put in later.

I cannot find it possible the defendant could at the same time and by the one act accept the car so that the property passed to him, and also take or be given possession or delivery of it for the purpose of further trial or trial only. It is impossible the defendant could have accepted the car as turned over to him and have agreed the missing accessories should be put in after, and also agree at the same time he should only have the right to retain

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and use it for the purpose of further trial. There is also inconsistency between the questions referred to and No. 6 submitted by plaintiff's counsel, by which the jury find the defendant, by retaining the car for two weeks and driving it over 600 miles, evidenced his intention of accepting the car.

By Q. 10 the jury find the defendant was induced by Neill to retain the car until the accessories arrived, and by 11 he was induced to retain and use it for the purpose of further trial. It is quite clear then the defendant by agreement had the right to retain the car for such time as would elapse until the accessories arrived, if he desired to do so, and no acceptance of the car would result. He also had the right, it is so found, to retain and use the car for the purpose of further trial. There is no evidence the accessories had arrived at the time the car was returned by the defendant, nor had they been tendered to him, and yet in view of their first finding the jury, by plaintiff's Q. 6, say the defendant by keeping the car two weeks and driving it 600 miles, evidenced his intention of accepting the car.

There is also difficulty between the answers to these questions and that of No. 13 by the Court, where the jury find the defendant made further use of the car than was reasonably necessary for the purpose of making an examination and fair trial of it to see if it fulfilled the conditions of the contract. These varying answers to me point to confusion and uncertainty in the minds of the jury, which led to the very apparent inconsistency in their answers, and which can only be remedied by a new trial.

Reference has been made to the fact, which was stated to have been admitted on the part of the defendant, that if he was liable at all the liability was for the sum for which the verdict was found. I can scarcely understand that this could be so. The action being for goods sold and delivered, the defendant could not be sued for goods he had never received, and at all events had not been tendered with up to the time the action was brought. In other words, if the defendant was held to have accepted the car as turned over to him, he would have to, or could be forced to pay for the accessories which had not been delivered, and yet amounted to a considerable portion of the value of the car.

In my opinion there should be a new trial.

New trial ordered.

CURLEY v. LATREILLE.

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Supreme Court of Canada, Idington, Duff, Anglin, Brodeur, and Mignault, JJ. February 3, 1920.

1. COURTS (§ V E—315)—QUEBEC—FOLLOWING DECISIONS OF ENGLISH COURTS—WHEN PERMISSIBLE—RATIONES SCRIPTÆ.

English decisions can be of value in Quebec cases involving questions of civil law only when it has been first ascertained that in the law of England and that of Quebec the principles upon which the particular subject matter is dealt with are the same and are given the like scope in their application and even then not as binding authorities but as *rationes scriptæ*.

2. AUTOMOBILES (§ III C—310)—CHAUFFEUR ORDERED TO TAKE CAR TO GARAGE — DISOBEDIENCE — JOY-RIDE — ACCIDENT — LIABILITY OF OWNER.

The owner of an automobile is not responsible for an accident caused by his chauffeur who having been ordered to take the car to the garage makes use of it to take a joy ride in the course of which, owing to the negligence of the chauffeur, the accident happens.

[See also *Gray* v. *Peterborough Radial R. Co.* (1920), 54 D.L.R. 236 and annotation, 39 D.L.R. 4.]

Statement.

APPEAL from the judgment of the Court of King's Bench, appeal side, Province of Quebec (1918), 28 Que. K.B. 388, reversing the judgment of the Superior Court sitting in review, to which the case had been submitted by the trial Judge, sitting with a jury, and dismissing the appellant's, plaintiff's, action.

F. Callaghan, for appellant.

D. C. Robertson, K.C., for respondent.

Idington, J.

IDINGTON, J.:—My appreciation of the facts presented in evidence herein leads me to the conclusion that the trial Judge misdirected the jury, if our decision in the case of *Halparin* v. *Bulling* (1914), 20 D.L.R. 598, 50 Can.S.C.R. 471, is to be followed as good law. The misdirection accounts for the inconsistencies that exist in some of the answers to the questions submitted.

The Court of King's Bench in accord with the interpretation which it has adopted of these findings has seen its way to their reconciliation, as it were, and in doing so apparently suggests there has, arising from such misdirection, been only a misapprehension of the verdict.

I am not prepared to deny either their right or duty to do so in this particular case and say they have erred. A new trial would be the only alternative and under a proper direction that would seem to be a hopeless expedient as far as plaintiff's ultimate success would be concerned.

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Duff, J.

With great respect, I cannot agree with the law as laid down by the Court of Review, and do agree in the main with the opinions of the Judges in the Court of King's Bench in favour of allowing the appeal there and dismissing the action.

I therefore think this appeal should be dismissed with costs.

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

Anglin, J.

ANGLIN, J.:—The facts out of which this action arises appear in the report of it in the Court of King's Bench, 28 Que. K.B. 388, and in the opinions of my brothers Brodeur and Mignault, which I have had the advantage of reading. While they differ in their conclusions both my brothers hold the view that the question of law which is presented, viz., the scope of the restriction upon the responsibility of masters for injuries caused by their servants implied in the words of art. 1054 C.C. "in the performance of the work for which they are employed."—"dans l'exécution des fonctions auxquelles ces derniers sont employés"—must be determined not upon the authority of cases decided in English Courts dealing with the question when a servant or workman will be deemed to have acted "in the course of his employment" but in the light of civil law authorities which deal with them and with the corresponding words of the C.N. art. 1384, "dans les fonctions, etc." English decisions can be of value in Quebec cases involving questions of civil law only when it has been first ascertained that in the law of England and that of Quebec the principles upon which the particular subject matter is dealt with are the same and are given the like scope in their application, and even then not as binding authorities but rather as *rationes scriptæ* and it is only on that footing and for purposes of comparison that I shall refer to them. I therefore cannot accede to the view that his case is concluded against the appellant by our recent decision in *Halparin* v. *Bulling*, 20 D.L.R. 598, 50 Can. S.C.R. 471.

It must not be forgotten however that modern French authorities hold much the same position. "Though entitled to the highest respect and valuable as illustrations they are not binding authority in Quebec." *McArthur* v. *Dominion Cartridge Co.*, [1905] A.C. 72 at p. 77.

But the articles of the Quebec Civil Code dealing with offences and quasi-offences (1053-1056) having been based on the Code

Napoleon (Rapports des Codificateurs, 1st Rep., p. 16) in considering their purview and determining their interpretation, French authorities dealing with the corresponding articles of that Code—at all events those antedating the enactment of the Quebec Civil Code, and especially those cited by the codifiers as the foundation on which they worked—must undoubtedly be given great weight. Yet in dealing even with these authorities it must be borne in mind that they "are useful only in so far as they explain what may be ambiguous or doubtful in the Canadian Code; they cannot control its plain letter or express provisions." *Herse* v. *Dufaux* (1872), L.R. 4 P.C. 468 at p. 489.

I do not find in the verbal differences between the French version of art. 1054 C.C. (dans l'exécution des fonctions) and art. 1384 C.N. (dans les fonctions) support for the view that it was intended that the scope of the master's responsibility in such a case as that now before us should be more restricted under the former than it is under the latter. Pothier in dealing with this subject uses the phrase "dans l'exercice des fonctions" (Obligations, No. 121); and that is the meaning ascribed the somewhat elliptical words of the C.N. (dans les fonctions) by all the authors who discuss it. The phrases "l'exercice des fonctions" and "l'exécution des fonctions" in themselves express very much the same idea. It may be however that the English version which in this instance appears to have been the original text (Preface to McCord's Civil Code, 1st ed., p. ix) under which the authorities are cited by the codifiers (1st Rep., p. 61) and which is at least of equal authority with the French text, by its terms "in the performance of the work for which they are employed" unequivocally indicates a restriction of the master's responsibility to injuries resulting from acts done by his servant "in the course of his employment"—("au cours de l'exécution de ses fonctions," 3 Langelier, p. 479, "dans le cours de ses fonctions," S. 1861. 1. 439) as that limitation is understood and applied in English law.

The codifiers in their report (Rapports des Codificateurs, 1st Rep., p. 16) allude to the departures in arts. 1053-1056 C.C. from the text of the French Code stating "that the wording has been changed to obviate certain objections raised to the latter," but we are not informed what these objections were and I find nothing in the works of our commentators which throws light on this important point.

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We are met at the threshold of this case by the fifth finding of the jury that the chauffeur Lauzon at the time of the accident was "performing work for which he was engaged by the defendant," although, in answer to the 7th question, they also found that he was "in possession of the motor vehicle without the knowledge and consent of the defendant and in disobedience of the defendant's order." In the view of the scope and effect of the last paragraph of art. 1054 C.C. taken by the Court of Review and by my brother Brodeur, there would probably be no difficulty in maintaining the fifth finding; Lauzon was engaged by the defendant as chauffeur and was undoubtedly driving his master's car. But it is scarcely reconcilable with the interpretation given to that paragraph by the Court of King's Bench and by my brother Mignault; "joy-riding" was not work for which he was employed.

The 7th finding is supported by a body of testimony of which the weight and reliability is above suspicion. Lauzon's whole evidence, on the other hand, is most unsatisfactory. The 6th and 7th findings of the jury would seem to imply the view that he told a fairy tale—that he was not testing the automobile at all, but simply joy-riding. The only corroboration of his story relates to its later stages and comes from the witness Leblanc, one of the companions of his "joy-ride," whose testimony appears to be even less trustworthy than that of Lauzon himself. In cross-examination he is involved in a series of contradictions.

The majority of the Judges in the Court of King's Bench disbelieved Lauzon's story where it is in conflict with that of the witnesses Gauthier and Desenfants, who say that he brought the defendant's automobile into the Laurier garage about 9.15 o'clock on the evening in question. *Falsus in uno falsus in omnibus.* They regarded his story as so highly improbable that they found little difficulty in discrediting it.

After carefully reading all the evidence, although a verdict can be considered as against the weight of evidence only if it is such as a jury viewing the whole of the evidence could not reasonably find (art. 501 C.C.P.), I am not prepared to say that the appellate Judges below were not well advised in rejecting Lauzon's account of the evening's occurrences and taking the view that he returned with the defendant's automobile to the garage as directed by the defendant's son, that he subsequently took it out again

in violation of his master's orders and purely for his own purposes and that he was engaged in so using it when he killed the plaintiff's son: or, assuming the law of Quebec to be as stated by the majority of the Court of King's Bench, that they erred in setting aside or ignoring the 5th finding of the jury and directing the entry of a judgment under art. 508 (3) C.C.P. different from that rendered by the Court of Review on the reserved case. I cannot but think that the jury was led to make its 5th finding by the concluding direction of the trial Judge, in reply to the question of a juror, quoted by Cross and Carroll, JJ., 28 Que. K.B. at 394:—

The Juror: If the jury is of opinion that Lauzon took the automobile without permission of the defendant according to you in such case he was not exercising the functions for which he was engaged. Is that what I should understand you to say?

The Judge: The chauffeur, although he had not the consent of his employer and acted against his instructions, could still be exercising his functions.

. . . .

M. Duranleau: The juror in his question to the Judge put the following case: The chauffeur, after taking the car to the garage, took it out again without permission and contrary to the instructions of his employer to take a ride for his own purposes; is the employer responsible?

The Judge: If a person enters a closed place where an auto is kept and without authority from the owner, and without his knowledge, takes possession of it, or even if he takes possession of the machine when it is under the care of a third person and causes damage in using it, the owner in such case is not responsible for the damage; but if the automobile is still under the control of the chauffeur and he uses it for his own purposes contrary to the instructions of his employer, he abuses his functions, but I am of opinion that in such case the owner is responsible.

There can be little doubt that that direction was understood by the jury as implying a statement of the law such as is involved in the following illustration given by Archibald, Acting C.J., in delivering the judgment of the Court of Review:

Where an owner of a car leaves his chauffeur in possession and in a position to use the car as he may deem fit, the result would be different because the owner of the car is responsible for the conduct of the man whom he is supposed to know. Take for example as an illustration that the owner has a private garage, and he instructs his chauffeur that his car is to be within the garage and the door locked by ten o'clock each evening but the owner leaves the chauffeur in possession of the key; the chauffeur, taking advantage of that, opens the garage, takes the car out, and damages result. The owner might easily have demanded of his chauffeur that he should deposit the key with him at night. I think there is no question that the owner would be responsible in such a case.

With great respect, I venture to agree with Cross, J., that this is "plainly a mistake."

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I have outlined the view of the facts bearing on the vital question on which the Court of King's Bench proceeded. To complete the statement of what seems to be material, however, I should add that upon the evidence it was part of Lauzon's duty to have placed the defendant's automobile in its proper position on the second floor of the garage when he brought it in, and that until he had done so it could scarcely be said that it had passed from his custody into that of the proprietor of the garage. When the automobile was in the garage from about 9.15 until 9.40 on the evening in question it remained on the ground floor. In view of these latter circumstances it is perhaps not of great moment, except as affecting his credibility, whether Lauzon actually brought the car into the garage or not, or whether he started on his *promenade d'agrément* (joy-ride) from the garage or from a point distant some 200 yards from it. In either case he certainly set out "on a frolic of his own" in the sense of that term as used by Parke, B., in *Joel* v. *Morison* (1834), 6 C. & P. 501, at 503, and adopted by Jervis, C.J., in *Mitchell* v. *Crassweller* (1853), 13 C.B. 237, at 246, 138 E.R. 1189, or as put by Cockburn, C.J., in *Storey* v. *Ashton* (1869), L.R. 4 Q.B. 476, at 480, he "started on an entirely new and independent journey which had nothing at all to do with his employment." On the other hand, it is equally clear that according to the opinion of the Cour de Cassation in *Picon* c. *Peltier*, D. 1908, 1. 351. Lauzon having been ordered to take the automobile to the garage

He then performs an act of his service but he does not execute this order strictly since instead of immediately putting away the car he uses it to take a ride.

As put in the text of the Arrêt,

Carrière placed under the authority of Picon only drove the automobile because the latter had intrusted to him the performance of a service directed: moreover, it was the duty of Picon to oversee the execution of his order.

The French Court extends the doctrine of the English deviation cases such as *Venables* v. *Smith* (1877), 2 Q.B.D. 279 (see also *Williams* v. *Kochler & Co.* (1899), 41 N.Y. (App. D.) 426, and *Chicago Consolidated Bottling Co.* v. *McGinnis* (1899), 86 Ill. App. 38, and treats as merely an abuse of the employment what would in England be regarded as something clearly outside its course, there having been, to quote from the syllabus of the latter American case, "a turning away from the master's service and an entering upon an affair which is the affair of the servant only."

In the direction of Erskine, J., in *Sleath* v. *Wilson* (1839), 9 Car. & P. 607, at p. 612, disapproved in *Storey* v. *Ashton, supra*, views somewhat similar to those which prevailed in *Picon* c. *Peltier* are expressed. On the other hand, the arguments which prevailed before the Cour de Cassation were unsuccessfully urged on the Court of Common Pleas by Sergeant Shee for the plaintiff in *Mitchell* v. *Crassweller, supra*. The case at Bar is indistinguishable from the French case. *Storey* v. *Ashton* and *Mitchell* v. *Crassweller*, on the one hand, and *Picon* c. *Peltier*, on the other, illustrate the distinct cleavage between the views of the limit on the master's responsibility for misconduct of his servant in England and France. It is interesting to compare the recent case of *Irwin* v. *Waterloo Taxi-Cab Co.*, [1912] 3 K.B. 588.

Responsibility for damage caused by a thing which he has under his care (art. 1054 C.C. para. 1) arises only when the occurrence is due to the thing itself, not when it is ascribable to the conduct of the person by whom it is put in motion, controlled or directed, D. 1918, 2. 7; D. 1912, 2. 255. See too, D. 1907, 2. 17.

The finding of negligence against Lauzon is unchallenged and unchallengeable. It is equally clear that there is no evidence of any want of care on the defendant's part in engaging him such as might render him liable under art. 1053 C.C.; and, in so far as the sixth finding of the jury imputes absence of reasonable supervision to the defendant, it is likewise without support in the evidence. On the contrary, he has, in my opinion, discharged any burden of proof which the Quebec statute, 3 Geo. V. 1912, ch. 19, may have cast upon him in this regard by shewing that his supervision of Lauzon was all that could reasonably be expected in the absence of any ground to suspect him of misconduct. I agree with the comments upon that finding made by Cross and Pelletier, JJ., and my brother Mignault. Failure by the defendant to exercise due supervision over his chauffeur was in no sense the proximate cause of the plaintiff's son being killed. No supervision that could reasonably be exacted would have prevented Lauzon joy-riding on the night in question. On the other hand, to a claim under the concluding paragraph of art. 1054 C.C., the most vigilant supervision would not avail as a defence except perhaps in regard to the burden of proof on the actual facts. Sec. 3 of 3 Geo. V. 1912, ch. 19, which replaced art. 1406 of the R.S.Q. 1909, affords the plaintiff no assistance.

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The head-note in *Woo Chong Kee* v. *Fortier* (1914), 20 D.L.R. 985, 45 Que. S.C. 365, cited by the respondent, is misleading. As pointed out by Greenshields, J., 3 Geo. V. 1912, ch. 19, sec. 3, was not in force at the date of the accident there in question. As soon as it appeared that the defendant owned the automobile driven by Lauzon the amended statute put upon him the onus of proving either that the accident was not attributable to any fault of Lauzon or facts sufficient to establish that Lauzon was not engaged at the time in the performance of work for which he was employed. But see *Boyle* v. *Ferguson*, [1911] 2 Ir. R. 489 at 496, on the latter point. The real difficulty with which we are confronted is to determine whether, on the facts as above stated, Lauzon was, as a matter of law, engaged "in the performance of the work for which he was employed"—"au cours de l'exécution de ses fonctions"—when he killed the plaintiff's son.

In view of the verbal differences between the Quebec Code and the C.N. already adverted to, Quebec authority on the question under consideration would be of exceptional value. Unfortunately there is a dearth of it. The particular aspect of the master's responsibility presented by the case at Bar does not seem to have directly engaged the attention of the Quebec Courts in any reported case brought to our notice, and the commentators do not discuss it. But such passing allusions as we do find seem to indicate a tendency to interpret the restrictive words of the Quebec Code as the equivalent of the phrase "in the course of their employment as servants" as used in such English cases as *Storey* v. *Ashton*, L.R. 4 Q.B. 476, rather than in the sense given to the words "dans les fonctions, etc." of the C.N. by the Cour de Cassation in *Picon* c. *Peltier*, D. 1908, 1. 351.

Thus in *Turcotte* v. *Ryan* (1907), 39 Can. S.C.R. 8, affirming 15 Que. K.B. 472, the liability of the master, Desjardins (defendant) was upheld by Fitzpatrick, C.J., delivering the judgment of this Court, on the view that the plaintiff had been injured by his co-defendant Turcotte while the latter was in Desjardins' service and "during the course of his employment," and by Lavergne, J., speaking for the majority in the Court of King's Bench: "Since it is in the discharge of his duties as Desjardins' employee that Turcotte has been the cause of this accident." And in *Trudel* v. *Hossack* (1894), 4 Que. Q.B. 370, at p. 373, the immunity of the

master from liability under art. 1054 C.C., was rested by Wurtele, J., who delivered the judgment of the Court of Queen's Bench, not on the fact that the servant Frenette was not engaged as a driver or even that he had taken his master's horse out surreptitiously, but on the ground that he "was not in the performance of any work for his master."

In the authorities cited by the codifiers (Rapports des Codificateurs, 1st Rep., p. 61) we find little to throw light on this question. Thus Pothier merely says that masters are not responsible for "délits or quasi délits (of their servants) which they commit outside of the scope of their functions" (Obligations No. 121). In Massé et Vergé, sur Zachariae, No. 628, we are told that:

> In principle the responsiblity of masters and employers in respect to damage caused by their servants or employees is not limited to the case where the injurious acts come within the terms of the mandate or of the duties; for the master or employer to be responsible it is sufficient that the injurious acts of the servant or employee relate to the object of their mandate and occurred in course of its execution. Orléans, 21st December, 1834, S. V. 55, 2, 661; Cass. 13th Dec., 1856, S. V. 57, 1, 442, and Paris, 8th Oct., 1856, S. V. 57, 2, 445.

Toullier says:—

> It is to direct some action to be done that one employs a servant, or charges another employee to do it for him. The action then becomes that of the master or employer and he ought to answer for it as for his own act.

I have read all the French authorities cited in the judgments below, by my colleagues from Quebec, and in the factums, and a great number of others. There is no doubt that the tendency in recent years of the French Courts and the text writers has been to hold the master answerable for any wrong committed by his servant while in his employment, unless the act complained of be wholly foreign to his functions as servant. They hold the master liable if the servant's act be in any way connected with his employment. Sainctelette in his work, "Responsabilité des Propriétaires d'Automobiles," p. 223, thus sums the matter up:—

> We have up to the present assumed that the servant or employee in question was a mechanician, a chauffeur, that is to say a person whose habitual functions consisted entirely in looking after the care and driving of the automobile; this is what enables us to say that when this employee uses the automobile without the knowledge of his employer, or in spite of his prohibition, he abuses his functions but does not perform an act entirely foreign to them.

And the modern authorities which the writer cites certainly go far to bear out his conclusion.

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I have already referred to *Picon* c. *Peltier*, D. 1908. 1. 351. In *Paterson* c. *Bibien*, D. 1904. 1. 70, a chauffeur who, contrary to orders, had taken his master's automobile out for his own purposes by his negligence in driving caused injury to one Bibien, a comrade whom he had taken for a drive. The Cour de Cassation, reversing the Cour d'Appel, held the owner not responsible—but solely on the ground that Bibien knew that the chauffeur was driving for his own purposes and not on account of his master and had entrusted himself to the care of the chauffeur personally and individually and not in his capacity as the servant of Paterson. The Court treats the case as one of "l'exercice abusif du mandat," and expressly states that the Court below was well advised in refusing to relieve the master on that ground. In the foot note, however, the editor of the report says:—

> Is it necessary to give the same answer if the damage was caused by a third person who was a complete stranger to the employee? For example, in placing it among the hypotheses of the present case, would it be necessary, in order to discharge the employer from all liability, that the accident had been caused by the driver of the automobile, not a companion that he had taken with him but a passer-by who had upset it? The question appears more delicate but it seems, however—according to the jurisprudence—that the answer should be the same in both hypotheses.

Referring to the same case the reporter in his foot-note to *Picon* c. *Peltier*, D. 1908. 1. 351, says: "In this case, in fact, one should only consider whether or not the mechanician performed an act of his service."

In the report of this case in the *Gazette du Palais*, 1904. 1. 140, the reporter in his foot-note cites as in point the case of *Daubert* c. *Salles*, D. 1861. 1. 439, where it was held that:—

> The master is not responsible for the prejudicial use made by his servant of something belonging to him when on the one hand the master committed no fault in leaving this thing at the disposal of the servant, and on the other hand, the servant in making use of it was not performing an act in the course of his duty.

A mistress had directed her servant to take some wine from her table and throw it away because she found it unfit to drink. The servant took it to the kitchen and there gave some of it to a visitor to drink. The wine was poisoned and killed the visitor. In an action by his widow against the mistress the latter was held not liable on the ground that the servant had acted outside the scope of her functions as such, and the decision was upheld by the Cour de Cassation. Although the case would seem to have been one

of pure accident, actionable fault on the part of the servant appears to have been assumed. The fact that the wine of which she made use belonged to her mistress and was entrusted to her to be thrown out and was therefore in her lawful custody as servant, the purposes for which it was given her not having yet been accomplished, did not suffice to render the mistress liable. As the Court puts it: "It was not as a consequence and in the course of his duties as servant that the latter had caused the poisoned wine to be drunk." (Compare 1 Roll, Abr. 95, sec. 3.)

Laurent in commenting on this case says: "One cannot say that an invitation is a service for which the master employs his domestic." Neither is joy-riding work for which a chauffeur is engaged. The principle underlying the decision of this case very closely approaches, if indeed it is not precisely that upon which the respondent would maintain the judgment of the Court of King's Bench in the case at Bar. What connection was there between "the work, for which (Lauzon was) employed" (la fonction à laquelle il était employé) and what he was doing when he killed the plaintiff's son except the fact that it was his master's automobile that he was using for his own purposes, having taken advantage of its being in his custody to do so?

It is interesting to compare with these cases the decision in *Coupé Co.* v. *Maddick*, [1891] 2 Q.B. 413, where the defendant having hired a carriage and horses from the plaintiff, his coachman, instead of taking them, as was his duty, to the stables, drove for his own purposes in another direction and in so doing negligently injured the horses and carriage. The master was held liable, but for breach of contract as bailee. In *Sanderson* v. *Collins*, [1904] 1 K.B. 628, however, while the decision in *Coupé Co.* v. *Maddick*, *supra*, was regarded as not maintainable on the ground above stated (compare arts. 1767, 1769, 1200, 1150, 1071 and 1072 C.C.), it was suggested by Collins, M.R., with some doubt that it might perhaps be upheld on the ground that the act done was within the scope of the coachman's authority since "he was entrusted with the carriage and horses for the purpose of driving them." In *Sanderson* v. *Collins*, *supra*, the master was held not liable, however, for an injury negligently done to a borrowed carriage by his coachman who had taken it out for his own purposes without his master's knowledge because in doing so the coachman had not been acting in the course of his employment.

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In *Irwin* v. *Waterloo Taxi-Cab Co.*, [1912] 3 K.B. 588, a driver for the defendant company, by order of the general manager, whom he was bound to obey, drove him in a cab which the manager had no right so to use, upon his private business and in so doing negligently injured the plaintiff. The driver was held to have been acting in the course of his employment and the plaintiff therefore recovered against the company. This case might not have been so decided in England 50 or 60 years ago. Both Vaughan Williams, L.J., and Fletcher-Moulton, L.J., dwell on the fact of the driver's belief that he was discharging his duty; he knew nothing of the limitation on the manager's right to use the company's cars. Compare an *arrêt* cited by Demolombe, vol 31, No. 617, where the Court gave some weight to the fact that the servant could not have supposed he was acting *dans ses fonctions*. A contrary view appears to have prevailed in *Clark* v. *Buckmobile Co.* (1905), 107 N.Y. (App. D.) 120.

In a case which Sainctelette cites at p. 219 from the work of Imbrecq, "L'automobile devant la Justice" (which is not in the Supreme Court Library), a master was held responsible where, having sent his chauffeur to drive a friend from Paris to Rouen, the chauffeur after reaching Rouen killed two persons while using the automobile in joy-riding with some companions. The Court, however, laid some stress on the fact that the return journey from Rouen to Paris would have taken at least two days and that the accident happened on the second day of the stay at Rouen, wherefore the chauffeur should be regarded as having been still "dans l'exercice de ses fonctions."

Some French authors state the master's responsibility in very broad terms. The passages from Baudry-Lacantinerie et Barde (Obligations No. 2911) quoted by my brother Mignault, and from Dalloz (1874 2. 52), quoted by my brother Brodeur, are examples. Larombière tells us that: "The master ceases to be responsible when the act has no connection with the duties of the servant and was committed outside of his service." Art. 1384, No. 12.

The same author (art. 1384 C.N., para. 10, *in fine*) says: "It suffices that the act is directly connected with the duties by the circumstances of time, of place and of service, in order that the master may be responsible, and this responsibility exists in all such cases."

Other writers are inclined to give a wider scope to the restrictive condition imposed by the Code and to treat as "en dehors des fonctions" acts which the former would regard as merely "l'exercice abusif des fonctions."

Demolombe in discussing art. 1384 of the C.N. (vol. 31, No. 617) cites with approval a decision of the "Tribunal Civil de la Seine" in which the important statement is made that the responsibilities imposed by this article on masters and employers "sont de droit étroit." See also S. 1875. 2. 36. The author also says: "It is always necessary that any act of the servant, or employee, falls within the nature of the duties for which he is employed and that it is performed as such in the capacity of domestic or employee."

On this statement of the law the vital question in the present case would appear to be: Was Lauzon at the moment of the accident in control of the car in the capacity of servant to the defendant?

Laurent (vol. XX., No. 582) says:—

The article imposes a condition in order that employers may be responsible for the acts of their employees, namely, that the damage must be caused in the exercise of the functions for which they are employed. It follows therefrom that if the damage was caused outside of the exercise of these functions the employers are not responsible. This condition is a result of the ground upon which the liability of employers is founded. They choose an employee to perform certain duties; in the performance of this service the employee causes damage by a *délit* or *quasi délit*, the law presumes that the damage is caused by the fault of the employer because he has chosen an unskilful, imprudent or ill-disposed employee. The presumption of fault and therefore the liability of the employer assumes then that it was *in the service* that the damage was caused. If the employee caused the damage outside of his service the reason for the liability of the employer ceases, and one cannot charge him with having made a bad choice since the damage caused has nothing in common with the service for which he chose the employee, and from that there is no longer a presumption of fault, and the liability under art. 1384 has no longer any *raison d'être*.

One and the same act then can make or not make the employer responsible, namely, whether it was committed in the service or outside of the service.

A writer in the Revue Trimestrielle, 1917, at pp. 134-5, says: "The employee makes his employer liable if he does an act even abusive or damaging within the spirit of his functions. But when he goes in violation of his duties the employer is not responsible."

Laurent (vol. XX., No. 586) cites with approval the following passage from a judgment of the Court of Appeal of Paris (D. 1852, 2. 240):—

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A single condition exists as to this liability of masters and employers which is that the damage was caused by their servants and employees in the exercise of the functions for which they are employed, which ought to extend especially to abuses committed in the performance of their duties, *quasi délits*, *délits* or even crimes. Since the injurious act relates to the performance of duties though there may be an abusive extension of it the condition of the law exists and the liability of the master is incurred.

But since the only limit on the responsibility of the master is that implied in the condition that the damage must arise in the performance of the work for which the servant is employed, (Toullier, vol. XI., No. 282), he is, at all events, entitled to insist that this condition of a responsibility admittedly severe shall be really fulfilled. (Fuzier-Hermann, Rep. vbo. Responsabilité Civil, No. 718; S. 1904, 2. 298.)

M. Wahl in an article in Revue Trimestrielle, 1908, at p. 14, says that the ground of the decision in *Picon* c. *Peltier* was that at the moment of the accident the master "n'avait pas abdiqué son devoir de surveillance." The writer had, however, stated his own view in these terms:—

> But art. 1384 ceases to be applicable when the driver in using the automobile acts without the knowledge of his employer and in his own name. In this case the employer is not bound for the consequences of the accident which he could not prevent and which did not happen in the exercise of the functions of the driver.

But the authority cited for this proposition is *Paterson* c. *Bibien*, above referred to.

The value of the French decisions as authorities is much weakened by the prevalent view that whether a servant is or is not acting "dans les fonctions" is regarded as a pure question of fact to be conclusively determined by the "juges du fond." Thus we read in Baudry-Lacantinerie et Barde, Obligations, No. 2195: "Authors cannot lay down any rules or formulate any presumptions as to which the Legislature is silent. It is a pure question of fact; it is left then for the appreciation of the judges on the merits." The same view is expressed by Laurent, vol. XX, No. 585: "This is a question of fact; it is necessary to leave it for the decision of the judge without wishing to bind him by presumptions which the law ignores." See also S. 1904, 2. 298, note (4-5); Garsonnet Traité de Procedure, XL, vol. 1, p. 162; Labori Rep. Vbo. Resp. Civ. No. 174.

With respect, the question is one of mixed law and fact—a question of fact only within certain limits. Addison on Torts, 8th ed., p. 122. What work was the servant employed to perform, what was he actually doing, and for whose benefit or on whose account was he acting, are no doubt, questions of fact. But, these facts being ascertained—and their ascertainment usually presents comparatively little difficulty—whether what the servant actually did was "in the performance of the work for which he was employed" depends entirely upon the proper interpretation of these latter words; and that is a question of law. "The whole difficulty is to state exactly the meaning which should be given to this part of the phrase." S. 1892, 1, 569, notes (1 and 2).

If there be no conflict in the evidence the question whether a servant whose wrongful act caused injury to a stranger was acting within the scope of his employment, is for the Court; but, if there be conflict, then the question is for the jury. *Barmore* v. *Vicksburg, etc. R. Co.* (1904), 85 Miss. 426. But whether the act causing injury is so connected with the course of the employment as to engage the responsibility of the master or is such a departure from it as relieves him, must as a question of degree be determined by a jury properly instructed by a Judge who correctly directs himself. Clerk and Lindsell on Torts, Can. ed., p. 76. See, however, *Joseph Rand* v. *Craig* [1919], 1 Ch. 1.

It may be of some assistance in determining how far English cases may be helpful as affording *rationes scriptæ* to compare the views taken by the French and English Courts of some comparatively elementary phases of the subject under consideration though not directly bearing upon the point immediately before us.

The basis on which the liability of the master rests is substantially the same in both countries. Although Demolombe's view was that it depends solely on the master's faculty of choice of his servant (vol. XXXI, Nos. 610-611), nearly all the other authors base it as well on the master's right of control by orders and instructions; and this double basis of responsibility is now well established in the French Courts.

If in fact art. 1384 subject employers to the obligation of answering for the acts of their employees, this is not merely because they have chosen them but it is also because they have the right to give them orders and instructions as to the manner of performing the duties for which they are employed. Larombière, art. 1384, No. 11.

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S. 1887. 1. 456, and note. See, too, S. 1893, 1. 217. note (3); Sourdat, tome 2, No. 887; Baudry-Lacantinerie et Barde, Obligations No. 2912; *Turcotte* v. *Ryan* (1906), 15 Que. K.B. 472, at p. 478, *per* Lacoste, J.C.

Since the decision in *Limpus* v. *London General Omnibus Co.* (1862), 1 H. & C. 526, 158 E.R. 993, as pointed out by Fletcher-Moulton, L.J., in *Smith* v. *Martin and Kingston-upon-Hull Corporation*, [1911] 2 K.B. 775, at p. 782. "The real question is whether it was an act done in the course of the [servant's] employment and not whether it was within the scope of the authority given to her."

The question is not one of authority: *Smith* v. *North Metropolitan Tramways Co.* (1891), 55 J.P. 630.

Blackstone indicated the same test in his Commentaries (Lewis, 1st. ed., vol. 1, p. 4321), when he said: "If the servant by his negligence does any damage to a stranger, the master shall answer for his neglect; but the damage must be done while he is actually employed in his master's service, otherwise the servant shall answer for his own misbehaviour."

In *Lloyd* v. *Grace, Smith & Co.*, [1912] A.C. 716, at p. 736, Lord Macnaghten says:—

> The expressions "acting within his authority," "acting in the course of his employment," and the expression "acting within the scope of his agency" (which Story uses) as applied to an agent, speaking broadly, mean one and the same thing. What is meant by those expressions is not easy to define with exactitude. To the circumstances of a particular case one may be more appropriate than the other. Whichever is used it must be construed liberally, and probably, as Sir Montague Smith observed, the explanation given by Willes, J., is the best that can be given.

Blackstone (Lewis ed.), vol. 1, page 430, states the principle in these terms: "As for those things which a servant may do on behalf of his master, they seem all to proceed upon this principle that the master is answerable for the act of his servant, if done by his command, either expressly given or implied; *nam qui facit per alium facit per se.*" See, too, Wood, Master and Servant, 2nd ed., para. 279, page 525.

But if delegation of authority is to be taken as the basis of the master's liability, by liberality of construction, implied authority must be made to cover all acts in the course of the employment. Wood, Master and Servant, No. 280.

The House of Lords, by its decision in *Lloyd* v. *Grace, Smith & Co.*, [1912] A.C. 716, dispelled the notion that it is also essential that the servant should be acting "for his master's benefit." *Joseph Rand* v. *Craig*, [1919] 1 Ch. 1, at p. 6. Appropriate as these words are in some cases, "in a general statement of the law they are out of place," says Lord Magnaghten. His Lordship proceeds to point out that in the very case in which Willes, J., had used the phrase "for his master's benefit," *Barwick* v. *English Joint Stock Bank* (1867), L.R. 2 Exch. 259, that eminent Judge also said (see [1912] A.C. at 733):—

> In all the cases it may be said as it was said here, that the master had not authorized the act. It is true he has not authorized the particular act, but he has put the agent in his place to do that class of acts and he must be answerable for the manner in which that agent has conducted himself in doing the business which it was the act of his master to place him in.

The master's faculty of choice is here plainly indicated as a basis of liability, as it was in the classic passage from the judgment of the same distinguished Judge in *Bayley* v. *Manchester etc. Ry. Co.* (1872), L.R. 7 C.P. 415, subject to the qualification that what was done by the servant, however wrongful, was done not from any "caprice of the servant, but in the course of his employment." See Wood, Master and Servant, para. 288, p. 553.

As put in *Marion* v. *Chicago Railway Co.* 59 Iowa, 428, "The mere purpose of the employee to serve his employer has not a tendency to bring the act within the scope of his employment." Compare, also, D. 1860. 1. 49.

In *Quarman* v. *Burnett* (1840), 6 M. & W. 499, at p. 509, 151 E.R. 509, Parke, B., put the liability of the master for the consequences of the servant's negligence on the ground that it was "he who had selected him as his servant from the knowledge of or belief in his skill and care, and who could remove him for misconduct, and whose orders he was bound to receive and obey." See, too, Smith on Master and Servant, 5th ed., p. 284; Addison on Torts, 8th ed., pp. 122 and 129; *Duncan* v. *Findlater* (1839), 6 Cl. & F. 894, at p. 910, 7 E.R. 934, *per* Lord Brougham.

In France and England, therefore, the applicability of the maxim *respondeat superior* in these cases would appear to rest on identical grounds. It arises out of the legal relation between the master and the servant.

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The master is liable in both countries alike, notwithstanding that he was unable to prevent the particular act which caused the injury (31 Demolombe, No. 611; 20 Laurent, No. 584; 4 Aubry et Rau, No. 447; Fuzier-Hermann, Vbo. Resp. Civ. No. 480; Marcadé, art. 1384, No. 3; S. 1885. 1. 21; Smith on Master and Servant, 5th ed., p. 284; Pollock on Torts, 10th ed., pp. 88-9); because he selected the servant (Fromageot "De la Faute," pp. 145, 150) and although the act was done in direct violation of his orders as to the manner in which the work should be performed—31 Demolombe, 612; Sourdat, Responsabilité, 4th ed., tome 2, No. 888; see, *per* Blackburn, J., in *Bayley* v. *Manchester, etc. R. Co.* (1873), L.R. 8 C.P. 148. "Where a . . . servant is acting within the scope of his employment, . . . however much he may have abused his authority, however improperly and blunderingly he may have acted, the defendants are liable"; *Limpus* v. *London General Omnibus Co.*, 1 H. & C. 526, at p. 539, 158 E.R. 993; *Whitehead* v. *Reader*, [1901] 2 K.B. 48; *Whatman* v. *Pearson* (1868), L.R. 3 C.P. 422; and is an illegal or even criminal act. S. 1873. 2. 42; S. 1851. 2. 359; *Dyer* v. *Munday*, [1895] 1 Q.B. 742. But there is no liability in either country where the illegal or criminal act is done wantonly for some purpose of the servant himself and not in the discharge of his duties; S. 1885, 1. 21; 20 Laurent No. 582, 2nd paragraph: "The rigorous condition imposed by law in order to make masters responsible is that the injurious act should be committed in the exercise of the functions for which their servants were employed." S. 1875, 2. 26. *Limpus* v. *London General Omnibus Co.*, *supra*; *Cheshire* v. *Bailey*, [1905] 1 K.B. 237; *Croft* v. *Alison* (1821), 4 B. & Ald. 590, 106 E.R. 1052; *Joseph Rand* v. *Craig*, [1919] 1 Ch. 1.

In France the owner of a public conveyance was held civilly liable for a criminal assault committed by his driver on a girl of 13 sent in his carriage from a railway station to a convent (D. 1873. 3, 7). This decision appears to have been rested on breach of a contract to conduct the girl directly to the convent as well as on the ground that the act of the servant was "*dans l'exercice de ses fonctions.*" The owner of an apartment was likewise held responsible where his concierge had aided in the seduction of a young girl by receiving letters for her and introducing young men into her room (S. 57, 2. 445). Larombière, however, condemns

this latter *arrêt* (art. 1314, No. 9) as does also Demolombe (vol. 31, N. 618). In England the master would probably have been held not liable in both these cases on the ground that the wrongful acts were committed "exclusively for the servant's private ends." Pollock on Torts, 10th ed., p. 99; *Richards* v. *West Middlesex Waterworks Co.* (1885), 15 Q.B.D. 660 at 662, 663. But it would be otherwise if the act, though actually forbidden, were done in the master's interest. *Mousell Brothers, Ltd.* v. *London & North Western Ry. Co.*, [1917] 2 K.B. 836. Compare S. 73. 2. 42, where a railway company was held liable for its servant's act in smuggling tobacco for his own purposes: "When the *délits* occurred and was only possible in the course of his duties and acting in his capacity as employee."

The master is likewise liable in both countries if the particular act causing damage, though not actually one for which the servant was engaged, is connected with (se rattache aux fonctions) and was committed while the servant is occupied in performing (à l'occasion de) work for which he was employed. Massé et Vergé sur Zachariae, para. 628 (2); 20 Laurent, No. 583; Fuzier-Hermann, Rep. Vbo. Resp. Civ. No. 669. But curious differences have developed in the application of this ground of liability. A fire caused by the carelessness of a workman in throwing a lighted match on the floor while smoking at his work, has been held in France to render the master liable on the ground that smoking while working in a place where he was surrounded by inflammable material was "une grave imprudence" and the damage was caused "dans les fonctions." S. 1847. 2. 283; see also S. 1896. 1. 91. In England under the like circumstances the master was held not liable (*Williams* v. *Jones* (1865), 3 H. & C. 602, by the majority of the Court of Exchequer (Erle, C.J., Keating and Smith, JJ.), on the ground that the lighting of the pipe was not in any way connected with the work for which the servant was employed. Keating, J., suggests that the firing of squibs or matches indulged in as a pastime during working hours would not be more clearly unconnected with the employment. But Blackburn, J., dissenting, viewed the case as one of negligence in the course of the employment imputable in law to the master and entailing liability upon him. Mellor, J., also dissenting, viewed it as negligence in the use of the shed where the workman was engaged, which had been

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loaned by the plaintiff to the defendant. The view taken by the majority however, prevailed in *Woodman* v. *Joiner* (1864), 10 Jur. (N.S.) 852.

Again in France it has been held that the servant's act which causes injury must arise directly out of his employment, and the master was held not liable where one workman mischievously flashed the sun's ray from a mirror in the eyes of another, who in his annoyance broke the mirror, whereupon the former threw some of the pieces of broken glass at him and thus destroyed his right eye. Inadequate supervision was the basis of the claim, but the Court held that the workman's act which had caused the damage "does not relate in itself to the service which he was charged to perform and has no connection with the duties assigned to him." S. 1904, 2, 908.

On the other hand, in England it has been held that where a clerk using a lavatory intended for employees failed to turn off a tap after washing his hands upon quitting work and thus caused a flood, the master was liable because, although washing his hands may not have been within the scope of the clerk's employment, it was incident thereto. *Ruddiman* v. *Smith* (1889), 60 L.T. 708. In an earlier case where a clerk had caused similar damage in using a lavatory which he was not permitted to use, the master was held not responsible; *Stevens* v. *Woodward* (1881), 6 Q.B.D. 318. But Grove, J., at p. 320, expressed the opinion that if a housemaid, whose duty it was to attend the lavatory and wipe out the basin, but who was expressly forbidden to use it, had done so and left the tap open, "her act of using the basin and omitting to turn off the water would be so incident to her employment that the master would be liable."

In France the fact that in order to commit the act causing injury the servant was obliged to enter a chamber to which his duties did not take him and to open a movable not belonging to him has likewise been held to preclude the master's responsibility; S. 1894. 2. 16. An act of the kind sanctioned but done beyond the limits of the property upon which the servant was authorised to perform such acts has been held in both countries not to entail liability on the master: *Bolingbroke* v. *Swindon Local Board* (1874), L.R. 9 C.P. 575.

I confess my inability to appreciate what substantial ground of distinction relevant to the course of the employment or "l'exécution des fonctions" exists between the case where the master loans his conveyance to his servant to use for his own purposes and that in which the servant, taking advantage of the opportunity afforded by his custody of or access to it, surreptitiously appropriates it. Indeed there would almost seem to be more reason for holding the master liable in the former class of cases than in the latter, since he was privy to the servant's use of his property. Yet in *Narcisse* c. *Boisin*, S. 1869, 2. 42. it was held that:—

> The accident caused by the imprudence of a domestic while driving the horse and carriage of his master does not make the latter responsible if the horse and carriage were driven not by his orders nor in his interest but for the purposes of the domestic himself to whom they had been lent for his personal use.

To the same effect is the decision in *Cormack* v. *Digby* (1876), 9 Ir. C.L. 557, although the servant who had borrowed his master's horse and carriage for the day voluntarily brought home some meat from town for the master. Compare *Rayner* v. *Mitchell* (1877), 2 C.P.D. 357. But in *Patten* v. *Rea* (1857), 2 C.B. (N.S.) 606, 140 E.R. 554, where the horse and rig were being used in the master's business, the fact that the servant was at the same time going on private business of his own did not avail to relieve the master from liability. In *Boyle* v. *Ferguson*, [1911] 2 Ir. R. 489, where the master was held answerable, the servant had general authority to use his master's motor-cars for his own pleasure as well as for the master's business and a jury was allowed to infer user for the latter purpose.

On the other hand, Sainctelette, at p. 219 of his treatise, cites the case of a workman employed in a garage who fraudulently took out an automobile at night to amuse his friends and while so doing killed a policeman. The master was held liable.

The identity of the ground of liability of the master for damages caused by fault of his servant in the French and the English law and the similarity of the principles on which this branch of the law is administered in the two countries point to the conclusion that, notwithstanding some differences in the views prevalent in each as to the degree of connection with the work assigned which is requisite and as to when an entry on an enterprise of the servant's own will be deemed a mere deviation from the strict execution of

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duty and when it will amount to such an interruption of the course of employment as to put the servant *en dehors de ses fonctions* and the master's responsibility in abeyance, in seeking the true interpretation of the provision of the Quebec Code under discussion one may not improperly take into consideration, in a case such as that before us, the reasoning on which the English Courts have dealt with analogous cases. After careful comparison of all the authorities available the only reasonable conclusion seems to me to be that the limitation of the master's responsibility which it was intended to impose by the words "dans les fonctions auxquelles ils les sont employés" was intended to be substantially the same as that which English Courts understand to be imposed by the restriction which they formulate in the phrase "in the course of the employment."

The Cour de Cassation formerly held that a domestic servant in the house of his master should be conclusively reputed to be acting in the course of his employment (dans ses fonctions): S. 1860. 1. 1013. But it has since abandoned this doctrine, which created a legal presumption of responsibility entirely outside the text of the Code, and has recognised that the master cannot be held responsible for a wrongful act committed in his house by his servant when not "dans l'exercice de ses fonctions"; S. 1885, 1. 21. In a more recent decision it has been held that domestic servants in the house of their master are *primâ facie* reputed to be acting "dans l'exercice des fonctions auxquelles ils sont employés"; D. 1893, 2. 296. Compare *Boyle* v. *Ferguson*, [1911] 2 Ir. R. 489, at p. 496; *Stewart* v. *Baruch* (1905), 103 N.Y. (App. D.) 577, at p. 580.

It would almost seem as if the same Court, impelled no doubt by the motive which has prompted legislation in Quebec and elsewhere subjecting owners of automobiles to special burdens greater than the common law would impose, has been disposed to hold the owner of an automobile liable for any use made of it by his chauffeur taking advantage of the control which his duties give him, however foreign to the work for which he is actually employed and however contrary to orders which in an English Court would be regarded as limiting the sphere of the employment. It is possible, although unlikely, that there may be a reaction in regard to this particular application of art. 1384 C.N., and that the French Courts may

ultimately reach the conclusion that the imputation of responsibility to the master in a case such as *Picon* c. *Peltier*, 1908. 1. 351, is "en dehors de toute texte" and involves legislative rather than judicial action. But it must be conceded that if the text of the Quebec Code were identical with that of the Code Napoléon and we were bound in interpreting it to treat modern decisions of the Cour de Cassation as binding us in cases arising under the Civil Code, as we do judgments of the Privy Council and House of Lords in cases from the other Provinces, we would probably find ourselves compelled to allow this appeal.

We find not a little support, however, in French authors and jurisprudence for what seems to me the more reasonable view taken by the English Courts in regard to the particular phase of the master's responsibility under consideration, as illustrated in such cases as *Storey* v. *Ashton* (1869), L.R. 4 Q.B. 476, and *Rayner* v. *Mitchell*, 2 C.P.D. 357. (See also *McCarthy* v. *Timmins* (1901), 178 Mass. 378; *Cavanagh* v. *Dinsmore* (1878), 19 N.Y. (S.C.) 465.) Thus it is not disputed that the responsibility imposed by art. 1054 C.C. is "de droit étroit," and that the condition attached to it must actually exist in the case of the master:—

> In certain instances (says Planiol referring to the master's responsibility for acts of his servant, vol. 2, No. 991), this responsibility is truly unique; it is the exaggeration of an idea lightly touched upon by Pothier and founded upon a social condition which has disappeared.

As Demolombe puts it, the act for which the master may be held must be committed by the servant "comme tel en sa qualité." It must either be committed in discharging, or be directly connected with, the work for which he is employed. S. 1904, 2, 298. The master is not responsible when the servant "va contre sa fonction." Rev. Trim. 1917, 135—where the servant "en se servant de l'automobile agissait à l'insu de son patron et en son nom personnel." M. Wahl Rev. Trim. 1908, p. 14:—

"In order that the accident can make the master responsible it is necessary that the horse and carriage were driven by his orders or in his interests." S. 1869, 2. 43.

Notwithstanding the comparatively recent decision in *Picon* c. *Peltier*, 1908, 1. 351. and what has been stated in some of the other recent French cases, I am not satisfied that it is even yet conclusively settled in France that when a chauffeur, who takes advantage of the fact that he has the custody of his master's auto-

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mobile to start out with it without his master's knowledge and contrary to his orders "on a frolic of his own," while so using it by his fault injures a third person, the master is responsible for the damage. In English law he certainly is not.

The case at Bar must be determined in the last analysis, however, upon the interpretation of the provision of art. 1054 of the Civil Code of Quebec, which admittedly states the condition of the defendant's responsibility. I find no ambiguity or uncertainty in the phrases, "in the performance of the work for which they are employed" and "dans l'exécution des fonctions auxquelles ils sont employés," when they are read together, as they must be. As applicable to this case both alike exclude the defendant's liability. Lauzon was acting neither "dans l'exercice de ses fonctions" nor "à l'occasion de cet exercice" but "en dehors de ses fonctions"—"en dehors de son service"—during his joy-ride on the night in question. So far as they may be considered, English authorities uphold this conclusion and French modern authorities, even were we bound by them, although on the whole adverse, are not uniform in forbidding it. I rest my conclusion, however, upon my opinion that according to its "plain letter and express provision," art. 1054 C.C. excludes the defendant's liability and that recourse to authority should therefore be unnecessary, *Herse* v. *Dufaux* (1872), L.R. 4 P.C. 468, at p. 489.

I would dismiss the plaintiff's appeal.

Brodeur, J.

BRODEUR, J. (dissenting):—This cause raises an interesting question concerning the liability for fault of another. The question is whether or not the owner of an automobile is responsible for an accident caused by his chauffeur who, having been ordered to take the car to the garage, made use of it to take a joy-ride, in the course of which the accident happened.

The jury found in favour of the claim. The Court of Review maintained the verdict of the jury and gave judgment against the owner of the automobile. The Court of Appeal, 28 Que. K.B. 388, reversed this judgment basing its decision mainly on the case of *Halparin* v. *Bulling*, 20 D.L.R. 598, 50 Can. S.C.R. 471, decided by the Supreme Court in respect to an accident happening under circumstances nearly like those in this case, and we there decided, following a decision given in England in the case of *Storey* v. *Ashton*, L.R. 4 Q.B. 476, that the owner of the automobile was not liable.

I said, in that case of *Halparin* v. *Bulling*, *supra*, that I considered myself bound by the English jurisprudence since that case came from Manitoba, but that our decision should not be considered a precedent in Quebec, as the liability of the master in the civil law rests upon different principles.

There have been raised in the present case some difficulties as to the meaning of the verdict of the jury and upon the question of whether or not the chauffeur was "in the exercise of the functions for which he was employed." But in taking the version most favourable to the defendant, the respondent Latreille, that is to say, that adopted by the Court of Appeal, I consider that he is liable. Here is what the Court of Appeal says as a reason for arriving at the conclusion that the chauffeur Lauzon was not exercising his functions:—

> It is proved....that the said Lauzon on the night in question had driven the motor car to different places in the city in violation of his employer's orders, at one of which places he took supper and was afterwards in the act of giving three of his personal friends a ride in the car when about midnight he drove the car against respondent's son and killed him.

It is admitted on both sides that the said Lauzon was in the employ of the defendant as chauffeur of his automobile and that he disobeyed the orders of his employer when he took the ride in the course of which the accident happened.

These facts being proved and admitted there remains the question whether or not they constitute in law a case of liability of the owner. That is the question we have to decide.

I consider that the Court of Appeal was in error in relying upon an English decision to decide the present case. The texts of the civil law and of the English jurisprudence would appear at first sight to have much resemblance. But it is always dangerous to look to the English law for authorities and decisions which have been inspired by a system proper in this body of law but which would be absolutely foreign to the principles generally followed in the civil law. We are told that the two texts are identical. The master is liable for the acts of his servant "in the performance of the work" says art. 1054 of the Civil Code. The authors of the English law say: "in the course of his employment in his master's service" (Smith, Master and Servant, 6th ed., p. 263), and the English jurisprudence in the classic case of *Barwick* v. *English Joint Stock Bank*, L.R. 2 Exch. 259, decided in 1867, uses the

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expression, "In the course of the service and for the master's benefit." It is claimed that the terms are identical and that therefore the Court of Appeal has properly decided the present case by applying our decision in *Halparin* v. *Bulling*, 20 D.L.R. 598, 50 Can. S.C.R. 471.

If the terms are identical and if the law is the same in both countries, how can one explain the great difference in the application of the same text to the subject of fellow servant? In England and in the English Provinces no remedy is given against the employer when an employee is injured by his fellow servant, notwithstanding this fellow servant is acting in the exercise of his functions "in the course of his employment and in his master's service." Smith, Op. Cit., page 263.

The case of *Priestly* v. *Fowler* (1837), 3 M. & W. 1, 150 E.R. 1030, sets forth this jurisprudence which is still followed in England and in the English Provinces of Canada where there is no statutory law on the subject. One who had to invoke such jurisprudence under our civil law would be in a poor position to do so for it is entirely opposed to the elementary principles of responsibility. Aubry and Rau, 4th ed., vol. 4, page 760.

But the texts are nearly in the same terms. Why then this difference in the two countries? It is because the theory of responsibility for the fault of another rests in England and in Quebec upon very different principles. In England a person is responsible for his own fault but it is only within a quite recent period (1867) that this responsibility exists, in terms that Pollock considers classic, to make the employer responsible for the acts of his employee. There is no departure from the common law by the doctrine of common employment laid down in *Priestly* v. *Fowler*, *supra*. The liability of the employer for the fault of his employee is only applied with reticence and circumspection, one might almost say with regret. It has received the intervention of Parliament on pressure by organised labour in the form of the Employers' Liability Act, and the Workmen's Compensation Act, to extend the liability of the master. But where these Acts have not been adopted and in a case of industrial workmen, we are still bound by the old principle of the doctrine of "common employment" or "fellow servant," principles repugnant to our idea of responsibility under the civil law.

Now, upon what is this English jurisprudence based? Pollock on Torts, 8th ed., p. 77, discusses this question and says: "No reason for the rule, at any rate, no satisfactory one, is commonly given in our books."

If we consult, on the contrary, the doctrine of the civil law on the matter, we see there the reason for the responsibility of the master for the acts of his servant. It rests upon the principle that the master should employ only good servants.

Pothier in his Treatise, "Des Obligations," No. 121, says that the responsibility has been established "to make the masters careful to make use only of reliable domestics."

We find the same principle enunciated in Demolombe, 131, No. 610, Colmet de Santerre, vol. 5, No. 36, and in Laurent, vol. 20, No. 582.

The authors of the Code Napoléon have adopted this doctrine. They are even more severe with respect to the masters than to the head of a family. The latter, under the rule of the Code Napoléon, and under our Code (art. 1054 C.C.) can avoid being held responsible for faults of his child by proving that he was unable to prevent the act which caused the damage.

We find, in Locre, vol. 6, p. 280, the reasons for which the authors of the Code Napoléon dealt more severely with the master than with the father in the case of responsibility for the fault of another.

The responsibility of the master exists in France and in Quebec even in the case where the servant acted of his own motion without orders or instructions from his master. Aubry et Rau, vol. 4, 4th ed., p. 759; Touillier, vol. 11, p. 284; Larombière, art. 1384.

This responsibility also exists in the case where the servant has abused his functions. That is the present case. Demolombe, vol. 31, No. 614; Laurent, vol. 20, No. 506; Révue Trimestrielle, 1917, p. 134.

As Demolombe says, who always wrote with greatest moderation, the responsibility of the master ceases only in the case where "the act which caused the damage has no relation with the functions for which he (the employee) was employed;" or as Dalloz says, 1874, 2, 52, "In the case where the fault does not relate to the functions in any manner whatsoever by the circumstances of time, of place and of service."

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What were the functions of the employee, Latreille? He was to be chauffeur of the automobile. He had to drive it and take care of it. It is true that he had, on the evening in question, disobeyed orders; but this disobedience did not relieve the master from responsibility. Why? Because this servant was a bad servant; and then, as say Pothier and the other authors, the master did wrong to engage a bad servant and to entrust to him a machine which he could use for his own purposes.

Some decisions have been rendered in France upon analogous cases. I will cite among others that reported in Dalloz, 1908. 1, 351, rendered by the Cour de Cassation in the case of *Picon* v. *Peltier*. The reporter's note is as follows:—

Master or employers are responsible not only for damage caused by their servants or employees in the normal or regular exercise of the functions for which they are employed but also for damage resulting from the abuse of these functions. (C. Civ. 1384.) Thus the owner of an automobile is civilly responsible for an accident caused by the act of the chauffeur employed by him to drive this car even in the case where the chauffeur, having received from his master an order to take the car to the garage, uses it to take a joy-ride on returning from which the accident happened.

The note published under this decision is not signed but it is very interesting. The citations given shew that this decision of the Cour de Cassation is in conformity with the jurisprudence and the doctrines adopted.

Sainctelette, who is an author of renown, has written a whole treatise upon the "Responsibility of Owners of Automobiles." Here is what he says at Nos. 188 and 189 of this work:—

Thus I order my chauffeur to wait for me at the door of a house where I am making a visit; in despite of my instructions he profits by my momentary absence to make, with my car, a trip on his own account, or a pleasure trip. Or suppose that I direct my chauffeur to drive in my car one of my friends to a neighbouring town and order him to return immediately; my chauffeur when he has done this remains in this town having a good time, drives his friends around in my car and ends by causing an accident. Or again, suppose that, before absenting myself from my home to take a voyage, I forbid my chauffeur to take my car out during my absence, and scarcely have I departed when he disobeys the order that I have given him. Finally, suppose that at the end of a trip, having no further need of the car, I direct my chauffeur to take it back to the garage; he profits thereby to take a joy-ride in the course of which he causes an accident.

Am I in these different cases responsible for the act of my chauffeur? In other words, has he acted in the exercise of his functions or, on the contrary, has the accident happened outside the scope of these functions? It should be noted that the chauffeur has received no permission to use the car and that if he did so it was without the knowledge of his master and sometimes

in despite of a formal prohibition. Can it be said, in these circumstances, that the fault committed by the employee outside of all the work for which he is employed and even in violation of instructions received, can be deemed to be connected with his duties so as to make the employer responsible?

189. The jurisprudence lays down a principle that masters or employers are responsible not only for damage caused by their servants or employees in the normal and regular exercise of their functions but even for that which results from an abuse of these functions.

The damage which is only connected with the functions by an abuse which is made of them makes the employer responsible. It follows that the latter is responsible when the employee has acted not only without authority but even in despite of a formal prohibition which has been given him. In these cases the civil liability of the employer is derived, in law, from the idea that he has made a bad choice of his employee, or that he has not sufficiently looked after the proper execution of his order or the observance of the prohibition that he has made.

It seems to me that it would be better for our Courts in Quebec to follow these opinions rather than those which have been enunciated in the jurisprudence where with regret there has been recognised for the victims of the servant some rights against his master, and where it is nevertheless declared that the master is not to be responsible for the fault of the fellow-servant who had injured him.

But it is said that art. 1054 C.C. is not in precisely the same terms as the corresponding article of the Code Napoléon. There is no difference so far as the subject which engages our attention is concerned. The Code Napoléon says that masters are responsible for the damage caused by their servants *in the functions* for which they have been employed. Our article says, "in the execution of the functions."

I do not see in these terms any difference which can affect the actual litigation. The servant in our case is the chauffeur of an automobile. That is his function, and it is in the exercise of his function that the accident happened. The authors in France, moreover, in discussing the subject, nearly always use the expression, "in the exercise of the functions."

See Demolombe, vol. 31, No. 614, who, in mentioning the first condition, under which a claim can be made, says: "It is necessary, first that the act should be one of those in which consists *the exercise* of the function to which he (the servant) is employed."

There has been discussed in France the question of whether or not damage caused on the occasion of the functions can make the

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employer liable. Mourlon is of opinion that it can not. Laurent, Baudry-Lacantinerie and Aubry and Rau, are of a contrary opinion.

But the accident which engages our attention did not happen on the occasion as in the case often cited of the coachman who maliciously strikes someone with his whip but I am of opinion that Lauzon committed his fault in the exercise of his functions as chauffeur of the automobile.

Our codifiers followed the Code Napoléon in drafting our art. 1054, as they say in their report of which this is the text: "The articles of chapter III., of Délits and Quasi Délits correspond to the articles of the French Code, save as to some changes in the terms to meet objections that have been raised against them."

What is referred to is evidently the word "préposés" found in the Code Napoléon, and which is replaced in our Code by the word "ouvriers."

For all these reasons I believe that the Court of Appeal, 28 Que. K.B. 388, erred in basing its judgment upon a decision rendered under the English law and under a system which has not for the master the same severity as the Civil Code.

In our case we should enter into the spirit of the law, into its reasons and its object; these are found in the character and the opinions of the writers and in the intelligence of its lawyers. All that we have in Pothier, in the Code Napoléon, in the Commentators, in the report of our codifiers and even in our Code, which was prepared before the English jurisprudence in terms more or less certain and definite, had settled the case where the servant could make his master liable; we know upon what the liability of the master rests in the French law; and Pollock shews us, on the contrary, that in the English jurisprudence "no reason for the rules, or at any rate, no satisfactory one, is commonly given."

Is it not more reasonable in these circumstances to follow the French jurisprudence as enunciated by the Cour de Cassation in 1908? I observe with some apprehension the tendency which exsts to decide Quebec cases by the light of English precedent. The remarks that I have made in the present case and the spirit of the law in the two systems shew how dangerous it is to depart from one system in order to seek in another precedents which

rest sometimes upon principles feebly enough recognised, and sometimes contradictory although the text makes them appear almost identical.

For my part I prefer to base my decision upon that of the Cour de Cassation because it was given under a law which our codifiers declare that they themselves adopted.

The appeal should be allowed with costs and the judgment of the Court of Review restored.

Mignault, J.

MIGNAULT, J.:—There is in this cause an interesting question as to the bearing of the last paragraph of art. 1054 of the Civil Code, which reads as follows: "Masters and employers are responsible for the damage caused by their servants and workmen in the performance of the work for which they are employed."

Paragraph 3 of art. 1384 of the Code Napoléon says: "Masters and employers (are responsible) for damage caused by their servants and employees in the functions for which they have employed them."

One knows that in France the provisions which make a person responsible for the act of another being founded upon a legal presumption of fault should, therefore, receive a strict interpretation. Baudry Lacantinerie et Barde, Obligations, No. 2938.

There are some differences of expression between our article and the corresponding provision of the French Code. Thus the word "workmen" has not in ordinary language a meaning as wide as the expression "employees." In addition, art. 1384 C.N., saying, "in the functions" etc., our article employs an expression a little less general in saying "in the execution of the functions" etc., a meaning that the English version renders still more precise by saying "in the performance of the work for which they are employed." I have pointed out the differences of expression between the last paragraph of our art. 1054 and para. 3 of art. 1384 of the French Civil Code. It is necessary now to determine whether or not our article should receive the same interpretation as art. 1384. In other words, can we with our text adopt here the solutions of the doctrine and of the French jurisprudence founded upon the text of the Code Napoléon?

These solutions can be briefly summed up. Thus M. M. Baudry Lacantinerie et Barde (Obligations, T. 4, No. 2914) says:—

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But this expression, "in the functions for which they have been employed," does not signify that the acts by reason of which masters and employers can be declared civilly responsible should constitute the exercise of the functions of the servants or employees. The condition required by the law is complied with when the acts causing injury are done either in the exercise of these functions or even on the occasion of this exercise, and even when the damage results from an abuse of the said functions.

And in No. 2991 the same authors shew that:—

The master or the employer would be responsible even for the act causing injury which the servant or employee had committed not only without his knowledge and without his orders but also in spite of the most formal prohibition. The reasons for the law lead to this solution because the circumstances which we now assume cannot take away the fault of which the master or employer has become guilty in making a bad choice of his servant or employee.

Thus in France the master is responsible in most cases where the fault of his servant or employee causes injury to another, and he can only escape from this responsibility when it appears that the incriminating act is entirely foreign to the functions of his servant or employee.

Granted then that a strict interpretation is called for in this matter, I am not convinced that the text of our article authorises us to adopt all the solutions that I have stated. Thus in the Province of Quebec the master and employer are responsible for damage caused by their servants and workmen *in the execution of the functions for which the latter are employed*, or to cite the English version of art. 1054 C.C., "*in the performance of the work for which they are employed.*" This clearly appears to me to exclude the responsibility of the master for an act done by the servant or workman on the occasion only of his functions if it cannot be said that this act was done in the execution of his functions. It is often very difficult to determine whether the act causing injury is accomplished in the execution of the functions or only on their occasion, but if it really appears that the act was not done in the execution of the functions of the servant or workman, we find ourselves outside of our text. The abuse of the functions if the incriminating act is done in the execution of these functions comes on the contrary within the text and makes the master responsible. It goes without saying that the master or employer cannot, like the other persons mentioned in art. 1054 C.C., escape the liability by shewing that he could not prevent the act which caused the damage.

In drafting the last paragraph of art. 1054 C.C., the codifiers appear to be governed by the doctrine of Pothier (Bugnet ed.) "Obligations," No. 121, which says:—

> Masters are also made responsible for injuries caused by the *délits* and *quasi-délits* of the servants or workmen whom they employ for any service. They are so even in the case where it was not within their power to prevent the *délit* or *quasi-délit*, when the *délits* or *quasi-délits* are committed by the said servants or workmen in the exercise of the functions for which they are employed by their masters, and even in the absence of their masters, which has been established to make masters careful to employ only good servants.
>
> In regard to the *délits* or *quasi-délits* which they commit outside of the scope of their functions the masters are not responsible.

I may be permitted to make one further general observation because most of the Judges of the Court of Appeal appear to me to have assimilated our law, as to the responsibility of masters and employers, to the English law under which it has been decided that the master is responsible for injurious acts done by his servant "in the course of his employment" an expression which, in their opinion, bears the same idea as "in the exercise of the functions for which the latter are employed," or, recite again the English version of art. 1054 C.C., "in the performance of the work for which they are employed." And having stated that in their opinion the meanings are identical the Judges have cited some English decisions, and especially the judgment rendered by this Court in the case of *Halparin* v. *Bulling*, 20 D.L.R. 598, 50 Can. S.C.R. 471, which came from the Province of Manitoba.

It is sometimes dangerous to go outside of a juridicial system to seek for precedents in another system on the ground that the two contain like rules save in the well understood case where one system borrows from the other a rule which was formerly foreign to it. But even when the rule is the same in the two it is possible that it should not be applied or interpreted in the same manner in both of them, and like the judicial interpretation—I speak of course of that which governs us—really forms part of the law which it interprets it can very well happen that the two rules, in spite of an apparent similarity, are not entirely identical.

I do not then base the conclusions which I believe should be adopted in this case upon any precedent drawn from English law, not even upon the case of *Halparin* v. *Bulling*, *supra*, but I base it solely on the text of art. 1054 C.C. The very complete review that my honourable colleague, Anglin, J., made of the jurispru-

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dence, French as well as English, shews how much better it is to adhere to the text of our article, a text which does not lend itself to any equivocation, than to attempt to draw a rule or principle from a large number of decisions in point. It seems to me, moreover, quite useless to seek for this rule since we have it in very clear terms in our Civil Code, and if the French jurisprudence and the opinions of writers relied on by my colleague, Brodeur, J., go beyond this rule, it is the rule itself and not this jurisprudence and these opinions which we should follow and apply.

In this case I am of opinion that Lauzon was not in the execution of the functions for which he was employed when he killed Elliot. The answer of the jury to question 5 is an answer that they could not reasonably give on an examination of all the evidence (art. 501 C.P.C.). The evidence of Lauzon bears the mark of improbability and even of absurdity and in spite of my repugnance to intervene in a matter of this kind I am compelled to say that no jury could in this case reasonably arrive at the conclusion that Lauzon at the time of the accident "was performing work for which he was engaged by the defendant." It is not here a case of abuse by the servant of the functions that his master entrusted to him, but an act done entirely outside of these functions and during which, with companions like himself, he enjoyed the luxury of a joy-ride at reckless speed along the streets of Montreal. To do that he took the automobile of his master from the garage where it had been placed and his pretext that when he killed Elliot he was trying and "testing" the machine, is such an absurd and improbable story that the jury could not reasonably believe it.

I have not lost sight of the provision of art. 1406 of R.S.Q. 1909, as amended by the Act 3 Geo. V. 1912, ch. 19, sec. 3. Before this amendment art. 1406 made the owner of a motor vehicle responsible for all accidents and damage or injuries caused by it on a public road or place. It was no doubt found that this article, which created an absolute liability of the owner even in the case of a pure accident, was too severe and the amendment placed on the owner or driver the burden of proving that the loss or damage was not due to the negligence or reprehensible conduct of the owner or driver. In my opinion this Act does not modify the common law as to responsibility of a person for his own fault (art. 1053 C.C.), or for the fault of another (art. 1054 C.C.), but it

obliges the defendant to prove that he does not come within the condition which, by the common law, makes him responsible for the act causing injury.

It is true that the jury, when question 6 was presented to them: "Was the said accident due to the fault and negligence or want of care of the defendant or his driver? If so, in what did the said fault or negligence consist?" replied (I cite this answer verbatim):—

As no evidence was produced to the contrary, we find that the defendant was negligent in omitting to satisfy himself from time to time as to whether the chauffeur or driver had car out against orders; but particularly throw blame on the driver for his want of competence in the way of driving, as in his evidence he said that something was wrong with the car, and in spite of that driving on St. Lawrence Boulevard at excessive rate of speed, not stopping behind stationary street car and pass same on left hand side, all contrary to the vehicle laws of the Province of Quebec.

But since it is necessary to ascertain whether or not the defendant was personally in fault, it remains to be said that the fault of which the jury found the defendant guilty is that of not having inquired from time to time whether or not the chauffeur had taken out his automobile against his orders; that is not for having employed an incompetent chauffeur and the jury could find the defendant guilty of this fault only because no proof to the contrary was given. But the evidence states that the defendant had made inquiries about his chauffeur before and after he engaged him and had given instructions to the owner of the garage not to allow the automobile to be taken out after ten o'clock at night. There is nothing on the record any more than in the answers of the jury to shew that the defendant was guilty of fault having any connection with the accident, and even supposing that the evidence had stated that the defendant did not watch his chauffeur—and it does not state it—nothing would have justified the jury in saying that the most complete surveillance would have prevented Lauzon from taking his foolish ride on the evening of the accident.

I am then of the opinion that the appeal should be dismissed with costs. *Appeal dismissed.*

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S. C.

Re ASTON and WHITE.

Ontario Supreme Court, Orde, J. August 12, 1920.

VENDOR AND PURCHASER (§ I C—10)—AGREEMENT FOR SALE OF LAND—ASSIGNMENT TO VENDOR OF INTEREST OF OWNER OF EQUITY OF REDEMPTION UNDER PREVIOUS UNREGISTERED AGREEMENT TO ANOTHER—LAND NOT DESCRIBED IN ASSIGNMENT—QUIT CLAIM—AFFIDAVIT UNDER SEC. 34 OF THE REGISTRY ACT, R.S.O. 1914, CH. 124—TITLE.

An affidavit or declaration made under the provisions of sec. 34 of the Registry Act, R.S.O. 1914, ch. 124, is only a piece of machinery incidental to the registration of an instrument, and if in the instrument itself there is any uncertainty as to the lands covered by it the affidavit cannot in any way remove that uncertainty. The rights of the parties affected by the instrument must be determined independently from such affidavit.

[*In re Nutt's Settlement*, [1915] 2 Ch. 431, distinguished.]

Statement. MOTION by a vendor of land, under the Vendors and Purchasers Act, for an order declaring that an objection to the title raised by the purchaser was invalid.

G. W. Morley, for vendor; *W. D. M. Shorey*, for purchaser.

Orde, J. ORDE, J.:—John Aston, the father of George Aston, the vendor on the present application, was the owner of the property in question, which was then subject to a mortgage. On the 29th June, 1918, he entered into an agreement under seal to sell the land to one Charles Hoare, the land being sufficiently described for registration purposes in the agreement.

On the 1st October, 1918, John Aston executed, under seal, an assignment in favour of his son George Aston of all the benefit of the agreement with Hoare.

John Aston died on the 24th October, 1918, having made a will, whereby he gave to his son George Aston all his property, and also appointed his son his executor. The will has not yet been proved, and it is really to avoid the expense and trouble of obtaining probate that this application is made. On the 29th April, 1920, Charles Hoare executed a quit-claim deed in favour of George Aston.

By an agreement in writing between George Aston and Nicholas White, the purchaser, the latter agreed to purchase the land in question. The purchaser now raises the objection that George Aston has not such a title in the lands as the purchaser is bound to accept, and contends that the legal estate in the land is still in the estate of John Aston, the father of the vendor. The vendor contends that the assignment by John Aston to him of the 1st October, 1918, constituted a conveyance of the legal estate.

This assignment recites that "by articles of agreement dated the 29th day of June, 1918, and made between the said assignor, of the first part, and Charles Hoare, of the second part, the said assignor agreed to sell and convey in fee simple unto the said Charles Hoare, who thereby agreed to purchase from the said assignor, the lands thereinafter described," etc., and also that "the said assignor has agreed to assign the said articles of agreement and all benefit and advantage to be derived therefrom to the assignee." The assignment then witnesseth that in consideration of the premises and of the sum of one dollar "the assignor doth hereby assign transfer and set over unto the assignee all that the said recited agreement and all the estate right title benefit advantage property claim and demand whatsoever of the said assignor of in or to the same and the property comprised therein."

The assignment nowhere mentions the lands except by reference to the agreement of the 29th June, 1918, but for purposes of registration George Aston has made an affidavit, under the provisions of the Registry Act, in which he swears, "to the best of my knowledge and belief," that the land described in the assignment is the land in question. The vendor contends that, by virtue of the words "and the property comprised therein" contained in the assignment, all John Aston's legal estate in the land passed to the vendor.

Strictly speaking, at the time of the agreement with Hoare and of the assignment to George Aston, the legal estate was vested in the mortgagee, John Aston's interest comprising only the equity of redemption, but I do not think that the question whether or not John Aston was possessed of the legal estate is material. For conveyancing purposes it is just as essential that the conveyance of an equity of redemption should be surrounded by the same safeguards as a conveyance of the legal estate.

The question to be determined is whether or not the title in George Aston is one which ought to be forced upon an unwilling purchaser. It may be argued that the assignment of the benefit of the agreement of sale made by John Aston with Hoare could be of no value to the assignee unless it was accompanied by a conveyance of John Aston's interest in the land; but it was surely incumbent upon George Aston to see that John Aston's interest

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was properly conveyed to him. If a conveyance can be made in this vague way, and the description supplied by an affidavit, then no title will be safe.

It is apparent that, under the terms of the assignment, George Aston would probably have had the right to require his father to execute a proper conveyance, but I am not here considering George Aston's rights as against his father, but whether or not the lands in question are sufficiently vested in George Aston to make it clear that he has a good title. There is nothing whatever on the face of the assignment to identify the lands except the reference to an agreement with Hoare, and it is conceivable that there may have been other agreements of the same date between John Aston and Hoare relating to the sale of other lands.

The effort on the part of the vendor to supplement what is lacking in the assignment, by attaching to it an affidavit setting forth the description, does not, in my opinion, improve his position. Section 34 of the Registry Act, R.S.O. 1914, ch. 124, provides that "no instrument which affects land without local description shall be registered unless the instrument, when offered for registration, in addition to the ordinary proofs for registration, has attached to it a statutory declaration by one of the parties to the instrument . . . to the effect that the instrument affects land within the registry division." This provision in the Registry Act is a comparatively recent introduction, and was really intended to cover cases of wills, letters of administration, powers of attorney, and other like instruments.

The affidavit is intended to assist the Registrar, by identifying the lands affected by the general terms of the instrument, in making his entries in the respective abstract indexes in his office. The affidavit in fact is only a piece of machinery incidental to the registration of the instrument. It does not affect the instrument itself in the slightest particular. If in the instrument itself there is any uncertainty as to the lands covered by it, this affidavit, except for registration purposes, cannot in any way remove that uncertainty. The rights of the parties affected by the instrument must be determined independently from any such affidavit. So that attaching the affidavit does not in the present case solve the vendor's difficulty. It still leaves the question, whether or not the lands referred to in the assignment are those in question

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here, open to doubt, and so long as there is any doubt I do not see how the purchaser can be compelled to accept the vendor's title.

Mr. Morley referred to the case of *In re Treleven and Horner* (1881), 28 Gr. 624, in which it was held that the description of certain land in a marriage settlement by reference to certain other registered conveyances was sufficient. In Armour on Real Property, 2nd ed., p. 346, this decision is referred to as justifying a description by reference to another conveyance, but it is pointed out that such a practice is inadvisable.

There is, however, clearly a very great difference between a description by reference to a conveyance already registered and one by reference to an unregistered agreement. In one case there is no difficulty in identifying the conveyance, and therefore in identifying the land, but in the case of a reference to an unregistered agreement there is no real certainty as to what instrument is referred to. Whatever authority the *Treleven* case may have, I do not propose to extend it by holding that title to land can be conveyed in the irregular and uncertain way in which the vendor claims to make title here.

Reference was also made to *In re Nutt's Settlement*, [1915] 2 Ch. 431, but that case involved the construction of a settlement as between the parties interested in it. I fail to see how it applies to the present case at all.

For these reasons, I hold that the title of the vendor is not such as the purchaser is bound to accept, and I accordingly dismiss the vendor's application with costs in favour of the purchaser.

Application dismissed.

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S. C.

New Brunswick Supreme Court, Appeal Division, Hazen, C.J., White, and Grimmer, JJ. November 19, 1920.

TIMBER (§ I—10)—CROWN LANDS—LICENSE TO CUT—STUMPAGE CHARGES—PAYMENT OF—FAILURE TO CUT—OPTION TO CUT OR PAY CHARGES—INTERPRETATION OF REGULATIONS—RIGHTS OF LICENSEE.

A renewal of a saw-mill license as provided by The Act *re* Timber Lands, 3 Geo. V. 1913 (N.B.), ch. 11, sec. 1(b) contained the following section of the regulations as promulgated by the Governor-in-Council:

"As a protection to the Government against lands being held under license for speculative purposes and not operated on, all licensees shall make such operations annually on the lands held by them under license as may be deemed reasonable to the Minister of Lands and Mines, and the Minister of Lands and Mines shall have the power to call upon any licensee to cut an amount equal to at least 10M. superficial feet of lumber

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for each square mile of licensed land held by him, and may require that such operation or cut shall be made on such blocks of timber lands held by the licensee as the Minister of Lands and Mines may determine or direct. Should the licensee prefer to pay the stumpage that would be due on such quantity of lumber at 10M superficial feet per mile instead of making the required operation or cut, he shall have the right to do so in any year, on his notifying the Minister of Lands and Mines to that effect, and obtaining his consent thereto; and such charge in lieu of stumpage shall be payable on or before the first day of August. On failure of the licensee to comply with any of the foregoing conditions the licenses shall be forfeited and the berths held under them shall become vacant and be open for application by any other person."

The Court *held* reversing the trial Judge that the intention of the section was to give the Crown protection as far as revenue was concerned from lands being held for speculation and that it conferred on the licensee an option either to cut or to pay for the privilege of not cutting, which option if elected by the licensee simply entitled him to retain his license and prevent forfeiture, and that payment under the option was not an anticipated or advance payment of stumpage which the Crown was bound to credit to the licensee upon stumpage afterwards becoming due for timber actually cut.

Statement.

APPEAL by the plaintiff from the judgment of Chandler, J., in an action brought by the Crown to recover a sum alleged to be due for stumpage under the Act respecting timber lands of the Province. Reversed.

J. J. F. Winslow, supports appeal.

H. A. Powell, K.C., *contra*.

The judgment of the Court was delivered by

Grimmer, J.

GRIMMER, J.:—This action was tried before Chandler, J., of the King's Bench Division, without a jury, in April last, judgment being delivered in the month of June following.

The suit was brought for the recovery of $6,070.25 stumpage claimed by the Crown on timber cut under licenses from the Crown, held by the defendant as trustee for Sir Herbert Holt, George F. Underwood and the estate of Sir William C. Van Horne. At the trial certain admissions were made on behalf of the plaintiff and defendant, and certain regulations of the Crown Land Department were put in evidence. These admissions and regulations, with the respective pleadings, constitute the case.

The plaintiff is the owner of 10,000 square miles of timber lands in the Province of New Brunswick, of which prior to February 16, 1912, 121½ square miles were held under licenses by Hilyard Bros. On the last-named date these licenses were with the consent of the Minister of Lands and Mines transferred to the defendant as trustee as aforesaid, and in due course new licenses

were issued by the plaintiff to the defendant for one year from August 1, 1912, subject to the conditions and covenants contained therein, where *inter alia* the following are found:

1. All timber licenses shall be subject to the right of the Lieutenant-Governor-in-Council to increase the mileage on licenses and the stumpage on all classes of lumber, when deemed expedient, on due notice thereof being given in the Royal Gazette, such increase to take effect at and after the date of the next following annual renewal, and also to any further regulations that may be made by order of the Lieutenant-Governor-in-Council for the purpose of expeditiously enforcing the payment or adjustment of stumpage on any logs or other lumber cut within the limit described in any license or otherwise giving effect to or enforcing the conditions of the license.

2. Licensees who have paid their stumpage dues in full and have fully complied with all the conditions of their licenses on or before the first day of August in each year, shall be entitled to annual renewals for such parts of the ground held by them as may at the first day of July in each year be vacant and unapplied for, on payment of the mileage thereon at the rate of $8 per square mile, payable on or before the first day of August in each year. No renewal mileage on licenses shall be received unless all stumpage dues have been duly paid as before provided; also provided that no license shall be reckoned at less than two square miles.

The defendant did not cut any lumber under said licenses for the year ending August 1, 1913, but held the lands without any operation of any kind thereon, mileage alone being paid. On March 20, 1913, An Act Respecting the Crown Timber Lands of the Province was passed, 3 Geo. V. (N.B.), ch. 11, and previous legislation affecting the public domain was repealed. This Act provided for the issue of licenses of two kinds, viz., The Pulp and Paper License and the Saw-Mill License, which, subject to a satisfactory compliance on the part of the licensee to such rules and regulations as may be made from time to time by the Lieutenant-Governor-in-Council, dealing with the Crown Lands, carried with them the right of renewal from year to year for the periods of 30 and 20 years respectively, from August 1, 1913. On August 1, 1913, renewal licenses, being saw-mill licenses, as provided in the last above-named statute, were issued to the defendant, subject to the regulations therein contained, of which No. 17, is as follows: (see head-note).

The defendant accepted the licenses and paid the mileage thereon, but did not cut any lumber on the land for the year ending August 1, 1914, so that for two successive lumber seasons no logs or lumber was cut by the defendant under the said licenses, nor did the Crown derive any revenue save mileage

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from the 121½ square miles of land covered by the defendant's licenses. However, fresh renewal licenses were issued to the defendant on August 1, 1914, for the year ending August 1, 1915, but the defendant apparently as heretofore not intending to operate the lands was notified by the Minister of Lands and and Mines under said regulation 17 to cut upon the said lands an amount equal to at least 10M superficial feet of lumber for each square mile of land, or 1,225,000 superficial feet, whereupon the defendant, with the consent of the Minister, exercised the privilege or option conferred upon him by the regulation, and paid the Crown the sum of $1,822.50 in lieu of stumpage on the 1,225,000 superficial feet of lumber which it has been required to cut by the said Minister. The same relations continued between the parties during the lumber seasons of 1915 and 1916, the leases being annually renewed and the defendant electing its option of paying on 10M superficial feet of lumber rather than operating on the lands.

On August 1, 1917, the licenses were again renewed, the mileage paid, and the defendant conducted a lumber operation on the lands the ensuing lumber season and paid the plaintiff the sum of $3,781.42, for stumpage, but made no claim for any credit as against this cut for the amounts paid in 1915, 1916 and 1917, when no lumber was cut, notwithstanding such a claim was made in respect to the cut of a year later. In 1918 the licenses were again renewed and the mileage paid. During the ensuing lumber season the defendant cut from and off the said lands 2,615,955 superficial feet of logs, upon which the stumpage amounted at the then current rate to $6,070.25. The defendant did not pay this stumpage when it became due, but in January, 1920, paid $602.75 therefor, this being the difference between the sums paid by it in 1915-16-17, amounting to $5,467.50, and the $6,070.25 of the 1918-19 cut. They also paid $16.45 for interest on the said last-named sum from August to the time of payment, and refused to make any further payment, claiming to be entitled to credit on the last-named operation for the amount paid in the 3 years there had been no operation, viz., the sum of $5,467.50. Judgment was delivered by the trial Judge dismissing the action with costs, from which this appeal is taken.

The ground upon which the appeal is based is as follows: That the trial Judge was in error in holding that any payment made by the defendant under sec. 17 of the timber license is a payment of stumpage as such, and that such payment being merely an anticipated or advance payment of stumpage the Crown is bound to credit any amount so received upon any stumpage afterwards becoming due from the defendant for timber actually cut under its license.

The case turns or rests entirely upon the construction to be given to sec. 17, regard being had to the object and intent thereof, as well as that the Crown is the owner and licensor of the lands held by the defendant.

To arrive at the proper construction to be given to the section, it must be interpreted (being reduced to writing) with the object of discovering the intention of its author (the Governor-in-Council) the written declaration of whose mind it is always considered to be. 10 Hals., para. 768, p. 433.

The words of a written instrument must in general be taken in their ordinary sense, but if the provisions and expression are contradictory and there are grounds appearing on the face of the instrument affording proof of the real intention of the parties, that intention will prevail against the obvious and ordinary meaning of the words. 10 Hals., para. 770.

The rule which is expressed in the maxim *verba fortius accipiuntur contra proferentem* is subject to the general principle that the instrument must be construed in accordance with the expressed intention and it does not come into operation until a doubt arises upon the construction of the instrument. In the case of a grant by the Crown the rule is reversed and the grant is taken most strongly against the grantee and in favour of the Crown, unless the grant is expressed to be made of special grace, mere motion and certain knowledge. 10 Hals., sec. 778, and the cases there referred to.

Applying these rules to the section, it seems to me there is but little difficulty, in fact none, in arriving at the plain, clear and unmistakable object, intention and purpose of the section.

In his judgment the trial Judge says:

> The whole thing turns upon the construction to be given to the provisions of section 17. The Crown claims that the payment made

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by the defendant under this section is not a payment of stumpage but is a charge in lieu of stumpage. The defendant claims that any payment made by the defendant under the provisions of this section 17 is merely an anticipated payment of stumpage and that it is entitled to credit for these payments on any amount due for stumpage on timber actually cut by the defendant under the licenses or any of them.

My view of the matter is that the contention made by the defendant is the correct one. I think that any payment made by the licensee under section 17 with the consent of the Minister instead of making the required operation or cut is a payment, of stumpage as such, and that the Crown having received this anticipated payment of stumpage is bound to credit the amount so received upon any stumpage afterwards becoming due from the defendant for timber actually cut under its licenses. If the Crown intended by section 17 to require the licensee to pay a certain amount of money instead of making the required operation or cut as a payment for the privilege of not making such required operation or cut, it would have been a very simple matter to use language that would have that effect, but I do not think that the language used in this particular section bears this meaning. According to the claim put forward by counsel for the Crown, section 17 authorises the Crown to require a payment of money either as a penalty for not making the operation or cut required by the Minister or as a payment for the privilege extended to the licensee of not making the required operation or cut, and a great deal of stress was laid by the counsel for the Crown upon the words "such charge in lieu of stumpage" in section 17. The effect of giving to section 17 the construction claimed by the Crown would be to compel the licensee to pay double stumpage under the circumstances such as those which occurred in this case. If the payment of $5,467.50 made by the defendant is to be retained by the Crown simply as a penalty or as a payment for the privilege or right of not making the operation or cut required by the Minister at any time, then the defendant will be required to pay stumpage on all timber actually cut by it upon the lands covered by these licenses subsequent to the making of these three several payments and will lose the benefit of these payments so far as stumpage is concerned. On the other hand, the Crown does not lose anything by the construction which I think should be given to section 17, as it merely gets its stumpage in advance and the amount actually payable by the defendant for timber actually cut under the licenses held by it could easily be adjusted. The words used in section 17, namely, "the stumpage that would be due," in my judgment deal with a payment of stumpage only and the words "charge in lieu of stumpage" used farther on in the license do not, it seems to me, change the construction to be given to the words first quoted.

With all due respect to the finding of the trial Judge I am quite unable to agree with the conclusion at which he has arrived. The Crown is the owner of the land under license to the defendant, holding the same for the purposes of revenue, and in order to protect its interest and to prevent speculation on the part of licensees had promulgated by the Governor-in-Council sec. 17 of the Regulations as herein quoted (see head-note). That regu-

lation distinctly and plainly states that it is for the protection of the Government against its lands being held for speculative purposes and not operated on, and requires that all licensees shall make such operation annually on the lands held by them under the licenses as may be deemed reasonable to the Minister of Lands and Mines, who shall have power to call upon any licensee to cut such quantity of lumber as he shall deem suitable not, however, to be less than 10M superficial feet upon each square mile of land held by the licensee, and he may at the same time point out the blocks of timber land upon which the operation or cut shall be made. We then come to the privilege which is conferred upon the licensee by the section, which is this: That should the licensee prefer to pay the stumpage that would be due on such quantity of lumber at 10M superficial feet per mile (as in case it had been cut) instead of making the operation or cut which he is required to make by the Minister, he shall have the right to do so in any year, upon his notifying the Minister and obtaining his consent thereto. Such charge *in lieu of stumpage* is made payable on or before August 1. It is further provided that if the licensee fails to comply with the foregoing conditions his licenses shall be forfeited and the berths held become vacant and open for application to any other person.

In my opinion the intention of this section is clear. It enabled the Crown to secure a certain amount of protection as far as revenue was concerned from the lands held by the licensee, thus preventing the tendency to speculation, and it conferred upon the licensee an option either to cut or to pay for the privilege of not cutting, which option, if elected by the licensee, in my opinion, simply entitled him to retain his license and prevent the forfeiture, which otherwise would take place under the provisions of the regulation. The words "such charge in lieu of stumpage" are to my mind clear and unmistakable, and the choice once made by the licensee and consented to by the Minister became final, the licensee thereby paying for the option which he enjoyed as hereinbefore stated.

This to me is the obvious meaning of the words, and we are bound, in my opinion, to construe these words according to their obvious meaning and not to wrest from them their natural signi-

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fication in order to reach or place upon them a construction which would be unfavourable to the Crown. I cannot and do not consider that sec. 17 requires a payment from the licensee in any sense as a penalty for not making the operation or cut required by the Minister, but it does confer upon him, as stated, the privilege of holding his lands without making a cut or operation, upon payment of a sum fixed by the Minister. In such a case an election to pay would not be in the nature of an anticipated payment for stumpage, but would be simply for the enjoyment of the privilege which was conferred. Should there be any uncertainty in the words "the stumpage that would be due" in my opinion it is fully explained and the purpose and intention made plain by the other words "such charge in lieu of stumpage," which to my mind place upon the object of the section a construction clear, plain and unequivocal.

From the conclusion at which I have arrived, it follows that the judgment entered in the Court below should be set aside and a verdict entered for the plaintiff for the sum of $5,616.68, the balance due as appears by the pleadings together with interest at 5% from January 14 last, and judgment entered thereon with costs in the Court below and on this appeal, as was agreed by and between the counsel representing the parties. And I wish further to express my inability to understand the attitude of the defendant in respect to the cut of 1917-18 when the sum of $3,781.42 was paid and no claim made for credit for the sums paid in 1915-16 and 17, and its conduct in pressing the present claim for credit in respect to the cut of 1918-19. *Appeal allowed.*

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CARR-HARRIS v. CANADIAN GENERAL ELECTRIC Co.

Ontario Supreme Court, Kelly, J. September 17, 1920.

CONTRACTS (§ III C—215)—AGREEMENT TO PROCURE ORDERS FOR MUNITIONS FROM BRITISH GOVERNMENT—SUPPOSED INFLUENCE OF PERSON EMPLOYED—VALIDITY—PUBLIC POLICY—COLLECTION OF COMMISSIONS.

An agreement employing a person solely because of his supposed influence with a member of the Government and other persons in positions of authority in England, to assist in endeavouring to procure from the British Government orders for munitions to be manufactured and supplied by the party employing such person is illegal and void as contrary to public policy and commissions earned under such agreement cannot be recovered.

[*Montefiore* v. *Menday Motor Components Co.*, [1918] 2 K.B. 241, followed.]

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ACTION to recover the balance alleged to be due to the plaintiff for commissions on orders for the supply of munitions obtained by the defendants from the British Government during the war, through the efforts and services of the plaintiff, as he alleged.

G. W. Mason, for the plaintiff.

Wallace Nesbitt, K.C., and *H. W. Shapley*, for the defendants.

KELLY, J.:—The plaintiff is a civil engineer and contractor. The defendants, in and prior to 1915, carried on an extensive manufacturing business in Toronto and elsewhere, and early in the war-period engaged in the manufacture of munitions, under contracts with the Shell Committee in Ottawa representing the Imperial authorities. About May or June, 1915, a report was current that the Shell Committee had no further orders to give for the manufacture of munitions, it being the belief in some quarters that the war was not likely to be of long duration. The defendants took a serious view of the falling off of orders. They had equipped themselves with necessary machinery to carry out the munition contracts they had already received; and if further orders of the same character were not obtained it meant the disbandment of much of the equipment which had been specially set up for munition purposes. The president and general manager was dissatisfied with conditions as they then existed—particularly with the practice which required contracts to be made through the Shell Committee, instead of directly with the authorities in England; and he seemed to think that the magnitude and importance of the defendants' business and capabilities and the efficiency of their staff entitled them to special consideration, or at least to be given the advantage of going beyond the Shell Committee and contracting with the English authorities, who had up to that time, as afterwards, insisted on contracting only through the Shell Committee.

The plaintiff says that in May or June, 1915, he had read press reports of a shortage of munitions, and that the Shell Committee had stated that they had no further orders to place in Canada for munitions; and he believed that, if he could go to England representing a company such as the defendants, he would be able to obtain munition contracts for them there. He had not been previously engaged as a manufacturer; he had had no experience in the making of munitions; and he was not previously associated in any way with the defendants, and had only a very casual

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acquaintance with the president and general manager. He was remotely related by marriage to Lord Buckmaster, then Lord Chancellor of England, and claimed an acquaintance with other persons of prominence there, who had to do with the manufacture or procuring of munitions for the British Government.

Early in July he interviewed the defendants' general manager, and suggested that, owing to his family connections in England, referring particularly to Lord Buckmaster, he could, he believed, get for the defendants the *entrée* very quickly to the fountain-head of the distribution of munition orders. This appealed to the general manager, and the proposal was left under consideration for several days, when, at the defendants' office, the general manager informed the plaintiff that he had decided to send him to England. Then, for the first time in this transaction, he met Mr. Ashworth, the defendants' assistant general manager, to whom, in the plaintiff's presence, and prior to the preparation of the contract now sued upon, the general manager said he had reason to believe that the plaintiff could get business in England through his connections. His proposal to the general manager, which contains the substance of the contract, was then (July 26, 1915) prepared by Ashworth and signed by the plaintiff. In it, after making reference to the conversations he had had with the general manager concerning war-orders and the advisability of his going to England in the company's interests, he sets forth the terms, one of which is:—

"In the event of your company securing contracts through my introductions or efforts, I am to receive from your company one per cent. of the amount of such contracts; payment of commission to be made as money is received from the purchaser."

As already intimated, he was not familiar with munition manufacture or the capabilities of the defendants' manufacturing plant to carry out such contracts. The defendants therefore decided to send to England with him their general sales-manager, Milne, a very capable man, familiar with the defendants' business and versed in its technicalities, and much more capable than was the plaintiff to speak of contracts from a manufacturer's standpoint. If obtaining contracts depended upon the merits and efficiency of the defendants' equipment and organisation and their administrative ability, he and not the plaintiff was the one who possessed the information,

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On the 5th August, the plaintiff and Milne left for England, and on the morning after their arrival in London the plaintiff called upon Lord Buckmaster, stated the purpose of his call, obtained a letter of introduction to Mr. Booth, a Deputy Director-General of the Ministry of Munitions—a deputy of Sir Frederick Black, who was the Director-General—and on the same day, in company with Milne, presented this letter to Mr. Booth. What followed need not be detailed unless it be determined that the agreement between the plaintiff and defendants can, in the circumstances in which it was entered into, be upheld. Whatever may have been the plaintiff's expectations, or the expectations of the defendants, of the results to be obtained from the plaintiff's personal influence with his connections, or friends, and notwithstanding that he did procure the letter of introduction to Mr. Booth, Lord Buckmaster appears to have made it quite clear at this first interview that he would not communicate with any member of the Government, and that he did not intend to interfere. From the evidence of what occurred at later interviews, it is apparent that the plaintiff again introduced the subject to Lord Buckmaster, who discouraged discussion upon it, and invariably referred the plaintiff to Mr. Booth. The fact should also be mentioned that neither Lord Buckmaster nor Mr. Booth, nor indeed any of those with whom the plaintiff conferred in England on the subject of obtaining munition contracts for the defendants, was aware that he was specially employed by the defendants on a commission-basis, or that he had a pecuniary interest in the defendants' success in obtaining from the Government, or the Munition Department representing the Government, the contracts they were seeking to obtain. I do not, for the time being, concern myself with whether the contracts on which the plaintiff now claims a commission were procured through his instrumentality.

A matter of first importance is to determine whether the contract between the contending parties was or was not the employment of the plaintiff on a commission-basis to use his family connection or supposed influence with persons in high station or official position, and as such having intimate relations with those controlling the letting of munition contracts, to procure for the defendants, by that means and not necessarily on the defendants' merits as manufacturers, what they manifestly found themselves unable otherwise to obtain. With due regard to the warnings

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given in earlier cases that caution must be exercised in declaring contracts void as against public policy, I am forced to the conclusion, reluctantly I admit, that the circumstances in which this contract was made, and the object it had in view, bring it within the class of transactions which binding authorities declare should not only be discouraged, but actually be held invalid. That both parties repudiate any intention of wrongdoing does not render the contract valid. It matters not whether they did or did not believe that the course they adopted was innocent and proper.

To sanction contracts of this kind, where it is intended that one of the contracting parties shall, for a pecuniary consideration, use his relationship to or familiarity with persons of influence to whom he has access to procure for the other benefits from the Government or representatives of the Government, would be subversive of the public good, and tend to corrupt the public service, particularly in time of war, when the utmost necessity exists for doing all things rightly, properly, and legally, in the interests of national safety.

Outside of the influence the plaintiff was expected to exert, any other service he could possibly have rendered could have been much more efficiently performed by the regular and permanent officers and employees of the defendants, who were experienced in the business and familiar with the capabilities of the defendants' plant, equipment, and organisation.

Objection was taken at the trial to the admission of evidence of what took place leading up to the commission-contract between the parties. Part at least of that evidence was taken subject to the objection; but, even if that part were disregarded, there remains quite sufficient to place it beyond doubt that the plaintiff, inexperienced as he was in the making of munitions, and unfamiliar with the defendants' business and equipment, was not so much retained by the defendants to advocate their case on its merits as to use the influence he was thought to possess to procure for the defendants results not necessarily based on these merits. The defendants' general manager had strong faith in his own ability and that of his capable assistants to advocate the efficiency of the defendants' equipment and their ability to perform such contracts as they desired to obtain; and it is almost inconceivable that he would, at a great expenditure for commission and expenses, have employed an inexperienced outsider—one not having the

technical qualifications possessed by permanent officers and employees of the defendants—to do the very services which they were much better qualified than he to perform.

The contract falls clearly within the authority of the recent case of *Montefiore* v. *Menday Motor Components Co. Limited*, [1918] 2 K.B. 241, the judgment in which was on facts very similar to those I find here, and is pregnant throughout with reasons for declaring void the commission-contract there under consideration. I need not go beyond that judgment and the cases therein cited for authority binding on me for the conclusion I have reached. What was intended to be accomplished by this contract was contrary to the public interest.

In the *Montefiore* case the defendants did not raise on the pleadings the defence of illegality on grounds of public policy, but the trial Judge (Shearman, J.), following the practice in earlier cases, himself raised the objection and declared the contract void. Here this plea is expressly set up in the defence. The *Montefiore* case was followed in our Courts in *Yeomans* v. *Knight* (1919), 45 O.L.R. 55, on a motion by the defendants to dismiss the action upon the pleadings and admissions of the plaintiff upon his examination for discovery, on the ground that the agreement sued upon, for commission on contracts procured through alleged political influence, was void as against public policy.

Having thus declared the contract void, I refer to the part the plaintiff took in procuring contracts for the defendants, only as that affects my judgment on the question of costs. That the defendants believed that the plaintiff was the means of procuring some contracts at least for them is evidenced by the very substantial sum already paid to the plaintiff for commission; though, if he were legally entitled to any commission upon the contracts in respect of which that sum was paid, it should, as I find it, have been one per cent. and not one-half of one per cent. Down to that time, the defendants had not repented of entering into a contract contrary to public policy. The Court should not be solicitous to encourage or condone illegal acts to which both plaintiff and defendant have been parties, even to the extent of awarding costs to defendants successfully resisting on that ground an action on the illegal contract.

The action is therefore dismissed without costs.

Action dismissed.

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DUBÈ v. MORNEAULT.

New Brunswick Supreme Court, Appeal Division, Hazen, C.J., White, and Grimmer, JJ. November 19, 1920.

CONTRACTS (§ I C—20)—CROWN LANDS—PARTY UNABLE TO OBTAIN PATENT—QUIT CLAIM OF IMPROVEMENTS—DELIVERY OF POSSESSION—PROMISSORY NOTES IN PAYMENT—CONSIDERATION.

When a party in possession of Crown lands but unable to comply with the conditions necessary to obtain the grant thereof gives a quit claim deed of the improvements on the lot and delivers possession to the purchaser in consideration of receiving his promissory notes, and such lot is afterwards approved to the purchaser by the Crown, there is sufficient consideration for the notes.

Statement. APPEAL by defendant from judgment of the Judge of the Restigouche County Court. Affirmed.

A. T. LeBlanc, supports appeal; *R. B. Hanson*, K.C., contra.

The judgment of the Court was delivered by

Hazen, C.J. HAZEN, C.J.:—This is an appeal from the judgment of the Judge of the Restigouche County Court, who in August last, having tried the case without a jury, found a verdict for the plaintiff on the plaintiff's claim and the defendant's counterclaim.

The action was brought to recover the amount due on two promissory notes given by the defendant to the plaintiff, and the defence was that the notes were given without consideration or for an illegal consideration, and that under the provisions of an agreement entered into between the plaintiff and the defendant, which I will hereafter set out in full, the plaintiff could not bring the action unless and until he complied with the terms of such agreement. Only one witness, viz., the plaintiff himself, was examined, and the material facts as appear from his evidence and the judgment appealed from are as follows:

The plaintiff was in possession of Lot No. 27, Range 17, in the parish of Grimmer, Restigouche County, the improvements on which he had purchased from one Gallipault. The title to the lot was in the Crown, in the right of the Province, when the plaintiff received it from Gallipault, and McLatchy, J., says that it was stated at the trial, though he can find no distinct evidence of it, that Gallipault had been allotted this lot under and by virtue of ch. 24 of Consolidated Statutes of New Brunswick, 1903, being an Act respecting the Free Grants of Crown Lands. He had never, however, obtained a grant of the same, but had made a small clearing on it, and built a log building 20 ft. wide by 60 ft. long before he sold his improvements or interest in the lot to the

plaintiff. The price paid by the plaintiff to Gallipault was $100 and having kept it for about a year plaintiff sold the improvements to the defendant for $600 and the defendant gave five notes in payment of the purchase price, one being for $200 and four for $100 each, and this action was brought to recover a balance of $25 and interest due on the $200 note and for the principal and interest due on one of the $100 notes.

It is important to ascertain what it was that the plaintiff actually sold to the defendant, and this appears from his own evidence, which is not in dispute. His testimony is that he sold him his improvements and rights to Lot No. 7 in the parish of Grimmer; that he sold it for $600 on terms; that at the time of sale the defendant paid nothing, but entered into an agreement, which I have already alluded to, as will appear later. He further says in his evidence that a man is only entitled to one lot of land from the Crown, that he knew that and knew he was only entitled to one lot from the Crown when he sold the improvements; that he had bought the improvements on Lot 17 from Gallipault; that at that time 2¾ acres of land were cleared on the place, and that he seeded this after he bought it, and kept the lot about a year before selling it; that he seeded the lot to hay, which was cut down. He says that he explained to Morneault that the reason he could not keep the lot was because he had no grant of it, and told him he was just selling the improvements, and Morneault then told him if he could make application for himself (meaning for the grant to issue to himself) he would not take $1,000 for the lot. "I told him," plaintiff said, "I could not get the grant myself, because I had another lot, and after this he paid me $175 and he is still living on the lot." He told Morneault what he would have to do to make application when he sold him the improvements. The agreement entered into at the time and signed by Morneault, which is Ex. "C" in the case, and dated May 8, A.D. 1917, commences: "Whereas I have this day purchased by quit-claim deed improvements on Lot No. 17, Range 17, etc." It is clear, therefore, that all that the plaintiff agreed to sell, and that all the defendant undertook to buy was the possession of and the improvements upon the lot, which improvements had been obtained from Gallipault.

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I have no doubt whatever, under the authorities, that this would constitute a valuable consideration in law, and that the trial Judge was right in so deciding, even though the plaintiff had no legal title to the lot and could not obtain a grant of the same. The authority quoted by McLatchy, J., to the effect that when a party in possession of real estate, claiming in good faith some interest therein, surrenders the same to the owner, in consideration of receiving from said owner his promissory note, the surrender of possession is a sufficient consideration for the note, and that a quit-claim deed of land without reference to the character of the title is in the absence of fraud a valuable consideration for that promise is undoubtedly sound. But it is contended that the consideration was illegal, and that sec. 9 of ch. 24, C.S.N.B. 1903, provides that

> No claim for improvements by any allottee whose lot is forfeited shall be allowed, except for buildings, the reasonable value of which shall for two years be a charge upon the lot, and shall be paid for by any other person applying therefor within that time before such lot shall be allotted to such applicant.

And secs. 1 and 2 of ch. 25, which provide for the survey and division of Crown Lands into lots for settlement, and that such lots so surveyed and laid off, and all other lots of Crown land which have been surveyed and are eligible shall be reserved for actual settlers, and shall not be disposed of to speculators or for lumbering purposes, support that contention.

Having reference to these sections, the contention is, as I understand it, that the lots were being used by Dubè for speculative purposes, but I cannot take this view of the case. Gallipault had made actual and valuable improvements on the lot. These improvements and the possession had been acquired by Dubè, for valuable consideration, and he further worked upon it and subsequently sold the improvements to Morneault, it is true for a larger sum than he paid; but this seems to me to be a fair business transaction, and I cannot see in it any evidence of speculation or that the land was being disposed of for lumbering purposes.

At the time of the transaction Dubè was the owner of a granted lot from the Crown, and it is distinctly provided that before any person shall be allowed or assigned any land under the provisions of the Free Grants Act, he shall make affidavit that he has no real estate, and therefore Dubè, being the owner of real estate, could

never have obtained, the grant from the Crown of the land and interest which he acquired from Gallipault, and it is contended therefore the whole transaction was illegal. This point might be well taken had Dubè sold the land to Morneault, but according to the evidence he did nothing of the sort, simply selling the improvements, and it was then up to Morneault, if he could do so, to obtain a grant from the Crown. This point was clearly considered between the parties at the time of the sale, and the following agreement was entered into:—

Restigouche County ss:

Whereas I have this day purchased by quit-claim deed the improvements on Lot No. 17, Range 17, Hazen Settlement, from Arsene Dubè, of Anderson, Parish of Grimmer, in the County aforesaid; And whereas I have this day signed five notes payable to the order of the said Arsene Dubè for an amount of $600, in payment of same. Therefore I, the undersigned, agree and promise to make application for the said lot personally and as soon after notice being given to me by the said Arsene Dubè and my failure to do so when requested, the said Arsene Dubè will have good and lawful right to sue for the payment of the said notes at maturity and if he could shew prooves that the said lot was not approved to me through my own fault or neglect.

Signed with my hand and seal and dated this 8th day of May, A.D. 1917.

In the presence of

(Signed) Phileas Arsenault, J.P., Co. of Restigouche.

(Signed) Maxime X Morneault (L.S.) his Mark

At the trial the *Royal Gazette* was put in evidence, shewing that this lot had been approved to Maxime Morneault, the defendant. The *Gazette* was dated December 19, 1917.

Dealing with this agreement McLatchy, J., says:—

There was placed in evidence at the trial a paper writing under seal signed by the defendant (Ex. "C"), and it is contended by the defendant that the plaintiff failed to comply with certain conditions set forth in said Exhibit "C;" that these conditions are conditions precedent to the right of action by the plaintiff, and hence the plaintiff must fail in this action. I am not quite certain what was intended by this agreement, but I do not construe it in accordance with the contention of the defendant.

In the defendant's factum his contention is thus stated: By Exhibit "C" placed in evidence the defendant agreed to make application for the lot personally, and in the event of the defendant neglecting to make such application and after receipt of notice from the plaintiff and his continued neglect, the plaintiff would have the right to compel payment of the notes.

The agreement, it is apparent, was made for the protection of the defendant, and while it is not very clear it seems to me that it was intended to convey the idea that if the defendant made application for the lot personally, as he agreed to do, and failed

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to have it approved to him, that Dubé could only sue and recover for the notes if he could prove that the lot was not approved to Morneault through his own fault or neglect. In view of the fact, however, that it was proved in evidence that the lot had been approved to Morneault by the Crown before the action was brought, I fail to see how it can in any way affect Dubé's right to recover. If the plaintiff should fail to recover the result would be that Morneault would obtain without any payment whatever improvements in the property for which he agreed to pay $600 and which he valued, as appears by Dubé's evidence, at the sum of $1,000.

In my opinion the Judge of the Restigouche County Court was correct in the conclusion at which he arrived, and the appeal should be dismissed with costs. *Appeal dismissed.*

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Ontario Supreme Court, Appellate Division, Mulock, C.J.Ex., Sutherland, Kelly and Masten, JJ. September 24, 1920.

CONTRACTS (§ IV A—329)—FOR SALE OF NEW ZEALAND PELTS—EMBARGO BY NEW ZEALAND GOVERNMENT—SUSPENSION OF CONTRACT—FAILURE TO REPUDIATE DURING TIME EMBARGO IN FORCE—BREACH—DAMAGES.

A memorandum signed by the defendants to sell or confirm a sale of a number of New Zealand pickled pelts contained the following clause: "All contracts made contingent upon causes beyond our control," and having failed to supply a balance of the pelts, the defendants contended that by reason of an embargo the contract was put an end to, and they were entitled to repudiate further performance. The Court held, affirming the decision of the trial Judge, that the contract was not annulled but merely suspended by the embargo, and that the defendants should have waited a reasonable time before repudiating the contract, also that the defendants were bound to use their best endeavours to obtain the consent of the Minister of Customs. That the defendants did not repudiate the contract while the embargo was operative and through their inaction allowed their opportunity for cancellation or repudiation to slip. That the measure of damages was the price which the plaintiff would have had to pay in New Zealand at the date of the repudiation of the contract.

Statement.

APPEAL by the defendants from the judgment of LOGIE, J., (1920), 47 O.L.R. 194. in an action on a contract to deliver New Zealand pelts. Affirmed.

R. McKay, K.C., for appellants.

T. R. Ferguson, K.C., for respondent.

Sutherland, J.

SUTHERLAND, J.:—Appeal from the judgment of Logie, J., reported in (1920), 47 O.L.R. 194, where the contract is set out and the relevant facts are fully dealt with. The contract is

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one between the plaintiff, carrying on business at Buffalo, New York, with the defendants, at Toronto, for the sale by the latter to the former of "10,000 dozen C.M.C. and/or C.F.M. New Zealand pickled pelts." The defendants' signed memorandum to sell or confirm a sale contains the following clause: "All contracts made contingent upon causes beyond our control." The defendants having failed to supply a balance of 3,313¾ dozen pelts, this action was begun for damages for their failure to fulfil their contract. The defendants' contention is that by reason of an embargo the contract was put an end to, and they were entitled to repudiate further performance.

The following are certain relevant findings made by the trial Judge (47 O.L.R. at pp. 198, 199):—

"The writ of summons herein was issued on the 7th April, 1917. No evidence was offered as to whether this order in council was in force at the date of the issue of the writ; but, by the evidence of Craig, Assistant Comptroller of Customs at Wellington, it appears that from the 1st March, 1916, to the 23rd May, 1916, from the 5th June to the 7th July, 1916, and from the 5th September, 1916, to the 30th June, 1917, all applications to export pelts to the United States were granted, provided the conditions as to consignment and nature and origin of pelts were complied with.

"According to a list furnished by this witness, permits for exportation of pelts to the United States of America, consigned to the plaintiff, issued to the defendants, were granted up to the 30th June, 1916, and no written applications of the defendants for exportation of pelts to the United States were refused between the 1st March, 1916, and the 30th June, 1917, though he states that it is possible that during the periods when the issue of permits was suspended the exporters were orally informed that it was useless to forward applications for permits, as shipments could not then be allowed; and this witness further states that, except during the period of absolute prohibition of exportation to the United States, he has no reason to believe that application from the defendants would have been refused, provided that the conditions governing exportation were complied with.

"From the 24th May, 1916, to the 7th July, 1916, it was not possible, except for the concession made in respect of the 'Niagara'

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shipments up to the 9th June, to obtain permits for the export to the United States of America of pelts weighing 34 lbs. per dozen or under.

"I think the fair inference to be drawn from a careful reading of McCartney's evidence is that after the 24th May, 1916, with the exception of the consignment referred to in his letter of the 25th May, he made no application for export on the plaintiff's account, nor did he inquire as to the probable duration of the prohibition or embargo so-called."

Three main points were pressed upon the appeal. The first was, that the trial Judge had erred in finding the relation between the plaintiff and the defendants to be that of vendor and purchaser, instead of principal and agent. I think it clear, having regard to the written terms of the contract, and the correspondence which followed, that the defendants must be held to have contracted as principals with the plaintiff.

The second point was, that the plaintiff, by his own conduct and acts prior to the raising of the embargo, treated the contract as at an end, and in consequence is "precluded and estopped" from claiming any right or privilege thereunder. Whatever the effect might have been had the defendants—after some time had elapsed and the dilatory effect of the embargo on their shipments become apparent—notified the plaintiff that they had bought some pelts on account of the contract, which they would hold, and were in a position to buy the balance, provided the plaintiff would agree to pay for the same under the terms of the contract and accept delivery when the embargo should be raised, alleging its operation and effect to be something beyond their control, but if the plaintiff would not agree to this would treat the contract as at an end, they did not pursue this course. In their letter of the 8th June, 1916, to the plaintiff, they say: "We might add that New Zealand advise they are completing your contract by the S. S. Niagara, which is just leaving New Zealand." In their letter of the 15th June they were asking the plaintiff to extend the expiring date of their last credit, giving as a reason that they had "not been able to ship these pelts as quickly as" they "expected, mainly through the difficulties one has to contend with in connection with the embargoes and restrictions that our Government in New Zealand has put on the export of all hides and skins."

The plaintiff had been pressing for a completion of the delivery of the pelts in question, and intimated that any charge for cables in connection with an extension of credit should be borne by the defendants. In a letter dated the 17th June, the defendants say: "Answering your favour of the 16th *re* extension of credit, would say that we were advised by New Zealand that your order would be completed by this boat, but unfortunately circumstances have arisen over which they had no control, so that they were unable to do so. We quite admit that it is no fault of yours that the credit has to be extended, and neither is it any fault of ours that we have to ask you to do this, because the war conditions seem to raise something fresh every day or two, which importers and exporters have to comply with. However, under the circumstances, we are quite willing to bear the expense of cabling out this extension, and we will accept your debit note for cost of same."

In a letter of the 7th July, the plaintiff expresses surprise at the small quantity of stock in the S. S. Niagara, which had recently arrived at Vancouver, and intimated that he had no reason to doubt but that the shipment on that boat would be sufficient to "clean up the lot, whereas it just about accounts for delivery of two-thirds of the order."

In reply to this, the defendants, in a letter dated the 13th July, state: "We quite admit that you have reason to complain about the slow manner in which the pelts we have on order for you are coming forward, but we regret to say that we have considerable difficulty in obtaining permits to ship. We are doing the very best we can under the circumstances. In fact, if we cannot obtain permits to ship, of course you will understand we will not be able to complete your order. However, you may rely upon us doing the very best we can under the circumstances." Again in their letter of the 12th September, 1916, to the plaintiff, they say: "Referring to the visit of your Mr. Wind, we took up the matter of the balance left on the contract for pelts, but we are afraid that we are quite unable to do anything at the moment, as at present New Zealand has put an embargo prohibiting the export of hides and calfskins out of the country." They were treating the contract not as annulled, but as suspended: *Andrew Millar & Co. Limited* v. *Taylor & Co. Limited*, [1916] 1 K.B. 402.

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As a matter of fact, on that date the absolute embargo had been "lifted," as the trial Judge pointed out in his judgment. The Toronto office of the defendants was apparently not aware of this at the time.

In his letter of the 28th October, the plaintiff says to the defendants: "We understand that all embargoes covering pickle skins out of New Zealand are now removed, and, therefore, would thank you to let us know what the prospects are of receiving the balance still due us on the contract." On the 9th November, he wrote them again, referring to his last mentioned letter, and adding that in the meantime he had "not as yet been favoured with a reply," and also requesting to know what the defendants "are doing towards having our order completed." On the 10th November, the defendants wrote in answer: "Regarding the balance of the lamb pelts which we were unable to ship on account of the embargo, we scarcely know what to say about this, and we are sending your letter to New Zealand. In the first place, we would point out that we were unable to complete this contract on account of conditions which were quite beyond our control. No doubt, under these circumstances, our New Zealand office will have looked upon this contract as completed. However, we are putting the matter before them and will write you when we have more information." Then, as the trial Judge points out, the plaintiff cabled the defendants in New Zealand: "Telegraph when you are likely to ship. Insist on fulfilment of contract." And in answer the defendants cabled, on the 29th December: "Refer you our Toronto house. They are handling matter."

On the 2nd January, the plaintiff wrote the defendants as follows: "We have just received a cable from Auckland, in which we are advised that the matter of our notice of insistence on the delivery of the lamb-skins on our contract with you, which up to date have not been received, has been referred to you in Toronto, as the parties who have charge of the transaction and are caring for details. We would, therefore, again address to you direct the inquiry as to what you propose to do in the matter, and when the stock will be shipped. We have already been handicapped considerably in our dependency on your shipment of these skins to take care of business for which we have booked orders, and it is important that we should know definitely when we may look for your fulfilment of the contract."

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It was only on the 3rd January, 1917, in their reply to this letter, that the defendants took the definite, firm, and final position that they would not complete the contract. After adverting to former correspondence, they say: "As you will notice, our contracts are all taken subject to conditions beyond our control, so that, while we regret the circumstances, we are quite unable to do anything further."

They did not repudiate it while the embargo was operative, nor until some time after it had been lifted. I agree with the opinion expressed by the trial Judge as follows (47 O.L.R. at p. 200): "The defendants, through inaction, allowed their opportunity for cancellation or repudiation to slip. It is therefore needless to speculate upon what would have been a reasonable time within which the defendants might have repudiated the contract during the period in which the absolute embargo was in force."

He further finds that there was a duty on the part of the defendants to use their best endeavours to obtain the consent of the Minister of Customs to permit the shipment of the pelts, and comes to the conclusion, apparently well warranted by the evidence, that, except during the period of absolute refusal to grant permits, permission would not have been refused had such application been made: *In re Anglo-Russian Merchant Traders Limited and John Batt & Co. (London) Limited*, [1917] 2 K.B. 679.

The third point to be considered is as follows: that the date fixed by the trial Judge is an erroneous one.

It was argued that if any breach of the contract occurred it must be held to have been on the 16th August.

I agree with the trial Judge that the breach occurred when the defendants definitely repudiated the contract, namely, the 3rd January, 1917; that it occurred at the place where the vendor was to deliver the goods on board ship, which was Auckland, New Zealand; and that the measure of damages was, therefore, what the plaintiff would have had to pay for pelts in New Zealand on that date.

On all gounds, I would affirm the judgment and dismiss the appeal with costs.

MULOCK, C.J. EX., agreed with SUTHERLAND, J.

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Masten, J.

MASTEN, J.:—This is an appeal from the judgment of Logie, J., dated the 8th March, 1920, whereby he declared that the plaintiff was entitled to recover damages from the defendants for breach of the contract in the pleadings mentioned, and referred it to the Master to ascertain the amount of the damages.

Three main questions were presented for consideration:—

First, were the defendants vendors or were they brokers?

Second, the contract being admitted and the failure to deliver to the extent of 3,313¾ dozen pelts, are the defendants excused from performance, by the embargo which took place, under that term of the contract which says, "All contracts made contingent upon causes beyond our control?"

The third point presented for consideration is the question of damages.

The facts are fully and accurately stated and the law discussed and applied by the trial Judge, with whose judgment, as well as that of my brother Sutherland affirming it, I fully agree.

It seems to me immaterial to determine whether the relationship of the defendants to the plaintiff was that of vendor or that of agent. In either case the defendants purported to enter into a binding obligation to supply to the plaintiff 10,000 dozen pickled pelts. There is no rule or principle of which I am aware that precludes an agent from undertaking a binding obligation to fulfil his principal's requirements to a specified amount on specified terms. Unless such an obligation is cancelled, it remains in full force, and no act of the parties is shewn which would put an end to that obligation. While, therefore, I agree with the view which is expressed by the trial Judge, I think that the defendants would still be bound, even though they were agents and not vendors.

With respect to the second question, namely, whether the contract came to an end under that term which provides, "All contracts made contingent upon causes beyond our control," I agree with the views which have been expressed by the trial Judge and with his application of the law to the facts of this case. It seems to me, moreover, that, when the embargo was imposed by the New Zealand Government on the 24th May, 1916, the defendants were under obligation to deliver the balance of the 10,000 dozen pelts; it was uncertain how long the embargo would last; and they had the choice from a business standpoint of two courses: either to buy

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the pelts as they were then doing in the market up to an amount sufficient to fill the contract and keep them ready for shipment on the chance that the embargo would be lifted, or they might adopt the course of ceasing at once to buy, and, if the embargo was lifted within such time as the contract remained in force, they would be under obligation to pay damages or buy in the New Zealand market as best they could at that time.

The defendants adopted the latter course, but they did not follow it up by notifying the plaintiff that they repudiated any obligation to fill the contract, on the ground that it had become impossible of fulfilment by causes beyond their control; at least they waited until January of 1917 before sending such notification, and meantime the embargo had been lifted. This is not, in my opinion, an adequate answer to the argument put forward on behalf of the plaintiff that the market for these pelts closed in July of 1916.

With respect to the question of damages, I agree with what has been said by the trial Judge, and would only note, in support of his statement (47 O.L.R. at p. 202), that the rule that "the measure of damages is the price which the plaintiff would have had to pay in New Zealand at the date of the repudiation of the contract by the defendants," has been recently applied by the Second Divisional Court in the case of *Merrill* v. *Waddell* (1920), 47 O.L.R. 572, 54 D.L.R. 18.

The appeal should be dismissed with costs.

KELLY, J., agreed that the appeal should be dismissed. Kelly, J.

Appeal dismissed.

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REX v. HARTFEIL.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck, Walsh and Ives, JJ. December 10, 1920.

1. INTERNAL REVENUE (§ I—10)—OFFENCE UNDER SEC. 180 OF INLAND REVENUE ACT, R.S.C. 1906, CH. 51—JURISDICTION OF MAGISTERIAL COURT.

The discretionary amount which may be imposed under sec. 180 of the Inland Revenue Act, R.S.C. 1906, ch. 51, and the absolute amount which falls automatically upon the accused under sec. 181 is one penalty or forfeiture which could be recovered in the same proceeding, the total amount or value of which is over $500, and the Magisterial Court designated by clause (*b*) of sec. 132 has no jurisdiction over an offence against sec. 180.

[*Rex* v. *Schmolke* (1919), 14 Alta. L.R. 601, not followed.]

2. COURTS (§ V A—297)—OVERRULING DECISION OF SAME COURT—STARE DECISIS.

If a majority of the Supreme Court of Alberta, sitting as a Court of five Judges in a criminal case, is of opinion that the Appellate Division, sitting as a Court of three Judges, has given a decision erroneous in principle because it considered itself bound by a decision in another Province, the Court is justified in reversing such decision.

[Review of authorities.]

Statement.

APPEAL by defendant from an order of Hyndman, J., refusing to quash a conviction for breach of the Inland Revenue Act, R.S.C. 1906, ch. 51. Conviction quashed.

H. R. Milner, for appellant; *H. L. Landry*, for the Crown.

Harvey, C.J.

HARVEY, C.J. (dissenting):—The immediate issue in this case is whether a penalty or forfeiture to which the defendant is clearly liable can be enforced in proceedings before a magistrate or whether the proceedings must be taken in a higher Court.

In my opinion the incidental question which arises whether this Court should consider itself bound to follow a previous decision is of much greater consequence to the due administration of justice.

Rex v. *Schmolke* (1919), 14 Alta. L.R. 601, is a unanimous decision of this Division which held expressly that a magistrate has jurisdiction to impose a penalty under sec. 180 of the Inland Revenue Act, R.S.C. 1906, ch. 51, and inferentially that he has jurisdiction to enforce the forfeiture under sec. 181 if the amount of such forfeiture does not exceed $500. It did not so decide because it considered that to be a proper construction of the Act, but because several years ago a Court of co-ordinate jurisdiction in respect to Dominion legislation, viz: the highest Court of the Province of Nova Scotia had so held in *Rex* v. *Brennan* (1902), 6 Can. Cr. Cas. 29, 35 N.S.R. 106.

There is no statutory provision requiring this Court to follow its own decision nor for that matter those of any other Court, but it has been its uniform practice since it was established to consider itself bound by its previous decisions with the single exception of the case of *In re Liquor License Ordinance; Finseth* v. *Ryley Hotel Co.* (1910), 3 Alta. L.R. 281, in which the Court by a majority of two to one allowed an appeal and at the same time refused to follow a previous unanimous decision. The ground for taking this action was that in that particular case our Court was the final Court of Appeal and the former decision was erroneous. Both of these grounds were promptly removed by the Supreme Court of Canada which granted leave to appeal and unanimously reversed the judgment.

In *Trimble* v. *Hill* (1879), 5 App. Cas. 342, at 344, the Judicial Committee of the Privy Council declared that all the Courts in England are bound by a decision of the Court of Appeal "until a contrary determination has been arrived at by the House of Lords."

In *Stuart* v. *Bank of Montreal* (1909), 41 Can. S.C.R. 516, the Supreme Court of Canada had to consider whether it should consider itself bound by a former decision of its own and there was no dissent from the view that it should do so. Duff, J., at 535, said:—

> This Court is, of course, not a Court of final resort in the sense in which the House of Lords is, because our decisions are reviewable by the Privy Council; but only in very exceptional circumstances would the Court of Exchequer Chamber or the Lord Justices, sitting in appeal (from which Courts there was an appeal as of right to the House of Lords), have felt themselves at liberty to depart from one of their own previous decisions. That is also the principle upon which the Court of Appeal now acts: *Pledge* v. *Carr*, [1895] 1 Ch. 51; and the Court of Appeal in any province where the basis of the law is the common law of England would act upon the same view. Quite apart from this, there are, I think, considerations of public convenience too obvious to require statement which make it our duty to apply this principle to the decision of this Court.

It must be quite apparent that if the Court does not shew respect for its own decisions it can hardly be surprised if no one else does. It throws the door of uncertainty wide open and every counsel not satisfied with a decision can come back and demand a re-argument of the whole question. It leaves a trial Judge in the uncertain position of not knowing whether he should act on his own judgment rather than follow a decision of this Division, which this Division on appeal from him may itself refuse to follow.

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These are matters of such great public convenience that they have a most important bearing on the due administration of justice. In the case last referred to (41 Can. S.C.R. 516), Anglin, J., makes a somewhat exhaustive reference to the cases on the subject and concludes from the more recent ones that a Court is bound by its previous decisions and adds, at p. 550: "Solely because I am convinced that the present case falls within the principle of the decision in *Cox* v. *Adams* (1904), 35 Can. S.C.R. 393, and because I consider that that decision binds this Court, I would allow the appeal, etc."

As he points out, in *Pledge* v. *Carr*, [1895], 1 Ch. 51, the case referred to by Duff, J., Lord Herschell, L.C., at 52, said: "We cannot overrule *Vint* v. *Padget* (1858), 2 De G. & J. 611, 44 E.R. 1126, for that was the decision of a Court co-ordinate in jurisdiction with ourselves," and the appeal was dismissed solely on that ground. It might be thought that a Court of Final Appeal, which could not be set right by any other Court, might adopt a rule different from that of an intermediate Court of Appeal whose judgment, if wrong, could be reversed on appeal, but in *London Street Tramways* v. *London County Council*, [1898] A.C. 375, the House of Lords held that its decision on a question of law was conclusive and binding on it in subsequent cases. Lord Halsbury, L.C., who delivered the judgment, which was concurred in by all the other Lords, stated, at p. 379:—

> My Lords, for my own part, I am prepared to say that I adhere in terms to what has been said by Lord Campbell and assented to by Lord Wensleydale, Lord Cranworth, Lord Chelmsford and others, that a decision of this House once given upon a point of law is conclusive upon this House afterwards and that it is impossible to raise that question again as if it was *res integra* and could be reargued and so the House be asked to reverse its own decision.

And further, at p. 380:—

> My Lords, it is totally impossible as it appears to me to disregard the whole current of authority upon this subject, and to suppose that what some people call an "extraordinary case" an "unusual case," a case somewhat different from the common, in the opinion of each litigant in turn, is sufficient to justify the rehearing and rearguing before the final Court of Appeal, of a question which has been already decided. Of course, I do not deny that cases of individual hardship may arise and there may be a current of opinion in the profession that such and such a judgment was erroneous; but what is that occasional interference with what is perhaps abstract justice as compared with the inconvenience—the disastrous inconvenience—of having each question subject to being re-argued and the dealings of mankind rendered doubtful by reason of different decisions, etc?

It seems to me clear that unless this Court intends to establish a new principle of decision for itself it must follow its previous decisions unless, of course, it is shewn that some decision or some provision of law has been overlooked in which case, as Lord Halsbury points out, it would not be correcting a mistake of law but one of fact.

Whether the reasons on which the judgment in *Rex* v. *Schmolke* was founded seem to be sufficient would appear to be unimportant though they have, in addition to the authority of our own decision cited, also the support of decisions of other Provincial Courts of Appeal, see *Rex* v. *Lee Guey* (1907), 15 O.L.R. 235, and *Rex*. v. *Sam Jon* (1914), 24 Can. Cr. Cas. 334, 20 B.C.R. 549.

For the reasons I have stated I think the decision of *Rex* v. *Schmolke* should be followed from which it results that the penalties and forfeitures under secs. 180 and 181 are recoverable by different proceedings and that the magistrate had jurisdiction to make the order of forfeiture under sec. 181 if the amount did not exceed $500.

The order is bad in form and in substance. In form it is a conviction whereas it should be only an order of forfeiture. It is bad in substance in that it adjudges imprisonment with hard labour, but these are both matters which may be amended on *certiorari* proceedings where the liability is clearly established as is the case here. The section declares the amount of the forfeiture should be double the amount of license duty which should have been paid. Now the defendant never wanted a license and the Act does not require anyone to pay any license fee for any license he does not want and, therefore, we can hardly say that there is any license fee which he should have paid.

There is a rule of construction, however, that notwithstanding the carelessness or ignorance of draftsmen the Court must try to give some sensible meaning to a legislative enactment and I cannot see that any sense whatever can be given to this section unless it means the license fee which, if it had been paid, would have rendered the Act legal and not subject to a penalty under sec. 180. Double that license fee would not exceed $500 and, therefore, the magistrate had jurisdiction.

I would, therefore, direct that the order be amended as above indicated and subject thereto that the appeal be dismissed without costs.

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Stuart, J.

STUART, J.:—Assuming that a majority of this Court sitting as a Court of five Judges upon a re-argument after a first argument before only three Judges is of opinion that the decision of the Appellate Division, sitting with three Judges, in the case of *Rex* v. *Schmolke*, 14 Alta. L.R. 601, was erroneous in principle, it becomes a very grave question to consider whether we should consider ourselves bound by that previous decision.

There are still some unfortunate features in the case one of which is that even upon the re-argument before five Judges the very question whether the Court should hold itself bound by *Rex* v. *Schmolke* was not squarely faced at least by counsel and there was little if any argument upon it. This was perhaps to some extent due to a mistaken delicacy on the part of counsel and possibly to some extent also on the part of the members of the Court.

In the circumstances I can only take what I conceive to be the proper course in fairness to the appellant, the accused, and to the Crown. That course is simply this. Not having heard any argument advanced which leads me to alter the opinion I expressed in my judgment in *Rex* v. *Schmolke*, 31 Can. Cr. Cas. 395, 14 Alta. L.R. 485, which the Appellate Division reversed, 14 Alta. L.R. 601, and observing from the judgments of the other members of the Court, except Harvey, C.J., which judgments I have had the opportunity of reading, that they are of opinion that the view I expressed was correct, I must face myself the question whether in all the circumstances this Court as constituted for this decision should or should not hold itself bound by the previous decision.

Having long since reached the proverbial third stage in a Judge's concern about the validity of his own decisions, I feel fairly able to discuss the application of the principle of *stare decisis* to the present situation with some degree of detachment.

That principle is discussed at length in 15 Corp. Jur., at pp. 916 *et seq.*, and also in Bouvier's Law Dictionary, vol. 3, p. 3118, and in Pollock on Jurisprudence, 3rd ed. (1911), 319 *et seq.* It was also very fully discussed by Anglin, J., in *Stuart* v. *Bank of Montreal*, 41 Can. S.C.R. 516.

I gather from the authorities that concern as to the scope of the principle has been practically confined to civil cases. In *Stuart* v. *Bank of Montreal* not a single criminal case is referred to.

And the general principle seems to rest mainly upon the desirability of giving certainty to the property and contractual rights of parties who may have, upon advice of their solicitors, acted upon the faith of a decision. See also observations of Jessel, M.R., in *In re Hallett's Estate; Knatchbull* v. *Hallett* (1880), 13 Ch. D. 696, at 729-30.

In the next place I would refer to the opinion of Best, C.J., in *Newton* v. *Cowie* (1827), 4 Bing. 234, at p. 241, 130 E.R. 759, where he said:—

> If our predecessors have given no reasons for their judgment or the reasons given for conflicting judgments are equally unsatisfactory we are put to that construction on the statutes which our own unfettered judgment induces us to think the Legislature intended should be put upon them.

I hasten of course to say that there were reasons given for the decision in *Rex* v. *Schmolke*, but those were not reasons upon the merits. The Court there did not announce its own independent opinion upon the proper construction of the statute but gave as its reason for its decision the propriety of following the decision of two out of three Judges in *Rex* v. *Brennan*, 6 Can. Cr. Cas. 29, 35 N.S.R. 106, a Nova Scotia case. But in that decision the two Judges gave practically no reasons for their decision.

So that we certainly have not here any decision given deliberately and upon carefully stated reasoning other of course than that of the desirability of uniformity in decisions upon criminal law throughout Canada.

For myself I cannot but feel extremely pessimistic about the possibility of this being brought about (otherwise than by legislative direction to do so) by means of Provincial Courts of Criminal Appeal following previous decisions of the Courts of other Provinces. The Ontario Court of Appeal in *Rex* v. *O'Meara* (1915), 25 D.L.R. 503, 25 Can. Cr. Cas. 16, 34 O.L.R. 467, flatly refused to follow our Appellate Division in *Rex* v. *Stubbs* (1915), 25 D.L.R. 424, 24 Can. Cr. Cas. 303, 9 Alta. L.R. 26, and I doubt if eastern Courts of Appeal will generally be found very ready to bow to decisions from the West.

When this Appellate Division is presented with an independently reasoned decision of its own in a criminal case and is asked to overrule it I think it will be found to be a very extreme and exceptional case in which it will be induced to do so. And yet in criminal matters I cannot absolutely exclude from my mind the

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possible propriety of doing so. With such a situation I prefer to deal when it is presented. But such a situation is not, I think, presented to us in this present case.

I think it pertinent also to refer to the decision of the English Court of Appeal in *Regina* v. *Edwards* (1884), 13 Q.B.D. 586, where that Court overruled *Re Edmundson* (1851), 17 Q.B. 67, 117 E.R. 1207, a decision of the Court of Queen's Bench *en banc* in a case in which there was no appeal from that Court. Brett, M.R., said, at p. 590:—

> For I do not think that the rule is applicable which often governs us in not overruling decisions of many years standing, on which persons may often have acted in making contracts or otherwise. Where the decision is really one as to the jurisdiction of another Court there seems to me to be no reason why, at any distance of time, a Superior Court may not overrule it.

The point involved here is one as to the jurisdiction of an inferior Court.

In addition to these considerations I think some weight should be given to the circumstance that the Court in the present instance is composed of five Judges whereas in *Rex* v. *Schmolke* it was composed of but three. In 15 Corp. Jur., p. 939, it is said: "In case of a conflict between a decision rendered by all the Judges constituting a Court and another decision rendered by the Court when less than all the Judges were sitting the decision rendered by all the Judges will prevail."

Of course that passage refers to the necessity of a later choice in a third case between two previous conflicting decisions. But it suggests to my mind this consideration. The Appellate Division of this Court, as the statute stands, is not a separate Court but merely, I think, the statutory delegate of the whole Court for the purpose of appeals. The statute says that we shall choose four of our number "to constitute the Appellate Division" (sec. 30). I am inclined, therefore, to think that, when we find five Judges sitting, being practically as many of all the Judges of the Court as could conveniently be assembled, there should be less hesitation in overruling a previous decision of three Judges particularly where no property or contractual rights are concerned, where the previous decision is very recent and where there were no considered opinions given on the merits but a simple adoption, for reasons which cannot of course be looked on as other than a praiseworthy attempt to get uniformity of law, of a decision from another Province for which itself no reasoning was really advanced.

And I feel the less reluctance to take this course because it really does not involve an implication that any very grave injustice was done to Schmolke in the other case. Upon the facts he was undoubtedly guilty and if my judgment quashing his conviction had stood he could have been proceeded against in the Supreme Court by indictment where the total penalty could have been imposed. As it was, he got off with the lesser penalty.

Finally and with profound respect I cannot assent to the proposition that the question of the jurisdiction of an inferior Court is a question of procedure only, which was the basis upon which the Court in *Rex* v. *Schmolke*, 14 Alta. L.R. 601, followed *Rex* v. *Brennan*, 6 Can. Cr. Cas. 29, 35 N.S.R. 106. As Ritchie, J., said in *Regina* v. *Taylor* (1876), 1 Can. S.C.R. 65, at 92:—

> Procedure, in my opinion, is mere machinery for carrying on the suit, whether in the Court appealed from or the Court appealed to, and for removing the cause from the Court appealed from to the Court appealed to, but not affecting the respective jurisdictions of either Courts.

And Lord Westbury in the House of Lords in *Att'y-Gen'l* v. *Sillem* (1864), 10 H. L. Cas. 704, at 720, 11 E.R. 1200, said:—

> Suppose the Legislature to have given to either tribunal, that is to the Court of the First Instance, and to the Court of Error or Appeal respectively, the fullest power of regulating its own practice or procedure, such power would not avail for the creation of a new right of appeal, which is in effect a limitation of the jurisdiction of one Court, and an extension of the jurisdiction of another. A power to regulate the practice of a Court does not involve or imply any power to alter the extent or nature of its jurisdiction.

Hence it seems to me that it is much more than a question of procedure that is involved in this case and was involved in the *Schmolke* case. So that I think there was manifest error in the reason which was in fact given for the decision in *Rex* v. *Schmolke*.

What is really suggested here and in the *Schmolke* case is that when two out of a quorum of three in a Court of Criminal Appeal in one of the Provinces have laid down without reasons a rule of law then all the other 30 or 40 Judges of all the other Courts of Appeal in the other 8 Provinces even though they are firmly of opinion that the decision was wrong must follow it simply because those 2 Judges happened to speak first and the point has not arisen again for some years. That is pushing the rule of *stare decisis* to an absurd extreme in my opinion and I cannot go that distance. The decision in *Rex* v. *Schmolke* was a decision, not so much upon law, as upon comity, convenience and desirable uniformity and for that very reason we are, I think, at liberty to question it.

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Moreover, I doubt very much whether any Provincial Court of Criminal Appeal would be so ready to forego its own opinion and follow another Provincial Court if that meant the acquittal of an accused instead of a retention of a conviction. Being concerned with the administration of justice and feeling grave responsibility a Court will naturally cling to its own view more rigidly where acquiescence in the views of others would mean setting some one free who it thinks should be punished. This is I think exactly what happened in *Rex* v. *O'Meara*.

It may of course still be that I was wrong in my view in *Rex* v. *Schmolke*, but I still adhere to that opinion and think that the penalty for the offence was more than $500, and that therefore there was no jurisdiction in the magistrate. The same question is really involved here and I therefore think the appeal should be allowed, but without costs, the judgment below set aside and the conviction quashed with costs.

Beck, J.

BECK, J.:—The defendant was convicted of a breach of sec. 180 of the Inland Revenue Act, R.S.C. 1906, ch. 51, for unlawfully without a license under the Inland Revenue Act having in his possession a still suitable for the manufacture of spirits without having given notice thereof as required by the said Act. He was fined $450 and costs $3.75.

Then an information was laid against him setting out the above-mentioned conviction and claiming that he "thereby became liable to forfeit and pay a penalty for the use of His Majesty amounting to double the amount of the license duty which should have been paid by him under the Inland Revenue Act, R.S.C. 1906, ch. 51;" sec. 181 enacting that

> Every person who becomes liable to a penalty provided for in the last preceding section shall, in addition thereto, forfeit and pay, for the use of His Majesty, double the amount of excise duty and license duty which should have been paid by him under this Act.

The hearing took place before a police magistrate under the supposed authority of sec. 132, clause (*b*), of the Inland Revenue Act, which enacts that

> Every penalty or forfeiture incurred for any offence against the provisions of this Act or any other law relating to excise may be sued for and recovered or may be enforced: (a) before the Exchequer Court of Canada, or any Court of record having jurisdiction in the premises; or, (b) if the amount or value of such penalty or forfeiture does not exceed five hundred dollars, whether the offence in respect of which it has been incurred is declared by this Act to

be an indictable offence or not, by summary conviction, under Part XV. of the Criminal Code, before a Judge of a County Court, or before a police or stipendiary magistrate, or any two justices of the peace having jurisdiction in the place where the cause of prosecution arises, or wherein the defendant is served with process.

The magistrate subsequently after a hearing ordered the defendant "to forfeit and pay the sum of $500 being double the amount of the license duty which would have been payable under the said Act;" in default of payment forthwith the defendant was to be imprisoned for 4 months at hard labour.

A motion to quash on *certiorari* was made to Hyndman, J., who dismissed the application but gave leave to appeal.

Some of the questions involved have already been dealt with by this Court.

In *Rex* v. *Schmolke*, 31 Can. Cr. Cas. 395, 14 Alta. L.R. 485, Stuart, J., held that:—

(1) That the words "if the amount or value of such penalty or forfeiture in clause b. of sec. 132 does not exceed $500" refer to the amount which the statute authorises as a punishment for the offence and not to the amount which is actually imposed. (2) That the discretionary amount which may be imposed under sec. 180 itself and the absolute amount which falls automatically upon the accused under sec. 181 is none the less one penalty or forfeiture the total amount or value of which is over $500. (3) That, therefore, the Magisterial Court designated by clause (b) of sec. 132 has no jurisdiction over an offence against sec. 180; and expressed the opinion, (4) That the penalty under sec. 180 and the additional penalty under sec 181 could be recovered in the same proceeding.

The decision of Stuart, J., was carried to appeal.

The Appellate Division constituted of three members allowed the appeal, 14 Alta. L.R. 601, following a decision of the Court *en banc* of Nova Scotia in *Rex* v. *Brennan*, 6 Can. Cr. Cas. 29. 35 N.S.R. 106, also a Court constituted of three members, of whom however one dissented. The precise point which seems to have been decided in the *Brennan* case and upon which the Appellate Division of this Court would seem to have based its reversal of the decision of Stuart, J., was that proceedings to recover the further penalty under sec. 181 must be the subject of a separate subsequent proceeding. The Appellate Division in the *Schmolke* case, 14 Alta. L.R. 601, gives no indication of a careful and independent consideration of the points involved, but expresses the opinion that Stuart, J., ought to have accepted the decision of the Nova Scotia Court in the *Brennan* case, "following

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the opinion of this Division in *Rex* v. *John Irwin Co. Ltd.* (1919), 31 Can. Cr. Cas. 54, 10 Alta. L.R. 600, adding (14 Alta. L.R. at 602): "In the last mentioned case we accepted and followed the decision of the highest Court of Saskatchewan upon a point of procedure under a Dominion statute," notwithstanding that in the *Irwin* case a doubt was expressed as to the correctness of the Saskatchewan decision. But the decision in the *Irwin* case (14 Alta. L.R. at 601) was placed on the ground that it related "only to a matter of procedure and it is desirable that there should be uniformity of interpretation of Dominion legislation" in such matters.

I was a party to the decision in the *Irwin* case. It was a question upon which much might be said for either view; it was treated as a matter of procedure only—wrongly, as I now think. In such circumstances, having no strong opinion against the opinion of the Saskatchewan Court, I was satisfied to follow it. I had no intention of going further.

I think that the question in the *Schmolke* case involved more than mere procedure or at all events involved consequences of great moment and that consequently the attitude taken in the *Irwin* case ought not to have been adopted in the *Schmolke* case, but the question most carefully examined independently.

A long experience has led me to the conviction that it is in the interests of justice to be careful to keep to the traditional law which limits the jurisdiction of inferior tribunals, especially justices of the peace and other magistrates, to the powers clearly conferred upon them, and which enables this Court to review their decisions so as to prevent injustice, even where there is jurisdiction. What we have to deal with here is a question of jurisdiction and not a mere matter of procedure, and is unquestionably a matter of moment, and, as I think, the important right to appeal depends upon the result of our decision. My opinion, then, is that the decision of the Appellate Division in the *Schmolke* case, 14 Alta. L.R. 601, ought not to have been based upon the rule applied to a mere matter of procedure in the *Irwin* case; and that on the true construction of the provisions of the Inland Revenue Act, the decision of Stuart, J., was right, subject to this that the penalty or forfeiture provided for in sec. 180 not only might but in my opinion must be adjudged if at all as part of the punishment for the offence upon the

original conviction and by the same instrument, and cannot be adjudged in a separate proceeding. I find some statutes which expressly provide that a declaration of forfeiture may be made by separate and subsequent provision, but the Inland Revenue Act contains no such provision.

Sitting as a member of the Appellate Division I repeat what I have said on more than one occasion that I feel bound not to refrain from expressing my real opinion upon questions of substantial importance notwithstanding a decision of this Division to the contrary. My reasons for taking and persisting in this position I set forth in *Finseth* v. *Ryley Hotel Co.*, 3 Alta. L.R. 281; and quite recently in *Rural Municipality of Streamstown* v. *Reventlow-Criminil* (1920), 52 D.L.R. 266, at 274, 15 Alta. L.R. 204, at 210.

Since I so expressed myself I have found further support for my position in a pronouncement of the Judicial Committee of the Privy Council, at least insofar as relates to decisions upon questions involving the liability of persons to penalties.

In *Read* v. *Bishop of Lincoln*, [1892] A.C. 644, at 654, 655, it is said:—

> With respect to some of the matters which have been the subject of debate in this appeal, it has been strongly urged that they have been conclusively determined by this board, and that if the facts are found to be the same no further argument is permissible. That question was raised in the case of *Ridsdale* v. *Clifton* (1877), 2 P.D. 276. Some of the points in issue in that case had been already the subject of decision by this Committee in the case of *Hebbert* v. *Purchas* (1871), L.R. 3 P.C. 605. In answer to the argument that they had been conclusively settled and were no longer open to discussion, Lord Cairns, in delivering the judgment of the Committee, said (2 P.D. at 305): "Their Lordships have had to consider, in the first place, how far, in a case such as the present, a previous decision of their tribunal between other parties, and an Order of the Sovereign in Council founded thereon, should be held to be conclusive in all similar cases subsequently coming before them. . . . In the case of decisions of final Courts of Appeal, on questions of law affecting *civil rights, especially rights of property*, there are strong reasons for holding the decisions, *as a general rule*, to be final as to third parties. . . . *Even as to such decisions* it would perhaps be difficult to say that they were, as to third parties, under all circumstances and in all cases absolutely final, but they certainly ought not to be reopened without the very greatest hesitation. Their Lordships are fully sensible of the importance of establishing and maintaining, as far as possible, a clear and unvarying interpretation of rules the stringency and effect of which ought to be easily ascertained and understood by every clerk before his admission to holy orders. [The case was one relating to Ecclesiastical law.] On the other hand, there are not, in cases

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of this description, *any rights to the possession of property which can be supposed to have arisen by the course of previous decisions*, and in proceedings which may come to assume a *penal* form, a tribunal, *even* of last resort, ought to be slow to exclude any fresh light which may be brought to bear upon the subject." It was argued for the appellants that the doctrine thus laid down in *Ridsdale* v. *Clifton* was only applicable where there was some "fresh light," and that by this was meant some fact which had not been under the consideration of the tribunal on the previous occasion. But an examination of the arguments and judgment shews that this was not the meaning of the Committee. They entered upon an elaborate and independent examination of the law bearing upon the legality of the acts already pronounced illegal, and it was expressly stated, as their Lordships' conclusion, "that although very great weight ought to be given to the decision in *Hebbert* v. *Purchas*, yet they ought in the present case to hold themselves at liberty to examine the reasons upon which that decision was arrived at, and, if they should feel themselves forced to dissent from those reasons, to decide upon their own view of the law." In the result their Lordships dissented upon one point from the reasoning of the previous Committee, and came to the conclusion that an act was lawful which had been previously pronounced illegal.

There is a very informing article on *Stare Decisis* in Bouvier's Law Lexicon which indicates a number of exceptions to the rule. See also *Rex* v. *Graves* (No. 3), (1912), 9 D.L.R. 175, 20 Can. Cr. Cas. 438.

I would therefore quash the conviction with costs to be paid by the informant.

The foregoing was written after an argument before a Court of three Judges. After an argument before a Court of five Judges I see no reason for doing otherwise than handing in the foregoing as my reasons for judgment.

Walsh, J.

WALSH, J.:—When Parliament conferred upon a police magistrate, as it did by sec. 132 of the Inland Revenue Act, R.S.C. 1906, ch. 51, the power to enforce "every penalty or forfeiture incurred for any offence against the provisions of this Act if the amount or value of such penalty or forfeiture does not exceed $500," it meant I think the total amount or value of such penalty or forfeiture. The "penalty or forfeiture incurred for any offence" must surely mean what the offender has made himself liable for by the commission of his offence. If one was asked what is the pecuniary penalty for the offence of which this defendant was originally convicted he would undoubtedly say a fine of not more than $500 nor less than $100, and double the amount of the license duty which should have been paid by him under the Act, in this case

$500. The aggregate of the minimum of these penalties exceeds $500, and so in my opinion the magistrate was without jurisdiction to try the charge.

I can see absolutely no justification for the laying of two separate and distinct charges for the same offence against the same man simply because two penalties differing in character and perhaps in amount flow from the same act. When he is convicted of an offence under sec. 180 then automatically arises the right to impose upon him every punishment to which he has rendered himself liable. There is absolutely nothing in sec. 181 postponing its application until fresh proceedings have been taken against the offender after a conviction following a charge laid under sec. 180. "Every person who becomes liable to a penalty provided for in" sec. 180 shall pay "in addition thereto" the penalty imposed by sec. 181. A person who contravenes any of the provisions of sec. 180 becomes liable to its penalties the moment he commits the act. Section 181 does not make it an offence to be convicted of an offence against sec. 180. It does not create a new offence at all. It inflicts a punishment which in its own words is "in addition to" those imposed by sec. 180 upon one who has become liable to them, that is one who has done, not necessarily one who has been convicted of doing, one of the acts prohibited by the section. For one and the same act this defendant has been fined $950. That seems to me the simple answer to the question of the magistrate's jurisdiction to enforce a penalty which does not exceed $500.

I think the appeal should be allowed and the conviction quashed but in view of the fact that these proceedings were quite justified under the judgment of the Appellate Division in *Rex* v. *Schmolke*, 14 Alta. L.R. 601, I would allow it without costs. Since writing the foregoing I have read the judgments of the Chief Justice and Stuart, J., on the point of *stare decisis* and as applied to this case and for the reasons given by him I agree with the opinion which Stuart, J., has reached.

Ives, J.

IVES, J.:—On December 22, 1919, this defendant was convicted by Primrose, Police Magistrate for the city of Edmonton for an offence under sec. 180 (*e*) of the Inland Revenue Act, R.S.C. 1906, ch. 51. He was sentenced to pay a fine of $450 and costs amount-

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ing to $3.75. In default of payment, nine months with hard labour unless the fine, costs, and costs of commitment and conveyance to gaol are sooner paid.

On the same day a further information was sworn against this man whereby the above conviction was recited and alleging that the defendant had thereby become liable to the penalty provided under sec. 181 of the Inland Revenue Act.

Upon this information a *warrant of arrest* was issued by Magistrate Primrose. This warrant was executed and the defendant arrested. Trial came on before Magistrate Primrose on December 24, 1919, the defendant being represented by counsel. The defendant objected to the magistrate's jurisdiction, adjournment to January 2 was made, and on that day defendant objected that the information disclosed no offence; that under sec. 181, the magistrate could not separate license duties from excise duties, and that double the amount of both would exceed $500 and so oust his jurisdiction, and the defendant also pleaded *autrefois convict*.

These objections were overruled and on January 6, 1920, evidence was taken, which consisted solely of proving the conviction made on December 22, 1919. At the conclusion of this evidence the defendant rested upon the plea entered and was convicted—the words used by the magistrate being: "*You are found guilty of this offence*"—and remanded for sentence from time to time until June 8, 1920.

On the last date counsel for the informant addressing the magistrate stated: "The reason this charge was laid was that this man openly offered bribes to the Inland Revenue Department to the amount of $600, to withdraw this charge, and therefore we come on him for the full amount that we can get both the fine and the license duty" and witnesses were thereupon called to prove counsel's statement.

At the close of this evidence the magistrate addressed the accused as follows: "I have not the slightest scruples about imposing the double license fee in this case. The license fee is $250. You will forfeit and pay the double license fee."

When remanding the defendant for sentence on January 6, 1920, the magistrate said to him: "You will be remanded until February 6 for sentence and I will think it over and see how I feel about it." Clearly shewing, I think, that the magistrate was of opinion that

he had some discretion in fixing the penalty. That he had none under sec. 181 is clear from the words of the section and hence the evidence of bribery was clearly inadmissible after the conviction —or before it for that matter.

The formal conviction is dated June 8, 1920. It recites the conviction of December 22, 1919, as the offence in a conviction is usually recited and proceeds: "And I adjudge the said Auguste Hartfeil for his said offence to forfeit and pay the sum of $500 being double the amount of excise duty which would have been payable under the said Act," and in default, etc., 4 months with hard labour.

Application for *certiorari* and to quash the conviction was made to Hyndman, J., in Chambers and by him refused. From his order the defendant now appeals upon the following among other grounds—(2) Absence of jurisdiction in the magistrate. (4) That the magistrate had no authority to adjudge imprisonment at hard labour in default of payment. (5) That the information disclosed no offence. There are 8 other grounds set out but I think it unnecessary to repeat them here.

In Part XV. of the Criminal Code, Parliament clearly contemplated a dual jurisdiction of the magistrate, one purely penal and the other quasi-civil—if I may use the expression—for the purpose of collecting penalties. Section 706 (*a*) and (*b*) makes the distinction. Under (*b*) Part XV. applies to

> Every case in which a complaint is made to any Justice in relation to any matter over which the Parliament of Canada has legislative authority and with respect to which such Justice has authority by law to make any order for the payment of money or otherwise.

Under this part of the Code I think a clear distinction is to be made between a "summary conviction" under 706 (*a*) and an "order" under 706 (*b*) and other sections of the Code in this part bear me out. Section 731 clearly refers to a magistrate's order for the payment of money and is to be distinguished from a summary conviction by him for an offence. See *Regina* v. *Sanderson* (1886), 12 O.R. 178. Section 721 clearly contemplates the distinction. This construction of this part of the Crim. Code must be borne in mind when we come to examine the Inland Revenue Act. Many of the sections of this Act are wretchedly phrased and call loudly for revision. Sections 132 and 133 are intended, I

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think, taken together, to confer upon the magistrate within prescribed limits the two jurisdictions which I have suggested in Part XV. of the Crim. Code.

Section 132 confers the quasi-civil jurisdiction and sec. 133 the penal or punitive authority. That is, 132 is pertinent to orders for the payment of money and 133 to summary conviction for the offence. Section 132 is found in the Inland Revenue Act, R.S.C. 1906, ch. 51, under the head "Recovery of Duties and Penalties," and says:—

> Every penalty or forfeiture incurred for any offence against the provisions of this Act or any other law relating to excise may be sued for and recovered or may be enforced: (a) before the Exchequer Court of Canada or any Court of record having jurisdiction in the premises; or, (b) If the amount or value of such penalty or forfeiture does not exceed $500.00 . . . by summary conviction under Part XV. of the Criminal Code before a . . . police or stipendiary magistrate . . . 2. Any such penalty may, if not forthwith paid, be levied by distress and sale . . . under the warrant of the . . . magistrate . . . or the said . . . magistrate may in [his] discretion commit the offender to the common gaol for the period of 6 months unless the penalty and costs, etc. . . . are sooner paid.

Clearly the word "penalty" in this section is restricted to a pecuniary penalty because of its association with the words "recover" and "paid" and the draughtsman would have avoided confusion if he had left out entirely the words "summary conviction" and would have authorised exactly what I think was and is intended, viz., to recover the penalty by the simple machinery of Part XV. of the Crim. Code. At this stage it would seem clear that under sec. 132, even if the defendant was liable to commitment for non-payment, the magistrate had no authority to add "hard labour" because it is not provided for in this section and therefore the conviction is bad. *Poulin* v. *City of Quebec* (1907), 13 Can. Cr. Cas. 391.

In setting out the facts I quoted somewhat extensively in order that it might be made clear that in the opinion of this magistrate he was called upon to exercise his punitive jurisdiction; that he was trying the issue of guilt or innocence of this defendant and that he "convicted" him and "imposed" a penalty. This was, I think, clearly wrong not only for the reasons I have endeavoured to offer but also because the defendant had not committed nor is he charged with having committed any offence for which he had not already been tried and convicted. For these

reasons I think the appeal should be allowed and the conviction quashed with costs in both Courts against the informant. The usual order for protection of the magistrate.

It is also objected by the defendant that a magistrate has no jurisdiction to deal with the offences found in sec. 180 because the effect of sec. 181 is to make the offender liable to a penalty exceeding $500.

This objection is squarely raised in *Rex* v. *Brennan*, 6 Can. Cr. Cas. 29, 35 N.S.R. 106, and is dealt with by Ritchie, J., at p. 38, in the following words:—

> The fact that a subsequent proceeding could be taken for *another* penalty, if the Crown wished it, does not affect the jurisdiction of the magistrate to try the case before him.

McDonald, C.J., concurred. That judgment was followed in this Court in the case of *Rex* v. *Schmolke* (1919), 31 Can. Cr. Cas. 395, which was reversed (1919), 14 Alta. L.R. 601, without discussion by the members of the Appeal Division of the issue raised. It is to be inferred from the words of Ritchie, J., in *Rex* v. *Brennan* and, I think, from the judgment in *Rex* v. *Schmolke*, that the penalty in sec. 181 is "another" penalty and must be recovered in a separate proceeding under Part XV. of the Crim. Code. If this is the proper inference then assuredly the reason for so holding is to be found in the simple fact that the provision is made in a separate section of the Act with a distinct number, viz: 181. Does that fact effectuate a different state of the law than if the provision of 181 had been added to 180 as sub-sec. (3)? I cannot think so. Suppose that no punishment were provided in 180 but that $600 were inserted in 181. Could it be successfully urged that a magistrate had authority. Surely not. If I am wrong then it would seem to me that a magistrate would be empowered to deal with the offences under secs. 107 and 111 by simply adopting two separate proceedings. The only argument I can appreciate that would meet the objection to the magistrate's jurisdiction would be that sec. 181 does not penalise the offender under 180 but automatically pronounces such offender a debtor of the Crown. That the true interpretation of the section is that it creates a debt rather than a punishment. Against such an argument however is the presence in the section of the words "forfeit" and "double the amount." With profound respect I cannot agree that a magistrate has jurisdiction to try an offender charged under sec. 180. *Appeal allowed.*

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SMITH v. CANADIAN PACIFIC R. Co.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont, and Elwood, JJ.A. November 29, 1920.

TRIAL (§ II B—46)—AUTOMOBILE—ACCIDENT AT RAILWAY CROSSING—CAUSA CAUSANS OF ACCIDENT—SUFFICIENCY OF EVIDENCE TO GO TO JURY—CONTRIBUTORY NEGLIGENCE.

In an action for damages for injuries caused by the plaintiff's automobile being struck by defendant's train at a level crossing, if there are considerations from which a jury may reasonably conclude that it was the failure of the defendant to give the statutory warning, rather than the plaintiff's own recklessness, that was the *causa causans* of the injury those considerations must be passed upon by the jury.

Statement. APPEAL by plaintiff from the trial judgment withdrawing the case from the jury and dismissing the action because of the contributory negligence of the plaintiff in driving recklessly onto the defendant's tracks in front of an approaching train. Reversed.

G. H. Barr, K.C., and *C. M. Johnston*, for appellants.

L. J. Reycraft, K.C., for respondent.

Haultain, C.J.S. Newlands, J.A. HAULTAIN, C.J.S., and NEWLANDS, J.A., concur with LAMONT, J.A.

Lamont, J.A. LAMONT, J.A.:—This is an appeal from a judgment withdrawing the case from the jury at the close of the plaintiffs' evidence, and dismissing the plaintiffs' action The action was for damages for personal injuries received in a collision between the automobile of the male plaintiff and the defendant's train.

On September 29, 1919, about 2 o'clock in the afternoon, the male plaintiff and his two daughters, Mary and Edna, were driving in an automobile from their home, about 5 miles north-east of Regina, into town. They were going west, and as they were driving along the highway where it crosses the defendant's railway at rail level, their automobile was struck by the defendant's train, with the result that all the occupants were seriously injured and the automobile smashed to pieces. So serious were her injuries, that Edna Smith died from the effects thereof a few days later. To recover damages for the injuries received by them the plaintiffs have brought this action, and they allege that the accident was due to the failure of the defendant's servants to sound the whistle of the engine and ring the bell, as required by statute. The defendant in its pleadings alleges that the accident was due to the negligence of the male plaintiff, who was driving the automobile, in driving upon its track in front of an approaching train without looking to see if danger was to be apprehended therefrom.

Sec. 308 (1) of the Railway Act, 9-10 Geo. V. 1919 (Can.), ch. 68, reads as follows.

308 (1) When any train is approaching a highway crossing at rail level the engine whistle shall be sounded at least eighty rods before reaching such crossing, and the bell shall be rung continuously from the time of the sounding of the whistle until the engine has crossed such highway.

And sec. 419 (2) provides:

(2) The company shall also be liable for all damage sustained by any person by reason of any failure or neglect to so sound the whistle or ring the bell.

There was abundant evidence to justify a jury in finding that the statutory requirements above set out had not been complied with. The trial Judge, however, found as a fact that the evidence submitted on behalf of the plaintiffs established that the male plaintiff had been guilty of contributory negligence and he withdrew the case from the jury. The question in this appeal is, was he entitled to do so?

The evidence of the male plaintiff shews that he had lived in the neighbourhood for 20 years and was familiar with the crossing, and had driven over it many times. He admits that after he crossed the tracks of the Grand Trunk Pacific Railway, which are about half a mile east of the defendant's line, he had an unobstructed view of the defendant's track for some distance north and south of the crossing, and, had he looked, he could have seen a train coming from the north, with the possible exception of one place where the train would be between himself and some buildings further to the north. He cannot, however, say that he had any recollection of looking for an approaching train, although he says he believes that he did, because that was his custom. As he had no recollection of looking, I think we must proceed on the assumption that he did not look. The roads were somewhat rough, but dry. The curtains of the automobile on the side from which the train was approaching were on, to keep out the wind, but he says there were panels of mica through which a person could see. He was driving at from 10 to 15 miles an hour. One or two automobiles had passed him before he came to the G.T.P. tracks, and another passed him between these tracks and those of the defendant. As he was approaching the defendant's line, he says he heard the noise of an automobile behind him, and asked his daughters if the driver wanted to pass. They

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informed him that apparently the driver did not want to do so. When he was about 50 or 60 ft. from the defendant's tracks he heard the honk of the horn of the automobile behind him, and thought that was a signal that the driver wished to go by. From where he then was to the railway tracks on the crossing the road was up-grade, and it narrowed where it crossed the rails to about 20 ft. Realising this fact, the male plaintiff concluded that on the crossing would not be a suitable place for the automobile behind to pass, and made up his mind to proceed over the crossing and then allow it to go by. This he proceeded to do, apparently forgetting for the moment that it was advisable before crossing a railway line to look and see if danger was to be apprehended from an approaching train. In giving his evidence he was not asked, nor did he say, whether or not he relied upon the defendant to give the warnings required by statute on approaching a crossing. Under these circumstances, was the male plaintiff so clearly the author of his own wrong that the trial Judge was justified in holding that there was no evidence upon which a jury could reasonably find that the accident resulted from the failure of the defendant to give the statutory warnings?

The principles applicable to this case were laid down by the House of Lords in the well known case of *Dublin, Wicklow and Wexford R. Co.* v. *Slattery* (1878), 3 App. Cas. 1155. That action was brought by the widow of John Slattery, who had been killed by the company's train. The deceased, his cousin and two friends went to the company's station, as one of them was taking the train to Dublin. There were two tracks in the station. The deceased crossed the company's line to get a ticket. The Dublin train pulled in and came to a standstill on the up track. After getting the ticket, the deceased recrossed the first track at the end of the Dublin train. Between that track and the next there was a 6-foot strip. From this strip he had an uninterrupted view up and down the line. He stood on the strip and beckoned his friend to come over. The friend not doing so, the deceased crossed the strip and stepped on to the down track and was struck and killed by the down train, which was perfectly lighted and which he could have seen had he looked. The engine of the down train did not whistle as it should have done in going through a station.

On these facts it was held, that there was evidence to be passed upon by the jury. In his judgment Lord Cairns, L.C., at p. 1166, said:

> If a railway train, which ought to whistle when passing through a station, were to pass through without whistling, and a man were, in broad daylight, and without anything, either in the structure of the line or otherwise, to obstruct his view, to cross in front of the advancing train and to be killed, I should think the Judge ought to tell the jury that it was the folly and recklessness of the man, and not the carelessness of the company, which caused his death. This would be an example of what was spoken of in this House in the case of *Jackson* v. *The Metropolitan Railway Company*, an *incuria*, but not an *incuria dans locum injuriæ*. The jury could not be allowed to connect the carelessness in not whistling, with the accident to the man who rushed, with his eyes open, on his own destruction.
>
> But in the present case the facts are materially different. It was not in the daytime, but at night, although the night was clear. As the deceased stood on the platform of the station he was behind the train which was at rest, and probably would not see the train which was advancing. When he reached the six-foot way he might, no doubt, have seen the advancing train had he stopped and looked to his left. But then he appears to have been in an anxious and perhaps flurried state of mind, desiring to bring his friend across, in time to obtain a ticket for the train which was in the station, and was about to leave. He might therefore be supposed when he got to the six-foot way to have omitted, in his haste, the precaution of stopping and looking up the line to his left, while on the other hand, had the advancing train whistled, as on this hypothesis it failed to do, his attention would have been called to the danger, and his movement across the line might have been arrested. Now I cannot say that these considerations ought to have been withdrawn from the jury. I think they should have been submitted to the jury, in order that the jury might say whether the absence of whistling on the part of the train, or the want of reasonable care on the part of the deceased, was the *causa causans* of the accident.

If the flurried state of mind of the deceased, caused by his anxiety to have his friend cross the line in time for his train, was a sufficient consideration to prevent that case from being withdrawn from the jury, there were in the present case, in my opinion, considerations equally effective for that purpose. Prudence does not demand that an automobile driver shall look to see if a train is approaching when he is half a mile distant from a crossing, nor yet a quarter of a mile. All that prudence demands is, that he shall look at a sufficient distance to stop his automobile and avoid danger. Had the male plaintiff looked when he heard the automobile behind him honking, or even a little later, he could have stopped his automobile and have avoided the accident. This honking, which he interpreted as a call to be allowed to pass,

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directed his mind to the necessity of having a suitable place in which to pass, and, knowing that such place existed only on the other side of the crossing, he proceeded toward it. But for the fact that his mind at the crucial moment was directed by the honking to finding a suitable passing place, he might have realised the necessity of looking for the train in time to have avoided the accident. This same result might have been brought about had the defendant given the warnings required by the statute. These warnings are required to be given not to apprise the wary, but to apprise the unwary of the approach of danger. Had they been given, the male plaintiff's attention might have been directed to the danger and the accident thus avoided. Under these circumstances it was, in my opinion, for the jury to say whether or not it was the male plaintiff's own want of care or the failure of the defendant to give the statutory warnings that was the proximate cause of the accident.

In *G.T.R. Co.* v. *Griffith* (1911), 45 Can. S.C.R. 380, Duff, J., at p. 392, says:

> If the jury considered the weight of probability to favour the conclusion that Griffith did not see the passenger train in time to escape it, then it seems clear that the question of contributory negligence could not be withdrawn from the jury. The considerations to which the majority of the law Lords give effect in *Slattery's* case and which prevailed in *Smith* v. *South Eastern R. Co.*, [1896] 1 Q.B. 178, and in *Toronto R. Co.* v. *King*, [1908] A.C. 260, appear to be entirely applicable.

In the present case the male plaintiff says he did not see the train until it was too late to avoid the accident.

There is, however, another consideration which, in my opinion, could not properly be withdrawn from the jury, and that is, that the plaintiffs were entitled to assume that the defendant would give the statutory warnings, and they may have been lulled into a sense of security by not hearing them. In the *Slattery* case, 3 App. Cas. at 1174, Lord Penzance says:

> To whatever degree the plaintiff's husband may have been to blame in the course which he took, and in whatever degree that course may have contributed to the accident which befell him, I think it is clear that the absence of that whistling which is usual in all railways as the signal of an approaching train, may reasonably have been considered by the jury to have influenced the course taken by the deceased man, and thus caused the accident. I think it is impossible to deny this; it might be that being accustomed to the station, and aware of the usual time at which the train from *Dublin* passed, he expected the whistle as usual, and not hearing it, did not think the train was coming;

or it might be that had the whistle sounded it would have awakened him to his danger in attempting to cross the line, though his mind was so occupied with the desire of getting his friends across to where he stood that he failed to hear the sound of the wheels, and did not look up the line, as he ought to have done, to see if a train was coming.

In these two ways at least, and perhaps in others, the accident might, in the opinion of jurymen who are the lawful judges upon the question, have been attributed to the absence of whistling, although they might also have been of opinion that had the deceased man used anything like ordinary care the danger caused by the want of whistling, which in the result proved fatal, might well have been avoided. If so, it was proper to take the opinion of the jurymen on the subject.

See also *Smith* v. *South Eastern R. Co.*, [1896] 1 Q.B. 178; *Toronto R. Co.* v. *King*, [1908] A.C. 260; *Doyle* v. *C.N.R. Co.* (1919), 46 D.L.R. 135; *Peart* v. *Grand Trunk R. Co.* (Privy Council) (1886), 10 O.L.R. 753.

But, it is said, this principle can have no application in the present case, that it is limited to cases where the man charged with the contributory negligence is dead, and cannot, therefore, testify that he had relied on the statutory warnings being given. In any event, it is said that the principle cannot be applied, where the driver of the automobile gives evidence and does not say that he had relied upon the warnings being given.

This argument, in my opinion, is answered by Lord Penzance in the *Slattery* case, where, 3 App. Cas. at 1176, he says:

> Whether the plaintiff gives any evidence or not, the affirmative of the issue in question is none the less ultimately upon the defendant, and he must satisfy the jury, and not the Judge, that the evidence has established it.

The issue in question was the contributory negligence of the deceased.

The burden of proving contributory negligence is on the defendant, and that burden is the same, whether the person whose contributory negligence is alleged to have been the cause of the accident gives evidence or not. If he gives evidence, the defendant has an opportunity on cross-examination of extracting from him admissions shewing that he had not relied upon the warnings being given, and had not been lulled into a sense of security by not hearing them.

But if it is open to a jury, where a person charged with contributory negligence gives no evidence, to find that the failure to give the statutory warnings may have influenced his conduct (and the above authorities shew that it is), it is equally open to

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them, in my opinion, to find the same thing where, although such person gives evidence, he is not questioned as to his reliance upon the warnings being given. The onus of negativing contributory negligence in this case was not shifted to the male plaintiff because he went into the witness box. That onus still rested on the defendant, and if it failed, as I think it did fail, to establish by cross-examination of the plaintiffs' witnesses, that the plaintiffs were clearly the authors of their own wrong, or, to use the language of Lord Cairns in the *Slattery* case, that they "rushed with their eyes open on their own destruction," the case must go to the jury. So long as there are considerations from which a jury may reasonably conclude that it was the failure to give the statutory warnings rather than the plaintiffs' own recklessness that was the *causa causans* of the injury, those considerations must be passed upon by the jury.

As I have already stated, such considerations exist in this case. I do not think the verdict of a jury could be said to be perverse if they held that the honking of the horn of the automobile behind, at the time when the mind of the male plaintiff should have been directed towards looking for the approaching train, distracted his mind and excused his failure to look to an extent sufficient to justify the conclusion that it was the failure to give the statutory signals, rather than the recklessness of the male plaintiff, that was the proximate cause of the accident. Nor do I think the verdict could be set aside if the jury held the defendant's negligence to have been the proximate cause of the accident for the reason that, had the warnings been given, the plaintiffs would have been aroused to a sense of their danger and have avoided the accident.

Nor yet if they based their verdict on the ground that the plaintiffs knew that the defendant was obliged to give the statutory warnings when approaching a crossing and that they were justified in assuming that such would be given, and not hearing them were lulled into a sense of security.

On the other hand, their verdict would be equally unimpeachable if they found that the accident was caused by the negligence and recklessness of the male plaintiff in driving upon the railway track without first looking to see if a train was approaching. What is the proximate cause of an accident is a

question of fact, and the jury is the tribunal that must pass upon that fact unless the circumstances under which the accident took place clearly establish that, no matter what may have been the negligence of the defendant, that negligence, cannot owing to the acts or omissions of the plaintiff, be connected up with the accident so as to be the cause thereof. In my opinion that was not established in this case. The case, therefore, should not have been withdrawn from the jury.

Having reached this conclusion, it is not necessary to consider whether or not the negligence of the male plaintiff, had such been established to be the proximate cause of the accident, would be an answer to the claim of the female plaintiff.

The appeal, in my opinion, should be allowed with costs, the judgment set aside, and a new trial ordered. The costs of the abortive trial to be costs in the cause.

ELWOOD, J.A. (dissenting):—This is an action brought by the appellants against the respondent for damages alleged to have been sustained by the appellants as the result of the negligence of the respondent. The negligence of the respondent alleged is that the respondent's train was running at a high rate of speed down an incline coming from the north toward the city of Regina, and for some time before approaching the crossing at which the accident took place was coasting or running very silently, and while it was approaching the said highway crossing at the level, the engine whistle was not sounded at least 80 rods before approaching the said crossing, or at all, and the bell was not rung continuously, or at all, while approaching the said crossing, as provided by the Railway Act of 9-10 Geo. V. 1919, ch. 68.

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On the day of the accident the male appellant, who is a farmer residing 4 or 5 miles from Regina, and his two daughters were proceeding to Regina in a motor car along the highway running east and west. This highway crosses the Grand Trunk Railway at grade level approximately 2,900 ft. east of Winnipeg St., and crosses the respondent's railway at grade level approximately 500 ft. east of Winnipeg St., both crossings being at right angles. The respondent's railway for nearly three-quarters of a mile north of its intersection with this highway runs in a straight line north by a little west, until it intersects Winnipeg St., from whence it curves more westerly. From its intersection at Winnipeg

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St. there is a slight grade of about 18 ft. down to the intersection with the said highway. From the point at which the said highway crosses the Grand Trunk line there is nothing to obstruct the view of the respondent's said line of railway; it is all open prairie, practically level, with no buildings intervening. North-west of the said intersection of the respondent's line with Winnipeg St., and just how far therefrom it does not appear, there are some farm buildings. Some of the witnesses testified that a train might be running along the curve north-west of Winnipeg St. and when it got between the said farm buildings and a person travelling along the said highway, between the Grand Trunk and respondent's tracks, if the engine were not emitting smoke or steam, it would be coming head-on to the observer and a casual glance might not disclose the fact that it was a train. Prior to crossing the Grand Trunk track, the appellants were passed by one or two motor cars going in the same direction, and after they passed that track by possibly one motor car, although the evidence is not quite clear as to that. At any rate, after passing the Grand Trunk track another motor car came up to within 20 or 25 yards of the appellants' motor car, and continued behind the appellants' motor car at about the same distance until the time of the accident. The male appellant heard the noise of this car at some point along the road, and I think from the evidence it is fair to conclude some distance east of the accident, and asked his daughters to look and see if this car wished to pass. The daughters, or one of them, looked and said no, the car was just keeping as it was. East of the said intersection of the highway in question with the respondent's line, and the highway, commencing about 50 ft. from the line, ascends to the line by a very slight grade, which the evidence shews is about 2½ ft. in the 50 ft. Just as the appellants' car was ascending this grade the car behind them gave several toots with the horn. The evidence of the occupants of the car is that they saw the respondent's train coming along the line from the north, and that the appellants had not noticed it, and that they tooted their horn to warn them. The appellant took this to be that the car behind him wished to pass him but concluded in his own mind that this was not a suitable place to let it pass, but would do so after he got over the railway. Just as the front of the appellants' car reached the railway, the whistle

on the engine of the respondent's train, which was going south, was blown, too late for the appellant to do anything, the appellant's car was struck, and both appellants were injured. One of the daughters was injured so badly that subsequently she died, and it is for these injuries and the alleged negligence of the respondent, above referred to, that the action is brought.

The evidence of the male appellant—the other appellant did not give evidence—is, that he did not know whether he looked after crossing the Grand Trunk tracks to see if any train was coming along the respondent's railway. He thought he did, but had no recollection of doing so. He was travelling with the curtains on the right side of his car on. These curtains had large pieces of mica in them, through which one could see. The curtains on the car behind the appellant's were on all round. The occupants of the car behind the appellant's saw the approaching train all the way from a point about one-third of the distance between the Grand Trunk and the respondent's tracks and west of the Grand Trunk tracks: that there was nothing to prevent their so seeing the train. At the conclusion of the appellants' case, counsel for the respondent moved to withdraw the case from the jury, on the ground that the evidence adduced by the plaintiff shewed that it was his contributory negligence for not looking on approaching the crossing that was the cause of the accident. The trial Judge acceded to this request, and this appeal is in consequence.

So far as the evidence went, I have no hesitation in finding that, if the case had gone to the jury, the jury should have found that the respondent failed to blow the whistle and ring the bell as provided by the Railway Act. That seems to me to then bring for our consideration whether or not there was contributory negligence on the part of the appellants.

It was suggested to us on the argument that, because the duty of the respondent to blow the whistle and ring the bell is a statutory one, even negligence by the appellants to look out for a train when approaching the respondent's line would not excuse the respondent from its breach of statutory duty, and it was suggested that the effect of failure to blow the whistle and ring the bell is different in Canada from what it is in England, because it was suggested that in England the duty is not statutory.

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Dealing with this view of the question, I shall refer to an English authority which was much quoted to us on the argument, and thereafter to Canadian authorities.

In *Dublin, Wicklow and Wexford R.* v. *Slattery*, 3 App. Cas. at 1166, Lord Cairns, L.C., is reported as follows:

If a railway train, which ought to whistle when passing through a station, were to pass through without whistling, and a man were, in broad daylight, and without anything, either in the structure of the line or otherwise, to obstruct his view, to cross in front of the advancing train and to be killed, I should think the Judge ought to tell the jury that it was the folly and recklessness of the man, and not the carelessness of the company, which caused his death. This would be an example of what was spoken of in this House in the case of *Jackson* v. *The Metropolitan Railway Company*, an *incuria*, but not an *incuria dans locum injuriæ*. The jury could not be allowed to connect the carelessness in not whistling, with the accident to the man who rushed, with his eyes open, on his own destruction.

In *G.T.R. Co.* v. *Griffith* (1911), 45 Can. S.C.R. at p. 398, Anglin, J., is reported as follows:

It certainly cannot be laid down as an absolute rule that failure to look and listen before crossing a railway must in every instance and in all circumstances be held to be contributory negligence sufficient to debar relief. There may be circumstances which wholly excuse that omission. That the deceased might have been in a flurried state of mind owing to anxiety to procure a ticket for a friend was deemed a consideration which could not have been withdrawn from the jury in *Dublin, Wicklow and Wexford Railway Co.* v. *Slattery*.

and at p. 399;

We have, however, the fact that Parliament has deemed it wise to enact that railway trains approaching highway crossings shall give certain signals not for the purpose of attracting the attention of those who are already on the alert and need no warning, but for the purpose of arousing those who are distracted or whose attention is absorbed owing to whatever cause and who, therefore, need warning. Parliament has specified the particular signals which in its judgment are best fitted to serve this purpose. Where it is clearly proved that those signals have been omitted and that an accident, which the giving of them *might* have prevented, has occurred, it must, I think, always be within the province of a jury to say whether or not, having regard to all these circumstances, the breach of statutory duty should be taken to be the determining cause of the accident. The moment the decision is reached that the statutory signals, if given, might have prevented the accident and there is evidence of their omission, it is not proper for the trial Judge to withdraw the case from the jury (unless, indeed, what is incontrovertibly contributory negligence is admitted or is so clearly proved in the plaintiff's own case that it would be proper to direct a jury to find it) and if, upon the case being submitted to them, the jury see fit to draw the inference that the omission of the signals was in fact the cause of the accident, it is not competent for an Appellate Court to disturb that conclusion.

In *Champaigne* v. *G.T.R. Co.* (1905), 9 O.L.R. 589 at 599, Street, J., is reported as follows:

The authorities appear to have gone this far; that where the railway company fails to give the statutory warnings of the approach of a train and an accident happens, the plaintiff is entitled to have the opinion of the jury upon any reasonable excuse given for the omission to look out for the approach of the train and the Judge cannot pass upon the sufficiency of the excuse himself.

In *G.T.R. Co.* v. *McAlpine*, 13 D.L.R. 618, at p. 623, [1913] A.C. 838, Lord Atkinson is reported as follows:

Where a statutory duty is imposed upon a railway company in the nature of a duty to take precautions for the safety of persons lawfully travelling in its carriages, crossing its line, or frequenting its premises, they will be responsible in damages to a member of any one of these classes who is injured by their negligent omission to discharge, or secure the discharge of, that duty properly, but the injury must be caused by the negligence of the company or its servants. If, as in the example taken by Lord Cairns in *Dublin, etc. Ry.* v. *Slattery*, the folly and recklessness of the plaintiff, and not the admitted negligence of the company, be the cause of the injury to the plaintiff, then the negligence of the servants of the company in omitting to whistle, for instance, as the train approached a station or level crossing would "be an *incuria*, but not an *incuria dans locum injuriæ*."

I think it will be abundantly clear from the above quotations that the omission of the respondent to perform its statutory duty does not excuse the appellants from their own negligence, if such existed. There are two extracts from the above quotation from the judgment of Anglin, J., in 45 Can. S.C.R. that I think are important to consider in coming to a conclusion in this case:

(1) Unless, indeed, what is incontrovertibly contributory negligence is admitted, or is so clearly proved in the plaintiff's own case that it would be proper to direct a jury to find it. (See p. 400.)

(2) It certainly cannot be laid down as an absolute rule that failure to look and listen before crossing a railway must, in every instance and in all circumstances, be held to be contributory negligence sufficient to debar relief. There may be circumstances which wholly excuse that omission. (See p. 398.)

So we have to consider: (1) Was what is "incontrovertibly contributory negligence" admitted, or so clearly proved in the appellants' own case that it would be proper to direct a jury to find it? (2) Is there evidence of circumstances which wholly excuse the appellants' omission to look; or, as Street, J., puts it in *Champaigne* v. *G.T.R. Co.*, 9 O.L.R. 589, "was there a reasonable excuse given" for the omission to look?

Apart entirely from the question of whether or not there was an excuse, or a reasonable excuse, for the omission to look, the

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evidence to my mind is quite clear that it was the duty of the appellants when approaching the respondent's line of railway to look for a train. The male appellant in his own evidence says one approaching a railway should, several times between the Grand Trunk and the respondent's tracks, look to see if a train is coming. If he had looked, he could not have failed to see the train. The car coming behind him, and at 20 or 25 yards behind him all the way, had the train in full view all of the time; there was nothing to obstruct the view; it was broad daylight, at about 2 o'clock in the afternoon, and if ever there was a case where there was clearly negligence which should disentitle the person injured to recover it is the present case, unless there was something which excused what should ordinarily have been done. There are several things which counsel for the appellants say should excuse the appellants: (1) It is suggested that they might have looked when the train was coming round the bend and the buildings, that I have referred to above, forming a background, they might not have distinguished the train from the buildings.

The answer to that seems to me to be that the male appellant is not aware that he looked. He was driving the car. There is no evidence that anybody in the car did look. If they had looked at the time that these buildings formed a background, the buildings would only form a background for a second or so; apart from that second or so the train would be in full view. The evidence of the persons who travelled in the car 20 or 25 yards behind the appellants is, that the approaching train was in full view all of the time for at least 1,800 ft. The appellants travelled the road in question frequently, it was their highway which they used in coming into Regina. They were as well aware as any person of the railway tracks, and of the necessity of looking for approaching trains.

It was suggested that the road was rough. Now the only evidence of this is the evidence of the male appellant, who was asked as to the condition of the road, and he says that it was "a little rough."

Then it was suggested that the car coming behind, and the inquiry by the male appellant of his daughters as to whether the car wished to pass might have distracted his attention. This event, however, took place some considerable distance from the

point of the accident, fairly near to the Grand Trunk tracks. The male appellant apparently heard the car and asked his daughter to look and see whether it wished to pass. He apparently did not take his eyes off the road or his attention from what he was doing. It is also suggested that the curtains being on might have obstructed his view. The answer to this is, that there were large pieces of mica through which he could see, and that, in any event, to enclose himself in with something that would obstruct his view and then approach a railway without making any effort to see whether a train was approaching, would, in my opinion, be recklessness that would disentitle him to relief. He was approaching a railway running at right angles to the road on which he was travelling; the view was uninterrupted by anything, and the occupants of the car coming behind him, enclosed all round with curtains, were able to see and did see the approaching train all the time.

It was lastly suggested that the tooting of the horn by the car behind, just as he was ascending the grade to the respondent's track, distracted his attention and is an excuse for his failure to look. With respect to that the following question and answer of the male appellant is all the evidence that we have:

> Q. What were you giving attention to as you were rising up the grade or what was occupying your attention as you were rising up the grade just before crossing the track? A. Well, the automobile coming behind me having blown his horn on me, I figured he wanted to pass, and I was considering letting him pass as soon as I got across the railway crossing.

In the first place, it will be observed that he was then about 50 ft. from the railway. He had never looked until then, and I cannot conceive that the mere fact that he intended to let the car pass him after he got over the railway would, or should prevent his keeping in his mind the necessity for looking to see if a train was coming. He knew and says that he knew that he was approaching the track. That should have conveyed to his mind the possibility of a train approaching. In his own evidence, as I have before mentioned, he says that one should look several times between the Grand Trunk and the respondent's tracks.

But what to my mind is the strongest answer to the contention of the appellant on all these excuses is, that the male appellant

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in his evidence does not offer any of these as a reason for not having looked to see if a train was coming. He does not offer any reason, or suggest any reason.

A number of cases were cited to us where failure to look for an approaching train was excused. In all of these cases either one of two conditions existed. Either the person injured had been killed and was, therefore, unable to give evidence, and it was in that case left to the jury to determine, and possibly conjecture whether, under the circumstances, the person killed should be excused from looking. Or, where the person injured gave evidence, he stated that the reason he did not look was because of certain circumstances, and it was left to the jury to say whether those circumstances which he stated caused him to fail to look were circumstances which excused him from failing to look. In the case at Bar, the evidence on the part of the appellant was evidence from which a jury, in my opinion, could only find that the appellants did not look to see if a train was approaching, and it was, therefore, in my opinion, incumbent upon the appellants to adduce evidence that would excuse them from their failure to look. The male appellant is the only one of the appellants who gave evidence, and he does not in his evidence anywhere suggest what it was that caused him to fail to look. He left it entirely to his counsel to suggest a probable cause, and I do not think, under the circumstances, that a jury would be justified in assuming that any of the reasons suggested by the appellants' counsel were sufficient excuses for the appellants' failure to look. If any of those excuses was the cause of the appellants' failure to look, the male appellant should have stated in his evidence that that reason was what prevented his looking. He did not give evidence to that effect, and I must, and I think correctly, assume it was because he could not give such evidence.

There was no evidence that the appellants were depending upon the train whistling at the whistling post, or ringing the bell, as was the case in *Doyle* v. *C.N.R. Co.*, (1919), 46 D.L.R. 135. This was not a case of coming upon the railway suddenly or unexpectedly, or of having only a second or two in which to act. The appellants drove along the road for, approximately, 1,800 ft. with the railway squarely before them, and all they had to do was to look, and they did not look.

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I am of the opinion that there was no evidence which would justify a jury in coming to the conclusion that there was any reasonable excuse for the failure of the appellants to look out for the approaching train, and, under those circumstances, I am of the opinion that the trial Judge was justified in withdrawing the case from the jury, and that this appeal should be dismissed with costs.

Appeal allowed.

MARKS v. ROCSAND Co. Ltd.

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Ontario Supreme Court, Orde, J. September 16, 1920.

1. COMPANIES (§ IV G—116a)—POWER OF MANAGER AS SUCH TO CALL SHAREHOLDERS' MEETING—VALIDITY OF RESOLUTION PASSED AT MEETING CALLED BY MANAGER.

The manager of a private company incorporated under the Ontario Companies Act has no authority as manager to call a meeting of shareholders, and where a meeting has been called by him as manager "to discuss matters of importance pertaining to the company's affairs," unless all the shareholders are present at the meeting or are represented by proxy after due notice of the business to be transacted, no resolution passed thereat can bind the shareholders.

2. COMPANIES (§ IV G—137)—SHAREHOLDER UNDERTAKING MANAGEMENT OF COMPANY—EXPECTATION OF REMUNERATION—SHAREHOLDERS EXPECTING TO PAY—PAYMENT ON BASIS OF QUANTUM MERUIT.

No by-law of a company is necessary for the employment of a director in some other capacity or for his remuneration for such additional services, and where the evidence shews that a shareholder definitely undertook by arrangement to manage the company's affairs and that he expected to be remunerated for his services, and that this was recognised by nearly all the other shareholders, he is entitled to be paid for such services as upon a *quantum meruit*.

[*Canada Bonded Attorney etc.* v. *Leonard-Parmiter Ltd.* (1918), 42 D.L.R. 342, 42 O.L.R. 141, followed.]

Statement.

ACTION to recover $1,200 alleged to be due to the plaintiff for salary as manager of the defendant company's business from the 15th June to the 15th December, 1918.

G. W. Mason, for the plaintiff.

J. R. L. Starr, K.C., for the defendant company.

Orde, J.

ORDE, J.:—The defendant company was incorporated on the 24th June, 1914, as a private company, under the Ontario Companies Act, with an authorised capital stock of $100,000, with five provisional directors and its head-office at Hamilton. The company's business was that of quarrying and dealing in stone, gravel, and sand. It had its plant at Erin, and, prior to and during the period in question here, an office in Toronto, in addition to the head-office at Hamilton. All the capital, consisting of 1,000 shares, was issued and fully paid-up.

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The plaintiff was not one of the incorporators, but became a small shareholder shortly afterwards.

In 1917 and the early part of 1918, the company was in a bad way and was involved financially.

At a meeting of shareholders held on the 28th May, 1918, the plaintiff, who then held 100 shares, submitted a proposition to purchase 51 per cent. of the stock and to advance certain moneys to the company. This proposition resulted in the plaintiff and Mr. H. N. Kittson, one of the original incorporators and already a holder of 280 shares, together advancing certain moneys and acquiring certain additional shares, so that by the 12th June, 1918, the plaintiff held 260 shares and Kittson 387, making 647 in all out of the 1,000 issued shares, thereby giving the plaintiff and Kittson control.

The plaintiff and Kittson had for some time during the earlier part of 1918 been conferring as to the company's affairs and the possibility of improving its position. The plaintiff says that there was an arrangement made with Kittson whereby the plaintiff was to become general manager of the company, and that he and Kittson, as well as Baby, the secretary-treasurer, were to be remunerated for their services. The plaintiff says he wrote Kittson in July, 1918, stating that he, the plaintiff, was to draw $200 per month as salary, and that Kittson was to receive $50 per month for his services in looking after the business at Hamilton.

This letter was not produced, and the plaintiff says that his file containing the copy disappeared, so that the only evidence of its contents is that of the plaintiff himself. Kittson says he remembers receiving one letter from the plaintiff complaining about the financial position of the company, and stating that the plaintiff had received no salary.

The plaintiff says that he was appointed manager of the company in June, 1918, by Kittson and Baby. Kittson was then a director, and, according to the last recorded minutes of any directors' meeting prior to that time, also vice-president. The president was Walter S. Connolly, who had held that office since the early part of 1916.

It is admitted that there was, at that time, no meeting of directors, formal or otherwise, at which the plaintiff was authorised to act as manager or in any other capacity, but there is no doubt

about the fact that from about the middle of June, 1918, onwards, Marks looked after the business of the company from its Toronto office, Baby, the secretary-treasurer, being engaged at the plant at Erin. Marks sent out bills of lading and invoices from the Toronto office and collected moneys which he remitted to Hamilton. It appears to have been taken for granted by the plaintiff and Kittson that, having control, they could practically undertake the complete management of the company. Mr. Kittson admits that there was some talk between the plaintiff and himself as to the latter's remuneration, and as to his rendering services to the company in some capacity, though he does not remember the word "manager" being used, but he takes the ground that no salary was agreed to by him at that time, and that the work to be done at the Toronto office was not at all onerous, because the sale of the company's output was largely in the hands of the Elias Rogers Company Limited, who had been engaged as the company's agents some time before. At this time the plaintiff, though a large shareholder, was not a director of the company.

On the 9th September, 1918, a meeting of shareholders, which is styled the "Annual General Meeting," was held, at which Messrs. Kittson, Marks, Tate, Baby, and Connolly were elected directors. At a meeting of directors held immediately afterwards, Mr. Kittson was elected president, the plaintiff vice-president, and Mr. Baby secretary-treasurer. As part of the business at this meeting, it was resolved that a salary of $150 per month, dating from the 1st June, 1918, be paid to Baby. No mention is made of the plaintiff's position as manager or of any salary to him.

The plaintiff continued, however, to perform the duties which he had entered upon in June, and Mr. Kittson admits that from that time he regarded the plaintiff as the "managing director" of the company. As he put it, the plaintiff was the director who managed the company.

During the autumn of 1918 matters became strained between the plaintiff and Baby, and later between the plaintiff and Kittson. The company's business was not improving, and the plaintiff was dissatisfied with Baby's management of the business at Erin. In October the plaintiff wrote twice to Kittson complaining about Baby, mentioning the fact that he, the plaintiff, had had no salary and was out of pocket for expenses. In his second letter

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he asked Kittson to call a meeting of shareholders to discuss matters. At the same time he dismissed Baby and the whole staff at Erin. Kittson, as president, did not call the meeting of shareholders, so the plaintiff took it upon himself as manager to do so, and on the 2nd December, 1918, sent out notices of a special meeting of shareholders to be held in the head-office at Hamilton on the 17th December, 1918, "to discuss matters of importance pertaining to the company's affairs." This notice he signed as "manager."

At the shareholders' meeting on the 17th December, 1918, there were present Messrs. Kittson, Morrison, Connolly, Marks (the plaintiff), Henderson, Tate, and Baby. The minutes of this meeting contain the following record:—

"Mr. Marks submitted that, in view of the time he had devoted to promotion of the company as manager, he was entitled to and demanded that $200 per month be voted to him for a period of six months, whereupon Mr. Connolly asked whether, in the event of such salary or bonus being voted to him, would he (Mr. Marks) claim priority on the assets of the company as against the guarantors to the bank. Mr. Marks definitely stated that we could take his word to the contrary, and that, if the amount was not voted to him forthwith, he would immediately apply for a winding-up order. In view of Mr. Marks' attitude, it was deemed advisable in the interests of the company to pass the following resolution:—

"Moved by Mr. W. S. Connolly, seconded by Mr. E. R. Tate, that six months' salary be voted to S. A. Marks at rate of $200 per month, or $1,200, and to H. N. Kittson six months' salary at rate of $50 per month, or $300, to December 1st, to be paid by the company when the finances of the company will warrant so doing."

The minutes do not record that either the plaintiff or Kittson refrained from voting on this resolution.

There was some question as to the regularity of this meeting. The plaintiff had no authority, as manager, to call a meeting of shareholders. Nor did the president's failure or refusal to call a meeting justify the plaintiff in assuming the right to call it. A special general meeting of shareholders can be called only upon the authority of the directors; and, although the plaintiff held a

sufficient number of shares to enable him to exercise his right to have a meeting called under sec. 46 of the Ontario Companies Act, he did not follow the requirements of that section. So that, unless all the shareholders were present at the meeting, or were represented by proxy after due notice of the business to be transacted, no resolution passed thereat could bind the shareholders. There seemed some doubt as to the number of absentees. The plaintiff says there was only one, and that he held and presented a proxy for him, but the proxy is not produced, and the president remembers no such proxy. The minutes of the meeting do not mention it. But, assuming that all absent shareholders were represented, in the absence of some evidence as to the extent of the authority given by the proxy, I must hold that the authority was limited to the business for which the meeting was called. A meeting called "to discuss matters of importance pertaining to the company's affairs" can hardly be considered as having been called for any "special" purpose whatsoever. Just what business could be transacted thereat may be open to doubt—possibly nothing but ordinary routine matters; but I am of the opinion that it was beyond the power of that meeting, in the absence of any shareholder, unless represented by proxy with full authority, to pass any resolution to remunerate two men who were then directors of the company.

At a subsequent meeting of shareholders held on the 20th January, 1920, the minutes of this meeting were confirmed; but, again, there was not a full attendance of shareholders, and no evidence is given as to the notice calling this meeting. Unless the notices set forth the fact that it was proposed to confirm the resolution passed at the meeting of the 17th December, 1918, the purported confirmation would not validate the earlier resolution. See Lindley on Companies, 6th ed., pp. 425 and 426. The meeting of the 20th January, 1920, was adjourned until the 11th February, 1920. At this adjourned meeting there were present only Messrs. Kittson, Connolly, and Baby, and, after referring to the fact that the plaintiff was demanding immediate payment of the amount voted to him on the 17th December, 1918, in spite of the resolution being qualified that payment was to be made "when the finances of the company will warrant so doing," they formally rescinded the resolution of the 17th December, 1918, both as to the plaintiff and as to Kittson.

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In so far as the plaintiff's claim is based upon the resolution of the 17th December, 1918, I do not think it can stand. I hold that the resolution was neither passed nor confirmed at a regularly constituted meeting of shareholders.

But the resolution has this value, so far as the plaintiff is concerned, that it corroborates his evidence that he did render six months' services to the company in the capacity of manager and as to what would be a fair remuneration for those services. The shareholders then present held a very large proportion of the capital stock—as far as I can gather from the minute-book, probably in excess of 90 per cent.

The plaintiff's right, if any, to recover on the strength of any resolution, being disposed of, it is not necessary to consider the effect of the general by-law of the company as to the remuneration of directors.

The plaintiff also relies upon his right to recover independently of any resolution.

Mr. Kittson, in the course of his evidence, took the ground that, as he was likewise largely interested in the company and was performing many services for the company for which he did not expect to be paid, the plaintiff was in the same position. With this I cannot agree. I think that the evidence shews that in June, 1918, the plaintiff definitely undertook, by arrangement with Kittson and Baby (Kittson and the plaintiff together holding two-thirds of the stock), to manage the company's affairs at its Toronto office, and that the plaintiff expected to be remunerated for these services. These facts are recognised by almost all the shareholders. Under these circumstances, unless there is some technical reason for refusing the plaintiff relief, he ought to recover.

Any doubt as to the necessity for a by-law in cases like this, which may have arisen from earlier decisions, has been set at rest by the recent case of *Canada Bonded Attorney and Legal Directory Limited* v. *Leonard-Parmiter Limited* (1918), 42 O.L.R. 141, 42 D.L.R. 342. It is there laid down that no by-law is necessary for the employment of a director in some other capacity or for his remuneration for such additional services: see *per* Riddell, J., 42 D.L.R. at p. 353. When his employment began, the plaintiff was not in fact a director, and did not become one until three months later.

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Under these circumstances, the plaintiff is, in my judgment, entitled to be paid for his services as upon a *quantum meruit*; and, as the value thereof has been practically determined by the shareholders themselves at $1,200, there should be judgment for the plaintiff for that amount, with costs.

Judgment accordingly.

EDMONDSON v. BOARD OF TRUSTEES FOR THE MOOSE JAW SCHOOL DISTRICT No. 1.

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Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. November 29, 1920.

NEGLIGENCE (§ I B—5)—SCHOOL BOARD—ALLOWING USE OF DEFECTIVE BAMBOO CROSS-POLE FOR JUMPING—POLE NOT DANGEROUS FOR PURPOSE IT IS USED—INJURY TO PUPIL WORKING ON—LIABILITY.

It is not negligence on the part of a School Board to allow the pupils to use a bamboo cross-pole for practising high jumping, although one end of the pole is splintered or jagged, if the pole is not dangerous for the purpose for which it is used, and it is not liable for injuries caused to a pupil by being hit with the end of the pole while watching other pupils practising jumping after school hours.

Statement.

APPEAL by defendant from the trial judgment in an action for damages for injuries received by a schoolboy while watching other boys practising high jumping on the school grounds after 4 o'clock and which resulted in the loss of an eye. Appeal allowed, action dismissed.

J. F. Frame, K.C., and *W. M. Rose*, for appellant.

J. L. Bryant, for respondent.

Haultain, C.J.S.

HAULTAIN, C.J.S.:—I am of opinion that this appeal should be allowed on the ground that there was no evidence upon which a jury could reasonably find negligence on the part of the defendant. There was nothing unusual or out of the common in the apparatus in question, and it was being used in the ordinary way. That the pole should be knocked down is an ordinary incident of any jumping competition, and under ordinary circumstances there is no resulting danger. The accident which unfortunately happened might equally well have happened whether the end of the pole was broken or not. I do not think that it requires any expert evidence to shew that a pole, either blunt or pointed at the end, propelled by the weight and force of a boy jumping against it, would be liable to put an eye out, if, in the language of the medical witness, it struck it "on the proper spot." A cricket ball, base

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ball or golf ball would be equally dangerous to anyone putting himself in the line of flight. There was no danger which could have been reasonably foreseen or provided against likely to arise from the ordinary use of the apparatus in question.

The facts in this case seem to me to disclose nothing more than a most deplorable accident which could not have been prevented by any ordinary measures of precaution and for which nobody is to be blamed, except, perhaps, the unfortunate lad himself, who put himself in a position of danger after having been warned.

Haultain, C.J.S.

I would therefore allow the appeal with costs, and set aside the verdict and dismiss the action with costs.

Newlands, J.A.

NEWLANDS, J.A.:—The plaintiff, a boy of 8 years old, a pupil in one of defendants' schools, was standing near a cross-bar, used by other schoolboys for high jumping, on the school grounds a few minutes after the close of the school for the day. One of the boys in jumping over the bar knocked it off, and the end of the bar hitting the plaintiff in the eye destroyed his sight. The bar in question was a bamboo pole, the small end of which had been broken, leaving sharp points which, when striking the eye, cut it and caused the damage complained of. The jury found negligence on the part of the defendants, "in allowing the use of such a stick which was dangerous."

The danger would consist in the sharp points on this stick hitting a spectator on the eye, or possibly the face. It could make no difference to the boys using the bar to jump over. Now the evidence shews that any kind of a stick used for this purpose hitting a boy on the proper spot on the eye would destroy the sight of the eye, and I think we may take it for granted that any kind of a stick hitting a boy of 8 years old on the eye, would hurt him, though it would only destroy his sight if it hit it, a medical witness said, "on the proper spot." There was no suggestion in the evidence that the pole in question was dangerous for the purpose for which it was being used, *i.e.*, as a jumping pole for the jumpers.

Two grounds of action are alleged: 1, negligence; and 2, a statutory duty to provide material and appliances for school sports and games as may be deemed necessary, and to repair and keep in order all school property. The provision to keep the material and appliances for school sports in repair can only mean for the purposes for which they would be used, and as this pole was

not out of repair for that purpose, the plaintiff could not recover on that ground. His cause of action, if any, is under the first ground, and the principles applicable to such a case are set out by Phillimore, J., in *Morris* v. *Carnarvon County Council*, [1910] 1 K.B. 159, at 167, Phillimore, J., says:—

But I am of opinion that there is a good cause of action in this case against the defendants wholly outside the statute, a liability which attaches to them not as an education authority, but as the owners of premises which are dangerous and upon which they have invited the plaintiff to come. There is a duty upon persons who invite others on to their premises to take care that the premises are not in a dangerous condition; and if that be true of what I may call their static condition, where the danger arises from the position of things as they stand without anything being moved, *a fortiorari*, is there a duty upon the owners to take care when they invite others to deal with something movable upon the premises the moving or dealing with which may be productive of mischief. Here this child, being on the school premises by invitation, is directed to use a swing door which happens to be dangerous for so young a child to use, and damage happens in consequence. For that damage I am of opinion that the defendants are responsible.

This pole could not be considered a trap, as it was not dangerous to anyone using it. It was no more dangerous to spectators than any other instruments used in sports striking a spectator "on the proper spot." A baseball might cause an injury to a small boy by striking him on the proper spot, but that could not constitute a ground of action against the School Board furnishing the boys with a ball to play with. The effect of the finding of the jury in this case is, that the pole in question being broken at the end would cause a greater injury by striking a boy who was a spectator than a pole with an unbroken end. They have therefore found that the amount of damage caused by this pole is the reason for holding that the School Board was negligent. This is not a proper criterion for deciding whether the Board was guilty of negligence.

If any kind of a pole would have caused damage by hitting a boy on the eye, then there must be negligence on the part of the School Board in providing a pole as a cross-bar for high jumping. This is, however, not suggested either by the pleadings or the finding of the jury.

I am therefore of the opinion that the School Board was not negligent in providing or allowing to be used a pole for high jumping; that the injury suffered by plaintiff, though a very regrettable accident, was a mere accident, for which they were not liable, and the appeal should, therefore, be allowed with costs.

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Lamont, J.A.

LAMONT, J.A. (dissenting):—This is an action for damages for personal injuries received by the plaintiff, which are alleged to have been caused through the negligence of the defendants.

On September 11, 1919, the plaintiff, a boy of 8 years, was in attendance at the Empress School, Moose Jaw. On school being dismissed at 4 o'clock in the afternoon, he went out of the school building to the school grounds. Some of the older boys were there, practising the high jump for the annual field-day shortly to be held. For the purpose of enabling the boys to practise the high jump, the defendants some time previously had furnished two uprights with holes at short intervals for pins, and a cross-bar which rested on the pins. This cross-bar in time became broken, and one of the boys brought to the school a bamboo pole, about 10 feet long, and on the day in question this pole was being used as a cross-bar. The pole was smaller at one end than the other. At the smaller end it was about the size of a man's little finger. The uprights were set east and west, and in jumping the boys ran at an angle towards the cross-bar from the south-east. When the plaintiff came out of the school, he went to where the boys were jumping; his brother, 10 years old, being one of those who were practising. The plaintiff went and stood near the west upright. One of the boys, Jim Wright, told him to stand back. In literal compliance with this direction, the plaintiff stepped back two steps. This stepping back took him to the north of the upright, and a little west. On the peg in the west upright lay the small end of the bamboo pole. The plaintiff's brother Leonard attempted to jump over the pole. In doing so his toe caught the pole and knocked it off the peg. The small end struck the plaintiff's left eye, cutting the corner right across and destroying the sight. Some time previously the plaintiff had lost his right eye, and this accident left him totally blind.

The plaintiff claims that his injuries resulted from the negligence of the defendants in permitting the use as a cross-bar of a bamboo pole with the small end thereof in a splintered or pointed condition. There was evidence that the small end had been broken. In his charge to the jury the trial Judge said:—

> The chief—in fact, the whole—controversy appears to me to be as to the condition of the small end of that bamboo stick. You have heard the evidence. The evidence of all the witnesses called on behalf of the plaintiff is to the effect

that that end was what you can describe as in a splintered condition. On the other hand, the evidence of all the witnesses called for the defence is that it was not in that condition at all. It was not as smooth as it could be made, but that it did not have ragged edges. Now which of these sets of witnesses do you believe?

The jury found that the injury received by the plaintiff was due to negligence on the part of the defendants. That such negligence consisted "in allowing the use of such a stick which was dangerous." The stick referred to was the bamboo pole. They also found that the plaintiff had not been guilty of contributory negligence, and they assessed the damages to him at $7,200. Judgment was entered in accordance with this verdict. From that judgment this appeal is brought, and the question is, was there evidence upon which the findings of the jury could properly be based?

A finding of negligence against the defendants causing the injury implies that they owed a duty to the plaintiff which they failed to discharge. The duty which they owed to the plaintiff depends upon the relationship existing between them. If the plaintiff was an "invitee" upon the defendants' premises, the defendants were under obligation to take greater care for his safety than if he were a mere "licensee." Hamilton, L.J., in *Latham* v. *Johnson*, [1913] 1 K.B. 398 at 410. In my opinion the plaintiff occupied the position of invitee.

In *Morris* v. *Carnarvon County Council*, [1910] 1 K.B. 159, a girl attending a public school provided by the defendants was injured while going through a swing door in one of the rooms. Phillimore, J., in his judgment, at 167, says:—

> But I am of opinion that there is a good cause of action in this case against the defendants wholly outside the statute, a liability which attaches to them not as an education authority, but as the owners of premises which are dangerous and upon which they have invited the plaintiff to come. There is a duty upon persons who invite others on their premises to take care that the premises are not in a dangerous condition . . . Here this child, being on the school premises by invitation, is directed to use a swing door which happens to be dangerous for so young a child to use, and damage happens in consequence. For that damage I am of opinion that the defendants are responsible.

The duty which an owner or occupier of premises owes to an invitee is set out in 21 Hals., para. 656, as follows:—

> 656. The duty of the occupier of premises on which the invitee comes, is to take reasonable care to prevent injury to the latter from unusual dangers which are more or less hidden, of whose existence the occupier is aware or

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ought to be aware, or, in other words, to have his premises reasonably safe for the use that is to be made of them. If this duty is neglected, an invitee who is injured thereby can recover damages in respect of his injuries.

In *Norman* v. *Great Western R. Co.*, [1915] 1 K.B. 584, Buckley, L.J., at p. 592, says: "The duty of the invitor towards the invitee is to use reasonable care to prevent damage from unusual danger which he knows or ought to know." If, however, the invitor has not neglected some legal duty to the invitee, he is not liable. *Struthers* v. *Burrow* (1917), 37 D.L.R. 667, 40 O.L.R. 1.

Were the premises of the defendants free from unusual dangers more or less hidden, which were or ought to have been known to the defendants?

The verdict of the jury, I take it, means that they accepted the testimony of the plaintiff's witnesses that the small end of the bamboo pole was in a splintered condition or had a sharp point, and that in such condition it was dangerous. There was evidence upon which they could find that a pole with a splintered or sharp end should not be used. The principal of the school testified that had he noticed that the pole was dangerous he would have discarded it at once. He also testified that, in addition to himself, two other members of the teaching staff supervised the sports of the boys, and that it was the duty of the supervisor to stand near one of the uprights so as to be in a position to put up the pole when it was knocked off. There was no one supervising the sports at the time of the accident. There was evidence that, the day preceding the accident, Miss Corman, one of the supervisors, had examined the small end of the pole and that it was then in its splintered condition. There was also evidence that, a day or so before, some of the boys asked the principal if they could take out the pole and practise jumping after 4 o'clock, and that he gave them permission to do so, provided they returned the pole to the coal-chute where it was kept. After the accident the pole disappeared. One boy testified that next day he saw it, or a pole like it, in the coal-chute, but after that no one appears to have seen it.

There was, therefore, in my opinion, evidence upon which the jury could find that the pole in question had a sharp or splintered point to the knowledge of the defendants' supervisors, and that the principal had given the boys permission to practise with it after 4 o'clock, when it was in that condition.

It was, however, contended: (1) that there was nothing hidden or concealed about the danger from the sharp end, and (2) that, in any event, there was always danger to anyone standing in the position of the plaintiff while the practising was taking place.

The evidence does not disclose that the plaintiff knew that the small end of the pole was in a splintered condition. But even if it had, it is not sufficient to shew that the danger was apparent to the eye.

In *Cooke* v. *Midland Great Western*, [1909] A.C. 229, Lord Atkinson, at 238, said:—

> The duty the owner of premises owes to the persons to whom he gives permission to enter upon them must, it would appear to me, be measured by his knowledge, actual or imputed, of the habits, capacities, and propensities of those persons.

In *Morris* v. *Carnarvon County Council*, [1910] 1 K.B. 159, in discussing whether or not the facts of that case brought it within the principle of a hidden or concealed source of danger, Darling, J., at p. 164, said:—

> In order to determine whether the present case comes within that principle one must have regard not only to the nature of the thing itself, but also to the class of persons who are invited or compelled to use it, and one must have regard to the knowledge, judgment and physical strength of those persons. What the law considers a concealed danger is not confined to things hidden from the eye alone; it extends to things hidden from the appreciation of the person injured, hidden from the combination of eyesight and knowledge of the properties of the thing which the eyesight observes. It is not enough here to say that this was a swing door and that the child could see that it was a swing door. No doubt the child could see that it was a swing door, but she did not know what that fact involved, or what the consequences of her using it might be. The finding of the jury must be taken to mean that the plaintiff did not know what were the concealed and hidden dangers of that swing door, and that to a child of her age, with only the knowledge and strength that a child of that age would possess, the door was a trap in the sense in which that word is used in the cases with which we are familiar.

The jury found that the plaintiff had not been guilty of negligence on his part. That finding, in my opinion, implies that, although he placed himself in a position of danger, he did only what was natural for a boy of his years to do. It also implies that, although the splintered condition of the pole was apparent to the eye, he did not appreciate the danger arising therefrom. He was told by Jim Wright to stand back. He stepped back, although by doing so he brought himself into the danger zone. This is evidence from which the jury might reasonably infer that he had no appreciation of the risk he was incurring.

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That there is a certain amount of danger attendant on the use of a proper pole is, in my opinion, no answer to the plaintiff's claim. The plaintiff's injury did not arise from the use of a proper pole, as the jury have found. If the pole had possessed a rounded end and a smooth surface, or any other end that would be proper for a cross-bar, it would still be a question for the jury whether or not there was any unusual danger to a boy of the plaintiff's years, arising from the use thereof. It is clear that if the invitee knew of the danger and appreciated the risk involved the defendants would not be liable. *Lucy* v. *Bawden*, [1914] 2 K.B. 318.

In the present case, in addition to the dangers incident to high jumping with a proper pole, there was added the danger incident to the use of a pole with a sharp point, and in my opinion such danger may not improperly be termed an "unusual" one, within the meaning of the decided cases; and while to a man of mature years the danger of being cut by the sharp end of the pole would be apparent, to a child of 8 years it might not be apparent at all, and if it was not, it would in my opinion be just as much a concealed danger as was the swing door in the *Morris* case.

The findings of the jury were in the plaintiff's favour, and they were based upon evidence which, if accepted, justified the conclusion that the pole in question had a splintered end; that permission for its use after 4 o'clock had been given; that the defendants' supervisors knew or should have known that it was splintered, and therefore liable to cause injury different from and in excess of that which would flow from a blow of a pole with a proper end; that they knew or should have known that it was natural for a boy of the plaintiff's years to watch other boys practising, and that the plaintiff on account of his years would not apprehend the additional danger arising from the use of the splintered pole.

In the face of such evidence, I do not see how the case could properly have been withdrawn from the jury.

In addition to the cases I have referred to, the following are instructive as to the liability of educational authorities for accidents to school children: *Ching* v. *Surrey County Council*, [1910] 1 K.B. 736; *Smith* v. *Martin and Cpn. of Kingston-upon-Hull*, [1911]

2 K.B. 775; *Shrimpton* v. *Hertfordshire County Council* (1911), 104 L.T. 145; *Smiles* v. *Edmonton School District* (1918), 43 D.L.R. 171, 14 Alta. L.R. 351.

As there was, in my opinion, evidence for actionable negligence for the jury and as the jury have found for the plaintiff, the verdict should stand. I would dismiss the appeal.

ELWOOD, J.A.:—This action was brought to recover damages for injuries alleged to have been sustained by the infant plaintiff through the negligence of the defendant. The negligence, as set forth in the statement of claim, is the following:—

(a) In permitting the said broken and dangerous equipment to be brought on the said grounds. (b) In permitting it to remain on the said grounds. (c) In not preventing the use of the said broken and dangerous equipment by the pupils of the said school. (d) In not providing adequate and continuous supervision of the use of the said broken and dangerous equipment. (e) In not providing proper equipment as required by law. (f) In that whilst knowing that the plaintiff was blind in one eye it did not exercise proper and particular supervision over him.

The jury found that the defendant was guilty of negligence, and that such negligence consisted in allowing the use of such a stick which was dangerous, and assessed damages in consequence. From this judgment the defendant has appealed.

The facts material to the case are that, prior to the time of the accident, the appellant had provided certain equipment for the boys to use in practising high jumping. This equipment consisted of two uprights, which had holes into which pegs were inserted. Upon these pegs rested a bar which consisted of a strip about a quarter of an inch thick sawn off a board about an inch thick, so that the bar would be approximately, a quarter of an inch by one inch, and usually about 10 ft. long. This bar was the bar usually supplied when one was requisitioned, and apparently, prior to the accident, such a bar had been supplied, but had in some way become broken. Thereafter, and about 10 days or 2 weeks before the accident, one of the boys had brought to the school a bamboo pole, which was used as a bar. This pole was thicker at one end than at the other. At the thick end it was apparently smooth and varnished over. At the smaller end, which was about the thickness of a man's little finger, at the time of the accident it was roughened. Two boys, witnesses for the plaintiff, produced rough drawings which they made shewing the edges to be jagged.

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Elwood, J.A.

There is no evidence as to the length of these jags, and, if the drawings were according to scale, which of course they would not be, the length of the longest jag could not have been more than, probably, a quarter of an inch. The evidence is that the breaking, which caused these jagged edges, took place about 3 days before the accident. There is nothing to shew the condition of the pole prior to this breaking. The accident took place about 5 minutes after 4 o'clock in the afternoon. The school was dismissed at 4 o'clock. Some of the elder boys had, prior to this day, asked permission to use the equipment for the purpose of practising high jumping in anticipation of a field day which was to take place shortly thereafter. The boys were given permission, but were not given permission actually on the day of the accident. However, on the day of the accident they were practising with this equipment. The infant respondent was not practising, he was too young. He was eight years old. His brother was practising, but the infant respondent was standing watching the jumping. The uprights were standing east and west, and the boys were jumping from south to north. Shortly before the accident, the infant respondent was standing close to the west upright. He was told by one of the boys to move back. He stepped back 4 or 5 ft. to the north and, I take it, east of the west upright. His brother then took a high jump, and, in jumping, in some way struck the bar, with the consequence that, apparently, this jagged edge of the bar cut the eye of the infant respondent, with the result that the sight of the eye was destroyed. He had lost the other eye previously.

The evidence shewed that, when the boys were using these uprights when the teachers were present, the younger boys were kept away, because it was, I apprehend, dangerous to have little boys around where the jumping was going on; not because of any particular danger in the bars being used, but because of the danger which is always more or less present when athletics of that kind are being engaged in. The medical evidence shewed that, if the regular bar had been used, it would not probably have caused the injury that was caused, but that it was possible, even while using the regular bar, if the bar were knocked with sufficient force and in the right direction, to put out an eye. The evidence of the teacher who had usually supervision in school hours of the sports

of these children was, that she had handled the bar in question either the day of or the day before the accident, and on previous occasions, that she never considered it unsafe, and it never occurred to her that it was unsafe to use it.

In view of the conclusion that I have come to, it is not necessary that I should express any opinion on the question of whether the jury was justified, under the evidence, in concluding that there was any negligence on the part of the appellant in permitting the bar to be used. I have come to the conclusion that the appellant owed no duty to the infant respondent which rendered the appellant liable for the particular accident which took place. I am of the opinion that there is nothing in the School Act, or in the regulations of the department, which renders the Board of Trustees of a school district insurers of the safety of the children in going to and returning from the school. They have a certain amount of control over the children, by which, I apprehend, the children are liable to expulsion, punishment or correction if they fail to behave themselves in going to or from school; but if, for instance, one boy should attack another in going to or from school and caused injury to the other, I apprehend that there would be no liability on the School Board therefor. Or if some of the boys were engaging, we will say, in a game of football or baseball, and some boy was injured in the game after school hours and while standing as a spectator to the game, there would not, I apprehend, be liability on the part of the School Board. So far as this case is concerned, the infant respondent had no right to be where he was at the time of the accident. It was out of school hours; his duty was to go home. This apparatus could not in any way, in my opinion, be held to be a trap.

In my opinion, therefore, the appeal should be allowed with costs, and the plaintiff's action dismissed with costs.

Appeal allowed.

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Supreme Court of Canada, Davies, C.J., Idington, Anglin, Brodeur, and Mignault, JJ. June 21, 1920.

HUSBAND AND WIFE (§ II 1—110)—PROPOSED MARRIAGE—PROMISES MADE BY HUSBAND'S FATHER THAT HE IS GIVING SON PROPERTY—MARRIAGE —DEATH OF HUSBAND—ENFORCEMENT OF PROMISES.

Representations made by a father that he is giving his son who is desirous of becoming married certain lands and chattels, such representations being made to the father of the son's future wife and the marriage taking place on the strength of the promises then made, may be enforced after the son's death by his administrators.

[*Heichman* v. *National Trust Co. Ltd.* (1919), 50 D.L.R. 401, 13 S.L.R. 22, affirmed.]

Statement. APPEAL from the judgment of the Court of Appeal for Saskatchewan (1919), 50 D.L.R. 401, 13 S.L.R. 22, affirming the judgment of the trial Judge and maintaining the respondent's action. Affirmed.

G. A. Cruise, for appellant; *J. M. Stevenson*, for respondent.

Davies, C.J. DAVIES, C.J.:—I must say that, alike during the argument at Bar and since then during my reading and examination of the case and factums, I entertained some misgivings as to the soundness of the judgment appealed from ((1919), 50 D.L.R. 401, 13 S.L.R. 22).

The question seems to me reduced to this: Had Stephen Heichman, the defendant's son, at the time of his death such a cause of action as entitled him to maintain an action against his father either for specific performance of his alleged agreement to give and convey to him the two-quarter sections of land in question or, in the alternative, for damages, as claimed in the statement of claim? If he had not, it goes without saying that the plaintiff company, as administrator of his estate, could not maintain the action.

I have reached the conclusion that the findings of fact by the trial Judge are clearly such as the evidence justified. His rejection of the evidence of Paul Serak and his complete discrediting of him and his acceptance of the evidence of Solinak and Antonenko as to what took place between the father and the son when the written document signed by the defendant, the father, purporting to evidence that he had conveyed the half-section of land in question to his son was read and that this was done and intended to be done in consideration of his son marrying Mary, the daughter of the witness Solinak, coupled with the fact that such document

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satisfied the father of the intended bride who gave his consent to the marriage which shortly afterwards took place, satisfy me that the judgment of the Court of Appeal was right and the ground on which it was based of estoppel was sound.

The deceased son was induced to change his condition in life and enter into a marriage with Mary Solinak on the explicit statement made and the written document signed by defendant and read by the son in the father's presence to his future father-in-law that he, the son, was the owner of the half-section of land in controversy, as he, the father, had transferred the half-section to his son or was about doing so.

It does seem to me that the son having been thus induced to change his condition in life and assume the duties and responsibilities of married life could enforce that contract as against the father, the defendant herein, and that the latter would, in equity, be estopped from repudiating his representations of fact respecting the ownership of the half-section in question or "from setting up his own iniquity as a defence."

The representations of fact made by the defendant and which resulted in the marriage of his son related to, and covered as well, the personal property involved in the action. His representations were that he was giving the half-section of land to his son and the horses and machinery necessary to work the same.

I concur in the judgment of the Court of Appeal as stated in the reasons for judgment of Newlands, J.A., 50 D.L.R. 401, 13 S.L.R. 22, on the main and substantial question before us, which I think is sufficiently supported by the authorities to which he refers.

I cannot, however, agree with respect to the point of a partnership reference on which he thinks an amendment of the trial Judge's judgment should be made. No such question was pleaded by the defendant, or in issue, or thrashed out at the trial and I would restore the trial Judge's judgment unamended, excepting that the extension of the time given for the return to the plaintiff of his personal property should date from the day of this judgment.

I think this appeal should be dismissed with costs.

Idington, J.

IDINGTON, J.:—I am of the opinion that the finding of facts by the trial Judge was amply justified by the evidence assuming

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Idington, J.

he was right, as a perusal of the relevant evidence assures me he was, in utterly discrediting the witness Serak as he did in a minor degree the appellant.

It might have been more satisfactory had the trial Judge expressly said his finding was arrived at and intended to be applied in light of and in conformity with the statement of the law correctly stated by the Judges in the Court of Appeal, 50 D.L.R. 401, 13 S.L.R. 22.

There is no doubt that they viewed the facts disclosed in the evidence as relevant to the principles of law upon which they proceeded.

It is very easy to confuse a representation of an existent fact with a promise to produce a condition of things in harmony therewith.

I see no reason to think that the Court of Appeal has done so and thereby erred in the application of the relevant law upon which they rely.

The mode of thought, and expression given thereto through interpreters, as in this case, is much more likely to have been correctly appreciated by the Judges in appeal, by reason of their experience in dealing with the like incidents of a trial in the Province of Saskatchewan, than we who have not had the same, though possibly something analogous, in our respective experience.

We should, therefore, be slow to reverse in such a case where we find the Court of Appeal has correctly apprehended the principle of law upon which they profess to act and apply thereto the evidence presented under such like difficulties.

Moreover, it is quite clear that what Solinak saw appellant about, was to be assured of the existent financial condition of his proposed son-in-law, in order to secure the future happiness of his daughter whose marriage he was being asked to consent to.

He left convinced by the appellant's actual representations and conduct that what had been done to satisfy him in that regard had in fact, by and in conformity with the representations or silence giving consent thereto as actual representations of fact, been accomplished.

I am, therefore, not disposed to act upon mere criticism of forms of expression of an interpreter suggesting another possible

meaning than that which the Court below has placed thereon, when clearly seized, as that Court seems to have been, of the principle of law to which the evidence must be applied.

I therefore think the appeal fails.

But in regard to the cross-appeal I doubt if the facts in any way one can look upon them, give any title to the measure of relief which the Court below has given.

If the parties are well advised they can reach a much more equitable result than anything based either upon the assumption of any partnership to be implied from the facts or adjustment based thereon, or anything analogous thereto, and would suggest they attempt same before the cross-appeal is finally disposed of.

In the event of their failure we must dispose of same as best we can.

Meantime I would dismiss the appeal with costs and suspend the disposition of the cross-appeal for such brief period as the parties may intimate a desire for their attempting to consider same.

ANGLIN, J.:—Although I was at first somewhat in doubt, on further consideration of the evidence of Efram Solinak and Antonenko, in the light of all the circumstances, I think it sufficiently supports the finding that a representation was made by the defendant that his son, Stephen, was the actual beneficial owner of, if not the legal holder of the title to, the half-section in question. I see no good reason why the plaintiff, as personal representative of Stephen Heichman and as trustee for Mary Heichman, whose intermarriage took place, as the defendant knew was intended, on the faith of that representation, cannot maintain this suit. It is not necessary to discuss the other grounds of action preferred by the plaintiff, viz., actual conveyance and contract to convey. For the reasons more fully stated by Newlands, J.A., 50 D.L.R. 401, 13 S.L.R. 22, I would dismiss the appeal with costs.

Anglin, J.

BRODEUR, J.:—This is an action instituted by the administrator of the deceased Peter Heichman for a transfer of a half-section of land in Saskatchewan and the return of certain chattels.

Brodeur, J.

The deceased was married to Mary Solinak under the following circumstances:

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Brodeur, J.

He went to see her at Battleford where she was living and she expressed then her willingness to marry him provided her father would be agreeable. The father of the bride, before giving his consent, wanted to know about the financial situation of the young man, met his father and there it was represented to him that the prospective son-in-law was the owner of the half-section in question in this case and of certain chattels. He was shewn a type-written paper describing the son as the owner. The father of the young girl was satisfied with the representations made and the marriage took place a short time afterwards.

The young man and his wife resided with his father for a while and then went to settle on this half-section where he died a few months after.

After his death (the young wife being herself very sick) his father brought her to his house and removed all the chattels from the half-section, and even the money which the young couple possessed.

Soon after the young wife was removed to some other place and the present action in recovery of the land and of the chattels is now instituted.

The defendant claims that his son was to give him a certain sum of money, viz., $3,000, and that credit was to be given on the purchase price of the half-section and that the contracts to that effect, though drafted, were never executed.

The evidence is somewhat conflicting as to what was said and done; but the trial Judge and the Court of Appeal, 50 D.L.R. 401, 13 S.L.R. 22, accepted the evidence of the plaintiff.

This evidence shews that the defendant represented to the father of the bride that his son was the owner of the property in question and that the payment of a sum of $3,000 was never mentioned.

What has become of the slip of paper which was read at the interview between the two fathers? The respondent denies its existence but the Court has found that such a document was read. Has this document been taken by the appellant from the house of his son when he took away everything, even the money? Of course the appellant denies that but such a thing might have occurred.

There is no doubt that the evidence as accepted by the Courts below is to the effect that the appellant represented that his son was the owner of the land and chattels in question. The law is that where upon proposals of marriage third persons represent anything material in a light different from the truth they shall be bound to make good the statement they make. *Montefiori* v. *Montefiori* (1762), 1 Wm. Bl. 363, 96 E.R. 203; *Mills* v. *Fox* (1887), 37 Ch. D. 153, at 162.

The appeal should be dismissed with costs.

There is a cross-appeal.

The trial Judge has charged the defendant with the value of the whole crop. The evidence shews, however, that this crop had been put in by the defendant himself and that he should not be charged with the whole value thereof and a reference was ordered to determine what amount should be properly charged to the defendant. The cross-appeal should be held over in order to give the parties an opportunity to settle.

Mignault, J.

MIGNAULT, J.:—In this case the evidence is very conflicting and the trial Judge, on the vital fact as to the ownership by the appellant's son Stephen Heichman, of the south half of sec. 30 of Tp. 38, believed the testimony adduced by the respondent in preference to that of the appellant's witnesses. He did not, however, state specifically the facts found by him, being content with saying that he found that the facts were as alleged by the witnesses on behalf of the respondent. Reference must therefore be had to this testimony, which was taken through an interpreter, the witnesses being Russians.

The story is that Stephen Heichman desired to marry Mary Solinak and asked the latter's father, Efram Solinak, to allow the marriage, pretending that he owned two farms. Thereupon Solinak, to make sure of Stephen's prospects in life, went with Stephen and one Antenenko to see the appellant. I quote from his testimony.

> Q. What was said to Peter Heichman? A. I told Peter Heichman, "Your son wants to marry my daughter." Q. Yes? A. Stephen told me that he had two farms, that you were giving him four horses and all the machinery. Q. Yes? A. Peter Heichman then said, "Yes, I am giving those." Q. Did he say he was giving the land too, as well as the machinery? A. Then I asked, "In whose name stands the land? Is the land standing?" Q. Yes? A. "The land is in my name but I am giving it to him. He is my son."

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Antenenko swore:

Q. What took place? A. We came over there to Peter Heichman's after 12. Q. Yes? A. Only John was home, and the children. Stephen then told John to go and get the father. Q. Yes? A. Then the father came and we got acquainted. Q. Yes? A. Solinak then started to ask questions. Q. What about? A. "Your son wants to marry my daughter." Q. Yes? A. "He says he has two farms, four horses, and all the machinery." Q. Solinak said that to Peter? A. Yes. Q. And what did Peter Heichman say? A. Peter Heichman then said, "Yes, that is right." Peter Heichman (should be Solinak) then asked in whose name was the land. Q. Peter Heichman asked? A. Solinak asked Peter Heichman in whose name was the land. Q. Yes? A. And Heichman then said, "It is in my name." Q. Yes? A. "Are you going to make this transfer over to Stephen?" "Yes, all right."

That conversation took place late on Sunday night, February 10, 1918. On Monday morning, the 11th, the appellant went with Stephen to see a Justice of the Peace, one Serak, and the two afterwards returned with a typewritten paper, which Stephen read to Solinak and Antenenko in presence of the appellant. The former gives the contents of the paper as read as follows: "I, Peter Heichman, give the south half of section 30, township 38, range 11, to my son Stephen, to my son I am giving this land."

Antenenko's version is: "I, Peter Heichman, turn over to Stephen Heichman the south of 30, half section 11-38; 38-11."

This satisfied Solinak and he consented to the marriage and returned home. The marriage took place on March 1, Stephen brought his wife home, and afterwards the appellant built him a house on the south half of sec. 30, where he resided until his death in October of the same year.

The difficulty of the respondent's case is no doubt increased by the fact that if such a paper ever existed it has disappeared, and this renders it imperative to carefully scrutinise the secondary evidence by which it is sought to prove its contents. The same critical scrutiny must be directed to the evidence by which the appellant attempted to contradict this secondary proof, for he afterwards called Serak, the Justice of the Peace whom the father and son went to see on February 11, and Serak stated that he had drawn up a paper purporting to be a receipt from the appellant to Stephen for the sum of $3,000, as a first payment on some land, and he is not sure whether the land was described in the receipt. Serak also said that he had subsequently prepared a

formal agreement of sale of the land in question which was never signed, and one of the copies of which he files. The trial Judge, however, did not credit Serak's testimony, and the alleged receipt is not produced, so I will not further consider Serak's story.

Apparently the trial Judge considered the evidence sufficient to shew that a gift had been made by the father to the son in consideration of the latter's marriage to Solinak's daughter. In the Court of Appeal, Haultain, C.J.S., very reluctantly he said, acquiesced in the strong findings of the trial Judge. Newlands, J.A., with whom Lamont, J.A., concurred, based his judgment in favour of the respondent on a representation made by the appellant to Solinak, Antenenko and Stephen Heichman, that he had given this farm and the implements to Stephen, estopping the appellant from now denying the truth of this representation.

Mr. Cruise, who very ably argued the case on behalf of the appellant, contended that if the respondent relied on a contract of gift by the appellant to Stephen, no action could be taken on such a contract under the Statute of Frauds in the absence of a memorandum signed by the appellant. He further urges that no sufficient consideration has been shewn for a gift of, or a promise to give, the land to Stephen. And as to the claim of estoppel founded on representation, Mr. Cruise argued that there was no representation of an existing fact, but at the most a representation, in the first interview, that the appellant would make over the land to Stephen. In regard to the document read in the second interview, Mr. Cruise urged that no existing fact was then represented but merely a statement made as to its contents. He further contended that if there was any representation, it was made to Solinak who is not a party to the action.

As to the contention based on the Statute of Frauds, I may say that the appellant did not plead the statute. Moreover, this contention is fully answered by the evidence given by Solinak and Antenenko and believed by the trial Judge of the contents of the writing read by Stephen in the appellant's presence, which writing was stated to have been signed by both the appellant and Stephen. This writing, it is true, has disappeared, but evidence was made without objection of its contents and I have no doubt that where a sufficient memorandum in writing under the Statute of Frauds is proved to have existed but to have been lost, secondary evidence

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of its contents can be made. As sworn to by both Solinak and Antenenko, the document read by Stephen satisfies all the requirements of the statute.

Then as to consideration, marriage is a valuable consideration to support an ante-nuptial promise by a third person. (7 Hals., *tit*, Contract, para. 803, p. 388.) *Shadwell* v. *Shadwell*, (1860), 9 C.B. (N.S.) 159, 142 E.R. 62, is in point. There the plaintiff's uncle had promised an annuity to the plaintiff on hearing of the latter's intention to marry. It was held that the marriage was sufficient consideration to support the promise. Mr. Cruise attempted to distinguish the case of *Shadwell* v. *Shadwell* by saying that here the promise was made to obtain the consent of the prospective father-in-law to the marriage and not to Stephen to induce him to marry. It must not be forgotten, however, that Stephen was the person chiefly interested in obtaining both the consent of Solinak, which would permit of his marriage, and the settlement on him of the land which would aid him in discharging the added pecuniary obligations resulting from his marriage. In the words of Earle, C.J. (9 C.B. (N.S.) at 174), Stephen

> may have made a most material change in his position, and induced the object of his affection to do the same, and may have incurred pecuniary liabilities resulting in embarrassments which would be in every sense a loss if the income which had been promised should be withheld.

I must therefore think that the objection as to want of consideration is not well taken.

Thus far I have considered the respondent's claim in so far as it can rest on a contract. I think the trial Judge and Haultain, C.J.S., so viewed it. As I have said, however, the two other Judges of the Court of Appeal preferred to base their conclusions on a representation made by the appellant that he had given the land to Stephen, estopping him from now denying the gift. I cannot free myself from doubt that this ground should be adopted. So far as there was representation, it would appear that it was solely made to Solinak, and Stephen, by reading the document signed by him and his father, was, in a way, a party to this representation. But so far as there was a contract, it was made with Stephen, and my opinion is that it was sufficiently supported by the consideration of Stephen's marriage. On this ground I think the trial Judge was right in giving judgment to the plaintiff.

I would dismiss the appellant's appeal with costs.

Appeal dismissed.

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Saskatchewan District Court, Ouseley, D.C.J. October 20, 1920.

BAIL AND RECOGNIZANCE (§ I—6)—SUMMARY CONVICTION—APPEAL FROM—RECOGNIZANCE VALIDITY OF.

The omission of the words in a recognizance on an appeal from a summary conviction that the accused "shall personally appear" and the omission of the covenant to "pay such costs as are by the Court awarded" render the recognizance null and void.

[*Ex. parte Sprague* (1903), 8 Can. Cr. Cas. 109, followed.]

Statement.

MOTION to set aside a recognizance on an appeal from a summary conviction on the ground that it is null and void and that the appeal be quashed. Recognizance held to be null and void.

E. F. Collins, for appellant; *W. G. Ross*, for respondent.

Ouseley, D.C.J.

OUSELEY, D.C.J.:—On April 8, 1920, the appellant was convicted before two Justices of the Peace for the Province of Saskatchewan for an offence under sec. 180 of the Inland Revenue Act, R.S.C. 1906, ch. 51. The conviction recites, in part, that the appellant,

> On the 13th day of March, A.D. 1920, on his farm, Section 7-12-24 West of the 2nd Meridian in the Province of Saskatchewan, did, without having a license then in force have in his possession a still, worm, rectifying or other apparatus, or part or parts thereof suitable for the manufacture of spirits, without having given notice thereof, contrary to the Inland Revenue Act, 1906, more especially sub-sec. *e* of sec. 180, R.S.C. 1906, ch. 51, and amendments.

Upon the conviction the appellant was fined $100 and the costs of the prosecution $13.05 and sentenced to one month's imprisonment in the common gaol at Regina. There is a notice on the conviction "gaol sentence suspended." The conviction further recites that in default of payment of the fine and costs a further 6 months, making 7 months in all, in the common gaol at Regina.

On the same day that the conviction was made the appellant was admitted to bail by giving a notice of appeal and giving a recognizance, which recognizance the respondent now attacks on the ground that it is null and void on the ground that the recognizance does not require the appellant to personally appear at the Court at which such appeal under the Code would come on for hearing. Counsel for the respondent also attacks the validity of the recognizance on the ground that the recognizance does not recite that the appellant will pay "such costs as are by the Court awarded."

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There is no doubt in my mind that the omission of the words in the recognizance "shall personally appear" and the omission from the recognizance of the covenant on behalf of the appellant to "pay such costs as are by the Court awarded" render the recognizance null and void.

The recognizance reads in part as follows:—

Whereas the said Gottlieb Schick has appealed to the next sittings of the District Court of the Judicial District of Moose Jaw to be taken and holden at Avonlea commencing Tuesday the 15th day of February, 1921, if therefore the said Gottlieb Schick appears at the said Court, prosecutes his said appeal, abides the decision thereof, and does not depart this Court, then the said recognizance to be void, otherwise to stand in full force and virtue.

Under sub-sec. (*c*) of sec. 750 of the Code as amended by 8-9 Ed. VII. 1909, ch. 9, sec. 2, an appellant is required "if the appeal is from a conviction or order adjudging imprisonment" to

either remain in custody until the holding of the Court to which the appeal is given, or shall within the time limited for filing a notice of intention to appeal enter into a recognizance in form 51 with two sufficient sureties before a County Judge, clerk of the peace or justice for the county in which such conviction or order has been made, conditioned *personally* to appear at the said Court and try such appeal, and to abide the judgment of the Court thereupon, and *to pay such costs as are awarded by the Court* . . . in cases in which imprisonment upon default of payment is directed.

The recognizance filed by the appellant is not in Form 51, the word "personally" is omitted, and the words "and to pay such costs as are awarded by the Court" are omitted. I am of the opinion that the omission of the word "personally" from the recognizance voids the recognizance; and I am further of the opinion that the omission of the words "and pay such costs as are awarded by the Court," renders the recognizance void on this ground also. I am quite convinced that the Legislature intended that if the appellant failed to comply with the conviction his personal attendance was necessary at the hearing of the appeal, so that the Court could direct that the conviction as to imprisonment could be put in execution and carried out. If the Legislature had intended that the mere appearance by counsel was sufficient they would not have used the word "personally."

Tremeear, in his excellent work on the Criminal Code, 1919 ed., at p. 1040, says:—

The giving of security is an essential part of the appeal, and unless it be done in the manner required by statute, the giving of a notice of appeal will be unavailing and the conviction may be prosecuted as if no notice had been given.

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The Queen v. *Joseph* (1900), 6 Can. Cr. Cas. 144, 11 Que. K.B. 211, Hall, J., in his judgment says, at p. 145:—

An appeal is not a general or common law right. It is an exceptional provision enacted by statute, and, to be availed of, the conditions imposed by the statute must be strictly complied with. They and all of them are conditions precedent. A notice that the persons convicted intend to appeal is not an appeal. It is an idle formality if not accompanied either by the surrender of the accused into custody or by their entering into recognizance with two sufficient sureties that they will try the appeal and abide the judgment of the Court thereon, and pay such costs as may be awarded against them . . . The security bond is a part of the appeal, and in my opinion the most essential part of it. I refer to Chitty's General Practice, vol. 2, p. 315.

To the same effect is the authority of *Rex* v. *The Doliver Mining Co.* (1906), 10 Can. Cr. Cas. 405.

The legality of the recognizance, however, is determined by direct authority of the Court of Appeal, in the Province of New Brunswick. In *Ex parte Sprague* (1903), 8 Can. Cr. Cas. 109, the head-note says:

The recognizance upon an appeal from a summary conviction must be conditioned that the defendant should "personally appear," and the omission of the word "personally" makes the recognizance defective.

At p. 116, Hanington, J., with whom Tuck, C.J., concurred, says:—

It was argued that the omission from the bond of the provision for the "personal appearance" of the defendant was not material or important. The case I have already referred to, *MacDonald* v. *Abbott* (1879), 3 Can. S.C.R. 278, has determined that such an omission is important and will invalidate the security. In this case the appellant was, by the conviction, ordered to be imprisoned in default of payment, and unless the Appellate Court had the defendant personally in Court it could not enforce that imprisonment. It is not enough to say that he was actually, as a fact, in Court when the motion was made to allow the appeal or during the hearing. He must be present and hear its determination, or at such time as the Court shall direct, so that the Court can by its officer direct him to be imprisoned. He might be present during the hearing and leave at any time before the order was made or before a motion for his arrest. His bond is to pay such costs as are awarded on the appeal, then if that is sufficient he can entirely evade imprisonment by simply keeping away from the Court so that it could not enforce his personal custody, and his bond would be no remedy because it did not provide for his personal appearance to abide the order of the Court, in other words, for his submitting to imprisonment. If the defendant against whom imprisonment is adjudged can escape such imprisonment by giving notice of appeal and filing a bond in which no provision is made for "his personal appearance" to take his sentence or imprisonment, then he can always escape. If the Legislature had not thought it important that the defendant should personally appear they would not have inserted the words

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in the section of the Act, nor would they in the form 000 which is given. They have, when stating the condition under which an appeal can succeed, stated distinctly, both in the section and in the form, that one of the conditions shall be a bond providing for the "personal appearance" as well as for the payment of the costs. How can this, or any other Court, say that these words and provisions, plain, distinct and positive as they are, should have no effect whatever?

I am quite content to follow the decision of the Court of Appeal in New Brunswick in the *Sprague* case, *supra*, and hold that the recognizance filed is void by reason of the fact that it fails to provide that the appellant shall personally appear at the Court to which the appeal is taken.

I am also of the opinion that in an appeal under the Summary Convictions Act (Cr. Code) the respondent is entitled to all the security which the Code affords him, and that an appellant cannot be said to have appealed within the meaning of sec. 750 of the Cr. Code where he files a recognizance which by its very terms fails to give the respondent all the security which the Code by its provisions says that the respondent is entitled to, and that the omission from the recognizance of the words "and pay such costs as are by the Court awarded" renders the recognizance void.

There is another consideration, however, which must be dealt with, and that is as to whether or not, even admitting that the recognizance is void, the respondent can move to quash before the time when the appeal should come on for hearing. It seems to me that *Regina* v. *Crouch*, 35 U.C.Q.B., p. 433, is direct authority for the course which the respondent has taken. In that case Richards, J., at p. 439, says:—

> If as a matter of fact the notice of appeal has not been given in time or the recognizance entered into or other matter required to be done before the appellant can proceed with his appeal, objection could probably be taken at any time for it would shew that the Court had no jurisdiction to try the appeal.

It is argued for the appellant that the General Quarter Sessions Procedure Act, 12-13 Vict. 1849, ch. 45, is in force in this Province. Under that Act by sec. 8 the Court before which the appeal is brought is empowered in cases where the recognizance has been entered into within the time by law required, but is in anyway invalid, to allow the substitution of a new and sufficient recognizance, and for that purpose to allow such time and make such examination and impose such terms as to the payment of costs to the respondent as shall appear just and reasonable. The

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decision of the Sessions upon this point is to be final, and not liable to be reviewed in any Court by *certiorari*, *mandamus*, or otherwise. (See sec. 9 of the Act of 1849.) Even if this Act were in force in Saskatchewan, which I very much doubt, the power conferred is a discretionary power, and taking into consideration the nature of the appeals and the extreme doubt I have on the question as to whether or not the Act is in force in this Province, I must decline to exercise any discretion which I might have under the Act in favour of allowing a substitute of recognizance in lieu of the one on file. We have in Canada the Summary Convictions Act, which is part of the Criminal Code (R.S.C. 1906, ch. 146), where therefore our Federal Government had dealt with the very subject, and the appellant invokes the aid of an Imperial statute which is in the nature of an amendment to the Act which the Federal Government has passed and in addition thereto I am almost convinced that the Northwest Territories Act, R.S.C. 1906, ch. 62, sec. 12, which provides that with some limitations the laws of England as the same existed on July 15, 1870, should be in force in the Territories in so far as the same are applicable to the Territories, cannot be invoked. In other words, where the Federal Government has by statute legislated and laid down procedure which governs appeal under the Summary Convictions Act it is not open for the appellant to invoke the aid of an Imperial Statute which is at variance with the Federal Act and would have the force of reading into the Federal Act something which the Federal Parliament has failed to enact.

The result is therefore that the recognizance filed, having been found by me to be invalid, is of no force and effect, and the matter must be remitted to the magistrates for them to deal with as if no recognizance had been filed.

I am also asked by the appellant to hold that there is nothing in the material before me to shew that the appellant is not now serving a gaol sentence. In answer to this objection I may say that if as a matter of fact the appellant is in gaol there was no necessity for a recognizance whatever, and I must assume that the object of filling of the recognizance was to obviate the necessity

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of the appellant spending the intervening time between the date of the conviction and the date of the hearing of the appeal in custody.

The order will go, therefore in the terms I have indicated with costs.

It will be noticed that I have directed that this matter be referred back to the magistrates for them to deal with as if no recognizance had been filed. I am asked by the counsel for the respondent to quash the appeal on the ground that the recognizance is void. I cannot on a substantive motion quash the appeal because the time for appeal not having arrived all I can do is to say that the recognizance is void. The recognizance being void and there being no security for the appeal the magistrates I assume will issue their warrant directing that the appellant be committed to gaol. Under the Code the accused has the option to remain in custody until the hearing of the appeal, or to file a recognizance. As I hold that there is no recognizance such as the Code requires on file, the appellant must either remain in custody or file such recognizance as the Code requires. My duty is done when I find that the recognizance is void and remit the matter to the magistrate with this judgment holding that the recognizance on file is void. I cannot take away the appellant's right to an appeal before the time limited for hearing the appeal has expired by simply declaring the recognizance to be void. Under sec. 750 of the Code the appellant still has the right to have his appeal heard by surrendering himself to the custody of the Court. All I can do on this motion is to find that the recognizance is void, and it is then up to the convicting justices to take such steps as they would have taken had no recognizance been filed. I cannot grant the part of the respondent's notice of motion asking that the appeal be quashed because I cannot take away the right which is given by the Code to the appellant to have his appeal tried by remaining in custody.

Judgment accordingly.

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British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher and McPhillips, JJ.A. October 5, 1920.

CONTRACTS (§ II A—125)—CONSTRUCTION—PARTY CONTRACTING IN OWN NAME—RIGHTS OF UNDISCLOSED PRINCIPAL—PRIVITY—RIGHTS OF THIRD PARTIES.

Where a party contracts in his own name, an undisclosed principal cannot sue or be sued on such contract, if the terms are such as import that the person signing is the real and only principal, and recitals in several contracts making the other contracts part of that containing the recital can only bind the parties to the recital; they can give no rights against a third party and can confer no rights upon a third party.

[*Tweddle* v. *Atkinson* (1861), 1 B. & S. 393, 121 E.R. 762; *Dunlop Pneumatic Tyre Co.* v. *Selfridge*, [1915] A.C. 847, followed.]

APPEAL by plaintiff from the judgment of Gregory, J., dismissing an action on the ground that there was no privity of contract between plaintiff and defendant. Affirmed by an equally divided Court. Statement.

The judgment appealed from is as follows:—

Gregory, J.:—It seems to me that effect must be given to the defendant's contention in para. 13-a of its defence. While the three contracts are, in a sense, interwoven, they still remain three separate contracts and to no one of them are the plaintiff and defendant both parties. A person not a party to a contract cannot sue or be sued on it. *Tweddle* v. *Atkinson* (1861), 1 B. & S. 393, 121 E.R. 762; *Dunlop Pneumatic Tyre Co.* v. *Selfridge*, [1915] A.C. 847. And in the first of these cases the contract distinctly provided that the plaintiff, who was not a party to the contract, but for whose benefit it was made, should have full power to sue, etc.

It is argued by the plaintiff that I must look at the plaintiff's reply which had been served when the question was directed to be set down for hearing. The reply says: "In the various transactions set out or referred to in the statement of claim, the Anderson company was and acted as agent of the defendant."

In the face of the language of the order I do not see how I can very well look at any other pleadings than the statement of claim and para. 13-a of the defence—but assuming that I may or that I must take it as true that the Anderson company was the agent of the defendant, I do not see how the position is improved for the rules of evidence would prevent the establishment of such a fact if it, as I think it does, contradicts the written contract.

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In other words, the plaintiff seeks to prove that the Anderson company in executing the contract with the plaintiff acted as agent for the defendant, its undisclosed principal. If it ever were the intention that the defendant should contract directly with the plaintiff, I cannot understand why the contracts were not drawn directly between them—the defendant company was known to the plaintiff for it is referred to in the preliminary contract of October 8.

The following cases: *Humble* v. *Hunter* (1848), 12 Q.B. 310, 116 E.R. 885; *Formby Bros.* v. *Formby* (1910), 102 L.T. 116; and *Dunlop Pneumatic Tyre Co.* v. *Selfridge*, *supra*, cited by Mr. Mayers, appear to me to establish the principle that where a party contracts in his own name an undisclosed principal cannot sue or be sued on that contract, if the terms are such as import that the person so signing is the real and only principal. In the *Dunlop* case Lord Parmoor, [1915] A.C. at p. 864, says:

> Parol evidence is admissible to prove that the plaintiff in an action is the real principal to a contract; but it is also well-established law that a person cannot claim to be a principal to a contract, if this would be inconsistent with the terms of the contract itself.

It is impossible for me to understand how it can be suggested that in the preliminary contract of October 8 it can be suggested that the Anderson company acted as agent for the defendant. That contract is for 10 vessels and the defendant is only concerned in three of them and of the $250,000 paid to the Anderson company defendant was only to receive a portion. If the defendant and not the Anderson company is the real principal in that contract then clause 1 requires him to enter into a contract with himself, and clause 4 requires him to give the plaintiff credit for $250,000, the amount paid to him on the signing of the contract. No such sum was paid. It was, however, paid to the Anderson company in connection with the construction of the 10 vessels.

The building contract of October 16 between the Anderson company and the defendant is surely entirely unnecessary if defendant is contracting directly with, and, in its terms, it is quite inconsistent with the idea that the defendant has any contract with, the plaintiff—see clauses 3, 4 and 5, but it is wholly inconsistent with the idea that the Anderson company has a contract with the plaintiff which the defendant agrees to perform;

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The provision in clause 3 making the defendant covenant directly with the plaintiff is of no more effect than the provision in *Tweedle* v. *Atkinson* enabling the son to sue in his own name.

And the recitals on the several contracts making the other contracts part of that containing the recital can only bind the parties to the recital. It can give no rights against a third person and can confer no rights upon a third person.

In my opinion, the three contracts taken together are only consistent with the idea that plaintiff while contracting directly with the Anderson company wished through him to control the actual building of the vessels and the defendant while also contracting directly with the Anderson company was willing to carry out all the Anderson company's covenants in its contract with the plaintiff—but this establishes no privity between the plaintiff and the defendant.

E. P. Davis, K.C., for appellant; *E.C. Mayers*, for respondent.

MACDONALD, C.J.A.:—I would dismiss the appeal.

After a careful analysis of the several agreements relied on by plaintiff's counsel I am unable to discover privity of contract between the plaintiff and the defendant. The scheme of arrangement between the several parties to these agreements appears to me to have been to avoid privity of contract between the parties hereto, either directly or through agents.

Macdonald, C.J.A.

The other two cases which by consent of counsel were to be governed by the result in this case should be in like manner disposed of.

MARTIN, J.A., would dismiss the appeal.

Martin, J.A.

GALLIHER, J.A.:—This is an appeal from an order of Gregory, J., *ante*, p. 589, dismissing the plaintiff's action on the ground that there was no privity of contract between plaintiff and defendants. This was decided on a point of law raised under para. 13-a of the amended defence. Mr. Davis argued two grounds:—

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1. The several contracts read together constitute an agreement between plaintiff and defendants. 2. In any event, Anderson & Co., was the agent for the defendants for the purpose of receiving the moneys paid by the plaintiff for the construction of the vessels and payment to Anderson was payment to the defendants, and plaintiff is entitled to sue as for moneys had and received.

The defendants admit a breach of the contract with Anderson & Co., of October 16, 1918, entered into by the plaintiff. They also admit that notice was given in pursuance of the terms of said contract and that they were relieved from all responsibility under their contract with the Anderson company of October 16, 1918.

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For some reason not explained, the plaintiff and defendants are not both parties signatory to any one of the contracts and the trial Judge held on the authority of *Tweedle* v. *Atkinson* (1861), 1 B. & S. 393, 121 E.R. 762, and *Dunlop Tyre Co.* v. *Selfridge*, [1915] A.C. 847, that a person not a party to a contract cannot sue or be sued upon it. Unless the present case can be distinguished from these, that would be an end to the appeal on this ground.

Other cases cited to us in argument by Mr. Mayers were: *McGruther* v. *Pilcher*, [1904] 2 Ch. 306; *Taddy & Co.* v. *Sterious & Co.* [1904] 1 Ch. 354, and *National Phonograph Co. Ltd.* v. *Edison-Bell, etc. Co.*, [1908] 1 Ch. 335, all along the line of the *Selfridge* case, *supra*.

In the *Selfridge* case it was held that, assuming the plaintiffs were undisclosed principals, that no consideration moved from them to the defendants and that the contract was unenforceable by them.

In the judgment of Lord Dunedin on this question of consideration, his Lordship dwells upon the fact that tires in question at the time of the transfer to Selfridge & Co. were the property of Messrs. Dew who sold them to Selfridge and answers his own query: "What then did Dunlop do or forbear to do in a question with Selfridge?" as follows: "The answer must be, nothing."

His Lordship in concluding his judgment says, [1915] A.C., at 856: "That there are methods of framing a contract which will cause persons in the position of Selfridge to become bound I do not doubt," but I take it we must read these words in the light of the language used by his Lordship earlier in his judgment wherein he states, at p. 855:—

> Speaking for myself, I should have no difficulty in the circumstances of this case in holding it proved that the agreement was truly made by Dew, as agent for Dunlop, or in other words, that Dunlop was the undisclosed principal and as such can sue on the agreement.

In *Tweedle* v. *Atkinson*, *supra*, the son was a stranger to the contract and no consideration moved from him nor had he entered into any covenant with any person in respect of the contract.

In *The Satanita*, [1895] P. 248, it was held that a contract existed between owners of competing yachts and that the plaintiff was entitled to maintain his action against the defendant, although

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each had made separate contracts with a third party, the Yacht Club, and there was no contract to which both were parties signatory. There the defendant, the owner of one of the yachts competing in the race, ran down and sank the plaintiff's yacht and the Court, Lord Esher, M.R., and Lopes and Rigby, L.JJ., held that by reason of their respective contracts with the Yacht Club, in which they agreed to abide by the rules and regulations governing the racing and to pay all damages consequent on their negligence the plaintiff was not limited in damages to those fixed under sec. 54 of the Merchants Shipping Act Amendment Act, 25-26 Vict. 1862 (Imp.) ch. 63. Rigby, L.J., [1895] P. 262, says:—

The contract did not arise with any one other than the managing committee at the moment that the yacht owner signed the document which it was necessary to sign in order to be a competitor. But when the owner of the "Satanita" on the one hand and the "Valkyrie" on the other actually came forward and became competitors on those terms, I think it would be idle to say that there was not then and thereby a contract between them, provided always that there is something in the rule which points to a bargain between the owners of yachts.

Let us see if we can bring the circumstances of this case within those words: To test this we have to examine the respective contracts set out in the pleadings. The preliminary contract between the buyer and the contractor was (so far as it affects the present case) that if he, the contractor, would enter into a contract with the builder for the construction of three steam vessels, he, the buyer, would enter into a contract with the contractor to purchase and pay for the said three vessels. In pursuance of this on October 16, 1918, the contractor entered into a contract with the builder (hereinafter referred to as the building contract), for the construction of the three vessels in accordance with the plans and specifications and upon the terms and conditions set out in a contract of even date between the buyer and the contractor (hereinafter referred to as the vessel contract). Each contract was in express words made a part of the other and a copy of each was attached to the other. The provisions of the building contract most pertinent to the question, are found in paras. 1, 2, 3 and 4, which are as follows:—

(1) This agreement shall be effective and binding upon the Contractor and Builder immediately upon the execution and delivery of the vessel contract, provided that such contract be executed and delivered on or before October 16th, 1918, otherwise this agreement to be null and void. (2) The Contractor covenants and agrees with the Builder to receive the payments to be made to the Contractor pursuant to the terms of the vessel contract and

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immediately upon receipt of such payment to remit the amount thereof to the Builder by exchange payable in Canadian currency at New Westminster, B.C., Canada, but if the Contractor fails to remit such payments as required, it shall not relieve the Builder of its obligation to construct the vessels or be deemed a breach of this contract or of the vessel contract. (3) The Builder covenants and agrees with the Contractor, and for and in consideration of the execution of the vessel contract by or on behalf of Raymond Van Hemelryck covenants and agrees directly to and with Raymond Van Hemelryck to construct each and every of the vessels provided for in the vessel contract in accordance with all the terms and provisions thereof and of the plans and specifications therein referred to, and to comply with and perform each and every stipulation act and thing which it is agreed by said vessel contract shall be complied with or performed by the Builder and to make each and every payment required of the Builder by the terms of the vessel contract, and to be bound by and to observe each and every provision of the vessel contract so far as the same prescribes any duty or obligation to be observed or carried out or thing to be done by the Builder, including all provisions therein contained in regard to certificate and inspectors or surveyors of the Bureau Veritas and the appointment and decision of matters by arbitrators, precisely as though it, the Builder, had been expressly made a party to said contract and had signed, executed and delivered the same in place of the Contractor. (4) The Builder hereby expressly ratifies and confirms the provisions contained in said vessel contract for payment of instalments of the purchase price to the Contractor instead of to the Builder; and hereby expressly appoints the Contractor its attorney and agent to collect and receive all payments falling due under the terms of the said vessel contract, and receipt therefor in its name, as fully to all intents and purposes as if said payments had been made to the Builder direct; and covenants and agrees that the Buyer's responsibility in regard to said payments shall cease immediately upon such payment to the Contractor, and the Buyer shall be under no responsibility to see to the due application of such payments to the Builder.

Provisions were made in the vessel contract (in case of default in payments by the buyer), for relieving the contractor and builder from all responsibility thereunder and under the building contract (A.B. 14) upon notice as therein provided being given to the buyer. Such notice was given.

In the meantime, however, the builders had performed certain work and purchased certain materials to carry out the contract and the buyer had paid certain sums to the contractor, who by a term of the building contract, the builders had constituted their attorney and agent to collect and receive the moneys due under the terms of the vessel contract, and the plaintiff is bringing this action to recover as moneys had and received such moneys so paid as under the terms of the contracts are in excess of what was due the builders.

These contracts disclose three things which at all times during the negotiations were present to the minds of all parties thereto:—

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1. A definite and ascertained person who should build the ships—the builders. 2. A definite and ascertained person who was to become the purchaser, the purchaser of such ships, and for whom they were actually to be built—the buyer. 3. A definite and ascertained person who was to pay for the ships—the buyer.

In addition the builders appointed the contractor their attorney to receive payment from the buyer and remit same to them.

In the *Selfridge* case, [1915] A.C. at 864, in the House of Lords, Lord Parmoor thus states the law:—

> There is no question that parol evidence is admissible to prove that the plaintiff in an action is the real principal to a contract, but it is also well-established law that a person cannot claim to be a principal to a contract if this would be inconsistent with the terms of the contract itself.

Now, while the appellant here is not in form a party to the building contract, nor the respondent in form a party to the vessel contract, yet each contract is in express terms made a part of the other, and upon reading these contracts it appears to me that it is consistent and not inconsistent with the terms of the respective contracts, that the buyer and the builders are the real principals.

When certain preparations were made, certain material purchased and certain work done under the contracts by the builders and certain payments made by the buyer, there was a coming together for a common purpose or undertaking and a part execution by each; and substituting the word "contracts" for the word "rule" in the language of Rigby, L.J., in *The Satanita*, [1895] P. 248, at 262, something in the contracts [rule] pointing to a bargain between the parties. Of course the general rule is that persons not a party to a contract cannot sue or be sued upon it, but this is subject to certain exceptions, such as here, where, if I am right in my view of the contracts, the real principals have been shewn. If this view is correct, it seems to me there can be no question of the consideration moving from the appellant to the respondents. We have then privity of contract, consideration and, consequently, the right to sue.

Having arrived at this conclusion, it is unnecessary to deal with the second ground raised.

A like result follows in the cases of *Van Hemelryck* v. *Northern Construction Company* and *Van Hemelryck* v. *Pacific Construction Company*.

McPHILLIPS, J.A., would allow the appeal. McPhillips, J.A.

Appeal dismissed, the Court being equally divided.

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KERR v. RURAL MUNICIPALITY OF MARTIN.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. November 1, 1920.

TAXES (§ III E—140)—RURAL MUNICIPALITY ACT, 7 GEO. V. 1917, 1ST SESS. (SASK.) CH. 14—OWNER OF LAND—MEANING OF—DISTRAINT FOR.

A person having a lease of land is not an owner within the meaning of sec. 289 of the Rural Municipality Act, 7 Geo. V. 1917 (1st Sess. Sask.), ch. 14, and the municipality has the right to distrain the goods and chattels of such lessee for non-payment of taxes due. A volunteer in occupancy of land may properly be assessed for taxes on account of such occupancy, although the land itself is exempt by law from taxation, the tax being a personal tax against the occupant and not a property tax.

Statement. APPEAL by plaintiff in an action for illegal distress. Affirmed.

Procter, for appellant.

D. A. McNiven and *H. H. Towill*, for respondent.

Haultain, C.J.S. Lamont, J.A. HAULTAIN, C.J.S., and LAMONT, J.A., concur with NEWLANDS, J.A.

Newlands, J.A. NEWLANDS, J.A.:—The defendants distrained upon certain wheat and oats belonging to plaintiff for taxes claimed to be due by him as occupant of N.E. ¼-25-13-32-W1st, and plaintiff brings this action for illegal distress: (1) because the distress was excessive, and (2) because no taxes were due thereon the owner being a volunteer, under the Volunteers and Reservists Relief Act, 6 Geo. V., 1916 (Sask.), ch. 7.

As defendants abandoned the distress on the wheat before action, and as the trial Judge has found that taxes were due and that the distress was otherwise not excessive and that plaintiff suffered no actual damage thereby, but was only entitled to nominal damages for the distress on the wheat subsequently abandoned, for which he allowed plaintiff damages in the sum of $10, with all of which I agree, I am of the opinion that the appeal must be dismissed on the ground that the distress was excessive and that plaintiff is not entitled to any more damages than he was allowed by the Judge.

That leaves only the question as to whether any taxes were due by plaintiff for which the defendants could distrain.

It was found by the trial Judge and not appealed against, that plaintiff was properly assessed as occupant of this land for the years 1916, 1917 and 1918. That being so, defendants had the right to distrain, unless plaintiff can succeed upon one of the following grounds upon which he appeals.

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1. Because the defendants had no right of distress the plaintiff being the owner of the lands mentioned in the statement of claim within the meaning of the Rural Municipality Act. 2. That plaintiff was not liable as occupant of the land for the years 1916, 1917 and 1918, the lands having been exempt from taxation by sec. 223 of the Rural Municipality Act. 3. Because the land was sold for taxes, the taxes thereon paid by the purchaser and afterwards redeemed by the defendants.

As to the first ground of appeal; plaintiff claims that defendants' only right to distrain is under sec. 289 of the Rural Municipality Act, ch. 14, 7 Geo. V. 1917 (1st sess. Sask.). This section provides that the municipality may distrain in the case of a person who is an occupant and not an owner, who neglects to pay his taxes. He further claims that he is an owner under the interpretation given to that word by sec. 2 (8), which says that "owner" includes a person who has any right, title, estate or interest other than that of a mere occupant in land, and plaintiff having a lease of the land, has an estate and interest therein. This interpretation is modified by the first words of the section, "unless the context otherwise requires," and in sec. 289 I think the context requires that we should not consider plaintiff as an owner of this land. The intention of the section is evidently that, where the occupant owns the land and the land itself is liable for the taxes, and they can be realised by a sale of the land, no right of distress on the goods and chattels is given. That is not the case here, as no provision is made in the Act for the sale of a leasehold interest, but only the land itself. The taxes levied against the plaintiff as occupant could, therefore, only be realised out of his goods and chattels, and not out of any interest he had in the land as owner, which interest, as will be subsequently seen, was not taxable.

I think, therefore, that the defendants had the right to distrain on the plaintiff's goods and chattels for the taxes assessed against him.

As to the second ground; that this land was exempt by sec. 223. This section exempts the land for which a volunteer is assessed, but sub-sec. 2 of sec. 221 provides that land exempt from taxation by law, if occupied by any person otherwise than in an official capacity, the occupant shall be assessed therefor, but the property itself shall not be liable. Plaintiff was, therefore,

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properly assessed on account of his occupancy of the land, but the land itself was not assessed. It was a personal tax against plaintiff, not a property tax.

For this reason I am of the opinion that the third ground of appeal also fails. When this land was sold for taxes, either due or thought to be due upon this land, and redeemed when it was found that such taxes were not due, it was not sold and could not be sold for the personal tax due by plaintiff as occupant, and I do not think that plaintiff's liability for this tax was in any way affected by such sale. The land, by sub-sec. 2 of sec. 221, was not liable for the tax assessed against the plaintiff, therefore the sale of the land can have nothing to do with that tax. Not being liable for the tax, the sale of the land could not pay that tax, and the tax not being paid, the defendants had, under sec. 289, the right to distrain.

The plaintiff therefore fails on all his grounds of appeal, and the appeal should be dismissed with costs.

Elwood, J.A.

ELWOOD, J.A.:—In this matter I have had the privilege of reading the judgment of my brother Newlands, and I concur in the conclusions he has arrived at. I merely wish to add a few words with respect to the third ground of appeal mentioned in his judgment.

The land was apparently properly sold for taxes due for 1913. There was, however, improperly included taxes for subsequent years. Subsequent to that sale, the tax purchaser paid taxes for the years 1917 and 1918. He had never been assessed for those years. Sub-sec. 9 of sec. 223, as amended by ch. 28 of 8 Geo. V. 1917 (2nd sess.), sec. 12, makes it clear that the land is not to be liable for any taxes assessed with respect to it, either as against owner or occupant, at any rate until the purchaser has obtained title to the land. When the purchaser paid these taxes he did so under a mistaken belief that he was liable for them. The taxes which he so paid were subsequently repaid to him, and I am of the opinion that, under the circumstances, the taxes assessed against the appellant as occupant were unpaid when the municipality returned the taxes theretofore paid by the tax purchaser. *Appeal dismissed.*

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Ontario Supreme Court, Orde, J. September 14, 1920.

1. HIGHWAYS (§ III—100)—TAXES FOR MAINTENANCE—ACT OF 1882 (ONT.)—EXEMPTION UNDER—LIABILITY UNDER HIGHWAY IMPROVEMENT ACT, R.S.O. 1914, CH. 40.

The Act of 1882, which divided the Township of Grimsby into two municipalities and exempted South Grimsby from certain taxes in connection with the Queenston and Grimsby road, does not relieve such township from liability for its share of the taxes required to maintain the road after its inclusion in the good roads system under the Highway Improvement Act, R.S.O. 1914, ch. 40.

[*Village of Merritton* v. *County of Lincoln* (1917), 39 D.L.R. 328; 41 O.L.R. 6, applied and followed.]

JUDGMENT (§ II A—60)—COUNTY COURT—DETERMINATION OF RIGHTS UNDER A STATUTE—ACTION LIMITED TO AMOUNT WITHIN JURISDICTION OF COURT—RIGHT TO BRING ACTION TO DETERMINE QUESTION BEYOND JURISDICTION.

A judgment of a County Court which deals with the question of the parties' rights under a statute is limited to the amount involved in the action over which the County Court has jurisdiction and does not conclude a party from seeking in the Supreme Court a determination of the broad question of its liability under the Act in question, although the facts and questions in issue and the parties are the same.

[*Fenerty* v. *City of Halifax* (1920), 50 D.L.R. 435, 53 N.S.R. 457, distinguished.]

Statement.

ACTION for a declaration that the plaintiffs, the Municipal Corporation of the Township of South Grimsby, were not liable for the levy made upon them by the defendants the Municipal Corporation of the County of Lincoln, under county by-law No. 605, in respect of the Queenston and Grimsby road; that the levy was illegal and void; and that the plaintiff corporation should not be assessed, rated, or taxed for any portion of the cost of the road under the system for the improvement of highways adopted by the county under the provisions of the Highway Improvement Act, R.S.O. 1914, ch. 40; and also for a declaration that the defendants the Municipal Corporation of the Township of North Grimsby were liable for all assessments in respect of the road; and for a mandamus, an injunction, and other incidental relief.

W. S. MacBrayne, for the plaintiffs.

A. W. Marquis, for the defendants the Municipal Corporation of the County of Lincoln.

G. S. Kerr, K.C., and *G. B. McConachie*, for the defendants the Municipal Corporation of the Township of North Grimsby.

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ORDE, J.:—The history of the Queenston and Grimsby Road goes back to a time prior to 1850, and is somewhat complicated. The road has been the subject of legislation and of much litigation.

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Its history is set out so fully in the judgment of Osler, J.A., in the case of *County of Lincoln* v. *City of St. Catharines* (1894), 21 A.R. (Ont.) 370, that it is not necessary to repeat it here. At the time of the passage of the by-laws by the County of Lincoln which have given rise to this action, the road was vested in the Municipal Corporation of the County of Lincoln by virtue of their purchase of it in 1860 from the joint stock road company which had owned it during the preceding seven years. In the case above mentioned, the Court of Appeal held, following a previous decision in *Regina* v. *Corporation of Louth* (1863), 13 U.C.C.P. 615, as to this same road, that the road was owned, not as an ordinary municipal road, but as any other asset or piece of county property.

The road passes through the northern part of the County of Lincoln, and crosses what was prior to 1882 the Township of Grimsby, as well as the Townships of Clinton, Louth, Grantham, and Niagara. In 1863, by 26 Vict. ch. 13, the Townships of Gainsborough and Caistor and the Town of Niagara, all within the limits of the County of Lincoln, which were not touched by the road, were exempted from any assessment or tax by the County of Lincoln for any liability or expenditure connected with the assumption of the road by the county.

In 1882 the Legislature, upon the petition of certain inhabitants and ratepayers, by 45 Vict. (Ont.) ch. 33, divided the Township of Grimsby into two municipalities, the Townships of North Grimsby and South Grimsby respectively.

As a result of this division, the Queenston and Grimsby road thereafter crossed the Township of North Grimsby and did not touch South Grimsby at all; and, following what had already been done in the case of the other southern townships, the Act of 1882, by sec. 8, exempted South Grimsby from certain rates in connection with this road. As the issue in this action turns almost wholly upon the effect and scope of this section, I set it out in full:—

"8. From and after the said last Monday of December, 1882, any rate, tax, liability or expenditure whatsoever, which, but for the passing of this Act, would have been assessable, ratable and taxable against the said original Township of Grimsby, in respect or on account of the road known as the Queenston and Grimsby

road, shall be assessed, rated and taxed against the said Township of North Grimsby, and shall be borne and paid by the said Township of North Grimsby solely, and the said Township of South Grimsby shall not thereafter be liable or be rated, assessed or taxed therefor."

From 1882 until 1917, no attempt was made by the County of Lincoln to assess the Township of South Grimsby with respect to the Queenston and Grimsby Road; but in 1917, 1918, and 1919 certain by-laws were passed by the Council of the County of Lincoln, pursuant to the provisions of the Highway Improvement Act, R.S.O. 1914, ch. 40, under which the county claim to be entitled to assess and tax the plaintiff corporation in respect of the road, notwithstanding sec. 8 of the Act of 1882.

By by-law No. 600, passed on the 3rd February, 1917, after reciting the Highway Improvement Act and an amendment and the expediency of adopting a plan for the improvement of certain highways in the County of Lincoln, it is enacted that the several roads and highways set forth in the schedule to the by-law "are hereby designated and assumed as county roads to be improved and maintained under the provisions of the said Highway Improvement Act and amendments thereto." Among the roads mentioned in the schedule is the Queenston and Grimsby road, from the western boundary of the county to Queenston. Section 5 provides that funds for the construction, improvement, and maintenance of the roads and highways therein designated shall be raised by annual levy based upon the equalised assessments of the municipalities within the county, or by the issue of debentures, or by other means authorised by the several statutes in that regard. The provisions of the by-law are more fully set forth at pp. 12 *et seq.* of the report of *Village of Merritton* v. *County of Lincoln* (1917), 41 O.L.R. 6, 39 D.L.R. 328, in which the effect of the Highway Improvement Act and of this by-law has already been considered by the Appellate Division.

On the 9th June, 1917, the council of the county passed two by-laws, one, No. 605, to raise by the issue of debentures the sum of $50,000 for the purpose of paying the cost of the construction of certain roads mentioned in by-law 600, and the other, No. 607, a general by-law to raise money to carry on the business of the county during the year 1917. Among the sums to be raised under

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this by-law is that of $6,914.55 in order to pay the interest and sinking fund on the good roads debentures authorised to be issued under by-law 605. And the several sums required to be raised for the several purposes set forth in the by-law are to be raised, levied, and collected by the municipalities as set forth in the schedule to the by-law. The share of the Township of South Grimsby of the amount required for the good roads debentures is fixed at $453.43. It may be noted in passing that this by-law, in distributing the assessment of the sum required for interest and sinking fund upon an earlier issue of Queenston and Grimsby road debentures, exempts the Townships of South Grimsby, Gainsborough, and Caistor and the Town of Niagara.

So far as the pleadings in this action are concerned, the by-laws passed in 1918 and 1919 are not mentioned; but, in view of the importance of the issues involved, it is unfortunate that the plaintiff corporation did not include them in their attack upon the defendants. It is possible, however, that, as the attack is really directed at by-law 600, upon which all the later by-laws are either wholly or partially based, it is immaterial whether or not they are brought directly in issue. Four such later by-laws were put in at the trial. They correspond for the years 1918 and 1919 respectively to by-laws 605 and 607 of 1917. By-law 620 of 1918 provides for a further issue of good roads debentures to the amount of $50,000, and by-law 626 provides for the raising of the moneys necessary to pay interest and sinking fund upon the debentures authorised under by-laws 605 and 620 (and also 625, which perhaps by oversight was not put in). South Grimsby's share of the amount so required is $1,154.19. By-laws 637 and 639 of 1919 are of the same character, the first providing for an issue of $200,000 of good roads debentures, and the second fixing South Grimsby's share of the interest and sinking fund requirements under by-laws 605, 620, 625, and 637, at $2,010.47. It ought to be noted in passing that these sums so assessed against South Grimsby during the three years mentioned are not confined merely to the expenditure connected with the Queenston and Grimsby road. By-law 600 covers a large number of roads in the county, some of them within the boundaries of South Grimsby itself, and there is no suggestion in this action that as to any other roads than the Queenston and Grimsby road the Township

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of South Grimsby are not liable for their share of the assessment. But there are no figures before me to enable me to determine how much of each of the three sums of $453.43, $1,154.19, and $2,010.47 above mentioned is referable to the Queenston and Grimsby road only. It is not of course necessary for the decision of the issues before me that any such apportionment should be made.

The Township of South Grimsby having refused to pay the $453.43 levied against it for the year 1917 by by-law 605, the County of Lincoln on the 18th November, 1918, commenced an action in the County Court of the County of Lincoln to recover that sum with interest. The Township of South Grimsby by way of defence alleged that this assessment was void because it was in part in respect of the Queenston and Grimsby road, and that by the Act of 1882 all assessments in respect of the said road should be made against the Township of North Grimsby. By way of reply the County of Lincoln pleaded the Highway Improvement Act, and also set up the alleged arrangement whereby South Grimsby had abrogated its rights under the Act of 1882.

Upon the application of the Township of South Grimsby, who claimed indemnity or relief from the Township of North Grimsby, the latter were added as third parties. The Township of North Grimsby, by their defence to the third party claim, set up the Highway Improvement Act and also alleged that the road had been taken over by the Province of Ontario in 1918 as a provincial highway, and further that the Township of South Grimsby had, in consideration of the allotment of certain additional mileage of county roads, abrogated their rights under the Act of 1882. This action was tried before the learned Judge of the County Court of the County of Lincoln, who gave judgment in favour of the County of Lincoln and of the Township of North Grimsby upon two grounds, namely: first, that, applying the reasoning of the learned Chief Justice of Ontario in the case of *Village of Merritton* v. *County of Lincoln*, 41 O.L.R. 6, 39 D.L.R. 328, the Act of 1882 did not relieve the Township of South Grimsby from liability for their share of the taxes required to maintain the road after its inclusion in the good roads system under the Highway Improvement Act; and, second, that, when by-law No. 600 was passed, an equitable division of mileage as between the two townships had been made, which rendered the provisions of the

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Act of 1882 inapplicable. From this judgment the Township of South Grimsby appealed to the Appellate Division. When the appeal came on, some discussion arose as to the possibility of a further appeal to the Supreme Court of Canada, and because of the doubt as to that and the importance of the issue involved, the argument of the appeal was allowed to stand in order that the parties might arrange, if possible, by commencing new proceedings, to raise the issue in such form as to enable it to be carried to the Supreme Court of Canada. It was suggested that this might be done by way of a case stated by the parties, but the County of Lincoln and the Township of North Grimsby declined to state a case. The Township of South Grimsby thereupon commenced this action in the Supreme Court of Ontario.

The two defendant corporations, in addition to setting up their respective defences upon the merits, now set up the further defence that the matter is *res judicata*, and that the Township of South Grimsby are estopped by the County Court judgment. In order to determine this question, it becomes necessary to compare in detail the issues raised in the two actions. The only relief claimed in the County Court action by the plaintiffs, the County of Lincoln, was judgment for the sum of $453.43 and interest, as well as the usual claim for "such further and other relief as may seem meet." The formal judgment, dated the 18th August, 1919, amends the record by substituting for the Municipal Corporation of the County of Lincoln, as plaintiff, one Camby Wismer, Treasurer of the Municipal Corporation of the County of Lincoln, and adjudges that the Township of South Grimsby do pay to the plaintiff the sum of $453.43 with interest from the 20th December, 1917, and the costs of the action, and to the Township of North Grimsby as third parties their costs of the action. The formal judgment does not expressly dismiss the claim for indemnity against the third parties, though that follows from the judgment of the learned County Court Judge.

The County Court judgment is therefore merely a personal judgment for $453.43 and interest against South Grimsby and a dismissal of the third party claim for indemnity in respect thereof. As to the subject-matter of that judgment, namely, the sum of $453.43 and interest, the liability of South Grimsby to the County of Lincoln has been determined by a Court, admittedly of com-

petent jurisdiction, whose judgment is subject to be reversed by way of appeal therefrom to a higher Court. The mere fact that it is now the subject-matter of an appeal in no way affects the question of *res judicata*. The liability or non-liability of the Township of South Grimsby to the County of Lincoln in respect of that cause of action, namely, the sum of $453.43 and interest levied or assessed under the by-laws of 1917, must forever be settled by the final result of the County Court action. The cause of action is merged in the judgment in that action, and cannot again be made the subject-matter of litigation between the same parties. This is too well established to require reference to any authorities. So that, in so far as the Township of South Grimsby seek in the present action any judgment which will relieve them from their liability to pay the County of Lincoln the sum of $453.43 and interest under the County Court judgment (assuming that that judgment is ultimately affirmed by the Appellate Division), I must hold that the matter is *res judicata*, and that the township are to that extent estopped by that judgment, notwithstanding that it may ultimately be determined in this action that the County Court action was erroneously decided. And, for the same reason, I must hold that as to that cause of action the Township of South Grimsby are estopped from again asserting a claim either by way of indemnity or otherwise against the Township of North Grimsby.

As already stated, I think it unfortunate that the present plaintiffs have not in their present action set up in their pleadings the by-laws passed by the county in the years 1918 and 1919 and the fact that the county are claiming upon the basis of the original by-law No. 600 to make assessments for those years as well as for 1917. Had they done so, it would have tended to distinguish the issues raised in this action from that raised in the County Court action much more sharply than is apparent from the present pleadings. But, notwithstanding this criticism, I think that the issues raised here are in fact wider, and, except in so far as the question of liability for the $453.43 cannot again be raised, different from that involved in the County Court action. By their statement of claim the plaintiffs claim a declaration that they are not liable for any portion of the levy made under by-law 605 in so far as the levy is made in respect of the Queenston and

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Grimsby road, and that such levy is illegal and void, and that the plaintiffs should not be assessed, rated, or taxed for any portion of the cost of the Queenston and Grimsby road under the system of good roads; and further that the Township of North Grimsby are liable for all assessments in respect of the said road. A claim is also made for a mandamus and for an injunction, but they are merely incidental and do not enlarge the issues. Now this claim of the plaintiffs asks in wide terms for a declaration which will finally determine the question whether or not the County of Lincoln can disregard the Act of 1882 and fasten liability upon the Township of South Grimsby for a share in the burden of maintaining the Queenston and Grimsby road for all time. The defendants say that the plaintiffs are estopped by the County Court judgment from again raising this question, because the same question was tried and determined in the County Court action. It is of course obvious that in order to determine whether or not the Township of South Grimsby were liable to the County of Lincoln for the $453.43 sued for in that action, the County Court Judge had to deal with the very question which is involved in this action, but I cannot see that the fact that he had to do so in order to dispose of the cause of action there, makes his decision a binding one between the parties except as to that cause of action, namely, the liability for the $453.43. To hold that it did would lead to this extraordinary result, that, if the county had sued for the $453.43 levied in 1917 in the County Court, being a Court having jurisdiction to entertain an action for that amount, and, before that action had been tried, had sued in the Supreme Court for the $1,154.19 levied for 1918, that amount being beyond the County Court's jurisdiction, then whichever Court happened to be last in pronouncing judgment would be bound on the principle of *res judicata* by the judgment of the other Court, merely because in determining the question of liability in respect of the particular cause of action some broader question had to be considered and determined. What is in issue here is the broad question of liability under the county's by-laws, involving not only matters with respect to the past but as to the future. Except as to the levy of $453.43 for 1917, that question, so far as any question of *res judicata* is concerned, still remains open and undetermined by the judgment of any Court of competent jurisdiction. To hold

that the County Court judgment had the effect of finally settling that question would be to give to the County Court a jurisdiction which it does not possess. The power to pronounce declaratory judgments under sec. 16 (*b*) of the Ontario Judicature Act, which is, by sec. 23 of the same Act, given to all Courts, is by the last mentioned section given only so far as the matters to which it relates are cognizable by such Courts. Had the County of Lincoln sought a declaratory judgment in the County Court action, it would have been effective only in so far as it related to some cause of action within the County Court jurisdiction.

But counsel for the defendant corporations nevertheless contended that if in the earlier action the same questions were raised, or might have been raised, as in the present action, notwithstanding that the cause of action may be different, the plaintiffs here are nevertheless concluded by the doctrine of *res judicata*.

The application of the doctrine of *res judicata* is not always a simple matter. When the only question involved is whether or not the cause of action has merged in the judgment, the doctrine clearly applies. The original cause of action is gone: *transit in rem judicatam*. It is on that plain principle that I hold that as to the right to re-open the question of liability for the 1917 assessment, amounting to $453.43, the matter is concluded by the County Court judgment. But, when the doctrine is invoked as a defence in another action involving issues which are necessarily raised in the first action, and which required determination in order to pronounce judgment upon the cause of action itself, difficulties at once arise. The authorities are clear that it is not essential to the plea of *res judicata* that there should be an actual merger in the judgment. As Willes, J., says in *Nelson* v. *Couch* (1863), 15 C.B. (N.S.) 99, at p. 108, 143 E.R. 721: "The plea sets up the exception of *res judicata*, and therefore must shew either an actual merger or that the same point has already been decided between the same parties." See Halsbury's Laws of England, vol. 13, p. 332;Cyc., vol. 23, pp. 1215 *et seq*. Had the judgment for the $453.43 been recovered in the Supreme Court instead of the County Court, then there would be ample authority for holding that a judgment upon the broad issue of liability under by-law 600 concluded that question, not only as to the sum of $453.43 assessed for 1917, for the recovery of which the action was brought,

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but as to all future assessments. No question of jurisdiction would arise in that case. It was on this principle that the decision was based in *Fenerty* v. *City of Halifax* (1920), 50 D.L.R. 435, 53 N.S.R. 457, which was cited by counsel for the defendants. See also *Tait* v. *Snetzinger* (1909), 1 O.W.N. 193.

But the judgment which is pleaded is that of a County Court, and I am unable to see how a judgment of that Court can be binding except as to matters within the jurisdiction of that Court, even though the facts and questions in issue and the parties are the same. The County Court had no power to make a declaratory judgment as to the general liability of South Grimsby under by-laws 600 and 605. Its power to deal with that issue was limited by sec. 23 of the Judicature Act to matters cognizable by that Court, and it could only deal with the question of general liability for the purpose of determining the right of the County of Lincoln to recover the sum of $453.43, an amount within the jurisdiction of the County Court. For this reason, I am of the opinion that the binding effect of the County Court judgment must be limited to the cause of action which merged in that judgment, and that the Township of South Grimsby are not concluded from seeking in this Court a determination of the broad question of their liability under the good roads by-laws of the County of Lincoln for assessments subsequent to the year 1917: *Davis* v. *Flagstaff Silver Mining Co.* (1878), 3 C.P.D. 228; *Webster* v. *Armstrong* (1885), 54 L.J. (Q.B.) 236; *Midland R.W. Co.* v. *Martin & Co.*, [1893] 2 Q.B. 172.

Upon the merits, two defences are raised: first, that the exemption accorded to the plaintiffs by sec. 8 of the Act of 1882 does not apply to the Queenston and Grimsby road, now that it has become part of the good roads system under the Highway Improvement Act; and, second, that the plaintiffs, through their duly constituted officers, agreed that the exemption should be abrogated in consideration of an allotment of certain additional mileage of road.

In support of the first of these defences, the defendants rely upon the decision of the Appellate Division in *Village of Merritton* v. *County of Lincoln*, 41 O.L.R. 6, 39 D.L.R. 328, upon which the County Court Judge based his judgment, and unless that case can be distinguished from the present one I am bound thereby to hold for the defendants.

Counsel for the plaintiffs say that in the *Merritton* case the exemption provisions of the statute were different, and that the reasoning of the Appellate Division does not apply to the present case.

The Act in the *Merritton* case was 26 Vict. ch. 13. It recites the purchase of the Queenston and Grimsby road by the County of Lincoln from a joint stock company, the company engaging to pay all liabilities and expenses connected with the construction and maintenance of the road, there being a large amount of indebtedness thereon, and that "it would be very unjust that any portion of the said indebtedness and maintenance should be imposed upon the Town of Niagara and the Townships of Gainsborough and Caistor," and enacts: "For any liability or expenditure connected with the assumption by the Corporation of the County of Lincoln of the Queenston and Grimsby road as a county work, the said corporation shall assess or tax the Townships of Niagara, Grantham, Louth, Clinton and Grimsby, and the Town of St. Catharines only, and shall not for any such purpose impose any such assessment or tax upon either the Town of Niagara or the Townships of Gainsborough and Caistor in the said county, nor shall any such liability or expenditure be in any way chargeable or borne by the said town and townships last mentioned."

It does not appear from the report of the *Merritton* case whether or not this Act was treated by the interested parties as thereafter exempting the village of Merritton from all liability to assessment for the future maintenance of the road. As a matter of construction, there is ample room for argument that the exemption applied only to the immediate expenditures arising from the assumption of the road, and not to future maintenance. In that respect there is a marked distinction between the provisions of that Act and those of the exempting section of the Act of 1882 (45 Vict. ch. 33, sec. 8), which I have already quoted, *ante* p. 600. Here the Township of South Grimsby is clearly freed from all future liability for any rate, tax, liability, or expenditure which, but for the Act, would have been assessable, ratable, and taxable against the original Township of Grimsby in respect or on account of the Queenston and Grimsby road.

But the point which I have to consider is not whether or not the exempting provisions of the two Acts are the same, but

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whether or not the reasoning of the Appellate Division in the *Merritton* case is applicable here. Meredith, C.J.O., says: 39 D.L.R. at 337, "It may be assumed, for the purposes of the case at bar, that the special Act relieved the exempted municipalities not only from the cost of acquiring the road but also from the expenditure for its upkeep." The learned Chief Justice then holds that the liability to contribute to the cost of the improvement of the road, under the Highway Improvement Act, is a very different one from that with which the special Act deals; that it is not a liability in connection with the assumption of the road as a county work, but a liability arising out of the provisions of the Highway Improvement Act by reason of the road being made part of a system of county roads for which the Act provides, and further that the imposition of a rate to meet the debentures, or an annual county rate upon all the ratable property in the county, is in no way in conflict with the special Act. One of the difficulties I have in appreciating the judgment in the *Merritton* case is that I do not understand how the Village of Merritton claimed the benefit of the Act of 1863 at all. It was neither expressly exempted by that Act, nor is it situated within either of the two exempted townships. There, however, is the decision of the Appellate Division as to the effect of the Highway Improvement Act upon an Act which for the purposes of that decision is construed as granting an exemption as complete as that of the Act of 1882 in question here. I do not see how I can do otherwise than hold myself bound to come to the same conclusion. It will be for the Appellate Division upon an appeal from this judgment to say whether or not their judgment in the *Merritton* case is more sweeping than it was intended to be, or this case is to be distinguished from that on some other point.

The other ground of defence was that the plaintiffs, through their representative, had agreed to abrogate their right to exemption, in consideration of an allotment of certain additional mileage of road. There was evidence that, in the course of the negotiations leading up to the adoption of the good roads system by the County Council, the Reeve of the Township of South Grimsby had acquiesced in the allotment of some additional mileage to his township because the inclusion of the Queenston and Grimsby road in the system would necessitate the Township of South Grimsby's contributing to its maintenance. There was no

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evidence that the Council of South Grimsby ever formally authorised its Reeve to make any such bargain, or that what he did was ever ratified by that council. No authority was cited to support the contention that the Reeve of a township can forgo a statutory right to exemption in this loose way; and, in the absence of any such authority, I must hold that nothing less than a by-law of the township deliberately abandoning, or authorising the abandonment of, its right to the exemption, can be invoked to support any such arrangement as is alleged here.

For the reasons already given, there will be judgment dismissing the action with costs.

Action dismissed.

AIMER v. CUSHING BROS. Ltd.

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Saskatchewan Court of Appeal, Newlands, Lamont and Elwood, JJ.A. November 29, 1920.

1. MASTER AND SERVANT (§ II A—50)—FACTORIES ACT, R.S.S. 1909, CH. 17, SEC. 19 (A)—DUTY OF MASTER TO INSTALL PROPER GUARDS—DUTY TO INSTRUCT INEXPERIENCED SERVANT.

In order to comply with section 19 (*a*) of the Factories Act, R.S.S. 1909, ch. 17, it is not only necessary for an employer to furnish the necessary guard for dangerous machinery but to take reasonable care to see that it is kept in its proper position to protect an employee using the machinery, and to instruct an inexperienced servant as to the best way of guarding against injury.

2. MASTER AND SERVANT (§ II B—160)—MACHINERY NOT PROPERLY GUARDED —INEXPERIENCED SERVANT DOING WORK TO BEST OF ABILITY—SAFER METHOD POSSIBLE—CONTRIBUTORY NEGLIGENCE.

Where a servant performs work in the best way he knows, and is not under obligation to be better informed, his failure to adopt some safer method is not contributory negligence on his part.

[See annotation, employer's liability for breach of statutory duty, 5 D.L.R. 328.]

Statement.

APPEAL by plaintiff from the trial judgment in an action for damages for injuries received working a machine known as a "shaper," the property of the defendant. Reversed.

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

F. F. MacDermid, for respondents.

The judgment of the Court was delivered by

Lamont, J.A.

LAMONT, J.A.:—The plaintiff was employed as a bench carpenter by the defendants, who operate a wood-working factory at Saskatoon.

On January 8, 1919, the foreman of the defendants' bench department gave the plaintiff a sketch of part of a circular stair-

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case and directed him to cut two hand-rails patterened according to the sketch. This necessitated the use of a machine called a "shaper," to mould or round them to the desired shape. This machine has evidently a flat surface through which two spindles are passed, to which are attached above the surface knives designed for the particular work required. The spindles are stated to revolve at a speed of 2,000 revolutions per minute. As the plaintiff was operating the machine, the rail he was shaping was jerked forward and his right hand was brought in contact with the knives, which cut it so badly that his four fingers had to be amputated. The plaintiff was not skilled in the use of this machine; its operation did not come within the province of a bench carpenter when the plaintiff learned his trade, and it is admitted by the defendants' witnesses that a man may be a bench carpenter without being qualified to operate a shaper. It would seem that bench carpenters who have an aptitude for machinery can pick up a knowledge of the operation of the machine without great difficulty. Prior to the occasion in question, the plaintiff had done some work on the machine; in all about six times. The first time he was given work to do on it he requested the foreman to get someone else to operate the machine. No inquiries were made before setting the plaintiff to work on the machine as to his experience therewith or his capacity therefor. There was supplied with the machine an adjustable spring guard, usually called a "springer," which served the double purpose of protecting the operator from the knives and of holding the wood to the surface of the machine. On the day in question the guard was not on the machine, but had been removed and placed on the bench. The defendants' manager testified that the firm provided the guard, but that it was optional with the man operating the machine whether he used it or not. No instructions were given to the plaintiff as to the operation of the machine, or the dangers incident thereto, before setting him to work thereon. The trial Judge in his judgment found as follows:

> The defendants installed with the machine duplicate guards for the two arms of the machine. These guards were up to date, and in my opinion securely guarded the machine as far as practicable. At the time of the accident one of the guards had been broken, but that did not make any difference to the accident in question, because only one of the same was in use. This guard or springer was used for the double purpose of guarding the knives and holding

down the piece of wood on the table. Some of the workmen used this guard or springer, and some did not. It could be detached from the machine, and was detached at the time of the accident. The plaintiff did not know that there was any guard for the machine. The device that was intended for a guard and a springer he only knew as the springer; he thought it was intended to hold the piece of wood on the table. The defendants never instructed the plaintiff as to the use of the guard or springer. I think, then, that although the machine was securely guarded as far as practicable, the defendants were negligent in not instructing the plaintiff in the use of the guard. . . . I find, however, that there was contributory negligence on the part of the plaintiff, and that this was the cause of the injury. This consisted in (a) putting the wood up to the knives against the grain of the wood; (b) the way he had his hands on the wood. At the trial he shewed the way he had hold of the wood, *i.e.*, with his fingers projecting over the wood on the side towards the knives. This was inviting disaster. (c) His omission to attach the templet to the piece of wood he was working with. (d) In not using the stud. This was a part of the machine to the knowledge of the plaintiff and could be used as a pivot against which the piece of wood would be placed so as to feed it gradually to the knives.

Section 19 (a) of the Factories Act, R.S.S. 1909, ch. 17, provides as follows:

> 19. In every factory (a) all dangerous parts of mill gearing machinery . . . and all other like dangerous structures or places shall be, so far as practicable, securely guarded.

That the revolving knives constituted a dangerous part of the machinery requiring to be guarded, does not seem to me to admit of argument. See *Hindle* v. *Birtwistle*, [1897] 1 Q.B. 192.

The first question then is: Was it securely guarded as far as practicable? With deference to the trial Judge I am of opinion that it was not. To comply with the requirements of the statute the defendants were called upon to do more than furnish a guard and leave it on the bench, because while the guard was on the bench the machinery could not be said to be guarded. To comply with the statute the defendants, in my opinion, were under obligation not only to furnish the guard, but to take reasonable care to see that it was kept in its proper position.

In *Smith* v. *Baker*, [1891] A.C. 325 at 362, Lord Herschell said:

> 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.

In *Tate* v. *Latham & Son*, [1897] 1 Q.B. 502, the defendants had provided a circular saw in their mill with a sufficient guard to prevent accidents. The guard was movable. One day the

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sawyer removed the guard and omitted to put it back in its place. Next day the plaintiff fell against the saw and was injured. It was held that the absence of the guard was a defect in the condition of the machinery. In giving judgment, at p. 505, Wright, J., said:

> The question is whether the absence of the guard was under the circumstances a "defect in the condition of the machinery or plant." If no guard at all had been provided it seems clear that its absence would have been a defect. Again, if the guard, although provided, had never been put in its place, it is equally clear that that omission would have constituted a defect. In the present case the guard was unnecessarily and for some time out of place. In my judgment, no distinction can be drawn between a case in which the guard was never fixed in position and one in which it was sometimes not fixed. When it was left out of its proper place its absence was as much a defect as if it had never been provided at all.

And on appeal, [1897] 1 Q.B. at 508, Lord Esher, M.R., at p. 509, said:

> It seems to me clear that, if the machine were left without that guard whilst in motion, it might at that time be said to be in a defective condition.

It cannot, therefore, in my opinion, be said that the shaper was as far as practicable securely guarded.

The trial Judge found that the defendants had been guilty of negligence in not instructing the plaintiff in the use of the guard before setting him to work at the machine. I entirely agree with that conclusion. A master is under obligation not only to see that suitable instrumentalities are provided for his servants to work with, and that these are maintained in proper condition, but also to see that these instrumentalities are safely used. This latter involves the giving of proper instructions to inexperienced servants employed on dangerous work, to enable them to appreciate the nature and extent of the dangers likely to arise and the best means of guarding against injury from such dangers.

In *Cribb* v. *Kynock*, [1907] 2 K.B. 548, at p. 552, Bray, J., said:

> We think it is established by the two cases cited by the Judge: *Crocker* v. *Banks* (1888), 4 T.L.R. 324, and *Sharp* v. *Pathhead Spinning Co.* (1885), 12 Rettie 574, that, on setting an inexperienced girl to work at a dangerous machine or to deal with dangerous articles, the girl should be warned of the dangers likely to arise.

The judgment in this case was approved in *Young* v. *Hoffman Manufacturing Co.*, [1907] 2 K.B. 646.

The plaintiff did not require to be told that his hand might be injured if it came in contact with the knives; that he knew; but he did need to be instructed of the likelihood of wood of the kind upon which he was working being jerked out of his hand when stuck with the knife, and as to the best way of avoiding the happening of such an event and the minimising of the danger of injury therefrom. The defendants gave no warning to the plaintiff as to the dangers likely to arise while using the shaper, or the proper means to take to guard against injury from such dangers.

The trial Judge, however, found that the plaintiff had been guilty of contributory negligence, and for that reason held that he was not entitled to recover.

A servant cannot always be said to have been guilty of negligence where he does not adopt the safest methods of performing the task allotted to him.

In Labatt on Master and Servant, 2nd ed., vol. 3, p. 3366, the author says:

> On the other hand, a dangerous mode of dealing with an appliance does not necessarily betoken negligence, where the servant was unfamiliar with the instrumentality which he was required to use.

And in vol. 3, at p. 3363, he says:

> Where several dangerous conditions combine to produce an injury, the servant cannot be held guilty of contributory negligence, as a matter of law, where he knew of only a part of those conditions.

And further, a servant is not guilty of contributory negligence, where, owing to a lack of instruction, he does an act which he does not know to be likely to injure him. *Cleveland Rolling Mill Co.* v. *Corrigan* (1889), 3 L.R.A. 385. In this case the Court remarked, at p. 390: "Ignorance may be a misfortune, but when it is not wilful, and no duty arises to be informed with the means of information at hand, it is not negligence of which the person charged with the duty of giving proper instructions on the subject, which he failed to perform, can complain or take advantage."

The plaintiff, as a bench carpenter, was not under obligation to be informed as to the proper way to use a shaper. In the various respects in which he was found to be negligent, the evidence shews that he was performing the work in the best way he knew. So long as a servant does that, and is not under obligation to be better informed, his failure to adopt some safer method

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is not contributory negligence on his part. It is only where the servant knows, or should know, that there is a safer method of performing the task than the one he adopts, that a master can be heard to complain that he did not adopt the safer method.

As the plaintiff was found guilty of contributory negligence in four respects, I think it well to examine these separately.

(a) Putting the wood to the knives against the grain of the wood. With deference I am of opinion that this was not established. The allegation in the statement of defence is as follows:

(b) The plaintiff while operating the said shaper at the time of the accident, started to work on the said piece of timber in the wrong place, which caused the knife to strike cross-grain and pull the wood along the head toward the plaintiff, and cut the plaintiff's hand, whereas, if the plaintiff had started near the end next to himself, where it was not cross-grained, the knife would not have had a tendency to bite into the wood and would not have injured the plaintiff.

The evidence does not disclose that the plaintiff commenced at one end of the rail when he should have commenced at the other. That was not contended. What was contended is, that, as the grain was a cross-grain right at the centre of the wood, he should have allowed the knife to strike it first right at the centre or a little to the left of the centre, but that he allowed the knife to strike it a little to the right of the centre. After the accident the defendants' superintendent examined the wood, and said he found that "the start of the cut was apparently a little over the centre of the right hand side." The trial Judge then asked: "Q. Your conclusion is that he started on the right hand side of the grain? A. I should imagine so. I could not know from looking at the piece."

On cross-examination he said: "Q. How much on the right hand side Mr. Groesch? A. According to the grain. That is a hard question. Q. I am speaking of the deduction you made? A. Well, it was not a piece of straight work, and it was up to the man to watch for this. Q. You weren't able to tell from the examination you made afterwards? A. Not very clearly."

If the superintendent who examined the rail could not say that the knife first struck on the wrong side of the grain, I do not see how, under the circumstances of this case, it can be found as a fact that it did. The plaintiff says it was his intention to have the knife strike with the grain and he would say that it did,

although he cannot be absolutely sure. The wood was a piece of American oak, which one witness described as "pretty tough stuff," which "the machine will take quicker than another piece of wood," thus rendering it necessary to be very careful in handling it. It is not impossible, or even to my mind improbable, that the knife striking a piece of very tough wood, even with the grain, would jerk it forward. The wood was not produced. The defendants finished it as a rail and sent it to fill the order for which it was being made, which effectually prevented its examination in Court. In any event, the statement of the defendants' superintendent, that "it was up to the man to watch for this," shews clearly to my mind the necessity for giving instructions to an inexperienced man, and, where such a man fails to watch, his failure in the absence of instructions cannot, in my opinion, be attributed to him as negligence. Such failure on his part would, it seems to me, be the direct result of a failure to instruct.

(b) The way he had his hands on the wood. The plaintiff's failure to hold the wood in such a way as to minimise the danger, was due, in my opinion, to the failure of the defendants to shew him how it should have been held. It is not shewn that he had any appreciation of danger arising from holding the wood the way he did.

(c) His omission to attach the templet to the piece of wood he was working with. The templet is a model. The reason the plaintiff gave for not nailing the rail on which he was operating to the model was that, if he did that, he could not get both under the knives. The height of both amounted to a little over 3 inches; he had the knives adjusted to 3 inches. Witnesses for the defendants testified that the knives could be adjusted to a height of 5 inches. Of this the plaintiff did not appear to be aware. A day or so before the accident the plaintiff had made a hand-rail and had used the model, but in that case he did not nail the model to the rail until after he reduced the rail with the shaper. He used the model only when finishing the work. The defendants' expert Neilson testified that he could have done the work the plaintiff was doing quite easily without having the model on. The plaintiff himself testified that it was a matter for the operator whether the model was used or not. In any event, if the model should have been used from the beginning, the obligation of

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instructing the plaintiff to that effect rested on the defendants, and in the absence of such instructions they cannot be heard to complain that it was not used.

(d) In not using the stud. A day or so before the accident, the defendants' superintendent assisted the plaintiff in cutting a similar rail. On that occasion they did not use the stud. The superintendent made no complaint about this, nor did he intimate to the plaintiff that he should use the stud as a matter of protection. Under these circumstances the plaintiff, in my opinion, was justified in concluding that it was not necessary to attach the stud.

The defendants' manager testified that he had instructed the superintendent to see before he put a man on the machine that he was capable of using it and understood it. This the superintendent failed to do, and his failure in this respect, and in not having the machine guarded, constituted, in my opinion, the proximate cause of the accident.

I would, therefore, allow the appeal with costs, set aside the judgment below and enter judgment for the plaintiff for damages, which I would assess at $2,000. The plaintiff is entitled to his costs. *Appeal allowed.*

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LAZARD BROS. & Co. v. UNION BANK OF CANADA.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee and Ferguson, JJ.A. June 11, 1920.

BANKS (§ IV C—114)—LIEN ON SHARES OF ITS OWN STOCK STANDING IN NAME OF CUSTOMER—KNOWLEDGE OF BANK—FAILURE TO DISCLOSE—ADVANCES MADE ON SECURITY—TITLE TO SHARES.

Failure on the part of the defendant bank to disclose to the plaintiffs, who made large advances to a customer of the bank on the security of shares of capital stock of the bank, which the plaintiffs supposed to be held for them by a trust company, but which in fact stood in the name of the customer, and on which the bank had a privileged lien, under sec. 77 of the Bank Act, 3-4 Geo. V. 1913 (Can.) ch. 9, for a debt due from the customer, disentitles the bank from asserting this lien over the plaintiffs' title to the shares, there being a clear duty to disclose such facts. But when the plaintiffs' debt was satisfied what remained of the shares should be available to satisfy the indebtedness of the customer for which as against him the shares were subject to the statutory lien.

[*Lazard Bros. & Co.* v. *Union Bank of Canada* (1920), 51 D.L.R. 636, 47 O.L.R. 76, affirmed with a slight variation.]

Statement.

APPEALS by defendants, the bank and Clarkson, from the trial judgment (1920), 51 D.L.R. 636, 47 O.L.R. 76, in an action against the bank and Clarkson, administrator, to establish the claim of

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the plaintiffs to 200 shares of the capital stock of the defendant bank standing in the name of DuVernet, deceased. Affirmed with a slight variation.

I. F. Hellmuth, K.C., and *Hamilton Cassels*, K.C., for appellant, the Union Bank of Canada,

D. W. Saunders, K.C., for appellant Clarkson.

Glyn Osler and *G. R. Munnoch*, for respondents.

The judgment of the Court was delivered by

MEREDITH, C.J.O.:—These appeals are by the defendants, the Union Bank of Canada and Clarkson, from the judgment, dated the 3rd February, 1920, which was directed to be entered by Middleton, J., after the trial before him, sitting without a jury, at Toronto, on the 22nd and 23rd December, 1919. Meredith, C.J.O.

The material facts are set out in the reasons for judgment of my brother Middleton, and it is unnecessary to restate them.

It is not open to question that it was agreed that the money advanced by the respondents to DuVernet should be secured by 500 shares of the capital stock of the Union Bank of Canada and 500 shares of the capital stock of the Union Trust Company, and that the advances made by the respondents to DuVernet were made on the faith of that agreement. It is also not open to question that the bank was aware of the agreement.

The way in which the transaction, as to the advances, was carried out was that the Union Bank drew on the respondents 6 bills of exchange for £5,000 each; these bills were accepted by the respondents, and the bank negotiated them on the London market, and out of the proceeds of them paid to the respondents £20,000, and applied the remaining £10,000 in taking up a bill for that amount which the bank had discounted for DuVernet. This bill had been sent forward for acceptance by the respondents, but had been recalled because the respondents insisted on the arrangement being carried out as it was carried out, which was in accordance with the agreement between the respondents and DuVernet.

It is clear, I think, that all the parties to the transaction, including the bank, fully understood that the respondents were to be secured for their advances by 500 fully paid-up shares of the Union Bank of Canada and 500 fully paid-up shares of the Union Trust Company.

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The difficulty which has occurred, and has led to the litigation, arose from the fact that the Union Bank shares were not transferred to the respondents on the books of the bank, but what was done was to deposit with the Union Trust Company a certificate for the shares in the name of DuVernet, with a power of attorney to transfer them, signed by him. The effect of this was that it was in the power of DuVernet, who remained the legal owner of the shares, to dispose of them in fraud of the respondents, and, as the bank contends, to leave them subject to the bank's statutory lien upon them for any indebtedness or liability of DuVernet to the bank; and the question for decision is, whether or not the bank is entitled, as against the respondents, to a lien on the 200 shares which remain of the original 500 for an indebtedness of about $30,000 of DuVernet to the bank, which existed when the arrangement as to the advances to be made by the respondents was entered into and carried out.

That the bank knew that the respondents, in accepting the bills which were drawn on them, would rely upon having as security for their advances the 500 Union Bank shares and the 500 shares of the Union Trust Company, is clear from the evidence of Wilson, the manager, who acted for the bank in the transaction.

To the question, "You realised that the pledge of the Union Bank shares was a condition on which Messrs. Lazard Brothers and Company would accept the drafts?" his answer was, "Yes" (p. 101 of the notes of evidence).

And yet what the bank is now setting up is a claim that would entirely wipe out that security.

The fact that the respondents left the bank-shares to stand in the name of DuVernet in order that his position as a director of the bank might not be prejudiced, or even if there was the additional reason that the respondents did not wish to take upon themselves the liability they might incur by becoming shareholders, is immaterial as far as the question that has arisen is concerned. They might well be willing to take the risk of DuVernet dealing with the shares in fraud of them, but it is impossible for me to suppose that either they or the bank contemplated that the shares would be subject to the bank's lien, which, if asserted, as I have said, would have wiped out the whole security.

As a matter of fair dealing, and, in my opinion, as a matter of law, a duty rested upon the bank to disclose to the respondents

the existence of the indebtedness of DuVernet and the lien for it, if it intended to preserve its lien; and, that not having been done, the bank is, in my opinion, precluded from now asserting the lien. Indeed, the bank's attitude in the transaction amounted to a representation that the shares were free to be dealt with by DuVernet by effectively pledging them to the respondents. The bank received a benefit from the payment of the drafts it had discounted for DuVernet. I say this not forgetting that it held the Union Trust Company shares as security for the advance which it had made.

The position which the bank now takes means simply this, that, although the bills which it drew on the respondents were accepted and paid on the faith that the advances were secured by the shares, and the bank knew that this was the position of the matter, had the respondents presented a transfer signed under the authority of the power of attorney, it might have declined to register it until the debt for which the lien is claimed should be satisfied.

It was argued by counsel for the bank that the respondents were estopped from claiming the dividends on the bank-shares, but we see no reason to warrant such a conclusion. The dividends were not received by DuVernet, but were retained by the bank in the exercise of its alleged statutory lien; and, if the right to the lien does not exist as to the shares themselves, it follows that it cannot be asserted against the dividends.

It was said upon the argument that the effect of the judgment is to entitle the respondents to the dividends, even if their whole claim is satisfied out of the proceeds of the shares when realised. No such result should follow, and, if necessary, the judgment may be amended by providing that, when the respondents' debt is satisfied, the shares are to be available to satisfy the indebtedness of DuVernet, for which, as against him, the shares are subject to the statutory lien.

With this variation, the judgment should be affirmed and the appeal of the bank be dismissed with costs.

The appeal of Clarkson was dealt with on the argument by providing that the provision of the judgment as to costs is not to prejudice his right to claim indemnity for his costs out of the estate of DuVernet, and that there should be no costs of his appeal to either party. *Affirmed with a variation.*

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KUM JOW and LEE DYE v. ELIOTT.

British Columbia Court of Appeal, Martin, Galliher and McPhillips, JJ.A. October 27, 1920.

VENDOR AND PURCHASER (§ II—30)—AGREEMENT FOR SALE OF LAND—REMEDIES OF VENDOR—FORECLOSURE.

Where a vendor has obtained a judgment fixing a period for payment of the amounts due under an agreement for sale of land and providing that on default the agreement shall be null and void and that the plaintiff recover possession of the said lands and that all monies paid under the agreement shall remain the property of the plaintiff, he elects to take the property in satisfaction of so much of the purchase money as then remains unpaid, and the failure of the purchaser to obey the decree and pay the money is sufficient abandonment or repudiation of the contract to justify rescission of the contract without restitution.

[*Standard Trust Co.* v. *Little* (1915), 24 D.L.R. 713, 8 S.L.R. 205; *Davidson* v. *Sharpe* (1920), 52 D.L.R. 186, 60 Can. S.C.R. 72, followed.]

Statement. APPEAL by defendants from judgment of Macdonald, J. Affirmed.

E. C. Mayers, for appellant; *A. D. Crease*, for respondent.

Martin, J. MARTIN, J. (dissenting), would allow the appeal.

Galliher, J. GALLIHER, J.A.:—I am in agreement with my brother McPhillips in dismissing the appeal.

McPhillips, J.A. MCPHILLIPS, J.A.:—The trial Judge has in his reasons for judgment set forth the facts with great clearness and I see no need for any further statement of them. After all the present case is a simple one and one that has the usual familiar features, the purchase of property in a rising market followed by a break, or what is popularly termed a "slump"—although the present case differs from many in that the property is productive, *i.e.*, rental bearing. It is evident though that it will not carry itself. The rents and profits derivable therefrom will not meet the payments under the agreement of sale, and the vendors, the plaintiffs in the action (the respondents) commenced this action, claiming the purchase price remaining due and accrued interest, and in default of payment being made sale of the land or foreclosure and possession thereof, the appointment of a receiver, and in the alternative that in default of payment an order cancelling the agreement of sale, and the subsequent agreement relative thereto, and that all moneys already paid be declared the property of the plaintiffs without any right in the defendants (the appellants) to any compensation or abatement.

The defence to the action, besides the usual and customary denials, sets up: that the plaintiffs seek to enforce agreements which they, the plaintiffs, have repudiated and denying the right

to any foreclosure thereof, and by counterclaim it is contended at this Bar, and I assume it was so contended in the Court below, that the contracts being repudiated by the plaintiffs, that the resultant effect as between the parties was that rescission of the contracts took place, *i.e.*, that there was express notice of intention to cancel the agreement of sale of October 7, 1911, which entitled the defendants to a return of all moneys paid in respect thereof.

The counsel for the appellants in an excellent and elaborate argument carefully presented the case as one that partook in its later phases of a joint adventure between the parties and that the payments to be made were as set forth in the later agreement of November 24, 1913, and cancellation could not take place in case of default in the absence of such a stipulation in the second agreement.

I would not, with deference, think that any such result was occasioned by the entry into the second agreement—by a provision therein all the terms of the first agreement except as varied in the second agreement were confirmed and it would be quite unreasonable to so construe the transaction, *i.e.*, that the entry into the second agreement resulted in the abrogation of the provision in the first agreement for resuming possession of the lands upon default and the right upon the part of the plaintiffs to the purchase moneys already paid. It would not seem to me that that which took place could be at all said to have any such resultant effect. In any case this submission on the part of the appellants is really met in this way—granted that there was no effective cancellation by the act of the plaintiffs alone and the giving of the notice there was the power in the Court to direct rescission in default of payment of the moneys found to be due upon the taking of the accounts—which is the judgment under appeal.

The judgment as entered in the action may be said to be the customary and usual judgment following suit for payment of the moneys due in respect to sales of land and this case does not differ at all in respect to the relief claimed and granted, it may be said that the form of judgment is stereotyped and well known in practice. In *Standard Trust Co.* v. *Little* (1915), 24 D.L.R. 713 at p. 716, 8 S.L.R. 205, Lamont. J. (now Lamont, J.A.) said:—

> The failure of the purchaser to obey the decree and pay the money found to be due is a sufficient abandonment or repudiation of the contract by him to justify rescission without restitution. *Dunn* v. *Vere* (1870-71), 19 W.R. 151; *Henty* v. *Schröder* (1879), 12 Ch. D. 666.

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In *Davidson* v. *Sharpe* (1920), 52 D.L.R. 186, 60 Can. S.C.R. 72, Anglin, J., at p. 195, said: "Lamont, J.A., states the law very clearly and accurately, if I may say so, in delivering the judgment of the Court *en banc* in *Standard Trust* v. *Little*, 24 D.L.R. 713, 8 S.L.R. 205." It will be seen upon an examination of the *Standard Trust* case and the *Davidson* case, that the judgment here under appeal is in a form which is supported by the Supreme Court of Saskatchewan and the Supreme Court of Canada (also see *Jackson* v. *Scott* (1901), 1 O.L.R. 488). In the *Davidson* case, 52 D.L.R. at 194, Anglin, J., said:—

> When the vendor sought and obtained a judgment fixing a period for payment and providing that on default "the agreement shall be cancelled and at an end and all moneys paid thereunder forfeited to the plaintiff," he elected, in my opinion, on that event happening, to take the property in satisfaction of *so much of the purchase-money as then remained unpaid.*

In the present case, the judgment provides that in case of default in payment of the amount found due upon the taking of the accounts,

> the said agreement of sale of the 7th day of October, 1911, and the said agreement of the 24th day of November, 1913, be deemed to be cancelled and that the sale in the said agreement mentioned shall thereafter be null and void and of no effect and that the plaintiffs recover possession of the said lands hereditaments and premises and that the moneys paid under the said agreement for sale of the 7th day of October, 1911, and the said agreement of the 24th day of November, 1913, shall remain the property of the plaintiffs and that any registration of the said agreement for sale or the agreement of the 24th day of November, 1913, and all assignments thereof respectively in the Land Registry Office at Victoria, B.C., be cancelled.

The terms of the judgment would appear to be quite unobjectionable in form and the relief accorded is quite, in my opinion, in conformity with the decided and controlling cases (*Lysaght* v. *Edwards* (1876), 2 Ch.D. 499, at p. 506; *Jackson* v. *Scott*, 1 O.L.R. 488; *Cameron* v. *Bradbury* (1862), 9 Gr. 67; *Sprague* v. *Booth*, [1909] A.C. 576; *Steedman* v. *Drinkle*, 25 D.L.R. 420, [1916] 1 A.C. 275; *Brickles* v. *Snell*, 30 D.L.R. 31, [1916] 2 A.C. 599).

Finally, upon the point taken that upon the facts that there was wrongful repudiation of the agreement of sale by the plaintiffs, and that the defendants having elected to accept that position, were entitled to the return of all the moneys paid. This contention is wholly untenable, there was no wrongful repudiation; the notice of cancellation was in effect merely a notice of intention under the

terms of the agreement of sale upon the part of the plaintiffs of the exercise of the option given in para. 9 of the agreement of sale and the exercise of their right thereunder and it is in express terms recited therein that:—

> The said sum of $40,000 and all subsequent payments on account thereof shall at the option of the vendors upon giving the notice hereinafter mentioned and notwithstanding any previous forbearance by the vendors or demand by the vendors of the whole unpaid purchase price belong absolutely to the vendors any rule or law or equity to the contrary notwithstanding; and the vendors may thereupon resume possession of the said premises and all improvements thereon and hold the same freed from these presents without any right on the part of the purchasers to any compensation therefor.

Therefore it is plain that exercising the option there is the right in the plaintiffs to retain all moneys paid by the defendants. There is no particular magic in the words used in the notice, "cancel the agreement"—the notice was, after all, as previously stated, merely a notice of the exercise of rights granted under the agreement of sale. It is true there is a power of sale given in the agreement of sale, but that is in no way mandatory.

The defendants have no position upon the facts that would entitle the Court to grant any relief. The evidence shews that the plaintiffs were pressing for the payment of, at least, the arrears of interest. The defendants were greatly in default and finally the plaintiffs bring the action which admitted of the defendants redeeming the property upon payment and even now under the terms of the decree all that the defendants need do is to make payment of the moneys due upon the taking of the accounts to entitle them to a conveyance of the lands. It is only in default of payment that cancellation of the agreements will take place, and in the Court alone is there authority to cancel the agreements. It rests with the defendants to comply with the judgment as entered, and paying what is found to be due upon the taking of the accounts they get the land, otherwise as is provided they shall "stand absolutely debarred and foreclosed." Time was of the essence of the contract in the present case and there was implied repudiation upon the defendants' part by the failure to complete. *Howe* v. *Smith* (1884), 27 Ch.D. 89, 95, 103.

There has been no breach of contract upon the part of the plaintiffs—the plaintiffs have not rescinded the contract—the plaintiffs invoked the judgment of the Court to decree compliance

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with the contract and in case of default that the contract be rescinded and the Court has so decreed and following the terms of the contract, as decreed by the Court, all the moneys paid by the defendants are declared, the default continuing, to remain the property of the plaintiffs. (*Best* v. *Hamand* (1879), 12 Ch. D.1.)

Upon the facts of the present case it may well be said that the defendants have on their part repudiated the contract without colour of right, in fact, by their conduct, have abandoned the contract and there can be no relief such as claimed. Here the contractual obligations are plainly and specifically set forth in the contract and the plaintiffs have been guilty of no breach of contract, the defendants, on the other hand, have; yet notwithstanding their breach of contract the defendants contend that they are entitled to *restitutio in integrum*. I cannot persuade myself that the defendants are entitled to any such relief, and in any case upon the facts entire restitution is impossible.

I would dismiss the appeal. *Appeal dismissed.*

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New Brunswick Supreme Court, Appeal Division, Hazen, C.J., White and Grimmer, JJ. November 19, 1930.

INFANTS (§ I C—11)—CUSTODY OF—DETERMINATION OF WHO SHOULD HAVE —WHAT SHOULD BE CONSIDERED.

In determining whether the custody of an infant child ought to be given to the mother as against the father under sec. 19 (10) of the Judicature Act, 1909, N.B., the Court should consider (1) the paternal right, (2) the marital duty, (3) the interest of the child, and of these three the dominant consideration is the welfare of the infant, which is not to be measured by money or physical comfort only, but the moral and religious welfare is also to be considered.

[*In re Armstrong* (1895), 1 N.B. Eq. 208, followed. Review of authorities.]

Statement.

APPEAL by Cora Mabel Sharp from judgment of Barry, J., awarding custody of children to Mrs. H. Sharp on *habeas corpus* proceedings.

C. F. Inches, supports appeal; *W. B. Wallace*, K.C., *contra*.

The judgment of the Court was delivered by

White, J.

WHITE, J.:—I have not been able to reach a decision in this case without much anxious consideration. This has not been because of any doubt I entertain as to the law governing the question we are called upon to decide, but because I have found it difficult to determine with that satisfying degree of certainty

which is desirable, whether the welfare, morally and physically, of the three infant children before the Court will be best served by awarding their custody and control to the appellant or to the respondent.

The Judge, whose written judgment is now before us on appeal, has therein stated so fully the facts disclosed by the evidence, that I do not think it would serve any useful purpose to recapitulate them here. There is, however, some testimony given by the respondent on the hearing before the Judge below, to which I think I ought to make reference, as the trial Judge has not done so in his judgment, though he could scarcely have failed to have it in mind in arriving at the conclusion which he reached. The appellant being asked if the respondent had ever threatened her with bodily violence, replied "Yes."

Q. What has he said? A. He told me once he would shoot me if it was not for the law. Q. Did he take steps to carry that into effect, to shew whether he was in earnest or not? A. He pointed a revolver at my head a couple of times. . . . Q. Was it loaded at the time? A. It was. . . . Q. What was his language like when he was angry? A. Well, it was terrible. Q. What did he say? A. Well, I can't tell just the words. Q. Was it profane language? A. Yes. Q. Obscene? A. Yes. Q. Did he ever use language of that nature in the presence of the children? A. Yes. Q. Frequently? A. Yes. Q. Were the children afraid of him? A. They were when he was like that.

The respondent, although he gave evidence on his own behalf, was not asked concerning these allegations of his wife, and did not deny them.

And just here, while referring to the question of evidence; I wish to say that I quite agree with the Judge in refusing to accept as true the testimony given by the girl Maizie Bryant.

The appellant claimed that the trial Judge erred:

1. In holding that the father and not the mother was entitled to the custody of the children. 2. In finding that Sharp was not a man of gross immorality. 3. In holding that it was necessary for Mrs. Sharp to shew that her husband was a man of gross immorality, to entitle her to the custody. 4. In finding that the letters exhibits could not be evidence of the immoral state of Sharp's mind, because Mrs. Sharp had, from a legal standpoint, condoned the offence by continuing to live with him. 5. In refusing to believe the evidence of Sharp's adultery with the housemaid. 6. In holding that the circumstances surrounding Sharp's contempt of Court in causing the children to be removed from the jurisdiction had no bearing on the main issue of the case. 7. In refusing a further adjournment to allow the production of evidence given in the suit for divorce against Sharp on the ground of adultery. 8. In not making an order that the mother could have access to the children.

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First, as to the principles of law involved. These, I think, were correctly laid down by the late Sir Frederick Barker, C.J., then Barker, J., in *In re Armstrong* (1895), 1 N.B. Eq. 208.

In that case Helen Armstrong, wife of William Armstrong, applied to the Supreme Court in Equity, by petition, under secs. 182 and 183 of 53 Vict. 1890, ch. 4, the Supreme Court in Equity Act, for an order for the custody of one or more of her four infant children, and for access to those who were permitted to remain in the custody of their father the said William Armstrong. Having taken time to consider, Barker, J., decided that in determining whether the custody of an infant child ought to be given to the mother as against the father under the sections of the Act referred to, the Court will take into consideration: 1. The paternal right. 2. The marital duty of husband and wife so to live that the child will have the benefit of their joint care and affection. 3. The interest of the child.

In support of this view, he refers to the judgment of Lord Jessel in *In re Taylor* (1876), 4 Ch.D. 157; and to that of Pearson, J., in *In re Elderton* (1883), 25 Ch.D. 220; and to that of Turner, L.J., in *In re Halliday's Estate* (1853), 17 Jur. 56.

In re Taylor, supra, was decided in 1876. At that time the Imperial Statute 36-37 Vict. ch. 12, was in force and was referred to by Jessel, M.R., in his judgment. Sec. 1 of that statute, as is pointed out by Barker, J., in *In re Armstrong, supra,* is substantially the same as sec. 182 referred to of the New Brunswick Act.

In re Elderton, supra, was decided in 1883, and therefore under the provisions of the Imperial Act referred to.

In re Halliday's Estate, supra, was decided in 1853, and, as pointed out by Jessel, M.R., in *In re Taylor,* Sir George Turner, in considering the questions involved in *In re Halliday's Estate,* recognised and gave effect to the provisions of Talfourd's Act.

With reference to that Act, Jessel, M.R., in *In re Taylor,* says, 4 Ch.D., at p. 159:

> First of all I have to consider what the law is. What the law was is clear. Before the passing of the Act commonly known as Serjeant Talfourd's Act, there is no doubt that you could not take away the custody of a child from its father except you shewed that either he was unfit to remain the custodian of the child, or that his so remaining would be an injury to the child. You had to shew either the one case or the other. That was the result of the

authorities. But the Act took away that right of the father in the most express terms, for the Act was confined to the cases where the child was in the sole custody of the father, and it gave to the then Court of Chancery, the jurisdiction which is now transferred to the High Court of Justice, that is to say, in terms an absolute discretionary power as to the custody of the infant on the application of the mother, when the child was under seven years of age, and this power was by a recent Act, passed in 1873, extended to cases where the child was under sixteen years of age. Therefore the law was altered by Talfourd's Act to this extent, that that which was formerly the absolute right of the father became, and is now, subject to the discretionary power of the Judge. When I say "the discretionary power of the Judge" I mean that, though the Act of Parliament gave the power in the most ample terms in which language could express it, "If he should see fit"—or, as the recent Act expressed it, "as the Court shall deem proper, or shall direct"—yet, of course, like every other power given to a Judge, the discretion of the Judge is to be exercised on judicial grounds—not capriciously, but for substantial reasons.

Talfourd's Act was repealed by the Act of 1873 referred to by Jessel, M.R., that is to say, the Act 36-37 Vict. ch. 12. Secs. 182 and 183 of our Supreme Court in Equity Act, 1890, above referred to, were carried forward into ch. 112, C.S.N.B. 1903, as secs. 96 and 97 thereof. Upon the repeal of this last-mentioned Act, and the enactment of our Judicature Act, 9 Ed. VII. 1909, ch. 5, these two sections referred to were continued in force and form Rules 10 and 11 of Order 56.

I have referred to these several enactments because, in seeking assistance from English authorities, it is necessary to have in mind the statutory enactments governing or affecting the same, and the extent to which such statutory provisions have been re-enacted and are in force in this Province.

Mr. Inches claims, that since the decision of the English cases to which I have referred, as cited and relied upon by Barker, J., in *In re Armstrong, supra*, the English Courts have taken a much broader view of the rights of the mother, applying to obtain the custody of the children from their father, than prevailed when the English cases referred to by Barker were decided. In support of this contention he cites *In re A and B* (*Infants*), [1897] 1 ch. 786; and *In re Story* (1916), 2 Irish R. 328.

But an examination of those authorities will shew that the law as there laid down was based upon the Imperial Act 49-50 Vict., ch. 27, sec. 5 of which reads as follows:

> The Court may, upon the application of the mother of any infant (who may apply without next friend), make such order as it may think fit regarding the custody of such infant and the right of access thereto of either parent,

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having regard to the welfare of the infant, and to the conduct of the parents, and to the wishes as well of the mother as of the father, and may alter, vary or discharge such order on the application of either parent, or, after the death of either parent, or any guardian under this Act, and in every case may make such order respecting the costs of the mother and the liability of the father for the same or otherwise as to costs as it may think just.

Mr. Inches contends that O. 56, R. 11, of our Judicature Act gives to the Court substantially the same powers as are conferred by sec. 5 of the Imperial Act last referred to. But it is, I think, only necessary to compare the language of R. 11 with that of sec. 5 referred to, to see that this contention cannot be sustained. Rule 11 reads as follows:

Whenever any application shall be made to a Court or a Judge for the custody or control of an infant, or for the access to an infant, it shall be the duty of the Court or a Judge to take into consideration the interests of such infant in deciding between the claims of the parents of such infant.

In *In re A and B (Infants)*, [1897] 1 Ch. 786, Lopes, L.J., says, at p. 791:

I think it is worthy of observation that each step in legislation has been to confer privileges on the wife with regard to the custody of and access to her children—to mitigate the severity of the common law has been the object of the Legislature ever since 1839, when Talfourd's Act was passed. In 1839 the jurisdiction of the Court of Chancery was thought to be deficient in many respects, especially in the scanty recognition of the rights of the mother, and the law was amended by Talfourd's Act of 1839 (2-3 Vict. ch. 54). The Act of 1839 was repealed by the Custody of Infants Act, 1873 (36-37 Vict. ch. 12), and that again very much enlarged the privileges of the mother. But in 1886 came the Act in question, the Guardianship of Infants Act (49-50 Vict. ch. 27); and that again, more than any Act before, increased the rights and privileges of the mother, and, in my judgment, sec. 5 was inserted expressly for the purpose of increasing and enlarging those rights. [He then proceeds to quote sec. 5 referred to, and says:] Now I come to the important words "having regard to the welfare of the infant and to the conduct of the parents and to the wishes as well"—mark these words—"of the mother"—she is put first—"as of the father, and may alter, vary, or discharge such order on the application of either parent, or after the death of either parent, or any guardian under this Act, and in every case may make such order," etc.

Rigby, J., giving judgment in the same case, says, at p. 794:

And then you come to the words, "the wishes as well of the mother as of the father." Those are very remarkable. If the rights of the father as they were construed down to that time are not intended to be interfered with by this section, what is the meaning of referring to the mother's wishes? If that means, "to the wishes of the mother subject to the rights of the father," it would be a transparent absurdity; if the rights of the father are to override the wishes of the mother, what is the use of mentioning them? When it says "the wishes of the mother as well as of the father," as a general rule you are to consult the wishes of one as well as the other. Now I cannot believe that

is the proper construction of this Act, that you are to read into that section "without prejudice to the rights of the father at common law, and as they stand by the decisions down to this time."

In *In re Story*, Gibson, J., says, at p. 338:

Cases before the statute of 1886 (ch. 27), described as a Mother's Act, do not govern where that statute introduces considerations which might have affected the earlier decisions.

We have in this Province to-day no statutory enactment giving to the wife upon application by petition to the Court of Equity wider rights than she had at the time *In re Armstrong* was decided.

By sec. 19, sub-sec. 10, of the Judicature Act, 9 Ed. VII., 1909 (N.B.), ch. 5, it is enacted that: "In questions relating to the custody and education of infants the rules of equity shall prevail." Therefore, although in the present case the application by the mother for the custody of her children was made by way of *habeas corpus*, the law which is to govern us in determining her rights is identical with that which would govern had she applied to the Court of Equity by way of petition, as was done in the case of *In re Armstrong*. If I am right in thinking this last-named case was rightly decided, we are to be governed by the three considerations referred to: 1. The parental right. 2. The marital duty. 3. The welfare of the infants. Of these three, the dominant consideration is the welfare of the infants. Barker, J., in *In re Armstrong* quotes with approval the definition of "welfare" given by Lindley, L.J., in delivering the opinion of the Court in *In re McGrath*, [1893] 1 Ch. 143, where he says, 1 N.B. Eq. at 210:

The dominant matter for the consideration of the Court is the welfare of the child. But the welfare of a child is not to be measured by money only nor by physical comfort only. The word welfare must be taken in its widest sense. The moral and religious welfare of the child must be considered as well as its physical well-being. Nor can the ties of affection be disregarded.

From the evidence in this case I find it difficult to believe that whether the custody of the children be given to one parent or the other, their moral welfare would be as well protected as one could wish it to be. If I were forced to award the custody of the children upon the sole consideration as to which parent was most likely to protect and foster their religious and moral welfare I would decide that one parent had as much right, or, rather, as little right to the custody of the children as the other. As to the physical welfare of the children, no attempt was made by or on

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the part of the mother to shew that she could, if awarded the custody of the children, provide adequate means for their support. It is true the children were, when the *habeas corpus* proceedings were instituted, at the home of her father, Mr. Lingley, but there is nothing to shew that if the children were placed in the custody of the mother, her father would continue to support and maintain them in as comfortable circumstances as their father, William H. Sharp, who is in receipt of an income of some $2,000 a year, would be able to do.

With regard to the second matter which we had to consider, viz., the marital duty, the weight to be given to it must, of course, vary with the circumstances of each case. When the conduct of the father has been such as to justify his wife in refusing to live with him, thus depriving their infant children of the benefit of the joint care and affection of both parents, then in my opinion, such failure on the part of the father to perform his marital duty might well outweigh such claim as he might otherwise have had by reason of his paternal right. For in such a case, when once the Court is satisfied that whether the custody of the infant children be awarded to the father or mother, their welfare would in either event be equally well assured, it would be a manifest hardship to the mother, and as I think an injustice to her to permit the father, by virtue of his parental right, to deprive her of the custody of their infant children.

Without stopping to consider whether Sharp's conduct toward his wife was such as would entitle her to a judicial separation from him, and conceding that she did wrong in leaving her home as she did, taking the children with her, I still think the evidence shews that Sharp more than she is to be blamed for the breach between them.

After carefully considering and weighing all the matters to which I have referred, I have reached the conclusion that Sharp should be given the custody and control of the three infants in question; but I have also reached the conclusion that the appellant should be given access to all three infants at all reasonable times.

To ensure the enjoyment by the appellant of such right of access it will be necessary to provide that the three children be

kept together at some suitable place within the Province. The order of the Court which I think should be made, omitting the merely formal parts, is as follows:

Ordered, that upon the said William H. Sharp giving his undertaking in writing, signed by him and by his counsel, and filed with the Registrar of this Court within fifteen days from this date, that at all times after the custody of said three infants shall have been committed to him, and so long as his right to such custody shall continue, each of said infants shall, until it attains the age of sixteen years, be kept by said William H. Sharp within the jurisdiction of this Court, and shall not depart the Province without leave of this Court or of a Judge thereof first obtained. And upon said William H. Sharp executing and filing with said Registrar, within said fifteen days from the date hereof, a bond to the King with two sureties, to the satisfaction of said Registrar, himself in the sum of $2,000 and each surety in the sum of $1,000, conditional for the due performance by the said William H. Sharp of the terms of said undertaking, and carrying out of the terms of this order to be by him performed, the custody of said three infants be committed to said William H. Sharp until otherwise ordered. And that, except as may from time to time be otherwise ordered by this Court or a Judge thereof, said three infants shall, by said William H. Sharp, be kept together and suitably educated and maintained at the City of Saint John, and said Cora Mabel Sharp, mother of said infants, shall at all reasonable times have access to all of said infants.

And it is further ordered that if the said William H. Sharp shall not within the time limit aforesaid, file such undertaking as aforesaid with the said Registrar, or shall fail to give such surety with bond as aforesaid within the time limit aforesaid, then the custody of all of said infant children shall be given to their mother, Cora Mabel Sharp, until further order by this Court or a Judge thereof.

Appeal dismissed.

CAN.

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MONTREAL COTTON AND WOOL WASTE Co. v. CANADA STEAMSHIP LINES.

Supreme Court of Canada, Davies, C.J., Idington, Anglin, Brodeur and Mignault, JJ. June 21, 1920.

CARRIERS (§ III C—385)—LOSS OF GOODS—STIPULATION IN BILL OF LADING FIXING AMOUNT—MEANING OF.

The damages caused by the loss of a consignment of goods, under a bill of lading containing the following clause, "The amount of loss or damage for which a carrier is liable shall be computed on the basis of the value of the goods at the time and place of shipment," must be calculated at the market value of the consignment, at the time and place of shipment, and not at the cost price to the owner at the place of purchase plus freight charges.

[*Canada Steamship Lines Co.* v. *Montreal Cotton, etc., Co.* (1919), 29 Que. K.B. 186, reversed.]

Statement. APPEAL from the judgment of the Court of King's Bench, appeal side, Province of Quebec (1919), 29 Que. K.B. 186, modifying the judgment of the Superior Court and maintaining the appellant's action in part. Reversed.

J. L. Perron, K.C., for appellant.

A. Wainwright, K.C., for respondent.

Davies, C.J. DAVIES, C.J.:—At the close of the argument the Court was unanimously of the opinion that the appeal should be allowed and the judgment of the trial Judge restored on the ground that the contract or bill of lading for the carriage of the goods fixed and determined the damages for which the defendant might become liable, namely, on the basis of the value of the goods at the time and place of shipment.

The defendant company did not dispute its liability for damages, the goods having been destroyed by its negligence during their transit. The sole question was as to the proper test by which its liability for damages should be determined. The defendant's contention was that its liability should be determined from the cost to the plaintiff of these goods under its contract with the Dominion Textile Co., Ltd., by which it agreed to purchase the entire output of the mills for 4 cents per pound for one year. That price so agreed to be paid was the value, it contended, of the goods in Quebec on which its liability should be based and determined.

The trial Judge held that the true value of the goods to the plaintiff under the contract of carriage was not the cost or price at which it purchased them from the mills but what they would

fetch in the open market at the time and place of shipment and assessed the damages on that basis at 8 cents per pound, or $2,010.24.

The Court of King's Bench, 29 Que. K.B. 186, reversed this finding, holding that the purchase price at which the plaintiff bought from the mills was the test of value of the goods under the contract of carriage to it for the loss of which only it could recover, and accordingly reduced the damages by half or to $1,005.12.

I am of opinion that the Court of King's Bench erred in the test they accepted as to the value of the goods at the time and place of shipment. That value, I think, was not the price which under a yearly contract for the entire output of the textile company's mills it had bought the goods for, but the market value of those goods to it at the time and place of shipment of the goods. Its contract for the purchase of the entire output of the mills may or may not have been a good one; it may or may not have been improvident. It is not evidence of the market value of the goods at the time and place of shipment which was proved independently as very nearly double the cost to it from the mills. The carrier had nothing to do with that price. If it had paid double the market value, it certainly could not recover such value from the carrier, nor can the fact of its having purchased at less than the market price at the time of shipment avail against the market value. An ordinary purchase in open market would be very different.

The evidence, uncontradicted at the trial, shewed that the goods had been purchased by plaintiff for resale in Montreal where their market value at the time of shipment was between 8 and 8⅝ cents per pound and that the only difference between the market value in Quebec and Montreal was the cost of carriage from Quebec to Montreal. This cost, $71.25, was no doubt inadvertently not deducted from the damages awarded in the Superior Court and must be, of course, deducted now.

In some way or another which has not been explained this vital and necessary evidence of the market value of the goods in Quebec at the time and place of shipment was overlooked by the Court of King's Bench. There, however, we find it in the record clear and distinct and uncontradicted, and so finding it must render our judgment accordingly.

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MONTREAL COTTON AND WOOL WASTE CO. v. CANADA STEAMSHIP LINES.

Davies, C.J.

A question was raised during the argument as to whether the bill of lading or contract of carriage was not illegal as contravening sec. 4 of the Statute 9-10 Edw. VII., 1910 (Can.), ch. 61, but as the defendant, respondent, so far from relying on that section, distinctly rests its case upon the validity of the contract I do not deem it necessary to discuss the question.

In my judgment the appeal must be allowed with costs and the judgment of the Superior Court restored with a reduction of the amount by the sum of $71.25, the cost of the carriage between Quebec and Montreal.

The case of *Wertheim* v. *Chicoutimi Pulp Co.*, [1911] A.C. 301, 80 L.J. (P.C.) 91, is, I think, much in point in some of the material points involved in this appeal. The head-note of that case in the *Law Journal* report states the decision of their Lordships to have been, *inter alia*, as follows, 80 L.J. (P.C.) 91:—

> Where a contract provided for the delivery of goods at a place where there was no market for them, damages for non-delivery should be calculated with reference to the market at which the purchaser, as the vendor knew, intended to sell them, with allowance for the cost of carriage.

Idington, J.

IDINGTON, J.:—The only evidence we have for our guide as to the value of the goods in question when destroyed, explicitly puts them at market prices in Montreal supplemented by clear and express evidence of their value in Montreal at the time in question and further, in accordance with common sense that their value in Quebec, the point of shipment in question, was the same less the expense of transportation from Quebec to Montreal.

Thus, even under the contract insisted upon by the respondent —of the legality of which there may be a doubt upon which I do not pass because the point was not taken below—the value is amply demonstrated.

What right has the respondent to reduce the value to the cost price, at another point than Quebec, of the goods which may have been got at a bargain, due to business foresight on the part of appellant, long before the time in question?

The appeal should be allowed with costs and the damages assessed on the basis of the market value sworn to.

Anglin, J.

ANGLIN, J.:—The defendant comes into Court admitting liability. The sole question at issue is the measure of damages to which the plaintiff is entitled. The defendant asserts that that

measure is fixed by the terms of the special clause in the bill of lading under which the goods were shipped for the loss of which the plaintiff sues. The plaintiff contests the validity of this special clause on the ground that it contravenes sec. 4 of 9-10 Edw. VII. 1910, ch. 61. But it is probably unnecessary to determine that question and I express no opinion upon it.

Assuming the validity of the special clause of the bill of lading relied upon, I find myself, with great respect, unable to agree with the view, which seems to have prevailed in the Court of King's Bench, 29 Que. K.B. 186, that by "the value of the goods at the place and time of shipment" (in this case Quebec) the parties meant the cost price of the goods to the owner at the place where he bought them (in this case Montmorency) plus the charges for freight. I find no justification for such a departure from the ordinary meaning of plain language. "Cost price plus freight" and "value" are by no means the same thing. The utmost that can be said is that the former may afford some evidence of the latter.

The only evidence in the record is that the value of the goods in question was the same in Quebec as in Montreal, due allowance being made for the cost of transportation; and the uncontradicted testimony is that the goods could not have been replaced at the time they were destroyed.

The only evidence of value was given by the plaintiff's manager who tells of actual sales in Montreal on September 4 at 9½ cents, on September 6 at 8⅞ cents and on September 26 at 8 cents. The trial Judge found the value at the date of the breach (Sept. 12) to have been between 8 and 8⅝ cents a pound. He fixed the value "within the terms of the bill of lading" at 8 cents a pound and allowed the plaintiffs as damages on that basis, $2,010.24.

Counsel for the appellant conceded at Bar that there should be a deduction from this amount of $71.25 to cover cost of transportation. I rather think it should be 44/50 of that amount ($62.70) since six bags out of the fifty were duly delivered, only 44 having been destroyed. The trial Judge appears to have fully intended to make this deduction as two *considerants* in his judgment shew. He apparently omitted to do so when finally computing the amount of the damages.

I would allow the appeal with costs here and in the Court of King's Bench and would restore the judgment of the Superior Court modified however to the extent indicated.

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MONTREAL COTTON AND WOOL WASTE CO. v. CANADA STEAMSHIP LINES.

Brodeur, J.

BRODEUR, J.:—The respondent is a navigation company which, in September, 1918, received at Quebec from the Dominion Textile Co. 44 bales of cotton waste and undertook to carry them to Montreal on one of its boats.

It had stipulated in the bill of lading that the amount of damages for which it might be liable should be based on the value of the goods at the point of shipment, namely, Quebec.

I would be led to believe that this clause of the bill of lading was illegal if it had the effect of restricting or diminishing the liability of the owner of the vessel, for I think it would be contrary to 9-10 Edw. VII., ch. 61. (The Water-Carriage of Goods Act.) But it is not necessary to decide this question in the present case, for the litigation turns only on the meaning of the following words of the bill of lading, "value of the goods at the place and time of shipment."

The appellant claims that the navigation company, having lost these 44 bales of waste, should repay the market value of the bales, which would be about 8 cents a pound. The respondent claims that it is only bound to reimburse the price at which purchased, namely, 4 cents a pound. The Superior Court decided in favour of the plaintiff-appellant, but in an Appellate Court the defendant succeeded, 29 Que. K.B. 186.

Articles 1073, 1074 and 1075 of the Civil Code shew us how the damages should be estimated. If a contract is unexecuted, the damages due by the one who violates it ought to replace all the advantages upon which the creditor might reasonably count, and the debtor is only held liable for damages which have been forseen and which follow immediately and directly upon such inexecution, unless there was fraud on his part; and no one suggests that the defendant rendered itself guilty of fraud.

In a contract for carriage, if the carrier loses the article he should reimburse its entire value, Baudry-Lacantinerie, 3rd ed., vol. 22, No. 2574.

It is admitted by both parties that the liability of the navigation company should be determined in the present case by the value of the goods at the port of shipment. Now, what is this value?

The defendant says that it is the price paid by the plaintiff to the Dominion Textile Co. The plaintiff claims that the price it paid was very low, and did not represent the actual market value.

And it proved by a witness, whose evidence is not contradicted, that the actual value of the goods was about 8 cents a pound. He tells us that, at Quebec, it was impossible to procure in the market goods of this kind and that the nearest place where they could be got was at Montreal, where they were worth about 8 cents, plus cost of carriage.

There is no doubt, as was decided in *Wertheim* v. *Chicoutimi Pulp Co.*, [1911] A.C. 301, 80 L.J. (P.C.) 91, that in such a case recourse might be had to the market price at Montreal in order to shew the value of the goods at Quebec.

The evidence shews that the goods had been sold, under a long term contract, to the appellant by the Dominion Textile Co. It was a contract which might have its advantages but which also had its drawbacks. In this case what amount would reimburse the consignor? Is it the value of the goods, or, rather, is it the price? Baudry-Lacantinerie (No. 3585) puts this question and answers it as follows:—

> When the goods had been sold by the shipper to the consignee, is it their value or the sale price which should be reimbursed by the carrier? It seems to us that the first solution leaves no doubt in a case where the price was *less* than th ir value, and that the goods had travelled at the risk of the shipper or at the risk of the consignee . . . In every case, at whosever risk the goods travel it is, under the common law, the *value* of the article which must be reimbursed.

In the present case, the purchase price was less than the value of the goods. Then, adopting the opinion of the above authority, I am compelled to say the Appellate Court was in error in basing its judgment upon the price paid by the appellant company.

The appeal must be maintained with costs of this Court and of the Appellate Court. The judgment of the Superior Court should be restored. There should be deducted from this latter judgment a sum of $62.70, which was included by mistake.

Mignault, J.

MIGNAULT, J.:—This action arose out of a shipment, in September, 1918, of 50 bales of cotton waste consigned to the appellant at Montreal by the Dominion Textile Co., Ltd.; from which company they had been bought by the appellant at the Dominion Textile Co.'s Mills at Montmorency, Que., the shipment being made from Quebec to Montreal. The bill of lading contained the following condition:—

> The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the goods at the place and time of

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shipment under this bill of lading (including the freight and other charges if paid and the duty if paid or payable and not refunded), unless a lower value has been represented in writing by the shipper or has been agreed upon or is determined by the classification or tariff upon which the rate is based, in any of which events such lower value shall be the amount to govern such computation, whether or not such loss or damage occurs from negligence.

The appellant alleged that when the said bales reached Montreal, employees of the respondent, through carelessness and neglect, instead of placing them in the respondent's sheds, left them on the dock exposed to the rain, where 44 of the said bales were spoiled, and the appellant claimed as damages $2,387.16.

By its plea the respondent, setting up the above condition, admitted its liability for the said loss "computed on the basis of the value of the said goods at the place and time of shipment as provided in the bill of lading," so that the only question is as to the amount to which the appellant is entitled.

The trial Judge (Maclennan, J.) found that the goods had been purchased by the appellant from the Dominion Textile Co. at 4 cents per pound, that there were no users of said goods in Quebec, but there were users and a market for them in Montreal where they were being brought for resale by the appellant, and where their market value, at the time of shipment, was between 8 and 8⅝ cents per pound; that the true value of said goods to the appellant at the time and place of shipment was not the invoice price or cost at which the appellant had bought them under a yearly contract, but what they would fetch in the open market at such time and place; that the only difference between the market value of said goods in Quebec and Montreal was the cost of their carriage from Quebec to Montreal, and that their value at Quebec might be taken to be the market value thereof in the ordinary course of business in the open market at Montreal, less the cost of carriage from Quebec to Montreal; and fixing their value at 8 cents per pound for 44 bales, weighing 25,128 pounds, the trial Judge gave judgment to the appellant for $2,010.24.

On appeal to the Court of King's Bench, 29 Que. K.B. 186, the latter Court reduced the judgment to $1,076.12 for the following reasons:—

Considering that the 44 bales of cotton waste in question were damaged and spoiled, as the defendant claims and the Superior Court has decided;

Considering, however, that the basis of the amount settled by the Superior Court is incorrect, and that the said judgment of the Superior Court—seeing

that the purchase price was 4 cents a pound—allowed the appellant a profit of 100% on the goods in question, without having re-sold them, without having touched them, and without having been at any expense or incurred any risk in the matter; that the amount of the compensation, in a case such as this, is, other things being equal, that of the loss sustained or of the price at which the purchaser could procure other like goods, but that, in the present action, there is, between the parties, a contract contained in the way-bill and which governs the question in the present instance; that this way-bill states that the amount of the loss or damage for which the appellant is liable should be calculated on the basis of the value of the goods at the time and place of shipment; that the goods in question were purchased at Montmorency, near Quebec, from the Montreal Textile Co., at the price of 4 cents a pound; that this sum fixes the value of the goods in question at the point of shipment, as the way bill requires; that in allowing 8 cents a pound the Superior Court allowed a value not at the place of shipment, as the contract requires—which is the agreement between the parties—but at Montreal, the place of delivery, and that the way-bill has specially provided that the liability of the appellant should be that of the value at the place of shipment.

The appellant now appeals to this Court from the latter judgment.

With all possible respect, I think the judgment appealed from is clearly wrong. The measure of damages was fixed by the bill of lading, and it was "the value of the goods at the place and time of shipment." The determination of this value involves a pure question of fact and we have only to look at the evidence, which was properly directed to shew the value of the goods to the appellant, to decide what amount should be awarded.

Mr. Lichtenheim, managing director of the appellant, was called by the latter. He said, in answer to questions put by the appellant's counsel:—

Q. I want to know what they were selling for at the market price? A. Your Lordship, the goods were purchased on a contract many months before they were ready for sale and you cannot sell those goods in that way until you obtain possession of them, never knowing whether you are going to get them or not. Q. Those goods were shipped from Quebec? A. Montmorency Falls. Q. The boat company took them from Quebec? A. Yes. Q. You have stated in your examination "on discovery" what the value of those goods was in Montreal? A. Yes. Q. Was there any difference between the value of those goods in Quebec and in Montreal? A. Freight and cartage only. And they could not have been replaced by the company at the price for which we wanted to sell. Q. All I am concerned with is whether there was any difference in the value between Quebec and Montreal, and if so what it was? A. The freight and cartage. That was the market price of the material at that time.

This evidence, which was not contradicted or tested by cross-examination, establishes that the only difference between the

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market value of the goods as between Quebec and Montreal, was the freight and cartage. In his examination on discovery, Lichtenheim swore that he could have sold the goods at 9½ cents per pound if he had them. As the witness testified to sales at 8, 8¾ and 9 cents, the trial Judge accepted the value as being 8 cents per pound, finding that the only difference between the price at Montreal and Quebec was the cost of carriage.

I take it that we are bound by this evidence which, as I have said, was not contradicted, and it establishes the value of the goods at Quebec, the place of shipment, by merely deducting from their value in Montreal the cost of shipment to the latter city. It also seems to me that in the case of two cities relatively near to each other, even though there be no buyers in the one, if there be buyers in the other, the value of the goods in the former can be fairly considered as being that at which they could be sold in the latter, less the cost of carriage. I am also of opinion that the value to be considered is the value to the purchaser: *Wertheim* v. *Chicoutimi Pulp Co.*, [1911] A.C. 301, at 307-8. This is in agreement with art. 1073 of the Civil Code, which allows to the creditor the profit of which he has been deprived, and the appellant would not be compensated according to this rule if he were given only the price he paid for the goods, excluding any profit on the same.

I have duly considered the reasons of the Judges of the Court of King's Bench, but, with deference, it seems to me that under this contract, and there is involved here merely a matter of contract, it cannot be said that the value of the goods is the purchase price of the same, or the price at which similar goods could be bought by the appellant. It is noteworthy that Lichtenheim swears he could not have purchased identical goods in the open market, but it suffices to say that the measure of damages was fixed by the contract, and was not the price at which the goods were purchased but their value at the place and time of shipment. This raises merely a question of fact and unfortunately for the respondent the evidence of this value, uncontradicted as it was, is conclusive against it.

Mr. Perron, for the appellant, conceded at the argument that the cost of the carriage of the goods from Quebec to Montreal, which the bill of lading stated to have been $71.39, for 50 bales,

making $62.82 for the 44 bales in question, should be deducted from the value found by the trial Judge. This deduction however should be without effect on the costs.

I would therefore allow the appeal with costs here and in the Court of King's Bench, 29 Que. K.B. 186, and restore the judgment of the trial Judge, reducing however the amount allowed to $1,947.42. *Appeal allowed.*

DRYSDALE v. REID.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. November 1, 1920.

NEGLIGENCE (§ I C—35)—OPEN WELL ACT, R.S.S. 1909, CH. 124—OPEN WELL—WHAT IS—QUESTION OF FACT.

Whether a well is an open well under the Open Well Act, R.S.S. 1909, ch. 124, is a question of fact to be proved at the trial. The fact that it is enclosed by a covering does not prevent it from being an open well if such covering is not sufficient to prevent stock falling in, nor is the fact that an animal does fall in without any evidence as to how it occurs, proof that the covering is so insecure as to make it an open well.

[*Hill* v. *Mallack* (1917), 37 D.L.R. 709, 10 S.L.R. 419, referred to. See Annotation, Negligence, 9 D.L.R. 76.

Statement.

APPEAL by plaintiff from the trial judgment dismissing an action for damages for the loss of a horse which fell into a well on defendant's premises and was killed. Affirmed by an equally divided Court.

A. Buhr, for appellant; *H. C. Pope*, for respondent.

Haultain, C.J.S.

HAULTAIN, C.J.S.:—In this case a horse of the plaintiff, which was lawfully at large, went from the premises of the plaintiff to an adjoining highway and thence on to land belonging to the defendant, which was not fenced. The horse was subsequently found dead in a well which was on the defendant's land. The defendant's land was not fenced, nor was there any fence enclosing the well. The well was about 12 feet deep and was cribbed. The cribbing extended about 2 ft. 6 in. above the level of the ground, and consisted of one-inch boards fastened to 4 corner scantlings running from the bottom of the well to the height above mentioned above the ground. The well was covered by one-inch boards. This structure was built in 1913, and up to the time of the accident had never been repaired. The well was in the middle of a slough, which, according to the evidence, was usually full of water in the spring which surrounded the whole structure.

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This action was brought by the plaintiff, who claims damages to the extent of the value of the horse. The claim is founded on alternative grounds:

1. That the well came within the provisions of sec. 2 of the Open Well Act, R.S.S. 1909, ch. 124, which enacts that: "2. No person shall have on his premises or on any premises occupied by him any open well or other excavation in the nature thereof of a sufficient area and depth to be dangerous to stock and accessible to stock of any other person which may come or stray upon such premises." 2. That the well, which was accessible to animals straying off the highway on to the unfenced land of the defendant, constituted a trap.

On the trial of the action the trial Judge found that the well was reasonably protected and enclosed, and that the defendant was therefore not liable on either branch of the case.

On the first branch of the case, the question to be determined is, was the well in question an "open well" within the meaning of the Act above quoted? It was argued on behalf of the plaintiff that an open well is a well which is not enclosed by a fence, and sec. 13 *a*. of Geo. V. 1910-11 (Sask.), ch. 41, was cited in support of that contention. This section amends sec. 4 of R.S.S. 1909, ch. 124. The section as amended will read as follows:—

4. No proceeding to recover any penalty for violation of any of the provisions of this Act shall be taken except at the instance of a person whose stock has been killed or injured or whose stock is liable to be killed or injured by reason of the non-observance of such provisions and in any such proceeding it shall be a sufficient defence thereto if it be shewn that such well, excavation or grain was kept enclosed by a lawful fence, (a) as defined by by-law made under the provisions of sec. 209 *a* of the Rural Municipality Act of the rural municipality within which such fence is situate or, in case no such by-law is in force in such rural municipality, as defined by the Stray Animals Act.

This section only applies to prosecutions under the Open Well Act, although, no doubt, enclosure by a lawful fence would be a good defence to a civil action. The well would be none the less an "open well," although enclosed by a lawful fence.

The following meanings are given to the word "open" in the New English Dictionary:

1. Of a containing space such as a house, box, etc., having its gate, door, lid or some part of its enclosing boundary drawn aside or removed. 2. Of a space; not shut in or confined; not surrounded by barriers so that there is free access, or passage on all or nearly all sides; unenclosed, unwalled, unconfined; 3. Not covered over or covered in, having no roof, lid or other covering; not covered so as to be concealed or protected.

The well in question was not an open well, in one sense of the term, under any of the above definitions; in other words, it was not a mere hole in the ground. I do not think, however, that

the evil aimed at by the Act was merely a hole in the ground in the form of a well, or other excavation in the nature thereof. Taking "open" as the opposite of "covered" or enclosed, I should be prepared to hold that a well which, by the insufficient nature of its covering or walls, is dangerous to stock, is an "open well" within the meaning of the Act. This well was accessible to stock as it was not surrounded by any sort of fence, and that it was dangerous is shewn by the result. The facts speak for themselves. It is not altogether surprising that a structure built by the defendant himself nearly 7 years before the accident and never repaired, surrounded and partially covered by water for some time every spring as it was should have become insecure.

The case of *Hill* v. *Mallack* (1917), 37 D.L.R. 709, 10 S.L.R. 419, was relied upon by the trial Judge as on all fours with the present case. I must, with deference, dissent from that view. In that case the evidence shewed that the defendant had stored grain in a portable granary, which, at the time, was sufficient to properly protect the grain and keep it from the reach of any stock and that there were no holes or cracks through which the grain could escape. Some grain did however escape through a hole or opening which was made through no default or negligence on the part of the defendant. The plaintiff's horses strayed upon the premises, and died or were injured from eating the grain which had escaped. It was held that,

> Where a granary is constructed as the one in question was constructed, and after grain is stored therein and without the fault or negligence of the defendant, an injury occurs to the granary which causes the grain to escape, which causes damage to animals straying upon the premises, the defendant does not, within the meaning of the statute (R.S.S. 1909, ch. 124, sec. 3), "have or store on his premises grain accessible to stock."

The facts of that case, in my opinion, clearly distinguish it from the present case. There the granary was securely constructed at the time of storing the grain, and the grain escaped through no negligence on the part of the owner or faulty construction. There is no evidence in the present case that the structure about the well was ever sufficient to prevent animals from falling into the well, and, even if it had been so originally, it is quite clear that after 7 years without any repairs it was not sufficient for the purpose.

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I would therefore allow the appeal with costs. The judgment below will be set aside and judgment entered for the plaintiff for $275 and his costs of action.

NEWLANDS, J.A.:—This is an action by plaintiff for the value of a horse which was found dead in a well on defendant's premises. The plaintiff claims that defendant is liable either under the Open Well Act, or because the well was a trap dangerous to animals which might come or stray on his premises, the same not being surrounded by a fence.

The trial Judge found:—

> In so far as his action is framed at common law, I have no hesitation whatever in finding as a matter of proved fact that the well was not a trap, or constructed or constituted in such a way as to make it a trap for stock which might trespass or in any other way come upon the defendant's premises. In so far as the alternative claim for damages under the Open Well Act is concerned, I am equally strong in my opinion that the defendant has proved beyond peradventure that the well was constructed in a reasonably strong manner and was a reasonable protection against stock which might come upon the defendant's premises and that consequently there is no liability under the evidence on the part of the defendant for the damage which the plaintiff sustained by reason of his mare falling into the defendant's well.

As the evidence shewed that the walls of the well covering were made of 1 inch lumber and extended 2 ft. 6 inches above the ground, with corner posts of 2 inch by 4 inch scantling, and with a cover on the top made of the same lumber, I think that the well was sufficiently covered to comply with the provisions of the Open Well Act, and for the same reason it could not be considered a trap. There was no evidence how the horse in question fell into the well, and, the evidence having shewn that the well was enclosed, the burden was on the plaintiff to shew that it was so insecurely closed that plaintiff's horse fell into it without any fault on the part of the horse. The fact that the material of which the covering of the well was made was 7 years old is not, in my opinion, any evidence that it was insecure, nor is the fact that the horse was found dead in the well. The further fact that the plaintiff owned this land the previous year and left the well in the condition in which it was is some evidence that plaintiff himself was of the opinion that the covering was a sufficient protection against stock falling into it.

I am of the opinion that the question, whether a well is an open well or not, is a question of fact to be proved at the trial.

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The mere fact that it is enclosed by a covering would not prevent it from being an open well, if such covering was not sufficient to prevent stock from falling in, nor, on the other hand, is the fact that an animal does fall into it, without any evidence as to how that occurred, prove that the covering is so insecure as to make it an open well.

As the trial Judge has found on the evidence that the well was neither an open well nor a trap, and there is evidence to support his decision, I am of the opinion that the plaintiff has failed to make out his case, and that the appeal should therefore be dismissed.

Lamont, J.A. LAMONT, J.A., concurs with HAULTAIN, C.J.S.

Elwood, J.A. ELWOOD, J.A., concurs with NEWLANDS, J.A.

Appeal dismissed by an equally divided Court.

PRESTON v. HILTON.

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Ontario Supreme Court, Orde, J. August 12, 1920.

1. MUNICIPAL CORPORATIONS (§ II C—134d)—BY-LAW OF CITY RESTRICTING BUILDING—BREACH—PERSONAL ACTION BY PROPERTY OWNER TO RESTRAIN—LOCUS STANDI OF PLAINTIFF.

A by-law which prohibits the doing of a thing otherwise lawful gives no private right of action in an individual. The remedy for its breach must be found within the four corners of the by-law itself or by injunction at the suit of the municipal corporation.

[*City of Toronto* v. *Williams* (1912), 5 D.L.R. 659, 27 O.L.R. 186, referred to; *Tompkins* v. *Brockville Rink Co.* (1899), 31 O.R. 124; *Mullis* v. *Hubbard*, [1903], 2 Ch. 431, followed. See also annotation, Municipal regulation of building permits, 7 D.L.R. 422.

2. ASSIGNMENT (§ I—5)—PERSONAL CLAIM FOR INJUNCTION TO PREVENT INJURY—ASSIGNABILITY.

A personal claim for an injunction to prevent either a threatened future injury or the continuance of an alleged existing injury is not assignable.

[*Markt & Co., Limited* v. *Knight Steamship Co.*, [1910] 2 K.B. 1021, applied.]

3. NUISANCE (§ II A—31)—MORTGAGEE—RIGHT TO INJUNCTION TO RESTRAIN NUISANCE—INJURY TO SECURITY.

The right of a mortgagee to an injunction to restrain a threatened nuisance if it exists at all, must be limited to cases where it is clearly shewn that the alleged nuisance would injure the security as mortgagee.

[*Ocean Accident and Guarantee Corporation* v. *Ilford Gas Co.*, [1905] 2 K.B. 493, referred to.]

Statement. ACTION for a declaration that certain permits issued by an officer of the Corporation of the City of Toronto to the defendants Z. Hilton and D. Hilton to build stables and a waggon-shed on a

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certain street of the city were issued contrary to a city by-law and were illegally and improperly issued and should be set aside, and for an injunction.

A. C. McMaster and *J. M. Bullen*, for the plaintiff.

W. J. McWhinney, K.C., and *E. P. Brown*, for the defendants Hilton.

Irving S. Fairty, for the Corporation of the City of Toronto, added as defendants.

Orde, J.

ORDE, J.:—This action was tried before me without a jury at Toronto on the 1st, 9th, and 20th April, 1920, judgment being reserved. Owing to a change in the ownership of the plaintiff's lands, which took place almost immediately after the trial, and certain subsequent proceedings resulting therefrom, the matter came before me again in Court on the 28th June, 1920, upon a motion made by the defendants Hilton. Before I can deal with the merits of the issues raised upon the trial, it is now necessary to determine whether what has happened since the trial may not have put an end to the matter altogether so far as the trial of this action is concerned.

The action was commenced on the 28th May, 1919, by Byron Preston against Z. Hilton and D. Hilton, who were carrying on business together in partnership as Hilton Brothers and also as Hilton Bread Company. The plaintiff alleged that he was a resident and property-owner on First avenue, Toronto, and claimed to sue on behalf of himself and all other property-owners on the said avenue. It was also alleged that the defendants Hilton had obtained permits from the city architect's department to build stables on the north side of First avenue and a waggon-shed on the south side of First avenue, contrary to the provisions of a certain by-law; that the said defendants had commenced to erect waggon-sheds on the south side, and had indicated their intention of proceeding with the erection of stables on the north side; and that the plaintiff would be greatly damaged by the erection of the stables and waggon-sheds and the presence of horses so near the dwelling houses. The plaintiff claimed a declaration that the permits were illegally and improperly issued, and should be set aside, and an injunction.

On the 27th June, 1919, an order was made adding the Corporation of the City of Toronto as defendants, and on the 9th September, 1919, Elizabeth Preston was substituted for Byron Preston as plaintiff.

At the trial I gave leave to the plaintiff to amend the statement of claim by setting up, in effect, that the erection of the stables and waggon-shed constituted a nuisance, and claiming a declaration to that effect.

After the conclusion of the trial on the 20th April, 1920, it was brought to my notice that the plaintiff Elizabeth Preston had on that day sold the property upon the ownership and occupancy of which her action is based, being house No. 26 on the north side of First avenue, to one Ann McClelland, taking from the purchaser a mortgage for part of the purchase-money. The plaintiff thereupon vacated the house, and possession was taken by Ann McClelland.

On the 29th May, 1920, Ann McClelland took out an order to continue proceedings, in which it was recited that the plaintiff had, on the 20th April, 1920, assigned and conveyed all her interest in the cause of action to the said Ann McClelland, and she was thereby substituted as plaintiff for Elizabeth Preston.

The defendants Hilton then gave notice, by my leave and direction, of a motion to extend the time for applying to discharge or vary the order to continue proceedings of the 29th May, and to discharge or vary the same, upon several grounds.

When this motion came on, counsel for Elizabeth Preston and Ann McClelland stated that the order to continue proceedings had been issued by inadvertence, and that it was not intended to substitute Ann McClelland for Elizabeth Preston as plaintiff but to add Ann McClelland as a plaintiff, and her written consent to be so added was duly produced and filed.

In view of the fact that the trial had taken three whole days, during which a great many witnesses were examined, and the action purported to have been brought on behalf not only of the plaintiff but of all other property-owners on First avenue, I preferred that the situation created by Elizabeth Preston's sale of her property and her removal from the street and the effect thereof upon the present action should be considered upon its merits without further technical complications, and the matter was argued before me on this footing.

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It is necessary at the outset that the nature of the action and the relief sought should be clearly understood. The action upon the amended pleadings is twofold: first, the plaintiff asks for a declaration that certain building permits granted by the City Architect are illegal and should be set aside and the defendants enjoined; and, second, she alleges that the buildings proposed to be erected will constitute a nuisance and asks that the erection thereof be restrained. No damages for any past injury are asked for.

The defendants contend that the effect of Elizabeth Preston's sale of her property and her removal therefrom is to bring the action to an end, and that neither the addition nor the substitution of Ann McClelland as a plaintiff can keep the action alive.

Counsel for the plaintiff urge that the action is still alive and may proceed to judgment, upon three grounds: (1) that Elizabeth Preston, as mortgagee of the property originally owned and occupied by her, has still a sufficient interest in the cause of action to entitle her to continue in her status as plaintiff; (2) that the cause of action is assignable by Elizabeth Preston to Ann McClelland; and (3) that, as Elizabeth Preston claims on behalf of herself and all other property-owners on the street, any other person belonging to the interested class can be substituted as a party plaintiff at any time.

Before considering these propositions, it will be necessary to determine the exact nature of the two distinct causes of action upon which this action is based, and whether or not they are assignable at all.

The plaintiff first seeks a declaration that certain building permits were illegally issued by the City Architect, as being in contravention of a certain by-law restricting the class of buildings which might be erected on First avenue, and an injunction. The by-law in question (No. 8078, as amended by No. 8080) prohibits the erection of any building to be used as "a livery, a boarding or sales stables or a stable in which horses are kept for hire or kept for use with vehicles in conveying passengers or for express purposes, a stable for horses for delivery purposes . . . on the property on either side of First avenue between Broadview avenue and Bolton avenue," and fixes a penalty for its breach.

I can see no distinction in principle between this by-law and that in the case of *Tompkins* v. *Brockville Rink Co.* (1899), 31 O.R. 124. Mr. McMaster sought to distinguish that case on the ground that the by-law in question there, being a by-law intended to lessen the danger from fire, by prohibiting the erection of wooden buildings within a certain area, was intended to benefit the whole community. But I am unable to see the distinction. In both cases the area within which certain classes of buildings were not to be erected is limited. Doubtless the primary purpose of a by-law such as that in question here is to protect those dwelling in a certain neighbourhood from annoyance or damage resulting from the presence of certain kinds of buildings, but the by-law benefits the whole community. A fire by-law is primarily intended to protect those within the fire-area. The difference, if any, is only in degree, not in principle. On the authority of the *Tompkins* case, and also of *Mullis* v. *Hubbard*, [1903] 2 Ch. 431, and *Mackenzie* v. *City of Toronto* (1915), 7 O.W.N. 820, I do not see how, on this branch of the case, any action can be maintained by a private individual either against the Hilton Brothers or against the Corporation of the City of Toronto. Nor do I see how the plaintiff's position can be strengthened by her claim to sue on behalf of the other owners of property on First avenue. Had they all been joined as plaintiffs, the position would be the same. The *Tompkins* case failed, not because the plaintiff did not sufficiently represent any class of persons, but because a by-law of this character, which prohibits the doing of a thing otherwise lawful, gives rise to no private right of action in an individual. The remedy for its breach is to be found within the four corners of the by-law itself, as pointed out in the *Tompkins* case, at p. 129, or by injunction at the suit of the municipal corporation, as in *City of Toronto* v. *Williams* (1912), 27 O.L.R. 186, 5 D.L.R. 659. Consequently, so far as the action is brought for a declaration and injunction as to the alleged breach of the city by-law, neither the plaintiff Elizabeth Preston nor the property-owners whom she claims to represent have any *locus standi*, and it of course follows that Ann McClelland is in the same position.

Now, what is the plaintiff's position with regard to the second cause of action, that arising out of the allegation that the stables

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and waggon-shed will constitute a nuisance? The plaintiff does not ask for damages. It is clear that a personal claim for damages arising out of tort cannot be assigned; and, whatever doubts may exist as to the assignability of a right of action for damages to property as a result of certain English decisions and of the views of certain text-writers (see the judgment of Anglin, J., in *McCormack* v. *Toronto R.W. Co.* (1907), 13 O.L.R. 656, at p. 659), the decision of the Divisional Court in that case is clear authority that even a claim for damages for injury to property is not an assignable chose in action.

There is, of course, a clear distinction between an assignment of a cause of action *ex delicto* and the assignment of the fruits of such an action. In *Glegg* v. *Bromley*, [1912] 3 K.B. 474, the Court of Appeal in England held that the fruits of an action for damages for false representation, as and when recovered, might be assigned, but this was not an assignment of the cause of action itself. The action must have continued in the name of the assignor.

If a claim for damage to property already sustained as a result of a tort cannot be assigned, it is difficult to see how a claim for an injunction designed to prevent either a threatened future injury or the continuance of an alleged existing injury can be assigned. In so far as such an injury or threatened injury is personal, it is clearly not assignable. Can the right of action for an injunction be assigned because the injury or threatened injury is to the property of the plaintiff? The only authority which Mr. McMaster was able to give me on this point was *Jones* v. *Simes* (1890), 43 Ch.D. 607. There the distinction between the survivorship of a right of action for damages at common law and the survivorship of the equitable right to a mandatory injunction to prevent the obstruction to the access of light to a house was pointed out, and it was held that the right to have the building removed was an equitable right which together with the remedy by injunction devolved upon or survived to the devisee of the property. In that case the injury or threatened injury was to the easement of light belonging to the plaintiff's land; and the objectionable building, if allowed to continue, would, to the extent of its interference with the passage of light to the plaintiff's property, have destroyed the easement. The devisee would

clearly have had an independent right of action; but, as pointed out by Chitty, J., at p. 612, it was important in point of time for the devisee to be able to stand upon the footing of the action begun by the testatrix rather than to be obliged to issue a new writ. That case is clearly distinguishable from the present. Here the injury or threatened injury, though it may affect the plaintiff's property, does so only by reducing its enjoyment or by impairing its value. It cannot in any way affect or cut down or destroy any right of property. Whether in every case the assignability of a chose in action is coincident with survivorship may be open to question; but, in my opinion, the claim for an injunction to restrain an injury or threatened injury to property on the ground of nuisance is a mere personal action, to which the maxim *actio personalis moritur cum personâ* applies. That being so, *â fortiori* it is not assignable.

So far as Ann McClelland claims either by virtue of her purchase from Elizabeth Preston or by virtue of any express assignment of the chose in action (no such express assignment has in fact been made, so far as I am aware), I hold that the plaintiff's cause of action could not be assigned or transmitted to her, and that she cannot be substituted for the plaintiff, as having acquired or succeeded to the latter's right (if any) to a declaration and injunction in respect of the alleged nuisance.

But Mr. McMaster urges that Ann McClelland, as one of the class for whose benefit Elizabeth Preston claims to sue, can be added or substituted as a party plaintiff. It is not clear that Ann McClelland was one of the class at the time the action was brought, but for the purpose of dealing with this point I shall assume that she was. In my judgment, an action either for damages for a nuisance or for an injunction to restrain a nuisance cannot be brought in a representative capacity. Though there may be many others who may sustain or fear damage from the nuisance it is clear that the injury or threatened injury must be peculiar to each person alone or to his own property. A class or representative action is permissible, speaking broadly, only in cases where all those whom the plaintiff claims to represent are in the same interest (by which is meant not merely a like or similar interest) as the plaintiff, such as, for example, an action to set aside a conveyance in fraud of creditors, where all the creditors

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share ratably in the successful result of the action, or an action on behalf of all the shareholders of a company, or of all the policy-holders in an insurance company, or of all the debenture-holders secured by the same mortgage trust deed, or of all the part-owners of a ship. This is very clearly brought out in *Markt & Co. Limited* v. *Knight Steamship Co. Limited*, [1910] 2 K.B. 1021, and especially in the judgment of Fletcher Moulton, L.J., at pp. 1035 *et seq.*, in which the distinction between the right to join several plaintiffs in the same action and the right of one plaintiff to bring a representative action is very fully discussed. What he says there is equally applicable here. All those who claimed to be entitled to relief against the threatened injury might possibly have been joined as plaintiffs under Rule 66, but this did not entitle one of the parties who claimed to be damnified to sue on behalf of the others as their representative. As Lord Justice Fletcher Moulton says at p. 1039: "The essential condition of a representative action is that the persons who are to be represented have the same interests as the plaintiff in one and the same cause or matter. There must therefore be a common interest alike in the sense that its subject and its relation to that subject must be the same." And he then proceeds to amplify this principle, and, at p. 1040, says: "The proper domain of a representative action is where there are like rights against a common fund, or where a class of people have a community of interest in some subject-matter." See also *Johnston* v. *Consumers' Gas Co.* (1896), 23 A.R. (Ont.) 566, and especially the judgment of Maclennan, J.A., at pp. 573-4. There is no such community of interest here. In this case each person whom the plaintiff claims to represent has a distinct and separate cause of action against the Hiltons for the special injury and damage, if any, which that person may sustain by reason of the alleged nuisance or threatened nuisance. It is only because of that special injury that the individual can sue at all. To the extent that the injury affects each one as a member of the public, relief can be obtained only at the suit of the Attorney-General. That the plaintiff cannot avoid this rule, by claiming to represent all those members of the public who are affected by the attempted wrongful act, is established by *Parsons* v. *City of London* (1911), 3 O.W.N. 55. The effort of the plaintiff to substitute another member of the so-called "class" therefore fails.

There remains, now, to be considered the claim that Elizabeth Preston as mortgagee may still maintain the action. The right of a mortgagee to an injunction to restrain a threatened nuisance, if it exists at all, must be limited to cases where it is clearly shewn that the alleged nuisance would injure her security as mortgagee. The question of the effect upon the comfort of the occupant of the property would not be a factor except to the extent that it might lessen the value of the property and so injure the mortgagee's security. This question is touched upon but not really dealt with in *Ocean Accident and Guarantee Corporation* v. *Ilford Gas Co.*, [1905] 2 K.B. 493. But on the principle that the reversioner may obtain an injunction to restrain an injury threatened to his reversion (Kerr on Injunctions, 5th ed., p. 153), I see no reason why a mortgagee should not in a proper case obtain an injunction to restrain a nuisance which threatens his security.

Assuming, therefore, that, as mortgagee of No. 26 First avenue, Elizabeth Preston may bring such an action as this, it becomes necessary to determine whether or not she has made out a case of any threatened injury to her security which would entitle her to an injunction. The evidence adduced at the trial was almost wholly directed towards establishing that the waggon-sheds and stables would interfere with the comfort of the residents on First avenue, and would reduce the value of their properties. In view of the possibility of another action being brought by one or more of the other residents as a result of my decision in this case, it might embarrass the trial of that action if I were to come to any conclusion upon the issues of fact as they stood at the conclusion of the trial. No evidence, of course, was given as to the effect which the alleged nuisance might have upon the security afforded by a mortgage upon No. 26. I do not see how, under the circumstances, I can find that the plaintiff has established any damage, either existing or threatened, to her security as mortgagee which would justify the granting of an injunction, nor would it be fair to the defendants to reopen the trial for the purpose of trying what is in reality a new issue, not raised upon the pleadings. It must not be overlooked that the injury, if any, to the mortgagee's security might be sufficiently remedied by an award of damages. It is worthy of note that the plaintiff was able to sell her property and was satisfied with the security of a mortgage upon it, notwith-

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standing the threatened injury. The difficulty in which the plaintiff finds herself is of her own creation, and I do not think at this late stage she should be permitted to surmount it by any amendment or by a continuation of the trial.

Judgment will therefore go, discharging the order of the 29th May, 1920, which purported to substitute Ann McClelland for Elizabeth Preston as plaintiff, with costs against Ann McClelland, and also dismissing the action with costs against Elizabeth Preston.

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BROWN v. BROWN.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Ives, JJ. December 9, 1920.

COURTS (§ II A—150)—ACTION FOR ALIMONY—APPLICATION FOR INTERIM ALIMONY—JURISDICTION OF COURT TO GRANT.

In an action for alimony the Court has jurisdiction to grant interim alimony in a proper case.

[*Lee* v. *Lee* (1920), 54 D.L.R. 608; *Secrest* v. *Secrest* (1912), 5 D.L.R. 833, 5 Alta L.R. 389, referred to.]

Statement.

APPEAL from an order of Simmons, J., setting aside an order of the Master for interim alimony. Reversed.

Wright & Wright, for plaintiff.

Short, Ross, Selwood, Shaw & Mayhood, for defendant.

Harvey, C.J.

HARVEY, C.J.:—This is an action for alimony. The Master made an order for interim alimony and disbursements. On appeal to Simmons, J., the order was set aside, no doubt, on the ground that there was no right to alimony of any kind since in another case, *Lee* v. *Lee* (1920), 54 D.L.R. 608, the same Judge had taken the same position to bring the question before this Division. Subsequent to his order, however, this Division decided in the other case (54 D.L.R. 608), that a right to alimony without more existed and could be enforced in this Court.

It is argued now, however, that notwithstanding that there is no right to interim alimony and disbursements, which is purely an incident to an action for divorce or some other principal relief, it is true that under the Divorce and Matrimonial Causes Act, there is given no right to maintain a claim for alimony simply, but the right to interim alimony and disbursements is not conferred by the Act directly but merely by conferring upon the Court thereby established all the jurisdiction theretofore exercised by the Ecclesiastical Courts.

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Some sixty years before a civil Divorce Court existed the case of *Wilson* v. *Wilson* was decided in the Ecclesiastical Court in 1797, and is reported in 2 Hagg. Con. 203, 161 E.R. 716. In the judgment of Sir William Scott it is stated that:—

> In suits instituted either by the husband or the wife (for I consider that fact to be indifferent) the wife is a privileged suitor as to costs and alimony; and on the same principle that the whole property is supposed, by law, to be in the husband. If the wife therefore is under the necessity of living apart, it is also necessary that she should be subsisted during the pendency of the suit; and that she should be enabled to procure justice, by being provided with the means of defence.

Even at that time if it were shewn that the wife had independent means of support the presumption of the husband's liability was rebutted as is shewn by another case reported in a foot-note.

Notwithstanding the fact that since that time the principle upon which that rule is said to be based has to some extent changed, the law still holds the husband liable for the wife's necessaries and interim alimony is still granted by the English Courts. The theory in its relation to costs was discussed in a quite recent case in the Court of Appeal, *Gilroy* v. *Gilroy*, [1914] P. 122. Buckley, L.J., at p. 127, said:—

> In the Divorce Court there exists in respect of costs as between husband and wife a state of things which in any other Court would be anomalous, that is to say, that in a litigation in which husband and wife are opposing parties the husband is compellable to pay or to provide for the wife's costs in the current litigation; it is a rule of practice which is based on the state of things which existed when a married woman had no property of her own and it was thought that she ought not to be left defenceless in litigation instituted against her by her husband; that by reason of the relationship between them, she had a right to ask that he should provide her with the means of carrying on the litigation.

And Cozens-Hardy, M.R., points out that in an earlier case, *Ottaway* v. *Hamilton* (1878), 3 C.P.D. 393, it was shewn that the cases proceeded upon the implied authority of the wife to pledge the husband's credit. In the last mentioned case, Thesiger, L.J., at p. 401, stated:—

> It was established that a suit for a separation instituted by a wife upon proper grounds was a "necessary" and that the husband was liable to her proctor for the costs thereof; and I think that upon principle a husband is equally liable for the costs of a suit brought for dissolution of the marriage. A suit for a separation was a "necessary" because a wife stands in need of protection from the cruelty of her husband and a suit for dissolution is equally a "necessary" when to cruelty is superadded adultery.

It is apparent from this that the rule requiring the husband to pay costs and, no doubt, interim alimony, was applied to divorce

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actions because it had been adopted in actions for judicial separation. While an action for alimony is not in form an action for judicial separation inasmuch as the wife does not ask for a declaration of separation yet it is much the same in substance for to establish the right to alimony she must shew that she is justified in living apart from her husband without relieving him of liability for her support. It would seem, therefore, that the practice of allowing interim alimony and disbursements is not one which our action for alimony requires to take from the practice in divorce actions, but rather that divorce actions have adopted it from actions in substance similar to our alimony actions.

But, be that as it may, the reason for it exists with exactly the same force in all such actions and it rests upon the *primâ facie* duty of the husband to support his wife and provide all reasonable necessaries. The practice has been followed in this Court since its formation and for as long before in the Territorial Court as the action for alimony has been maintained and for the reasons stated it is, in my opinion, entirely justified.

I would, therefore, allow the appeal with costs and restore the Master's order, the costs of the appeal from it to be paid by defendant.

Stuart, J. STUART, J., concurs with Harvey, C.J.

Beck, J. BECK, J.:—Master Clarry made an order for interim alimony. The plaintiff appealed. Simmons, J., set aside the order. The defendant appealed. The only question argued was whether this Court had jurisdiction to grant interim alimony.

In the recent case of *Lee* v. *Lee*, 54 D.L.R. 608, this Court decided that it had jurisdiction to grant alimony to a wife in an action solely for alimony.

The question raised in the present case is the jurisdiction to grant interim alimony.

In the case of *Secrest* v. *Secrest* (1912), 5 D.L.R. 833, 5 Alta. L.R. 389, I held that this Court had jurisdiction to do so. Notwithstanding the arguments put forward in the present case I do not find it necessary to add anything to what I said on the former occasion.

I would therefore allow the appeal with costs and set aside the order of Simmons, J., with costs and restore the Master's order.

Ives, J. IVES, J., concurs with Harvey ,C.J.

Appeal allowed.

HARDY v. ALAIN.

QUE.

Quebec Court of Sessions of the Peace, Lachance, C.J.S.P. November 12, 1920.

C. S. P.

COURTS (§ II A—175)—INLAND REVENUE ACT, R.S.C. 1906, CH. 51—PENALTY—FINE AND IMPRISONMENT—JURISDICTION.

Where a Dominion statute imposes a fine and also imprisonment, and directs that the trial and sentence is to be regulated by the Criminal Code, sec. 1028 of the Code applies, and the Court has jurisdiction to inflict either the one or the other of the two kinds of punishment.

[*The Queen* v. *Robidoux* (1898), 2 Can. Cr. Cas. 19; *Ex parte Kent* (1903), 7 Can. Cr. Cas. 447, followed. See also *The King* v. *Plamondon* (1920), 55 D.L.R. 304].

Statement.

SUMMARY CONVICTION under Inland Revenue Act for having made and put in operation a still for the distilling of liquors without having first obtained a license.

Lachance, C.J.S.P.

LACHANCE, C.J.S.P.:—The defendant is charged with having, during the winter months of 1919-1920 and the spring of 1920, made and put in operation a still for the distilling of liquors in the city of Quebec, without having previously obtained a license.

The defendant pleaded not guilty and, moreover, during the hearing, asked that, in the event of a conviction, he be condemned to a fine only and not to imprisonment.

The interpretation given to date by the jurisprudence on this subject would authorise me to do so. *Ex parte G. Hamel*, King's Bench, Montreal, 12th January, 1881.

The Queen v. *Robidoux* (1898), 2 Can. Cr. Cas. 19, Court of Queen's Bench, judgment of Würtele, J., sitting in appeal from a sentence of the Court of the Sessions of the Peace of Montreal:

Where a statute of Canada imposes a fine and also imprisonment, the punishment is in the discretion of the Court which is not bound to inflict both, but may inflict either the one or the other of the two kinds of punishment by virtue of the Criminal Code, art. 932.

Ex parte Kent (1903), 7 Can. Cr. Cas. 447, Supreme Court of Nova Scotia, McDonald, C.J., on appeal from the sentence given by a magistrate:

Where both fine and imprisonment are provided as the authorised punishment for a statutory offence, upon summary conviction, the magistrate may in his discretion impose either a fine alone or an imprisonment alone or both, unless the particular statute provides otherwise.

Rex v. *Auerbach* (1919), 45 D.L.R. 338, 31 Can. Cr. Cas. 46, Court of King's Bench, Quebec, judgment of Martin, J., sitting in appeal from a sentence of the Court of the Sessions of the Peace, which had imposed a fine of $200 and an imprisonment of one month, and in default of payment, an additional month of imprisonment, while the law fixes the minimum at 6 months.

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Martin, J., held that the magistrate could not impose less than the minimum and consequently quashed the sentence and, basing himself upon the above-cited jurisprudence, condemned the defendant only to the fine of $300 and on default of payment, to 6 months' imprisonment.

It has been contended that sec. 1028 of the Criminal Code applies only to offences contained in the latter.

Sections 132 and 133 of the Inland Revenue Act, R.S.C. 1906, ch. 51, refute such pretension.

Section 132 says: If the amount of the fine does not exceed $500, it may be recovered, on summary conviction, under Part XV. of the Criminal Code. This consequently settles the question of the procedure in the case.

Section 133 says: If the term of imprisonment does not exceed twelve months, it can be imposed in accordance with the enactments of Part XV. of the Cr. Code. This settles the procedure as to the sentence.

Thus the whole case, trial and sentence, is regulated by the Criminal Code. Why, therefore, should not sec. 1028 apply?

Moreover, apart from the above jurisprudence, under what principle should punishment be more severe for a purely statutory offence than for a crime?

The Criminal Code contains few infractions, if indeed there be any, punishable both by fine and imprisonment; yet, it provides punishment for acts which are evil in their origin. Stealing is a vicious act from its inception, whereas the extraction of alcohol from ingredients which contain it is not in itself evil. If it is controlled by the Legislature, it is because the unrestricted fabrication thereof might lead to abuses prejudicial to morality.

I am of opinion that the offence has been proven but that nevertheless the facts taken as a whole authorise the Court to exercise the discretion mentioned above.

This is a first offence, moreover, the interested Departmental authorities have seemed to be of opinion that such discretion might be exercised.

Consequently, the Court declares the defendant guilty of the offence charged against him and condemns him to a fine of $200 and costs and, in default of payment, to an imprisonment of 6 months, and declares the still and other apparatus and effects seized in the present case to be confiscated in favour of the Crown.

Judgment accordingly.

ADVANCE RUMELY THRESHER Co. v. BAIN.

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Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. November 1, 1920.

JOINT CREDITORS AND DEBTORS (§ II—5)—SALE OF GOODS—JOINT DEBTORS —MORTGAGE GIVEN BY EACH—DISCHARGE OF ONE MORTGAGE— —RELEASE OF ONE DEBTOR—LIABILITY OF OTHER.

Where one of two joint purchasers of a chattel has given a mortgage on real estate owned by him to secure the purchase money and the vendor has discharged the mortgage and taken a transfer of the land in complete release of such joint debtor, it must before it can proceed against the other joint debtor, bring the land into account and allow such other joint purchaser, as a credit, the value of the land.

Statement.

APPEAL by defendant from the trial judgment in an action to recover the balance alleged to be due under agreements for purchase of certain machinery. Judgment set aside, reference ordered.

C. E. Gregory, K.C., for appellant; *F. L. Bastedo*, for respondent.

Haultain, C.J.S.

HAULTAIN, C.J.S.:—The defendant Bain and one W. J. Merriam purchased certain farm machinery from the Rumely Products Co. under written agreements. As collateral security for the moneys due under these agreements, Bain and Merriam each executed a mortgage in favour of the vendor on lands respectively owned by them. The mortgages and agreements were duly assigned to the plaintiff company. This action was brought to recover the balance alleged to be due under the agreements and to enforce the mortgage given by the defendant. The action was defended on practically one ground, set up in the following paragraph of the statement of defence:

In the further alternative the defendant says that the plaintiff or the assignors of the plaintiff took a mortgage from the William J. Merriam mentioned in the statement of claim for the indebtedness sued on in this action, upon the S.E. quarter of Section 3, in Township 7 and Range 26, West of the Second Meridian, and in the month of June, 1919, the plaintiffs took a transfer of the said land from the said Merriam and thereafter and thereby became the registered owners of the said land, and the said mortgage and the indebtedness represented thereby became merged in the plaintiff's title, and the plaintiffs have now no claim against the defendant for the said indebtedness.

It is admitted that the plaintiff discharged the mortgage given by Merriam and took a transfer of the land from him.

The evidence relating to this transaction is extremely unsatisfactory and incomplete. I would draw from it, however, the following conclusions: The discharge of the mortgage and the taking of the transfer of the land by the plaintiff company was a

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complete release of Merriam from any further claim by the company in respect of the original indebtedness. This, however, in view of the reservation of the company's rights against Iverson and the defendant, does not release or discharge them from their liability, neither does the release of Merriam deprive his co-debtors of any right to contribution which they may have. There was some evidence that the land was only taken from Merriam as collateral security, on the understanding that, when it was sold by the company, the proceeds would be credited on the original indebtedness. The transaction, in my opinion, speaks for itself, and cannot operate as a substitution of securities, but is a discharge from liability in consideration of a transfer of the land.

I think, therefore, that before the plaintiff can proceed further upon the Bain mortgage it must bring the land into account, and the defendant should be allowed as a credit the value of the land. Some evidence was given at the trial as to the value of the land, but only by witnesses for the defendant. The defence was exclusively confined to one ground, namely, that the defendant was discharged from his liability by operation of law, because of the transaction between his joint debtor, Merriam, and the plaintiff. The plaintiff should, therefore, have an opportunity of submitting evidence as to the value of the land.

Under these circumstances the judgment entered herein in June will be set aside, and there will be a further reference to the local registrar at Weyburn to compute the amount due under the mortgage in question, and for that purpose to ascertain the value of the land in question as it was on June 27, 1919, the date of the transfer from Merriam to the company. The amount of such value, together with interest thereon at the rate of 10% per annum, will be credited to the defendant on the said mortgage.

In default of payment of the amount found by the local registrar within three months, there will be the usual order for sale.

Newlands, J.A.

NEWLANDS, J.A.:—The evidence in this case shews that the plaintiff took from Merriam, who was jointly indebted with defendant for the debt for which this action is brought, a transfer of a quarter section of land in satisfaction of Merriam's liability on this joint debt. If Merriam had discharged his liability by a cash payment, plaintiff would have had to give defendant credit

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Newlands, J.A.

for it. For the same reason it must give him credit for the value of this land. Mr. Bastedo's statement that the plaintiff is willing to transfer this land to defendant on his paying the whole debt, can have no effect upon the legal rights of the parties. The quarter section transferred by Merriam to plaintiff is its property. Defendant has and can have no legal claim to it. If plaintiff were to transfer it to him it would be a gift.

I am therefore of the opinion that plaintiff, having taken a quarter section of land from Merriam in satisfaction of his indebtedness on the joint debt of himself and defendant, must give defendant credit for its value. There should be a reference to ascertain the value of this land.

The defendant should therefore be credited with the value of this land as of the date of the transfer, with interest at the rate charged in the statement of claim, and the appeal should be allowed to that extent, with costs.

LAMONT, J.A., concurs with NEWLANDS, J.A. Lamont, J.A.

ELWOOD, J.A., concurs with HAULTAIN, C.J.S. Elwood, J.A.

DANSEREAU v. CORPORATION OF ST. HENRI-DE-MASCOUCHE. QUE.

Quebec Court of Review, Demers, Panneton and de Lorimier, JJ. June 12, 1920. C. R.

MUNICIPAL CORPORATIONS (§ II A—30)—MINUTE OF COUNCIL TO PERFORM WORK—CONDITION ATTACHED—CONDITION NOT FULFILLED—LIABILITY OF CORPORATION.

A municipal corporation is not under obligation to carry out a minute of the council to construct a bridge where such minute imposes conditions as to obtaining a Government subsidy for carrying on the work which have not been complied with.

APPEAL by plaintiff from the judgment of the Superior Court on an application to compel the defendant corporation by mandamus to construct a bridge. Affirmed. Statement.

The judgment of the Superior Court, which is affirmed, is as follows:—

Loranger, J.:—This is an application to compel, by way of mandamus, the defendant corporation to carry out a minute of council, confirmed by it, to construct an iron bridge over the St. Jean Baptiste River, in the parish of St. Henri-de-Mascouche, and in default to pay a penalty of $2,000.

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On November 12, 1912, a minute was drawn up by J. H. Lafortune, notary public, duly appointed special superintendent for this purpose. By this minute it was decreed and ordered that a bridge should be constructed over the St. Jean Baptiste River, in the parish of St. Henri-de-Mascouche, in conformity with the conditions stated in the said minute. This minute was confirmed, without amendment, on January 7, 1913. It is laid down in the minute that, notwithstanding all the stipulations therein contained, it shall be given effect to only on condition and from the time that an Order or Orders in Council by the Government should assure to the municipality of St. Henri-de-Mascouche a sum of $4,000 to assist in the construction of the bridge.

On February 20th, 1918, the assistance of the Government of Quebec was put at the disposal of the defendant. Although the conditions of the minute, the applicants say, are fulfilled, and in spite of the protest which has been made to it, the defendant neglects, omits and refuses to carry out the said minute. The applicants, who are all electors, and interested in the work being carried out, apply to the Court, and ask for an order directing the defendants to commence the necessary proceedings for the construction of the said bridge and to carry out what is required by the minute. They also allege that the defendant recognised its obligation by asking for tenders for the construction of the said bridge, but that, under a pretext which is unfounded and a mistake in law, it has rejected them, and refuses to proceed to carry out the said construction works.

The defendant contested the action by a defence which in substance amounts to this: I admit the minute, but you cannot require it to be carried out because it has lapsed. It is true that I asked for tenders and that I refused them, but I used the discretion which the law allows me, the tenders being too high and irregular, of deciding whether it is advisable at present to construct the bridge in question.

Let us in succession, dispose of two of the grounds of the defence:

1. If the minute is in force, it is not prescribed, for the condition having only happened on February 20th, 1918, prescription can only begin to run from that date.

2. If the defendant is obliged to construct the bridge, the fact that the tenders are too high does not constitute a legitimate ground for refusal. If it is a duty which the law imposes, the question of the cost of the works is immaterial. It ought to carry out the works under the best conditions in the circumstances. The only question to decide, and which presents certain difficulties, is the following:—

(a) Was the minute ever put in force? (b) If it was, then has the defendant discretionary power to carry it out as it likes?

The question of how far the discretionary power of a municipal corporation extends is certainly very interesting. It is equally so as to whether a mandamus will lie to compel a municipal council to put its by-laws and minutes in force. Certain authors maintain that a corporation is not bound to make its own by-laws respected, and that it is for it to decide upon the occasion for enforcing its minutes. It is a discretionary power, over which the Courts have no control.

The plaintiffs have cited several authorities to shew that a mandamus will lie, especially since the amendment to the Code of Procedure which enlarged the scope of the reasons which, under the former Code, could give rise to a mandamus.

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Langelier, J., maintains that to-day the English authorities should not apply, for, he says, we are no longer concerned with reasons which, in England, give rise to a mandamus. The new Code sufficiently points them out to us, and the Code alone (art. 992) is the best authority in the matter. When there is no other remedy equally appropriate, advantageous, and efficacious, a mandamus will lie, (1) when a corporation omits, neglects or refuses to fulfil a duty which the law imposes on him; (2) In all other cases, when the plaintiff is interested in the performance of an act or duty which is not a merely private matter. As we see, the wording is very wide and gives great discretion to the Court.

The Court must then ascertain whether the Act which the corporation omits, neglects or refuses to do is imposed on it by law, or whether the one who asks for the mandamus is interested in the "performance of any act or duty which is not of a merely private nature."

Here, the plaintiffs are assuredly interested, their interest is obvious. The bridge in question is necessary and in the public interest, but is the corporation legally obliged to construct it? Has it not the exercise of a discretionary power as to the occasion for constructing or otherwise, although the works are necessary?

It is not a question of interfering with the discretionary powers of the corporation: it is whether the Court can compel the corporation to use its discretion, if it has not already done so. Has the municipal council not exercised its discretion by confirming the minute which ordered the construction of the bridge? It had only to suspend the confirmation of the minute or to amend it, or even to repeal it. This is also the opinion expressed by Sir Adolphe Routhier, in giving the judgment of the Court of Review in *Gauvin* v. *Corporation St. Patrice* (1903), 23 Que. S.C. 318.

The defendant maintains that it has the exercise of a discretionary power in carrying out duties imposed by the minutes. Undoubtedly it has a discretion in the choice of methods, in the mode of executing the works, but it cannot, in its discretion, decide that the works ordered by the minute are not necessary, unless it amends or repeals the minute.

This question of the discretionary powers granted to a municipal council is discussed at length in the following cases: *Gauvin* v. *Corporation of St. Patrice*, 23 Que. S.C. 318; *Lagacé* v. *Oliver* (1902), 21 Que. S.C. 285; *Goulette* v. *Corp. of Sherbrooke* (1904), 25 Que. S.C. 387; *Chicoine* v. *La Compagnie de Macadam de St. Hyacinthe* (1904), 11 Rev. de Jur. 95; *Elliott* v. *Syndics des Chemins, etc.* (1894), 3 Que. Q.B. 535; *Mountain Sights* v. *City of Montreal* (1917), 37 D.L.R. 688, 52 Que. S.C. 174, 23 Rev. de Jur. 597; *Girard* v. *Corp. of Athabaska* (1888), 16 Rev Leg 581. See also *High's Extraordinary Legal Remedies*, 3rd ed. at 442.

I would adopt the opinion of the Court of Appeal and the Court of Revision in the cases above cited and say that a mandamus will lie to compel a municipal corporation to enforce a minute which it has confirmed and which is in force at the moment when it omits, neglects or refuses to comply with it.

The question of principle being put to us, let us see if it applies in the present case.

No one disputes that a municipal corporation, when it performs work under a minute is bound to follow the directions. It would commit an illegal Act if it ordered other works than those indicated in the minute, and carried them out in another manner than that prescribed by the minute which it has confirmed. How does the minute of November 12, 1912, read?

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"Art. 2. The bridge shall be constructed of iron, with abutments and piers of concrete and other materials necessary to this kind of construction, the whole conforming to the plans and estimates or specifications hereto annexed to form part thereof, which plans and estimates signed Louis A. Vallée, engineer, have been countersigned by me, *ne varietur*."

"Art. 10. I direct that this minute shall only be given effect to on condition and from the moment that an Order or Orders in Council by the Government shall assure a sum of at least $4,000 to the municipality of St. Henri-de-Mascouche to assist in the construction of this bridge."

In order to succeed the plaintiffs must establish (1) Their interest; (2) That the minute they rely on is in force.

1. The interest of the plaintiffs is proved; it is evident that the bridge will be useful to them and that they suffer very great inconvenience from the fact of being deprived of it. (2) Is the minute in force? It is here that the difficulty arises. The minute imposes three conditions, (a) That a subsidy be granted by the Provincial Government, (b) That such subsidy be guaranteed by an Order-in-Council, (c) That the bridge be constructed according to the plans and estimates accepted by the then council and annexed to the said minute. [The Judge here goes into the questions of fact in order to ascertain whether the aforesaid conditions were satisfied, and comes to the conclusion that they were not. *La Corporation de l'Assomption* v. *Forest* (1916), 25 Que. K.B. 568.]

I quote the words of Pelletier, J.:

"It is certain that the contribution by the Provincial Government has not been obtained. It is said that the Government has promised it; now, that is incorrect, in fact the Government has promised nothing at all. A member of the Government (in this case the Secretary of the Department) wrote a letter, not to the municipal council but to Mr. Reid, member for L'Assomption, in which he declares that certain amounts would be furnished, but it is admitted and recognized by everyone that a letter of this kind does not bind the Government, especially if it is not confirmed by an Order in Council. Where it is a case of money which has to be voted annually by the Legislature, a promise binds no one if the Legislature does not confirm the promise by an annual vote of money. Therefore, this letter, written to a third person, cannot be set up as a confirmation of what has been done."

The defendant is bound to conform to the minute as prepared, approved and confirmed by it in January, 1913. At this point there is a change: without amending the minute, or passing a new one, which would entail the acceptance of new plans, the defendant has no authority to act, because the conditions of the minute not having been fulfilled, it has never been in force, and the defendant would be going beyond its powers if it attempted to construct the bridge otherwise than by following to the letter the provisions of the minute that it has confirmed, and which binds it as soon as it shall receive a grant of $4,000 by Order in Council, and that it will construct the bridge according to the plans and estimates annexed to the said minute, and upon the faith of which the said minute was confirmed.

If the minute had been legally in force, the reason given by the defendant for not executing it would have no value.

The question of money should not enter into the computation when public works are deemed necessary for the benefit and advantage of the public. The municipal council, having decided that the works were useful and necessary, ought to carry them out as soon as the conditions imposed by the minute shall have been fulfilled, and if it refuses to do so, then the Courts can intervene, and as Cimon, J., said in *Gauvin* v. *Corp. St. Patrice, supra*, "Set them in motion"—while leaving to the council the choice of ways and means.

I resume, 1. Without deciding the question of principle, which would be useless for the case in question, I take for granted that mandamus is the appropriate remedy to compel a corporation to carry out a minute which it has confirmed and which is in force. 2. In the present case, a mandamus would not lie; because the conditions imposed by the minute for putting it in force have not been fulfilled; (a) The grant has not been made by Order in Council; (b) The notice of the secretary of the Department is not a guarantee that the grant is made and will be paid; (c) The conditions imposed for payment of the grant are not those provided for in the minute which, alone, can bind the defendant if they are fulfilled; (d) The defendant is not bound to act under the minute as long as the conditions therein contained have not been fulfilled; (e) The council has no authority at present to commence the works, unless it amends the minute or has a new one prepared, with new conditions, to meet the requirements of the Department of Public Works.

The Court entertains the hope that the defendant will find a way of coming to the assistance of those interested who suffer considerable annoyance for the lack of a way of communication to the large thoroughfares, and will see to making the existing discomfort disappear, and which threatens, if continued, to disturb the order and harmony which should reign in the municipality.

Perron, Taschereau, Rinfret, etc. for plaintiffs; *E. Hébert*, for defendant.

JUDGMENT:—For the reasons above cited, the Court, while recognising that the plaintiffs' complaint is well founded in fact, after having examined the documents and maturely deliberated, give judgment as follows:—

Considering that a municipal corporation is not permitted to carry out works otherwise than in the way prescribed by the minute which ordered such works: that as long as the said conditions have not been fulfilled as prescribed by the minute, the defendant is not bound to carry out the works mentioned therein: that a notice given to the member for the county by the secretary of the Department that a sum of money is at the disposal of the municipality, does not constitute a guarantee that the grant has been made by the Government and that payment thereof will be made, the said notice of the secretary not being equivalent to an Order in Council which the minute prescribes: that to compel

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the defendant to carry out works under the conditions which the evidence has shewn would be to oblige it to commit an illegal act, seeing that the defendant is bound by the terms of the minute and has no right to go beyond it; that the plaintiffs have not shewn that the minute was in force, the conditions imposed not having been fulfilled: that, consequently, its carrying out by way of mandamus cannot be required against the defendant.

The action of the plaintiffs is declared to be ill-founded and is dismissed with costs. *Appeal dismissed.*

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POTTER v. LANDEN.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart and Ives, JJ. December 9, 1920.

BROKERS (§ II B—10)—SALE OF REAL ESTATE—STATUTE REQUIRING AGREEMENT FOR COMMISSION TO AGENT TO BE IN WRITING—SCOPE OF ACT.

The Alberta statute (1906 stats., ch. 27) entitled An Act to prevent Frauds and Perjuries in relation to Sales of Real Property, only applies to a commission agreed to be paid by a vendor to an agent, and not to a commission or other remuneration to which a purchaser's agent may be entitled.

[See Annotations, 4 D.L.R. 531 and 15 D.L.R. 595.]

Statement.

APPEAL from the decision of Walsh, J. [See *post* p. 698], upon the argument of a point of law which had been set down for argument before trial.

A. H. Clarke, K.C., for plaintiffs.

A. McL. Sinclair, K.C., and *J. W. Hugill*, for defendants.

Harvey, C.J.

HARVEY, C.J., concurs with Stuart, J.

Stuart, J.

STUART, J.:—The plaintiffs are suing the defendants for a commission as the remuneration for securing a purchaser of certain lands, that is, the defendants are alleged to have employed the plaintiffs to act as their agents, not in selling, but in purchasing certain real estate.

The defendants pleaded the statute, viz.: Alta. stats. 1906, ch. 27, claiming that there was no memorandum in writing. The plaintiffs contend that the statute only applies to a commission agreed to be paid by a vendor to an agent and not to a commission or other remuneration to which a purchaser's agent may be entitled. Walsh, J., upheld the contention of the plaintiffs and the defendants have appealed.

As the matter presents itself to my mind, the whole point of the case is this:—Does the word "sale" as used in the statute refer to the *act* of some one or does it refer to the mere legal conse-

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quence of the acts of certain persons? Does it mean the acts or business proceedings of a person who may sell lands or does it refer to the mere legal concept of a sale as an agreement between two parties that one shall sell and the other buy from him certain property?

I have come to the conclusion that the former is the proper construction to put upon the word and this entirely without regard to the amending statute of 1920. I think the statute has in view the acts and business dealings of people, and not the mere legal result which may or may not follow in the way of an actual contract. In other words, I think the word "sale" refers to the act of selling and this act can only be the act of a vendor. It seems to me the other view would really preclude the possibility of even an agent for the vendor recovering, except in the case where a definite contract had been entered into with a purchaser. We have on several occasions held otherwise. I do not think the use of the words "signed by the party to be charged" throw much, if any, light upon the question. They really mean nothing more than "the defendant." True, the words "the vendor" might have been used, but even then we should have had probably to say that "the vendor" ought to include a proposed vendor where a sale had not been concluded.

When we interpret the word "sale" as referring to an act we are able to apply it to the initiation of or preparation for the act and need not confine it to the final act of accord or of execution of a document.

I think everyone knows the abuse which was intended to be remedied by the Act and certainly there never was felt to be any abuse in regard to purchaser's agents.

It was said by someone that the Statute of Frauds or every line of it had "cost a subsidy." With regard to the present Act it can never be fully known either how many actions have been stopped by it altogether or, therefore, how much perjury has been prevented. This would have to be known before a fair balance of debit and credit against the Act could be made.

I would dismiss the appeal with costs.

IVES, J. (dissenting):—These plaintiffs are claiming for services rendered the defendants as their agents to bring about a purchase of lands on defendants' behalf. Defendants moved to set aside

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the claim on the ground that there was no memorandum in writing signed by them as required by ch. 27, 1906 stats (Alberta). Walsh, J., dismissed the application on the ground that the statute applied only to the vendor of lands and not to purchasers. I think the appeal should be allowed. The Act is intituled:—"An Act to prevent Frauds and Perjuries in relation to Sales of Real Property" and from such language I think public policy demands an interpretation as wide as the language of the statute will permit. At the time the plaintiffs' cause of action arose, the statute read as follows:

1. No action shall be brought whereby to charge any person either by commission or otherwise, for services rendered in connection with the sale of *any* land . . . unless the contract upon which recovery is sought in such action or some note or memorandum thereof is in writing signed by the party *sought to be charged*. . .

It would seem to me that from the language used, viz.: "services rendered in connection with the sale of any land" and "signed by the party *sought to be charged*" there is a clear intention that purchasers are in exactly the same position as vendors in meeting a claim for services rendered. If not then the section should have read "his" land instead of "any" land and "vendor" instead of "party sought to be charged."

I cannot find any authority which enables me to use the amendment to the Act passed in the present year—ch. 4 stats. of 1920—to arrive at the intention of the Legislature of 1906—14 years ago. The amendment contains nothing declaratory of the intention of the Legislature of 1906.

Appeal dismissed.

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TOUSIGNANT v. DUMOUCHEL.

Quebec Court of Review, Demers, Panneton and de Lorimier, JJ. June 12, 1920.

ELECTIONS (§ II C—73)—DRIVER HIRED BY RETURNING OFFICER—LIABILITY OF DOMINION GOVERNMENT—CONTRACTS—PRINCIPAL AND AGENT.

The Dominion Government is not responsible for the cost of services rendered by a driver at an election, such driver being employed by the returning officer; the driver is not the agent of the Government and the returning officer is personally responsible for cost of the services.

Statement.

APPEAL from the Superior Court in an action for services rendered at a Dominion election by a driver.

The plaintiff claims $233 from the defendant as the cost and value of services rendered for his benefit, and according to the account produced.

The defendant denies the allegations of the declaration and pleads as follows: The plaintiff holds no license as chauffeur, in accordance with the Montreal City by-law; the plaintiff's account is incorrect as to the amount and the dates; at the time of the election of December, 1917, the defendant was Returning Officer for the District of Hochelaga; the plaintiff then offered his services to him with the understanding that he would take the chance of getting paid by the Dominion Government; the defendant did all he could to obtain the payment of the account by the Government and he produced at the examination of the plaintiff an account made up by the plaintiff himself, which account was sworn to; the Dominion Government has not yet agreed to pay this account; nevertheless, since the commencement of the action, for the sake of peace, and in order to oblige the plaintiff, he has paid to the latter's attorneys a sum of $75, and this without prejudice, always hoping that the Dominion Government would itself pay the account; this sum of $75 and that of $31.50 already paid to the plaintiff, making $106.50, represents more than the value of the services rendered by the plaintiff.

The Superior Court non-suited the plaintiff for the following reasons:—

Considering that the defendant was returning officer in the Dominion election held in the Hochelaga Division in the month of December, 1917: that on June 11, 1918, the plaintiff signed a solemn declaration before D. A. Léonard, notary, to the following effect: "I duly made every trip during the length of time stated and shewn in an account produced by me to the notary, Raoul Dumouchel, in his capacity as returning officer of the Hochelaga Division;" that the account to which the plaintiff refers in his solemn declaration is the same as that upon which is based his action against the defendant; that the plaintiff, examined as a witness at the trial, admits that when he engaged his services to the defendant he knew that the latter was returning officer; that he engaged himself to him as such, and that no amount was settled on; that the services of the plaintiff for which he asks judgment were rendered to the defendant as a returning officer, and that the latter was the agent of the Dominion Government, to the knowledge of the plaintiff; that the legal claim of the plaintiff is against the Dominion Government and not against the defendant, who is not personally liable to the plaintiff for the payment of the latter's debt; that the defendant acted as an agent in the name of the Dominion Government and within the limits of his authority as agent, and that, under the circumstances shewn by the evidence, he cannot be held personally liable to the plaintiff, who is a third party, so far as he is concerned, with whom he made a contract on behalf of his principal; that the plaintiff has not proved or even alleged that the defendant collected from the Dominion Government the money which the plaintiff claims; that the defendant

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has amply proved that he tried to get the Dominion Government to pay the plaintiff's claim, but that the Government has, up to the present, given nothing to the defendant with which to pay the plaintiff's account; that the defendant has even personally paid to the defendant, out of his own money, considerable payments on account , in which he was in no way legally bound to do;

In view of art. 1715 C.C. (Que.), dismisses the plaintiff's action with costs.

Trudeau and *Guerin*, for plaintiff; *Beauchamp* and *Desjardins*, for defendant.

Panneton, J.

PANNETON, J.:—The first question to decide is whether the Government is liable to the plaintiff for the account in question. The Election Act of 1906 (R.S.C., ch. 6), applies to the present case. This Act states what the Government must pay to its Returning Officers. The rate is fixed at 12½ cents a mile for whatever is necessary for carrying out the Returning Officer's duties, such as publishing notices, distributing and collecting ballot boxes, etc.

The connection of the Government with the Returning Officer, and the tariff for the services rendered by the latter, are fixed by the Act. The present case is not one of the relation between a principal and an agent, to which is applicable that part of the Civil Code which treats of agency. When a person engages another to render services to him at an amount agreed on, the person so engaged is not the agent of the one who engaged him. The Government requires certain public officers for carrying out the Election Act, and this Act fixes their remuneration; it only requires these officers, there is no legal connection between the coachman employed by the Returning Officer and the Government. The Act provides what the Returning Officer shall be paid at so much per mile necessarily travelled, whether it be on foot, on horseback, by carriage or by automobile—it is his affair. The Government having refused to pay the Returning Officer the plaintiff's account, the latter can have no Petition of Right to get himself paid by the Government which did not employ him and did not authorise the Returning Officer to employ him. The defendant is then personally liable to the plaintiff for the services the latter rendered to him.

The plaintiff's account is so much exaggerated, so uncertain as to amounts, dates and the number of hours he was employed—this is evident from the different accounts he rendered—that I

would leave it at the amount paid by the defendant, namely, $106.50 in all, as being sufficient, $31.50 being credited to the defendant upon the account sued on. But as the payment of $75 was made after action commenced, the defendant should be ordered to pay the costs of an action for $75 and the costs of taxation. This is the opinion of the Court.

The Court reverses, with costs, the judgment of the Superior Court, rendered December 10, 1919, and, proceeding to give the judgment which it should have given, condemns the defendant to pay to the plaintiff the costs of an action for $75.

Appeal allowed.

Re CONSOLIDATED TELEPHONE Co. Ltd. and TOWNSHIPS of CALEDON and ERIN.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, and Ferguson, JJ.A. July 19, 1920.

TELEPHONES (§ I—1)—TRANSFER OF FRANCHISE—APPROVAL OF ONTARIO RAILWAY AND MUNICIPAL BOARD NECESSARY.

Before an agreement for the sale of a part of a telephone company's plant and system to a corporation in which it operates the approval of the Ontario Railway and Municipal Board is necessary under the Ontario Telephone Act, 8 Geo. V. 1918 (Ont.), ch. 31, secs. 24 and 87.

The Board in determining whether to give or withhold its approval of such sale acts as the delegate of the Legislature and should consider such matters as the Legislature would consider if an application were made to it which would be necessary but for the above sections, under which the discretion of the Board is absolute, subject only to review by the Lieutenant-Governor in Council under sec. 47 of the Ontario Railway and Municipal Board Act, R.S.O. 1914, ch. 186.

The Board has power under sec. 9 of the Railway and Municipal Board Act, R.S.O. 1914, ch. 186, to act upon the report of the chairman of the Board without bringing the parties before it again where the chairman has taken the evidence and the parties concerned have been fully heard.

Statement.

APPEAL by company from the orders of the Ontario Railway and Municipal Board refusing applications for the Board's approval of certain by-laws passed by the township councils of Caledon and Erin. The company first moved for leave to appeal, which motion was allowed in part the appeal being limited to questions of law arising on the following points:

(1) That the application for approval of the by-laws was not heard or determined by the Board in accordance with the Ontario Railway and Municipal Act.

(2) That there was error in law in this, that on the facts and evidence before it, the Board should not have withheld its approval of the agreement of sale.

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The facts of the case are fully set out in the following opinion of the Chairman of the Board:

The Chairman, having been authorised by the Board to report to the Board upon the matters arising upon these applications, attended at the town of Orangeville on the 6th and 13th days of February, 1920, on notice to all parties in interest, and heard what was adduced in evidence by the parties and by way of argument. The Chairman thereupon intimated that he had reached the conclusion, for reasons then disclosed, to report to the Board that the agreements of sale in question should not be approved by the Board, and the Chairman further intimated that, before reporting to the Board his conclusion as above, he would consider certain objections in law raised by Mr. Wegenast, acting on behalf of the Consolidated Telephone Company.

Mr. Wegenast contended that the Board had not an uncontrolled judicial discretion to give or withhold its approval to the sale in question; and that, whatever the scope of its discretion in the premises, the Board could not withhold its approval on the grounds intimated by the Chairman at the conclusion of the hearing—namely, that the councils of the municipalities concerned, being trustees for the intended subscribers of the proposed municipal telephone systems, were bound to take "all those precautions" (in managing this trust affair) "which an ordinary, prudent man of business would take in managing his own;" that, failing in their duty in that behalf, the transaction of purchase entered into by the municipal councils, and of which approval is now sought, is improvident, and would impose an unreasonable burden on the intended subscribers of the proposed municipal telephone systems, in the amount of the purchase-price fixed, and in the onerous rates required to carry on the systems afterwards.

Mr. Wegenast's contention is that, on the facts this case, of the Board cannot withhold its consent on the ground that the bargain is a bad one from the point of view of the municipalities, as that in effect would be an attempt to force the company to take less for its property than the sum at which it was valued by the appraiser appointed by the municipalities. Mr. Wegenast seems to have overlooked that this is not the only alternative, as

the company is at liberty to take back its plant and return the purchase-money to the municipalities; the contract of sale having fallen through.

Very wide powers are vested in the Board by the Ontario Telephone Act, 8 Geo. V. ch. 31. Sections 102 and 104 read thus:—

"102. The Board shall superintend the carrying out of this Act and, for that purpose, shall have and may exercise all necessary powers and authority over and in respect of any person, company, municipal corporation or Board of Commissioners."

"104. The Board may, upon request and on such terms as seem expedient, assist by advice any company, municipal corporation, the Commissioners for any system and resident assessed land-owners as to the establishment, extension, maintenance and operation of any system or works authorised by this Act and the proceedings incidental thereto."

In addition to these general powers, specific powers are conferred on the Board by a score or more of sections, so that in the result a compliance with the Act requires that the development step by step of a municipal telephone system shall from its inception be minutely supervised and controlled by the Board. Of these specific powers those apposite in this case are contained in the following sections of the Act:—

"24. By agreement with the owner the initiating municipality may, with the approval of the Board, acquire by purchase any existing telephone system operated in the municipality or any portion thereof, and also any part of such system situate in another municipality with the consent of the council of such other municipality, and failing such consent with the approval of the Board."

"87. No company shall sell or transfer its system or a controlling interest in it to any person or company, or amalgamate with any company or system, or enter into an agreement which shall, in effect, transfer the ownership or control of the system of such first named company to any other company, whether such other company is within the jurisdiction of the Legislature of the Province of Ontario or not, until the Board has approved such sale, transfer, amalgamation or agreement."

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By sec. 5, sub-sec. 4, of the Act constituting the Board, the Ontario Railway and Municipal Board Act, R.S.O. 1914, ch. 186, it is declared that "the Board shall have all the powers of a Court of Record."

Section 107 of the Ontario Telephone Act (omitting as irrelevant paragraphs (*a*) and (*b*)) reads thus:—

"107. The Board shall have jurisdiction to inquire into, hear and determine any application by or on behalf of any person interested . . .

"(*c*) requesting the Board to make any order, or give any direction, sanction or approval which by law it is authorised to make or give."

In view of the foregoing, the proper conclusion seems to be that the Board has jurisdiction to entertain the application, and has a discretion in exercising its powers in the premises, and that the Board is not bound, as suggested by Mr. Wegenast, to exclude from consideration as a determining factor the price agreed upon by the contracting parties.

The authorities cited against the exercise of such a discretion do not seem to conclude the matter. In the English case cited, *Julius* v. *Bishop of Oxford* (1880), 5 App. Cas. 214, the Bishop of Oxford was held to have a discretion to exercise or not exercise a power conferred on him by the enacting words "it shall be lawful." In that case, after referring at some length to the authorities in which mandamus had issued, and amongst them to the case *Macdougall* v. *Paterson* (1851), 11 C.B. 755, 138 E.R. 672, in which occurs the dictum of Chief Justice Jervis cited by Mr. Wegenast, Lord Penzance says (5 App. Cas. at pp. 231, 232): "In all these instances the Courts decided that the power conferred was one which was intended by the Legislature to be exercised; and that although the statute in terms had only conferred a power, the circumstances were such as to create a duty. In other words, the conclusion arrived at by the Courts in these cases was this—that regard being had to the subject-matter—to the position and character of the person empowered—to the general objects of the statute—and, above all, to the position and rights of the person, or class of persons, for whose benefit the power was conferred, the exercise of any discretion by the person empowered could not have been intended. . . . The question

then arises whether in the present case there are any considerations sufficiently cogent to exclude the idea that the Legislature intended a discretion." After an analysis of the enactment, he states his conclusion that the bishop had a discretion, in these words (p. 234): "The conclusion, then, at which I arrive is, that the appellant has not established his case. The words 'it shall be lawful' are permissive and enabling only. It devolved upon him to shew that the Legislature intended the exercise of the power, thus conferred, to be a duty, in the performance of which the bishop was not intended to have any discretion, and he has, in my opinion, failed to shew it."

The conclusion from this seems obviously to be that it depends on the circumstances of each particular case whether enabling words which vest power in a person or tribunal give rise to a duty enforceable by mandamus. The general jurisdiction conferred on the Board by sec. 102 of the Ontario Telephone Act to superintend the carrying out of the Act, and, for that purpose, to have and exercise all necessary powers and authority over and in respect of any person, company, municipal corporation, or Board of Commissioners, seems to vest in the Board a discretion limited only by the express provisions of the Act. Section 24, which requires the approval of the Board to a purchase of the kind in question here, places no express limitation upon the discretion of the Board to approve or withhold its approval. Besides this, there is a class of persons vitally interested in the success of the proposed municipal telephone systems whose success will be conjectural if the sale goes through, and these are the petitioners for the establishment of the systems. These petitioners have, to the number of some 150 from the township of Caledon, and of some 40 from the township of Erin, applied to the Board to have their names struck off the petition on various grounds. These latter applicants attended at the sittings on the 6th and 13th February instant. These numerous applications are symptomatic of the widespread dissatisfaction at the proposed purchase, on the part of the very persons whose support is essential to the success of the proposed municipal systems. The Board has a duty to protect this large class of interested persons (who are otherwise remediless) from the consequences of this improvident bargain. The Board has not refused to hear and determine

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the applications, but has functioned in that it has, through the Chairman, held two all-day sessions, at which the transaction was exhaustively considered, and as a result the conclusion reached is that approval should be withheld.

The disposition of the matter proposed at the hearing seems amply supported by authority, as a reference to *Smith* v. *Chorley Rural Council*, [1897] 1 Q.B. 678, will shew. "In this case" (quoting the words of the Master of the Rolls, at pp. 679, 680) "the defendants were a local authority who had power to approve or disapprove plans relating to houses proposed to be erected in their district. The plaintiff submitted plans of proposed houses to the defendants, whose duty was not merely ministerially to put 'approved' or 'disapproved' on the plans, but to determine whether they would or would not approve them." At p. 680, Lord Justice Lopes says: "Many points have been argued in this case; but the one we have to deal with is this. Plans were laid before the district council, who did not refuse or neglect to consider them, but, exercising their discretion, they disapproved of them, thinking that the street in which the houses were to be built was a new street. The rule applicable to such a case is that the exercise of the discretion of a tribunal, however erroneous it may be, upon a question within its jurisdiction and when honestly exercised, cannot be questioned. Any other conclusion would lead to this—that though the Legislature has entrusted to a local tribunal a discretion as to a particular matter which they consider, and as to which they honestly exercise their discretion, still the Court could direct them to exercise their discretion in a different way—a result which in my opinion would be absurd."

The Chairman is of the opinion that the Board has a discretion in the exercise of its power to approve or disapprove of the proposed purchase and sale upon the grounds intimated at the hearing, and he will report to the Board recommending that the purchase and sale be not approved.

The Chairman of the Board certified as follows:—

The Ontario Railway and Municipal Board having received applications in these matters for approval of by-law No. 772 of the Township of Caledon and of by-law No. 17 of the Township of Erin, did appoint Friday the 6th February, 1920, at half-past 10 o'clock in the forenoon, at the court-house, in the Town of Orangeville, for the hearing of the applications.

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Pursuant to the provisions of sec. 9* of the Ontario Railway and Municipal Board Act, R.S.O. 1914, ch. 186, and to the provisions of sec. 105 of the Ontario Telephone Act, 1918, 8 Geo. V. ch. 31, the Board did authorise, appoint, and direct Donald Malcolm McIntyre, Esquire, K.C., the Chairman of the Board, to examine and report to the Board upon the said applications, and any questions or matters arising in connection with the same, and the said Donald Malcolm McIntyre, Esquire, did, pursuant to such authorisation, appointment, and direction, attend at the said time and place and at a subsequent adjournment of said appointment to Friday the 13th February, 1920, at the same hour and place, and did hear what was alleged by the parties and what was tendered in evidence.

The said Donald Malcolm McIntyre, Esquire, did in writing, under date the 23rd February, 1920, report to the Board upon he said applications, and upon the questions and matters arising in connection with the same, and the said report was adopted by the Board as the order of the Board, and as the basis of the Board's order herein.

The Chairman further certified that the report was considered by a quorum of the Board, composed of the Chairman and Vice-Chairman (the third member of the Board being then ill), and the same was, after consideration, and without notice to the parties or further argument, adopted as the basis of the Board's orders.

By the orders, the applications were dismissed.

F. W. Wegenast, for appellants.

K. B. Maclaren, for respondents.

MEREDITH, C.J.O.:—This is an appeal by the Consolidated Telephone Company Limited from the refusal of the Ontario Railway and Municipal Board to give its approval to by-law No. 17 of 1919 of the Council of the Corporation of the Township of Erin, passed on the 15th day of December, 1919, providing for the purchase by the corporation "of the telephone Meredith, C.J.O.

*9. The Board or the Chairman may authorise any one of the members to report to the Board upon any question or matter arising in connection with the business of the Board, and when so authorised such member shall have all the powers of two members sitting together for the purpose of taking evidence or acquiring the necessary information for the purpose of such report, and upon such report being made to the Board, it may be adopted as the order of the Board, or otherwise dealt with as to the Board seems proper.

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plant now owned and operated by the Consolidated Telephone Company Limited and located within the limits of the townships of Erin, East Garafraxa, Eramosa, and the village of Erin," for the sum of $34,064.47, and by-law No. 772 of the Council of the Township of Caledon, passed on the 15th day of December, 1919, which recites that the council on the 1st day of August, 1919, did, by by-law No. 770, provide for the establishment of a telephone system under Part II. of the Ontario Telephone Act, 8 Geo. V. ch. 31; that the council, on the 14th day of November, 1919, by resolution, accepted the offer of the Consolidated Telephone Company Limited for the sale of that part of its system in the townships of Caledon, Albion, and Mono, for $39,355.08; and that a bill of sale providing for the purchase by the corporation had been prepared, a copy of which is annexed to the by-law.

After these recitals, the by-law provides:—

1. That the terms and conditions of the bill of sale providing for the purchase by the Municipal Corporation of the Township of Caledon of that part of the telephone plant now owned and operated by the Consolidated Telephone Company Limited, and located within the municipal limits of the Townships of Caledon, Albion, and Mono, particulars of which plant and equipment are fully set out in the said bill of sale, for the sum of $39,355.08, be and the same are hereby approved and confirmed.

2. That the Reeve and Clerk of the Municipal Corporation of the Township of Caledon be authorised to sign the said bill of sale and affix the seal of the said corporation, and make the affidavit of *bona fides* in the said bill of sale.

3. That the Reeve and Treasurer of the Municipal Corporation of the Township of Caledon be authorised to do all things necessary in behalf of the said corporation to carry out the terms of the said bill of sale, including the payment to the vendors of the price agreed upon.

The bill of sale bears date the 15th day of December, 1919, and it contains a recital that "the parties of the first part (i.e., the appellants) are possessed of the goods and chattels, plant and attachments, hereinafter set forth, described, and enumerated, and hath contracted and agreed with said parties of the second part for the absolute sale to them of the same for the sum of $39,355.08, and these presents are intended to carry out such contract and agreement."

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And what are assigned are: "All those the said goods, chattels, plant and attachments, hereinafter described, that is to say, the telephone plant, equipment, and system now operated by the parties of the first part and located within the municipal limits of the Townships of Caledon and Albion, in the County of Peel, Mono, in the County of Dufferin, including poles, wires, attachments, furniture and fixtures, telephones, fixtures and attachments, all which said chattels and attachments are situate and being in the Townships of Caledon and Albion, in the County of Peel, and the Township of Mono, in the County of Dufferin."

A bill of sale, similar in form to that made to the Corporation of the Township of Caledon, was made to the Corporation of the Township of Erin, on the 15th day of December, 1919.

No formal agreement was entered into in either case, and, except in so far as the documents that were executed constitute agreements, as to which I express no opinion, no agreements have been entered into.

In the case of the Township of Erin, its telephone system was established by by-law No. 11, passed on the 2nd day of August, 1919; the system established by this by-law is one for the convenience of the petitioners for the passing of it, who are landowners in that township, though provision is made for the extension from time to time of the system, "upon the application of such persons as may desire to become subscribers."

It seems to have been assumed that the approval of the Ontario Railway and Municipal Board was necessary to be had before the by-laws for the establishment of the system would become operative, and application for that approval was made, but it was not given. This does not appear upon the material before us, but counsel agree that it is in accordance with the fact. This was done under, as I understand the Act, misapprehension as to the necessity for the Board's approval. Its approval is necessary where it is proposed to extend the system into another municipality (sec. 11) or into an unorganised township (sec. 12).

Section 13, however, provides that, where the establishment of a system or the construction of an extension of one may require the issue of debentures, no debt shall be incurred for either purpose until the Board shall have approved the by-law providing for the establishment of a system or the extension of an existing one;

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and it may be that it was because the by-law provides for the issue of debentures for these purposes that the approval of the Board was applied for.

The steps taken on the applications, the refusal of which is attacked by the appellants, and the proceedings before the Board, as well as the reasons for its decision, are fully stated in the reasons for the action taken by the Board, and it is therefore unnecessary to restate them.

The grounds urged upon the argument before us were substantially two in number: (1) that the appellants should have been afforded an opportunity of being heard before the Board dealt with the report of its Chairman; (2) that the refusal of the Board to give its approval was wrong, and this, it was urged, was a question of law, as to which there was a right to appeal to this Court.

The Telephone Act contains no express provision as to appeal, but sec. 106 provides that "the provisions of the Ontario Railway and Municipal Board Act, with respect to the jurisdiction and powers of the Board, and as to practice and procedure, shall apply *mutatis mutandis* to the exercise of the jurisdiction conferred on the Board by this Act, and the decision of the Board on any question of fact shall be final."

By sec. 48 of the Ontario Railway and Municipal Board Act, R.S.O. 1914, ch. 186, an appeal to a Divisional Court, by leave, upon a question of jurisdiction or upon any question of law, shall lie.

The section of the Telephone Act applicable is, in my opinion, sec. 24. It provides that:—

"By agreement with the owner the initiating municipality may, with the approval of the Board, acquire by purchase any existing telephone system operated in the municipality or any portion thereof, and also any part of such system situate in another municipality with the consent of the council of such other municipality, and failing such consent with the approval of the Board."

Section 25 does not, in my opinion, apply. What was being done by the parties was to make agreements for the purchase of parts of the appellants' system, not only the part of it in the municipality, the corporation of which was contracting, but in other

municipalities, and there is nothing to shew that the conditions to which sec. 25 applies existed. Section 87 requires the approval of the Board to the sale or transfer by a company of its system or a controlling interest in it to any person or company, and that approval has not been obtained.

It is clear, therefore, that before any agreement of sale or purchase could become operative the approval of the Board was essential.

In exercising the power conferred by secs. 24 and 87 the Board does not, in my opinion, act judicially, but acts as the delegate of the Legislature. Apart from the authority conferred by the sections, the appellants could not sell and the respondents could not purchase the appellants' system or part of it. The purchase would have the effect of transferring the appellants' franchise, and without legislative authority that they could not do.

The purpose of the legislation was to avoid the expense of an application to the Legislature for a special Act and to provide a simple and expeditious means of obtaining the authority which a special Act would confer, namely, the approval of the Board of what it is proposed to do.

If this be the purpose of the legislation, just as the Legislature would determine what its action should be as a matter of public policy, and having regard to its effect upon any one who would or might be affected by the transaction, the Board, acting as the delegate of the Legislature, in determining whether to give or to withhold its approval, would have to consider the matters which the Legislature itself would have considered if application had been made to it for a special Act; and I can imagine no reason for requiring the approval of the Board if what I have said I take to be its functions are not its true functions.

There are to be found on the statute-book many cases in which provision is made that, as a condition to effective action, the assent of the Lieutenant-Governor in Council is required, and there were many more before the passing of the Municipal Act of 1913. By that Act, in many, if not all, of the cases where under former Municipal Acts the assent of the Lieutenant-Governor in Council was required, the Board was substituted for the Lieu-

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tenant-Governor in Council, and it is a reasonable inference that it was intended that it should exercise its powers as the Lieutenant-Governor in Council would have exercised his.

In later years the Legislature has been careful to safeguard the public interests in matters of railway, telephone, and other franchises, and it is impossible for me to conceive that it was intended that, as would be the effect of adopting the appellants' contention, the Board is powerless to do more than when an agreement is presented for approval to approve of it or at the most to determine only whether the agreement was a fair one to the parties affected by it.

In my view, the cases cited by the appellants' counsel have no application. They all deal with powers very different from those which are conferred upon the Board, and in some of them the decisions proceeded upon the ground that the body whose action was in question had exceeded the powers which had been conferred upon it.

Regina v. *Newcastle-on-Tyne Corporation* (1889), 60 L.T. 963, is a typical case illustrating this. In that case it was provided by legislation that persons who intended to erect new buildings or to alter or enlarge existing ones should give notice in writing of their intention, and leave at the same time at the surveyor's office a drawing of the front elevation and other information specified in the Act, and that the corporation should approve or disapprove of the intended new building within 28 days. The plans were disapproved on the ground that a dwelling-house of the nature and character intended to be erected would be unsuitable to the locality, although the plans did not disclose any breach of any by-law or statute relating to new buildings. What was decided was that (p. 966) the legislation was "framed in the interest of the building owner for the purpose of limiting the time within which the corporation must determine whether or not the plans, drawings, and descriptions shew an intended building which, when erected in accordance with them, will not infringe any of the regulations contained in the Act or the by-laws."

The mere statement of the case which the Court dealt with shews that there is no similarity in the scope of the powers conferred upon the corporation and those conferred on the Board.

In my view, the discretion of the Board is absolute, subject only to review by the Lieutenant-Governor in Council under sec. 47 of the Ontario Railway and Municipal Board Act.

If the action of the Board were open to review by this Court, my conclusion would be that it has not been shewn that its discretion was exercised wrongly or upon a misapprehension of the facts, or that the grounds upon which it proceeded were not such as it was entitled to take into consideration in determining whether to give or to withhold the approval applied for.

There remains to be considered the question as to the failure to afford the appellants an opportunity to be heard by the Board itself before a decision was reached.

Under the provisions of sec. 9 of the Ontario Railway and Municipal Board Act, the Board authorised its Chairman to report to the Board upon the applications. Acting on this authority, the Chairman held an inquiry, which the parties attended and at which they were heard and evidence was taken, and he reported to the Board what had been done and the conclusion to which he had come. The Board, after the reading of the report and some explanations by the Chairman, came to the conclusion that approval should be withheld. It does not appear that any application to be heard before the Board was made by the appellants, nor did they apply to the Board under sec. 25 of the Ontario Railway and Municipal Board Act to review, rescind, change, alter, or vary its decision or order.

I am not satisfied that the Board was not warranted in taking the course which it adopted.

Section 9 provides that the report made to it "may be adopted as the order of the Board, or otherwise dealt with as to the Board seems proper."

This language is, I think, wide enough to warrant the Board, where evidence has been taken and the parties concerned have been fully heard, in acting upon the report without bringing the parties before it again. The concluding words of the section which I have quoted appear to me to support that view, and to leave it to the judgment of the Board whether to act upon the report or to have the question in dispute discussed before the Board.

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No useful purpose would be served by allowing the appeal on this ground; it would mean either that proceedings must be begun *de novo* or at least that the appellants would be given an opportunity to be heard by the Board with doubtless a similar order to that now in appeal being made. In view of this and the apparent acquiescence by the appellants in the course taken by the Board and their failure to apply under sec. 25, I would disallow the objection on this ground, and I would dismiss the appeal with costs.

Meredith, C.J.O.

Since the foregoing was written, the report of a late English case has come to hand, *Rex* v. *Inspector of Leman Street Police Station* [1920], 3 K.B. 72. The question was as to the necessity of the Home Secretary holding an inquiry before making an order for the deportation of an alien on the ground that "he deems it to be conducive to the public good," and that in exercising this power, which was conferred by art. 12 (1) of the Aliens Order, 1919, the Home Secretary was not acting as a judicial tribunal but as an executive officer. In delivering the judgment of the Court the Lord Chief Justice said (p. 78):—

"Turning . . . . to the statute . . . . and the order, I have no doubt that it is not for us to pronounce whether the making of the order is or is not conducive to the public good. Parliament has expressly empowered the Secretary of State as an executive officer to make these orders, and has imposed no conditions."

This case is, I think, analogous to the case at Bar, and supports the conclusion to which I have come.

Maclaren, J.A.

MACLAREN, J.A.:—I agree with the Chief Justice in the dismissal of this appeal. In addition to what he has said, I would call attention to the limited nature of the appeal. When application was being made to this Court, under sec. 48 of the Railway and Municipal Board Act, for leave to appeal, the appellants' counsel sought to introduce questions of fact and evidence as well as questions of law; but in granting leave it was ordered that "the appeal should be limited to questions of law arising on the following points: (1) that the application was not heard or determined by the Board in accordance with the requirements of the Ontario Railway and Municipal Board Act; (2) that there was

error of law in this, that, on the facts and evidence before it, the Board should not have withheld its approval of the agreement of sale."

Directions were given to the appellants' counsel to put in those portions of the report of proceedings and evidence on which he relied to establish the charges of the exclusion of material evidence as to value and the want of jurisdiction. In compliance with this, the appellants put in what purported to be an extract from the report of the proceedings and evidence as taken down by the stenographer. After the formal heading, the following appears:—

"13th February, 1920,

"Alex. McLeish, sworn:

"To Mr. Wegenast:

"Q. You are not making an offer to sell the poles at that rate? A. No, but I can put in evidence in the box right here to-day at that price; a deal was closed to-day at that price.

"The Chairman: We are not going into the values. Of course, if there is any modus by which a settlement can be reached, the Board is quite willing, but it must be open and above board, and of course with the consent of all parties who would be committed to it, and I don't see how we can get the consent of all these petitioners."

The foregoing is the whole of the evidence which the appellants put in, in support of their complaint as to the exclusion of material evidence as to value. No other part of the report of the proceedings was put in.

It is difficult to imagine of what value the admission of evidence as to the sale of a lot of new telephone poles on the 13th February, 1920, would have upon the value of the poles of 10 to 12 years of age included in the two sales in question here. It appears from the report of the Chairman, which was adopted by the Board, that he did not consider that the transaction was to be looked at in the light of the possible value of any of the minor elements or materials of the plant, taken separately; but rather as to the whole undertaking as a going concern, and he came to the conclusion that the undertaking was altogether too heavy a burden for the two municipalities, and in this the Board agreed with him.

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When the counsel for the appellants was making his application to this Court for leave to appeal and making complaint as to his not having had a full opportunity of presenting his case, he was answered by the opposing counsel that the respondents had not called a single witness, and that the Chairman had offered to adjourn to a future day in Toronto, or that he might if he preferred put in a written argument, and in his reply he did not controvert this statement.

In my opinion, the Chairman and the Board acted throughout in accordance with the requirments of the statute.

Maclaren, J.A.

Magee, J.A.

MAGEE, J. A.:—I agree that in the circumstances the discretion exercised by the Ontario Railway and Municipal Board in withholding approval of the sale should not be interfered with. I am not without doubt as to the propriety of the Board acting without again hearing the parties in adopting the report and conclusions of the Chairman after he alone had heard the parties and their evidence.

Ferguson, J.A.

FERGUSON, J.A. (dissenting):—The appellants complain that the Railway and Municipal Board did not hear and determine the applications on which the order appealed from was made, in that only the Chairman of the Board heard the parties, and in that he refused to hear evidence of value, notwithstanding which refusal he reported to the Board, and the Board acted on his report, that the contracts for which the Board's approval was asked were improvident contracts, in that the price to be paid for the appellants' telephone system was too high.

The material before us supports the appellants' statement and complaints; and, as I view it, the question is, should the Board, on an application for its approval of a contract for the purchase and sale of a telephone system (Ontario Telephone Act, 8 Geo. V. ch. 31, secs. 24 and 87), hear the parties and consider such relevant evidence in argument as the parties submit, or has the Board full power to act according to its own wisdom without hearing, considering, or weighing such arguments and evidence as would appear to be relevant to the issue to be determined?

If the Board, in exercising the powers conferred by secs. 24 and 87 of the Telephone Act, does not act as a judicial tribunal or in a judicial capacity, but as executive officers of the Government, the statute may have conferred upon the Board power and

authority to act according to its own wisdom and information without regard to the representations, evidence, and arguments of the parties: *Rex* v. *Inspector of Leman Street Police Station*, [1920] 3 K.B. 72. If, on the other hand, the Board, in exercising the powers conferred upon it by these sections, is acting in a judicial or quasi-judicial capacity, and in determining the question for its consideration is exercising a judicial discretion, then I think the reasoning of the judgment in the *Leman* case (*supra*) supports the view that the Board ought to hear the parties, and act on evidence, and should not reject or refuse to hear or consider relevant evidence and argument.

The Board did not purport to act without hearing the parties; but, on the argument of this appeal, it was sought to support the Chairman's refusal to hear the relevant evidence as to value and the failure of the Board, rather than the Chairman thereof, to hear the parties, on the ground that no hearing was necessary.

I have had the advantage of perusing and considering the opinion of my Lord the Chief Justice; but, with respect, I am unable to adopt the view that the Legislature intended to confer or has by express enactment conferred upon the Ontario Railway and Municipal Board the absolute, autocratic legislative powers, possessed by the Legislature, of limiting or destroying the rights of a person or corporation to contract freely, without evidence, without hearing the parties, and without regard to the equities and rights of the matter. It may well be that the Legislature intended that the approval of the Board should be substituted for the approval of the Crown, acting through the Legislature, or acting by and on the advice of the Executive Council or by and on the advice of executive officers of the Government; but it does not follow that it was intended that the Board could act without hearing the parties, as the Crown and Legislature might have done, and a careful perusal of the Ontario Railway and Municipal Board Act, R.S.O. 1914, ch. 186, and particularly the sections of the Act providing for hearings, notice to parties, inquiry, taking of evidence, and appeal, has led me to the conclusion that the Legislature intended and enacted that before acting the Board shall inquire and give every party whose rights are being dealt with, an opportunity of being heard.

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To my mind, Lord Loreburn in *Board of Education* v. *Rice*, [1911] A.C. 179, at p. 182, fairly and accurately enunciated the principles which should govern this Board in the performance of its duties and in the exercise of its powers, when acting under or pursuant to secs. 24 and 87 of the Telephone Act. Lord Loreburn says:—

"Comparatively recent statutes have extended, if they have not originated, the practice of imposing upon departments or officers of State the duty of deciding or determining questions of various kinds. In the present instance, as in many others, what comes for determination is sometimes a matter to be settled by discretion, involving no law. It will, I suppose, usually be of an administrative kind; but sometimes it will involve matter of law as well as matter of fact, or even depend upon matter of law alone. In such cases the Board of Education will have to ascertain the law and also to ascertain the facts. I need not add that in doing either they must act in good faith and fairly listen to both sides, for that is a duty lying upon every one who decides anything. But I do not think they are bound to treat such a question as though it were a trial. They have no power to administer an oath, and need not examine witnesses. They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view."

It may be that the Board was in possession of facts and information which enabled it to conclude that the price which the respondent municipalities proposed to pay for the telephone systems of the appellant company was too high; but that does not, it seems to me, justify the Board in its refusal to admit the appellants' evidence and argument, or justify the Board acting on evidence or information which it did not disclose to the appellants, and which evidence and information they were not afforded a fair opportunity to correct or contradict.

For these reasons, I am of opinion that the Board, in considering and acting on evidence not disclosed and in refusing to hear and consider the appellants' relevant evidence and argument, acted erroneously and on a mistaken assumption of jurisdiction, and, by thus acting on a wrong construction of the Act, have

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RE CONSOLIDATED TELEPHONE CO. LTD. AND TOWNSHIPS OF CALEDON AND ERIN.

Ferguson, J.A.

not exercised the real discretion given to them by the Act: and that the appeal should be allowed and the matter referred back to the Board for reconsideration in the light of such further relevant evidence as the appellants shall see fit to submit, and for determination after the appellants have had a fair opportunity of hearing, considering, correcting, and contradicting such information as the Board possesses and proposes to consider and act upon, but which may not have been given by the parties to the controversy, or disclosed to them. It may be that the approval of the Board is not necessary to the validity of the contract for which its approval was sought. The parties appear to have assumed that such approval was necessary, and I have dealt with the matter on that assumption, but I must not be taken to have reached any conclusion on the question, which, no doubt, will be considered in the litigation now pending in which the respondent municipalities are endeavouring to recover from the appellant company the purchase-moneys paid under and pursuant to the contracts for which approval was sought and refused.

Appeal dismissed.

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HICKEY v. SPOLLEN.

Quebec Court of Review, Demers, Panneton and de Lorimier, JJ. June 12, 1920.

1. TAXES (§ V A—185)—TRANSFER OF RIGHTS BY HEIRS—SUCCESSION DUTIES NOT PAID—ILLEGALITY OF TRANSFER.

A transfer of their rights by the heirs of an inheritance while the succession duties remain unpaid is illegal and will be set aside.

2. ATTACHMENT (§ III C—58)—RETURN OF GOODS OR PAYMENT OF OWNER'S VALUATION.

A defendant who is sued by way of attachment, must either return the goods attached or pay the price at which the owner values them if this is a reasonable valuation.

Statement.

APPEAL from the judgment of the Superior Court in an action to set aside a transfer and to recover back certain goods. Reversed.

The judgment of the Superior Court, which is set aside, was given by Chauvin, J., on December 10, 1919.

The plaintiff, Edward Hickey, states that he is one of the legal heirs of Mrs. Julia Hickey, who died intestate about March 8, 1918, and the plaintiff, Andrew Knox, states that he is subrogated to the rights of other heirs under deeds of transfer dated

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June 4, 1918; that, as legal heirs, they claim the property of the inheritance which is in the defendant's possession, consisting of certain goods and animals and a sum of $1,500, which was given to the said Julia Hickey by her marriage contract with the late James Brown, and which was payable one month after the death of the said James Brown, which occurred on March 8, 1918, some hours before the death of Mrs. J. Hickey.

The defendants plead, in substance, that no declaration of death was made or registered after the death of Mrs. Hickey, and that the succession duties payable upon the property have never been paid, and that for these reasons the transfers granted to the plaintiff, A. Knox, by some heirs are invalid, and give him no title; that the defendants are ready, as they have always been, to return to the legal heirs, or their representatives, on their request, the goods which are included in the inheritance of the late Mrs. Julia Hickey; that, as to the sum of $1,500, the share of the defendant amounting to $250, they deposit it with interest and the costs of the present action for the said amount, reserving the right to make up the amount if insufficient, and ask for the dismissal of the action as to the balance.

The Superior Court maintained the action in part by the following judgment:—

Considering that the succession duties upon the property of Mrs. Julia Hickey have not been paid, and that for that reason the transfers to Andrew Knox, one of the plaintiffs, by Mrs. Elizabeth Hickey, Mrs. Theresa Hickey and John Hickey, are null and void, and confer no title on him; that the plaintiff, Edward Hickey, being one of the co-heirs of Mrs. Julia Hickey, his sister, is entitled to his share of the sum of $1,500, a portion of the inheritance of his said sister, namely $250, and also in the personal property left to him by the will of the late James Brown, and which were in the possession of the latter and of Mrs. Julia Hickey at the time of their death, and which consisted, according to the evidence, in a cow worth $25, a carriage robe worth 50 cents, and furniture worth $7; that no demand was made upon, or proceedings taken against the defendants by the heirs of Mrs. Julia Hickey to regain possession of the goods claimed by the defendants, and that the defendants declare that they are ready and have always been ready to return them and to place them at the disposal of the heirs or their representatives.

The Court notes on the record the offer of the defendants to return to the legal heirs of Mrs. Julia Hickey the personal property forming part of the inheritance, and of the offer and deposit of the sum of $250, with interest and costs, the latter to be made up to the necessary amount:

Declares the said offers to be good, valid and sufficient, and authorizes the plaintiff, Edward Hickey, to take and receive the said sum of $250 upon his signing the certificate or receipt Ex. "A" produced by the defendants with their defence; maintains the action of the plaintiff, Edward Hickey, with costs to that extent and dismisses it as to the rest with costs against the plaintiff, Andrew Knox.

A. McConnell, for plaintiff; *T. P. Foran*, K.C., for defendant.

JUDGMENT—Considering that the succession duties on the goods of Mrs. Julia Hickey have not been paid and that therefore the transfers to Andrew Knox, one of the plaintiffs, by Mrs. Elizabeth Hickey and Mrs. Theresa Hickey are null and void and confer no title on him; that the plaintiff, Edward Hickey, being one of the co-heirs of Mrs. Julia Hickey, his sister, is entitled to his share of the sum of $1,500 which forms part of the inheritance of his said sister, namely, $250, and also in the personal property which was left to the latter by the will of the late James Brown; that the defendants have not denied by their plea that they were in possession of a buggy; that their offer to return the goods which they might be in possession of was then insufficient; that, moreover, such offer was not accompanied with an offer to return to the plaintiffs their share of the harness, $7, which they had illegally sold; that the plaintiff, as joint owner, has the right to claim these goods from the defendants who are not heirs; that they admitted at the hearing that they were in possession of a carriage robe; that it is proved that, at the time of his death, Brown had in his possession a yearling cow; that the admission in the plea was therefore insufficient, likewise upon these facts; that the defendants, admitting that they are in possession of the greater part of the goods claimed, are bound to return them or to pay the value which the plaintiffs ask, when the valuation made by them appears reasonable; that a defendant sued by way of attachment and who detains the goods cannot be allowed to keep them by merely paying the value which he places on them; that the cow claimed, according to the evidence, is worth more than $35, and that if the defendants wish to keep it they must pay the value claimed by Hickey and fixed by the witness Knox; that the yearling cow was worth the amount claimed in the suit, namely, $25; that the defendants have not denied that they were in possession of a buggy worth $40; that the defendants being in

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possession of a carriage robe valued by the plaintiff at $10, must return the robe or pay the value asked; that it is the same with regard to all the goods which furnished the room of the said Mrs. Brown at the time of her death, which are valued at $40; that seeing that the harness was sold by the defendants for $7, and that the plaintiffs have not proved that it was worth more, the claim of the plaintiff must be reduced to this amount.

Reverses the judgment appealed from with costs, and proceeding to give the judgment which the Superior Court should have given, condemns the defendants to return to the plaintiff Hickey within 15 days after judgment, the cow worth $70, the yearling worth $25, the buggy worth $40, the carriage robe worth $10, and all the goods furnishing the room of the said Mrs. Brown, worth $40, or else to pay to the plaintiff the sum of $251.66, including therein the share of the plaintiff in the harness sold, with interest from July 18, 1918, and costs and dismisses in its entirety the claim of the plaintiff Knox, reserving his remedy.

MEMORANDUM DECISIONS.

Memoranda of less important Cases disposed of in Superior and Appellate Courts without written opinions or upon short memorandum decisions and of selected Cases.

REX v. WAH KEE. ALTA.

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Alberta Supreme Court, Walsh, J. October, 1920.

MUNICIPAL CORPORATIONS (§ II C—112)—*Early closing by-law —Commercial business—Laundry not included.*]—Motion to quash a conviction under the Edmonton early closing by-law on the ground that a laundry is not within the by-law. Motion granted.

G. B. O'Connor, K.C., for applicant; *J. C. F. Bown*, K.C., *contra*.

WALSH, J.:—Section 239 (*b*) of the Edmonton Charter enacts that "all stores, shops and places doing a commercial or other business, except such as the Council may exempt, shall be closed at six o'clock in the afternoon of every week day." The defendant being a laundryman has been convicted of a breach of this section. He moves to quash this conviction upon the sole ground that a laundry is not within the section.

A laundry certainly is neither a store nor a shop. I think that it is not a place doing a commercial or other business. I read the word "commercial" in the sense of relating to commerce partly on the *ejusdem generis* principle and partly because that is its ordinary and generally understood meaning. I do not think that it would occur to very many people that a man whose occupation is that of washing other people's dirty linen is carrying on a commercial business. The word "commercial" conveys to the mind the idea of dealing or trading in some article of commerce and that idea is strengthened here by the words "commercial . . . business" being linked up with the words stores and shops. In a sense of course every business which has profit for its object and which of them has not, is a commercial business, but how absurd it would be for instance to call a boot-black's stand a commercial business. Yet he cleans one's boots just as a laundryman cleans his shirts. If a laundry is not a commercial business is it an "other" one? If it is a business at all as it certainly is and it is not a commercial one it must be an "other"

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one if the Legislature meant to bring within the section not only every business of a commercial character but also every business not of that character. I do not think that is the meaning of these words at all. If such is their meaning the words "a commercial or other" are mere surplusage which mean nothing and the section would have made much easier and more intelligent reading without them for then it would have read that all stores, shops and places doing business must close at the named hour. Every one, even a Chinese laundryman, could understand that. It is quite evident that the Legislature meant to confine the application of this section to certain classes of business places, otherwise the reference to places doing a commercial business would never have appeared in it. On the *ejusdem generis* doctrine and viewing broadly the general scheme of the section I think that the "other" business referred to is one that is akin to or of the same type as a commercial business and so it does not include a laundry.

If the opinion that I am giving effect to is wrong I think it must follow that every business in the city which is open to the public and is established for gain (such as the hotels, the restaurants, the theatres and the offices of the doctors and lawyers) is within the section for it is either doing a commercial business in the same sense that a laundry is or it is doing a business which is not commercial and therefore is doing an "other" business. That the Legislature did not mean this is shewn by the fact that at the same time that sec. 239 (*b*) was passed sec. 239 (*a*) was enacted providing for a weekly half holiday and it was made so broad as to include "all or any class or classes of places wherein any business, trade, profession, calling, occupation or means of livelihood is carried on." In the face of language so broad and comprehensive as this it is impossible for me to extend the restricted language of sec. 239 (*b*) which immediately follows it to cover the class to which this applicant belongs.

The conviction is quashed. No costs.

REX v. HUGHES.

Alberta Supreme Court, Walsh, J. November 27, 1920.

EVIDENCE (§ VIII—672)—*Wrongfully obtained—Improper admission—Criminal trial.*]—Motion to quash a conviction for theft on the ground of improper admission of evidence. Conviction quashed.

M. M. Porter, for motion; *W. H. Sellers*, for Attorney-General.

WALSH, J.:—As I read the evidence of the constable he swore to two separate and distinct occasions on which the accused spoke to him about the robe; of the theft of which he has been convicted. The first of these occasions was, when the constable stopped him on the street and questioned him about the robe. I can see nothing objectionable in the admission of this evidence because (1) the defendant was not then under arrest and (2) the answers given by him to the constable's questions did not amount to a confession of guilt but on the contrary were a denial of it. *Rex* v. *Hurd* (1913), 10 D.L.R. 475, 6 Alta. L.R. 112, 21 Can. Cr. Cas. 98. The second of these occasions was after his arrest. The record is rather obscure as to this. All that there is on the subject is to be found in the following excerpt from the constable's evidence, "And I did not believe his story" (referring to the story told him on the street) "and I brought him down and he said he stole it from a car, etc." The only meaning that I can take from this is that disbelieving the defendant's first story the constable took him to the police station and secured this confession from him. He was then virtually if not actually under arrest and no statement made by him should have been received in evidence until its voluntary character was satisfactorily established. There is absolutely nothing in the record to shew that this statement was voluntarily made by the accused and it therefore was improperly admitted. The only admissible evidence that there was before the magistrate at the close of the case for the prosecution was that given by the constable as to the statements of the accused on the street (for the constable was the only witness called for the Crown in opening) and that as I have said was a denial and not an admission of guilt. The accused should, in my opinion, have been discharged then.

He, however, gave evidence himself and placed two other witnesses on the stand in his behalf. If there was to be found in

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the evidence of himself and his witnesses enough to supply the defects in the Crown's case and thereby establish his guilt it could be taken advantage of by the Crown. That is not the case however. Then, in rebuttal, the prosecution, against the protest of the prisoner's counsel, put on the stand the owner of the robe. His evidence was not rebuttal evidence at all. It was directed to the question of his ownership of the robe which up to that time had not been asserted, much less proved, and to the circumstances under which he had left it where he last saw it. This would have been perfectly admissible in proof of the charge but was inadmissible in reply. Being of the opinion that the only evidence upon which the conviction could be founded was improperly admitted and therefore that there was no evidence to justify it I must quash the conviction and order the discharge of the accused from the custody in which he is held under it. There will be no costs of the motion and the magistrate and all others acting under his conviction and the warrant issued thereon will have the usual protection.

POTTER v. LANDEN.

Alberta Supreme Court, Walsh, J. November 23, 1920.

BROKERS (§ II B—10)—*Sale of real estate—Agent acting for purchaser—Contract for services not in writing—Alta. Stats. 1906, ch. 27—Construction—Application.*]—Action to recover payment for services in connection with the purchase of real estate, the plaintiff acting for the purchaser in the transaction. Affirmed, *ante* p. 668.

A. H. Clarke, K.C., for plaintiff.

A. Macleod Sinclair, K.C., and *J. W. Hugill*, for defendants.

WALSH, J.:—The plaintiff sues to recover from the defendants payment for his services rendered to them in the purchase of land in Alberta. I am asked to dispose of a question of law which has been raised by the defendants at the outset of the litigation, namely, whether or not ch. 27 of the Alberta Statutes 1906 [an Act to prevent Frauds and Perjuries in relation to Sales of Real Property], applies to such a claim.

This statute provides that no action shall be brought whereby to charge any person "for services rendered in connection with the sale of any land," unless the contract upon which recovery is sought

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or some note or memorandum thereof is in writing signed by the defendant or his agent. In my judgment this statute does not apply to this case. The services for which the plaintiff claims were rendered not in connection with the sale of the land but in connection with its purchase. One who acts for the vendor of land renders services in connection with the sale of it but one who acts for a purchaser renders services in connection with its purchase, though of course a sale by the owner is necessarily involved in every purchase. The Act only applies in favour of the person to whom the services were rendered. *Heaton* v. *Flater* (1914), 16 D.L.R. 78, 8 Alta. L.R. 21. *Karrar* v. *Schubert* (1914), 19 D.L.R. 804, 8 Alta. L.R. 21 at 23, and the services rendered to these defendants consisted in the acquisition of this land for them. This view of the Act is emphasised by the amendment by sec. 38, ch. 4, 10 Geo. V. 1920 (Alta.), which extends relief in certain circumstances to an agent who has sold lands. The scope of this amendment is a plain indication to me of the mind of the Legislature on the subject for I am quite sure that if the original Act was intended to apply to an agent of the purchaser the same relief would have been given to him by this amendment in parallel circumstances as is thereby afforded the agent of the vendor. The whole scheme of the Act from its title down to the above amendment is to protect an owner of land against liability to one who claims to have sold it for him and this is what I think Stuart, J., referred to in *Heaton* v. *Flater*, 16 D.L.R. at 78, as "the well-known evil which this statute was intended to remedy."

My judgment upon this point is therefore in favour of the plaintiff to whom the costs of this motion will be costs in the cause.

Judgment accordingly.

JOHNSON v. RICE.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart and Ives, JJ. December 9, 1920.

GARNISHMENT (§ I A—5)—*Action for damages—Counterclaim by defendant for rent—Garnishee summons by defendant attaching moneys owing to plaintiff—Validity.*]—Application to set aside a garnishee summons on the ground that such remedy is not open

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to a defendant who claims by way of counterclaim by reason of the wording of Rule 648 (Alta.) and that the affidavit in support of the garnishee summons is not sufficient. Application granted on the second ground.

J. K. Paul, for appellant; *L. H. Fenerty*, for respondent.

The judgment of the Court was delivered by

IVES, J.:—This is an action in which the plaintiff seeks damages. The defendant counterclaims for rent in a sum certain and obtained a garnishee summons attaching moneys alleged as owing to plaintiff.

Application was made to set aside the garnishee summons on the ground that such remedy was not open to a defendant who claims by counterclaim by reason of the wording of Rule 648 and the definition of the word "plaintiff" found in the Judicature Ordinance. The application was refused by Winter, D.C.J., and from his order the plaintiff by leave appeals.

Upon the issue I have set out I think the order was right. The stumbling block seems to be in the hasty construction of the definition of the word "plaintiff" in sec. 2, sub-sec. 7, of the Judicature Ordinance. There it is said that

> Plaintiff includes any person asking any relief (otherwise than by way of counterclaim *as a defendant*) against any other person by any form of proceeding whether the same be taken by action . . . or otherwise."

The definition in the English Judicature Act is the same as ours and as far back as 1878, Brett, L.J., in the case of *Winterfield* v *Bradnum* (1878), 3 Q.B.D. 324, said at 326: "A counterclaim is sometimes a mere set-off; sometimes it is in the nature of a cross-action; sometimes it is in respect of a wholly independent transaction." And these distinctions have clearly affected the construction of the word "plaintiff" when used in the Rules of Court, by the Judges in a line of cases down to the present time. The distinction is clearly to be apprehended in the recent case of *New Fenix Compagnie etc.* v. *General Accident Fire and Life Assce. Corp.*, [1911] 2 K.B. 619.

This distinction is, I think, meant to be made by the words of the definition which I have underlined, viz., "*as a defendant.*" In the present case the counterclaim is in the nature of a cross-action and not a defence to the plaintiff's claim. The defendant but takes advantage of the existence of proceedings instituted to have an independent claim of hers against the plaintiff litigated

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and so avoids a "multiplicity of actions." In such circumstances I hold that she is a plaintiff within the meaning of Rule 648, Alberta Judicature Ordinance, 1914.

But the plaintiff urges another ground in support of his application, viz., that the affidavit in support of the garnishee summons is not sufficient. Upon an examination of the affidavit filed I am utterly unable to understand how the clerk could determine at whose instance it was issued or to whom the deponent referred in the several paragraphs.

Raising a claim by counterclaim should occasion no difference or change in the style of cause unless a stranger is added. The affidavit here should have been styled the same as the statement of claim and have stated the indebtedness of the plaintiff to the defendant and the other facts required to be sworn to.

The summons issued should have retained the same style of cause and would have readily complied with Form C in effect by beginning—"You are hereby notified that in an action commenced in this Court etc. . . . the defendant by her counterclaim claims of the plaintiff the sum of etc." There is no sanctity in a printed form and by using them in this instance the defendant is led to make absurd statements. Nor do I think the defects are such that the defendant should be permitted to remove, re-draft and re-swear it. Its appearance discloses absolute lack of care in its preparation and I am not prepared to countenance such careless practice. *Mohr and Morkin* v. *Parks etc. Co.* (1910), 3 Alta. L.R. 252.

No such affidavit as Rule 648 calls for has been filed and hence no garnishee summons should have issued. In the result the appeal should be allowed and the garnishee summons set aside. Upon the issue mainly argued and relied upon, however, the appellant fails and I would therefore allow the appeal without costs.

Appeal allowed.

Re HODNETT.*

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Ontario Supreme Court, Holmested, Registrar in Bankruptcy, November 29, 1920.

BANKRUPTCY (§ I—7a)—*Procedure under Bankruptcy Act, 1920—Filing of authorised assignment with Registrar—Necessity for—Sec. 11 and Rule 7—Time for filing—Certified copy—Affidavits—*

*See annotation; The Bankruptcy Act, 1920, 53 D.L.R. 135.

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Filing fees.]—Question submitted to the Registrar, on behalf of the Canadian Credit Men's Association, official trustees, whether or not an authorised assignment under the Bankruptcy Act, 1920, should be filed with the Registrar.

J. M. Bullen, for the applicants.

HOLMESTED, REGISTRAR IN BANKRUPTCY.—The Act and Rules are not explicit on the point, and the question seems to depend on what is the proper inference to be drawn from the Act and Rules as they stand. It is a necessary inference from what is stated in the Act and Rules that all assignments shall be filed with the Registrar without delay after the making thereof; and this may be demonstrated by a careful consideration of sec. 11 and Rule 7.

However, I am unwilling to make any ruling, because the question of payment of fees to the officers (of whom I am one) is involved; and I respectfully refer the question to the Judge in Bankruptcy, suggesting that not only the main question as to the necessity for filing assignments should be considered, but also: (1) the time for filing; (2) whether an original should be filed or whether a copy certified by the trustee would suffice (see sec. 11 (3), (8)); (3) whether the copies of the affidavits required by sec. 11 (11) and form 19 should also be filed; and (4) whether, if the affidavits and assignment should all be filed, a separate filing fee should be charged for each affidavit (see tariff item 13).

BRENNER v. AMERICAN METAL CO.*

Ontario Supreme Court, Latchford, J. December 10, 1920.

BANKRUPTCY (§ I—7a)—*Assignment to authorised trustee under Bankruptcy Act, 1920—Effect of—Sec. 10—"Property"—Sec. 2 (dd) —Causes of action—Action for breach of contract—Leave to assignee to proceed with action begun before assignment—Con. Rule 300.*]—Application by the plaintiff for an order that Osler Wade, an authorised trustee under the Bankruptcy Act, be permitted to proceed with this action, which was begun on November 6, 1920.

H. H. Shaver, for plaintiff.

G. R. Munnoch, for defendants.

*See Annotation, The Bankruptcy Act, 1920, 53 D.L.R. 135.

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LATCHFORD, J.:—When the plaintiff assigned on November 10, 1920, the action became defective. It was not a personal action, but one founded on an alleged breach of contract.

By sec. 10 of the Bankruptcy Act, 1920, the assignment, being in proper form, vested in the trustee all the property of the assignor.

By sec. 2 (*dd*), "property" includes "things in action . . . and every description of property, whether real or personal, movable or immovable, legal or equitable, and whether situate in Canada or elsewhere; also obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, in, arising out of, or incident to property as above defined."

Under a similar provision and definition in the English Bankruptcy Act, it has been held that as a rule all the bankrupt's causes of action vest in the trustee. The exceptions are claims in respect of personal torts to the bankrupt and claims in respect of injuries to his reputation: Yearly Practice, 1920, p. 221.

The present action does not fall within the exceptions stated, and the order authorising Wade to proceed should be made: Rule 300 (Supreme Court of Ontario, 1913).

The time for appearance, or such other course as the defendants may be advised to take, should be extended from the 13th to the 20th December.

Costs in the cause.

SASKATCHEWAN LAND Co. v. HARVEY.

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Saskatchewan King's Bench, Bigelow, J. December 2, 1920.

BROKERS (§ II B—12)—*Sale of land—Real estate agent's commission—Sufficiency of services.*]—Action for commission on the sale of a section of land.

P. M. Anderson, K.C., for plaintiff; *H. G. W. Wilson*, K.C., for defendant.

BIGELOW, J.:—This is an action for commission on the sale of a section of land. William Starr (whose rights were assigned to plaintiff) was a real estate agent at Indian Head. In the spring of 1918 the defendant listed his farm for sale with Starr at $60 an acre; $10,000 cash, balance 7%; and agreed to pay Starr a commission of $1 an acre. The listing is denied by defendant, but I think I must accept Starr's evidence that it was so listed for several reasons:

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(a) In April, when Thompson and Lockerby called on Starr, Starr gave them the price and other details, the same as defendant gave Thompson after Thompson and defendant were introduced. (b) In April, 1918, on the same occasion, Lockerby saw what was probably the plaintiff's memo. of the listing containing the same terms. (c) Starr's letter to A. D. Millar, February 19th, 1918, giving the same particulars.

It is easy to suggest that plaintiff might have made this memo. without defendant's consent, but I cannot understand how he would get all the details, including the price and cash terms, exactly right, without plaintiff's knowledge and consent.

In April, 1918, Thompson called on Starr, who brought this land to Thompson's attention, and he would have taken Thompson out to see the land. He first telephoned defendant to see if he was at home, and defendant brought in his car to Indian Head. Starr then introduced Thompson to defendant, and the three of them went out to look at the property. No sale took place to Thompson at that time. Thompson bought other land near Balcarres. In the fall of 1918 defendant moved to British Columbia, and before that altered the listing with Starr to $75 an acre and subject to a lease.

Nothing further was done by any of the parties until September, 1919, when Thompson returned to Indian Head and saw Starr and inquired if he had any farms for sale close to town. Starr mentioned the farm in question, and stated it was now $75 an acre, subject to a lease. Starr offered to write to defendant in British Columbia to see if it could be bought for less, but Thompson said he would write himself. Thompson did write to defendant, who soon afterwards came to Indian Head and closed the sale to Thompson at $70 an acre, with $15,000 cash.

Was this a special or a general listing? If it was a special listing at $75 the defendant having afterwards sold to Thompson at $70, plaintiff would not be entitled to succeed.

In *Toulmin* v. *Millar* (1887), 12 App. Cas. 746, Lord Watson said:

> When a proprietor with a view of selling his estate goes to an agent and requests him to find a purchaser, naming at the same time the sum which he is willing to accept, that will constitute a general employment; and should the estate be eventually sold to a purchaser introduced by the agent, the latter will be entitled to his commission, although the price paid should be less than the sum named at the time the employment was given. The mention of a specific sum prevents the agent from selling at a lower price without the consent of his employer, but it is given merely as the basis of future negotiations, leaving the actual price to be settled in the course of those negotiations

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See also *Burchell* v. *Gowrie*, [1910] A.C. 614. *Wright* v. *Smith and Nelson* (1919), 49 D.L.R. 408, 12 S.L.R. 491; Lamont, J., at p. 411, says:

A "general employment" means that the understanding, express or implied, between the parties is, that if the agent procures a purchaser who is willing to buy at a price and upon terms which the vendor is willing to accept, the agent shall be entitled to his commission, the price and terms specified in the listing being considered simply as a basis of negotiations. See Duff, J., in *Stratton* v. *Vachon* (1911), 44 Can. S.C.R. 395.

On his examination for discovery defendant said:

Q. Well, at that time you would have been prepared to pay Mr. Starr a commission if the sale had gone through on terms satisfactory to you? A. If that sale had gone through I certainly would have. Q. Whether it had been $60 an acre or $70 an acre? A. I would have paid him a commission if that sale had gone through. Q. That $60 was simply mentioned by you as a basis for negotiations? A. That was what I was asking for the place at that time. Q. But it was not your final figure? A. No. Q. If Mr. Starr had procured a purchaser who was willing to buy the farm at any price suitable to you, you would have paid him his commission of $1 an acre? A. Yes.

I conclude then that this was a general listing.

I further find that Starr did find the purchaser, namely, one Thompson, who completed the sale with the defendant, and that Starr was the efficient cause of the sale. *Stratton* v. *Vachon*, 44 Can. S.C.R. 395.

The defendant argues that as the first negotiations came to an end in April, 1918, and the sale was not made until October, 1919, the plaintiff should not recover, and this would be quite right if plaintiff had had nothing further to do with bringing the parties together in the fall of 1919. *Herbert* v. *Bell* (1912), 8 D.L.R. 763, 6 S.L.R. 10; *Philip* v. *Bauer* (1907), 5 W.L.R. 187. But this case is different from the last two cited cases, in that Thompson saw Starr in September, 1919, and Starr told him this farm was still for sale. Starr offered to write to defendant in British Columbia to see if it could be bought for less than the listed price, $75, but Thompson said he would write himself. Thompson did write, and the correspondence resulted in a sale. It is true that Starr did not do very much on this occasion, but I think it was the efficient cause of the sale, coupled with what he had done before, namely introduced the purchaser and shewed him the farm.

There will be judgment for the plaintiff for $640 and costs.

Judgment accordingly.

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SASKATOON TOWNSITE Co. Ltd. v. PEEBLES.

Saskatchewan King's Bench, McKay, J. November 18, 1920.

LIMITATION OF ACTIONS (§ II B—40)—*Agreement for sale of land—Not under seal—Assignment—No acknowledgment of debt—Debt more than six years old—Volunteers and Reservists Relief Act, 6 Geo. V. 1916 (Sask.), ch. 7—When applicable.*]—Action for the balance of purchase money due on an agreement of sale of land.

F. G. Atkinson, for plaintiff; *H. Peebles*, for defendant.

McKAY, J.:—This is an action for the balance of purchase money due on an agreement of sale of Lot 9, in Block 17, in the townsite of North Battleford, according to Plan No. B 1929.

The said agreement is in writing, but not under seal, and is dated March 12, 1912, whereby A. B. Simpson and H. W. Detwiller agreed to sell the said lot to the defendant and R. D. Dobson, J. Shaw and J. E. Smith, for the sum of $3,000, and the said defendant and Dobson, Shaw and Smith jointly and severally agreed to pay to said Simpson and Detwiller the said sum of $3,000 as follows: The sum of $750 on March 12, 1912; $750 on September 12, 1912; $750 on March 12, 1913; $750 on September 12, 1913; with interest on the unpaid purchase money at the rate of 8% per annum.

The said Simpson and Detwiller by assignment in writing dated October 31, 1919, assigned all moneys due owing or payable under said agreement, and all their right title and interest therein to the plaintiff, and caused the said lot to be transferred to the plaintiff.

The plaintiff claims there is still due the sum of $976.94 with interest thereon from December 2, 1919, at the rate of 8% per annum.

When this case was called on for trial, the defendant was allowed on terms to plead the Statute of Limitations, being ch. 50 of the R.S.S. 1909, as a bar to the plaintiff's action.

At the conclusion of the plaintiff's case, Mr. Walker, for defendant, moved for the dismissal of the plaintiff's action on the ground that it was barred by the Statute of Limitations. I reserved judgment on this motion and heard the evidence for the defence.

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I find against the defendant on all the defences raised, except as to the action being barred, and proceed to deal with this defence.

The last payment made by the defendant or by anybody else was on September 12, 1913.

There is no acknowledgment of the alleged debt by defendant since the last payment made on September 12, 1913.

This action was commenced in December, 1919, more than 6 years after the last payment.

The defendant admits that Robert Dobson, one of the purchasers in the agreement sued on, was on active service in the Canadian Expeditionary Force from the spring of 1915 to the spring of 1916.

Mr. Atkinson, for plaintiff, contends that the action is not barred, for two reasons:

1. That as the plaintiff has a vendor's lien on the land sold, sec. 8 of 37-38 Vict. ch. 57 (the Real Property Limitation Act, 1874) applies, and that, under said section, plaintiff has 12 years from the date of the last payment within which to bring his action. 2. That as Robert Dobson, one of the purchasers in the agreement sued on, was on active service overseas as a volunteer in the Canadian Expeditionary Force from the spring of 1915 to the spring of 1916, secs. 3 and 23 of 6 Geo. V. 1916 (Sask.) ch. 7, the Volunteers and Reservists Relief Act apply, and as the plaintiff's right to bring this action was suspended for at least 1 year, the 6 years had not expired at the time the writ was issued in December, 1919.

This question was raised in *Barnes* v. *Glenton*, [1899] 1 Q.B. 885. The head-note is as follows:

Where an action is brought to recover a simple contract debt, and the money sought to be recovered is charged on land, the period of limitation is that imposed by the Limitation Act, 1623, and has not been enlarged to twelve years by the Real Property Limitation Act, 1874.

This action is brought on the promise to pay contained in the agreement of sale, which is a simple contract. It is not an action to enforce the vendor's lien against the land agreed to be sold. The action, therefore, in my opinion, falls within sec. 1 of R.S.S. 1909, ch. 50, which says that all actions of debt grounded upon any contract without specialty shall be commenced within 6 years after the cause of action arose.

As to the second contention:

Sec. 2 of the Volunteers and Reservists Relief Act, 6 Geo. V. 1916 (Sask.), ch. 7, as amended by 7 Geo. V. 1917, ch. 34, sec. 48, provides that

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This Act is passed only for the protection of the property and interests held *bonâ fide* in their own right by persons who have joined or who may at any time hereafter join as volunteers the forces raised by the Government of Canada for overseas service in the war now existing . . . and its provisions shall apply to such persons exclusively.

When construing sec. 3 of said Act, sec. 2 should be borne in mind, and although the language used in sec. 3 may be wide enough to prohibit the bringing of an action upon a personal covenant in any agreement for the sale of land made by a volunteer, yet, in my opinion, in view of sec. 2 above in part quoted, such prohibition should be restricted to an action against the volunteer or an action that would affect his rights or interests, and not to all actions that may be brought upon such agreement. If the wide construction were to be put upon this section as contended by plaintiff's counsel, then it would prohibit the bringing of an action even if the volunteer had ceased to have any interest in the agreement or land.

The action in this case, in my view, could have been brought against the defendant at any time after default, as it does not affect the interest of the volunteer Dobson in the land or in any way prejudice his rights. It is purely a personal action against the defendant Peebles.

I am therefore of the opinion that secs. 3 and 23 of said Act do not apply.

The result is, that in my opinion the plaintiff's claim against the defendant is barred, as it commenced this action more than 6 years after the cause of action arose, and defendant is entitled to judgment dismissing the action. But in view of the order I made on November 11, 1920, allowing the amendment on which the defendant has succeeded, it will be without costs to defendant up to the amendment, and with costs to defendant after the amendment. There will be a right of set-off as to costs.

Judgment accordingly.

RHEINDHART v. PAUKSCHEN.

Saskatchewan King's Bench, McKay, J. November 25, 1920.

CONVERSION (§ I B—10)—*Contract for sale of cattle and grazing leases—Purchaser to have privilege of cutting hay—Failure of vendor to complete contract—Right of purchaser to hay cut by him.*]—Action for alleged wrongful conversion of a quantity of hay.

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H. Olding, for defendant.

McKAY, J.:—This is an action for the alleged wrongful conversion, and, in the alternative, wrongful detention by defendant of 200 tons of hay the property of plaintiff of the value of $400.

The plaintiff claims a return of the hay or its value $400 and damages.

The defence is a denial of all the allegations of the plaintiff and the trial proceeded as including a denial that the hay in question was the property of the plaintiff, and, if necessary, I would still allow the defendant to so amend his defence denying that the said hay was the property of the plaintiff but that it was the property of the defendant.

The defendant counterclaims for damages and the return of a wagon and team of horses or their value $500.

It appears from the evidence that plaintiff and defendant are cattle ranchers.

The defendant was ranching and living in Alberta at the time he met plaintiff in June, 1919. The plaintiff was then ranching and living in the Beaver River district north-west of Battleford in Saskatchewan. In June, 1919, the defendant, while looking over the Beaver River district for a ranching location, met the plaintiff and he says the plaintiff informed him that he had grazing leases for certain lands and some hay permits which he was willing to sell. They entered into negotiations with the result that plaintiff agreed to sell his grazing leases and hay permits, etc., to defendant, and defendant agreed to buy them for $1,500.

They started to go into Lloydminster to close the deal and put it into the form of a written agreement, and on the way plaintiff interviewed his son with the object of getting the son to winter his cattle, 60 head of cows and young cattle and 30 calves, 90 head in all. The son declined to do so whereupon the plaintiff offered to sell the cattle to defendant and after some negotiations he agreed to buy them.

Plaintiff and defendant went into Lloydminster and they employed Dean, a solicitor in that town, to draw the agreement for the sale and purchase of the leases, hay permits, cattle and good-will of the plaintiff. This agreement is dated and was signed by both parties on July 9, 1919, and was put in at the trial as Ex. A.

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The defendant delivered to the plaintiff as the cash payment of $500, a wagon and team valued at $500.

This agreement, Ex. A, amongst other things, states as follows:

Whereas the vendor alleges that he is the owner of the cattle hereinafter more particularly described and is entitled to the grazing leases and hay permits also hereinafter more particularly described. . . .

The purchase price of the said cattle, leases, etc., and the good-will shall be $6,480.00 (including the deposit of $500.00 above mentioned): the balance of $5,980.00 to be paid in cash on or before the first day of November, A.D. 1919. In case the Purchaser exercises his right to purchase under this option, the Vendor agrees to give a Bill of Sale of the cattle free and clear of all incumbrances, assignments of the leases and to hand over the hay permits. The Purchaser shall be at liberty to proceed with the putting up of the hay under the permits this summer, but in case he fails to exercise the option the hay shall belong to the Vendor.

The grazing leases hereinbefore mentioned consist of the following: E ½ of 17-60-25 W. 3rd. Section 16-60-25 W. 3rd, and other lands mentioned in the agreement. The hay permits hereinbefore mentioned consist of the following: S.E. of 29-60-25 W. 3rd and other lands mentioned in the agreement. Also included along with the good-will hereinbefore mentioned are the following: . . . The buildings on section 16, aforesaid.

After the agreement was signed the defendant returned to Alberta for his haying outfit which he brought to the premises agreed to be bought and started to cut the hay on the lands for which plaintiff claimed he had permits, the plaintiff giving him the receipts he received from the Dominion Lands Office at the time he paid for the permits, and which receipts had a description of said lands, and were given to the defendant in order that he might know on what lands he could cut the hay. The plaintiff also allowed the defendant to go into occupation of the buildings (log shacks) on said sec. 16, being part of the lands for which plaintiff claimed he had grazing leases.

The defendant cut and put up the hay on the said lands until about the end of September, 1919, when he again returned to Alberta for the purpose of bringing down his cattle to the premises agreed to be bought.

On the way down from Alberta with his cattle, the defendant left his cattle with his men to bring them on and he came ahead so as to get to the plaintiff's ranch by November 1, 1919, and take over the cattle and leases, etc., and pay the balance of the purchase money to the plaintiff. The defendant first went to Lloydminster and not finding the plaintiff there, he hired a driver and

livery team to take him to the plaintiff's ranch. The defendant arrived at sec. 16 about midnight of October 31, 1919, but did not find the plaintiff there. Next morning defendant drove over to the plaintiff's summer camp at Beaver River, the place where plaintiff was living at the time the agreement in question herein was made, where he arrived before 12 o'clock November 1, 1919, but did not find plaintiff there. Defendant then returned to sec. 16, and on his way there between 1 and 3 o'clock p.m. met the plaintiff. Defendant informed plaintiff he had been looking for him, and had the balance of the purchase money, and asked him where the cattle were, and had he the assignment of the leases, to which the plaintiff replied that part of the cattle were south and part north of Beaver River and that he had not the grazing leases, all he had were applications for the same.

In my opinion, what the plaintiff agreed to sell and what defendant agreed to buy were grazing leases granted by the Dominion Government, not the mere application for the same, as plaintiff contends.

The plaintiff did not have any grazing leases on November 1, 1919, when the time arrived to complete the sale and purchase and the evidence shews that he could not get the leases for the lands in question, as there was another application besides his, and the grazing leases for these lands were given to a returned soldier.

I find that the defendant was ready with the balance of the purchase money to pay same to plaintiff, provided the plaintiff delivered to him the cattle and the assignment of grazing leases as called for by the agreement. Plaintiff had no grazing lease and could not deliver same, and the defendant was justified in refusing to take the cattle without the grazing leases.

The defendant had the right under the agreement to put up the hay under plaintiff's permits, and this hay was to become the property of plaintiff only in case defendant failed "to exercise the option." The defendant was ready and willing to exercise the option within the time called for by the agreement. The agreement does not name the place where the payment was to be made, and defendant before noon of November 1, 1919, was at Dean's office in Lloydminster, at the Mudie Lake ranch on sec. 16, on October 31, and November 1, 1919, and at the plaintiff's summer

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camp at Beaver River on November 1, 1919, before 12 noon, ready to pay over the money if plaintiff fulfilled his part. But plaintiff was in default in not having the grazing leases to give to defendant, and he cannot take advantage of his own wrong.

In my opinion, then, the hay in question was the property of the defendant, and the plaintiff's action must be dismissed with costs.

As to the counterclaim:

The evidence shews that after the default of the plaintiff to complete the agreement (Ex. A), the defendant continued to remain in that district. There is no evidence that he had to move elsewhere, or that he was put to any costs by reason of the default of the plaintiff, except that the defendant did say he was moving from Mudie Lake ranch to Township 63, Range 3, West of 3, about 40 miles by road, and that it would cost him $700 to move there. But he does not claim damages for those expenses.

The expenses for which he claims were incurred in coming from his Alberta location to the premises agreed to be bought, and he appears to have intended to come to that district anyway before he met plaintiff. Under these circumstances, I cannot allow him any of the damages claimed.

He also claims a return of the waggon and team, or their value, $500. In my opinion he is entitled to these, as the completion of the purchase did not fall through on his account.

The result will be that defendant will be entitled to judgment dismissing plaintiff's claim, and for a return of the team and wagon, or their values, $500.

The defendant will be entitled to costs of the action and counterclaim. *Judgment accordingly.*

NOLLE v. NOLLE.

Saskatchewan King's Bench, Taylor, J. November 10, 1920.

HUSBAND AND WIFE (§ II D—73)—*Separation agreement—Payment to wife of certain sum—Repayment of wife's money put into homestead to improve it and get patent—Consideration—Right of recovery.*]—Action by wife to recover the sum of $2,000 agreed to be paid to her in a separation agreement.

L. Tourigny, for plaintiff; *S. W. Baker*, for defendant.

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TAYLOR, J.:—In this matter there is practically no dispute between the parties. The plaintiff and defendant are husband and wife and entered into a separation agreement on February 14, 1919. In para. 6 of the agreement it is provided that the husband is to pay to the wife $2,000 for her equity in the land owned by the party of the first part, that is the husband. For this the wife sues, and the defence is that this covenant is not binding.

It is admitted that the only land owned by the party of the first part is a homestead within the meaning of the Homestead Act. It is admitted also that the wife did not go before a Justice or any of the officials mentioned in 6 Geo. V. 1915 (Sask.), ch. 29,* and give the consent therein mentioned. It seems to me, however, that that Act has no application whatever to the agreement in question.

The husband was called, and on cross-examination he admits that the $2,000 was to be paid to his wife because of the fact that when they were married she had certain money and this money and her work went into the homestead. I infer that the usual improvements had to be made, the home kept up, and that she actually advanced money for the purpose of making it a home and complying with the provisions necessary to obtain patent. It is not shewn that there was any agreement that she was to receive this money out of the homestead, or that she was to have any charge on the homestead. The evidence is that she had neither any registered nor unregistered mortgage, charge or encumbrance of any kind on the homestead, but the husband says that he agreed to pay her $2,000 because he thought at the time he agreed to pay it that she deserved it because of the moneys which she had put in and the service which she had rendered. That might not have given her a legal claim against the homestead, that is to say, a claim which she could have enforced by action in the absence of any special agreement between her husband and herself that she should be entitled to such a special claim; but it is quite conceivable that in fair dealing between the husband and the wife, the husband should recognise that she had a claim to an interest in the homestead by reason of the money which she had advanced and work which she had done, and that in arriving at the amount

*See Amendment, 10 Geo. V. 1919-20 (Sask.) ch. 66.

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which he should pay to her and which she should receive on the separation these would be taken into consideration and considered an equity in the land, which after all amounts to a claim which in fair dealing should be recognised between the parties. She would have a legal claim probably to a return of the cash which she had advanced to her husband, and it might be contended—I do not say that it should be so—that as between husband and wife should the wife advance money to the husband for the purpose of improving his homestead it is on the understanding that she has a charge and interest in the homestead. She was being paid this $2,000 for that claim according to the evidence of the defendant, and I think that therefore this agreement to pay the $2,000 is binding on the defendant and was made for valuable consideration. The interest which she was then releasing to the defendant was not the interest intended to be protected by the Homestead Act, but an entirely different kind of claim altogether.

In the result there will be judgment for the plaintiff for the amount of claim with costs.

Judgment accordingly.

BOYCE v. JOLLY.

Saskatchewan King's Bench, MacDonald, J. November 25, 1920.

SALE (§ II C—35)—*Of traction engine—Implied condition—Failure to fulfil—Reduction in price—Chattel mortgage—Assignment—Rights of parties—Farm Implements Act.*]—Action to recover the amount of a chattel mortgage given to secure the purchase price of a traction engine.

P. E. Mackenzie, K.C., and *H. A. Whitman*, for plaintiff.

G. T. Killam, for defendants.

MACDONALD, J.:—This action is brought by the plaintiff against the defendants to recover the amount of a chattel mortgage for $1,000 and interest given by the defendants to the plaintiff, and now overdue. The said chattel mortgage was given by the defendants to the plaintiff to secure the purchase-price of a "Happy Farmer" 8-16 traction engine and a 24 x 36 Waterloo separator sold by the plaintiff to the defendants for said sum.

The defendants raise various defences. They first rely on the fact that there is no contract between the plaintiff and the

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defendants in the form provided by the Farm Implements Act, 8 Geo. V. 1917 (Sask. 1st sess.), ch. 56. With respect to this defence, I am of opinion that the Farm Implements Act does not apply. It is true that the plaintiff was what is popularly known as an "implement agent"—that is to say, he was an agent for various companies dealing in agricultural implements to secure orders for the purchase from such companies of farm implements, and was paid commissions on all orders so obtained by him, but apart from the implement in question in this action he himself had no interest in contracts brought about by him other than to earn his commission, and did not own the machines for which he secured purchasers. The machine in question is the only one that he sold on his own behalf, and I am therefore of opinion that the Farm Implements Act does not apply to this transaction. *Robinson* v. *Burgeson* (1919), 11 S.L.R. 229.

The defendants plead:—

that they made known to the plaintiff the purpose for which they required the said engine, and that there was an implied contract that the said engine would fulfil each and every of the warranties set out in sub-secs. "b" to "f" of para. 7 of the statement of claim.

The warranties referred to are:—

(b) That the engine was well made and of good material; (c) that the engine would well perform the work for which it was intended; (d) that the engine would be durable; (e) that it would develop continuously its rated horse-power; (f) that it would furnish ample power to drive a 24 x 36 Waterloo separator complete at full capacity.

Disregarding the form of the pleading, and assuming that the intent was to plead that under the circumstances of the case there was an implied condition that the goods should be reasonably fit for the purpose for which they were required, I am nevertheless of opinion that there was no such implied condition. I cannot find that the defendants shewed they relied on the plaintiff's skill or judgment; what they did rely on was the express warranty hereafter mentioned. The defendants therefore had no right to reject the machinery.

The defendants further contend that the plaintiff warranted that the said engine would furnish ample power to drive the separator in question to full capacity. The plaintiff denies that he used the words "to full capacity," but admits that he may have said it was capable of running the separator and would run it

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satisfactorily. In my opinion, what the plaintiff admits he may have said is to the same effect as saying that it would run the separator to full capacity. When a person says that an engine will run a separator, surely he would not be understood to mean that the engine would run the separator when there was only fed into the separator a fraction of the quantity of grain which the separator was intended to thresh. I therefore find as a fact that the plaintiff did warrant that the engine could run the separator to full capacity, and on the evidence it is clear that the engine could not do so. The defendants are, therefore, entitled to set off in diminution of the purchase price the difference between the value of the engine which they received and what would have been the value of the engine if it had been as warranted, that is, if it had been capable of running the separator to full capacity. Unfortunately, however, there is no evidence before me as to the value of the engine that was actually delivered, and there will be a reference to the Local Registrar at Wynyard as to the value of the engine that was delivered, and subject to what is hereinafter stated the plaintiff will be entitled to judgment for the amount claimed less the difference between the value of the engine as delivered and the value of an engine such as it was warranted to be.

The plaintiff proved the execution of the chattel mortgage in question, and also an assignment by the plaintiff to the Cockshutt Plow Co. of the same. The plaintiff attempted to prove a re-assignment by the Cockshutt Plow Co. to the plaintiff of the chattel mortgage, but the proof was defective, and the document tendered in proof was not received in evidence. Before the plaintiff can have judgment for the difference between the amount claimed and the amount to be deducted therefrom, as aforesaid, he must either file with the Registrar a proper reassignment from the Cockshutt Plow Co., verified by affidavit of the chattel mortgage in question, or file a verified consent of the Cockshutt Plow Co. to be added as a plaintiff, in which latter event the Cockshutt Plow Co. will be so added and judgment will go in favour of the plaintiff as aforesaid. The question of costs will be reserved until the reference is had before the Local Registrar. If the plaintiff does not file either such re-assignment of consent within 6 weeks from this date the action will be dismissed with costs.

Judgment accordingly.

ROCKDESCHEL v. BIRCH.

SASK.

C. A.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. November 29, 1920.

VENDOR AND PURCHASER (§ III—37)—*Sale of land—Land held under agreement—Dispute as to amount due under—Resale by purchaser—Consent of vendor—Quit claim to new purchaser—Reservation of rights against original vendor as to amounts in dispute.*]—*Validity—Enforcement.*]—Appeal by defendant from the trial judgment in an action on an agreement for sale. Affirmed with a variation as to interest.

J. F. Frame, K.C., for appellant.

R. Robinson, for respondent.

HAULTAIN, C.J.S.:—In this case the plaintiff held certain land under agreement for sale from the defendant. The purchase money was payable under the agreement by the delivery of a part of the crop grown on the premises in each year to the vendor. The value of the grain so delivered, at the market price at the time of delivery, was to be credited to the plaintiff on the agreement. During the currency of the agreement some questions arose between the parties as to the amount of the credits the plaintiff was entitled to in respect of grain delivered by her to the defendant. So far as the present appeal is concerned, those amounts are not in dispute and amount in all, apart from the question of interest, to the sum of $471.34.

Some time in the early part of 1919, the plaintiff entered into negotiations with one J. D. Macdonald for the sale to him of her interest in the land. The defendant was to a certain extent made a party to these negotiations, in order to obtain his consent to the sale to Macdonald. At the conclusion of the negotiations the plaintiff executed a quit claim deed to Macdonald of all her interest in the land in question, and the defendant transferred the land to Macdonald, receiving in return a mortgage on the land for $5,400. The quit claim deed from the plaintiff to Macdonald contains the following clause:—

> Without prejudice to the said Pauline Rockdeschel to recover from A. L. Birch any amounts not credited on an agreement for sale covering the said land, which should have been credited thereon, this exception to be a personal remedy only, and not to be held against the said land.

The reason for the addition of this clause will appear later.

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C. A.

The evidence with regard to what took place between the parties during these negotiations is very conflicting. It agrees in one important respect, and that is, that there was an attempt to estimate the respective interests of the parties in the land. The defendant claimed that, after giving the plaintiff credit for everything she was entitled to, there was still an amount of $5,400, due to him under the agreement. The plaintiff, according to the evidence, disputed that amount, claiming additional credits for the items represented by the sum of $471.34, mentioned above, and interest. The evidence clearly establishes that the plaintiff was entitled to be credited with this amount. The defendant, however, says that the carrying out of the sale to Macdonald was based on a distinct understanding that he was to receive the specific amount of $5,400, and that the transaction was carried out on that understanding. The plaintiff, on the other hand, denies this, and says that she never agreed to a settlement with the defendant on that basis. Her evidence on this point, which is corroborated by other witnesses, is to the effect that, when she claimed the additional amount of $471.34, the defendant refused to allow the amount to be taken into consideration in the transaction with Macdonald, but told her that if she thought she was entitled to that amount, she could sue for it. She accordingly closed the transaction with Macdonald, reserving her rights against the defendant, as has been shewn above.

The trial Judge has found, on very conflicting evidence, in favour of the plaintiff on this point, and I quite agree with his finding. The evidence of the defendant himself admits that, if he had given credit to the plaintiff for all the payments she had made, the amount of $5,400 should have been reduced by $471.34 and interest. He also admits that, in calculating the amount he was to receive from Macdonald, his intention was to arrive at the amount actually due to him by the plaintiff under the agreement.

The appeal should therefore be dismissed, except in regard to the question of interest. The plaintiff was not entitled to interest at 8% upon the amounts claimed, as the rate of interest under the agreement was only 6%. The judgment below should be varied accordingly.

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C. A.

As the appellant has failed substantially on the appeal, and the respondent might have avoided the necessity for appeal with regard to interest, about which there never should have been any question, I would not allow any costs of appeal to either party.

NEWLANDS, J.A. (dissenting):—The effect of the evidence in this case is that plaintiff and defendant were both interested in the piece of land sold. Defendant only agreed to the sale on the condition that he was to receive $5,400 for his interest. The sale was made on this condition, the plaintiff reserving her right to sue defendant for a part of the amount he insisted on receiving, she claiming that he was not entitled to that amount out of the purchase price. Having agreed to the sale on the only terms on which defendant would sell, she has no claim against him, and could not bind him by any reservation in the conveyance to the purchaser.

The appeal should, therefore, be allowed with costs.

LAMONT, J.A.:—This is an appeal from a judgment in favour of the plaintiff for $586.50, with interest thereon at the rate of 8% per annum from the date of the statement of claim.

The defendant was the owner of the south ½ 35-38-6 W 3rd, and on April 28, 1916, sold the same under an agreement of sale to one R. C. Piper for $9,600, payable $2,400 cash, and the balance by delivering to the defendant each year one-half of the crop grown on the land, which crop the defendant was to take at the market price and credit the amount thereof on the agreement. In July, 1916, Piper assigned his interest under the agreement to the plaintiff. After the threshing in the years 1916, 1917 and 1918, the plaintiff delivered to the defendant his share of the crop or paid its equivalent. In April, 1919, the plaintiff desired to sell her interest under the agreement to one J. D. Macdonald. Macdonald would not buy unless at the same time he could get title from the defendant. The plaintiff and defendant came together in the office of one Tolley to ascertain the amount of their respective equities. A discussion arose between them as to the price which the defendant was allowing for the 1916 crop. He contended that the price of the wheat was only $0.50 per bushel, because it was tough; whereas the plaintiff claimed that she should be credited at the rate of $1.11 per bushel. According to the defendant's calculation, there was $5,400 still due to him. The plaintiff would

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not agree that this sum was due. Finally, however, they agreed to allow the sale to Macdonald to go through on that basis. Macdonald gave the plaintiff some property for her interest, and took from her a quit claim deed; while from the defendant he obtained title to the land, giving him back a mortgage for $5,400. The quit claim deed to Macdonald stated that the plaintiff did release and quit claim all her interest in the land, but:

> Without prejudice to the said Pauline Rockdeschel to recover from A. L. Birch any amount not credited on an agreement for sale covering the said land, which should have been credited thereon, this exception to be a personal remedy only, and not to hold against the said land.

The trial Judge found on the evidence that the defendant should have allowed the plaintiff an additional credit of $471.34 and interest thereon at 8%, which brought the total amount to $586.50, and he gave judgment for that amount. The defendant now appeals.

There was ample evidence to justify the Judge in coming to the conclusion that the plaintiff was entitled to the additional credits. It was however contended before him, and also before us, that, as she agreed to put through the sale to Macdonald on the basis that there was $5,400 coming to the defendant, such constituted a settlement of the contract, and that she cannot, after the transaction is closed, be heard to claim that the defendant was not entitled to that sum, even although certain credits to which she was rightfully entitled had been omitted. In reference to this argument the trial Judge says:—

> The defendant sets up an alleged settlement for $5,400 between the plaintiff and the defendant at the time. I don't believe that such a settlement was made. The plaintiff wished to put through the sale with Macdonald, and I believe the plaintiff's evidence that it was never agreed that this was a final settlement, but that she reserved her rights as against the defendant, and that the defendant said, "If she was not satisfied with 50 cents a bushel, to go ahead and sue." In my opinion this interpretation of what took place is corroborated by what is put in writing in the quit claim deed between the plaintiff and Macdonald, where she expressly states that the quit claim deed is without prejudice to her rights to recover from Birch any amounts which were not credited on the agreement.

This finding is tantamount to saying that it was agreed between the parties that they would put through the sale to Macdonald on the basis claimed by the defendant, but that, if the plaintiff was not satisfied to accept the amount credited by him on the agreement, she was to be at liberty to bring an action against him

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for the difference between what had been credited and what she claimed should have been credited. If that was the agreement between them, the plaintiff is entitled to succeed. The question is, was there evidence to justify the finding of the trial Judge that such was their understanding? In my opinion, there was. In giving her testimony the plaintiff said that, at the meeting in Tolley's office, when she disputed the allowance of 50 cents per bushel for the 1916 wheat, the defendant said that, if she was not satisfied with 50 cents, she could go ahead and sue him. This she interpreted as giving her the right to sue for the credits if she put the deal through on the basis of the defendant's equity, being $5,400.

Not only did she reserve the right to sue in the quit claim deed, but Tolley, in his evidence, in giving an account of what took place at the interview in his office, was asked if the plaintiff, in his presence, had said she was going to reserve her rights against Birch, and his answer was, "Oh yes, she did."

On this evidence I am of opinion that the trial Judge was justified in holding that what took place did not amount to a final settlement, but that the plaintiff was, notwithstanding the sale to Macdonald, to be at liberty to test in Court the correctness of the defendant's account.

The only other point raised was as to the allowance of 8% on the credits from the date they were made until the sale to Macdonald took place. The rate of interest specified in the agreement was only 6%. In the final calculation, the credits not having been allowed, the purchase money which they represented was charged to the plaintiff, together with interest thereon at 6%.

As she only paid 6%, that is all she can ask the defendant to pay. The amount allowed, therefore, should be reduced to $557.71. In all other respects the appeal should be dismissed. I would not allow any costs of appeal.

ELWOOD, J.A., concurs with HAULTAIN, C.J.S.

Appeal dismissed with a variation as to interest.

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GRANT v. BROWN.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands and Lamont, JJ.A. November 1, 1920.

APPEAL (§ XI—720)—*From Local Master—Application to extend time—Power of Court of Appeal to hear—Rule 653 (Sask.)—King's Bench Act, 6 Geo. V. 1915, Sask., ch. 10—Application to a Judge in Chambers.*]—Application to the Court of Appeal to extend the time for giving notice of appeal against an order of a Local Master of the Court of King's Bench. Application refused.

A. W. McNeal, for appellant; *H. Ward*, for respondent.

HAULTAIN, C.J.S.:—The application in this case is, in effect, an application to this Court to extend the time for giving notice of appeal against an order of a Local Master of the Court of King's Bench. The only question argued before us was as to the power of this Court to hear the application, the argument on the merits being postponed until that question has been disposed of.

Rule 653 of the Rules of Court provides as follows:

653. The notice of appeal shall be served within 30 days after the verdict where the application is for a new trial, and within 30 days after judgment in other cases; but the Court or Judge may either before, or after the expiration of such period, enlarge the time for giving notice; . . . Provided that in appeals from interlocutory orders the notice of appeal shall be served within 15 days from the date of the order; but the Court or Judge may, in like manner, enlarge the time for giving such notice.

It was argued on behalf of the defendant that the power to enlarge the time for giving notice of appeal is by this order restricted to the Court of King's Bench and the Judges and Masters of that Court. It will not be necessary to decide this point, because the application must fail on the ground that the proposed appeal, being an appeal from a decision of a Local Master, must, under the provisions of sub-sec. (2) of sec. 44 of the King's Bench Act, 6 Geo. V. 1915 (Sask.), ch. 10, and Rule of Court No. 622, be made to a Judge in Chambers. The application must therefore be refused with costs.

Although the matter is not before us, I think it desirable to call attention to certain facts in this case. The plaintiff having failed to appear for examination for discovery after an appointment taken out and served on his solicitor, an application was

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made to the Local Master to strike out the writ of summons and statement of claim. On this application the following order was made on February 4, 1919:

> It is hereby ordered that the plaintiff do appear at his own expense and attend for his examination for discovery at the Court House in the Town of Gravelbourg in the Province of Saskatchewan within thirty days from this date.

No time is fixed by the order and no further appointment was taken out by the defendant, but on the expiration of the thirty days a further application in chambers was made to strike out the plaintiff's writ of summons and pleadings. This application was granted. Except for the order of February 4, 1919, above mentioned, the only material used in support of this application was the affidavit of the defendant's solicitor who, referring to the above recited order, swore, "that the said plaintiff has not appeared for his examination for discovery as directed in the said order." This does not seem to me to be a sufficient ground for dismissing the plaintiff's action. No time was fixed by the order at which the plaintiff was to appear for examination, no examiner was named, and no appointment was taken out or served. Under these circumstances it is difficult to understand upon what grounds the order dismissing the action was made.

NEWLANDS, J.A., concurs with HAULTAIN, C.J.S.

LAMONT, J.A.:—I concur in refusing the application.

Application refused.

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